

Copyright and Distance Education in New Zealand: An Uneasy Partnership

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Abstract

Distance education is an important and expanding part of New Zealand's education system. Yet, although education and the law of copyright are inextricably linked, there are certain anomalies in the provisions which have been made for educational purposes within the Copyright Act 1994. Although the fair dealing provisions alleviate the difficulties experienced in complying with the Act by traditional 'internal' education, it is apparent that the requirements of distance education have been overlooked. This paper analyses the education and library exceptions from liability for copyright infringement in the Act and concludes that generally they are both inconsistent and impracticable. The move of the legislation away from a reliance on the traditional defence of fair dealing, toward the institution of copyright licensing schemes for different types of copyright works is examined and questioned. Finally, the paper proposes that, given its importance to New Zealand, the special requirements of distance education should be acknowledged within the Act.

Introduction

The single argument used ... appears to me the most baseless and the most extraordinary which I ever heard. It is this - that these public bodies want the books - and that they have no funds of their own to buy them with ... If the plea of want is to give a title to that which is another's, what becomes of property? ¹

The uneasy relationship between the law of copyright and the requirements of education is longstanding. The Berne Convention recognises 'that a balance needs to be struck between the rights of authors to compensation on the one hand and the needs of institutions and the broader public interests in the dissemination of knowledge on the other hand'. However, the 1994 Report of the Department of Justice on the New Zealand Copyright Bill 1994 ('the Bill') states that, of the approximately 112 oral submissions and 175 written submissions received, 'somewhat more than half focussed on educational copying'.² The resulting 'educational provisions' which are contained in the Copyright Act 1994 ('the Act') represent a compromise between the interests of the copyright owners and the educational institutions.

In accordance with Berne Convention principles, the Act permits students to make their own copy of a copyright work for 'research or private study'. This is called 'fair dealing' (s 43). A teacher giving a lesson at an educational establishment is permitted to make one copy of a

literary work for use in the course of instruction (s 44(1)). This provision will permit the teacher to reproduce a work on the chalk or whiteboard or on overhead transparency. There are, however, no comparable provisions within the Act which are suitable for the requirements of the distance student or teacher.

As originally drafted, the Bill contained broad educational exemptions for copying literary, dramatic, artistic and musical works and published editions. Such provisions were particularly appropriate for distance education. For example, following Justice Doogue's interpretation of s 21(4) of the Copyright Act 1962 in *Longman Group Ltd v Carrington Technical Institute* (1991) 2 NZLR 574, 590, it was proposed that multiple copying of entire works for use in a course of instruction would be permitted (cl 44). The proposed cl 43 permitted an educational institution to make one copy of certain specified amounts of the said works, (including a complete copy of an artistic work), and allowed for more than the specified amounts to be copied, provided the educational institution paid equitable remuneration to the copyright owner for supply to staff members or students for the purposes of private study or research.

However, in response to submissions on the Bill opposing these proposals, substantial changes were made. In the process, it appears that certain essential requirements of distance education were overlooked. Important examples are the ability:

- to reproduce various categories of copyright works as multiple copies;
- to reproduce copies of works obtained from the library interloan system as multiple copies; and
- to authorise an agent, such as a librarian, to supply copies of works to distance students by using the fair dealing provisions.

Yet copyright law itself has adapted in order to accommodate many new technologies not foreseen at the time of the first Copyright Act, the Statute of Anne (8 Anne c.19 (GB)). In order that the traditional balance between the competing purposes of copyright law be maintained, (on the one hand the desirability of granting a monopoly to authors and inventors in order to promote creativity, and, on the other hand, the placing of limits on that monopoly in order to benefit the greater public good), it is equitable that the law should likewise accommodate modern educational developments. This paper analyses the education and library exceptions from liability for copyright infringement and proposes that, given its importance to New Zealand, the special requirements of distance education should be acknowledged within the Act.

Characteristics of Distance Education

Societal factors (such as a fluid employment market; an accelerating rate of technological development; an economic necessity that both parents in traditional families take employment outside the home; and a longer life expectancy for the average person, coupled with more ambitious social and educational aspirations), have led to an overwhelming demand for traditional

internal teaching to be supplemented by a more flexible and lifelong form of education. Yet education budgets are limited. Goldring states:³

Teaching institutions throughout the world are facing a crisis of resources, and must find new ways of producing the same, or better, learning outcomes with fewer resources ... Distance learning offers a number of attractions that may be cost-effective without diluting quality.

In New Zealand the cost-effectiveness of distance education is evidenced by the level of its funding from the State. The base funding category for internally taught tertiary education courses in 1995 varied, depending on the type of course: an arts course taught internally was funded at \$6,507 (the lowest category of funding); an agriculture degree was funded at \$12,418. However the base funding rate for *all* extramural (distance teaching) courses was set at the lowest category for internally taught courses, that is \$6,507.⁴

Although there are various characteristics, both pedagogical and practical, which distinguish distance education from internal teaching, this paper considers only two. They are:

1. that distance education is based on non-contiguous communication, including a similar isolation from access to libraries and other sources of supplementary educational materials;
2. that distance education operates by means of a 'pre-produced course which ... aims to be self-instructional'.

The provision of a *self-contained*, self-instructional course may be desirable for certain categories of distance education. In order to provide their students with such a course, distance educators must be able to supply all resource materials to each student.

An alternative approach is propounded by Holmberg,⁵ who maintains that in order to stimulate critical approaches, and allow for the pluralism of viewpoints, the provision of a *guide* to the study of set or suggested texts, is desirable in university study. If they choose to provide students with this latter form of self-instructional course, distance educators must be confident that it is possible for each distance student to select from recommended resource materials and obtain them, as required, on an individual basis.

Impinging upon all aspects of distance education is the necessity to adhere to stringent budgetary requirements.

Distance Education and Copyright Law

It is trite law that the resource materials required in education are a tangible representation of their creator's ideas and as such are protected by the law of copyright. Nevertheless, if it is not possible to provide adequate resource materials in their original form (and, as explained below, it often will not be possible), then it is essential that the resource materials be made available as copies. This is what the 'education exceptions' within the Act are intended to facilitate.

New Zealand is a small, under-populated country and, inevitably, production and distribution costs of its educational resource materials are high, as is the cost to the consumer. Imported resource materials are also expensive and often difficult to obtain.⁶ Furthermore, the parallel importation provisions in the Act generally frustrate any attempts by the educational institutions themselves to supply originals of all foreign resource materials for purchase by their students. Effectively, the institution may not import any copyright works from a cheaper outlet overseas if there is a body possessing an exclusive licence to distribute those works in New Zealand.⁷ For these reasons, and also the fact that students are already bearing a high proportion of their course fees, the original resource materials which students (whether distance or internal) will be required to purchase must be limited. However, a modern educational course draws on many such resource materials. If New Zealand's educational qualifications are to remain acceptable to the international community then any suggestion that its educational courses should be limited in scope would be ill-conceived.

Furthermore, the objective of distance education is parity with traditional internal education. Distance learning is no longer viewed as a second-best substitute.⁸ At Massey University, which is New Zealand's largest 'dual mode' tertiary education institution, distance students pay the same course fees as internal students, and may therefore be entitled to conclude that they should receive educational courses which deliver their message in no less an effective way than the parallel internal course. But internal students have at least one advantage over distance students: they are able to make their own copies of copyright materials under the fair dealing provisions of the Act.

Copyright and Self-Contained Distance Study Courses

A teacher wishing to produce a self-contained distance study course needs to be able to make multiple copies of copyright works. However, the Act contains provisions for educational copying which vary considerably and often inconsistently, depending upon the particular category of work considered.

Literary, dramatic, artistic and musical works and published editions (s 44)

Section 44 comprises the most comprehensive and useful category for distance education. It includes all print-based media such as newspapers, journals, edited collections of works, poetry, plays, sheet music, law reports and statutes. The inclusion of 'a table or compilation' within the statutory definition of literary works (s 2(1)) allows both databases and multimedia works to be afforded protection as literary works. Educational exemptions from liability for copyright infringement are provided in s 44.

Section 44(2) permits multiple copying, but only provided '[t]he copying is not done by means of a reprographic process ...' and it 'is done in the course of preparation for instruction, or for use in the course of instruction; or after the course of instruction ...'. This provision embraces the situation of a teacher reproducing a copyright work on a blackboard or overhead projector

screen, before a class of students, who then copy the work into their own exercise books. 'Instruction' is defined in the Act to include the giving or receiving of lessons in person, or by correspondence, although it is difficult to envisage this particular provision being of any use in practice to the teacher of distance education.

However s 44(3) contains limited recognition of the multiple copying requirements of distance education. It allows multiple copying of a literary, dramatic, or musical work, or the typographical arrangement of a published edition for an educational purpose 'by means of a reprographic process or by any other means',⁹ by or on behalf of an educational establishment. 'Educational purpose' is not defined, but the reason for the use of this phrase rather than the statutorily defined 'instruction' which is used elsewhere in the Act (ss 44(1), (2), 45), appears to be that it is only if multiple copying is for the purposes of educational establishments that such a provision may be considered to be consistent with the Berne Convention. An 'educational establishment' is broadly defined to include educational and training institutions at all levels, which have been established under one of the Education Acts, and which are not conducted for profit.

Section 44(3) is specific on the amount of a copyright work which may be copied. At present this is 5% or 5 pages, whichever is the greater, (to be reduced in 1998 to 3% or 3 pages), but if 5 pages is in fact the entire work, then the amount which may be copied is reduced to 50% of the entire work (s 44(4)).

No charge may be made for the supply of any copy so made to a student (s 44(3)(e)). The meaning of this proviso is unclear. Does it mean that the students may not be charged for the copies as a separate item from the general course fees? Alternatively, does it mean that no sum whatsoever, whether from the general course fees or otherwise, may be put towards the overheads expended by the institution in preparing the copies?

Furthermore, where part of a work has been copied under s 44(3) by, or on behalf of, an educational establishment, then neither that particular part, nor any other part of the work may be copied again by that establishment within 14 days (s 44 (6)).

It is apparent that compliance with the provisions of s 44(3)-44(6) within any large educational establishment, such as a university, is impracticable. Indeed, the net effect of the provisions has been to persuade the majority of New Zealand's tertiary education establishments not to rely upon the Act for their multiple copying requirements (whether for distance or internal courses), but instead to enter into a reprographic rights licensing scheme.

Copyright licensing schemes

Unlike the Australian copyright legislation,¹⁰ the Act neither defines nor limits the nature of copyright licensing schemes. The terms of a licensing scheme are negotiable between the parties, subject only to a wide power of review accorded to the Copyright Tribunal (ss 147-168). It is questionable whether this arrangement is satisfactory. Matters such as the question of whether the licence fees take adequate account of the existing 'free' multiple copying allowances under the Act, the cost to the educational establishments of the sampling procedures, the copying of public

interest works such as law reports, the question of responsibility for the expenses of the licensor, and the copying of works which are out of print or unavailable, are left to negotiation. However, the bargaining strengths of the parties concerned are not evenly balanced, and there is a possibility that the much stronger economic position of the publishing organisations, as copyright owners, could lead to inequitable licensing arrangements. Furthermore, the costs involved in bringing an application to the Copyright Tribunal for review would be a deterrent to many educational establishments.

Reprographic licensing schemes

The educational reprographic rights licensor is Copyright Licensing Limited ('CLL'). CLL is a non-profit making association of publishers and authors which was established in 1988 by the Book Publishers Association of New Zealand. CLL has reciprocal agreements with similar associations in other countries, and delegated authority from local and international publishers and authors to license the reprographic reproduction of copyright literary works (apart from literary works which are computer programs, databases, or multimedia works), within New Zealand. Although to date CLL does not have a blanket authority from all publishers and authors, the terms of its licence confirm that it will indemnify an establishment against any claim for infringement of copyright brought by a publisher or author (indeed, such an indemnity is now provided for within the Act) (s 167). An educational establishment pays an annual fee, based on the number of its students, to CLL for this privilege.

The CLL licence indemnifies the multiple copying of greater amounts of literary works than is permitted by s 44(3), and removes the 14-day restriction on further copying contained in the Act. The licence also permits the making of multiple copies of the whole of a literary work, where it has been ascertained that the work is unavailable in New Zealand and cannot be obtained 'at a reasonable commercial price' (undefined). This is a situation for which the Act does not specifically provide, although s 162 indicates that the availability of a copyright work is one of the matters to which the Copyright Tribunal must have regard, when an application is made concerning a reprographic licence.

There is no differentiation made in the licence between internal and distance courses. However, it is likely that this is inequitable in that no consideration appears to have been given to the availability to internal students of the fair dealing provisions which are contained in s 43. (This point is discussed in a subsequent section of the paper.)

Exclusions from the reprographic licensing scheme

1 Copies of works

The CLL licence allows the copying of specified kinds of 'Copyright Material', which CLL has confirmed does not include *copies* of copyright works. This precludes copying of material obtained through the library 'Interloan' system, an exclusion which is of great significance for

both distance education and internal teaching courses. (This matter is also discussed in more detail in a subsequent section of the paper).

2 Electronic works

The licence does not include the electronic copying of a published work. However, s 44(1) of the Act permits the making of one copy of a work, *by any means*, provided it is done for the purpose of instruction. This section will allow, for example, the electronic scanning of a work at a university printery as part of the process of producing educational course materials. Further, as there is no time period mentioned in s 44(1) which limits the period during which such a copy may be retained, the electronic copy may be retained indefinitely. It is however, essential that safeguards are in place to ensure that the copy can only be accessed for the purpose of preparing material for the particular educational course.

It is the next step in the production process which is less clear. The licence will permit the printery to produce multiple copies. CLL's argument that the licence will not permit 'copying from a copy' is not well-founded, provided only that the university has not obtained the material from Interloan, (in other words the university or its library must possess the original material from which the multiple copies are to be made). After all, the traditional printing process, to which, it is presumed, the licensor had no objection, involved photocopying an original work, followed by the making of multiple copies from the photocopy in the university printery. The argument that the licence does not apply because the first photocopy has been replaced by an electronic copy, even though legitimately made, is illogical. However, the matter may be settled by an application to the Copyright Tribunal under s 150.

3 Artistic works

An artistic work is defined broadly within the Act (s 2(1)). The definition embraces, in particular, any graphic work or photograph, *irrespective of artistic quality*, and therefore includes maps, diagrams, and graphs. Historically, artistic works have received special treatment under copyright law on the basis that each is a complete work in its own right. Any exception for educational use must, of necessity, permit the copying of the whole copyright work. Nevertheless, the Act permits one copy of an artistic work to be made for use in the course of instruction (s 44(1)). Fair dealing with an artistic work is also permitted (s 43). However, multiple copies of artistic works may only be made by reprographic means if the artistic work occurs *within* a copied literary work (s 44(5)).

In this category the CLL licence permits no more than is already permitted under the Act. The licence paraphrases the words of s 44(5), in allowing reproduction of 'the whole of an artistic work that is published in conjunction with any other work and is produced as part of a reproduction of that other work'. This provision causes particular difficulties for teaching, not least because of its lack of precision. There is no guideline within the licence or the Act as to what is the *minimum* amount of an accompanying literary work which must be copied in order to make legal the copying of an artistic work. For instance, where an artistic work is an integral part of the literary work, (that is, it has been created by the author of the literary work), and is not separately copyrighted, it is difficult to understand why the artistic work could not be copied alone, as part of the 10% allowance (under the licence) or under the 5% allowance of the Act. This would be particularly useful in the teaching of scientific subjects where it is often wished to include copies

of graphs or diagrams but teachers would prefer to write their own accompanying teaching text. The Bill as originally drafted would have permitted such copying, and there would not appear to be a conflict with the provisions of the Berne Convention (art. 9(2)).

4 Other exclusions

There are a number of other specific exclusions from the CLL licence. They include music scores, including any words; loose maps and charts; and separate illustrations or photographs that are not published in conjunction with any other work.

Educational use of sound recordings (s 45)

Section 45 states that copies of a work which is a sound recording may be made for instruction where either the lesson relates to language teaching, or the lesson is conducted by correspondence, provided there is no relevant licensing scheme in operation. However, for sound recordings of music at least, licensing schemes are available. To copy a recording of music, a licence is generally required from at least two of three separate bodies, since there are three separate copyrights associated with a music sound recording. The public performance right of the composers and music publishers is administered by the Australasian Performing Rights Association; the public performance and broadcasting rights of the recording companies are administered by Phonographic Performances (NZ) Limited; and the mechanical copyright is administered by the Australasian Mechanical Copyright Owners Society.¹¹ The inconvenience and expense which will be incurred by the necessity to submit multiple applications each time an establishment wishes to copy a sound recording is apparent. However, to date, there appears to have been no proposal that any form of 'blanket' licensing scheme for educational use of music recordings be implemented.

An alternative to copying recordings for internal students is provided by ss 47 and 178, which permit students to listen to a sound recording which is played for the purposes of instruction at the educational establishment. Such a playing, is neither 'a performance in public', (which would be an infringement of copyright), nor an infringement of performers' rights in the recording.

For distance teaching a partial solution is for the educational establishment to purchase limited numbers of the original sound recording for its library. These would then be available for rental to distance students. Although the rental of a sound recording is an act restricted by copyright,¹² s 79 provides that the rental of sound recordings by educational establishments and libraries, provided it is not effected for the purpose of making a profit, is not an infringement of copyright.¹³ It should be borne in mind, however, that such a compromise might not be practicable where there is a very large 'class' of distance students. In particular, the time required to arrange to loan, utilise and then return an item could be prohibitive.

Educational use of films (s 45)

Sections 47 and 178 permit internal students to view a film or video¹⁴ shown by their teacher, and exempt such a showing from being an infringement of copyright. Similarly, a distance educator may wish to include commercially produced films or videos within the course resources for their distance students. However, there is no statutory provision for multiple copying of films by an educational establishment, other than within the very limited circumstances specified in s 45. Section 45 permits multiple copying of films for educational purposes, but only insofar as ‘... the copying consists of or includes the making of a film or film sound-track ... where the lesson is on how to make films or film-sound-tracks ...’.

As is the situation for sound recordings, one solution is to purchase a limited number of copies of the film or video and deposit these in the library for rental to students. The Act provides that the rental of films by educational establishments and libraries, provided it is not effected for the purpose of making a profit, is not an infringement of copyright (s 79). However the same practical considerations apply as those discussed in relation to sound recordings.

It may be noted also that s 86 rather incongruously permits the use of television ‘stills’ for domestic or private use. Such a concession, extended to include the use of film stills for educational purposes, would be of particular use within the growing number of media studies courses at tertiary establishments.

Educational use of broadcasts and cable programmes (s 48)

Sections 48 and 179 permit a recording of a broadcast or cable programme, or a copy of such a recording, to be made for the educational purposes of the establishment. Section 48 also refers to licensing schemes, the existence of which would prevent even one copy being made for educational purposes. The intention of the legislature is that licensing schemes should be made available for off-air recording by educational establishments. However, because the cost of setting up such schemes for a small population is prohibitive, at the date of writing only one such licensing scheme is in existence. That is for ‘TV Open Learning’ programmes which broadcast under the auspices of ‘eTV’. Although it is therefore permissible to record any other broadcast or cable programme for educational purposes, it is not possible to make copies of such an off-air recording for distribution to a group of distance learners. Obtaining permission from the copyright owner, who is generally an overseas company, is often an extremely time-consuming and expensive task and it is concluded that most educational establishments will choose not to use such material for their distance learners.

Furthermore, although the playing of a broadcast for the purposes of instruction before students and staff at an educational establishment is not considered to be a performance in public for the purposes of the Act (ss 47(2), 178), there appears to be some doubt over whether a *copy* of a broadcast may be played by a student at home as part of a distance education course.

Educational use of electronic works

Electronic works are works which are published in electronic format such as material on CD-ROMs, online databases, and computer software. The term 'electrocopying' is generally understood to cover the storage, display, dissemination, manipulation or reproduction of print-based copyright works into machine readable form.¹⁵ The contents of such works are protected in the same way as their printed equivalents, and the provisions of s 44 will apply for educational copying. The CLL licence does not apply to such works, but with the recent formation of a New Zealand branch of the Software Publishers Association, the instigation of licensing schemes for educational use of software would seem likely (The Dominion, 10 September 1996).

There are particular difficulties arising from the use of these 'new' technologies for the distribution of copyright material. Copyright owners cite, in particular, the ready availability of copying facilities, coupled with a lack of clear guidelines concerning what may be copied, and the ease of transfer internationally, so that a work can readily be sent electronically to a country in which copyright protection is inadequate. Indeed the Library Association (UK) suggests that there is some doubt, 'given the fears of rights owners', whether the statutory fair dealing defences will extend to electronic works, claiming that '[i]n most cases, anyway, service contracts override those defences'.¹⁶ However the writer contends that the foregoing is not a valid reason for excluding this category of copyright works from the statutory defences. Such an exclusion is contrary to both the Berne Convention (in particular art 9(2)) and the underlying purpose of copyright law (to benefit the public good).

Nevertheless it would seem that the growing use of on-line electronic media, both to supplement library collections and as educational tools, is being matched by a threatened expansion of copyright protection. The former Chief Justice of Australia, Sir Anthony Mason, recently drew attention to the anomaly contained in a proposed amendment to the Australian Copyright Act 1968:¹⁷

If a library can hold a hard copy on its shelves and readers may consult it without a fee, why should the new technology of scanning the same material into an electronic reserve only for the purpose of allowing reading on screen lead to a charge?

... we [Australia] have much to lose from an expansion in copyright protection. It will suit copyright owners and large commercial interests in the United States and Europe but will disadvantage Australia as well as the developing nations and poorer peoples of the world.

He also criticises the move to extend copyright to the electronic browsing of documents on screen as being a fundamental change to the legal concept of copyright, that is that it exists only in the form of expression and not in information and ideas per se.

Educational use of copyright works for the purpose of examinations (s 49)

Sections 49 and 177 provide that copyright is not infringed by anything done for the purposes of an examination, whether by way of setting the questions, communicating them to the candidates, or answering the questions. The equivalent provision in the United Kingdom excludes the copying of a musical work for the purpose of an examination,¹⁸ but, despite submissions on the Bill suggesting that New Zealand should follow the United Kingdom in this respect, no rationale for such an exclusion was found.¹⁹

There appears to have been little or no recorded analysis of the practical effect of this provision. Distance teaching, in particular, is generally assessed throughout the year by the submission of written assignments. Such assessment might be a large proportion of the final examination mark. Indeed often this proportion is so substantial as to logically be considered to comprise part of the examination. It could be argued that this provision would allow multiple copies of say a television broadcast to be distributed to students with the intent that assignments be directed towards the content of that broadcast.

Submissions on the Bill had suggested that the term 'examination' be defined more clearly, but the Report of the Department of Justice observed: 'Neither do we see any particular gain in trying to define more closely what constitutes an examination, as the term is generally understood and can be applied in a commonsense manner'.²⁰ The Library Association (UK) maintains that '... it is unlikely that this exemption [ie the equivalent provision in the Copyright, Designs and Patents Act 1988] applies to work continuously assessed as part of the examination process'.²¹

Such assertions demonstrate a lack of familiarity with modern methods of education which adopt on-going assessment process. There appears to be no particular reason why the provisions of s 49 and s 177 should not be utilised for such student assessment.

Copyright Works and Guided Distance Study Courses

As has been demonstrated, those distance educators who would ideally choose to provide their students with a self-contained educational course, (which could be considered to be equivalent in all respects to the course followed by fellow internal students), may find this choice to be one which is not readily able to be met under present copyright legislation. That being so, is the distance educator instead able to rely upon use of the second category of educational course; one which seeks to guide students by encouraging them to consult supplementary materials and which is promoted by Holmberg²² as being particularly desirable in university study? An ability to obtain supplementary materials from the particular educational institution's library is crucial to distance students following this latter form of educational course.

However, just as the modern education budget is limited, so too is that of its library. While a library generally holds more than one copy of a supplementary text, it would be highly impracticable for a library to include in its collection multiple copies of all works which might be required by a class of students, whether internal or distance. Implicit reliance is placed on the

ability of students to copy relevant sections of the text for their study. Furthermore, certain supplementary course materials will be placed on reserve in the library. Students enrolled on the course who can attend the library in person may borrow reserved material to use within the confines of the library, but may not have the material issued to them to take off the premises. However, s 43 will generally permit such students to make copies of the material, on the grounds that its use for research or private study can be justified as fair dealing. What, if any, concessions are available for the distance student within the copyright legislation? The following sections of the paper will address this question.

Copying by librarians

It is in the application of the statutory limitations which have been placed on the amount of a copyright work which may be copied by a librarian that conflict may arise between the librarian's interpretation of the Act, and the claims of distance education to be accorded the same privileges as internal education.

Part III of the Act distinguishes between libraries which are 'prescribed' and those which are 'non-prescribed', with the statutory exceptions applying only to the prescribed libraries. Generally prescribed libraries are those maintained by educational institutions, government departments, local authorities, and also all libraries which are members of the Interloan Scheme: (some commercial firms, Crown Health Enterprise libraries, Crown Research Institute libraries etc) (s 50 as amended by SR 1995/146). Libraries which are non-prescribed may not make, or supply, copies of copyright works to any person or library, and are therefore confined to supplying the actual work on request. While the fair dealing provisions of s 43 will enable students who can attend the library in person to make their own copies from its collection, there is no alternative means for the non-prescribed library to supply copies of material to the distance student. The following discussion is confined to the prescribed libraries.

Copying from the library's collection

Section 51 permits a librarian to make a copy from a published edition of a 'reasonable proportion' of a literary, (but not a computer program),²³ dramatic, or musical work, provided any person is supplied with only one copy on the same occasion, and uses the copy for the purposes of research or private study.

There are conflicting views among librarians as to the amount of such a work which can thereby be copied. For example, the Massey University Library Distance Service booklet advises distance students that 'normally no more than 10% or one chapter of any book ...' will be photocopied for an individual. On the other hand, the Joint Standing Committee on Interloan has stated: '... In essence, it is the significance of what is copied that impacts on 'reasonable proportion', not the simple amount that is copied. It is especially important to note that there is no '10%' rule'.²⁴

Despite submissions made by the universities at an early stage, the phrase ‘reasonable proportion’ is not defined in the Act.²⁵ Although the Bill, as originally drafted, proposed to quantify the amount of such a work which could be copied by a librarian, this was rejected in favour of ‘linking the formula of what is permissible to what is permissible under the fair dealing clause’(s 43). Indeed, the Report on the Bill states: ‘... [T]his clause is properly viewed as an adjunct to the fair dealing clause’.²⁶ This would indicate that any policy of educational libraries which purports to limit the copying of a work for a student to a maximum of 10% is unsound in principle, and stems from a misunderstanding of the underlying purpose of the section. Such a policy disadvantages distance students, particularly those studying for a higher degree in which research may be a large element of the course work.

Under s 52 a librarian may copy a literary (*including a computer program*), dramatic or musical work contained in an article in a periodical, or a published edition that is an article in a periodical, for supply to any person, provided that person is supplied with only one copy of that article on the same occasion, (and with no more than one article from the same periodical, unless the articles all relate to the same subject), and the person uses the copy for the purposes of research or private study.

In both ss 51 and 52 the onus of correct user lies on the person receiving the copy, not with the librarian, who is under no statutory obligation to be satisfied that a person to whom a copy is supplied will use it only for the purposes of private study or research.²⁷ The librarian may charge the person supplied no more than the actual costs of copying and ‘a reasonable contribution to the general expenses of the library’. This provision is intended to allow the library to make a full cost recovery.

Any artistic work must appear within another work and may not be copied separately (ss 51(1), 52(1)(a)). While a separate artistic work may be copied by a student under the fair dealing provisions, there is, of course, generally no such opportunity for the distance student. Furthermore, the same questions of definition arise as under the similar provision contained in s 44 (discussed ante).

Copying from other libraries’ collections: interloan

Section 53 permits the supply of copies of works by librarians for users of other prescribed libraries, provided that the user has requested the other library for supply of the copy for the purposes of private study or research (the onus lies on the librarian of the requesting library to establish this), and the user uses the copy for the purposes of research or private study (onus on the user). Section 53 differs from s 52 in that it implies that no more than two articles from a periodical may be supplied at any one time. On requesting the material to be so obtained, the user will be required to sign a form produced by the requesting library to confirm the copy is for ‘research or private study’ This declaration prevents the copy then being reproduced as multiple copies for distance students. The obvious solution would seem to be to advise the students to each make their own individual interloan requests for the material. However, university libraries generally impose conditions upon their undergraduates’ use of the interloan service with which

it would be difficult, in practice, for a distance student to comply. Common examples are a requirement that a tutor's authority for the undergraduate loan be signed on the interloan form, or a provision that the location of the appropriate interloaning library for undergraduate interloan requests must be made manually, rather than electronically. (Indeed, internal undergraduates may be similarly disadvantaged, particularly in the case of single semester courses where time is of the essence.) In one particular university, undergraduate use of the interloan service is not permitted at all. The reason for these limitations is economic.²⁸ As a result, copyright material which is not available within the educational establishment's own library is likely to be unavailable to distance undergraduate students.

Fair dealing in the library

Section 43 permits 'fair dealing with a work for the purposes of research or private study'. This section applies to all categories of work. 'Private study' is not defined but would seem to exclude group or class study. As s 43 is specific in not permitting the making of multiple copies it is doubtful whether, in practice, this omission would have any practical significance.²⁹ 'Research' is similarly not defined and accordingly will include research undertaken by commercial or industrial entities. The nature of the 'fair dealing' for the purposes of research or private study is not specified in s 43, but it is important to realise that an educational purpose alone does not make a dealing fair. In particular, where the particular act done with regard to a copyright work (which would otherwise be an infringement of copyright, but is claimed to be fair dealing under s 43), consists of any form of copying, the Act states what the court is required to consider. These are:

- (a) the purpose of the copying,
- (b) the nature of the work copied;
- (c) whether it could have been obtained within a reasonable time at an ordinary commercial price;
- (d) the effect of the copying on the potential market for, or value of, the work; and
- (e) where part of a work is copied, the amount and substantiality of the part copied taken in relation to the whole work.

Accordingly, in some instances it may be fair dealing even though the whole of a work is copied. Much depends on the motive with which the material has been copied.³⁰ Therefore fair dealing may be a defence to a charge of copyright infringement brought against a student who copies an entire work.

Although the Act is not specific on the point, there is a line of authority for the view that the infringing act, in respect of which the defence of fair dealing has been raised, must be that of the individual or organisation who is the proposed end-user of the material.³¹ It should be noted, however, that all such reported decisions concerned an agent who was commercially motivated. In these decisions it was held by the courts to be irrelevant that the end-user required the works for the statutorily prescribed purposes. For example, in *Television New Zealand Ltd v*

NewsmonitorServices Ltd ([1994] 2 NZLR 91), the court found that the videotaping of the plaintiff's news programmes by a commercial enterprise, for the purpose of on-selling transcripts of excerpts of programmes, was infringement of the plaintiff's copyright under the 1962 Act. The defendants had claimed that their copying was for their customers' use only, that that use was limited by contract to 'reference purposes only', and that as such (among other defences) the copying amounted to 'no more than fair dealing for the purposes of research or private study'. Similarly, in *De Garis v Neville Jeffress Pidler* ((1990) 18 IPR 292 (Fed C of A)), which was another media monitor case, Beaumont J stated: '...[E]ven if study were the purpose for which a subscriber retained the services of Jeffress, it cannot be said that "study" was the purpose of Jeffress'.

However, the writer has found no reported decisions on the situation where the agent is a non-profit making body. The equivalent provision in United Kingdom copyright legislation³² permits any library, including a profit-based service, to copy on behalf of individuals under fair dealing. For distance students (and, indeed, for internal students with certain physical disabilities), the ability to instruct an agent to carry out fair dealing on their behalf is essential. It is submitted that there is no logical reason to exclude such a possibility.

Although ss 51 and 52 permit librarians to copy certain categories of copyright works for students it has been noted that the limitations placed on the categories of copyright works which may be copied under those sections prevent them from being an adequate substitute for fair dealing.

Copyright and Distance Education in Australia

Notwithstanding the implications of the closer economic relations (CER) trade relationship with Australia, the declared aim of which is the 'harmonisation' of laws and practices in order to remove impediments to trade between Australia and New Zealand, there remain substantial differences between the respective copyright laws of the two countries. Indeed, the Law Reform Division of the Department of Justice described the Australian provisions for educational copying as 'exceedingly convoluted'.³³

In 1974, recognising the wide-spread expansion in the use of the photocopier, the Australian Government had appointed a Committee (the Copyright Law Committee on Reprographic Reproduction, chaired by Franki J), 'to examine the question of the reprographic reproduction of copyright works in Australia, and to recommend any alterations to the copyright law, and any other measures considered necessary to effect a proper balance of interest between owners and users of copyright materials in respect of reprographic reproduction'.³⁴ The Report of the Committee generally favoured the interests of education, as against the interests of the copyright owners, for three reasons:

- (i) No international agreement on the question of reprographic reproduction had been reached;
- (ii) Australia was a substantial importer of copyright material;

- (iii) As a disseminator of information Australia faced special problems: the size of the country, its geographical isolation, its limited resources for subscribing to large numbers of foreign, scientific and technical publications.³⁵

The recommendations of the Committee were embodied as amendments to the Commonwealth Copyright Act 1968, and demonstrate a move away from a reliance on the traditional fair dealing defence and towards statutory licence schemes.

Although the retention of a fair dealing provision for study or research was recommended, the Committee advised the removal of the qualifier 'private' from 'study'. Puri indicates that this might permit the making of copies 'by a teacher for the purpose of imparting instructions in the classroom'.³⁶

Multiple copying for educational purposes of insubstantial parts of literary or dramatic works is permitted, without charge, provided that the person who makes the copy, (or for whom it is made), may not copy any other part of that work within 14 days of the first copying.³⁷ The amount of a work which is thereby permitted to be copied is greater in Australia than in New Zealand. Furthermore, it is submitted that the provision concerning further copying, by specifying the person, rather than the establishment, is more able to be readily complied with than the comparable provision in the New Zealand legislation.

Australian distance teaching establishments may also rely upon provisions in the Act which prescribe multiple copying under statutory licence by educational establishments (Copyright Act 1968, s 53B(9), (10) (Cth)). The provisions are designed to permit the copying of the whole, or part, of articles and other works by educational establishments for teaching purposes, subject to certain limitations, provided that an equitable remuneration is paid to the copyright owner. Copies made for external students, however, are exempt from restrictions on multiple copying and from payment, although prescribed records of all such copying must be kept. Detailed arrangements for sampling procedures and regular surveys, in order to ascertain appropriate payments to the respective copyright owners are prescribed in the Act. However, Wills states:³⁸

Given the number of tertiary institutions in Australia each will typically be required to have a number of its teaching departments participate in a 12 week sample or survey exercise once every 5 years ... [T]his contrasts unfavourably with the New Zealand situation where some departments of each University are required to participate in an 8 week survey each year.

The principles to which regard must be had in the Australian Copyright Act when determining whether copying a work is fair dealing, are substantially the same as those contained in the New Zealand legislation. In *Haines v Copyright Agency Ltd* ((1982) 40 ALR 264 (SC (NSW))), McLelland J considered the effect of the existence of the statutory licence for multiple copying by educational establishments³⁹ on the provision for fair dealing for purposes of research or study. Observing that one of the statutory guidelines in determining whether a copy constituted a 'fair dealing' was the effect of the dealing on the value of the work, His Honour said '... that

value might depend upon the existence of provisions of the law ... which enables the owners of copyright to obtain remuneration for multiple copying'. However, as there is no statutory provision for the reprographic licensing of literary works contained in the New Zealand legislation, it is submitted that the principles expressed in *Haines* could have no application in determining fair dealing with such works within this jurisdiction.

Perhaps the most significant difference between Copyright Acts of Australia and New Zealand is the Australian 'educational exception' from the parallel importing provisions of the 1968 Act. This exception allows educational institutions to negotiate on their own behalf for favourable rates of importation of textbooks for their courses, regardless of whether there is already a licensed distributor of those books within Australia.

Conclusion

In analysing the provisions within the Act for the requirements of education, the importance of distance education to New Zealand's society and economy has been stressed. Although it has not been possible, within the scope of this paper, to deal exhaustively with every issue appertaining to the requirements of distance education, nevertheless the need for certain amendments to the legislation have become apparent. First, because the parallel importing provisions effectively prevent the provision of reasonably priced resource materials for students, there is a need for more generous and practicable multiple educational copying provisions within the Act. Such provisions should also acknowledge particular situations such as unavailability of an original work.

Secondly, it is recommended that, as in Australia, the establishment of licensing schemes for the educational use of certain copyright works be provided for by legislation.

Thirdly, although a case can be made for reprographic licensing of literary works, in order to facilitate the multiple copying of greater amounts than is permitted under the Act, and to provide some recompense to the copyright owners, the question of licensing of other categories of copyright works is far from clear. The potential requirements to make multiple copies of such works would seem to be much lower, and, coupled with New Zealand's low population, raise the question as to whether the establishment of such schemes is economically viable, from either the licensor's or licensee's point of view. An alternative position is recommended, which is that such use should be dealt with entirely by the Act. A safeguard against abuse of the proposed allowances is that dealings be permitted only with works which are either considered to be scholarly, or of public interest, and also are directly related to a particular educational course.

Finally, there is a demonstrable need to extend the fair dealing provisions to librarians as agents for an end-user who is unable to utilise the provisions in person. Logically such an extension must fall within the intention of the legislation, and this should be made clear. There can be no question of commercial interests being jeopardised any more than when the fair dealing is carried out by the end-user. More specifically, a librarian must not be limited to copying 'a reasonable proportion' for the distance student, but should be bound to act in accordance with legitimate requests for 'fair dealing'.

Keywords

Distance Education; Copyright; Multiple Copying; Fair Dealing; Libraries; Licensing Schemes.

Endnotes

- ¹ Sir Samuel Egerton Bridges, MP, in his pamphlet arguing against 19th century English copyright legislation which required 11 copies of each work published to be surrendered on demand to the universities, certain libraries and the British Museum: Brydges, S.E. (1974) *Four Tracts on Copyright 1817 - 1818*. New York: Garland Publishing Inc.
- ² Law Reform Division, Department of Justice *Copyright Bill: Department Report* (Wellington, November 1994), 59.
- ³ Goldring, J. (1995) Coping with the Virtual Campus. *Legal Education Review*, 6(91): 101.
- ⁴ Ministry of Education Handbook (1995) *The EFTS Funding System for Tertiary Institutions 1995*. Wellington: Ministry of Education.
- ⁵ Holmberg, B. (1981) *Status and Trends of Distance Education* London: Kogan Page.
- ⁶ For discussion of the failure of the Copyright Act 1962 to recognise 'that New Zealand might have interests substantially different from those of copyright exporting countries such as the United Kingdom', see Brown, A. (1990) Current Issues in Copyright. In *Intellectual Property: The Context for Reform* Law Commission Report No 13, Wellington.
- ⁷ Submissions on the Copyright Bill suggested that the proposed parallel importation provisions would encourage the setting of unnecessarily high prices; this was not accepted by the Government. Above n 2, 40.
- ⁸ For a discussion contrasting the 'scepticism' with which the academic world greeted the introduction of the British Open University with the high respect in which it was held by the time of its tenth anniversary see Perry, W. (1981) The Growth of Distance Learning. In Prof. M Neil (ed), *Education of Adults at a Distance: A Report of the Open University's Tenth Anniversary International Conference*. London: Kogan Page.
- ⁹ 'Reprographic process' is defined in s 2(1) and clearly envisages the use of modern technologies such as the photocopier.
- ¹⁰ See the Copyright Act 1968 (Cth).
- ¹¹ For addresses of the licensing bodies, see Copyright Council of New Zealand *A Directory of Organisations Responsible for Administering Copyright, Obtaining Clearances and Giving General Advice* (Wellington, 1996).
- ¹² See s 9(3). The new rental right of a copyright owner of a computer programme, sound recording, or film, was required to be inserted by TRIPS. Interestingly, the loan or rental of a literary, dramatic, musical or artistic work is not subject to copyright.
- ¹³ It appears that libraries may recover the actual administrative costs for such rental, since article 11 of TRIPS provides that the new rental right applies only to 'commercial rental'.
- ¹⁴ In *TVNZ Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91, Blanchard J confirmed that '... a videotape is a cinematograph film and therefore within s 14 [1962 Copyright Act] ...'.
- ¹⁵ Norman, S. (1996) *Copyright in Further and Higher Education Libraries*. London: Library Association Publishing.
- ¹⁶ Above n 15, 18.
- ¹⁷ B Juddery 'Copyright protection threatens off-shore income, claims Mason' (May 8-14

1996) 6 17 Campus Review 3.

18 Copyright, Designs and Patents Act 1988, s 32(4) (UK).

19 Above n 2, 70

20 Above n 2, 70.

21 Above n 15, 10.

22 Above n 5.

23 The reason for this exclusion is not clear.

24 See Joint Standing Committee on Interloan *Implications for Interloan of the Copyright Act 1994*. (JSCI.NZLIA Public Documents Series, No 1995/6), cl.3.3.

25 See *Copyright in the Universities: Discussion Paper* (New Zealand Vice Chancellors Committee, June 1989).

26 Above n 2, 75.

27 It appears that this new balance of responsibilities, as altered by the 1994 Act from the position under the 1962 Act, in which the onus was placed on the librarian, will circumvent application in New Zealand of the decision in *Moorhouse v University of N.S.W* [1974-1975]133 CLR 1. In *Moorhouse* a university library was held to have authorised infringement by permitting readers to use its photocopier without any supervision or warning notices concerning the copyright provisions. Gibbs J stated that a library could not offer an unlimited supply of books and an unlimited opportunity to use copying machines without qualification or supervision.

28 While the Act makes no limitation as to the imposition of a charge for this service, the rules of the interloan scheme itself do not permit charging between member libraries other than for 'premium services'. Furthermore, there is some question as to whether any charges made might be construed as 'subsequent dealing' under s 93.

29 For discussion see Puri, K.K. (1983) Fair dealing with Copyright Material in Australia and New Zealand. *Victoria University of Wellington Law Review*, 13: 277.

30 See *Associated Newspapers Group plc v News Group Newspapers Ltd* [1986] RPC 515, 518; *Television New Zealand Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91, 107; and for a full discussion see Butterworths *Copyright Law* (Butterworths, Wellington, 1996) C/455.

31 See *De Garis v Neville Jeffress Pidler* (1990) 18 IPR 292 (Fed C of A). See also *Longman Group Ltd v Carrington Technical Institute Board of Governors* [1991] 2 NZLR 574, 588-589; and *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545 as discussed by Blanchard J in *Television New Zealand Ltd v Newsmonitor Services Ltd* above n 30.

32 Copyright, Designs and Patents Act 1988 (UK), s 29.

33 Above n 2, 62.

34 Lahore, J *Copyright law: intellectual property in Australia* (Butterworths, North Ryde, 1988), [1.1.160].

35 See above n 34, [4.12.5].

36 Above n 29, 284.

37 Copyright Act 1968, s 53A(3) (Cth). Section 53A permits the multiple copying of 2 pages or 1%, whichever is the greater, of a copyright work on any one occasion. Therefore, for works which are longer than 500 pages, the Australian legislation is more generous to educational institutions than the Copyright Act 1994, s 44(3) (NZ): see ante.

- ³⁸ G Wills 'Copyright & Copyright Licensing: The Implications of the New Legislation' (AITEA Fourth New Zealand Branch Conference, Palmerston North, July 1995).
- ³⁹ See the Copyright Act 1968, Part VB, Div I and 2 (Cth).