

One of the five sessions at NCSC2004 was devoted to intellectual property rights in a new publishing environment. **Kjell Nilsson** is Director of BIBSAM, the Royal Library's Department for National Coordination and Development. He has a vast international experience of IPR related problems and has monitored the developments for many years.

The balance is gone! Copyright in the digital era

By **Kjell Nilsson**, director of BIBSAM, the Royal Library's department for national coordination and development



For as long as copyright laws have been made, one of the overriding goals has been to strike a balance between the interests of the rights holders and those of the people who use their works.

Lately, this balance has been swept away.

During a period of almost fifteen years, in many parts of the world, an extensive revision of copyright legislation has taken place. The main purpose of this revision has, allegedly, been to "adjust legislation to the digital environment".

Since the beginning of the 90's, no fewer than six directives have been adopted by the European Union: the directive on copying computer programs, the lending and rental directive, the term of protection directive, the directive on the protection of databases, the general copyright directive (INFOSOC), and the directive on the enforcement of copyright. All of these directives have strengthened the positions of the rights holders, and weakened those of the users. As a matter of fact, this has been one of the officially stated objectives.

The general copyright directive of 1999 is a terrific blow to the balance of interests.

This directive clearly states that when it comes to copyright contracts always override law (except for moral rights). "So what", you might say, "this is the way it always used to be." Almost correct (see below), but as Joseph Heller once said: "Something happened". Remember, we have entered into the digital environment. That is what the revisions are all about.

In the paper environment you buy books and journals without even thinking of signing a contract, and then, hopefully, use them in accordance with applicable legislation. By contrast, in the digital environment, access to commercially provided documents is always regulated by some kind of contract. And it is for that very reason that the clause saying that contracts override law means such a radical transfer of power to the rights holders.

The times when users get the opportunity to negotiate the contracts, e.g. in conjunction with the signing of licence agreements, they have at least some influence over the terms, even if the parties are extremely unequal. When it comes to click contracts or, even worse, technical protection measures, the rights holders are simply dictating the terms. Neither negotiated agreements nor dictates need allow for the copyright exceptions specified in legislation. And, remember, scholarly publishing is a rather monopolistic business. The seller's position is pretty solid.

So, what do we do?

Good question. Of course, you can always hope the EU will change their minds and state that exceptions given in law can never be eliminated in a contract. Actually, this would only be logical, since they once, in the database directive of 1995, did just that, and they have always taken great pride in the principle of "acquis communautaire", declaring that EU directives should always be consistent between themselves. But I am not sure. My belief in the rule of logic is not that great any more. And, anyway, reviewing and changing an EU directive is a very long process.

As I see it, open access publishing is just about the only hope users have if they want to escape from this trap. The Budapest Open Access Initiative (BOAI) defines open access as "free availability on the public Internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts ... without financial, legal or technical barriers other than those inseparable from gaining access to the Internet itself." If the open access movement fulfils its promises, in the area of scholarly journals it could prove to be a fatal counter attack on those who did away with balance in copyright.