

To copy, or not to copy

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Copyright Licensing Ltd v University of Auckland (2002) 7 NZBLC 103,585 is a test case brought to clarify the extent to which the universities are entitled to copy copyright material without infringing copyright. It is relevant not only to universities but also to any other organisations which routinely make copies of copyright material, and directly affects organisations similar to universities (e.g. technical institutes and schools). It also affects other organisations, particularly large organisations which maintain their own libraries or subscribe to publications of relevance to their operations. Prime examples are government agencies, local bodies and corporates who distribute copyright information internally. In fact, if you are reading this article, the chances are that you are part of an organisation which copies and distributes copyright material.

Because copyright subsists *automatically* in original literary works, and “literary work” is very widely defined (any written work), there is likely to be copyright in virtually any written material that such organisations might wish to copy. (The principal exceptions are: Acts, Bills and reports of select committees introduced into the House, court and tribunal judgments, and reports of commissions of inquiry, in which there is no copyright; and works whose authors died over 50 years ago, in which copyright will have expired.)

Copyright Licensing Ltd has an impact on such copying in two essential respects: it explains the *purposes* for which it is permissible to copy copyright works (i.e. when and what you can copy) and the process that you must follow (i.e. how you can copy).

Purposes

While the permitted purposes are the less controversial aspect of the decision, it is unlikely that many organisations will have appreciated the limited purposes for which they can legitimately copy copyrighted material. The decision therefore brings that issue into sharper focus. Organisations which routinely copy such material should particularly note the following rulings.

- First, fair dealing with a work is permitted for the purpose of *criticism or review* (s42 of the Copyright Act 1994). It was held that this must be for “the investigation of the text, character, composition and origin of literary documents” or “the art or practice of estimating the qualities and character of literary or artistic works” (i.e. criticism) or “an account or criticism of a book, play, film, product, etc” (i.e. review).
- Secondly, fair dealing with a work for the purpose of *reporting current events* is permitted (s42). “Current events” has been given a liberal interpretation - the material copied need not be current provided it is used to report current events. This does not, however, extend to use for editorial or other purposes. The judge commented that it was difficult to think of any circumstances where the reporting of current events would occur other than in the news media, but in fact many organisations have information services whose functions include informing members of the organisation of current events of relevance to their operations, and they will wish to rely on this exception in doing so.
- Thirdly, fair dealing with a work for the purposes of *research or private study* is permitted (s43).

- Fourthly, copying for *educational purposes* is permitted within strict (and quite complex) guidelines (s44). Essentially, a person giving a lesson may make a single copy of the whole or part of a work for that purpose. An educational establishment may make more than one copy for an educational purpose, but only of part of a work (up to 3% or three pages, whichever is greater; unless three pages would be the whole work, in which case no more than 50%). Importantly, the establishment must not charge students for those copies. Nor may it copy any part of the same work within 14 days. Of particular relevance to educational establishments are the rulings that:
 - They cannot charge for such copies even by indirect means such as charging a fee for a course pack containing such material; or as part of a student's overall course fee.
 - In calculating how much of a work may be copied, each individual work in a compilation is to be treated as a separate work.
 - If more than the permitted part of a work is copied (e.g. more than three pages), the *whole* copy is an infringing copy, not just to the extent that it exceeds the permitted length (although, the judge notes, this may turn on the particular facts).
 - By successive copying of three pages at a time each 14 days it would be permissible for an educational establishment to copy an entire work (provided the other requirements of the section are met).
- Fifthly, *librarians of prescribed libraries* (see s50(1) for the definition of “prescribed libraries”) are entitled to provide *one* copy of a reasonable proportion of a work to any person for private study. Where the work is an article in a periodical, no more than one article in the periodical can be supplied on any occasion, unless the copies supplied all relate to the same subject-matter (ss 51 and 52). Interestingly, it was held that a librarian need no longer be satisfied when making and supplying such material that it will be used for the permitted purpose – the obligation is on the person supplied to use it only for such purposes.

Process

The more controversial aspect of the judgment concerns how such permitted copying must be done. In a number of respects it is likely to require changes to the way in which copying is undertaken if the law is to be complied with.

Copying must be done by the person who requires it for the permitted purpose (e.g. by the person who intends to criticise or review the work), or in response to a *specific request* from that person. In other words, it is not permissible for (say) a lecturer or librarian to copy a work in advance and then distribute it to students to critique, or when the students request a copy (even if, because of course requirements, such requests are inevitable). The students will either have to make their own copies, or specifically request each copy that they need *before* the copy can be made.

If adhered to, this requirement obviously creates significant (and annoying) inefficiencies; not least in preventing an educational establishment from preparing course materials for distribution at the commencement of a course. In practical terms, it will require a system to be put in place for the students to make the necessary specific requests in advance of the need to provide them with copies.

There is, however, further inefficiency to come. It is not permissible for the educational establishment or library to make a master copy from which to run off individual copies when they are requested by students. So, on each occasion, copies must be made from the original

work. Anyone who has stood by a photocopier turning the pages of a book and lining them up on the glass for each copy page will understand the practical implications of that requirement.

The decision is being appealed by the universities. If these practical difficulties remain following that appeal, it will be interesting to see how they are addressed in practice; and whether it will result in lobbying for amendments to the Copyright Act to facilitate copying for educational purposes.

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