

Overview of Key Copyright Law Concepts

By Simon Penlington

The starting position

The owner of copyright in a work has exclusive rights to do and authorize other persons to do certain acts in New Zealand in relation to the work. These acts include copying, issuing copies to the public and making an adaptation.

Literary works

Literary works are defined as any work other than a dramatic or musical work, that is written, spoken or sung; and includes a table or compilation or computer program.

Original literary works are automatically protected by copyright once they are recorded in writing or otherwise. It is not necessary to mark the work with the © symbol to obtain protection. Originality under the Act means: the work is not a copy of another work or a work which infringes the copyright in another work.

The author of a literary work is the first owner of copyright in that work unless the work is created in the course of that author's employment. Where the author is employed the employer is the first owner of the copyright. Copyright in a literary work exists for 50 years from the end of the calendar year in which the author dies.

Typographical works

The typographical arrangement of published editions also attracts copyright protection. Hence the layout of the published magazine or newspaper in which a literary work appears may not be copied without the copyright owner's (i.e. the publisher's) authority. Copyright in a typographical work exists for 25 years from the end of the calendar year in which the typographical work was published.

Breach of copyright

Essentially, any dealing with a literary work without the authority of the copyright owner is a breach of copyright. Copying is the most common form of breach. Copying means "reproducing or recording the work in any material form", and includes "storing the work in any medium by any means".

Copying a substantial part of a literary work also constitutes a breach of copyright. What amounts to "substantial" is determined by whether the essential character of the literary work has been copied. To answer this question a quantitative and qualitative comparison between the original and infringing work must be undertaken. The Courts have looked at a number of factors, including whether the copy under examination has used the same language, layout, headings, incidents and detail as the original work. If it has, then the copy is likely to have infringed the copyright in the original work.

Assigning or licensing copyright works

A copyright owner can assign (sell) or license (allow the use of) his/her rights in the copyright work to another party or parties.

An owner can assign all or some of his or her rights. He or she may also assign his or her rights for all or part of the duration of the copyright period. An assignment (sale of copyright) is not effective unless it is in writing signed by the person assigning the rights.

A license to use a copyright work is not required to be in writing. As with an assignment, the terms on which the rights are licensed govern the use of the copyright work by the assignee (i.e. the person who obtains the right to use the copyright work).

In the case of licensing the use of a literary work, the common rights that a copyright owner may assign are:

- First New Zealand Serial Rights

First New Zealand serial rights are the rights to reproduce your literary work first in a serial publication (i.e. a newspaper or magazine) within New Zealand. For additional certainty it is helpful to specify the name of the magazine or newspaper you are authorising your article to be published in. Once the magazine or newspaper has published your article, all copyright rights revert to you, including the right to license other publishers to reproduce your article.



Original literary works are automatically protected by copyright once they are recorded in writing or otherwise.

The author of a literary work is the first owner of copyright in that work unless the work is created in the course of that author's employment.



Essentially, any dealing with a literary work without the authority of the copyright owner is a breach of copyright.

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If you would like legal advice tailored to your particular situation, please contact Simon Penlington.

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- **Second or Reprint Rights**

As the name suggests, second or reprint rights are the rights to reproduce your work for a second time. The original publisher may want a credit when the work is reprinted.

- **Electronic or Online Rights**

Electronic rights cover a wide range of rights including the right to reproduce your work in an electronic document, on a website, in a database and on a CD-ROM. Hence you should be clear in any agreement with a publisher they type of electronic rights you are licensing, if any. For example, you may wish to only license the right to reproduce your work on the publisher's website or in the publisher's electronic form of the magazine which your article was first published. If you are licensing the rights to reproduce your work on a publisher's website, you should consider whether that right is exclusive or non exclusive and the duration of the right.

- **All Rights**

As the name suggest, an all rights license allows a publisher to reproduce your work in anyway, at any time and in any medium, without seeking your permission or paying you any further money for your work.

In specifying what rights you are licensing, it can also be very helpful to spell out in the licensing agreement the rights you are not licensing. For example, if you are licensing to a publisher the first time New Zealand rights to reproduce your article in the next edition of its magazine, make clear that this right does not allow reproduction of your article overseas or in electronic form, including, but not limited, to publication in a database or on a CD-ROM.

Copyright and the internet

The Copyright Act 1994 was intended to be technology-neutral and, according to a leading authority in the area, the Act "...undoubtedly covers publication on the Internet and the same principles apply to those publication as to any

other kind of publication" (see Burrows and Cheer, *Media Law in New Zealand* (5th ed, 2005) page 202).

Applying the plain meaning of the words of the Act, it is my opinion that publishing or posting an article on a website requires reproducing or recording the article in a material form. It therefore comes within the definition of copying in the Act which says copying is "reproducing or recording the work in *any material form*", and includes "storing the work in *any medium by any means*".

There are two United States decisions which hold that publication of a work in electronic form breached the author's copyright in the original written work (see *Random House Inc v Rosetta Books* 150 F. Supp 2d 613 which dealt with the right to publish a book in electronic (e-book) form on the internet or *New York Times Company Inc v Tasini* 121 S Ct 2381 which dealt with publication of articles on *Lexis/Nexis* which is an internet database).

While these cases were decided in the context of particular licensing agreements and United States legislation, in my opinion, the Courts accepted the underlying principle that creating an electronic version of the author's work was creating a copy of that work.

Remedies for breach of copyright

The remedies for breach of copyright are injunctions, damages or an account of profits. An injunction or interim injunction can be obtained to prevent a person publishing a work in breach of copyright.

Damages compensate the copyright owner for the loss s/he suffered as a result of the breach of copyright. Typically damages equate to the sum the owner would obtain for permitting the use of his/her work. Additional charges may be ordered if the breach of copyright is flagrant.

An alternative to damages is an account of profits. This remedy requires the copyright infringer to pay the owner the profits it has earned from the copyright infringement.

Disclaimer: *The above summary of key concepts in copyright law is of a general nature only.*

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