Australian Society of Indexers NEWSLETTER

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Editorial

Greetings! Thank you to those who complimented me on the new style of the Newsletter! The annual membership directory has replaced an article from Janet Hine delaying it yet again. (Sorry Janet!) Photos for the last two conferences were not ready in time for publication but will be ready for July. In the July issue I will be printing Glenda Browne's article *Automatic indexing and abstracting* from the Robertson Conference. I have put it up already on the Web site, with remaining articles being added later. I have added links to cross references in Glenda's article which makes for interesting reading. The coupon on the back of each issue is meant for recruiting new members, **not for renewals**! My apologies to the members who thought they had to pay again! :) Please spread the word...

That's all for this month. See you next month...

Dwight Walker, Editor and Webmaster

Letters to the Editor

I noticed in the April 1996 issue of the Australian Society of Indexes Newsletter a mention of a thesaurus of 19th century Australian terminology. (p.4) I wish to find out what progress has been made with this project and obtain the address of the person(s) who are working on this thesaurus. I hope you can help me with this request - thanks.

Roger Swanson, Roger.Swanson@natlib.govt.nz, Reference & Research Services, Alexander Turnbull Library, National Library of New Zealand, 7 May 1996

Reply from Editor is on page 8

Meetings and Training:

Victoria

Monday, 24 June, 6 p.m., La Trobe Lib., Melbourne

History of the Book (HOBA) seminar: 'Newspapers'

Convenor: Liz Morrison (Monash University)

Venue: State Library of Victoria in the La Trobe Library (entrance off La Trobe Street to the La Trobe Roadshow Theatre), Staff seminar room, 4th floor

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Branch News

Progress on Formation of New AusSI Branches

by Ian Odgers, Secretary, National/Vic. Branch

We are pleased to announce that two new AusSI Branches are planned to be formed in the near future, namely in South Australia and Queensland. As shown in the current membership listings published in this issue, both states have attained the minimum number of members (10) for branch formation. South Australia currently has 11 members, and Queensland 12.

In addition, Western Australia now has eight members, only two short of reaching the minimum number. Members in Perth are encouraged to recruit further members, possibly through their editor/publisher contacts, with a view to forming a branch there also. Forming these branches, even where the numbers are small, will provide members with a sense of focus, where like-minded individuals can get together and discuss topics of mutual interest.

South Australia

A meeting will be held on **13 June** in Adelaide to officially form the South Australian Branch of AusSI. All members in SA have been contacted, and hopefully as many as possible will attend, as a quorum of six is needed. Further information can be obtained from Susan Rintoul, ph. (08) 235 1535.

Queensland

AusSI members Helen Penridge and Leslie Bryant in Brisbane are currently planning the formation of a Branch in Queensland. Further details will be announced shortly. *[See their phone nos. inside - Ed.]*

ACT Committee for 1996/97

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Secretary	Shirley Campbell
Treasurer	Laurelle Tunks
Committee	Lynn Farkas, Robert Hyslop, Joan Jensen, Susan MacDougall, Robert Withycombe

Newly Registered: Dwight Walker, Randwick, NSW

Newly Joined: Mrs J. Grant, Tallangatta, Vic
Mrs A. Prestney, Catherine Field, NSW

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by Elinor Lindheimer, Immediate Past President of ASI

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(Finally, ALL board members are on email!!!!!)

I greatly enjoyed spending time with Josephine McGovern in Denver, and also meeting Mac McMaster and family in Bristol!

The Denver meeting was a great success--212 attendees, second only to the 25th anniversary meeting in Alexandria, Virginia that Nancy Mulvany put on. Workshops (making your own web page -- i.e., "Weaving Your Own Small Web" by Jan Wright and Kari Bero; and "The Structure of Book Indexes" by Bella Hass Weinberg OR Ann Hall's introduction to indexing and and Anne Leach's marketing workshop) were excellent. Roundtables were packed and informative. Saturday conference was varied and informative. The keynote speaker was Linda Milliman, manager of the 40,000-square-foot Tattered Cover Book-store in Denver, where we'd had our reception the evening before (and ASI members bought a LOT of books, you can be sure!). We learned a lot, a surprising amount of it relevant to us as freelancers, about customer service and em-ployee relations. Other speakers were on scholarly indexing, children's book indexing, genea-logical indexing, medical indexing, technical indexing, using indexing skills in a grants research project, using the World Wide Web, and ergonomics without spending money on equipment (VERY welcome!).

Denver Conference Publications

Available from:
ASI Publications Sales Office,
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Seattle, WA 98148-0267, USA
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Society of Indexers (UK) TRAINING IN INDEXING

Open-learning course for index-ing books, periodicals, images and other information media. Write to:
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If you have a tip for other CINDEX users, or a problem, write to the Newsletter or contact Garry Cousins Phone/fax (02) 9955 1525

CINDEX Tip № 13

Making files for typesetters #1

It is usually necessary these days to give a publisher an index on disk as well as in hard copy. Making these files is quite straightforward, although you have a lot of flexibility in the types of files you can make. All of these procedures make *separate files* which you can then copy onto floppy for your publisher; none of them affect the original index in the slightest.

In the next three columns I will look at making plain text files, making files for proprietary word processors (WordPerfect, Word, etc), and making files with generic coding, like ANSI or University of Chicago Press coding.

Plain text files

To make a plain vanilla text file with no coding for italics, boldface, etc type PRINT/FILE. This will bring up the **Typesetting** menu. Make the following settings:

- In **File type** type dostext
- **Insert tags?** to N
- **Use layout width?** to N, so you don't produce a file with lines which wrap
- **Use layout spacing?** to Y, so that formatting like blank lines between alphabetical groups is preserved

Use format indents? to Y, so that the indentations for subheadings are preserved

Now press <Enter>. CINDEX will write the new file, giving it the same name as the index, but with a .TXT suffix. You can copy the file to a floppy with this command (where XYZ is the name of the index):

!COPY XYZ.TXT A:

CONTRACT FOR THE PROVISION OF INDEXING SERVICES by Kingsley Siebel

Introduction

1. Glenda Browne raised some important matters in her article 'Professional Liability of Indexers' (Jany/Feby 1996 *Newsletter*). I have since seen two (government and semi-government respectively) contracts containing unusual and disturbing obligations for the performance of contracts for [indexing] services. There is much that is common to both (which are called Standard Contracts). Where it is necessary to distinguish between them I use A for the government, and B for the semi-government contract. My comments are not to be taken as being legal advice.

Glenda's article

2. The Internet story about the two Robert Maxwells has insufficient detail and lacks credibility, unless some form of injury or loss was caused. If there was negligence on the part of the indexer, then *prima facie* only the publisher had a right against the indexer. The *New York Times* story has still less detail.

3. The formation of a company cannot escape the conditions or liabilities of a contract; in fact, the obligations in a corporate contract may be viewed more seriously by the courts than personal agreements. For example, an individual indexer's claim against duress or unconscionability in contract, by a more powerful or dominant party, may receive a more sympathetic hearing.

Contract generally

4. An indexing contract (or agreement) is usually between a publisher (offeror) and an indexer (contractor). Such a contract need not necessarily be in writing though some offerors require it. [In the discussion that follows I use the terms 'offeror' and 'contractor' where the context calls for it or for brevity].

5. A contract may be terminated upon the conditions of performance being satisfied, but there may be situations under which termination can be postponed. For example, defects in the performance may surface later, such as in a building, architectural or research contract. Generally, it may be said that an indexing contract terminates upon acceptance for payment by the publisher. Both contracts sighted stipulate a 30 day period for payment after 'acceptance', by the offeror. Both impose certain unreasonable obligations which are to continue for ever, and which could cost the indexer several times more than the amount paid for the index. Statutory limitations set a period of 6 years after which no action can be taken for breach of contract; in the case of negligence the period is 6 years after the loss is suffered.

Reasonable conditions for performance

6. In both contracts the offerors stipulate fairly regular obligations for the performance of the 'contract services', such as a high standard of professional efficiency and competence; expedition; specified formats (requiring the use of particular thesaurus for keywords, or the use of a style manual). They also require delivery in a particular form (on disk and hard copy), and both require confidentiality and completion within a stated time.

Special conditions in these government contracts

7. Additional obligations are imposed by both contracts. Some of these seem much less reasonable, and require careful examination:

(a) that consideration for the contract (i.e. the benefit or payment) will be made within 30 days, but *subject to 'acceptance'* by the offeror of the 'contract services'; see 6 for details of the nature of performance.

(b) exclusive vesting of intellectual property rights (i.e. copyright in the index) in the offeror: see 9 below.

(c) each requires indemnification of the offeror against any liability or claim in respect of infringement of intellectual property by the indexer. Different words are used to express this as being in the 'course of or incidental' to the 'performance of the contract services' (A), or the 'development or production of documents' (B). Whilst B requires only a 'warranty', A calls for proof of an indemnity insurance to 'survive the expiration or termination' of the contract. These clauses are expressed as being mandatory.

(d) offeror B requires the contractor to 'maintain during the period of the contract' (3 months) public liability insurance[1] for 'the premises at which the consultancy services are performed'. (Contract A was for 'contract services of 2 years')

(e) both offerors (using different language) require the contractor to indemnify the offeror *at all times* against any liability, claim, demand or suit etc. brought against them. Offeror A required this indemnity if the loss or

liability was 'reasonably incurred or suffered' where it is 'caused by any wilful, unlawful or negligent act or omission of the contractor... in connection with this contract'. B required this indemnity 'arising out of or as a result of the performance of the contract services'.

(f) offeror A not only required the indemnities to 'survive the expiration or termination of the contract', but also 'so long as any obligations remain in connection with this contract'. A also wanted the indexer to 'effect and maintain indemnity insurance in the joint names of the contractor and the offeror' for 'an amount of *not less than 5 million dollars'*. This is also a mandatory clause.

Comment on special conditions

8. The demands noted at 7(a) and (b) seem reasonable, but certain considerations arise from these obligations which may tend to favour one party as against the other. If payment is subject to the 'acceptance of the contract services' it is reasonable to argue that by such acceptance the contract services have *prima facie* been properly performed: (see 9 below). However, there may be the remote possibility of some presently unknown claim arising from the negligence of the indexer.

My note at 7(c) in respect of infringement of copyright of 'documents' has probably never arisen before. In the very nature of an index, if the same index is done by 7 different persons, it is an original construction every time. An index does not provide information, it only points to information in the document being indexed. It is unfortunate that this 'standard' form contract which may be used for other services, such as consultancy or research services, should be used for indexing. 'Documents', is defined to include 'written text, reports, sketches, plans, maps, drawings, designs and photographs' any one of which is hardly a component of an index. (This condition seems quite unnecessary and inappropriate.) The offerors have not recognised the completely different nature of indexing services. There is no objection to the principle of the obligation so it can safely be ignored, if not protested. However, it seems most unreasonable for A to call for the indemnity to continue for ever and a day: see 8(ii) below.

As for 7(d) the offeror is attempting to preserve its own data which are placed in the hands of the indexer: (see footnote 1). Any person who is running any type of business may have a library, computer equipment, software, account books etc. which are insured against loss, so this is a reasonable obligation, which indexers must include in calculating a level of fees for an index.

The clause noted at 7(e) is of an entirely different nature. Once again the 'standard form' of contract is inappropriate for indexing services. Ultimately it may be that the only possible cause for any liability is a 'negligent act or omission' arising out of the performance of, or 'in connection with' the contract. The burden of proof will be on the offeror, first, that there was negligence and secondly, that the claim arose out of that negligence. Mere error may be of no legal effect.

The clause noted at 7(f) is pernicious, and could well be contested if the contract is entered into by an individual (as opposed to a corporation).

The onus of proof of negligence or other act or omission which caused the loss or injury is on the party making the allegation. Defences (which cost money) may be as follows:

(i) that the responsibility for the contract services is at an end on 'acceptance' by the offeror, and that satisfaction of performance is demonstrated by payment. On the other hand, if the indemnity is considered to be a separate contract, any claim will still have to be based on performance.

(ii) that no liability can run for ever and a day. It is contracting for an impossibility like 'the sun will not rise on a [particular] day in the next year';

(iii) that the condition is imposed by a powerful and dominant party [government] against an individual; this inequality[2] in the relationship of the parties may make the consent of the indexer to the contract not a voluntary consent. If so the contract might be declared void or this clause severed.

(iv) that the obligation to maintain *for all time* a 5 million dollar indemnity insurance for professional liability (which could cost about $2500 p.a.) is not commensurate with the benefit arising under the contract. It would seem that the consideration (even if it may be as high as $5,000) is given with one hand and taken away, many times over, with the other. Such a contract may be unconscionable,[3] particularly if entered into by an individual. It is likely that these conditions may be severable (offeror A does provide for severability of a clause that may be void or unenforceable), or the entire contract may be void.

Copyright

9. Unlike authors, the indexing profession has not received sufficient recognition to claim copyright in the creation of an index, but this must change at least to the extent of a moral right - a subject which has been under consideration by a special government inquiry. It has become almost customary to vest copyright in an index in the publisher. Vesting transfers ownership of property and all rights and interests. Is it not reasonable to suggest that the publisher (who has satisfied himself of the standard of performance before 'acceptance' and payment) also assumes the burden (defects if any) of a future claim? Can the publisher invest itself

with the advantages and divest itself of the disadvantages? Should there be a right of further claim against the indexer? I am advised that general policy requires indemnity of the copyright holder.

Conclusion

10. A publisher may legitimately require indemnification against a breach of copyright or other intellectual property right by the contractor, but to require a heavy toll of indemnity (with no relief in sight) is not so reasonable. The term of [professional] indemnity insurance in contract A seems an unacceptable condition.

It must be emphasised that once entered into it will be more difficult to avoid the consequences of a contract, particularly if the indexer enters it as a corporation. At least some written dissent (if not protest) may be made that the contract is unreasonable in particular clauses and that the form of contract is not appropriate for indexing services. If there is insistence from the offeror, this protest may be pleaded, if it comes to the crunch - as did Macaulay.

If there is a strong consensus among members of our Society not to enter into such contracts there is likely to be a change of attitude by similar offerors. Can this be achieved? Will there be a trumpet call from those who refuse to sign such contracts?

Footnotes:

1. I am informed by a competent Insurer that public liability is a form of insurance against physical injury or damage . If for example the indexer is using 'documents' (or a disk) provided by the offeror, the insurance covers damage to these documents, but as they are considered to be 'goods in custody' the premium is additional for this class.

2. "Inequality of bargaining power may be applied to a service agreement by the application of public policy for the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable to be in unreasonable restraint of trade. Such a case was **Schrooder Music Publishing v Macaulay** [1974] 1 WLR 1308, where the music company publishers used their superior bargaining position to obtain the exclusive services of Macaulay (an unknown song writer) for a period of at least five years and obtained an assignment of copyright of Macaulay's music works under an agreement that gave the publisher the right to terminate the agreement on giving one months notice but contained no obligation to publish Macaulay's works: Lord Diplock (House of Lords) found that the agreement was unconscionable." (Extracted from Butterworths' **Halsburys Laws of Australia**, by Prof. John Carter)

3. The insurer I consulted advised that professional liability insurance is calculated on the income of the person over a year. Normally a $5 m. insurance will not be covered by an insurer without seeking re-insurance, which of course means a higher premium. Collective Society cover is a possibility, but this is hardly practicable.

Letters to the Editor *(cont. from page 1)*

See Rachel Jakimow,Administrative Support to the Working Group, DNC Office, National Library of Australia CANBERRA ACT 2600 Tel: +61-6 262 1522, Fax: +61-6 273 1133 E-mail: r.jakimow@nla.gov.au, http://www.nla.gov.au/dnc/tf2001/prog795.html *-Ed* ①

John Simkin's letter, of 7 March 1996, about the HOBA (History of the Book in Australia) project, has stimulated my interest in the history of indexing in Australia. I'm undertaking a higher degree and am wondering if this should be my thesis topic for next year, or would it be too excruciatingly boring to sustain?? John Simkin might care to know about Michael Harrington's chapter on the indexing of Commonwealth govt information in his book, *The Guide to Government Publications in Australia*, AGPS Press, AGPS, Canberra, 1990 (if he hasn't already read it). Liz Morrison, of the History of the Book (HOBA) project, advises that Liz Lee, who is on secondment from the Barr Smith Library, has been working on particular aspects of indexing history in Australia and has collected quite a bit of information. ②

Patricia Holt, Patricia.Holt@arts.monash.edu.au, 15/5/96

Available July 1996!

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Please provide images such as adverts in TIFF, WMF, CorelDraw or EPS format. Photographs can be scanned but not line-art.

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Indexing Rates

The 1996 recommended rate for freelance *back-of-book* indexers has been kept at **$35.00 per hour** in line with rates for freelance editors. Although the Society recommends this rate, individual indexers are at liberty to charge above or below this rate as they deem appropriate.

Database indexing rates are more variable, and are usually charged on a per record basis, so rates will vary depending on the complexity of the indexing required.