

Copyright—Publishers and Authors: Consideration of Authors’ and Publishers’ Rights, Photocopying and Reprographic Rights

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Most of the furore over the Copyright Bill as it was introduced into Parliament was focused on the educational copying provisions and the loudest opposition came from authors.

Let me first try to give you a broad estimate of the value of copyright in New Zealand.

In 1976, I wrote a book called *The Passionless People* which most New Zealanders seemed to take more seriously than I did.

Not long before, I had embarked on the precarious career of freelance journalism, and the immediate success of *The Passionless People* led me to anticipate riches from royalties.

But when it was all over, I realized that, in New Zealand, writing books is a mug’s game.

The Passionless People sold 5000 in hard covers and near enough to 20,000 in paperback—all in less than a year. That is a very big sale in New Zealand.

Proportionately, in the United States or Britain, such a best seller would have bought me at least a couple of years to write other books, and the consequent fame would have brought me fees from highly paid journalism.

However, my earnings were about the equivalent of half the annual income of a senior journalist. I think I used it to put a new roof on my house.

I soon found I could earn much more as a public relations practitioner, but I still write books, and it’s still a mug’s game. I survive by supplementing my income from other sources.

So what’s copyright worth in New Zealand?

If you write footie books you may hugely boost the income you get from your day job. They require limited research, a pumped up controversy or two, and not too much subtlety, please.

If you write educational or technical books of the sort that fit into school curricula, then you may become quite well off.

If you write quality children’s fiction—and we have some brilliant practitioners of this genre, including the amazing Margaret Mahy—then you may earn as much as middle management, maybe even more.

If you write serious non-fiction as, say, Michael King does, and you work desperately hard, and find some way to supplement your income that doesn't obtrude into your real work too much, then you may get by.

New Zealand is rich in books on history and biography. In fact, I think we probably have as well documented a history as any country in the world. And very few people have made much money from documenting it.

If you write adult fiction, you certainly shouldn't give up your day job. Janet Frame and Maurice Gee, among many others, have proved that no matter how good you are, no matter how internationally respected, you can't do the hard graft that writing fiction of this quality demands without some financial support, especially at the beginning.

The lucky ones do their writing on university salaries.

Very, very few people in New Zealand get rich from writing. Even the most able and prolific make the sort of money businessmen would snort at contemptuously.

So anything that protects New Zealand writers from the unreasonable exploitation of their work is important to both writers and their future and to publishers and their ability to flourish.

The licensing system now being set up to charge educational institutions for use of copyright material can be expected—if the experience of other countries recurs here—to boost the income of publishers and authors, and especially the authors of technical works and textbooks.

I wasn't surprised when, a few weeks ago, I read in newspapers and watched on television the celebration of those men who invented a method of placing commercials on the steps of escalators.

Personally, my adulation was muted, my gratitude for their gift to the nation totally under control—despite all the media coverage.

I tried, God knows I tried, to feel as good as everyone else seemed to about the invention of yet another form of media to carry commercials. I failed.

The lesson is: if you're torn between developing a flawless writing style and inventing a better mouse trap—go for the mouse trap if worldly riches are your ambition.

But I don't want you to think I take an uncritical view of writers and their books and believe their contents are always essentially important and valuable to our society. I would guess that 80 per cent of the contents of the big bookshop chains at any given moment could be disposed of without the life of the mind suffering in any way.

Sir Arthur Quiller-Couch, an English academic and writer, once wrote that the tragedy of the burning of the great library at Alexandria in 47 BC was not the act itself but that the incendiarys had neither the time nor the taste to discriminate.

However, some of us are, quite irrationally, writers by vocation. It's very fortunate for

New Zealand society and culture that the urge to write is something that burns inside some people until it escapes, regardless of reward.

Copyright ownership

New Zealand law, for a long time, acknowledged copyright as a property vested at first in the journalist or author who could then license a newspaper, magazine or book publisher to use it.

Newspaper journalists and owners here inherited the ramifications of Britain's Literary Copyright Act of 1842 which gave journalists some control over the use of their work even when they were salaried by the publisher. The employer was deemed to have bought with the journalist's pay packet only publication rights.

British law changed in 1988 transferring copyright ownership from the employee journalist to the newspaper or magazine owner.

New Zealand law made the same change last year in the 1994 Act.

Where articles are commissioned from freelance journalists, the journalists retain copyright.

Before the select committee last year, the journalists' union claimed the reason newspaper owners wanted copyright was to sell articles again from an electronic data base; and I'm sure they were absolutely right.

Now I think one should be circumspect about completely reversing a law based on such a principle, especially when it seems to have worked well enough for 150 years.

But journalists had a difficult task trying to defend the status quo for newspaper and magazine employees because other media had adopted the principle that because employers provided staff with all the equipment and expenditure to research and write a story, the story belonged to that employer. I know I wouldn't have liked to argue their case.

I'm not taking the side of the employer here because I'm a freelancer careless of the interests of employed journalists. The fact is I found myself in a position similar to theirs over a book. A publisher provided substantial financial backing and support systems for me when I wrote and edited a reference work and I agreed it was reasonable that we should share ownership of the copyright.

I decided that if I was paid to do something it was fair to compromise my copyright. So, as I say, I'm glad I didn't have to argue the journalists' case.

But my situation was very rare in the world of book publishing. The normal situation is the author writes the book, holds the copyright and gives publication rights to the publisher. The preservation of this copyright and the protection of the writer and publisher against the abuse of multiple-copying was a case I was only too prepared to argue.

The photocopying state publishing houses

Educators hate me using the word, but the fact is educational institutions were *plundering*

the works of authors through these substantial photocopying centres that had become the equivalent of state-owned publishing houses. Multi-copies of substantial passages of protected works were freely available for students.

Five universities voluntarily signed licensing agreements in 1994. This seemed to indicate they felt guilty and wanted to exorcize that guilt.

Their attitude during the debate over the 1994 Copyright Bill, however, suggested their guilt could easily be assuaged by the law if it gave them permission to make multiple copies of up to ten per cent of protected works without payment. That was what they lobbied furiously for at the end.

The Bill sought to allow educational institutions virtually *carte blanche*. It was all a bit sinister. Educators, probably educational bureaucrats, had tried to put a fast one across authors and publishers.

School book grants were coming down. Here was a chance to get texts cheaply. Authors and publishers could be forced to subsidise education.

When authors opposed the Bill's educational reprographic copying provisions, the Minister of Justice said in his reply that the taxpayer could not afford to pay the costs of copyright licensing for educational books to either New Zealand or foreign copyright owners.

We pointed out that authors were affronted that they alone should be forced by law to subsidise education. In fact, they were so affronted that of the 280 submissions to the select committee on the Bill, about 180 were about educational copying, a huge proportion of them from writers.

The Minister of Justice, with good humour in the end, acknowledged that if writers can do anything it is compose stylish invective.

In our submissions, the Society of Authors envisaged this:

An English teacher with a class of 30 students studying the New Zealand short story goes to a library, borrows a number of anthologies, reproduces 30 times his own anthology and distributes the stapled book to his class. Maybe he collects them back at the end of the course for future use. Science and business teachers could do the same with excerpts from specialist books.

What happens is the manufacturers and retailers of the photocopying machine, the paper, the ink and even the staples are paid in full; as is the teacher or any other person involved in the process. The only people not paid are those who made it all possible in the first place—authors. And the business of publishers is being destroyed.

As a consequence, publishers may then decide not to publish new anthologies or other textbooks because students don't need to buy them any more.

And students will have a casual attitude towards the value of intellectual property, and consider they have the right to steal it.

The universities wanted to be able to copy up to ten per cent. The publishers and the authors wanted a maximum of one per cent—as they have in Britain and Australia—to force educational institutions to negotiate licence fees with copyright holders if they wanted to use their photocopiers to produce texts. Half the licence fee, by the way, goes half to publishers and half to authors. Although authors own copyright, publishers suffer equally when work is purloined.

What the government came up with is a pointless compromise: educational institutions may make multiple copies of up to three per cent from any one work not more than once a fortnight—after a phasing in period of two years.

We think three per cent is probably low enough to force all primary schools, colleges and polytechnics to apply for licences and thus pay for what they take as class sets.

But we're not absolutely sure. We won't know until schools have worked out whether or not they can make do with class sets compiled within the confines of three per cent once a fortnight. If they don't come forward to negotiate licensing arrangements, then we will know we have a problem.

The executive secretary of the British Authors Licensing and Collecting Society told me she has grave reservations about the provisions. In Britain and Australia, they have one per cent maximums.

And believe me, foreign writers and publishers are professionally interested in what happens here. We enlisted the aid of writers in Australia and Britain because if educational institutions here are allowed more than the British and Australians think is fair, their writers stand to suffer. You see, there's an international agreement that means we pay each other's writers when work is taken under the licensing scheme.

I think the support we got from foreign writers was a factor in making the government back off the ten per cent. At least one Australian writer said he would have an embargo on sale of his books in New Zealand written into his contract if the original provisions of the Bill were allowed to stand

I say the compromise was pointless because if licensing was favoured, then the amount should be a maximum of one per cent over, say, two or three months, bringing it roughly into line with other like countries. In making it a maximum of three per cent they just may have created a problem for the future. Why did they do it?

I'm also bemused by the unnecessary complications caused by the use of terms like "pages". You can multiple-copy up to three per cent of a work or three pages, whichever is the greater; except where it is the whole of a work when you may multiple-copy up to half of it.

Is there a standard metric page? Are all books the same? May pages be large or small and covered with large or small type?

Why should someone be able to multiple-copy up to half a full poem just because it's shorter than five pages? I think poets are entitled to be dismayed.

Why not just three per cent of anything or, better still, one per cent? I think simplicity often disturbs MPs, just as a spare and simple sentence will often terrify amateur writers into adjectives.

Will the Act protect licences? Ask us in two years.

Fair dealing

Publishers and authors also wanted some definition in the Act of “fair dealing” when copyright material is used for commentaries and reviews, etcetera. The government decided in the end to make it subject to the courts which really liberalizes use because you don’t have to be very smart to know that authors haven’t the resources to go to court, and publishers aren’t as wealthy as some people seem to think either.

I got the feeling the problem of “fair dealing” was too hard.

All of us, MPs as much as anyone, worked very hard to get satisfactory legislation but the odds were against us all because everything was hurried. Many of the groups affected just didn’t have the knowledge or the resources to apply themselves to the issues.

This is a huge, complex Act and everything was done at the double. Quite early the publishers and authors virtually had to abandon “fair dealing” and concentrate on the more damaging aspects of the original Bill.

It made me wonder again if New Zealand is big enough to be a sovereign state in the modern world. In Britain and even in Australia, there are more MPs and more specialists with more time and resources to apply to the special national problems of this kind of legislation. Here, we cut and sutured British law and hoped it would keep good health out here in this country.

The property right

One major problem copyright holders face is the public’s difficulty in understanding it as a form of property—and, consequently, respecting it.

During the last week before the 1994 Copyright Act was passed the universities and the Foundation for the Blind did last-ditch lobbying for changes to be made in their favour.

The universities wanted the ten per cent for educational copying and failed, I’m happy to say.

The Foundation for the Blind succeeded, even though their moral arrogance was extraordinary, and their understanding of copyright ownership negligible. One of their members, before the argument had been joined, said no moral answer was possible against their point of view.

They now have the legal right to take any work of copyright, turn it into a braille book or talking book and then simply notify the copyright owner the deed is done. I don’t know how, say, P D James, will react if one day she receives advice that the Foundation for the Blind in New Zealand has legally recorded her work without permission or payment.

The Foundation insisted that getting permission took too long. Publishers and the Society of Authors countered with a proposition to set up an organization to facilitate clearance, perhaps within Copyright Licensing Ltd.

The Foundation said permission was sometimes not given. We said we knew of only one case. They said they knew of many. We discovered permission had been sometimes turned down by publishers because they didn't have the rights to give.

All authors wanted was the right to control use of their copyright for two reasons:

- 1) To emphasize that it is property, even if we're giving it away.
- 2) Because we could foresee some danger in the existence of a commercial audio-books industry.

But what interested me was the inability of the Foundation spokesperson to grasp the principle of copyright as a form of property. He told me they saw it as a matter of access. They wanted access to copyright in the same way the disabled had gained access ramps to public buildings at public expense.

I tried the analogy of a law providing handicapped people with the right to enter any library via the access ramp and then steal books because it took too long to queue up at the counter. I asked if the Foundation should have the right to simply take the talking-books technology and tapes without getting permission. The spokesperson could not understand.

Frankly, authors aren't too fussed about the blanket right to translate books into braille or to record talking books, but the episode does illustrate a wide public misconception of intellectual property.

During the public controversy over the Bill, a surprising number of academics argued against tight licensing restrictions in the name of the free flow of information, and because students are hard up. Theirs was a for-the-greater-good argument. Some of them could not be made to understand how theft of existing works would inevitably, seriously damage the writing and publishing industry.

A professor of higher education at Boston College, in the US, recently wrote a proselytizing piece in *The Bookseller* on how the copyright restrictions imposed under GATT mitigated against the development of Third World countries who couldn't afford to buy books:

The fact is, that most of the world's knowledge is produced in a few industrialized nations and the products of that knowledge—including books, journals, and the new technologies of computer programmes and CD ROM discs—are manufactured in these same countries.

His advocacies will horrify authors. He writes:

...while it may be justified to insist on commercial terms for Nintendo games, some flexibility for scientific materials and the like is appropriate. The owners of

knowledge must modify their profit-orientated approach to certain segments of the knowledge industry.

Nowhere does he suggest computer manufacturers or software designers should modify their profit-orientated approach in the interests of Third World development.

On the other hand, journalists, in their submissions to the Parliamentary select committee, likened the transfer of copyright from employees to employers to the confiscation of land under the old Public Works Act.

Some of our Society of Authors members insist copyright as property is as absolute as the ownership of a home or chattels, and during the controversy over the Bill many summoned up the most extravagant indignation, comparing the multiple copying of their work with stealing manufacturers' products or farmers' crops.

It is a point of view and for the purposes of lobbying, we let those extravagances resound.

But it's not quite that simple. I believe authors and publishers have a moral obligation to provide ready access to their work in the interests of the spread of knowledge and the intellectual growth of our country. But then every author I know agrees deep down with this. All they want is a fair price that will help them do what they do best—which is write and publish.

All the writers I know want to communicate. They also want to inform, to persuade, possibly to move, to enthral others. They crave readers. They don't want to stop access, and nor should they.

And publishers by their very nature provide that access and want to continue to do so.

There is no copyright on facts or ideas, only on the individual, artistic expression of them; so generally the advance of facts will go on regardless. We know that people make copies of our work for the purposes of individual study or pleasure. I do that myself. I don't know how people get by without a copying machine.

Writers have already accepted a modification of their ownership. In the days before the fast, efficient photocopier, those who wanted to use quite brief excerpts from a book for public use were obliged to get permission from copyright holders or their representatives.

One of my first jobs with the New Zealand Broadcasting Service Talks Department in the 1950s involved writing dozens of letters a week to publishers around the world to get permission to use quotations in programmes.

[Those were the days when they *made* radio programmes; whereas today they simply answer the phone.]

Nowadays, both publishers and authors are happy for multiple-copying of agreed amounts of their work without permission—as long as they receive fair payment for it.

Even some non-professional writers are confused to the edge of paranoia at the moment. The following is the "All Rights Reserved" paragraph at the top of a manuscript for a book by a group of New Zealand scientists that I'm editing:

No part of this publication may be reproduced, stored in a retrieval system, transmitted, reported, or copied by any means electronic, mechanical or otherwise without written permission of the copyright owner.

Information contained in this publication is confidential and is not to be disclosed in any form to any party without prior approval in writing of the chief executive officer of.... [etcetera, etcetera]

I wondered when I read this if I shouldn't edit it at night under the blankets with a torch.

I think authors and publishers, perhaps in association with other, similar organizations, need to embark on a long-term educational programme to change the perception of intellectual property among the public.

The licensing organization

One confused issue that came to a head during the campaign against the unfair provisions for multiple-copying in the original Bill is the structure of, and representation on, copyright licensing organizations.

Publishers and authors tried to present a united front because their interests concerning the Bill pretty well overlapped. But there was an underlying tension.

The Society of Authors supported the principle of licensing but wanted a limit of ten per cent of a work even in any licensing arrangement because they had no representation on CLL (Copyright Licensing Ltd) and thus were unable to influence licensing negotiations.

The publishers wanted freedom for CLL to negotiate any arrangements it thought appropriate. Authors then conceded this in the interests of unity during the campaign on the Bill, but it was then we decided CLL should be an equal partnership.

CLL was established a few years ago by the Book Publisher's Association of New Zealand in the wake of similar organizations set up in Britain and Australia.

In both those countries, and in almost every other Western nation, authors and publishers have equal representation in the copyright licensing organizations.

In New Zealand, the authors lacked time and resources—and perhaps, in the beginning, the foresight as well—to get involved with the setting up of CLL; so it became a wholly owned subsidiary of the publishers' association.

Publishers know their industry well but, in my experience as president of the NZ Society of Authors, once they move out into the arena of public issues, they are, to be quite frank, unworldly. And for historical reasons they deeply patronize writers.

Let me explain. Authors almost always hold copyright and license publishers to produce, distribute and sell their books.

Above all else, authors want to have work in print.

Publishers, on the other hand, must make a profit to survive.

Negotiations on contracts that give publishers the right to publish are almost always

loaded in favour of the publisher because authors in almost every case want their books in print, more than publishers need to accept them.

Thus, authors have often adopted the posture of supplicants, and publishers have responded accordingly.

Make no mistake, publishers love books too and there's a long tradition in the industry of taking risks with good books. One of the reasons is altruistic—publishers like producing quality. Another is they may see in an author the prospect of profits from future books, and of prestige from being the publisher of a particular author they may think will become much admired.

This tradition among publishers is fading fast as the Rupert Murdochs of the world have moved into publishing, unconcerned with the quality of their authors' prose but enraptured by carefully written, lavishly illustrated annual reports. Nevertheless, publishers have contributed hugely over the years to the growth of a national literature in this country, and I'm sure will continue to do so.

Until recent years, contracts were fairly standard. The author got his fair cut and most of them were happy, except insofar as slagging publishers at parties is a bit of an author's sport.

Then along came heavy retail discounting and the end of the recommended retail price; and the evolution of a bookselling chain whose volume of sales makes it so powerful some publishers feel the need to consult it on whether to publish and how many to print. This chain virtually decides the retail price.

The pressure therefore goes onto the publishers who then move some of it on to the authors—perhaps to accept royalties not on retail prices but on publishers' returns.

All these things have increased suspicions and tensions between authors and publishers. This made the CLL negotiations difficult.

At first we met the most intractable opposition to any representation at all. Those associated with the BPANZ and CLL justifiably felt paternalistic towards the organization for which they had done the set-up work and paid the set-up costs. They insisted writers were represented by *their* nominees.

But gradually, we've come together and I think there's a broad understanding now that if half the licensing proceeds belong to authors, then authors should have equal rights to direct representation on the negotiating body.

What helped us is pressure has been put on licensing organizations by the government in the Copyright Act which provides for regulations, if necessary, to examine and restructure the constitutions, representation and financial disclosure of licensing bodies.

Also, the Copyright Council recently formed a sub-committee to establish principles of fair representation for all sectors in the music, performing arts, sound recordings and literary industries.

I believe this issue will soon be resolved to everyone's satisfaction.

The future

The new Copyright Act may be in place, but I predict many difficulties ahead for copyright holders over the next few years because of the pace of technological change. Britain's Authors' Licensing and Collecting Society has established a legal fund as it approaches the problems not so much of photocopying but of electronic rights and electrocopying by print scanners. New Zealand copyright holders will have to make decisions on how they assign special rights as the technology changes and various forms of publishing proliferate.

Many people around the world are predicting the death of the book. Most of us are shaking our heads, and I believe that narrative will exist on paper for a long time to come. But I understand that more reference books in the world were published on CD ROM last year than in book form and who would predict future technology?

The problem for copyright holders will be marshalling the resources for research and legal advice to advance with confidence into the future. At the moment the Society of Authors has little more than enough money to meet administrative costs.

But in the meantime, over and above any problems we may have with the law, I think the most important duty of all intellectual property owners is to develop a continuing campaign to make the public aware that what they own *is* a kind of property.

RESPONSE

Grant Wills of the New Zealand Vice-Chancellors' Standing Committee on Copyright was at the seminar but time constraints prevented him from speaking.

As a person integrally involved in presenting the University's position on copyright legislation, he has commented upon two aspects of this paper as follows:

- "A. McMcLauchlan's assertion on page 34 that:
"Five universities voluntarily signed licensing agreements in 1994. This seemed to indicate they felt guilty and wanted to exorcise that guilt"
is not accepted as being a fair assessment of what occurred.
The Universities concerned entered into negotiations with copyright owners in 1990, not out of a sense of guilt, but as a means of addressing by a licence the competing claims of copyright owners and copyright users. Universities were well aware of the need for appropriate licensing arrangements.
- B. Mr McLauchlan, on pages 34, 35 and 36, contends that Universities sought the right to make multiple copies of up to ten per cent of a work without payment. That assertion does not reflect the Universities position. Being both producers and users of copyright materials, the Universities argued for legislative provisions to balance the competing rights. They were opposed to a flat fixed percentage (10% or otherwise) on the grounds that this would create inequities depending on the types of copyright materials used. They also noted that fixed percentages would add to copyright licence compliance costs."