

LIBRARIANS AND COPYRIGHT

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This article was written in response to Ms Carmen Vietri's "The free flow of information or the flow of free information?" (2005) 4 NZIPJ 48.

The purpose of copyright

The first copyright legislation, known as the Statute of Anne, was introduced in Britain in 1710. The purpose of that Act, which is true of most subsequent legislation, was "to support learning and the sharing of ideas". This phrase draws attention to the inherent tension that underlies copyright law: the need on the one hand to encourage the creativity and protect the rights of authors and publishers, balanced on the other hand by the need for society to benefit from the ideas and knowledge incorporated within publications, whether these are in printed, audio-visual or electronic form. Librarians have always been firm supporters of copyright, perhaps because this balance is reflected and paralleled in the role of librarians – to collect and preserve published work for present and future generations, and to make this available to everyone who needs it.

It is said that good copyright law pleases no-one. This is because, in attempting to protect the rights of both copyright owners and copyright users, and to maintain the proper balance between those rights, legislators must use words to express general concepts that will then be interpreted to fit specific instances. In some areas, New Zealand's Copyright Act 1994 achieves precision and clarity. But unfortunately, in too many places the Act is written in a way that defies understanding – for example s.4, which attempts to define the meaning of "cable programme service" and related terms; or which is plain bizarre – s.44(2) allows multiple copying of the whole of a work for educational purposes, provided that "the copying is not done by means of a reprographic process", i.e. is copied by hand; or which is less than helpful – for example s.43, copying for research or private study, which implies that the only way you can determine what is "fair dealing" is to go to court, or s.51, which allows librarians to copy an undefined "reasonable proportion".

Nevertheless, New Zealand citizens (including librarians, and the users of libraries) are required to comply with the law, and fortunately some help is available – librarians can obtain opinions from their own legal advisors, consult LIANZA's *The Copyright Act 1994: Guidelines for Librarians*¹ (which is currently being revised), visit websites that provide information and interpretation of copyright law², or seek the views of reprographic rights organisations such as Copyright Licensing Limited³, Print Media Copyright Agency⁴ or Screenrights⁵.

In her article "The free flow of information or the flow of free information?"⁶ Carmen Vietri, Business Development Manager of Copyright Licensing Limited, makes a number of points with which we will probably all agree – for example, that copyright law complements the objectives of the information profession, by providing an incentive for creators to create and for publishers to invest in publishing. It is also suggested that the general public are not too concerned with copyright – which is probably true. But the conclusion can not be drawn from this that librarians do not care about copyright, or that "Many of the activities of New Zealand libraries compete with copyright owners' markets for their works".

Copying by librarians

The question is raised as to how far the library provisions of the Act can legitimately be used by libraries to justify their copying practices, and disagreement is taken with one paragraph (11.2) of the LIANZA Copyright *Guidelines* that states, in reference to ss.51-52 (which deal with copying by librarians of parts of published works and of articles in periodicals) that “While only one copy may be supplied to each person, an individual may request on behalf of the named members of a group that a copy be supplied to each of these named people”. This statement was included on the advice of the LIANZA Copyright Task Force’s legal advisor. In support of a contrary view, reference is made to the judgment of Salmon J. in the 2002 case between Copyright Licensing Limited and the eight New Zealand Universities⁷. But that judgment, in paragraph 103, gives the Judge’s view that “it is implicit that a request must be made by, or at least on behalf of, the person wanting to use the copy for the purposes of research or private study”. The phrase “or at least on behalf of” would seem to support LIANZA’s view, provided that the copying is undertaken on behalf of named people. It would seem to be permissible for named individuals to request through one person that a librarian supply a single copy to each of them. But it is not permissible for librarians of prescribed libraries to make multiple copies and supply these to one person who then on-distributes the copies to other people, since under ss.51-52 librarians are authorised to supply only one copy to any person on the same occasion, and there must be a request by the person to the librarian to supply the copy. The judgment is also cited as requiring (in paragraphs 103-118) that “any reproduction by libraries should be an isolated case and, if repeated, should occur on separate and unrelated occasions”. However, the judgment does not appear to make these assertions.

It is also claimed that rights-holders are concerned that document delivery services offered by libraries are an unfair abuse of the permitted acts as set out in s.51 and 52 of the Act. In particular, concern is expressed on behalf of rights-holders that libraries record bibliographic data in databases, and then communicate the information to their customers in a variety of ways – “for example, on the Internet, on company intranet sites, or by regular ‘current awareness’ bulletins circulated electronically or in hard copy. The libraries effectively market the works to customers in conjunction with their copying services, encouraging them to search or browse the database and seek photocopies”.

There seems to be confusion here. First, all libraries create databases of their holdings of books and related resources, and of the periodicals to which they subscribe. These databases, called catalogues, are completely legal. One of their purposes is indeed to “market the works to customers ... encouraging them to search or browse the database”; but their purpose is certainly not to encourage customers to seek photocopies from the library. They do not, and since they are compilations of bibliographic data can not, constitute an infringement of copyright. Second, some libraries create databases of citations to periodical articles relevant to their clients, while others subscribe to very expensive indexing and abstracting services which serve a similar role. Again, the purpose of these can be defined in marketing terms, and certainly libraries encourage their users to search and browse these databases. But again, the purpose is not to encourage customers to seek photocopies from the library – although librarians will provide photocopies of periodical articles if requested, as they are explicitly permitted to do under the terms of s.52 of the Act.

The article correctly states that, with the ready availability of copying technology, in many cases it is likely that a customer will choose to obtain copies of articles or book chapters when given the opportunity, rather than purchase an entire journal or book. Certainly, no one is going to place an annual subscription to a journal, which may cost many hundreds or even thousands of dollars, in order to obtain one journal article. On the other hand, people certainly will purchase a book if it meets their needs and if it can be obtained “within a reasonable time at an ordinary commercial

price” (s.43(3)(c)). Anecdotal evidence suggests that library bulletins or similar awareness tools in fact often grow the market by leading to additional purchases of books.

According to Ms Vietri, the answer is for libraries to acquire the necessary licences to make and supply the reproductions that are requested, and attention is drawn to Part VIII of the Act which specifically contemplates collective licensing and remuneration for reproduction from copyright works. But the intent of Part VIII is to extend the provisions of the Act – to allow more extensive and generous copying than the often restrictive sections of the Act permit. Licence agreements are very valuable to libraries and the institutions they serve where the Act is restrictive (for example, copying for educational purposes). But there is no need for libraries to enter into licensing agreements with RROs if the copying that they are undertaking is within the terms of the Act. Except in cases where the Act requires a licence to be used if available (for example, s.48, “Recording by educational establishments of broadcasts and cable programmes”, which in any event does not apply to printed materials), licences are necessary only where there is a need to extend what is permitted by the Act.

Charging by librarians

It is pointed out that libraries frequently charge customers for their services or recover photocopying costs, or both, and charges levied by two district law society libraries are cited. But it is always dangerous to generalise from the particular. Most New Zealand librarians are well aware of the requirement that “where any person to whom a copy is supplied is required to pay for the copy, the payment required is no higher than a sum consisting of the total of the cost of production of the copy and a reasonable contribution to the general expenses of the library” (s.52(2)(c)), and this point is repeated in at least five different paragraphs in LIANZA’s *Copyright Guidelines*.

Amendments to copyright law

Ms Vietri points to proposed digital amendments to the Copyright Act, which if enacted “will confirm the ability of libraries to reproduce and communicate materials to customers in digital form”. This, it is stated, poses an additional threat to the economic market of authors and publishers: “Copyright law should protect the right of copyright owners to exploit the market for their work during the period of copyright protection”⁸. It is, of course, completely understandable that the author’s views are heavily weighted in favour of copyright owners and publishers whom Copyright Licensing Limited represent. Hopefully it is equally understandable that librarians, representing the needs of society in general and their users in particular, take a wider view in attempting to maintain the balance that good copyright law should attempt to achieve.

Librarians are not, of course, the only people pressing for a more equitable and balanced application of international copyright law. For example, the 2004 Geneva Declaration on the Future of the World Intellectual Property Organization⁹ calls on WIPO to “take a more balanced and realistic view of the social benefits and costs of intellectual property rights as a tool, but not the only tool, for supporting creative intellectual activity”; and argues that

The functions of WIPO should not only be to promote “efficient protection” and “harmonization” of intellectual property laws, but to formally embrace the notions of balance, appropriateness and the stimulation of both competitive and collaborative models of creative activity within national, regional and transnational systems of innovation.

International copyright law

Later in the article, reference is made to international copyright conventions, and in particular to the Berne Convention¹⁰ (last amended in September 1979) and the three-step test of the TRIPs Agreement¹¹, which was signed as Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization¹² on 15 April 1994 – both well before New Zealand’s Copyright Act was enacted on 15 December 1994. Ms Vietri quotes the Court of Appeal case *New Zealand Airline Pilots’ Association v Attorney-General*¹³:

The presumption of statutory interpretation [is] that so far as its wording allows legislation should be read in a way which is consistent with New Zealand’s international obligations. That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text.

Equally relevant is paragraph 20 of the 2002 judgment of Salmon J., referred to above:

In the event of ambiguity the Court must take into account New Zealand’s convention obligations. However, as a starting point I make the assumption that the provisions of Part III [of the Copyright Act 1994] are designed with these obligations in mind.

It may or may not be correct that “It is unlikely that the Copyright Act’s library provisions ... adequately meet the three-step test”, but it is New Zealand copyright law as enacted that libraries must comply with.

Reference is also made to the May 2001 European Union Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society¹⁴, to 2003 changes to U.K. copyright law, and to the policies of the British Library. These do not form part of New Zealand’s domestic law or international obligations. New Zealand citizens (including librarians) are subject to New Zealand copyright law, as interpreted by the Courts, and not to the laws and practices of overseas jurisdictions. Provided that they comply with the requirements of New Zealand legislation, librarians are completely within their rights to market their informational resources to their customers and to provide copies within the restrictions of the Copyright Act.

Proposals for amendment of New Zealand copyright law

Ms Vietri concludes her article by listing “three key areas” in which New Zealand copyright law should be amended, to ensure an appropriate balance of interests is maintained between copyright owners and users.

The first of these proposals is that

the Act should be amended to ensure the payment of equitable remuneration to rights-holders when their works are copied, by any means, for commercial purposes or where there is systematic or multiple copying. This should apply not only to the library provisions, but in relation to the existing “fair dealing” for research or private study permitted use.

There is no reference in the Copyright Act to copying for commercial purposes, and if there is to be a change to the law in this area, very careful definition will be required, particularly in relation to what a commercial purpose is. Systematic or multiple copying for educational purposes is already subject to licence agreements, and provided that the remuneration is indeed fair and equitable, these serve a very useful function and will no doubt continue. However, the reference

to s.43 (copying for research or private study) seems strange, given that this section does not allow multiple copying or copying for commercial purposes. Likewise, the reference to copying by librarians (ss.51-56) is equally inapplicable, given that these sections do not permit multiple copying.

The second proposal is to align New Zealand copyright law more closely with UK law:

UK law requires a librarian to be satisfied that the requirement of a person requesting a copy of copyright material for research (now non-commercial research only) or private study, and the requirement of any other person:

- i. are not similar, that is to say, the requirements are not for copies of substantially the same article or part of a work, at substantially the same time and for substantially the same purpose; and
- ii. are not related, that is to say, he and that person do not receive instruction to which the article or part of the work is relevant at the same time and place.

Amendment of our Act along the above lines would not change the substance of the law, but would provide greater guidance and assistance in curbing abuses of the library copying provisions.

Librarians certainly support any amendments to the Act which remove ambiguity and achieve clarity of interpretation (although it is difficult to see that the above quotation meets this goal). However, librarians deny absolutely that the wording of the present Act results in “abuses of the library copying provisions”. In this regard it should be noted that the requirement of the 1962 Copyright Act, which in s.21(1)(a) stated that copies may be supplied “only to persons satisfying the teacher or librarian or a person acting on his behalf that they require them for the purposes of research or private study and will not use them for any other purpose”, was dropped from the 1994 Act. Librarians copying for their users are not, therefore, required to ascertain what use is to be made of the copies – although as Salmon J. noted in paragraph 104 of his 2002 judgment, if the librarian knew that the user “was obtaining a copy for a purpose other than research for private study he would, no doubt be a party to a non-permissible copying”.

The third proposal is that the Act be amended to require that persons requesting copies from a prescribed library “supply to the librarian a signed declaration stating that the copies are required for the purposes of **non-commercial** research or private study only and will not be used for any other purpose”. As noted above, any introduction of the concept of copying for commercial (or non-commercial) purposes into the Act will require very careful definition. At least in tertiary educational institutions, it would not be at all easy to distinguish copying for purely research purposes from copying for research purposes that may subsequently have a commercial output.

As noted, the LIANZA Copyright *Guidelines* already require a declaration that anyone requesting a copy on Interloan has assured the requesting library that the use of the copy will be for private study or research¹⁵. Ms Vietri suggests that this “level of formality” be extended to *all* copying by libraries, as this would assist in instilling a proper sense of the importance of copyright and appreciation of the need to avoid infringement. This suggestion would be easily achieved in public and educational institution libraries which provide access to user-operated photocopiers and do not undertake copying for users other than to supply copies of periodical articles on Interloan. There would be bureaucratic costs for other types of libraries.

Copyright licences

The article concludes with the assertion that it is perfectly reasonable to expect companies or individuals to pay for copying copyright material for commercial advantage – just as they would pay for any other materials they use in the course of their business. This may be so, but copying for commercial purposes is only a tiny proportion of the copying undertaken by librarians and library users. The solution is for Copyright Licensing Limited, or some other RRO, to enter into licence agreements with commercial firms, if it can be demonstrated that their level of copying exceeds fair dealing. Many libraries, particularly those in the educational sector, already have licence agreements with CLL, Screenrights and other RROs, which they value for extending the often restrictive provisions of the Copyright Act and allowing more generous conditions for copying from copyright materials than the Act permits.

Through these partnerships, libraries and RROs seek to maintain the balance that copyright law must strive to achieve, for the ultimate benefit of authors and copyright owners, of library users, and of society as a whole.

Footnotes

1. <http://www.lianza.org.nz/about/governance/copyrightact.html>
2. For example <http://www.waikato.ac.nz/copyright/>
3. <http://www.copyright.co.nz>
4. <http://www.pmca.co.nz>
5. <http://www.screen.org/>
6. *New Zealand Intellectual Property Journal* v.4 no.3, February 2005, p.48-52.
7. Copyright Licensing Ltd v University of Auckland and others. *Intellectual Property Reports* v.53, 2002, p.618-640; *New Zealand Law Reports* 2002 v.3, p.76-98.
8. Ms Vietri here appears to be advocating for an extension of copyright owners' rights to an area where they have not previously existed – that is, for the creation of a digital distribution right. See “Digital Technology and the Copyright Act 1994: Policy Recommendations” (Cabinet Paper 18 June 2003) paragraphs 19-23 (http://www.med.govt.nz/buslt/int_prop/digital/cabinet/)
9. <http://www.cptech.org/ip/wipo/genevadeclaration.html>
10. http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html
11. http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm
12. <http://www.jurisint.org/pub/06/en/doc/02.htm>
13. *New Zealand Law Reports* 1997 v.3, p.289.
14. http://europa.eu.int/information_society/europe/2005/all_about/digital_rights_man/doc/directive_copyright_en.pdf
15. <http://www.lianza.org.nz/about/governance/copyrightact.html> Schedule 1 paragraph 3.4.