Writers and the law of copyright

Kanwal Puri*

The following article is the transcript of an address delivered in Wellington in September 1984 to the Golden Jubilee Conference of PEN New Zealand Centre Inc. PEN, an acronym for "Poets, essayists and novelists", is an international organisation overseeing the interests of writers. In the article, Dr Puri explores the justification for copyright in the light of modern technological changes. He suggests that the duration of copyright protection is too long. He discusses the pitfalls of publishing agreements and calls for new standard forms of contract to be worked out.

The subject of this address is the New Zealand law of copyright. As a body of law, this has only become the focus of systematic study in New Zealand in fairly recent years, although it has long been the case in Europe, the United Kingdom and the United States, and more recently in Australia.

The copyright law protects the rights of authors in their original literary, dramatic, musical and artistic works and grants similar protection to a wide range of other subject matter which also represents the result of creative effort, such as sound recordings, films, broadcasts and published editions.

The central rights protected by copyright are the right to reproduce or make copies of the work or other subject matter and the right to present it to the public, whether by way of live performance, broadcasting or diffusion over wire services.

The above-mentioned categories of copyrightable material (which are eight in number) are very broad and cover a diverse range of subject matter. Thus copyright protection in relation to "literary works" extends far beyond works of high art such as novels, plays and poems and applies to the most mundane kinds of subject matter, ranging from railway timetables and telephone directories to lists of numbers for use in a newspaper bingo game. The same is true of the other categories of "works".

Copyright is a right to prevent the unauthorised reproduction by another person of the tangible form in which a person has chosen to express his or her ideas.

* Senior Lecturer in Law, Victoria University of Wellington.

There are many ways in which one's thoughts may be expressed. This may be by way of a book, recording, painting or a film.

What are the justifications for giving copyright? Some people have argued that copyright is a natural right. A person has a natural property right in the creations of his or her mind. Others have taken a more pragmatic approach. According to them, copyright protection finds its justification in fair play. The moral basis for copyright protection is said to be found in the Eighth Commandment, "You shall not steal". Also, "No one should be allowed to reap what he or she has not sown". This ethical norm is balanced by public interest. There are several benefits which flow from the creative activity, both economic (e.g. volume of goods and services) and others (e.g. society's stock of ideas). Furthermore, the grant of a proprietary right to the authors in relation to the product of their labours gives them incentive and security for the considerable investment of time, labour, resources and skills.

I. THE EFFECTS OF TECHNOLOGICAL DEVELOPMENT

In the last 50 years or so, copyright protection has been extended to a whole range of subject matter far removed from that originally protected: to sound recordings, cinematograph films, television and sound broadcasts and published editions of works. More recently, consideration has been given to the protection of computer programmes and live performances.

Another aspect of technological development is the effect which this has had on existing rights. Until quite recently, the basic right to prevent copying could only be infringed by the printing press or by hand; today, works may be reproduced by a wide variety of means, including reprographic reproduction and retrieval from a computer data bank in which the work has been stored.

Likewise, the right of public performance was once confined to live performance; now a performance can be just as readily disseminated by means of a sound recording, cinematograph film, television or sound broadcast or by diffusion over a cable system. On the one hand, these can be viewed as a variation of the basic rights of reproduction and performance. It should be noted, however, that they provide the copyright owner with a very considerable expansion of those rights. On the other hand, these new modes of reproduction and performance can be of great public benefit, particularly in such areas as education and research. What should be the private-public balance in such cases? Should the copyright owner be allowed to sweep everything into his or her net? This mopping up of treasure trove by the copyright owner may not be totally justifiable. But why should the public now be allowed to use the owner's material in these new ways without permission? Perhaps, these two conflicting interests should meet at a half-way house. While the proprietary interest of the copyright owner should be recognised, limited access upon payment of a set fee should be allowed. Such a balance has been struck in Australia by the enactment of sections 53A to 53D in that country's Copyright Act of 1968, whereunder multiple copies of works in educational institutions and institutions assisting handicapped readers can be reproduced without obtaining prior permission of the copyright owner, but upon payment of a set fee.

II. LEGAL REQUIREMENTS FOR PROTECTION

Copyright law deals with such matters on which the present day cultural industries are founded — publishing, record, film, television, radio industries and so on. But interestingly enough, copyright is absolutely automatic. In this sense, copyright is distinct from other main branches of intellectual property, viz. trademarks, patents and industrial designs. In these, protection is available upon registration. But copyright law requires no formalities to be complied with. There is no application to be filed, no fee to be paid and no deposit of work to be made. Copyright subsists as soon as a work is created. Copyright is different from the physical object, e.g. a painting. When the artist sells it to a purchaser, the purchaser gets the ownership in the physical object. Copyright may still continue to vest in the artist. Copyright is not tangible — it canot be felt or touched — but it can be transacted like any other property.

The copyright law does not prescribe any mandatory requirements regarding marking of works with the letter "c" within a circle, e.g. "© Reserved". Thus errors or omissions of copyright notices or claims cannot result in a loss of copyright. The use of the notice or symbol, however, is strongly recommended. By putting the copyright symbol, the ownership and date are established. The existence of notice may also make it difficult for the infringer to plead innocence under section 24(2)(b) of the Copyright Act 1962. Otherwise, the infringer may successfully escape liability to pay damages. Further, there are certain advantages of marking in the international arena. For example, in the United States a notice of copyright must be placed in all copyrighted materials. The Universal Copyright Convention (UCC) also provides for a similar notice requirement. A proper copyright notice should contain the symbol ("c" within a circle), the name of the copyright owner, the year of first publication and the location.

The copyright system is based on an international network. There are two main copyright conventions — Berne and UCC. Almost all countries of the world are members of one or both of these conventions. These conventions guarantee a certain level of copyright protection in all the member countries and also adopt the principle of national treatment, i.e. same rights and privileges are conferred upon the residents of member countries as are applicable to such country's own residents.

The Copyright Act 1962 requires that in order to be entitled to copyright protection, a "work" must be original. Originality does not mean that a work has to be "novel" or "inventive" in the patent sense. Nor need a work have artistic or creative quality. There are two basic requirements: one, the work must have originated from the author, i.e. it must be the result of his or her efforts and not copied, and two, the author must have used some skill or labour in producing the work. The second requirement becomes important in cases where the work is a compilation or arrangement of non-copyrighted material or material whose copyright term may have expired.

Reduction of the work to some material or tangible form is also a prerequisite for protection. Thus copyright does not subsist in a conversation, spectacle or performance.

The word "literary" must not be taken as implying a requirement that the work must have a particular standard or merit. It is used in the Copyright Act 1962 in a generic sense. Materials which are informational or factual, e.g. examination papers, catalogues, football coupons, etc. are literary works. The work need not have any grammatical composition or style. Thus, tables and compilations are expressly included in the definition of the term "literary" in the Act. "Table" may include a list or timetable and a "compilation" may include a dictionary, an almanac, a gazette, an anthology or selection of other non-copyrighted materials.

III. DURATION

The general rule is that the copyright subsists for the life of the author and 50 years after his or her death in the case of literary, dramatic, artistic and musical works. The period of protection is, however, shorter in the case of photographs, anonymous and pseudonymous works, sound recordings, films, television and sound broadcasts. In all these cases, the copyright lasts only for 50 years. Copyright in published editions of works subsists for a period of 25 years. Unpublished works are also protected under the Act for a period of 75 years.

It is submitted that the period of protection in most cases is too long and should be reviewed. It is a well-known fact that the real beneficiaries of copyright (in the economic or monetary sense) are the commercial enterprises, viz. the publishing houses, record, film, radio and television companies. But the law was originally designed to reward the creator of the work, who does not appear to be reaping the benefit (nor his or her descendants) of the long term of protection. In any case, with the scientific and technological revolution in the past few decades, the copyright owners are able to get quick and enormous rewards soon after the production of the work, and therefore it is submitted that the long period of copyright protection is overburdening the society without any real justification or need.

IV. COPYRIGHT AND CONTRACTS

The usual method of dealing with copyright property is to grant assignment (total or partial) or licences (exclusive or non-exclusive). Assignment implies transfer of full title in the copyright, including the right to enforce the copyright against future infringements. The assignee may even alter the work without consent of the original owner and publish successive editions. On the other hand, an exclusive licence confers concurrent rights on the licensor and licensee. Ordinarily, the original owner will have to be joined as a party to a suit for infringement of copyright against a third party. Moreover, the exclusive licensee must publish the work in its unaltered form.

Under the Copyright Act 1962, no assignment of copyright (whether total or partial) shall have effect unless it is in writing signed by the assignor or by a person on his or her behalf (section 56). Similarly, an exclusive licence must also be granted in writing, signed by or on behalf of the owner of copyright (section 26(9)).

Contracts to publish books usually contain provisions that deal with the following: preamble and description of the work, delivery of the manuscript, illustrations, publication, rights granted, subsidiary rights, authors' warranties, copyright infringement, proof reading, indexing, accounts, royalties, advance payments, options on future works, return of the manuscript, insurance by the publisher, remaindered copies, cost of author's corrections, permissions, assignment of rights to third parties, revision, cheap editions, division of royalties, promotion copies, free copies, author's death or incapacity, mutual assistance, variation of agreement, termination, arbitration, and other miscellaneous provisions.

Authors are usually presented with standard form contracts. The terms of such contracts serve mostly the interests of the publishers and the reading, let alone the understanding of these contracts, presents difficulties to the authors. Generally, authors sign such contracts "on the dotted line" because they soon realise that the terms are on a take-it-or-leave-it basis; there is no freedom of choice.

In general a party to a contract cannot escape its obligations merely because a bad bargain has been made. In recent years, however, some courts have developed the idea of unfair or unjust contracts. There is a gradual judicial recognition of the principle of unconscionability as a ground to set aside contracts (or some of their terms) in those cases where one party has used its superior bargaining power to obtain a harsh and oppressive contract.

Publishers feel very reluctant to alter the terms of the publishing agreements. The pre-determined terms are non-negotiable. Most publishers instruct their staff not to alter the contracts. There is a sense of security in sticking to the original contract. I dare say that many publishers themselves do not fully appreciate the full implications of all the terms which they offer to the authors for their approval. The truth of the matter is that the standard forms are written by lawyers who are paid handsomely to safeguard the interests of their clients, viz. the publishers. The lawyers in their zeal to protect the interests of the publishers in all the possible situations draft very verbose and complex contracts, which authors cannot possibly comprehend.

I believe that PEN has a very important role to play in this regard. PEN should try to bring the publishers and authors together to debate the terms of publishing agreements. A standard form may then be drafted taking into account the interests of both parties. I am sure such an exercise will be to the mutual benefit of publishers and authors.

Until such consensus is achieved, authors should grant rights "by way of exclusive licence" only and not by assignment. This will sufficiently safeguard authors' position. Subsidiary rights such as converting the work into a script for a film, TV serialisation, dramatic stage play and character merchandising should be linked to fees paid in addition to the payments for basic publishing rights, so that the writer is rewarded as the rights are exercised and his or her work becomes more useful.

Where a copyright owner assigns his or her copyright, there is nothing to stop the assignee re-assigning it, even if this is in breach of the book agreement.

At the most, the assignor can file a suit for damages for such a breach. Authors should be careful when making agreements to ensure that they state their intention as clearly as possible. A non-exclusive licence need not be in writing. It may actually be implied from the conduct of the parties or the circumstances of the case.

A publishing agreement creates a contractual relationship. Ordinary rules of contract law governing dealings with personal property apply. There are no special formalities to be observed. However, as noted above, if the agreement is in the nature of an "assignment" or an "exclusive licence", writing is required.

V. FORMS OF AGREEMENTS

There are mainly four forms of publishing agreements which are prevalent in the market-place today. They are:

(i) Outright sale of copyright in consideration of a lump sum payment. On the signing of such an agreement, copyright belongs to the publisher. This may be so even where the work has not yet been created. Section 57 of the Copyright Act 1962 recognises assignment of future copyright. This provision states that the copyright in the work shall vest in the publisher when the work is created. No further agreement is required. Where an outright sale of copyright has taken place, the rights of the parties are concluded at once. The author has no liberty to reproduce substantially the same matter in another book, and if he or she does, the second publication will be an infringement of the copyright in the first. It may also be noted that an "outright sale" agreement does not imply any obligation on the part of the publisher that the work must be published, unless the terms of the contract specifically provide for it.

(ii) Licence for a period on royalty terms is the second form of agreement which is commonly entered into between publishers and writers. Such agreements usually provide that the "royalties shall be calculated on the net revenue received from copies sold". Writers should be wary of such terms and must understand the full implications of the "net" revenue. If the royalty payable to the author is a certain proportion of the price of the work, the agreement should fix a minimum price at which the work is to be sold. This is not usually done in practice.

(iii) Profit-sharing agreements are also sometimes entered into between the parties. They are in the nature of partnership agreements whereunder the author contributes the manuscript and the publisher invests and repays himself or herself out and the net profits are divided between the parties in accordance with the terms of the agreement. If the agreement is silent regarding the proportion of shares, then the parties must share equally. Such agreements create a fiduciary relationship.

(iv) Finally, there are agreements which are in the nature of commissioning agreements whereunder the author commissions the publisher to publish the work and then sell it at a fixed commission. No rights in the work are vested in the publisher and the author runs the entire risk. Such agreements, which are a rarity, should make it clear whether the author is at liberty to make similar contracts with other publishers.

VI. POINTS IN DRAFTING

Writers should know that copyright is divisible as to time, place and classes of acts. They should remember to consider whether the agreement is to include all translations, abridgements, selections, dramatisations, film rights, television, radio and "in-flight" rights, foreign rights, performing rights in the case of musical and dramatic works, and so on. Other matters which may be specified, as appropriate, are: number of copies to be published, single edition or successive editions, publication in serial form in magazines or volume form?

What is needed today is public awareness about copyright matters. All concerned should realise that copyright owners will not sit back when their rights are infringed: copyright is after all their bread and butter.