QUESTIONS AND ANSWERS

ON

COPYRIGHT

FOR

LIBRARIANS

Third edition

Tony Millett

tony.millett@xtra.co.nz

July 2013

COPYRIGHT STATEMENT

ATTRIBUTION-NONCOMMERCIAL-NO DERIVATIVE WORKS (BY-NC-ND)

You are free:

- **to Share** — to copy, distribute and transmit the work

Under the following conditions:

- **Attribution** — You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work).
- **Noncommercial** — You may not use this work for commercial purposes.
- **No Derivative Works** — You may not alter, transform, or build upon this work.

With the understanding that:

- **Waiver** — Any of the above conditions can be waived if you get permission from the copyright holder.
- **Public Domain** — Where the work or any of its elements is in the public domain under applicable law, that status is in no way affected by the license.
- **Other Rights** — In no way are any of the following rights affected by the license:
    - Your fair dealing or fair use rights, or other applicable copyright exceptions and limitations;
    - The author's moral rights;
    - Rights other persons may have either in the work itself or in how the work is used, such as publicity or privacy rights.

For any reuse or distribution, you must make clear to others the license terms of this work.

DISCLAIMER

These answers represent my own personal opinions, in response to questions asked of me by New Zealand librarians. Where appropriate you should seek advice from your legal adviser.

RELATED PUBLICATIONS

The Copyright Act 1994 and Amendments: Guidelines for Librarians (2011)

Linked from: http://www.lianza.org.nz/resources/copyright

Implications for Interloan of the Copyright Act 1994 and Amendments (2010)

Linked from: http://www.lianza.org.nz/resources/copyright

Sample Library Copyright Policy (2011)

Linked from: http://www.lianza.org.nz/resources/copyright

Copyright Guidelines for Academic Staff and Students (2009)

Linked from: http://www.lianza.org.nz/resources/copyright

Questions and Answers on Copyright for Academic Staff and Students (2009)

Linked from: http://www.waikato.ac.nz/copyright/

Copyright Guidelines for Research Students (2012)

Linked from: http://www.lianza.org.nz/resources/copyright

QUESTIONS AND ANSWERS

1. **For some laboratory processes in my institution there is a reading list which staff must show they have read before undertaking a process. Can copies of these articles be obtained (either from the library's own collections or on Interloan) and be stored in a central place, say in a pamphlet box on library shelves or in a vertical file?**

   In interpreting the Copyright Act, it is usually useful to work through each relevant section of the Act, to see whether any section applies to what you want to do. So, in this case, can the copying be undertaken under:

   ***s.42, Copying for criticism, review, and news reporting**? No, this section is not relevant.*

   ***s.43, Copying for research or private study**? No, because this section applies to copying by an individual for that individual's own research or private study, not to copying for other individuals or for the library or its collections.*

   ***s.44, Copying for educational purposes**? No, because s.44(3) applies to copying by or on behalf of an educational establishment, and s.44(3)(f)(ii) restricts copying to no more than the greater of 3 percent or 3 pages of the work. (It is true that licence agreements which educational institutions have with Copyright Licensing New Zealand (CLNZ) extend this limit to the whole of a periodical article, but the CLNZ licence relates to multiple copying for student course-packs, not to copying for library collections).*

   ***s.52, Copying by librarians of articles in periodicals**? No, because this section applies to copying for a specific library user, not for the library's collections or for other users.*

   ***s.53, Copying by librarians for users of other libraries**? No, because sub-section (2) states that copying under this section must be for a person who has requested that the copy be supplied for the purposes of that person's research or private study. This section applies to copying for the users of other libraries, not for the collections of other libraries.*

   ***s.54, Copying by librarians for collections of other libraries**? No, because most unfortunately this section applies only to copying from books, not from periodical articles.*

   ***s.55, Copying by librarians or archivists to replace copies of works**? No, because sub-section (1)(b) states that the purpose of copying under this section must be to replace in the collection of another library "an item that has been lost, destroyed, or damaged", so this section does not apply.*

   ***s.56, Copying by librarians or archivists of certain unpublished works**? No, this section is not relevant.*

   The answer to this question, therefore, must be no. You could approach CLNZ to see if they would offer your library a licence to allow you to do what you are asking.

2. **Can digital copies of periodical articles obtained from other libraries or from overseas document supply companies be placed on a server for use by researchers of a long-term research project, the personnel of which will change over the years?**

   Provided that the digital copies have been obtained lawfully, they may be communicated to authenticated users under the provisions of s.56A (Library or archive may communicate digital copy to authenticated users). However, the difficulty will be with the words "obtained lawfully", since ss.52, 53, 54 and 55 do not apply, for the reasons given in the answer to Question 1. And digital copies of periodical articles supplied by overseas document supply companies are for the research or private study of the requester, not for the library's collections. If your library subscribes to digital copies of the journals in which the articles are published, you could provide hypertext links to the relevant articles.

3. **Does New Zealand copyright law apply to all authors, regardless of their nationality and regardless of the place of publication of the work?**

   Yes. New Zealand copyright law applies to almost all nationalities and countries – those Convention countries (defined in s.2(1)) that are signatory to any of the copyright conventions that New Zealand is signatory to: the Berne Convention, the Universal Copyright Convention and the TRIPPS Agreement. As a rule of thumb, librarians can assume that virtually all publications have been published in or by a citizen of a Convention country. Countries that are not signatory to any of these three copyright conventions include Afghanistan, Iran, Iraq, Nauru, Tuvalu and Yemen, among others.

4. **Are New Zealanders required to comply with overseas copyright law?**

   No. New Zealand citizens in New Zealand are required to comply with New Zealand copyright law.

5. **Is the position different if you are publishing overseas?**

   Yes. Your overseas publisher is likely to require you to comply with the copyright law of the country of publication.

6. **Is a music score a "musical work"?**

   No. Music scores are "literary works", and the same rules apply as for books.

7. **Do New Zealand libraries need to comply with the code of practice of overseas associations such as the British Music Publishers' Association (for example, regarding the copying of musical publications)?**

   No, not unless your library has a licence agreement with the association.

8. Does a student writing a thesis have to obtain permission from the copyright owner for every quotation used in the thesis, even if the quotation is only a few words?

No. A short quotation from another work is well within the fair dealing provisions of s.43 (Copying for research or private study). Acknowledgment of the source should of course always be made – but this is a matter of academic practice, not copyright law (although "sufficient acknowledgement", defined in s.2(1), is required under s.42, copying for criticism, review, and news reporting).

9. How do I register copyright in my work?

You do not (and can not) register copyright in New Zealand: copyright automatically exists as soon as a work is published, i.e. "issued to the public" (s.10). This is not so in some other countries (such as the U.S.) where copyright in a work is normally registered. Some people print a ©, the name of the copyright owner, and the year of publication on the verso of the title-page to indicate that there is copyright in the work, but this is not required to assert copyright ownership under New Zealand law, and their absence does not mean that the work does not have copyright protection.

10. Who owns copyright in a directory that has been compiled mainly by one person but which has been contributed to by various librarians over the years?

The author of the work. There can be multiple authors each owning copyright, but whether this would apply to the contributing librarians in this case would depend on the extent of their contribution, and whether there was an agreement between them and the main author. The fact that someone else published the work does not affect copyright in the work, unless the author has passed copyright ownership over to the publisher. Nor does the fact that the publisher has inserted a © prove that the publisher owns the copyright – it just indicates that copyright in the work is claimed.

11. Does the copyright position change if the directory is substantially enhanced and published in an electronic version?

If the changes are sufficient to mean that the electronic version forms a substantially new work, not just a copy of the old work (for example, that its coverage has been significantly extended and brought up-to-date) then copyright in the new work will be owned by the author or creator of that new work. A court might need to rule, if there is a dispute. The new work should, of course, include acknowledgement of the earlier work on which it is based.

12. What is the copyright position regarding the loan to other schools of books that are photocopy masters? Most of these state that they must not be given or sold to, or photocopied by, other schools or teachers.

You are constrained by this licence agreement. You may loan the books, but must make it very clear to the borrowers that the books must not be photocopied. To cover the library,

you may wish to require the borrower to sign a simple statement that no copies will be made.

13. My institution has a collection of slides of art works, which is used for teaching purposes. I have just learnt that this collection has now been digitised. What are the copyright implications?

First, are the original slides lawful copies? Copyright in artistic work lasts for 50 years. If the original slides were made unlawfully, then making a copy from them by any means, including by digitisation, is "subsequent dealing" which is not permitted. Second, and assuming that the slides were made lawfully, who owns the copyright in the slides? If your institution employed or commissioned someone to make the slides, then your institution is likely to own the copyright, but this does need to be determined. If your institution <u>does</u> own the copyright, then it can give permission for the work to be digitised. If, however, your institution does <u>not</u> own the copyright, there are no exceptions in the Copyright Act allowing for the slide collection to be digitised without first getting permission from the copyright owner(s).

14. Can a spoken-word recording be copied as back-up to the original in case of damage? If so, should the original or the copy be loaned out?

The Copyright Act (s.80) allows a back-up copy to be made for preservation purposes of a computer program, but not of other media. However, s.55(1-2) of the Act permits the librarian of a prescribed library to make a copy (other than a digital copy) of any item in its collection "for the purposes of preserving or replacing that item in the collection of the library or archive in addition to or in place of the item", provided that "it is not reasonably practicable to purchase a copy of the item in question to fulfil the purpose". And s.55(3) permits the librarian of a prescribed library to make a digital copy of any item in its collection if "the original item is at risk of loss, damage, or destruction", again provided that "it is not reasonably practicable to purchase a copy of the original item". Note that s.55 does not apply if the original work can be purchased.

In the case of a digital copy, the digital copy must replace the original work, and only the digital copy may be accessed or loaned. In the case of any other copy, both the original and/or the copy may be accessed or loaned.

15. How does copyright apply to newspapers? Are there any restrictions on copying either print or digitally-scanned newspapers?

There is copyright in newspapers in the same way as in any other literary works. A newspaper is either a "periodical", thereby falling under the provisions of s.52, or a "published work", falling under s.51. Librarians of prescribed libraries may copy the whole of an article (under s.52) or a "reasonable proportion" of a book (under s.51) for any person, provided that the provisions of those sections are complied with. An entire issue of a newspaper may not be copied without permission from the copyright owner, unless that issue of the newspaper is more than 50 years old and is therefore out of

copyright, or unless you have a licence to copy, e.g. from PMCA, or unless the copying is being undertaken under section 55 (see also the answer to Question 14).

16. Are librarians copying for their users required to find out what the copy is to be used for – e.g. for the users' research or private study?

No. This was a requirement of the 1962 Copyright Act but is not required by the 1994 Act. However, if you know that a copy is to be used for a purpose not permitted by the Act (for example, because the user volunteered this information to you), then as a responsible citizen you should not supply the copy – otherwise it might be held that you were aiding and abetting a breach of copyright.

17. If a work (such as a car manual, standard, consumer magazine) has a specific copyright statement in it, does this mean that neither the reader nor the librarian may make a copy from the work?

No. New Zealand citizens may make copies, provided that the copies are in accordance with the provisions of the Copyright Act 1994 (as amended). Readers must comply with ss.42 or 43, librarians with ss.50-56. The exception to this would be if the library has signed a specific licence agreement with the copyright owner (e.g. e-journal publisher, database provider or aggregator), in which case the terms of the licence agreement take precedence.

18. We are now being asked by the public to scan and email copies from a variety of publications (newspapers, journals, books, the Internet). Do copyright rules apply?

Absolutely. Copying includes digital copying. Note that the Copyright (New Technologies) Amendment Act 2008 imposes additional requirements when digital copies are made or supplied by librarians.

19. I have a photograph, taken in the 1930s, of the Southern Cross Airplane down on the West Coast. I do not know who the photographer was. I would like to try to sell copies of this photograph, but do want to get any copyright issues right.

Copyright in a photograph is owned either by the photographer, or by the person who commissioned and paid for the photograph to be taken. This copyright lasts for 50 years after the death of the copyright owner, so copyright in the photograph you have could still exist. However, if the photographer is unknown, then copyright expires at the end of 50 years after the photograph was first made available to the public, in which case copyright in your photograph will have expired.

You should also be aware that s.105 of the Copyright Act 1994 gives the person who commissions the taking of a photograph for private and domestic purposes, but who does not own the copyright in the photograph, the right to privacy, which includes the right not to have copies of the work issued to the public, not to have the work exhibited or shown in public, and not to have the work communicated to the public. And s.98 of the Act gives

the author of a work the right not to have his or her work treated in a way that is derogatory. Derogatory treatment is defined as treatment, whether by distortion or mutilation of the work or otherwise, that is "prejudicial to the honour or reputation" of the author.

20. In this context, what does "unknown authorship" mean? Unknown to whom? Do I need to make any attempt to find out who may have taken the photograph?

"Unknown" is not defined in the Act. It means unknown to the general public, including the person wanting to make the copy. A court would normally expect you to take "all reasonable steps" (also undefined) to locate the copyright owner. If you do not know who the photographer is, and cannot think of any way of finding out, then perhaps you should not make the copies unless you are quite sure that copyright in the photograph has expired.

21. The Library of our not-for-profit organisation wishes to expand its services to include early childhood centres, and we hope to make copies of journal articles for users on request. Can we offer such a service without registering as a prescribed library, as long as we exercise "fair dealing" with the journals as required by the Act?

In interpreting the Copyright Act 1994 (as amended), you need to be clear under which section of the Act the copying is being undertaken. The "fair dealing" provision comes from s.43, which covers copying by an individual for that individual's own research or private study. It does not cover copying by a librarian on behalf of a user. Copying by librarians is covered by ss.50-56, and all these sections apply to copying by the librarian of a prescribed library. If your library is not a prescribed library, it may not take advantage of those sections. Your library may become a prescribed library either by applying under s.234(b) of the Act, or by becoming a member of the Interloan Scheme.

22. If a commercial document supply company such as Infotrieve sends a digital copy of an article or other document to the library, is it okay for the library to forward it to the requesting borrower by email?

Yes. Forwarding a copy is not making a copy (transient copying does not infringe copyright), provided that the library does not retain a copy of the article supplied. The Infotrieve charge includes any copying and royalty charges payable to the copyright owner.

23. Under the Trans Tasman Interlending Scheme, are libraries in New Zealand permitted to supply copies (either print or digital) to Australian libraries?

Yes. In August 2010, on the recommendation of the Te Puna Strategic Advisory Committee, the LIANZA Council agreed that overseas libraries should be deemed members of the Interloan scheme, without requiring payment of an annual Interloan fee, to enable New Zealand libraries to provide copies in fulfilment of international Interloan

requests. As a consequence, overseas libraries are now prescribed libraries under the terms of section 50 (as amended).

This means that prescribed New Zealand libraries may now make copies (including digital copies) for supply to overseas libraries in accordance with the terms of sections 53, 54 and 55 of the Copyright Act 1994 (as amended).

24. If as an artist I sell a painting to someone else, who owns the copyright?

You do. Selling a work does not transfer copyright ownership of the work, unless copyright ownership is explicitly sold along with the work.

25. Is it two articles only, or more than two articles, that libraries are permitted to supply on Interloan if the articles are from the same issue of a periodical and all relate to the same subject-matter?

Two articles only, as specified in s.53 (Copying by librarians for users of other libraries). It is s.52 (Copying by librarians of articles in periodicals for their own users) that permits the copying of more than one article, if these relate to the same subject-matter.

26. What does "on the same subject-matter" actually mean?

I interpret this phrase liberally and literally, as meaning "on the same subject". Thus, all articles in a subject-specific journal such as Journal of Family Violence *or* Child Cancer *are likely to be on the same subject (family violence or child cancer). However, the articles in a general journal such as the* New Zealand Listener*, or general science journals such as* Scientific American, Nature *or* Science*, will not be.*

The CLNZ licence agreement (Schedule 2 para 1.1) states: "The term 'the same subject matter' will be interpreted on a case-by-case basis. For the avoidance of doubt, it is not intended to allow copying of multiple articles from the same issue of a periodical publication unless the content of each of the articles copied is closely related and focusing on a particular aspect of a subject".

27. One of our library users has made use of our resources for many years. He is a scientific editor who is undertaking work for international pharmaceutical companies. He has complained to our Dean, and to his MP, that we will not provide him with pdfs from some of our electronic resources. What is the copyright position?

Use of your electronic information databases is subject not to the Copyright Act, but to the licence agreements you have with the database providers, aggregators or e-journal publishers. The first principle that must be applied in the electronic environment is not, what use is to be made of the licensed materials, but rather, is the person an "authorised user" as defined in the licence agreement? Most licence agreements limit use to current members of the staff of the licensee and individuals who are currently studying at the

licensee's institution, or to registered users of the library. And most agreements exclude commercial use. A number of licence agreements do permit access by walk-in users, but again, exclude commercial use, limiting access for "the purposes of research, teaching and private study". In the situation you describe, your decision not to provide copies from the databases to which your library subscribes would appear to be the correct one.

28. We have been asked by an external user to scan an item from our collection and email it to her. Is this permissible?

Yes, under the terms of either s.51 (which allows a "reasonable proportion" of a book to be copied) or s.52 (which permits the whole of a periodical article to be copied), as applicable. Copying includes making a digital copy – but note the additional requirements of s.56B: you must give to the user a written notice that sets out the terms of use of the digital copy, and you must "destroy any additional copy made in the process of making the copy that is supplied" as soon as is reasonably practicable.

29. Our library is finding increasing numbers of CD-ROMs and DVDs being acquired with book purchases, with a confusing mish-mash of notices and warnings, ranging from "shrink-wrap" licences through to blendings of copyright and rights warnings on the versos of title-pages. What is the legal status of these?

New Zealand citizens are subject to New Zealand copyright law, not to the laws of overseas jurisdictions. And in my view "shrink-wrap" licences, which have not been read, let alone agreed to, prior to purchase, have no legal validity (or should have no legal validity) whatsoever. The same applies to other notices and warnings. I believe that they can safely be ignored. Of course, if the vendor of a work asks for a licence agreement to be signed prior to purchase by the library, the terms of this licence must be adhered to.

30. Can the holding library make a copy of a university thesis on request?

It really depends whether a thesis falls within the definition of "unpublished work" in s.56 (Copying by librarians or archivists of certain unpublished works). Section 10(1)(a) states that "publication" means "the issue of copies of the work to the public". Section 9(1) states that "issue to the public" means "the act of putting into circulation copies not previously put into circulation" – which presumably would include theses, even if the "circulation" is limited to the library, examiner, supervisor, the student's parents, etc. It is true that s.10(3) excludes from the definition of publication "publication that is not intended to satisfy the reasonable requirements of the public" – but it could be held that the ten or so copies of a thesis that a student prints are indeed more than sufficient "to satisfy the reasonable requirements of the public". My view is that s.56 is intended to cover unpublished works such as letters, journals and archival papers, rather than theses. I consider, therefore, that permission does need to be sought from the author of the thesis.

Note that s.10(1)(b), in the definition of "publication", includes making a work available to the public by means of an electronic retrieval system. This includes making a digital

copy of a thesis available via an institutional research repository, the Australasian Digital Theses Program, a library catalogue, or other means.

31. A number of libraries have received a letter from the Recording Industry Association of New Zealand which states that, if the libraries are renting CDs and DVDs to the public and making a profit from doing so, "we require you to immediately cease and desist from doing so".

It is correct that s.79 states that rental of a sound recording, film or computer program is permitted by an educational establishment or prescribed library, only if the rental of the work is not "for the purposes of making a profit". Note that the use of the word "purposes" implies intent: the intent of the library must be not to make a profit. In most if not all libraries, the purpose of making a charge for the rental of CDs, DVDs etc is to make a contribution towards recovery of a very small proportion of library costs, and certainly not to make a profit.

There is nothing in the Copyright Act requiring libraries to prove to anyone that they are not making a profit from rentals. Presumably, the purpose of the letter is to draw libraries' attention to the existence of s.79.

32. I run a toy library, which hires out toys to our members who pay an annual membership fee. Can my library also hire out DVDs and CD-ROMs?

Section 79 of the Copyright Act restricts the rental of sound recordings, films or computer programs to prescribed libraries (defined in s.50) or educational establishments (defined in s.2(1)). Unless your toy library falls within these definitions, you may not rent out DVDs or CD-ROMs without the prior permission of the copyright owner.

33. My library is about to cease to be a member of the Interloan Scheme and will therefore become a non-prescribed library. (a) Will licence agreements with CLNZ or PMCA still apply? (b) Will I be able to copy articles for the library's current awareness service? (c) Will users be able to make copies under the fair dealing provisions of the Copyright Act?

(a) Yes. Licence agreements with RROs take precedence over the Copyright Act; and in any case, these licences are not affected by your library's status as prescribed or non-prescribed.

(b) No. Copies may be made for library users, or for current awareness services, under ss.51-56 of the Act only by librarians of prescribed libraries.

(c) Yes. The provisions of s.43, copying for research or private study, apply whether or not your library is prescribed, because this section relates to copying by users for their own research or private study, not to copying by librarians for their users.

34. Publications often have printed inside them a statement such as "No part of this work may be reproduced or copied in any form or by any means, electronic or mechanical, including photocopying, without the written permission of the publisher". Are libraries required to comply with such statements?

Not in my view. Unless your library has signed a licence agreement with the publishers of the work, in which you agree not to make copies or partial copies, then the provisions of the Copyright Act 1994 (as amended) apply – I cannot see that a statement printed in a work can override the rights given to librarians under New Zealand statutory law. You will, of course, need to be clear under which section of the Act you are making the copies, and ensure that you comply with the requirements of that section.

35. Where a library user requests a standard on Interloan, can the library add the standard to its collections and then loan it to the requester?

Not under s.53 (Copying by librarians for users of other libraries), since this section allows supply only for the purposes of the research or private study of the requester. However, a copy of the standard could be obtained and added to the library's collections under s.54 (Copying by librarians for collections of other libraries) – but only if the requesting library has been unable to purchase a copy of the standard "at an ordinary commercial price within the 6 months preceding the supply". In the case of standards, presumably the library could purchase a copy "at an ordinary commercial price" (i.e. not an inflated second-hand price). Note the requirements for record-keeping set out in s.54.

36. Does s.55 (Copying for preservation or replacement) mean that my (prescribed) library may make a copy of a video which cannot be purchased from any other source for preservation purposes? Is it the original copy, or the preservation copy, that should be loaned out?

Yes, s.55 does mean this. The purpose of the copying must not, of course, be to have a second copy – because if it were, the purpose of the copying would not be to "preserve or replace" the original copy, but rather to have a second copy, and copying for this latter purpose is not permitted under s.55.

Note that it must not be "reasonably practicable to purchase a copy of the item in question to fulfil the purpose". If the video is available for purchase, s.55 does not apply and if a back-up copy is required, a second copy of the video must be purchased.

It is probably preferable for the original copy to be kept as the master, and for the preservation copy to be loaned, so that, if another preservation copy has to be made at a later date, the copy can be made from the original master copy.

It is unfortunate that s.80 of the Act allows a back-up copy to be made only of a computer program, and not of an audio-tape, video, or other easily mangled works.

37. We get children coming into the library for school projects and cleaning us out of books on a subject. Is it permissible (a) to make several photocopies of pages from a book, to give to other children when they come in? (b) to download pages from the Internet, and keep these to photocopy for customers when they request information? (c) to print off several copies of pages from the Internet, just in case they will be useful for requesters?

(a) No. In the February 1992 Judgment of Salmon J. the Judge ruled that librarians under ss.51-52 may copy for their clients only in response to a specific request – they may not copy just in case someone else may subsequently ask for the same thing. And ss.51-52 restrict the copying to one copy only on the same occasion.

(b) You cannot assume, just because something is on the Internet, that there is no copyright in it and that it may be copied freely. You should probably assume that there <u>is</u> copyright in anything on the Internet, unless the copyright owner has clearly waived copyright (or has been dead for over 50 years!). If copyright has not been waived, you may make a copy of a "reasonable proportion" under the terms of s.51, but only where you have received a specific request to provide the copy by your user, and you may not make copies just in case other users may subsequently request copies. However, if copyright has been waived, then you may make as many copies as you like for whatever purposes you like.

(c) Same answer. Note that it is always open to you to request permission to copy from the copyright owner.

38. I have been asked by fellow public librarians how much of a book may be copied for library users. Is it 10 per cent?

Section 51 (Copying by librarians of parts of published works) permits "a reasonable proportion" of a work to be copied. Guidance as to what is "a reasonable proportion" may perhaps be obtained from s.43 (fair dealing) and s.44 (3% / 3 pages / 50%). The 1990 Carrington Judgment made clear that there is no "ten per cent rule". In effect, each instance must be considered individually.

39. Is ten percent a good rule of thumb for copying for research or private study?

No. The only guidance is how a court shall interpret fair dealing, as set out in s.43. In essence, it is the significance of what is copied that it the most important factor, not the simple amount of the copying.

40. The children's team in my library has asked if it is legal to show a DVD to children as part of their holiday programme activities, or would they need to apply for a licence?

Under the Copyright Act s.16(1)(d) and (e), playing or showing a work in public is a restricted act. Unfortunately, none of the exceptions in the Act (e.g. sections 47, 57, 81,

87, 87A) apply to what you want to do. Your library would therefore need to get prior permission from the copyright owner.

41. The Parliamentary Library has requested copies of three articles from the same issue of a periodical to be supplied (which is not permitted under s.53), claiming that the needs of Parliament override copyright. Is this correct?

*Section 59 of the Copyright Act states that copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings, or for the purposes of reporting parliamentary or judicial proceedings. "Parliamentary proceedings" is not defined, but (by analogy with "judicial proceedings", which is defined) presumably refers to proceedings before Parliament, so any copying done under this section would have to be used in Parliament (for example, to prove a point being made in debate or to answer a Parliamentary Question). Section 59 would be unlikely to apply to select committee work, or just because an MP wanted to read something. It would be sensible for libraries supplying copies under this section to annotate the copies "Supplied f*or *the purposes of parliamentary proceedings under s.59 of the Copyright Act 1994".*

42. Are we able to copy as a back-up CDs that come with ESOL and computer books? My understanding is that we were able to do this in the past.

Section 80 of the Copyright Act 1994 permits the making of a back-up copy of a computer program "in order to preserve the original copy for use if the copy is lost, destroyed, or rendered unusable". There is not and has not ever been provision for making back-up copies of other easily-mangled materials such as audio-tapes or video-tapes, or of CDs, DVDs etc.

Section 55 of the Act does allow the librarian of a prescribed library to make a copy of any item in its collection for the purpose of "preserving or replacing that item by placing the copy in the collection of the library in addition to or in place of the item". But note that this section applies "only where it is not reasonably practicable to purchase a copy of the item in question to fulfil the purpose". So, if you can no longer purchase a second copy of the CD, you may make a back-up copy under s.55. But if you can still purchase a copy, you should do this – and then place one copy aside in a safe place so that it can be brought out if the first copy is "lost, destroyed, or rendered unusable".

43. Is showing clips of a YouTube video to a class a breach of copyright?

The YouTube Terms of Use just prohibit commercial use. Educational institutions are not "conducted for profit", and use for educational purposes is not commercial use.

Section 32(2) of the Copyright Act states that "the playing or showing of a work in public is a restricted act". However, s.47(2) (as modified by the Copyright (New Technologies) Amendment Act 2008) states that the playing or showing, for the purposes of instruction, of a sound recording, film, or communication work to an audience consisting of persons who are students or staff members at an educational establishment or are directly connected with the activities of the establishment "is not a playing or showing of the work

in public for the purposes of section 32(2)". YouTube falls into the definition of communication work and its related term "communicate" ("to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system").

Therefore, films and videos may be shown to classes in educational establishments without breaching copyright in those films and videos, as may clips from YouTube. It should be noted, however, that if there is a statement or licence attached to the video or film-clip prohibiting or restricting its use, then that takes precedence over the provisions of the Copyright Act.

44. The LIANZA *Copyright Guidelines* state that copies of articles received on Interloan may be copied and included in print course-packs. But the CLL licence agreement allows multiple copies to be made only from print originals. What is the source of the LIANZA statement?

The source is CLL (now CLNZ)'s Copyright Licensing Bulletin *for February 1999; and CLNZ's Frequently Asked Questions – Licensees (see http://www.copyright.co.nz/FAQs/1187/) No. 8 which states that under the CLNZ licence copies may be made from Interloan copies where it is not possible to obtain the material from any other source.*

45. Our Acquisitions Department, when trying to obtain a publication for the library's collections, is often referred to the publisher's website from where a copy may be downloaded and printed. This is particularly so for reports and other publications of New Zealand Government Departments. Only very occasionally is a charge made for this. We would like to place these downloads on a server, rather than (or as well as) making a print copy – linking to the publisher's server is not satisfactory because the links are often not stable, and the reports can vanish overnight. Is providing electronic access to documents via our library website breaking copyright?

You must assume that there is copyright in anything on the Internet, including reports and other documents, unless it is specifically stated that copyright is waived, or that the work is in the public domain, or that the work is made available via an open content licence such as a Creative Commons licence which permits free downloading and copying. You therefore need the copyright owner's permission to make a print or digital copy, or to communicate the work – i.e. to make the work available electronically on a computer network, intranet or server.

It is true that s.56A permits the librarian of a prescribed library to communicate a digital copy to authenticated users without seeking further permission, provided that the library complies with the provisions of s.56A. However, this section applies only if the library already holds a lawfully-obtained digital copy.

Unless this is so, it is necessary for the library to seek permission from the copyright owner. Permission can, of course, be sought in the one request – i.e. you can ask the copyright owner if you may make a print and/or digital copy, and also make the work available to authenticated library users on a secure server.

46. Can research outputs be stored in a "dark archive" of an institutional repository, to which there is no access by the public?

If the research outputs are in print format, then they may not be digitised (which is a form of copying) without the permission of the copyright owner. It makes no difference whether or not the digitised copies are placed in an archive to which there is no public access – it is the copying that is not permitted.

If, however, the research outputs are already in digital format, and the library has obtained the digital copies lawfully, then under s.56A the library may communicate (i.e. make available on a computer network or secure server) the digital copies to authenticated users, provided that the provisions of s.56A are complied with. However, a library may not digitise a work without permission and communicate that digital copy under s.56A, because the digital copy will not have been obtained lawfully.

Copyright in most journal articles is owned by the journal publishers, and many of these permit authors to archive their articles in institutional repositories. However, often this relates only to pre-prints, or versions other than final published versions. Many publisher websites give details of what they permit.

47. What is the duration of copyright in a work, the author of which is a corporate body such as the New Zealand Library Association or a university department?

The Copyright Act 1994 clearly accepts that corporate bodies may be authors – s.18, "Qualification by reference to author", states that a work qualifies for copyright if the author is, at the material time, a body incorporated under the law of New Zealand or of a prescribed foreign country; and s.21(2) states that where an employee makes a work in the course of his or her employment, that person's employer is the first owner of copyright in the work.

Unfortunately, s.22 (Duration of copyright in literary, dramatic, musical, or artistic works) is silent about the duration of copyright where the author is a corporate body. My own view is that in such cases copyright would expire 50 years from the end of the calendar year in which the work was made or made available to the public.

I do not consider that a work which has corporate authorship can be considered to be a work of unknown authorship. But even if it is, s.22(3) makes clear that copyright in such a work expires "at the end of the period of 50 years from the end of the calendar year in which it is first made available to the public by an authorised act".

48. What is the duration of copyright in periodical articles, the copyright in which has been transferred from the author to the journal publisher?

The same as for books – 50 years from the end of the calendar year in which the author died. Copyright duration is not affected by change of copyright ownership.

49. The LIANZA *Copyright Guidelines* state that libraries should have a compliance programme in place, to ensure that breaches of copyright are not taking place on library-supplied self-service photocopiers. What should such a compliance programme include?

Several years ago an Australian academic library was prosecuted because users of the library's self-service photocopiers were found to be breaching copyright. It was held that having warning notices above each copier was not sufficient: as the library was providing the photocopiers on library premises, it had an obligation to ensure that its users did not breach copyright. Hence the statement about the need for compliance programmes in the LIANZA Copyright Guidelines.
A compliance programme would include warning notices above all self-service photocopiers and scanners, outlining what the Copyright Act allows; and regular and frequent checks by a staff member, during all the hours that the Library is open, on what users of the copiers are doing, with intervention if any breaches of copyright are observed. A record would need to be kept of when the checks were undertaken and by whom, so that the Library could show, in the event of a prosecution, that it was taking all reasonable steps to ensure that breaches of copyright law did not occur.

Such a compliance programme is likely to be expensive, given the hours that libraries are open seven days a week. At some libraries, photocopier service staff (who clear paper jams, fill paper trays, etc) are asked to report any apparent breaches of copyright that they observe, but many libraries do not have separate copier service staff. One way to avoid the problem is not to have self-service copiers or scanners, but rather to employ staff to undertake all copying for users – but this, too, is expensive, and not very user-friendly. There would appear to be no easy solution. (See also the answer to Question 94, below).

50. In compiling a major regional bibliography for my library, I interloaned a large number of copies of periodical articles, in order to confirm bibliographic details, to assist indexing, and to allow checking of the articles' relevance to the scope of the bibliography. These copies would be of very considerable value to the library and to those using the bibliography, since the periodicals from which the articles have been copied are not held by the library. Is it permissible for these copies to be retained by the library and held in vertical files?

No, because the copies were supplied under s.53 (Copying by librarians for users of other libraries), for use by you for your research or private study, and not for the library's collections. Most unfortunately, s.54 (Copying by librarians for collections of other libraries) applies only to copying from books, not from periodical articles. (See also the answer to Question 1).

51. What is the position regarding copyright in works on the Internet?

There is copyright in most types of work on the Internet, and the fact that something is posted on the Internet does not automatically give anyone the right to copy, store or disseminate it, unless:

- *the author or copyright owner has waived copyright or specifically granted permission*
- *the work has been made available via an open content licence such as a Creative Commons licence which permits free downloading and copying*
- *the Copyright Act allows this*
- *the work is in the public domain (i.e. is out of copyright)*
- *the author has been dead for more than 50 years.*

It has been argued that placing material on the Internet without restrictions is an implied licence to view, download and/or print the material. It has also been argued that viewing, and subsequently downloading a work from the Internet breaches the copyright owner's exclusive right to reproduce or communicate the work, or to control how it is used. When in doubt, it is always wise to seek permission from the copyright owner.

It would be extremely helpful if all those who place documents, reports and other materials on the Internet, including Government departments and institutions, would clearly state what the copyright position is regarding these documents.

52. I am setting up a free library service specialising in lending audio-books to the elderly and the infirm, to the sight-impaired, and to other kinds of disadvantaged / especially-challenged readers of all ages, and I need to know what the law says about such lending. Specifically: (1) If a registered charity buys or is given original copies of audio-books, can it then lend those original copies to its members? (2) If so, can it also lend downloadable copies online? (3) If so, is it required to have a licence or special permission (from publishers) to do so? (4) Would the proposed library be required to purchase special (more expensive) "library" copies of the audio-books to be downloaded by or otherwise lent to its members? Or (5) would it simply be required to take every reasonable precaution to prevent copies being made and circulated, and if so, what might those reasonable precautions be?

(1) Since you are loaning original audio-books and are not making copies, and since you are offering a free service, I cannot see anything in the Copyright Act that prevents you loaning audio-books – provided that (a) no charge for the loan is made; (b) the publishers of the audio-books have not placed any restrictions on their free loan; (c) the audio-books being loaned are original works, not copies; (d) the audio-books have been obtained lawfully by you or by the people who donate them to you; and (e) no copies are made, either by you, or by borrowers, or by anyone else, except as is provided for in the Copyright Act 1994 (as amended).

(2) If you have downloaded a copy of an audio-book lawfully (i.e. with the permission of the copyright owner), and if the copyright owner has not placed any restrictions on the loan of the downloaded audio-book, then the downloaded copy may be loaned under these same conditions. It may also be loaned online – again, provided that the copyright owner has not expressly prohibited this.

(3) You will need a licence or special permission from the publishers / copyright owners only if what you are doing is beyond what the publishers have allowed by permitting downloading. If the publishers place no restrictions on what you do with the downloaded

copies, then you may make use of them as you wish. However, if the publishers state (for example) that copies may be downloaded only for the personal use of the person undertaking the downloading, then you must comply with that restriction, or negotiate a licence or permission with the publishers / copyright owners.

(4) You must comply with the restrictions specified by the publishers as copyright owners. If the publishers require you to purchase "special" copies for any use other than for personal use, then you must comply with this.

(5) As lender of the audio-books you have a responsibility to ensure that borrowers of the audio-books are made aware of relevant copyright law. This could be done by attaching a label to each audio-book, stating that "The Copyright Act 1994 prohibits the sale, letting for hire or copying of this copy".

53. I am helping a community service organisation to set up a library which includes a database of their articles, books and other resources. Is there a way for a community service organisation to gain permission to disseminate articles to its experts and clientele without breaching the Copyright Act? Can such an organisation purchase its own copyright licence?

As this library is a non-prescribed library, the provisions of the Copyright Act relating to copying and supply by prescribed libraries do not apply. You may certainly loan original issues of periodicals and original books to the users of the library, but you may not make or supply copies, either in print or digital format, from periodicals or books. You could approach Copyright Licensing New Zealand, to see if they offer a licence for this type of library – see their website at http://www.copyright.co.nz/.

54. If a non-teaching waiariki (allied) Māori staff member of a polytechnic wrote a book privately, with lots of her own family information about Māori hairstyles (including her grandmother's direct words), can she claim sole intellectual property rights, or does the institution have the right to claim it, or should it be shared? She did not use the institution's time, money or resources.

The author owns the copyright, as specified in s.21. Only if a person "makes, in the course of his or her employment" a work can the employer claim copyright ownership. If the author was not requested by the polytechnic to undertake this work as part of her employment, and did not use its time or resources, then she owns copyright as author.

55. Does a library need to obtain permission to download and print a report from a government department website?

Yes, unless the website already states somewhere that documents on it may be downloaded and printed. Once you have this permission, you may make a print copy for placing in your library's collections; you may also communicate the downloaded copy (that is, make it available via a computer network, the Internet, an intranet or a secure server) to your authenticated library users under s.56A, provided that the provisions of

that section are observed. Storing such documents on a library server allows ongoing access to them should they subsequently be removed from the publisher's website.

56. A friend wrote some songs, the words for which he gathered from published and unpublished mōteatea. A group of us gathered and sang the songs, so that they could be recorded onto disc, utilising the recording facilities at a Wānanga and a Māori radio station which were made available free of charge. Another person paid for the CD cover and cases, on which was printed a copyright symbol and the name of a Māori organisation. Who owns the copyright?

Your question illustrates how complex copyright in sound and video recordings can be. First, the author owns copyright in the songs. It is not relevant that some or all of the words were taken from other sources such as published and unpublished mōteatea. By weaving the words into songs, the author has created new works in which he owns the copyright – unless he has passed the copyright over to someone else.

Second, there is separate copyright in the performance of the songs, owned by the performers – unless they have passed the copyright over to someone else (such as a record company or the recording studios in which the recordings were made, for example).

Third, there is separate copyright in the cover of the CD.

Fourth, there is separate copyright in the final version of the CD. Note that printing a copyright symbol © on a work does not prove copyright ownership – it merely indicates that the named person or organisation is claiming copyright ownership.

Fifth, copyright in the final version of the CD relates only to the physical expression of that performance on that CD. It does not remove copyright in the original songs (owned by the author) or in the original performance of the songs (owned by the performers) – unless copyright ownership has been passed over to someone else.

57. A small group, in conjunction with a Māori radio station, are about to embark on a project which will involve talking to kaumātua and kuia about te reo, tikanga and other things. Some will be filmed, others only recorded. Consent forms will be given to those who are interviewed. Sound bites will be made from the finished product which will be available for access on our website. We are an incorporated body and have charitable status, so packaging for commercial enterprise is not the emphasis behind the project. What should our approach to copyright be in regard to this project?

Section 21(1) of the Copyright Act 1994 states that "the person who is the author of a work is the first owner of any copyright in the work". Section 5(1) states that "the author of a work is the person who creates it". Section 5(2) states that "the person who creates a work shall be taken to be ... (b) in the case of a sound recording or film, the person by whom the arrangements necessary for the making of the recording or film are undertaken". All this means that copyright in an oral history (whether recorded on film

or in a sound recording) rests with the person making the film or sound recording, not with the person(s) being recorded.

In this case, if the recordings are being made either under contract to the radio station, or by employees of the radio station in the course of their employment, then copyright is owned by the radio station. If the recordings are being made in association with the radio station but not under contract, then copyright is owned by the person or persons responsible for making the arrangements for the recordings – which in this case could be the small group only, or perhaps the small group and the radio station jointly. Either way, copyright ownership does not rest with the persons being recorded – although of course it is necessary to obtain their permission to make the recordings, and it is ethical practice to get their agreement in advance to ways in which the material is subsequently to be used.

The copyright owners may make whatever use they wish of the recordings, including making them available on a website.

58. Our library rents out music CDs and movie DVDs. Could the revenue gained from the rental of these materials be considered profit, in light of section 79 (Rental by educational establishments and libraries), which does not permit prescribed libraries to "effect the rental of the work for the purposes of making a profit"?

"For the purposes of making a profit" is not defined in the Copyright Act 1994. In my view, it is meant in the business sense and is certainly not the equivalent of "income".

The purpose of libraries in lending CDs and DVDs is the same as their purpose in lending books – to meet the needs of their clients for access to recorded knowledge, and to make recorded knowledge as widely available as possible. It is certainly not the purpose of libraries to make a profit, and nor do they do so: it is the purpose of video stores, not of libraries, to make a profit. The charge libraries make for the rental of CDs and DVDs is intended solely to recover a small proportion of the costs of providing the rental service, and in my view is not in breach of the provisions of section 79 of the Act.

59. Could, then, this requirement in section 79 be used to support a case to the Council's Finance Officer that the rental charge made for the loan of CDs and DVDs should be discontinued after (say) two years, when the purchase and processing costs of the materials have been recovered?

It could certainly be used in making such a case. However, the Finance Officer may well respond that the continuing rental charge is intended to recover some of the costs associated with the loan and housing of the CDs and DVDs, and the general expenses of the library.

60. My library has associated with it a self-professed "private collection" that is managed by a committee of volunteers. It receives a grant from my Council as the local authority and shares our library management system, but operates independently, with no reporting structure to myself as District Library Manager.

Because they utilise our LMS their holdings are added on Te Puna as if they were ours, and we provide an Interloan service on their behalf. We would like to bring this collection within our library (as we have done with two other similar community collections), but the committee seeks to retain independence at any cost. I am wondering if copyright issues may be another link to develop the argument for their inclusion in the district library service. In particular, is the continued provision of Interloan and cataloguing services for this library, which does not meet the criteria of a prescribed library, a possible breach of copyright?

Section 50(1) of the Copyright Act 1994 defines a prescribed library as "(d) A library maintained by an educational establishment, government department, or local authority". "Maintained" is not defined, and you would need to seek legal advice as to whether this community collection could be considered to be "maintained" by your local authority. Given that it receives a grant from your Council, that it utilises your library's LMS, that its holdings are listed in your catalogue, that its holdings are listed on Te Puna as if its holdings are part of your library's holdings, and that you utilise your Council-paid staff to provide cataloguing and Interloan services for it, it could perhaps be argued that it is, at least in part, "maintained" by your Council and is therefore prescribed. Central to this argument would be the attitude of your Council – that is, whether your Council claims that it "maintains" the community collection.

Whether or not it is prescribed, your library may certainly provide cataloguing services for them – since no copying is involved, the Copyright Act does not apply. Further, your library may, if you choose, borrow books or other original works (e.g. original issues of journals, not copies) on its behalf from other libraries – again, since no copying is involved, the Copyright Act does not apply.

However, if it is not prescribed, you may not request copies of periodical articles or copies of parts of books from other libraries for them, and prescribed libraries may not supply on Interloan copies of periodical articles or copies of parts of books to them.

In attempting to persuade this community collection to become a full branch of your library, you could draw their attention to the fact that, if it is not a prescribed library, you are unable to continue to obtain copies for them via Interloan. However, your success in this will no doubt partly be determined by the number of copies that are requested on Interloan by them.

You could also perhaps remind the Committee that, if the collection is not a prescribed library, copies from library materials may not be made either for its own users, or for the users of other libraries.

Perhaps more fruitfully, you could point out that, if it becomes a full branch of your library, there will be many benefits to its staff, including access to all the advantageous provisions of the Copyright Act available to prescribed libraries, and that its users will therefore benefit very considerably.

61. Why is there sometimes an embargo on viewing periodical articles online?

Copyright in a periodical article lasts for 50 years after the end of the calendar year in which the author died. Usually, when an author arranges with a commercial publisher to publish an article, the author signs a contract which passes copyright over to the publisher. The publisher may publish the article in print format; or may publish it in digital format. Digital publication may be by the publisher from the publisher's website; or may be through an aggregator such as ProQuest or Ebsco. Where the publisher allows an aggregator to publish the article, the publisher as owner of the copyright often places an embargo of between 3 months and 12 months (and sometimes for much longer), which prohibits the aggregator publishing the article through its service until the embargo has expired. This is so that the publisher can sell print copies of the periodical for a period, before sales of the print copies are undercut by publication of the digital version through the aggregator's service. These arrangements (including any embargoes) are a matter of contract or licence between the publisher as owner of the copyright and the aggregator; they are not a matter for copyright law.

62. Is a researcher permitted to put abstracts and full versions of his/her own articles on a website?

Section 71 of the Copyright Act 1994 states that it is not an infringement of copyright to copy an abstract, or issue copies of an abstract to the public, where the abstract indicates the content of an article that is published in a periodical, and where the article is on a scientific or technical subject. Unfortunately, this exception does not apply to an abstract of an article that is not on a scientific or technical subject – that is, it does not apply to an article in the humanities, education, law or social sciences.

A researcher may place PDFs of his/her articles on the web for others to access only if:

(a) copyright ownership in the articles has not been passed over to the publisher(s) of the articles; or if this has been done,

(b) only if the publisher allows this. Many scholarly publishers allow authors to place copies of their own articles on the web (for example, in institutional research repositories), but often with restrictions – for example, permission may be given only for pre-prints or for non-final versions of the articles. Most major periodical publishers give copyright information on their websites, which spells out what their authors may and may not do. Examples are Elsevier at http://www.elsevier.com/journal-authors/author-rights-and-responsibilities#rights, or Wiley-Blackwell at http://authorservices.wiley.com/bauthor/faqs_copyright.asp.

63. Where can I find a "stock" notice for putting above library public photocopiers?

A sample warning notice for putting above photocopiers and scanners that are provided for self-use by library clients is included as Appendix 1 of LIANZA's The Copyright Act 1994 and Amendments: Guidelines for Librarians *at http://www.lianza.org.nz/resources/copyright.*

64. Is it permitted to provide hypertext links from records in library catalogues or websites to pdf documents without permission from the document copyright owner?

There is no copyright in a URL, and I cannot see how copyright could be breached by including a URL in bibliographic records in your catalogue or on your website – you are not making a copy of any document by so doing, and if you or a user displays the document on the screen, that is a transient copy which is permitted under section 43A of the Copyright Act.

There is copyright in documents on the web – unless:

(a) the copyright owner has waived copyright, or specifically granted permission
(b) the copyright owner has made the work available via an open content licence such as a Creative Commons licence which permits free downloading and copying
(c) the Copyright Act allows copying
(d) the work is in the public domain
(e) the copyright owner has been dead for more than 50 years (!).

Assuming that there is copyright in some or all of the documents to which you are providing a link from your catalogue or website, I suppose it is theoretically possible that you could be held liable because you are providing a link to an in-copyright work, knowing that users of your website will very likely download and/or print the document to which the link has been made, and that you could therefore be seen to be aiding a possible breach of copyright. However, I really think that this is <u>extremely</u> unlikely, because any possible breach of copyright is being done by the user of your website, not by you; and in any case, the user could presumably have found the document for him/herself by doing a Google search, so what you are really doing is organising information so that it is easier for your users to find relevant information – which after all is what librarians and information managers do.

I suggest that, before making the link, you check the website to see if there is any copyright statement prohibiting downloading and/or copying. If there is, you should seek permission from the copyright owner, and if permission is refused or you do not get a response, not make the link (but you can still provide the bibliographic details of the document, as there is no copyright in a bibliographic citation).

The only difference in making the link directly to the pdf document, rather than to the relevant page of the website, is that by so doing you may prevent the user from seeing any copyright statement that appears on the website but is not displayed within the pdf document. So if there is a copyright statement, you may consider it is better to link to the relevant website page, rather than to the document itself. Or perhaps you could print the copyright notice against the document description within your website.

65. Can a contract override any of the laws regarding copyright ownership? For example, can someone claim all copyrights and moral rights to a work of art if it is simply written up in a contract and signed by the artist?

My understanding is that, under contract law, the signatories to a licence agreement can choose to opt out of the provisions of other relevant acts. This means that the terms of a licence agreement take precedence over the relevant sections of the Copyright Act.

66. My library purchases from an overseas supplier DVDs that are in a "public performance rights" version, rather than a "home use" version, and we pay very much more for this version. Does this mean that the groups / institutions which borrow our DVDs have these performance rights for the period of the loan?

My reading of the "Public Performance Rights" licence that you sent me is that it permits your library not only to loan the DVDs to your users for use at home (which does not require a "Public Performance Rights" licence), but also to show the DVDs in your library to your users (which does appear to require a "Public Performance Rights" licence).

However, your question asks, does the "Public Performance Rights" licence also apply to users who borrow the DVDs from your library, to enable them to use the DVDs outside the home? I should think that it does, because the licence states that a public performance is "<u>any</u> performance..." . However, if you are concerned about this, you could always contact the supplier to seek confirmation that this is so.

67. Other DVDs we obtain from an overseas supplier come with a licence that states they are "for home, library or educational use only". What does this mean?

This licence allows your users to borrow the DVDs from your library for use in their home, or for educational use, by which I presume is meant, for use in an educational establishment such as a school, polytechnic or university, or for use by a church, society, association or other group for use for educational purposes. It does <u>not</u> include showing the films to a group for "public performance" purposes such as for entertainment purposes, for commercial purposes, for fund-raising, or similar purposes.

68. Can library users play commercial DVDs on hardware (video players or PCs) in the library? Is this in conflict with s.16(1)(c) or (d), Playing or showing a work in public?

Unless there is a statement attached to the DVD stating that it may be played only on the borrower's own equipment (which is <u>extremely</u> unlikely), I see no problem with a patron playing a DVD on a DVD player in the library, since no copying is involved.

In the same way, if no copy is being made, then there is no problem about an individual watching a DVD in the library on a library PC for that individual's private purposes (entertainment, educational purposes, or whatever).

Nor do I think there is any problem if a small group of the user's friends or acquaintances watch the DVD – I do not think this could possible fall within the definition of section 16(1)(c) or (d). I can't see any definition of "in public", but at least in part I should have thought that it is the intention that counts. If a library shows a DVD

in the library to a group such as children, then the intent is to show the work in public to the public (in this case, to children), and that would be playing or showing a work in public. But this, it seems to me, is not the same as an individual watching a DVD privately in the library for his or her own private purposes, and perhaps being joined by a couple of friends who watch it with him or her for their private purposes.

69. Do copyright rules applying to Interloan also apply to libraries within my own network of libraries? We have a combined District that incorporates 14 libraries under two District Councils.

If no copies are being made, then the Copyright Act does not apply and you may shuttle original works (books, periodicals, DVDs etc) between branches or other system libraries to your heart's content.

I should have thought that the branch libraries are part of your library system, and are not "other libraries" as referred to in sections 53 (Copying for users of other libraries) or section 54 (Copying for collections of other libraries) or part of section 55 (Copying to replace copies of works in the collection of another prescribed library). If so, then you are making copies under section 51 (Copying of parts of published works), section 52 (Copying of articles in periodicals), part of section 55 (Copying to replace copies of works in the collection of your own library), or section 56 (Copying of certain unpublished works). Copying under all of these sections is reasonably generous, and the wording of the sections relating to Interloan between prescribed libraries (sections 53 and 54 and part of section 55) is very similar to the wording of the other sections.

However, given that you say that some of the libraries are from a different district council, it might be that a court would consider them to be separate prescribed libraries. This may be more likely if they have separate holdings statements on Te Puna, or different library symbols.

But either way, I don't see that it matters: if you study what you are permitted to do under each of these sections, I don't think you will find much difference in what is permitted and what the requirements are, whether the copying is being done under sections 51-52 and part of 55, or sections 53-54 and part of 55. The same comment applies if you are supplying digital copies between the libraries in your system.

70. I am confused regarding the amount of copying that a prescribed library may copy for students. Is it 3% or 3 pages whichever is the lesser or 50%? And does this change for patrons (not students) standing at the photocopier copying chunks out of a recipe book, or making multiple copies of song lyrics? What should we be advising these patrons?

Your questions, alas, do show some confusion. You have to think under what section of the Copyright Act the copying is being undertaken, and then follow the requirements of that section.

If the copying is being done for an educational purpose, by or on behalf of an educational establishment (including by a librarian acting on behalf of an educational

establishment), then section 44(3-4) applies: multiple copies may be made, but only the greater of 3% or 3 pages (and if this means that the whole of the work would be copied, then only 50% of the work may be copied).

If the copying is being undertaken by a librarian for the prescribed library's own library user (whether a student or otherwise), then sections 51 and 52 apply: a "reasonable proportion" (not defined) of a book may be copied, or the whole of a periodical article, or more than one article from the same issue of a periodical if the articles all relate to the same subject-matter.

If the copying is being undertaken by a library user (whether a student or otherwise) on a photocopier or scanner, then section 43 applies: the copying must be for the user's own research or private study, only one copy may be made, and the copying must be "fair dealing" (section 43 lists what a court will take into account –- and therefore what the user must take into account – in determining whether the copying is "fair dealing").

Go to the LIANZA Copyright Guidelines *at* http://www.lianza.org.nz/resources/copyright, *download the pdf, and in Appendix 1 you will find a sample warning notice to put above library photocopiers and scanners, which attempts to spell out what users may copy on these. You may certainly copy this notice, and you may adapt it to your own particular circumstances if you wish (e.g. put the name of your library on it).*

71. My library is attached to a not-for-profit organisation which is funded by a number of territorial local authorities in the region. The library is not a member of the Interloan Scheme. Do we fit the definition of a prescribed library?

Section 50(1)(d) of the Copyright Act 1994 states that a prescribed library includes "A library maintained by an educational establishment, government department, or local authority". It seems to me that the significant words are "maintained by". I am not a lawyer, but I should have thought that the territorial authorities that contribute funding to your institution could not be said to "maintain" your institution or your library – they do not appoint your staff, or determine your opening hours, or set your priorities, etc etc.

If your library was either a charter or non-charter member of the Interloan Scheme, then you would be a prescribed library, but you say that this is not the case.

There is provision in the Act under section 50(1)(e) for the definition of prescribed library to include "A library of any other class of library prescribed by regulations made under this Act, not being a library conducted for profit". Note that even if the institution to which a library is attached is "conducted for profit", this does not mean that the library itself is "conducted for profit". There is further reference to the regulation in section 234(b).

So there would appear to be three options:

(1) seek legal advice to see if your library qualifies to be a prescribed library under section 50(1)(d);

(2) become a member of the Interloan Scheme; or

(3) apply for the definition of prescribed library to be extended to your library by regulation under section 50(1)(e). I don't know how this is done – you could consult the MED or a lawyer.

72. Although my library is a member of the New Zealand Interloan Scheme (a non-Charter member), we do not loan out items, and when we borrow through Interloan, we borrow though the Auckland Public Library business service. Does this invalidate our "prescribed library" status?

This is a question for TPSAC (the Te Puna Strategic Advisory Committee, which has replaced the JSCI as administrator of the New Zealand Interloan Scheme), since they determine whether a library is eligible to be a member of the Interloan Scheme. The Copyright Act (as amended) just states that libraries which are members of the Interloan Scheme are prescribed libraries.

73. Over several years we have built up an electronic (and also hardcopy) collection of Annual Reports and Independent Appraisal Reports. Both of these types of documents are publically available, but in the case of Independent Appraisal Reports they disappear quite quickly off websites. Obviously we REALLY don't want to delete the collection that we have built up, and often in the case of Annual Reports, we were subscribed to receive hard copies from the company, but they have since stopped sending out the hard copies now things are available on the web. I have the horrible feeling that you are going to say that in order to comply with copyright, we are going to have to contact all the producers of these 100s of annual reports and appraisal reports to request permission to store and use them! Would there be a practical way of doing this? Or is there a licence we could buy that would allow us to collect these?

There is copyright in annual reports, as there is in any other type of publication. Copyright will be owned by the issuing body – the company in the case of annual reports, and whoever issued the Independent Appraisal Reports. You may make copies (either print or digital) for adding to your collections, and you may make copies available digitally to your users, only within the limits of what is permitted in the Copyright Act 1994 (as amended) or with the permission of the copyright owner.

From what you say, it would appear that for a period you received print copies of reports directly from the companies. These are lawfully obtained original print works, and may be loaned out to your users, or consulted in your library, in the same way as original copies of any other book or library material.

If you want to make the annual reports and appraisal reports available digitally for your users, consider the following options:

(1) If you have lawfully obtained digital copies from the copyright owners, you may communicate (place on a server for access by authenticated library users) the digital copies under the terms of section 56A. However, from what you say, this is not the case – you have only lawfully obtained <u>print</u> copies.

(2) You may make digital copies of the reports for the purposes of preservation or replacement, if the reports are at risk of loss, damage or destruction, and if it is not reasonably practicable to purchase copies, under the terms of section 55(3).

(3) You may point to the digital copies on websites, for example from your catalogue or from a list of reports that you have on your website. However, this may not be a solution, given that some of the reports disappear from the publisher or company websites.

(4) It is always open to you to write to the copyright owners for permission.

So in summary: if you consider that the print copies of the reports are at risk of loss, damage or destruction, you may make digital copies under section 55(3). But please first read the requirements of this section in the Copyright (New Technologies) Amendment Act 2008.

Alternatively, write for permission from the copyright owners.

74. My library holds many issues of two local newspapers in paper form. May we digitise these newspapers? Do we need to seek permission from the newspaper publishers?

Section 55(3) of the Copyright Act permits the librarian of a prescribed library to make a digital copy of any item in the collection of the library without infringing copyright in the work if (a) the original item is at risk of loss, damage or destruction; and (b) the digital copy replaces the original item; and (c) the original item is not accessible by members of the public after replacement by the digital copy except for purposes of research the nature of which requires or may benefit from access to the original item; and (d) it is not reasonably practicable to purchase a copy of the original item. It is this last clause which could perhaps prevent you from using s.55(3) – if the newspapers have been microfilmed by the National Library, and if your library is able to purchase the microfilm, then is it "reasonably practicable to purchase a copy of the original item"? It is reasonably practicable to purchase a copy of the <u>microfilm</u> copy, but I don't think this could be considered to be the same as "reasonably practicable to purchase a copy of the <u>original</u> item", so I consider that s.55(3) <u>does</u> apply in your case, and that you may make a digital copy under the provisions of that section.

You may then communicate the digital copy – make it available to authenticated library users via an intranet or secure server – under the provisions of section 56A (but note the requirements of that section).

Neither of these sections requires your library to obtain permission from the copyright owner. However, you may wish to do this, in case the publisher is able to fill gaps in your library's holdings of the newspaper, so that your digital set of the newspaper is as complete as possible.

75. My library also holds in a vertical file newspaper clippings from a wide number of different newspapers. May we digitise these clippings? Do we need to seek permission from the newspaper publishers? And do members of the public need copyright permission to scan their old news clippings and put them online?

(a) By the library:

Yes, I believe that section 55(3) would apply equally to newspaper clippings (but note, not photocopies of newspaper clippings) held in the collection of your library.

(b) By members of the public:

Members of the public may scan (make a digital copy) of newspaper clippings (but not photocopies of newspaper clippings) under section 43, Copying for research or private study, provided that they comply with the provisions of that section. However, there is no provision in the Copyright Act for members of the public, without first obtaining permission from the copyright owner, to communicate the digital copies, for example on the Internet, because under s.16 communicating a work to the public is a restricted act. The library provisions (e.g. sections 55(3) and 56A, referred to in the answer to Question 74) do not, of course, apply to anyone other than the librarians of prescribed libraries.

76. In our Library we have Aotearoa People's Network public Internet terminals on which members of the public sometimes download music from the Internet, and then transfer music files to their own devices, e.g. MP3s or iPODs. Others have been seen transferring the library's music CDs into the CD drive and "ripping" copies off to their iPODs. If this is for their own personal use, is this OK?

Section 81A, Copying sound recording for personal use, states:

"(1) Copyright in a sound recording and in a literary or musical work contained in it is not infringed by copying the sound recording, if the following conditions are met:

- *(a) the sound recording is not a communication work [i.e. radio or television broadcast, newscast, etc]; and*
- *(b) the copy is made from a sound recording that is not an infringing copy [i.e. is a lawful copy]; and*
- *(c) the sound recording is not borrowed or hired; and*
- *(d) the copy is made by the owner of the sound recording; and*
- *(e) the owner acquired the sound recording legitimately; and*
- *(f) the copy is used only for that owner's personal use or the personal use of a member of the household in which the owner lives or both; and*
- *(g) no more than 1 copy is made for each device for playing sound recordings that is owned by the owner of the sound recording; and*
- *(h) the owner of the sound recording retains the ownership of both the sound recording and of any copy that is made under this section.*

(2) For the avoidance of doubt, subsection (1) does not apply if the owner of the sound recording is bound by a contract that specifies the circumstances in which the sound recording may be copied."

Section 81A, therefore, allows copying (including format shifting) of a sound recording, but only from a legitimately acquired sound recording already owned by the person making the copying, and only for his/her personal use or for personal use of others in his/her household. It does not, therefore, cover copying of sound recordings downloaded from the Internet, or from sound recordings held and owned by the library.
There are certain Internet sites (such as iTunes) that lawfully permit downloading of music from those sites, with or without payment of a fee. If the website clearly states that the music may lawfully be downloaded, then it is OK for the downloading to be undertaken on a library-provided computer, and for the copy then to be copied onto the user's own device. But unless this is so, downloading of music from the Internet is a breach of copyright, and should not be undertaken either on library-supplied computers, or on individuals' own computers. The subsequent copying of the unlawfully-downloaded music onto individuals' devices only compounds the breach of copyright.
I consider that librarians have a duty to try to ensure that copyright is not breached by users of the library, its hardware and resources. A sample notice regarding copying and downloading of music is included as Appendix 2 of LIANZA's The Copyright Act 1994 and Amendments: Guidelines for Librarians *at* *http://www.lianza.org.nz/resources/copyright*.

77. My library has a DVD collection and we are currently allowing our customers to view the DVDs on the Aotearoa People's Network computers. One or two customers may view a DVD at the same time. Is this acceptable, seeing that it is not public viewing?

I can not see anything in the Copyright Act 1994 (as amended) that prevents users from playing DVDs lawfully acquired and owned by the library either on library-provided hardware, or on personally-owned hardware either within or outside the library, since no copying is involved. I also do not see any problem if the user of the DVD, viewing the film in the library for his/her personal and private purposes (e.g. for entertainment, educational purposes, or whatever), is accompanied by a couple of friends who watch the same DVD at the same time for their own personal and private purposes – I do not consider that such viewing could possibly fall within the definition of section 16(1) (c) or (d), Playing or showing a work in public.

However, this will not apply to any DVDs owned by the library which have been purchased on condition that they be for home viewing use only (DVDs with this stipulation are often cheaper than those with different, more liberal conditions). Libraries must, of course, comply with the licence or other agreements agreed to at the time of purchase.

78. My organisation holds a large collection of photographs taken by staff photographers working for various newspapers over the years. If we have a photograph of an artwork, be it sculpture, painting, installation etc, who owns the copyright in the photograph?

There is copyright in the original work of art (sculpture, painting, installation, etc).

Photography is a form of copying, and the photographer should have obtained permission from the copyright owner to make the copy. However, there is an exception to this (section 73) in regard to certain artistic works on public display – buildings, and works such as sculptures, models for buildings, or works of artistic craftsmanship that are "permanently situated in a public place or in premises open to the public". Copyright in such a work is not infringed by making a photograph or film of it.

There is separate copyright in the photograph, which is owned either by (a) the photographer, or (b) the photographer's employer, if the photograph was taken in the course of the photographer's employment, or (c) by the person who commissioned and paid for the photograph, if the photograph was commissioned.

79. Can you point us to further information about the proposed change to section 21(3), which will give copyright ownership to the photographer, rather than to the person or institution commissioning a photograph to be taken, as is the law at present?

The Copyright (Commissioning Rule) Amendment Bill 2008, with explanatory information, is at http://www.legislation.govt.nz/bill/government/2008/0299/latest/whole.html?search=ts_bill_copyright#DLM1599201.

80. If my school bought a cable that allowed us to connect an iPod that has movies on it, legally purchased and downloaded from iTunes, to our data projector and played the movies to a group of students, are we breaking copyright laws?

I do not think you would be breaching copyright law. Section 47(2) of the Copyright Act 1994 states that "The playing or showing, for the purposes of instruction, of a sound recording, film, or communication work to an audience consisting of persons who are students or staff members at an educational establishment or are directly connected with the activities of the establishment is not a playing or showing of the work in public for the purposes of section 32(2)".

This rather convoluted way of putting things means that an educational establishment (such as a school) may play films or videos to its students and staff, provided that the films are lawfully-obtained copies. But note that this section 47(2) does not permit you to play films or videos to parents of your students, or to anyone else not "directly connected with the activities of the establishment".

81. My research library holds institutional subscriptions for several journals. These subscriptions are for both e-journals and print. (1) Are our scientists permitted to download pdfs from these e-journals to their reference management software? (2) Are they permitted to photocopy an article of interest from a print issue? (3) Are they able to store pdfs in shared access networked folders? (4) Would it be possible for the librarian to manage pdfs purchased say from Infotrieve and keep them as a central resource, and if someone wants to read it they come to me, just like a book?

(1) The answer to this question will depend on what is permitted in the licence agreement(s) your library has signed with the e-journal publisher(s). I should think that the licences will certainly allow the staff and researchers at your institution to make print copies of individual articles for their own research or private study; I should think also that the licences will allow the staff and researchers to download pdf copies of the articles to their own PCs and place these in their own reference management system, but again for their own research or private study. Without seeing the licence(s), I do not know whether they will allow staff and researchers to download pdfs and put these on an intranet or secure server for access by a number of staff or researchers – this is probably less likely, although I know that some licence agreements from e-journal publishers do allow articles to be shared with other researchers in the same institution.

(2) Yes – in accordance with the provisions of fair dealing set out in section 43 (Copying for research or private study) of the Copyright Act 1994. I believe that this section probably allows the copying of the whole of a periodical article, but certainly no more than a "reasonable proportion" of a book.

(3) Only if this is permitted by your licence agreement(s) with the e-journal publisher(s) – see the answer to your first question.

(4) No, because the Infotrieve licence statement that comes with each supplied article states (I understand) that the article may be used only by the person who requested the article, for that person's own research or private study. Nor would the librarian be able to do this if the articles are obtained on Interloan from a New Zealand or overseas library – because section 53 (Copying by librarians for users of other libraries) states that articles may be supplied only if "a person has requested the library to which the copy is being supplied to supply him or her with the copy for the purposes of research or private study" – that is, for the requester's own research or private study, and not for other researchers or for the library's collections. And most unfortunately, section 54 (Copying by librarians for collections of other libraries) applies only to "a published edition that is a book" – not to a periodical article.

82. Is the copying of book covers, for inclusion in a newsletter listing new accessions, or for adding to library catalogue records, a breach of copyright?

There is no copyright in the wording (author, title, publication details, blurb, etc) on book covers, because this is not more than a "reasonable proportion" and is not substantial, taking in relation to the whole work. However, most book covers include illustrations, photographs or other art work in which there is likely to be separate copyright. Book covers, therefore, should not be copied without the prior permission of the publisher as copyright owner. You could ask for blanket permission from each publisher to copy any of their book covers in this way. Most publishers will give permission willingly, as this is free advertising which increases exposure to their books.

Several book suppliers and other organisations provide a charged service for linking to copies of book covers from library catalogue records.

83. I am having trouble understanding clause (1)(d) of section 56A, Library or archive may communicate digital copy to authenticated users. Could you give a couple of examples of how this applies?

Section 56A(1) states that the librarian of a prescribed library may communicate a lawfully-obtained digital copy of a work to authenticated users, provided that "(d) the number of users who access the digital copy at any one time is not more than the aggregate number of digital copies of the work that (i) the library or the archive has purchased; or (ii) for which it is licensed".

Here is an example of what this means in practice: if (say) two copies of a Braille book are purchased, the book may be made available digitally to no more than two concurrent Braille users; and if four copies are purchased, the book may be made available digitally to no more than four concurrent Braille users. Another example: subscribers to some e-book services are required to nominate (and pay for) a specified number of concurrent users to the e-books in the collection. In both examples, the number of users who access the digital copy at any one time must not exceed the aggregate number of digital copies of the work that the library has purchased, or for which it is licensed.

84. I am confused: can you clarify when s.56A applies and when s.56B applies, as each seems to have slightly different wording and uses different language, e.g. "communicate" vs. "supply", "digital copy" vs. "copy in digital format", "informed in writing about the limits of copying and communication" vs. "written notice that sets out the terms of use of the copy", etc?

Sections 56A and 56B are completely separate sections, standing in their own right – they are not sub-sections either of section 56 or of each other.

Section 56A allows librarians of prescribed libraries to communicate (make available via a computer network, the Internet, an intranet or a secure server) a copy of a work in digital format that the library has already lawfully acquired to authenticated users, without needing to obtain permission from the copyright owner or licensee, and sets out the requirements if librarians do this. Note that it does not apply if the librarian already has permission from the copyright owner or licensee to communicate the digital copy.

Section 56B qualifies sections 51, 52 and 56 (copying by librarians of prescribed libraries for their own users). It sets out the two additional requirements that librarians must follow if the copy being supplied is in digital format. Neither of these two additional requirements is onerous.

85. My library is a non-Charter member of the Interloan Scheme. Is my library thereby a prescribed library?

Yes. The Copyright (General Matters) Regulations 1995 clause 4 states that "The class of library constituted by libraries that are members of the interloan scheme is hereby declared to be a class of library for the purposes of section 50 of the Act". Section 50 of the Copyright Act defines prescribed libraries. The LIANZA website makes clear that both Non-Charter and Charter Libraries are members of the Interloan Scheme.

86. Does a prescribed library need to have a licence with PMCA in order to make copies from newspapers for its users?

It is not clear (at least to me) whether a newspaper is a periodical (and therefore covered by section 52, "Copying by librarians of articles in periodicals") or a published work (and therefore covered by section 51, "Copying by librarians of parts of published works"). If a newspaper is a periodical, the librarian of a prescribed library may make, for supply to any person, one copy of an article, or more than one article from the same issue if the articles all relate to the same subject-matter. If a newspaper is a published work, the librarian of a prescribed library may make, for supply to any person, one copy of a "reasonable proportion" of the work. Either way, I should have thought that it is not necessary for a prescribed library to have a licence with PMCA.

Note that users of a library may copy from newspapers only within the "fair dealing" provisions of section 43 ("Copying for research or private study").

87. I have been approached by a group of researchers who are working on a project which involves analysing abstracts of university theses, and then obtaining copies of relevant theses on Interloan for study by members of the team. What are the copyright implications?

There is no copyright in bibliographic citations, so these may be copied and stored on a server for use by the research team. However, there is copyright in abstracts – the exception relating to abstracts in section 71 of the Copyright Act 1994 applies only to abstracts accompanying articles on a scientific or technical subject published in periodicals, not to abstracts published in books or theses.

Section 43(1) of the Act states that "Fair dealing with a work for the purposes of research or private study does not infringe copyright in the work". Section 43(3) lists the factors that a court will take into account (and therefore that a user copying from a work for her or his own research or private study must take into account) in determining whether such copying is "fair dealing". These factors are:

- *(a) The purpose of the copying; and*
- *(b) The nature of the work copied; and*
- *(c) Whether the work could have been obtained within a reasonable time at an ordinary commercial price; and*
- *(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".*

In my view, provided that the copying is "for the purposes of research or private study" of the person making the copy, copying (which includes making a digital copy) of the whole of an abstract is probably not an infringement of copyright in the thesis, given that an abstract is not substantial, taken in relation to the whole thesis.

However, communicating a work (making it available on a computer network, the Internet, an intranet or secure server) to the public is an act restricted by copyright (section 16(1)(f)). I cannot see anything in the Copyright Act 1994 (as amended) that

permits abstracts from theses to be copied and stored on a server for use by the research team.

A court might rule that making a summary of the essential elements of an abstract is not making a copy of the abstract, but rather is creating a new work, based on the abstract. If so, then copyright in the new work (the summary) is owned by the author of it, and may be stored on a server and made available to the research team.

Section 53 of the Act (Copying by librarians for users of other libraries) is quite clear: a copy may be supplied on Interloan only where "a person has requested the library to which the copy is being supplied to supply him or her with the copy for the purposes of research or private study", and the person to whom the copy is supplied "may use the copy only for the purposes of research or private study".

There is no breach of copyright if the hard copy of the thesis is read in the library by the requesting person. However, it is not lawful for a copy of a thesis supplied on Interloan in digital format to be stored on a server and accessed by members of the research team, since the copy was supplied for the requester's use, not for the use of anyone else.

Of course, those theses and abstracts that have been digitised and made available via an institutional research repository or ADT (the Australasian Digital Theses Program) may be accessed by all members of the research team, because as part of the deposit process, the authors of the theses (the copyright owners) have given permission for their theses to be made available and accessed in this way.

88. In our Local History Room we often make a copy of a newspaper article or a brochure for preservation purposes. The copy is made available for the public to use while the original is stored in closed access. It is material that cannot be replaced and further copies cannot be purchased. Is this permitted? If a user wants a copy of it, can we copy from the copy for them?

I believe so.

(1) Print copy: *Section 55(1) of the Copyright Act 1994 permits the librarian of a prescribed library to make a copy (other than a digital copy) of any item in the collection of the library for the purposes of "preserving or replacing that item by placing the copy in the collection of the library in addition to or in place of the item".*

(2) Digital copy: *Section 55(3) permits the librarian of a prescribed library to make a digital copy of any item in the collection of the library "if (a) the original item is at risk of loss, damage, or destruction; and (b) the digital copy replaces the original item; and (c) the original item is not accessible by members of the public after replacement by the digital copy except for purposes of research the nature of which requires or may benefit from access to the original item; and (d) it is not reasonably practicable to purchase a copy of the original item".*

(3) Copying for a library user: *Section 51 permits the librarian of a prescribed library to "make from a published edition (other than a published edition that is an article in a periodical), for supply to any person, a copy of a reasonable proportion of any literary,*

dramatic, or musical work ...". And section 52 permits the librarian of a prescribed library to "make for supply to any person a copy of (a) a literary, dramatic, or musical work ... that is contained in an article in a periodical; or (b) a published edition that is an article in a periodical ...". In both these sections "copy" includes a digital copy.

Summary: *You are within the law if you make either a print or digital copy for preservation purposes (section 55); and you are within the law if you make either a print or digital copy of the copy for your user (sections 51-52) – provided that you comply with the requirements set out in sections 51, 52 and 56B, as appropriate.*

89. If a member of the public or a student is found to have repeatedly downloaded copyright material using a library computer, what should the library do?

LIANZA's Sample Library Copyright Policy *suggests:*

"If the person can be identified, the facts of the case are ascertained. If the alleged breach is substantiated, the person is given information on copyright law as this affects library users, and is warned that a repetition may result in the person being banned from using public-access Internet computers in the Library. If notification is received of a second apparent breach of copyright by the same person, and if that breach is substantiated, the person is given a second warning. If notification is received of a third apparent breach of copyright by the same person, and if that breach is substantiated, the person is told that s/he may not use Library-supplied public-access Internet computers in the Library, other than to access the Library Catalogue or Library-subscribed electronic resources, for a period of six months. If the person is a member of the Library, this information is noted on the person's Library record.

If it is not possible for the Library to identify the person using the public-access computer on the specified date and time, either because the Library does not require users to authenticate, or because records of use are kept for only a very short period or not at all, the Library reports back to the IPAP or copyright owner that the alleged breach has been investigated but that the alleged infringement can not be substantiated or infringer identified".

90. If someone asks for a copy of a periodical article that has already been obtained through Infotrieve for another borrower, is it legitimate for the librarian to tell that person the name of the other borrower? And is it OK for the other borrower to share the copy?

No. Articles received from Infotrieve are (I understand) clearly labelled that the article has been supplied for the requester's own research or private study, and must not be used for any other purpose. Therefore, to make the copy of the article available to another person would be in breach of the stipulation that accompanied the copy received from Infotrieve – in effect, would breach the library's contract with Infotrieve.

This is no different to a copy of an article supplied on Interloan under section 53 of the Copyright Act 1994, "Copying by librarians for users of other libraries", which states

that a copy of an article may be supplied only to a person who "has requested the library to which the copy is being supplied to supply him or her with the copy for the purposes of research or private study".

Further, to tell a person that a copy of an article has already been supplied to another person would, to my mind, be breaching the privacy of that other person.

If, however, a person knows that a colleague has received a copy of an article on Interloan or via Infotrieve (perhaps because that person has seen the copy of the article on the original requester's desk, or learns about it in the course of conversation), then section 53(3) applies: "Where any person is supplied with, or otherwise comes into possession of, a copy made in accordance with this section, that person may use the copy only for the purposes of research or private study". And a second copy may not be made of the copy received on Interloan or via Infotrieve.

Note also that the copy of an article supplied on Interloan or via Infotrieve must be given to the requester – the copy (or a copy of it) may not be held in the library's collections, because the copy of the article was supplied for the requester, to be used for the requester's own research or private study, and not for other requesters or other library users.

91. We have a publications page on our website, where members of the public (or librarians) can download our public reports in PDF format. Can you suggest wording that we could use, making it clear that we are happy for downloading to take place?

While many people assume that making publications or other materials available on the Internet without restrictions is an implied licence allowing others to view, download, print, store and/or disseminate the material, this is not so. It is therefore very helpful if publications on the Internet are accompanied by a clear statement setting out what is permitted.

The following wording would be appropriate for your organisation's publications web page:

> *"We produce a wide range of publications, which include guidelines, reports, policy documents, pamphlets and information sheets. Copyright in these publications is owned by us.*
>
> *All publications listed on this page to which a link is provided may be freely downloaded from this website and printed or stored. Print copies of publications are available free of charge unless otherwise indicated. ..."*

Alternatively, you could refer to one of the Creative Commons licences – see http://www.creativecommons.org.nz/licences/licences-explained/.

92. Where can I find out about publishers' policies regarding the use of electronic versions of articles?

Either from individual publishers' websites, which usually have a copyright page, or from the SHERPA/RoMEO site at http://www.sherpa.ac.uk/romeo/, which lists publishers' copyright and archiving policies.

93. My City Council's Library and Archives holds a photograph of the city, taken about 1929-1931. Unfortunately the origin of the photograph and the photographer are unknown. We are planning a project with the Children's Book Club where we would take an enlarged copy of the photograph and colour-in bits and pieces as we learn about the area's history – the aim is to show the community that you do not have to be a serious researcher in order to use the archives and find things of interest. What is the copyright position?

The answer to your question depends on whether or not the photograph is "of unknown authorship". Section 7(2) of the Copyright Act 1994 defines "unknown authorship" as follows: "For the purposes of this Act, the identity of an author shall be regarded as unknown if it is not possible for a person who wishes to ascertain the identity of the author to do so by reasonable inquiry; but if that identity is once known it shall not subsequently be regarded as unknown". I take this last clause to mean that, if the identity of the author was ever discovered, then the work cannot subsequently be considered to be unknown. If the identity of the photographer you refer to was not ever discovered, the photograph is of unknown authorship, in which case, if the photograph was taken about 1930, then copyright in the photograph would have expired at the end of 1980.

However, if the identity of the photographer was ever discovered, then the photograph is not of unknown authorship; and if the photographer took the photograph at (say) the age of 20, and did not die until the age of 90, then copyright will not expire until 50 years after the end of the calendar year in which the photographer died, that is not until 2050. You cannot, therefore, assume that copyright in the photograph has expired.

Section 67(1) of the Copyright Act ("Acts permitted on assumptions as to expiry of copyright or death of author in relation to anonymous or pseudonymous works") states that copyright in a work "is not infringed by any act done at a time when, or in pursuance of arrangements made at a time when, (a) it is not possible for a person who wishes to do so to ascertain the identity of the author by reasonable inquiry; and (b) it is reasonable to assume (i) that copyright has expired; or (ii) that the author died 50 years or more before the beginning of the calendar year in which the act is done or the arrangements are made". While in the case you describe (a) is so, (b) is not. To be completely within the law, therefore, you should probably assume that there is copyright in the photograph, and not proceed to copy or make other use of it.

That said, you may decide that, as you have taken all reasonable steps to locate the identity of the photographer, and are unable to do so "by reasonable inquiry", there is little or no risk in going ahead and copying the photograph.

I should also draw your attention to section 98 of the Copyright Act, which prohibits "derogatory treatment" of an in-copyright work. "Treatment" means "any addition to, deletion from, alteration to, or adaptation of," a work; and treatment is "derogatory"

if, "whether by distortion or mutilation of the work or otherwise, the treatment is prejudicial to the honour or reputation of the author". I am unable to tell from your description whether what you wish to do could be considered "derogatory treatment" by the copyright owner.

94. My library is trying to come to terms with the requirements of the Copyright Act and amendments. The area where we are having particular trouble is the compliance programme for public self-service photocopiers. Can you offer advice on this?

The LIANZA Copyright Guidelines *state that a library should have a compliance programme in place, to check that library users of self-service photocopiers, scanners and printers are not breaching copyright. Such a programme is part of the obligation that libraries have, to take all reasonable and practicable steps to minimise copyright infringement in their institutions. My answer to Question 49 (above) attempts to spell out what such a compliance programme would entail.*

Your library would certainly not be able to check what every user is copying – such checking would be prohibitively expensive, and surely no court would consider this to be reasonable. You could ask library staff, whenever they pass library photocopiers, scanners or other library-supplied equipment (or whenever they fill a copier with paper or clear a paper jam) to have a quick look at what is being done – if someone has a book on the copier, and a pile of copying beside it, it is highly likely that the person is copying the whole book. And it should be obvious if someone is copying library-owned CDs or DVDs. However, this approach is a bit hit-and-miss, and you would not easily be able to keep a record of the checking. Alternatively, you could assign a staff-member to check the copiers several times a day (preferably at different times each day), and keep a record of the days and times of the checks – but this, too, is wasteful of expensive staff resource.

The position is even more difficult with regard to a compliance programme to ensure that users of library public-access computers are not unlawfully copying or downloading materials from the Internet.

A record of the checking undertaken as part of the library's compliance programme needs to be kept. The purpose of the record is to be able to prove to a court (should your library or council ever face legal action on the issue) that your library is making regular or spot checks – however spotty these may be.

As far as I know, no New Zealand library has ever been taken to court for not enforcing copyright on library-supplied self-service photocopiers – but a major Australian university library was, a few years ago, so the risk is there.

95. My institution is a profit-making private training establishment (PTE). Does section 48 apply to us? What about the other sections relating to copying for educational purposes?

Because your institution is "conducted for profit", it is not covered by the definition of "educational establishment" given in section 2(1) sub-section (e) of the Copyright Act 1994. Therefore section 48, "Copying and communication of communication work for educational purposes", does not apply, and your institution may not take advantage of what is permitted under this section to an "educational establishment". Most of the educational provisions of the Copyright Act limit their application to an "educational establishment": these are sections 44(1), 44(3)–44(6), 44A, 46, 47 and 48. Educational provisions not limited to an "educational establishment" are sections 44(2), 45 and 49, but the first two of these sections are so limited in their application, they will probably be of little use to you. Therefore, you must rely on licence agreements your institution has with (for example) CLNZ, PMCA or Screenrights to allow you to make copies for educational purposes. Alternatively, it is always open to you to obtain prior permission from copyright owners.

96. In section 48, does "communication work" include audiovisual clips copied or shown from the Internet (e.g. YouTube), or television and radio broadcasts accessed via the Internet?

Yes – unless licences authorising the copying or communication of the communication work are available under a licensing scheme (section 48(4)). So, for example, the Screenrights licence applies to those broadcasts it covers, and section 48 applies to broadcasts not covered by the Screenrights licence, such as overseas radio and television broadcasts accessed via the Internet or otherwise.

97. I understand that it is not possible for a prescribed library to supply journal articles on Interloan to an overseas library. My library has a small number of overseas users (these are individuals, not libraries) who occasionally ask us for copies of papers. These users pay for our services, as they do not belong to our organisation. Is this permitted under the Copyright Act?

It is certainly permitted for your library to loan original books or original issues of periodicals to overseas libraries.

In August 2010, on the recommendation of the Te Puna Strategic Advisory Committee, the LIANZA Council agreed that overseas libraries should be deemed members of the Interloan scheme, without requiring payment of an annual Interloan fee, to enable New Zealand libraries to provide copies in fulfilment of international Interloan requests. As a consequence, overseas libraries are now prescribed libraries under the terms of section 50 (as amended).

This means that prescribed New Zealand libraries may now make copies (including digital copies) for supply to overseas libraries in accordance with the terms of sections 53 ("Copying by librarians for users of other libraries"), section 54 ("Copying by librarians for collections of other libraries") and section 55 ("Copying by librarians or archivists to replace copies of works") of the Copyright Act 1994 (as amended).

Libraries may also supply copies of works, either under section 51 ("Copying by librarians of parts of published works") or section 52 ("Copying by librarians of articles

in periodicals") to "any person" (which may include a person resident overseas), provided that the provisions of sections 51 and 52 are complied with. Note particularly sections 51(2)(b) and 52(2)(c), which both state that "where any person to whom a copy is supplied is required to pay for the copy, the payment required [must be] no higher than a sum consisting of the total of the cost of production of the copy and a reasonable contribution to the general expenses of the library". This means that your library may make a charge that covers your costs (including overheads), but may not make a profit.

98. What is the copyright position regarding posters and placards, with no identifiable author or illustrator, and produced by organisations or publishers now long defunct?

The Copyright Act 1994 does not address the issue of who owns copyright in works issued by an organisation or publisher that is no longer in existence. As stated in my answer to Question 47 (above), I do not think that a work which has corporate authorship can be considered to be a work of unknown authorship (which includes anonymous and pseudonymous authorship).

However, whether or not, I don't think there is any doubt from section 22 that copyright continues for 50 years after the end of the calendar year in which the author died, or if there is no author, for 50 years after the end of the calendar year in which the work was first made available to the public. The fact that an author has died (i.e. ceased to exist), or that the organisation or publisher that produced the work has ceased to exist, is irrelevant (other than that it makes seeking copyright permission much more difficult) – copyright continues for the period given in section 22.

The fact that a person wants to do something (for example, re-publish in a book a poster or placard that is still in copyright) but is unable to find the copyright owner does not change the law relating to the duration of copyright. In effect, the law states that if you are unable to obtain permission, don't publish.

However, this needs to be qualified by reference to Section 67 of the Copyright Act ("Acts permitted on assumptions as to expiry of copyright or death of author in relation to anonymous or pseudonymous works"). Sub-section (1) states that copyright in a work "is not infringed by any act done at a time when, or in pursuance of arrangements made at a time when, (a) it is not possible for a person who wishes to do so to ascertain the identity of the author by reasonable inquiry; <u>and</u> (b) it is reasonable to assume (i) that copyright has expired; or (ii) that the author died 50 years or more before the beginning of the calendar year in which the act is done or the arrangements are made". Note that this applies only to anonymous or pseudonymous works.

99. For a publication published in more than one volume, is each volume a "work" (as used in the Copyright Act), or is the collection of volumes the "work"?

"Work" is not defined in the Copyright Act 1994, which is unfortunate, given how much the term is used. For books, I think it probably means a complete work, not just one volume of a work. For periodicals, the meaning is even less clear – does the term

"work" mean a single article, an issue containing a number of articles, a volume containing a number of issues, or a run of a number of volumes?

100. Does the CLL licence agreement allow libraries to copy items for their course reserve collections?

The purpose of the licence agreement which CLL (Copyright Licensing Ltd, now Copyright Licensing New Zealand – CLNZ)) has with tertiary institutions is to allow them to make multiple print copies of periodical articles or parts of books for print student course-packs. The licence agreement also allows them to make electronic copies from print copyright materials, and distribute these to students via CD or DVD, or place them on a secure server for access by authenticated students and staff involved in particular courses of instruction.

There is nothing in the CLNZ licence agreement about a print copy made under the CLNZ licence being placed in a library's course reserve collection – but nor is there anything that forbids this. CLNZ has said that a copy of an article made under the licence should not be placed in a library course reserve collection, because this is not a course-pack. But it can be argued that there is little or no difference between giving a course-pack (which may contain only one article) to students, and putting the course-pack in the library for use by students. However, if this is done, it is essential that the copies placed in the library under the terms of the CLNZ licence are included in the sampling surveys carried out in accordance with the licence agreement.

Digital copies made under the terms of the CLNZ licence may be placed in a library's electronic course reserve collection only if users of this collection are required to authenticate in order to access the digital copies, and access is restricted to students enrolled in the relevant course. Since most library systems do not do this, it is more appropriate for such materials to be made available to students via Blackboard, ClassForum, Moodle, MyWeb, or one of the other course management systems that are used in tertiary institutions for making digital materials available to classes. The amount copied must comply with the CLNZ licence agreement.

101. Does the Copyright Act (as amended) permit digital copies of materials to be placed in a library's electronic course reserve collection?

Section 44(4A) permits a digital copy of a work made in accordance with section 44 sub-sections (3) and (4) to be communicated to "a student or other person who is to receive, is receiving, or has received, a lesson that relates to the work". "Communicate" means "to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system" (section 2(1)), and includes making information available via a computer network, the Internet, an intranet or secure server. Note that under this section, the amount copied is limited to no more than the greater of 3% or 3 pages of the work.

Section 44A does not apply, because this section relates only to "a work that is made available on a website or other electronic retrieval system".

Section 56A does not apply, because this section applies only to already-digitised material that the library has already lawfully obtained – material may not be digitised under this section.

102. Can copies be made for a library's course reserve collection under section 44(1)?

No. The Salmon Judgment (see NZLR *2002 v. 3 p. 76-98) at paragraph 72 makes clear that section 44 sub-section (1) applies only to copying by or for a lecturer, to assist him or her in preparing for or giving the course. It does not allow either single or multiple copies to be made for student use.*

103. Can copies be made for a library's course reserve collection under sections 51-52?

No. The Salmon Judgment (see NZLR *2002 v. 3 p. 76-98) at paragraph 103 states, in relation to sections 51 and 52, that "it is implicit that a request must be made by, or at least on behalf of, the person wanting to use the copy for the purposes of research or private study". Copies made by librarians for Course Reserve collections do not meet this requirement.*

104. Is a case from a law report the equivalent of a periodical article, as referred to in the Copyright Act?

I believe so. The Copyright Act does not appreciate the subtle distinction made by librarians between a "periodical" and a "serial". But given that law reports are similar to periodicals in that they have volume and issue numbers, issue dates, and are published under the same generic title over many years, I consider that law reports are "periodicals" for the purposes of the Copyright Act, and that cases within law reports are the equivalent of "periodical articles".

105. Does viewing a YouTube video in a public library breach copyright?

Copyright information on the YouTube website makes clear that the person uploading material to YouTube must own the copyright in that material, or have permission from the copyright owner. If complied with, this means that all material on YouTube is there with the permission of the copyright owner.

Material lawfully placed on YouTube by or with the permission of the copyright owner is placed there with the knowledge and understanding that users will download and make use of the material – why else do people place material on YouTube?

All users of YouTube must comply with the YouTube Terms of Service (see http://www.youtube.com/t/terms) which in section 4 state: "YouTube hereby grants you permission to access and use the Website as set forth in these Terms of Service".

Provided that users make use of materials on YouTube within the parameters of these Terms of Service, they may lawfully download and view materials from YouTube in a library or elsewhere.

106. Can we copy video recordings owned by the library onto DVDs, or do we need to re-purchase them in DVD format?

Your query needs to be looked at from two different perspectives, depending on the purpose of the copying.

(a) If the purpose of the copying is format shifting (that is, to have the videos in a different format), then the answer is no. Section 81A of the Copyright Act 1994 allows format shifting of sound recordings, but only from legitimately acquired sound recordings already owned by the person making the copy, and only for her/his personal use or for the personal use of others in her/his household – not for educational or library use. There is no provision in the Copyright Act for format shifting of videos, films or DVDs.

(b) If the purpose of the copying is because the original item is "at risk of loss, damage, or destruction", then the answer is yes. Section 55(3) allows the librarian of a prescribed library to "make a digital copy of any item (the original item) in the collection of the library ... if (a) the original item is at risk of loss, damage, or destruction; and (b) the digital copy replaces the original item; and (c) the original item is not accessible by members of the public after replacement by the digital copy except for purposes of research the nature of which requires or may benefit from access to the original item; and (d) it is not reasonably practicable to purchase a copy of the original item" (that is, the original video recording). Section 55(3) does not state what format the copy made of the original item must be in, so provided that all the conditions of this section are complied with, a copy of a video may be made in DVD format.

107. Can we copy DVDs that are at risk of loss, damage or destruction, if copies are available for purchase but only in zone 1 format?

I believe so. Section 55 is headed "Copying by librarians or archivists to replace copies of works". Sub-section (3) permits the librarian of a prescribed library or the archivist of a library to "make a digital copy of any item (the original item) in the collection of the library or archive without infringing copyright in any work included in the item, if – (a) the original item is at risk of loss, damage, or destruction; ... and (d) it is not reasonably practicable to purchase a copy of the original item". Presumably the DVD you wish to copy (the "original item") is in zone 4 format. If you are unable to purchase a second copy in zone 4 format, then it is not possible to purchase a copy of the original item, so under section 55(3) you may make a copy, provided that the original is "at risk of loss, damage, or destruction" and provided that the other requirements (sub-sections (b) and (c)) are complied with.

See also the answer to Question 127 (below).

108. I am a school librarian. Can copies be made from newspapers? We have a CLL licence.

It is not clear from your query whether you are referring to you as a librarian making one copy of a newspaper article at the request of a user, or to the making of multiple copies for handing out to students for use in a class.

Copying by librarians of prescribed libraries from newspapers is covered by the Copyright Act 1994, in the same way as is other material held in libraries such as books and periodical articles. See my answers to Questions 15 and 86 (above). But note that this copying, undertaken under sections 51 or 52, permits the making of one copy only at the specific request of a library user – it does not permit multiple copies to be made for handing out to students.

Multiple copying for educational purposes is covered by section 44(3-4), which is very restrictive, permitting no more than the greater of 3% or 3 pages of the work to be copied. For newspapers, as for periodicals and anthologies or compilations, the 3% / 3 pages limit relates to the article in the newspaper or periodical, or the chapter in the anthology or compilation, not to the entire newspaper issue or periodical issue, or the entire anthology or compilation.

Copying from New Zealand newspapers is covered by the PMCA (Print Media Copying Agency) licence agreement. The licence agreement with CLL (Copyright Licensing Ltd, now Copyright Licensing New Zealand – CLNZ) specifically excludes newspapers from its coverage.

109. Who owns copyright in letters – the author, or the person to whom the letters were sent? And for how long does copyright last?

Ownership of copyright is, of course, separate from ownership of a work – when you purchase a book from a bookshop, you do not purchase copyright in that book.

Ownership of a work is not covered by the Copyright Act. I should have thought that, by writing a letter to someone, you are in effect giving that person the letter, thereby passing ownership of the letter to the recipient, while still retaining copyright ownership in the physical expression that is the letter. Therefore, copyright is owned by the author of the letters.

Section 22 of the Copyright Act 1994 deals with duration of copyright. This section does not distinguish between published and unpublished work. A letter is a literary work, and section 22(1) states that copyright in a literary work "expires at the end of the period of 50 years from the end of the calendar year in which the author dies". This means that copyright ownership continues after the death of the author, is inherited by whoever is left the copyright in the author's will (or, if no one is named, whoever inherits the possessions of the author), and continues for a further 50 years.

Many people argue that copyright duration is far too long, and that it should benefit just the author, not the author's heirs or successors.

110. We have a patron who comes to the library and asks us to make colour copies of the artistic work on dress or curtain fabric, gift wrapping paper and such like which she has purchased, which she uses to make greeting cards which she sells. Are we in breach of copyright by doing this?

Yes. There is copyright in the artistic work that is on the dress or curtain fabric or gift wrapping paper being copied. The fact that the patron has purchased the fabric and gift wrap makes no difference: when you purchase a work you do not purchase any copyright in that work.

Copying undertaken by library staff must be in accordance with the provisions relating to copying by librarians – in this instance, section 51 ("Copying by librarians of parts of published works"). However, this section covers copying of literary, dramatic and musical work – it covers artistic work only insofar as this is included within the literary work. And the person supplied with the copy may use it only for that person's research or private study. Since neither of these apply, the copying may not be undertaken by a librarian under section 51. Nor do any other sections of the library provisions apply. In my view, in copying this artistic work for your patron you are in breach of copyright, and could be held liable by a court if the copyright owners took legal action against your library.

Nor may the user make a copy for her or himself under section 43 ("Copying for research or private study"), since the copying is not being undertaken for those purposes.

111. The Ministry at which I work has interloaned articles for researchers and stored these on an electronic records system that anyone in the Ministry can access. This has been done to meet the requirements of section 17 of the Kyoto Protocol, which states that "As part of its inventory management, each Party … should make the archived information accessible by collecting and gathering it at a single location". Is this breaking the terms of our Interloan agreement?

Yes it is. Periodical articles supplied on Interloan have been copied under the terms of section 53 ("Copying by librarians for users of other libraries"). Copying under this section must be at the request of, and for the purposes of research or private study of, a specific individual.

Copying for the collections of other libraries is covered by section 54 ("Copying by librarians for collections of other libraries"). However, most unfortunately this section applies only to copying from "a published edition that is a book", and not to copying of periodical articles.

Your Ministry may wish to point out to the Ministry of Economic Development, which administers copyright law, that this restriction, which as far as I can see serves no useful purpose, forces your library to be in breach of section 17 of the Kyoto Protocol.

112. A patron of my library is writing a thesis on New Zealand historical fiction for children. She wishes to include a number of illustrations, and wants to know how she should proceed in obtaining copyright permission when the publisher has ceased to exist. Can you offer any advice?

Copyright does not cease just because the publisher no longer exists – just as copyright does not cease just because the author dies (i.e. no longer exists). The author's copyright continues for 50 years after the end of the calendar year in which the author died (section 22(1)).

Copyright in illustrations may be owned by the publisher, but is more likely to be owned by the illustrator, and this copyright, too, continues for 50 years after the end of the calendar year in which the illustrator died.

If you went ahead and used the illustrations without permission, and if legal action were to be taken against you, it seems to me that a court might take one or other of the following views:

The hard-line view: *copyright exists for 50 years, and the fact that you have been unable to trace anyone (publisher, illustrator) who is able to give permission to copy makes no difference: if you are unable to obtain permission to copy, for whatever reason, you should not make the copy.*

The perhaps more reasonable view: *you wish to make a copy for educational purposes, not for commercial gain; you have demonstrably made attempts but have been unable to find anyone who can give you permission to make a copy for your thesis; you have been able to show to the court that reproduction of the illustration is important to your thesis; you have duely acknowledged the name of the illustrator and source of the illustration; at least some of the principles of fair dealing as set out in section 43(3) of the Copyright Act 1994 have been complied with; therefore the copying of the illustration in your thesis, while not strictly within the law, is perhaps acceptable in the circumstances.*

Just which way a court would rule is, of course, not known, but I suspect that the first view would apply. My advice, therefore, is that you should not reproduce the illustration if it is still in copyright and you are unable to obtain permission (for whatever reason) from the copyright owner.

113. The same patron also wishes to know whether it is correct to assume that there is no need to obtain permission to include illustrations in the thesis when it is submitted for examination, but only when it is lodged with the library in its final form. In other words, if all the copyright permissions are not received before the submission date, is it OK to leave the illustrations in the thesis, but remove them if necessary from the final copy?

It is the copying of the illustrations in the first place, rather than the subsequent lodgement of the thesis in the library, that breaches copyright in the illustrations. (This breach does become more significant if the thesis is made available in digital format through an institutional research repository or the Australasian Digital Theses

Program, not because this makes any difference to the lawfulness of the original copying, but because it makes it much easier for the breach of copyright to be discovered).

It is true that section 49 of the Copyright Act ("Things done for purposes of examination") states that "Copyright is not infringed by anything done for the purposes of an examination, whether by way of setting the questions, communicating the questions to the candidates, or answering the questions", but I do not consider that this section applies to a written thesis.

114. A patron has asked the library to print CD and DVD cover images from the Internet in colour for her. There is no copyright statement associated with the cover images. Is copying these permissible?

If the covers consist only of words there is unlikely to be any copyright in these, as the words will not be significant or substantial, taken in relation to the whole work. However, it is likely that the covers will include images or illustrations, in which there will be copyright, and this copyright may well be held by the illustrator or photographer, not by the publisher of the CD or DVD. Under the Copyright Act 1994, making a copy of an illustration is a restricted act; but section 51 ("Copying by librarians of parts of published works") allows the librarian of a prescribed library to make "from a published edition", for supply to any person, "a copy of a reasonable proportion of any literary, dramatic, or musical work, and may include in the copy any artistic work that appears within the proportion copied, without infringing copyright in the literary, dramatic, musical, or artistic work or the typographical arrangement of the published edition". The CD or DVD, together with the cover, is a "published edition". If a librarian of a prescribed library copies the whole of the cover, then presumably the artistic work "appears within the proportion copied", and the copying is therefore permitted under section 51.

This applies to the copying of the cover of a CD or DVD owned by the library (or a patron of the library). But the question then arises, does it also apply to the image of a CD or DVD on the Internet – is this image on the Internet a "published edition"? Unfortunately, the definition given in section 2(1) of the Copyright Act is not very helpful: "Published edition means a published edition of the whole or any part of one or more literary, dramatic, or musical works". I should have thought that the cover image is a "part" of the work, and that section 51 therefore also applies to images of covers copied from the Internet.

115. My library has received from an academic staff member photocopies of periodical articles, all nicely done and readable and with full references printed on them, with a request that these be placed in the library's electronic course reserve collection. May the library scan these photocopies to make the electronic images, or do we have to scan the originals?

This question raises two separate issues:

(a) Copying by the academic staff member

You state that the photocopying has been done by the academic staff-member. This copying could lawfully be undertaken only in accordance with the provisions of section 44, "Copying for educational purposes". Section 44 is made up of sub-sections which have to be considered separately. The academic staff member could not make the photocopies under sub-section (1), because this sub-section permits copying only to enable the staff member to prepare for or give "a lesson at an educational establishment"; this sub-section therefore does not apply to copying for students. Nor could the copying be undertaken under sub-section (2), because copying under this sub-section must not be done "by means of a reprographic process" such as photocopying. And sub-sections (3-4A) limit copying to "no more than the greater of 3 percent of the work or edition or 3 pages of the work or edition" – further qualified by the restriction in sub-section (4) that, if this means that the whole of a work would be copied, then "no more than 50 percent of the whole work or edition" may be copied. So the whole of a periodical article may not be copied by an academic staff member under sub-sections (3-4A).

Section 44(3-4A) is very restrictive, which is why tertiary education institutions have entered into licence agreements with Copyright Licensing New Zealand (CLNZ). This licence permits 10% of a work to be copied, or the whole of a periodical article, for educational purposes. However, the intention of the CLNZ licence is to enable academic staff to make multiple copies for handing out to students in the form of print course-packs, or to place the materials on a controlled-access server to make them available in digital format to students enrolled in specific courses. It is not the intention of the CLNZ licence to permit copying for library course reserve collections, either print or digital (although there is nothing in the licence which prevents a copy of a print course-pack being placed in a library's print course reserve collection).

In sum, if the academic staff member wishes to copy material for students to read, this must be done under the terms of the CLNZ licence, and made available to students either in the form of print course-packs, or digitally via a controlled-access server. The latter is best done through Blackboard, ClassForum, Moodle, MyWeb or whatever is the system currently used at your institution, because these information management systems enable access to be restricted to students enrolled in a specific course. There is absolutely no need for the library and its print or digital course reserve collection to be involved at all.

(b) Scanning by the library

The Copyright Act 1994, as amended by the Copyright (New Technologies) Amendment Act 2008, allows copies made under the library provisions of the Act (sections 51-56) to be supplied in digital format. However, none of these provisions relate to making digital copies for the collections of the library, other than in the specific instance (under section 55) where the copying is being undertaken to preserve or replace the original item because it is "at risk of loss, damage, or destruction".

It is true that section 56A allows the librarian of a prescribed library to communicate (i.e. make available via a computer network, the Internet, an intranet or controlled server) a digital copy of a work to an authenticated user, but only if the provisions of

section 56A are complied with – and in particular, provided that the librarian "has obtained the digital copy lawfully" (section 56A(1)(a)). This section does not permit the librarian to make a digital copy – only to make a digital copy available of a work that is already in digital format and that the library has obtained lawfully.

In the instance you describe, section 56A does not apply, because the library has received the materials in print format, not in digital format; and because, even if the library had received the materials from the academic staff member in digital format, those digital copies would not have been made lawfully by the academic staff member, as explained above.

In my view, course reserve collections should not include copies of in-copyright materials. They should be limited only to original books or original issues of periodicals, or to copies of works that are out of copyright, or to works where the copyright owner has given permission for copies to be made (e.g. a lecturer's own course-notes).

116. In the good old days, authors of articles published in journals were given multiple print copies of their articles (called reprints or offprints) by the publishers, for distribution to their colleagues or to students. These days, publishers such as Elsevier no longer send print copies, but instead send the author a PDF of the article, once it has been published. May the author store these PDF copies indefinitely and distribute them to colleagues?

This question raises a number of issues:

(a) Who owns the copyright in the article?

Under section 21(1) of the Copyright Act 1994, "the person who is the author of a work is the first owner of any copyright in the work". Sub-section (2) qualifies this by stating that "Where an employee makes, in the course of his or her employment, a literary, dramatic, musical, or artistic work, that person's employer is the first owner of any copyright in the work". However, at least in the universities, copyright in articles written by staff, which under section 21(2) is owned by the university as employer, is passed back to the staff member in order to enable the staff member to negotiate for publication with a journal publisher. Copyright in such articles, therefore, is now owned by the author.

It is normally the case that, when an author successfully reaches an agreement with a journal publisher to publish an article, the author signs a contract or agreement which passes copyright in the article over to the publisher. In such cases, the publisher now owns copyright in the article. (Note that this does not always happen, particularly with non-commercial publishers).

Where the author has signed such a contract or agreement with the journal publisher, the author is bound by that agreement, and unless the agreement allows, may not make copies of the articles without the permission of the copyright owner (i.e. the publisher). However, the agreement is likely to give the author some limited rights.

(b) How do you know what the position is for different publishers?

Many publishers give information about copyright on their websites. For example Elsevier (the publisher you refer to) has a page on authors' rights at http://www.elsevier.com/journal-authors/author-rights-and-responsibilities#rights. Wiley-Blackwell's page is at http://authorservices.wiley.com/bauthor/benefits.asp. Oxford Journals has a page at http://www.oxfordjournals.org/access_purchase/rights_permissions.html. There may be separate statements regarding bulk copies of reprints and eprints – Oxford Journals has such a page at http://www.oxfordjournals.org/corporate_services/reprints.html. There is also the SHERPA/RoMEO site at http://www.sherpa.ac.uk/romeo/, which lists publishers' copyright and archiving policies.

If your author is unable to find a copyright statement such as these on a publisher's website, s/he should email to their Rights Department or Permissions Team (the name is likely to differ from publisher to publisher) and ask what is permitted.

I presume that, if a publisher (such as Elsevier) sends to the author a copy of the final article in PDF format, it will be accompanied by information as to what use may be made of the copy. Note that you cannot assume that supply of a PDF by the publisher automatically gives permission to the author to store it indefinitely or distribute it to colleagues. If such permission is not supplied by the publisher with the PDF, and/or is not on the publisher's copyright web pages, then the author should ask the publisher.

At least one publisher (Wiley-Blackwell) states that the copyright position may vary from journal to journal. This is likely to be because this publisher very frequently publishes on behalf of other organisations such as learned societies, associations etc.

117. What is the legal position regarding making a back-up copy of a CD or DVD which comes with a book?

Section 55(3) allows the librarian of a prescribed library to make a digital copy of any item in its collection if "the original item is at risk of loss, damage, or destruction" and provided that "it is not reasonably practicable to purchase a copy of the original item". The digital copy must replace the original item, and only the digital copy may be accessed or loaned. This applies to a CD or DVD, whether or not it comes as part of a book.

If your library wants a back-up copy of a work which is in print you must purchase an additional copy – you may not make a back-up copy of a work that is "at risk of loss, damage, or destruction" if it is "reasonably practicable to purchase a copy of the original item". So, your library should purchase an additional copy of the book plus the CD or DVD that comes with it, lend out one copy, and keep the other copy of the book plus its CD or DVD in a safe place in case it has to be used to replace the borrowable copy.

It is not permitted to make a back-up copy, other than of a computer program under section 80, of any work (book, CD, DVD, etc) if the work is available for purchase.

118. If a photograph of a garment in a shop window is taken on a cell-phone and used in class, does that breach copyright? Does it make any difference that the garment is mass-produced, and placed in the window for commercial (not artistic) purposes?

A garment in a shop window is almost certainly an artistic work, as defined in section 2(1) of the Copyright Act 1994. All the provisions in the Act relating to copyright in artistic work therefore apply.

The special exception in section 73(1)(b), relating to works of artistic craftsmanship on public display, does not apply because this sub-section applies only to works that are "permanently situated in a public place or in premises open to the public" – garments in shop windows are unlikely to be on permanent display.

Section 44 does allow copying to be undertaken for educational purposes under certain prescribed conditions. Sub-section (1) allows artistic work to be copied by any means (including by photographic means using a cell-phone), but only if the copying is undertaken for use in the course of instruction (which includes preparation) by or on behalf of the person giving the course, and is for the purpose of assisting that staff member to prepare for or give the course or provide the instruction; and the copy may not be used for any other purpose. Sub-section (2) does not apply, because this sub-section allows copying only by means of a non-reprographic process (for example, copying by hand). Sub-sections (3-4) do not apply, because they do not include artistic work, and in any case sub-section (3)(f)(ii) allows "no more than the greater of 3 percent of the work" to be copied – and you cannot copy just 3% of an artistic work. Sub-section (5) does not apply, because the artistic work covered by this sub-section must be "included within the part of any work or edition copied under subsection (3) of this section".

The fact that a garment is mass-produced does not affect the copyright in it – after all, a book is mass-produced but there is still copyright in the book.

Nor does the purpose for which the garment is placed in the shop window affect the copyright in it – after all, a book in a bookshop or library is in a public place but there is still copyright in the book.

Nor does the fact that the media are free to take a photograph of a person in a public place apply – there is no copyright in a person.

The question states that the photograph was used in class, but not does say who used it. If it was the teacher or person taking the class, then section 44(1) applies. If it was a student, then perhaps section 43 ("Copying for research or private study") may apply. Nor does the question state for what purpose the photograph was used in class – possibly section 42 ("Copying for criticism, review, and news reporting") may apply.

In the present instance, if only one copy (the cell-phone photograph) was made, and this one copy was used for educational purposes, it seems unlikely that the copyright owner would take exception to the copying and initiate legal action (although the fact that no legal action is taken against possible infringement does not affect the copyright position). However, if multiple copies of the image were later made and used for

commercial purposes (for example, printed on tee-shirts for sale) the position would be very different.

As can be seen, copyright law is complex. In interpreting it, I suggest that you first need to determine what copying you wish to do, and then see if any of the exceptions (sections 41 to 49) apply. Note section 40, which states that "the provisions of this Part of this Act are to be construed independently of one another so that the fact that an act is not permitted by one provision does not mean that it is not permitted by another provision".

119. My institution has just purchased EndNote, which has raised the issue of multi-user access to an amalgamated group EndNote library here. (1) Some people want to combine their own libraries into an amalgamated group library – a library that everyone can use – and place this onto a common drive. Is this OK? (2) Does the copyright position change if some of the references contain embedded PDFs? (3) Is it a breach of copyright to print out a PDF and let other people read it, or for that matter let several people look at a printed-out copy of a research paper? (4) What about multi-user access to a shared EndNote library that does not contain PDFs, but does indicate for each individual citation who the person is who holds the PDF?

(1) By "libraries" do you mean collections of full-text periodical articles, either in printed or in electronic format? If so, then these copies were obtained either via Interloan under section 53, or by copying by the user under section 43. In either case, the copies were made / supplied for the user's own research or own private study, and may not be used for any other purpose. The Copyright Act does not allow copies made for an individual's own research or private study to be "pooled" and used by a number of other users, whether held in the library or in an office or laboratory. This applies to both print and electronic copies. So, placing digital copies of periodical articles which were copied or obtained for the research or private study of an individual on a server for use by a number of other individuals is not permitted.

(2) There is no copyright in a bibliographic citation, and a bibliographic citation may include a URL. However, the URL should be included in a bibliographic citation only if it links to a lawful copy of the periodical article – for example, to an article held in a publisher or aggregator database to which the library subscribes. The URL should not link to an electronic copy of a journal article which was obtained or copied for the research or private study of an individual – because to do so implies that this copy may be accessed by other individuals. The same principle applies to embedded PDFs.

(3) Since the PDF was copied or supplied for the individual person's own research or own private study, it may not be copied for any other individual. Nor should it be read by any other individual, since the copy was not made or supplied for the research or private study of any other individual. However, in practice no copyright owner is going to know or care if other individuals read the article – provided that the use they make of it is "for the purposes of research or private study" (section 53(3)).

In this regard it should also be noted that licence agreements take precedence over the Copyright Act. So if the article is supplied or otherwise made available under the

terms of a licence agreement, and if that licence permits the article to be copied, or shared with other researchers, then that takes precedence. I am thinking of the licence agreements under which articles included in aggregator or publisher databases are made available, or the licence agreements under which publishers allow authors of journal articles to make use of their own publications – these often allow the authors to share their articles with other researchers or colleagues working in the same field.

(4) Bibliographic citations that indicate the holder of a periodical article in PDF format are not unlawful, although I suppose it might be argued that, by indicating the holder of the article, other users are being encouraged to go to the holder to obtain a copy, which I suppose could be considered "aiding and abetting" a breach of copyright. But as I said in the previous paragraph, in practice no copyright owner is going to know or care if other individuals read the article – provided that the use they make of it is "for the purposes of research or private study".

120. The organisation for which I am librarian is celebrating its centenary, and to mark the occasion a book has been commissioned, which will contain historic photographs. Two of these are from books published by N. M. Peryer, a publisher unfortunately no longer in existence. One of the photographs is of someone who died in 1971. What is the copyright position?

Unless you are able to obtain permission from the copyright owner, you should not publish these photographs in your book. The fact that the publisher is no longer in existence, or that the subject of the photograph has died, does not affect copyright duration.

121. What are the limits / parameters of what may be copied from e-books in an educational establishment?

Exactly the same restrictions and exceptions apply to copying of or from e-books as apply to copying of or from printed books. Copying for educational purposes is covered by sections 44, 44A and 46 of the Copyright Act 1994 (as amended).

However, libraries and educational institutions often purchase access to e-books by means of a subscription, rather than purchase the e-books outright (as is normally the case with printed books). While this does not affect copyright in the e-books, it does usually mean that access to the e-books is covered by a licence agreement signed by the library or educational institution with the publisher of the e-books, or with an aggregator acting on behalf of the publishers of the e-books. Where a licence agreement is in place, this takes precedence over the terms of the Copyright Act, and determines usage of (including copying from) the e-books. Signatories (libraries or educational institutions) must of course comply with the terms of the licence agreements they sign, and must also ensure that their users (staff, patrons, researchers, students) also comply.

122. A patron of my library is writing a book for publication, and wants to know whether permission from the publishers must be obtained for paraphrases or direct quotations from other books. My understanding is that "fair use" does not require permission, and that permission is needed only if more than 10% of a writer's original work is being reproduced. Is permission needed for books that are in the public domain?

Section 43(1) of the Copyright Act 1994 states that "Fair dealing with a work for the purposes of research or private study does not infringe copyright in the work". (Note that the term used is "fair dealing", not fair use). Unfortunately, neither "research" nor "private study" are defined in the Act.

Section 43(3) of the Act then goes on to define the factors that a court shall have regard to in determining what constitutes fair dealing for the purposes of research or private study. There is no mention of any ten percent allowance, and in fact a judge once said that "there is no ten percent rule".

There is no prohibition on paraphrasing or summarising someone's words and incorporating these into your work – this is standard academic practice. Of course, due acknowledgement of the work(s) used must be given.

However, the question of direct quotation is not so clear-cut. In my view, direct quotation of short passages is permitted, again provided that the source is acknowledged. However, some commercial publishers are more cautious, and require permission from the publishers of the original works before direct quotations may be used.

In your email you refer to direct quotes of "maybe a couple of sentences". Personally, I think this is permissible; however, if you are concerned, then I suggest that a quick email to the publisher(s) seeking permission would not take much time.

You certainly do not need to seek permission for direct quotations from works that are out of copyright – but note that under section 22(1), copyright continues for 50 years from the end of the calendar year in which the author died, not 50 years from the publication-date of the work. (Under section 25, copyright in a typographical arrangement of a published edition, for example a new edition of a work that is out of copyright, expires 25 years from the end of the calendar year in which the edition was first published).

123. Could you clarify how abstracts are covered by copyright law. I know about section 71, which allows abstracts to be copied or issued to the public, provided that the abstracts are of articles on a scientific or technical subject (but not of articles in the humanities, education, law or social sciences). But is it permissible to create a new abstract and publish it on a website?

Certainly. By creating a new abstract you are not copying a published work (the original abstract), but creating a new work (the new abstract). Of course, your abstract must be a new work, paraphrase or summary, and not a word-for-word copy of the original abstract.

124. A group of scientists want to set up a digital repository of all the papers on their subject which they have collected over the years, often through Interloan, to be made accessible to the whole group. I understand that this is not permitted under the Copyright Act, because interloaned copies of papers may only be made available to the person who requested them, for that person's own research or private study. This restriction does not fit well with the collaborative nature of scientific research. My questions are: Where copyright has been signed over to the journal publisher, does it expire 50 years after publication? And does this 50 year limit apply to material published outside New Zealand, or does the law in the country of publication apply?

Your interpretation of what is permitted regarding copies of articles supplied on Interloan, whether in print or digital format, is correct.

Under section 22(1) of the Copyright Act 1994, copyright "expires at the end of the period of 50 years from the end of the calendar year in which the author dies". This duration does not change just because copyright has been signed over to a publisher or to anyone else, and is, of course, a much longer period than 50 years from the year of publication.

New Zealand copyright law applies in New Zealand both to material published in New Zealand and to material published overseas (section 19). Citizens of New Zealand are, of course, subject to New Zealand copyright law, not to the copyright law of overseas jurisdictions.

However, note that if your library has licence agreements with electronic journal publishers or aggregators, the terms of those licence agreements apply, and supersede New Zealand copyright law.

125. What happened to section 92A?

Section 4(2) of the Copyright (New Technologies) Amendment Act 2008 introduced into the Copyright Act 1994 a very broad definition of Internet service provider which included libraries, schools, universities, polytechnics, local authorities, offices, businesses, law firms, government departments, telecommunications organisations, Internet cafés, etc. Section 53 of this Amendment Act added a new section 92A to the Copyright Act 1994, which required Internet service providers (including libraries) to "adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer". As a result of protests from a host of individuals and organisations (including LIANZA and the Telecommunications Carriers' Forum), the Government decided to repeal section 92A, replacing it (in the Copyright (Infringing File Sharing) Amendment Act 2011) with a new definition of IPAP, or Internet protocol address provider, applicable to the infringing file sharing regime implemented by this Amendment Act, which excludes libraries and other organisations that "are not in the nature of a traditional ISP such as Telecom". The infringing file sharing regime is an improvement over the previous section 92A system (not implemented) – particularly because libraries are no longer included in the definition of ISP or IPAP, and because suspension of Internet accounts can be ordered only by a district court, and only up to

a maximum of six months. However, the infringing file sharing regime does raise a number of difficulties for libraries. Nevertheless, libraries have an obligation to ensure that breaches of copyright, whether by file sharing or by other means, do not occur within their institutions either by their own staff or by patrons using library-supplied computers or other equipment.

126. As part of an online book club for teens, my library is proposing to create a novel on Facebook to which each member of the club would contribute a paragraph. Who would own the copyright in the finished work? Does publication on Facebook change this?

Section 21(1) of the Copyright Act 1994 states that "the person who is the author of a work is the first owner of any copyright in the work", unless the work is made by an employee in the course of his or her employment (section 21(2)).

"Author" is defined in section 5(1): "the author of a work is the person who creates it". This is further qualified by section 5(2): "the person who creates a work shall be taken to be, (a) In the case of a literary, dramatic, musical, or artistic work that is computer-generated, the person by whom the arrangements necessary for the creation of the work are undertaken ...".

Section 6 defines the meaning of "work of joint authorship": this term "means a work produced by the collaboration of 2 or more authors in which the contribution of each author is not distinct from that of the other author or authors".

Section 8 elaborates on the meaning of "copyright owner": where copyright "is owned by more than one person jointly, references in this Act to the copyright owner, or to the owner of the copyright in the work, are to all owners". And "where different persons are entitled to different aspects of copyright in a work, the copyright owner ... is the person who is entitled to the aspect of copyright relevant for that purpose".

All this means that copyright in each contribution is owned by its author. Of course, the contributors may reach agreement with the editor or other person with overall responsibility for bringing the work together that copyright should be owned by that editor. And if there is a publisher, it is likely that the publisher will have reached agreement with the contributors that copyright should be owned by the publisher.

The fact that the novel is published on Facebook does not affect the copyright position. In fact, the Facebook Statement of Rights and Responsibilities at https://www.facebook.com/legal/terms specifically states "You own all of the content and information you post on Facebook ...". Whether placed on Facebook, or made available in some other way, copyright in each contribution is owned by the contributor, unless an agreement for some other arrangement has been reached with an editor, publisher or other entity.

127. Many of the DVDs we purchase are out of the zone of our players – that is, are zone 1, but our DVD players take only zone 4 or no-zone DVDs. The solution proposed by our IT guys is that we make a zone-free copy from the purchased DVD. Would this be a breach of copyright?

The Copyright (New Technologies) Amendment Act 2008 inserts into the Copyright Act 1994 sections 226A to 226E, dealing with technological protection measures. Section 226E(2)(b) allows a "qualified person", such as the librarian of a prescribed library or an educational institution, to use a TPM circumvention device to enable an act that is permitted by the Copyright Act to be undertaken. Unfortunately section 226, in its definition of a TPM or technological protection measure, specifically excludes zone controls.

Section 226 (b) states that "for the avoidance of doubt, [a TPM or technological protection measure] does not include a process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it only controls any access to a work for non-infringing purposes (for example, it does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market segmentation by preventing the playback in New Zealand of a non-infringing copy of a work)".

What this means is that the rights given to librarians and other "qualified persons" in sections 226D and 226E to circumvent a TPM do not apply to a device or system that controls geographic market segmentation (i.e. the zoning you refer to), so librarians and others may not circumvent zoning restrictions by applying the provisions of sections 226D and 226E.

So if librarians are not permitted to utilise the TPM provisions of the 2008 Amendment Act, is there anything in the original Copyright Act which allows zoning restrictions to be circumvented?

The Copyright Act 1994 of course does not mention zoning restrictions. However, section 55, "Copying by librarians or archivists to replace copies of works", in sub-section (1) states that "The librarian of a prescribed library or the archivist of an archive may make a copy of any item in the collection of the library or archive for the purposes of (a) preserving or replacing that item by placing the copy in the collection of the library or archive in addition to or in place of the item; ... without infringing copyright in any work included in the item". Sub-section (2) then goes on to state that this sub-section "applies only where it is not reasonably practicable to purchase a copy of the item in question to fulfil the purpose".

This section 55 is amended in the Copyright (New Technologies) Amendment Act 2008. The amendment states that section 55(1), quoted above, does not apply where a digital copy is being made. Instead, the Amendment Act inserts a new sub-section (3) into section 55, which states that "The librarian of a prescribed library or the archivist of an archive may make a digital copy of any item (the original item) in the collection of the library or archive without infringing copyright in any work included in the item if
(a) the original item is at risk of loss, damage, or destruction; and
(b) the digital copy replaces the original item; and

(c) the original item is not accessible by members of the public after replacement by the digital copy except for purposes of research the nature of which requires or may benefit from access to the original item; and
(d) it is not reasonably practicable to purchase a copy of the original item".

What all this means is as follows:

(1) If you copy a DVD, you are making a digital copy.

(2) Under section 16 of the Copyright Act 1994, copying a work is an act restricted by copyright. And under section 29, "Copyright in a work is infringed by a person who, other that pursuant to a copyright licence, does any restricted act" – unless otherwise authorised by any of the exceptions given in the Copyright Act.

(3) The Copyright Act 1994 (as amended) does not provide any exception, under either the copying by librarians provisions or the copying for educational purposes provisions, for making a copy to circumvent a zoning restriction.

(4) Section 55(3) does allow librarians of prescribed libraries to make a digital copy of a work in the collection of the library, if the purpose of making the copy is because "the original item is at risk of loss, damage, or destruction". It could possibly be argued that libraries make copies of audio-visual materials such as videos, audio-tapes and other media because they are so much at risk of being lost, damaged or destroyed, although this perhaps applies much more to tape-based media such as video and audio tapes, rather than to disk-based media such as DVDs.

(5) If your library is prepared to argue that this is the purpose of making the copy of the DVD, note the requirements of (b) and (c) quoted above.

(6) Note also the wording of (d): "it is not reasonably practicable to purchase a copy of the original item". If the DVD has just recently been purchased by your library, then it will normally be possible "to purchase a copy of the original item". From a librarian's perspective, it is unfortunate that the wording of this (d) differs from the original section 55(2), which (as quoted above) reads "it is not reasonably practicable to purchase a copy of the item in question <u>to fulfil the purpose</u>" – since it is not reasonably practicable to purchase a copy in a format that can be played on the library's zone 4 players. However, (d) does not have those additional words.

Summary:

Unless your library is prepared to argue that the purpose of making the copy is because the DVD "is at risk of loss, damage, or destruction", rather than because it is in the wrong format, then I can find nothing in the Copyright Act 1994 as amended that allows you to make a copy.

Your options therefore would appear to be:

(1) purchase a DVD player that can play any zone recordings; or

(2) in each instance, seek permission from the copyright owner (normally, the publisher of the DVD) for permission to make a copy in zone 4 format.

Note: *This answer differs from the answer given to Question 107 (above). In that case, the library wants to make a copy of a DVD in zone 4 format held by the library ("the original item"). Since a copy can be purchased only in zone 1 format, it is not possible "to purchase a copy of the original item", so it is permissible to make a copy in zone 4 format under the terms of section 55(3). In this case, however, "the original item" held by the library is in zone 1 format, and since it is possible "to purchase a copy of the original item" in that format, it is not permissible to make a copy under the terms of section 55(3).*

128. As a librarian I create abstracts for the library catalogue, to provide information to the user about a particular book or resource. If the blurb at the back of the book contains the information I wish to incorporate in the abstract, may I copy or paraphrase it?

There is copyright in blurbs, just as there is in any other document – see section 14(1)(a) of the Copyright Act 1994.

Section 16(1)(a) of the Act states that copying a work is a restricted act. And section 29(1) states that "Copyright in a work is infringed by a person who, other than pursuant to a copyright licence, does any restricted act" – unless this is permitted by one of the exceptions included in the Act.

"Copying" is defined in section 2(1) as meaning "in relation to any description of work, reproducing or recording the work in any material form, and includes ... storing the work in any medium by any means".

However, making a paraphrase of a blurb is not making a copy of it, so is not a "restricted act". In my view, you may certainly make a summary or paraphrase of a work (including of a blurb) without infringing the copyright in that work.

A blurb is a form of advertisement, added to the cover of a book, DVD or other resource to advertise the work, and to give guidance to potential purchasers or users as to its content and likely relevance. By paraphrasing such an advertisement and adding it to your catalogue, you are further promoting use of the resource. It is extremely unlikely, therefore, that the owner of copyright in the blurb would have any objection to what you are doing, provided that the abstract you create is a paraphrase or summary and not a blatant word-for-word copy.

129. I am in process of converting videos to DVD format, and am having difficulty in tracing some producers who I think are the copyright holders of videos in our collection. I should like to know: how long do I need to keep searching, how much documentation do I need to prove that I have been searching, and is there anything else I need to do in order to get copyright waiver if I can't trace the producer/author?

The first question to be asked is, What is the purpose of copying the videos to DVD format? If the purpose is because "the original item is at risk of loss, damage, or destruction", then under section 55(3)(a) of the Copyright Act 1994 (as inserted by the Copyright (New Technologies) Amendment Act 2008) the librarian of a prescribed library may make a digital copy of any item in its collection without infringing copyright – provided that sub-sections (b), (c) and (d) of section 55(3) are complied with. Those sub-sections are that the digital copy must replace the original item (i.e. the video); the original item must not be accessible by members of the public after replacement; and it must not be reasonably practicable to purchase a copy of the original item.

If the purpose of the copying is not because the original videos are "at risk of loss, damage, or destruction", then digital copies may not be made without the prior permission of the copyright owner.

There is nothing in the Act that spells out what you have to do if you are unable to trace the copyright owner, or how much documentation you should keep. Only a court could rule on these issues. Usually, a court will rule on what is "reasonable", depending on the particular circumstances of the case.

I do not know whether a court would rule that, if you are unable to locate the copyright owner after making diligent inquiry, you may go ahead and make a copy. I suspect probably not – the judge might well rule that, if you are unable to locate the copyright owner, you should not make a copy. However, a judge <u>might</u> rule that, if you have made all reasonable endeavours to locate the copyright owner without success, and can show to the court the efforts that you have made (the documentation you refer to), then the breach of copyright in such an instance is not very serious. Until there has been some case law, there is no way to know how a judge might rule.

Some people take the view that the risk in making a digital copy is very low – it is extremely unlikely that the copyright owner would ever find out that a copy onto DVD has been made; and that if the copyright owner did find out, it is more likely that they would write asking you not to make copies and to destroy any copies that have been made, rather than taking legal action. However, responsible institutions should take the view that they do not want to be a party to breaching copyright, even if the risk of being found out is very low.

.

Perhaps you should give further consideration as to whether the purpose (or one of the purposes) of copying the videos to DVD format is because the videos "are at risk of loss, damage, or destruction".

130. We hold a video that has no publication details on it, and it is not one that can even obscurely be traced to a publishing institution but which quite clearly is focused on IHC, for IHC with IHC people. How can we make a copy within the framework of copyright law?

The fact that a work does not have a copyright statement on it, and that you are unable to trace any copyright owner, does not alter the fact that there is copyright in the work, and that it may not be copied without the permission of the copyright owner.

Section 67 of the Copyright Act 1994 confirms this. Section 67 states that copyright is not infringed if (a) it is not possible for a person who wishes to do so to ascertain the identity of the author by reasonable inquiry; and (b) it is reasonable to assume that the copyright has expired, or that the author died 50 years or more earlier. By implication, therefore, copyright is infringed if it is not possible to ascertain the identity of the author but it is not reasonable to assume that copyright has expired or that the author died 50 years or more earlier.

Your choices therefore would appear to be:

(1) Copy the video onto DVD under s.55(3)(a) on the grounds that "the original item [i.e. the video] is at risk of loss, damage, or destruction".

(2) Copy the video onto video (which is not a digital format) – which a prescribed library is permitted to do under section 55(1)(a) (copying for preservation or replacement).

(3) Copy the video, and hope that no-one takes legal action against your library – knowing that your defence will be that you took all reasonable steps to trace the copyright owner, but were unable to do so.

(4) Don't copy the video.

131. When using an extract from a non-New Zealand article in a parliamentary submission, is there a need to get the journal's permission? Does this change if the submission is to a Minister for purposes of a regulatory decision?

You do not need to get permission. Section 59(1) of the Copyright Act 1994 states that "Copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings". And section 60(1) states that "Copyright is not infringed by anything done for the purposes of the proceedings of a Royal Commission, commission of inquiry, ministerial inquiry, or statutory inquiry". Submissions to Parliament or a Select Committee would be covered by "parliamentary proceedings". And I should have thought that submissions to a Minister would be covered by one or other of these two sections – although of course, only a court could rule definitively.

132. I have a researcher who would like to copy two chapters (about 40 pages) from a 300 page book I have Interloaned for him. What does the "reasonable" provision mean?

This is a very difficult question, because the Copyright Act 1994 gives little useful guidance. Section 43, "Copying for Research or Private Study", states in sub-section (1) that "Fair dealing with a work for the purposes of research or private study does not infringe copyright in the work"; and in sub-section (3) that, in determining what "constitutes fair dealing for the purposes of research or private study, a court shall have regard to –

(a) The purpose of the copying; and
(b) The nature of the work copied; and
(c) Whether the work could have been obtained within a reasonable time at an ordinary commercial price; and
(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".

This means that, under section 43 of the Act:

- *the copying must be for the sole purpose of the user's own research (which may be commercial research) or private study*
- *the whole of a work must not be copied – although it is probably permissible to copy the whole of one periodical article*
- *it is unlikely that there will be fair dealing with a work if a whole chapter from a book, a summary, or the whole or the greater part of the treatment of a particular topic in a work, is copied*
- *there is no "10 percent rule" permitting a set amount (for example, 10 percent) of a work to be copied*
- *no more than one copy of the same work, or the same part of a work, may be made on any one occasion*
- *but the whole of an abstract which summarises the content of any article on a scientific or technical subject published in a periodical may be copied, or included in an electronic database (section 71).*

Your researcher must determine for him / herself whether the criteria listed above apply to the material that he / she wants to copy. I regret that I am unable to give any other guidance on this.

133. I would like to use in a musical composition some words I have taken from the Atatürk ANZAC memorial. I have emailed the Turkish Embassy but have not yet had any response. What is the copyright position?

The words were written by Mustafa Kemal Atatürk in 1934. He died on 10 November 1938, so copyright in the words expired 50 years after the end of the calendar year in which he died, i.e. on 31 December 1988. You are therefore free to use these words in your composition. However, given that these words are on a war memorial, national and cultural sensitivities come into play, so I consider that you have done the correct thing by writing to the Turkish Embassy.

134. Does publication of a thesis change whether copyright permission needs to be obtained for use in the thesis of diagrams copied from periodical articles?

It can be argued that all theses are "published" (see the answer to Question 30, above). Whether or not, certainly making a thesis available digitally via a computer network constitutes "publication". So the same principles regarding permissions apply to all theses. In general, if there is any likelihood of there being separate copyright in the diagram or drawing, permission should be obtained from the copyright owner. If

the thesis is subsequently published by a commercial publisher, it is very likely that the publisher will insist that permissions be obtained prior to publication.

135. What is the copyright position for use in theses of diagrams copied from the Web?

I believe that there is copyright in anything on the Internet, unless the author has specifically waived copyright, or has stated that the material is in the public domain or is subject to a Creative Commons licence which permits free downloading and copying.

If the diagram or illustration on the Web is accompanied by a copyright symbol or statement, then there is no doubt – you must get permission.

However, the absence of a copyright symbol or statement can not be taken to mean that the copyright owner has waived copyright: the copyright owner may have forgotten to indicate the copyright status, or not given any thought to copyright issues – but this does not negate the legal rights of the copyright owner. It could be argued that, by placing material on the Web, the copyright owner is in fact waiving copyright – but that can not be assumed. So if the copyright owner can be identified, an email should be sent seeking permission. However, often the copyright owner will not be able to be identified. In such a case, and if it ever came to a court case (which is extremely unlikely), it seems probable that the court would ask for evidence that the student had taken all reasonable steps to identify the copyright owner, without success.

So, the student should seek permission if the copyright owner can be identified. However, if the copyright owner can not be identified, the student should decide either not to use the material, or to take a slight risk that the copyright owner might discover that the material has been copied without permission and take legal action for breach of copyright. Such discovery is, of course, facilitated if the thesis is published digitally and made available on the Internet through a research repository or the Australasian Digital Theses Program.

136. What is the copyright position regarding a recording of a group singing old hymns and other songs?

Recordings, like other A/V works, have a number of copyrights applying to them:

(1) Copyright in each of the original pieces. There may be separate copyright in the original music, and in the words. Some or all of these copyrights may have expired.

(2) Copyright in the new musical arrangements. Permission to copy will need to be obtained from whoever did these new arrangements.

(3) Copyright in the performance(s) of the new musical arrangements. Permission should have been obtained from each of the performers to make the recording (section 171(1)(a) of the Copyright Act 1994). And permission from each of the performers needs to be obtained to communicate the recording (i.e. to make it available by means of a communication technology, such as via a website) (section 171(1)(b)), or to make copies of the recording (section 173(1)).

At the time that the recordings were made, it is probable that no-one gave any thought to copyright, or the need to get permission to make a recording and to make copies of the recording. (It is a defence if it can be shown that "at the time of the infringement the defendant believed on reasonable grounds that the performer's consent had been given" (section 171(2))).

It may not be difficult to get permission from the arranger(s). And if the performers are still around, it should not be difficult to get their permission for making the recording, making copies of the recording, and communicating track(s) from the recording on your or other websites.

That still leaves to be considered the question as to whether there continues to be any copyright in the original music or words. Copyright in musical works expires "at the end of the period of 50 years from the end of the calendar year in which the author dies" (section 22(1)); or, if the work is of unknown authorship, "50 years from the end of the calendar year in which it is first made available to the public..." (section 22(3)).

137. I own a complete set of the journal *Here and Now: an Independent Monthly Review*, which I would like to digitise and make available on the Web. The journal was published in Auckland between October 1949 and November 1957, and is a very important source for this pivotal era in New Zealand's political, social and literary history. Copyright in the original articles published in the journal will be owned either by the publishers (Here and Now Publications) or, more likely, by each of the individual authors, most of whom will have died by now. What is the copyright status of this journal, and how should I proceed to gain copyright approval if necessary?

Copyright duration is not affected by transfer of copyright ownership. It is often the case that, as part of the contract to publish, the publisher of a scholarly journal will require copyright ownership to be transferred by the author of the article to the publisher. However, my understanding is that copyright duration continues for the same period as before – i.e. until "the end of the period of 50 years from the end of the calendar year in which the author dies" (section 22(1)). The only difference is that copyright is now owned by the journal publisher.

For many of the authors published in Here and Now*, the copyright will not yet have expired – for example, in the case of articles by Dan Davin, the copyright will not expire until 31 December 2040 (1990 + 50 years).*

In addition, there is separate copyright in the "typographical arrangement" of the published edition, which expires "at the end of the period of 25 years from the end of the calendar year in which the edition is first published" (section 25). For Here and Now*, typographical copyright will have expired on 31 December 1982 (1957 + 25 years).*

However, it is not always the case that the author's copyright is transferred to the journal publisher – and this applies particularly to small literary journals, where no thought may have been given to copyright ownership. Where copyright has been

retained by the author (or rather, where copyright has not been transferred to the publisher), and where the author has died, copyright will be owned by whoever the author left the copyright to in her/his will. If the author did not specify this in the will, then copyright will be owned by whoever was named to inherit the "goods and chattels" referred to in the will.

If the work is "of unknown authorship", copyright expires "at the end of the period of 50 years from the end of the calendar year in which it is first made available to the public by an authorised act" (section 22(3)). For Here and Now*, copyright in works of unknown authorship will already have expired (1957 + 50 years).*

If the publisher of Here and Now *is still in existence, you should contact that publisher to find out whether copyright is owned by the publisher, and if so whether you may have permission to digitise. However, if the publisher is no longer in existence, seeking permission to digitise is not an option available to you.*

If this is the case, what are your options?

(1) Assume that copyright is owned by the individual authors, and try to obtain their permission to digitise, either from them (if still alive) or from whoever now owns the copyright. This is almost certainly not a possibility.

(2) Assume that copyright ownership is owned by the publisher. Make "all reasonable" efforts to locate the publisher, but if no longer in existence or cannot be traced, go ahead and digitise. However, this leaves you (and your web publisher) open to a charge that you have breached copyright, and if it ever came to a court case, you would need to convince the judge that your assumption that copyright is owned by the publisher is "reasonable", and that you took "all reasonable" steps to try to trace the publisher. There is, therefore, the possibility of risk in this option, and you may not want to put yourself (or your web publisher) in such a position.

(3) Wait until copyright has certainly expired – which for younger writers may be a lot later than 2040.

138. The scientific research institute at which I work has been asked by a British film producer for permission to use an image of a moa in an educational television programme on unusual fauna of the world. The image was first published by the research institute in one of its scientific journals in 1955, and is credited to Neville Lewers, a well-known photographer and artist. Are we able to give permission for the image to be used?

Neville Robert Lewers was born in 1913 and died in 2009. Copyright in his work, therefore, continues for 50 years from the end of the calendar year in which he died (section 22(1) of the Copyright Act 1994) – that is, until 2060.

The only exception to this would be if the photograph was taken by Lewers in the course of his employment, in which case copyright will be owned by that employer (section 21(2)); or if Lewers was commissioned (and paid) to take the photograph, in which case copyright will be owned by whoever commissioned the photograph to be

taken (section 21(3)). Since there is almost certainly no way of knowing whether either of these is so, it must be assumed that they are not so.

This being the case, copyright continues in the photograph; and since copyright is not owned by your institute, you do not have authority to authorise the photograph to be used in the way requested.

139. I am thinking of starting a small Internet business, researching Internet databases for people who need research done but are either too busy to do it themselves, or simply don't know how to research databases themselves. Am I permitted to purchase PDFs from Infotrieve and pass these on to my clients?

The first question is, will Infotrieve make copies of articles and supply these to you, if you are a commercial research company and not a library?

If Infotrieve will do so, then you may certainly pass these copies on to your clients – forwarding a copy is not making a copy. Of course, you may not retain a copy of the supplied article, because it is supplied for the requester's own research or private study, not for your company.

However, this needs to be qualified by anything that is in the Infotrieve licence agreement. You must comply with that licence agreement in all respects.
You also probably need to check out whether Infotrieve charges more for the supply of copies of articles to a commercial company than it does for supply to a library.

My suggestion is that you contact Infotrieve, tell them what you are proposing to do, and then comply with their response.

140. Sub-section 6 of Section 44 seems to indicate that a tutor or lecturer at a polytechnic or university may copy the whole of a book under the copying for educational purposes provisions, provided that no more than 3% is copied at any one time, and that each batch of copying is undertaken at fortnightly intervals. Is this correct?

No, I do not believe that your interpretation of section 44(6) is correct. It seems to me that the purpose of section 44(6) is to place further restrictions on the copying that is permitted under section 44(3). Section 44(3) permits the greater of 3% or 3 pages of a work to be copied for an educational purpose by or on behalf of an educational establishment, and section 44(6)(a) further restricts this by stating that that same 3% / 3 pages may not be copied again under section 44(3) by or on behalf of that educational establishment within 14 days of the first copying. Section 44(6)(b) then goes even further, and states that no other part of that same work may be copied under section 44(3) by or on behalf of that educational establishment within 14 days of the first copying. The clear intent of section 44(6) is to place further restrictions on copying from the work from which copies have lawfully been made under section 43(3) – the intent is not to permit the whole of a work to be copied over a period of time. Indeed, section 44(4) makes it clear that the whole of a work may not be copied under section 44(3).

141. I am setting up a private self-help library and study group, and would like to play and loan CDs and DVDs that I have purchased. What are the copyright implications?

Copyright law is concerned (among other things) with the copying and showing of in-copyright materials; it is not concerned with the loan of original works, such as the books, audios and videos that you have purchased. Under New Zealand copyright law you do not require the permission of the producer or publisher to loan these materials to other people. However, if the books, audios or videos were supplied to you on the condition, if they are loaned, that each person will be loaned only one item at a time, then you have an agreement with the producer or publisher and must abide by that agreement. You may certainly negotiate with the publisher or producer to change that agreement.

Section 81 of the Copyright Act 1994, "Playing of sound recordings for purposes of club, society, etc.", states that "It is not an infringement of copyright in a sound recording to play the sound recording as part of the activities of, or for the benefit of, a club, society, or other organisation", provided that the following conditions are complied with:

> *"(a) That the club, society, or organisation is not established or conducted for profit; and*
> *(b) That the main objects of the club, society, or organisation are charitable or are otherwise concerned with the advancement of religion, education, or social welfare; and*
> *(c) That the proceeds of any charge for admission to the place where the recording is to be heard are applied solely for the purposes of the club, society, or organisation."*

However, copyright law is superseded by any agreement that you have signed with the producer or publisher of the sound recordings. You must comply with any agreement that you have signed, but you may certainly negotiate with the publisher or producer to change that agreement.

Producers or publishers may place whatever restrictions they wish on the use of their works. However, these restrictions, imposed as a condition of the supply to you of the works, must have been known to you and agreed by you prior to purchase – the restrictions cannot be imposed at a later date. In other words, if you accepted conditions and restrictions at the time you purchased the works, you must legally comply with those conditions and restrictions, or negotiate for a change to them.

The meaning of "private home viewing" is as defined in the agreement with the producer or publisher of the works. I should have thought that it includes showing the work to a group in a private house, but you need to read the definition given in the agreement to confirm this. Certainly, a group meeting in a private house would not be considered to be a "public gathering".

I do not think that an annual membership / registration fee is the same as a fee to view or listen to a video or audio at a "private home viewing".

Producers and publishers may certainly specify, as part of the agreement, that a work is not for rent, loan or resale. If you have accepted this stipulation as part of the agreement to purchase, then you must abide by this.

The audios and videos you have purchased may not be copied – if additional copies are required, they must be purchased from the producer or publisher.

Videos purchased by libraries and rental stores are purchased under the terms of agreements which those libraries and rental stores must abide by.

Section 79 of the Copyright Act 1994 states that "Copyright in a work (being a computer program, sound recording, or film) is not infringed by the rental of that work to any person by an educational establishment or a prescribed library", provided that "(a) the educational establishment or prescribed library does not effect the rental of the work for the purposes of making a profit; and (b) the work that is the subject of the rental has previously been put into circulation with the licence of the copyright owner" (i.e. is a lawful copy). But as noted above, this provision will be superseded by any agreement signed with the producer or publisher.

142. Am I able to include photographs in a database, if I have made every effort to seek permission from the publisher? For example, 20 of the 1700 photographs in a database of WW1 soldiers come from a publication where I have been unable to contact the publisher. Given that these will have been only a few photos scanned from the book, are these likely to be covered by "fair use"?

It seems to me that the fact that you are unable to trace the copyright owner does not give you the right to make copies without permission. A judge may very well rule that, if you are not able to obtain permission from the copyright owner, then you shouldn't make a copy until copyright has expired.

Photographs are particularly difficult, because there is usually separate copyright in images; and because you need to know whether the photographs were commissioned or not. Copyright in a photograph may continue for a very long time – for example, if a photo was taken by a photographer when s/he was 20, and s/he lives until the age of 90, copyright in that photograph will continue for 120 years after it was taken – the remaining 70 years of the photographer's life, plus 50 years.

Section 43(3)(e) of the Copyright Act 1994 implies that in some circumstances it may be permissible to copy the whole of a work under the fair dealing provisions, but it seems unlikely that this would apply to the copying of the whole of a number of photographs from a book.

143. Why does section 52 allow more than one article to be copied from the same issue of a periodical, but section 53 allows only two articles to be copied?

You are correct that the wording of section 52(2)(b) ("Copying by librarians of articles in periodicals") is more generous than that in section 53(1)(b)(ii) ("Copying by librarians for users of other libraries"). It seems likely that the drafters of the

Copyright Act 1994 considered it reasonable to be more generous regarding copying by librarians of prescribed libraries for their own users, as compared with copying by librarians for the users of other libraries.

144. Does section 52 mean that a librarian may supply 5 articles on the same topic from a (hypothetical) journal issue that contains 30, or even 6 articles? Is there any upper limit? How does this relate to a "special topic" issue of a journal?

Yes, section 52 does mean this, provided that the articles copied all "relate to the same subject-matter" – that is, are closely related and focus on a particular aspect of a subject. The Copyright Act does not set any upper limit. This applies also to "special topic" issues of journals: if all the articles are on the same subject, defined narrowly, then under section 52(2)(b) they may all be copied for the user.

145. Does "reasonable proportion" trump "the same subject-matter"?

No. "Reasonable proportion" is used in section 51(1) ("Copying by librarians of parts of published works") and section 53(1)(a) ("Copying by librarians for users of other libraries") in relation to copying by librarians of prescribed libraries from books or other works. The phrase does not relate to copying of periodical articles.

146. What does "reasonable proportion" actually mean?

"Reasonable proportion" is not defined in the Act. The LIANZA Copyright Guidelines *in paragraph 11.6 says:*

> *Guidance may be obtained from s.43 (fair dealing for research or private study) and s.44 (copying for educational purposes – the 3% / 3 pages rule). In essence, it is the significance of what is copied that impacts on "reasonable proportion", not simply the amount that is copied. It is especially important to note that there is no "ten percent rule".*

So in effect, each instance must be considered individually, and it is impossible to lay down helpful guidelines.

That said, if you pushed me, I would probably agree that providing a copy of one chapter from a book of at least 10 chapters is possibly "reasonable"; that providing copies of short sections from a couple of chapters is probably "reasonable"; and that suggesting to the student that, if more is wanted, s/he should purchase the book, is a good idea. However, how a court would rule on this is unknown.

147. I have included short quotations from four New Zealand literary works in a journal article. Is this fair dealing?

The copying of passages from other works is standard academic practice, and is covered by one or other of sections 42 or 43 of the Copyright Act 1994.

Section 42(1) states that "Fair dealing with a work for the purposes of criticism or review ... does not infringe copyright in the work if such fair dealing is accompanied by a sufficient acknowledgement". "Fair dealing", "criticism" and "review" are not defined. I should have thought that this section authorises quotation (with "sufficient acknowledgement") from a literary work in an article of criticism of that author's work.

Section 43(1) states that "Fair dealing with a work for the purposes of research or private study does not infringe copyright in the work". Sub-section (3) of this section defines what a court shall have regard to in determining what constitutes "fair dealing for the purposes of research or private study" in relation to section 43(1).

I should have thought that the journal article constitutes research, and that the requirements of sub-section (3) (a), (b) and (d) are satisfied. Subsection (3) (c) does not apply. If this is correct, then the question is whether the requirements of sub-section (3) (e) are met. Only a court could rule on this, but in my view the requirements of "amount and substantiality" are met in the article.

There is nothing in the Act requiring permission to be sought from the copyright holder if sections 42(1) or 43(1) apply.

148. In the past my library has supplied articles to our off-campus students and staff from our electronic journal subscriptions as PDFs that we have saved (and later deleted) and sent as email attachments with a copyright statement. Now we are starting to send a URL link to the requesting article – either to the contents page of a journal issue, or to an abstract where access to the PDF is on the same screen. Should we send some type of copyright statement with the URL link? Should this statement relate to the relevant licence agreement, rather than to the Copyright Act?

The Copyright Act 1994, as amended by the Copyright (New Technologies) Amendment Act 2008, permits the librarian of a prescribed library to make a digital copy of a periodical article and supply this to "any person", provided that the provisions of sections 52 and 56B are complied with. One of those provisions is that the librarian must give to the person to whom the digital copy is supplied, when the copy is supplied, "a written notice that sets out the terms of use of the copy". LIANZA's Copyright Guidelines *in paragraph 11.9 gives some suggested wording for such a notice.*

And section 56A allows the librarian of a prescribed library to communicate a copy of a digital work (that is, to make it available by means of a computer network, the Internet, an intranet or secure server) to an authenticated user, provided that the work is already available in digital format, that the librarian acquired the digital copy lawfully, that each user is informed in writing about the limits of copying and communication allowed by the Act (suggested wording is given in LIANZA's Copyright Guidelines *Appendix 3), that the digital copy is communicated to the user in a form that cannot be altered or modified, and that "the number of users who access the digital copy at any one time is not more than the aggregate number of digital copies of the work that the library has purchased or for which it is licensed". Section 56A,*

therefore, allows a prescribed library that has lawfully obtained a copy of a work in digital format to communicate that copy to its users without a licence, provided that the required conditions have been complied with.

Section 56A does not of course apply where permission to communicate the work has already been granted by the copyright owner – for example, works included in electronic databases which are subject to licence agreements. You are correct that the licence agreements signed by your Library with e-journal publishers, database providers and aggregators take precedence over the Copyright Act 1994 (as amended). Unfortunately, the principle that lies behind section 226D, that a copyright holder's rights as stated in section 226B "do not prevent or restrict the exercise of a permitted act" (that is, an act permitted by the Copyright Act), applies only to "the issuer of a TPM work" and not to other in-copyright works.

Most licence agreements (with a few exceptions) are reasonably generous in what use they allow of the articles in their databases for educational purposes.

I think your Library is wise to give your users a URL link to the articles they require, rather than to make a digital copy of the articles and supply these digital copies on request to your users. But this does place the onus on your users to comply with the terms of your licence agreements, and although you make this information very easily available to them via your Catalogue, you know that most of your users will never look this information up.

It therefore seems very sensibly for your library to send some brief copyright information with the URL links to your users, explaining that the article is subject to copyright law in general and to the licence agreement signed by the library in particular. This will need to be a generic statement, rather than a statement specific to each of your database licence agreements, since the latter would be a nightmare to administer.

149. Are libraries allowed to keep photocopied items in a vertical file to lend to members, if the copies are of items published before the 1994 Copyright Act came into force?

The question is not, does the Copyright Act 1994 apply retrospectively? but rather, are the copies held in your vertical file lawful copies – that is, were the copies made lawfully under the Copyright Act 1962, which the 1994 Act superseded?

Section 21 of the Copyright Act 1962 is headed "Special exceptions for libraries, Universities, and schools". Sub-section (1) of section 21 states that a copy of a published work may be made or supplied by or on behalf of the librarian "of the library maintained by any Government Department, local authority, public body, University, or school, or of a library of any other prescribed class, not being a library conducted for profit", subject to the following conditions:

(a) The copies in question shall be supplied only to persons satisfying the librarian that they require them for the purposes of research or private study and will not use them for any other purpose;

(b) No copy shall extend to more than a reasonable proportion of the work or to more than one article in a periodical publication, unless two or more articles in the same publication relate to the one subject-matter;
(c) No person shall be furnished with more than one copy;
(d) Persons to whom copies are supplied shall not be required to make a higher payment (if any) for them than the cost attributable to their production.

It is clear from this wording that section 21(1) applies only to copying for a user, for that user's own research or private study – it does not permit copying for the library's own collections, or for use by other users.

Sub-section (2) states that copyright is not infringed by making or supplying a copy of a work, by or on behalf of the librarian of a library, if the copy is supplied to the librarian of another library. It is clear from this wording that section 21(2) applies only to copying for another library, not for your own library.

There are no provisions in the 1962 Act for copying for preservation or replacement.

It seems to me, therefore, that the copies in your vertical file made before 1 January 1995 (when the 1994 Act came into force) were not made lawfully under the 1962 Act and therefore are unlawful copies.

150. Does making an index to an in-copyright work breach the copyright in that book?

No. Indexing a work certainly does not affect copyright in the work being indexed – the indexer is not copying the original work, but is creating a new work, the index.

151. Is it permissible to "share" articles from online journals among members of a team?

Subscriptions to online journals, whether through aggregators such as Ebsco and ProQuest, or direct from journal publishers, are almost always subject to licence agreements signed by the library with the aggregators or journal publishers. These licence agreements override copyright law, and your library has an obligation to ensure that all use of the e-journals conforms with the terms of those licence agreements.

Many licence agreements do allow articles to be shared with other researchers in the same institution, but only for those researchers' own research or private study. Other licence agreements may not permit this. Generally speaking, licence agreements with e-journal publishers are likely to be more liberal in what they permit than licence agreements signed with aggregators.

Because of the number of licence agreements your library may have signed, and the complexity of these agreements, it would almost certainly be preferable for your enquirer to "share" the articles by distribution of URL links to the members of the team (there is no copyright in URLs). Team members may then choose whether to read the article(s) on the screen, or download the article(s) to their own PCs, or make

print copies of the article(s) – all of which will certainly be permitted by the licence agreements, provided that the use is for each team member's own research or private study.

By following this suggestion – referring URL links to the members of the team, rather than making print copies for them – your enquirer can be sure that s/he will be acting in accordance with the licence agreements, and does not need to be concerned with what each separate licence agreement permits or does not permit.

Copying from print journals must, of course, be in accordance with the Copyright Act 1994, as summarised in LIANZA's The Copyright Act 1994 and Amendments: Guidelines for Librarians.

152. How many pages can be copied from e-books for educational purposes? Does the CLNZ licence apply?

If your library has purchased the e-books, then they are subject to the same provisions of the Copyright Act 1994 (as amended) as for print books, so the very restrictive section 44(3-4) applies – the greater of 3% or 3 pages. If, however, your library has purchased an annual subscription which permits access to the e-books, then you must comply with the terms of the licence agreement which your library has signed with the e-book publisher or supplier. This licence agreement overrides the provisions of the Copyright Act, and may in fact be more generous.

The CLNZ licence excludes "works downloaded from the Internet", so does not cover e-books.

153. Who owns the copyright in the church ledgers from our local church? These date back to the early 1900s and some are badly damaged.

Section 21(1) of the Copyright Act 1994 states that "the person who is the author of a work is the first owner of any copyright in the work". Sub-section (2) qualifies this by stating that where a work is made by an employee in the course of his or her employment, that person's employer is the first owner of any copyright in the work. Section 2(1) of the Act defines employee as meaning a person who is "employed under a contract of service or a contract of apprenticeship".

Section 5(1) of the Act defines the meaning of "author of a work" as being "the person who creates it", and sub-section (3) states that the author of a work may be "a natural person or a body corporate".

I assume that the church ledgers were compiled over many years by different people who are not named. If these people were ministers, they would have been employees of the church, parish or diocese. Or they may have been people acting in some official capacity given to them by the church, for example secretary, minutes secretary, recorder or the like – whether this would amount to a "contract of employment" only a court could decide.

Given that the church's ledgers are unpublished, and assuming they are works of unknown authorship, I should have thought that copyright would rest with the church.

Section 22(3) states that "if the work is of unknown authorship, copyright expires at the end of the period of 50 years from the end of the calendar year in which it is first made available to the public by an authorised act". So copyright will have expired in all ledgers published prior to 51 years ago.

154. Does the need for a library to have a "compliance programme" apply only to photocopiers? Or does it also apply to checking what people are doing on our Aotearoa People's Network computers? And what about wi-fi users?

Libraries have an obligation to minimise all copyright infringement in their libraries, whether the infringement is by photocopying, file sharing, downloading, uploading, copying, etc. This applies to all library-owned equipment, including public-access computers and the library's computer and wi-fi networks.

155. How can libraries mimimise copyright infringement?

Some steps to minimise copyright infringement might include:

- *Reading and understanding LIANZA's* The Copyright Act 1994 and Amendments: Guidelines for Librarians*, and particularly section 22, which is on the LIANZA copyright webpage at http://www.lianza.org.nz/resources/copyright.*
- *Developing a written copyright policy specific to your library (a* Sample Library Copyright Policy *is on LIANZA's copyright webpage).*
- *Incorporating within that policy your library's procedures for dealing with charges of alleged copyright infringement.*
- *Nominating a senior manager to have special responsibility for copyright matters in your library, to whom staff may refer when a copyright issue arises.*
- *Giving instruction to your staff on copyright issues relating to libraries.*
- *Training your staff on what to do if unlawful downloading by library users is suspected.*
- *Educating your users on copyright matters affecting them, including issues relating to copyright and the Internet.*
- *Posting warning notices about illegal copying and downloading from the Internet adjacent to public-access computers, scanners, photocopiers and other library equipment, and on screen-savers.*
- *Blocking access where possible to Internet sites the sole purpose of which is known to be to facilitate unlawful downloading of materials from the Internet.*
- *Investigating charges of alleged copyright infringement promptly – of course always treating users with respect, observing and preserving their privacy, and considering them to be innocent unless evidence proves otherwise.*
- *Where breaches of copyright by a library staff member are substantiated, giving the person additional instruction about copyright law in general and the current incident in particular, and warning that a repetition may result in disciplinary action being taken under the library's employment contract with that staff member.*

- *Where breaches of copyright by a library user are substantiated, and the user can be identified, giving the person information about copyright law as this affects library users, and warning that a repetition may result in the person being banned from using public-access Internet computers in the library.*
- *Responding to charges of alleged infringement in a timely manner. Libraries do have the right to challenge and dispute such charges; they should report back to the IPAP or copyright owner if they are not able to identify individuals who have used library computers on dates and times at which breaches of copyright have been alleged; and they should be prepared to list the steps taken by their library to minimise copyright infringement.*

156. The organising association of a conference wants to publish the conference papers. What is the copyright position vis-à-vis the authors of the papers?

Under section 21(1) of the Copyright Act 1994, "the person who is the author of a work is the first owner of any copyright in the work". This applies, whether or not there is any copyright statement on the work. Therefore, the association that organised the conference must first seek permission from each of the authors (the copyright owners) before publishing their papers. If this is not done, the authors could take legal action for breach of copyright against the association. If any individual author refuses permission, that author's work must not be published.

The only exception to this would be if the organising committee of the conference, in inviting or accepting papers for the conference, made clear to each author in advance that copyright in their papers would transfer to the association to enable publication of the papers in the conference proceedings – or to put this in other words, if the organising committee of the conference entered into an agreement with the authors whereby their copyright was transferred to the association.

157. My organisation produces a database which lists New Zealand-related theses, whether published in New Zealand or elsewhere, and which provides links to as many of these theses as possible. The database is accessed by researchers both within New Zealand and overseas. Can you suggest some generalised wording that provides copyright guidelines for users of the site?

Here is my suggestion:

> Access to the full text of theses is provided with the permission of the authors, who retain ownership of copyright in their theses. Use of these theses must be in accordance with the fair dealing provisions of section 43 of the New Zealand Copyright Act 1994. In particular, use must be for research or private study, and must be fully acknowledged. Any commercial use or re-publication is prohibited under New Zealand copyright law.

This wording deliberately fudges to whom the permission of the authors to allow access has been given; and also does not imply that permission to link has been specifically given by the authors. I am assuming that the permission of the authors to allow electronic access to the full-text was given to the universities to which the theses were

submitted, not to your organisation, but the wording seems to work just as well if the permission of some of the authors to allow access has been given directly to your organisation.

New Zealand users are, of course, subject to New Zealand copyright law – hence the reference to the New Zealand Act and the wording of the relevant section. Overseas users are subject to the copyright laws of their own country, but of course it is perfectly permissible for your organisation to lay down the conditions under which your database may be accessed by overseas users – with my suggested wording you are stating that they may do so only in accordance with New Zealand copyright law.

In my view, the providers of databases to which you link, whether New Zealand or overseas, should include a copyright statement which applies to all users of the theses in those databases (as, for example, is done with the University of Auckland's ResearchSpace database). This means that, before being able to access a full-text thesis, the user should be confronted with a copyright statement that spells out the terms of use relating to that specific thesis. If any theses database to which you link does not do this, then the copyright conditions as stated in your copyright wording apply, both to New Zealand users of the full-text databases and to any overseas users who access those databases via your database.

158. My organisation publishes a digital newsletter / magazine on our website, and we would like to have a general statement regarding copyright, which also deals with the use of any royalties received. Can you suggest some wording?

Here is my suggestion:

1. Copyright in each issue of *[title]* is owned by *[organisation]*.
2. Copyright in each article published in *[title]* is owned by the author or authors of that article.
3. Authors are asked to acknowledge first publication in *[title]*, should they subsequently re-publish their articles in another source.
4. Articles are accepted for publication in *[title]* on the understanding that the authors agree that their articles may be re-published in aggregator databases such as those made available by Ebsco or Gale.
5. Any royalties or other payments received from aggregators will not be returned to individual authors, but will be credited to the *[organisation]* professional development fund and identified in *[organisation]*'s financial statements, thereby being distributed back to the *[organisation]* membership as a whole.

159. The professional association to which I belong is soon to publish a unit I have written for use in schools. In the unit I suggest that teachers make multiple copies of several extracts included in the unit for distribution to students. Is this permissible?

If the extracts to be copied are written by you, then it is certainly permissible for the copyright owner (whether this is you, or the association as publisher) to give permission to teachers to photocopy excerpts for students, and to impose any limits on

such copying (or impose no limits) as you wish. It would no doubt be helpful to teachers if this was stated in the book – for example, by inclusion of a statement such as "Material in this unit (or, Up to x percent of material in this unit) may be copied by teachers for distribution to their students or for use in class, provided that the source is acknowledged in the material copied".

If the extracts to be copied are taken from another book, then section 44 of the Copyright Act 1994 comes into play. Sub-sections 3-5 permit multiple copies of part of a literary, dramatic or musical work to be copied by any means, without infringing copyright in that work, provided that the copying is done for an educational purpose, by or on behalf of an educational establishment (which includes schools), no charge is made for supply of the copies, and the copying is "no more than the greater of 3 per cent of the work or edition or 3 pages of the work or edition". If artistic work is included within the part of the work copied, then this, too, may be copied without infringing copyright in that artistic work. Due acknowledgement to the work(s) copied must, of course, be made.

160. Who owns copyright in this work – me as author or the association as publisher?

The Copyright Act 1994 is very clear: section 21(1) states that "The person who is the author of a work is the first owner of any copyright in the work".

The publisher becomes owner of the copyright only if you as author pass copyright ownership over to the publisher by signing a document or contract to this effect. Some publishers (for example journal publishers) require authors to pass copyright ownership in their articles over to them as a condition of publication.

161. What sort of copyright education programme should my library have for staff and library users? – is it enough that we have our policy available via website or on request; that copyright and file-sharing notices are available at all our photocopiers, internet computers and multimedia stands; that training is given to staff; that occasional advice is given in our newsletter; and that users are given gentle reminders when they are about to infringe on copyright?

What you are doing seems admirable. See also the answer to Question 155 (above).

162. The training arm of the organisation for which I am librarian, which is a private training establishment (PTE), requires all those undertaking a course to read one chapter (16 pages) of a 272-page book. Is it permissible to copy these pages and give them to students, perhaps on a CD?

If the organisation presenting the course is an educational establishment (as defined in section 2(1) of the Copyright Act 1994), then, under section 44(3-4), multiple copies of part of a book or other work may be copied, provided that no charge is made for the supply of the copy to any student, and no more than the greater of 3% or 3 pages are copied (and if this would result in the whole of the work being copied, then only 50% may be copied). Further, under section 44 (4A), copies of a work made under section

44(3-4) may be made available via a computer system or network to students receiving the instruction.

But as you point out, 3% of a book of 272 pages is 8 pages, not 16.

The universities and polytechnics cope with this situation by entering into a licence agreement with Copyright Licensing New Zealand (CLNZ), which permits them to copy material for issuing to students (either in print course-packs, or on CD) to a more generous extent than the amount of copying permitted under the Copyright Act. I suggest you contact CLNZ, whose contact details are on their website. The website also gives details of the educational licences – see http://www.copyright.co.nz/Educational/.

163. I have burnt several CDs using music from both library-owned CDs and my own personal CD collection. I use these compilation CDs when I present a library programme for babies and their caregivers. Is this in breach of the Copyright Act?

There are two parts to your question:

(1) Is it lawful to make copies of music from CDs owned (a) by the library and (b) by me?

The answer is "no". Section 81A of the Copyright Act 1994 allows copying of sound recordings only from a legitimately-acquired sound recording owned by the person making the copy, and only for her/his personal use or for the personal use of others in her/his household. In the case of (a), you do not own the sound recording – rather, the library owns it. And in the case of (b), you are not making the copy for your own personal use, but rather to present a library programme.

(2) Is it lawful to play sound recordings?

The answer is "yes". Although in this scenario no copies are being made, under section 16(1)(d) the playing of a copyright work in public is a restricted act. However, section 81 allows organisations (such as libraries) which are not established or conducted for profit to play sound recordings as part of their activities, provided that any admission charge is applied solely for the purposes of the library.

164. What is meant by "making an adaptation of a work"? Would this be a different format, such as reading a book out loud and recording it?

Section 16(1)(g) of the Copyright Act 1994 states that making an adaptation of a work is a restricted act.

"Adaptation" is defined in section 2(1) of the Act:

*In relation to a **literary or dramatic work**, it includes (i) a translation from one language to another; or (ii) where a dramatic work is converted into a literary work, or a literary work into a dramatic work; or (iii) a version of a work where the story or action is conveyed wholly or mainly by means of pictures.*

*In relation to a **computer program**, it includes a version that has been converted into or out of a different computer language or code.*

*In relation to a **musical work**, it is an arrangement or transcription of the musical work.*

*There is no reference in this definition to an **artistic work**.*

Reading a book out loud is <u>not</u> making an adaptation of the work, and nor is it copying the work. Rather, reading a book out loud to an audience in a public library is more likely to be considered a "performance"; and section 16(1)(c) states that performing a work is a restricted act, although section 32(1) provides additional clarification by stating that "The performance of a work in public is a restricted act only in relation to a literary, dramatic, or musical work". "Performance" is defined in section 2(1) as follows: "(a) in the case of a literary work that is a lecture, address, speech, or sermon, includes delivery of that work; and (b) in general, includes any mode of visual or acoustic presentation of a literary, dramatic, musical, or artistic work, including presentation of the work by means of a sound recording, film, or communication work". Reading a book out loud is presumably an "acoustic presentation of a literary work".

Personally, I do not believe that any copyright owner or court would hold that reading a book out loud to an audience in a public library or school is a breach of copyright in the book, unless the book being read is "a lecture, address, speech, or sermon".

Recording the reading of the book, or including the reading in a communication work, would, I think, more likely be considered to be copying the book – and under section 16(1)(a) copying a work is a restricted act. And of course, what you then went on to do with the recording – playing it to a different audience, publishing and distributing it, etc – would likely constitute breaching copyright in the book.

But see also the answer to Question 165 (below).

165. Is it acceptable for librarians, teachers and other adults to read portions of books aloud in public libraries, schools and other venues? If so, could such readings be recorded? I am not sure of the limits of what is meant by "performance" of an author's work.

See the answer to Question 164 for comments on what is meant by "performance" as this relates to reading the whole of a book out loud in a library, school or other venue, and recording that reading or including it in a communication work.

However, your question relates to reading <u>portions</u> of books. This is covered by section 70, "Public reading or recitation", which at sub-section (1) states: "The

reading in public or recitation in public by 1 person of a reasonable extract from a published literary or dramatic work shall not be treated as a performance in public for the purposes of section 32(1), if that reading or recitation is accompanied by a sufficient acknowledgement". Unfortunately "reasonable extract" is not defined, and there is no obvious reason why the phrase "reasonable extract" is used, as compared with "reasonable proportion" used in sections 51 and 53. Guidance on what is "reasonable" may perhaps be obtained from section 43 (fair dealing for research or private study) and section 44 (copying for educational purposes), although neither of these sections are entirely relevant.

In my view, it is completely lawful for a "reasonable extract" (not defined) from an in-copyright work to be read out loud to an audience in a public library, school or other venue.

Section 70(2) goes on to state: "Copyright in a work is not infringed by the making of a sound recording, or the communication to the public, of a reading or recitation that under subsection (1) is not treated as a performance in public, if the recording or communication work consists mainly of material in relation to which it is not necessary to rely on that subsection". I think this means that a public reading may be recorded, or included in a communication work, only if it is out of copyright or is covered by an exception in the Copyright Act other than section 70(1). Where this is not so, recording of the reading or including it in a communication work would constitute breaching copyright in the book.

166. There is a label on the photocopy machine in my library that prohibits the copying of certain types of documents: "bank notes, passports, checks, bonds, revenue stamps, drivers' licenses, bank drafts, stock certificates". This is obviously an American message, but I would like to know what is and isn't legal in New Zealand.

Yes, this statement is an American one, not necessarily applicable in New Zealand.

There is nothing in the Copyright Act 1994 specifically either prohibiting or allowing the copying of any of the types of documents referred to in your photocopier notice. Rather, other New Zealand Acts are applicable, e.g. the Passports Act 1992 or the Reserve Bank of New Zealand Act 1989.

(1) Bank Notes

The Reserve Bank webpage has lots of information about copying banknotes (e.g. for educational purposes). There it is stated:

Banknotes
The section applies to all banknotes, not necessarily a New Zealand banknote.
The reproduction of all or part of a New Zealand banknote shall be authorised in the following cases:

- *For photographs, drawings, paintings, films and generally for any type of image in which the focus is not the banknotes or reproductions themselves and which do not provide a close-up view of the banknote designs;*

- *For one-sided reproductions, provided these are more than 125% or less than 75% of both the length and width of the respective banknote, irrespective of the material used for the reproduction.*

(2) Passports

I can't see anything in the Passports Act prohibiting the copying of passports – and in fact, most travel websites recommend that you do make a copy of your passport.

I presume that copyright in a passport is owned by its "author" – i.e. the Dept of Internal Affairs, i.e. the Government, i.e. the Crown. Crown copyright continues for 100 years (long, long after the expiry of the passport !!!) and the Copyright Act 1994 s.16(1) states that copying a work is a restricted act.

However, the Government's SafeTravel website at http://safetravel.govt.nz/news/index.shtml#passport actually recommends you make a copy ("Take a copy of the personal details page of your passport with you and leave a copy at home with a trusted friend or family member"). In my view, this statement allows you to make a copy of the personal pages of your own passport without any need to seek permission from the copyright owner.

(3) Other Types of Documents

I have not investigated the other types of documents you mention.

Clearly, the notice on your photocopier is intended to maintain the security of the different types of documents it refers to. However, in my view there is far more risk to libraries in library users copying other types of works on library-supplied photocopiers – such as entire books, sheet music, etc. I suggest you remove the notice altogether, as it does not apply to New Zealand in general or to New Zealand copyright law in particular, is confusing to your users, and is in fact contrary to Government official advice in regard at least to the two types of documents I have checked (banknotes and passports).

167. In my library we photocopy book covers which we use in our displays. These displays can be as a simple as a few book covers on the windows or a more 3D effect with book covers and other paraphernalia promoting the collection. Are we breaching copyright, especially with regard to photocopying the illustrations on the book covers?

There is very likely to be separate copyright in the illustrations used in book covers, so copying these without permission of the copyright owners is a breach of copyright.

You may, of course, use the original book covers in your displays, since this does not involve copying.

You could always write to the major publishers whose covers you use, asking for permission to copy the covers of books published by them for use in your displays. Permission is likely to be granted, since it is to the publishers' advantage to have their

books promoted. You would need to take care not to copy the covers of books published by publishers who you do not write to or who do not give you permission.

168. I run a preschoolers' session at our local public library and want to organise educational activities (cutting and sticking) for the children following the reading of the story. There is no money changing hands and it is clearly an educational purpose but I am making more than one copy and it is of all the characters in the book. What is the position regarding copyright of the picture book illustrations for this purpose? Do I have to ask the publisher or the author for permission to do this?

There is copyright in illustrations, whether the illustrations are in a children's book or any other book, and they may not copied without the prior approval of the copyright owner, unless copyright in the work has expired. Copyright expires at the end of 50 years from the end of the calendar year in which the illustrator died.

The provisions of the Copyright Act 1994 relating to copying for educational purposes do not apply, as a public library is not an "educational establishment" as defined in the Act.

So yes, you will need to obtain permission from the copyright owner. This will usually be the publisher of the book, rather than the illustrator or author.

169. My library lends out audio books to public libraries and schools around New Zealand for use by people who have genuine print disabilities – i.e. to those who can't access information in a print format because they are blind or vision-impaired, have certain physical disabilities, have perceptual or other disabilities, or have insufficient literacy or language skills. We purchase commercially-produced audio books – we do not do in-house productions. Provision of the audio books in CD format is increasingly becoming problematic. What is the copyright position around copying or converting an audio book from CD to another format for educational purposes?

To answer this question, I need to work through the sections of the Copyright Act 1994 that might be relevant:

*(1) **Section 69(1)** of the Copyright Act 1994 allows "a body prescribed by regulations made under this Act" to "make or communicate copies or adaptations of published literary or dramatic works for the purpose of providing persons who have a print disability with copies that are in Braille or otherwise modified for their special needs, without infringing copyright in those literary or dramatic works", provided that the conditions contained in subsection (2) are complied with.*

The bodies prescribed by regulation under section 69 are:

The Christian Ministries with Disabled Trust
The Correspondence School
The New Zealand Radio for the Print Disabled Incorporated

The Royal New Zealand Foundation for the Blind
The University of Auckland
The Wellington Braille Club

Section 69, therefore, does not apply to your library. In any case, unless the words "or otherwise modified for their special needs" can be taken to apply to format shifting of sound recordings, which seems very doubtful, section 69 does not appear to be relevant to what you want to do.

(2) ***Section 45*** *deals with copying for educational purposes of films and sound recordings. Unfortunately, this section is very restrictive, applying only to lessons on how to make films or film sound-tracks (s. 45(2)(a)), or to lessons that relate to the learning of a language or that are conducted by correspondence (s. 45(4)(a)(v-vi)). Section 45 does not appear to be relevant to what you want to do.*

(3) ***Section 81A*** *deals with copying (including format shifting) of sound recordings, but applies only to sound recordings owned by the person making the copy, and only for that person's personal use or the personal use of others in her/his household. Section 81A, therefore, does not apply to your library.*

(4) ***Section 55(1-2)*** *permits the librarian of a prescribed library to make a copy (<u>other than</u> a digital copy) of any item in its collection, "for the purposes of (a) preserving or replacing that item by placing the copy in the collection of the library in addition to or in place of the item; or (b) replacing in the collection of another prescribed library an item that has been lost destroyed, or damaged", and provided that "it is not reasonably practicable to purchase a copy of the item in question to fulfil the purpose". The purpose of making the copy by your library is not preservation, but could perhaps be held to be <u>replacement</u>, so provided that the non-digital copy (whether or not in a different non-digital format) replaces the original copy, it is probably OK for your library to make a non-digital copy. However, my understanding of the question is that your library wants to make a digital copy – if so, s. 55(1-2) does not apply.*

(5) ***Section 55(3)*** *permits the librarian of a prescribed library to make a <u>digital copy</u> of any item in its collection, provided that "the original item is at risk of loss, damage, or destruction", and that "it is not reasonably practicable to purchase a copy of the original item". Since the purpose of making the copy by your library is not because the original recording is "at risk of loss, damage, or destruction", but rather because you want the recording in a different digital format, s. 55(3) does not apply.*

(6) ***Section 55(4)*** *allows the librarian of a prescribed library to make a <u>digital copy</u> of any item in its collection, if "the digital copy is used to replace an item in the collection of another prescribed library that has been lost, damaged, or destroyed", and "it is not reasonably practicable to purchase a copy of the original item". Since the original item is not "lost, damaged, or destroyed", s. 55(4) does not apply to your library making copies for the collections of other libraries.*

Conclusion

I can not find any section in the Copyright Act 1994 that allows format shifting of sound recordings into digital format (other than s. 81A, which does not apply to libraries or schools).

170. A resource I have written for teachers to use in schools is now being prepared for publication. It includes about ten photographs from various Internet sites (ex United States presidents and so on) which the person printing thought may be "generic" and not a copyright issue. Is this correct?

There is, of course, copyright in images such as photographs. Copyright in each photograph will be owned by its photographer, unless the photographer has passed the copyright on to someone else, e.g. the publisher of a book or journal. In New Zealand law, copyright in the photograph continues for 50 years after the end of the calendar year in which the photographer died.

As far as I am aware there is no such concept as "generic" in New Zealand copyright law.

If the United States presidents are long dead, copyright in photographs of them may well have expired.

You say that you have taken the photographs from various Internet sites. If the photographs on these sites are still in copyright, publication of the photographs on the sites may well be unlawful and a breach of copyright.

That said, it is highly unlikely that anyone will object to, or claim breach of copyright in, your use of the photographs of well-known individuals such as presidents – provided that there is no statement on the website or attached to the image that there is copyright in the photograph. If there is such a statement, I suggest you choose a different image that does not have a copyright statement attached to it.

171. My library has some scrapbooks that have been donated to us by a (now deceased) member. The scrapbooks contain newspaper clippings from various newspapers from the 1930s and 1940s. Someone wants to copy the scrapbook in its entirety. Is the scrapbook covered by copyright law (i.e. the layout and content of the scrapbook), or are the newspaper articles covered? Or both?

Let's take this step-by-step:

(1) Were the scrapbooks compiled lawfully?

Yes. Section 16 of the Copyright Act 1994 sets out the acts restricted by copyright. These include: (a) copying the work; and (b) issuing copies of the work to the public, whether by sale or otherwise. Since the newspaper clippings were not copied, and the scrapbook was not issued to the public, the Copyright Act does not apply and the scrapbooks were compiled lawfully.

(2) Is there copyright in the scrapbooks?

Yes. The compiler of the scrapbooks has spent time gathering the clippings, determining which to include, deciding on the layout, etc. It seems to me, therefore, that each scrapbook is a "literary work", as defined in section 2(1) of the Act: "Literary work means any work, other than a dramatic or musical work, that is written, spoken or sung, and includes (a) a table or compilation, and (b) a computer program".

Since the compiler is dead, copyright in the scrapbooks is owned by the compiler's heir(s), and continues for 50 years from the end of the calendar year in which the compiler died (section 22(1)).

(3) Is there copyright in the newspaper clippings?

Yes. However, section 43 of the Act permits fair dealing with a work for the purposes of research or private study, with sub-section (3) listing the five criteria that a court shall have regard to in determining whether copying is fair dealing.

(4) Conclusion

There is copyright in the scrapbooks of newspaper clippings, and this copyright does not expire until 50 years after the compiler's death.

It could be argued that one copy of some (or all) of the scrapbooks could be copied under section 43, provided that the copying is done by the person wanting to use the copies for that person's own research or private study, and provided that the copies are in fact used only for the person's own research or private study. It seems to me that, of the five criteria set out in section 43(3), the first four are satisfied. The fifth ("where part of a work is copied, the amount and substantiality of the part copied, taken in relation to the whole work") is more problematic; however, given that this sub-sub-section (e) begins with the words "where part of a work is copied", there is the clear implication that in some instances it may be lawful to copy the entire work.

I consider, therefore, that some (or possibly all) of the scrapbooks could be copied under section 43, provided that only one copy is made, that the copying is done by the person who wants to use the copies for that person's own research or private study, and that the copies are in fact used only for the person's own research or private study.

172. Can you help me answer the following query I have received from one of my library's users. He has been researching the history of his extended family for several decades. Some of the research involved engaging a paid researcher in Ireland. He has sent some of the results of his research to members of one of the families in New Zealand. One of these family members is intending to use the material he supplied in some sort of family tree/family history document, without seeking any agreement to use the compiled material. How does copyright apply?

Your user owns the copyright in the physical expression of the family history material that he has gathered or that has been gathered for him – that is, in what the Copyright

Act 1994 calls the "literary work". He does not own copyright in any of the ideas, facts or other details incorporated in his work.

Section 16 of the Copyright Act, "Acts restricted by copyright", in sub-section (1) states that "The owner of the copyright in a work has the exclusive right ... (a) to copy the work; ..."; and section 30, "Infringement by copying", states that "The copying of a work is a restricted act ...". This means that no-one, without permission, may copy your user's "literary work". However, others may make use of the facts that have been incorporated in the "literary work", and re-format these facts to create a new work. Section 43 also permits "fair dealing" with a copyright work "for the purposes of research or private study".

In my view, there is nothing in the Copyright Act to prevent the family members to whom your user has supplied family history material to make use of the material, for example to incorporate it in their own work (i.e. to create a new "literary work"), provided that they do not just copy your user's "literary work". The family members should, of course, give due acknowledgement to the source(s) used in their work, including to your user's compilation and research.

173. My library has purchased an e-book which includes scanned copies of 255 New Zealand history books that are out of copyright (the newest of these books is about 100 years old). What are our rights regarding the use of this e-book? And what are the purveyor's rights, given that all he has done is scan the books and burn a CD to sell?

Section 22(1) of the Copyright Act 1994 states that "Copyright in a literary, dramatic, musical, or artistic work expires at the end of the period of 50 years from the end of the calendar year in which the author dies" (i.e. not from the year of publication). If copyright in all the works on the e-book has indeed expired, then copying (including making a digital copy) of these works by the compiler of the e-book was not unlawful.

The question then arises: is there copyright in the e-book? This partly depends on whether or not the e-book can be considered to have been "published". Section 10(1) states that the terms "publication" and "publish", in relation to a work, "means the issue of copies of the work to the public ...", although sub-section (3) qualifies this by saying that "publication" does not include "publication that is not intended to satisfy the reasonable requirements of the public". From what you say, the compiler has produced a number of copies which he hopes to sell, and has therefore published the e-book.

It also depends on whether the e-book is a new work. Section 14, "Copyright in original works", states in sub-section (1) that "Copyright is a property right that exists, in accordance with this Act, in original works ...", but sub-section (2) states that "A work is not original if – (a) it is, or to the extent that it is, a copy of another work ...". In my view, the e-book that you have purchased is a new work, because it brings together copies of a large number of previously separately-published books in a new format. There is therefore copyright in the e-book, and the compiler as copyright owner has all the rights afforded by the Copyright Act.

Note that the fact that your library has purchased the work does not affect the copyright in the work – you do not purchase copyright in a work when you purchase a copy of the work.

174. In my Council Archive I hold hundreds of posters for past events held at the local Theatre. These date from the 1920s to 2011. The manager of the Theatre would like to use some of these posters (or copies) to form a permanent display at the Theatre. My view is that copyright clearance should be sought (or at least attempted) for the re-use of these posters in the permanent display, especially given that this permanent display is not the purpose these posters were created for. The Theatre manger takes the view that copyright clearance is not required because the posters have been retained as part of the Theatre's archival record. My questions are: Am I correct in my understanding that using these posters in a new display is a form of publishing? Is copyright clearance required for the re-use of these posters, or is the Theatre free to use these posters as they see fit because they form part of the Theatre's archival records? If copyright clearance is required, is the copyright term 50 years from the death of the artist or 50 years from the date the poster was first made available to the public?

Copyright ownership

The first issue to be established is, who owns the copyright in the posters?

Copyright is normally owned by the author of a work (section 21(1)). However, if a person makes a work in the course of her / his employment, then the employer owns the copyright (section 21(2)). And if a work is commissioned and paid for, then the person who commissioned the work owns the copyright (section 21(3)).

Posters do not normally record the name of the author or designer. The Copyright Act 2004 acknowledges that a work may be of unknown authorship (section 7). However, the Act is silent regarding who owns copyright in a work of unknown authorship.

My views are:

(1) The posters could have been commissioned by the Theatre, for example to advertise events or shows held there. If this is the case, then copyright will be owned by the Theatre.

(2) Or the posters could have been made by an employee of the Theatre. If this is the case, copyright will be owned by the Theatre.

(3) Alternatively, the posters could have been commissioned by the producers of the shows – in which case they will own the copyright.

(4) The fact that the posters form part of or are held by the archives of the Theatre does not affect copyright in the posters.

Duration of copyright

Copyright continues for 50 years after the end of the calendar year in which the author (or artist) died (section 22(1)). However, if the work is of unknown authorship, copyright continues for 50 years from the end of the calendar year in which it is first made available to the public (section 22(3)). In the case of an artistic work such as a poster, "made available to the public" means "exhibition in public" (section 22(4)(b)(i)).

Artistic or literary work

"Artistic work" and "literary work" are defined in section 2(1). I am not entirely clear into which category a poster would fall – presumably this would be determined by the quantity and importance of the art work, taken in relation to the whole poster and in comparison with the amount and importance of the text. I should have thought that most posters of shows would be considered to be artistic works.

Copying of work

Section 30 states that the copying of a work is a restricted act in relation to every description of copyright work. The copying of an in-copyright work is therefore unlawful, whether the work being copied is a literary work or an artistic work.

Display of work

Section 16(1)(e) states that to show a work in public is an act restricted by copyright. However, Section 32(2) states that the showing of a work in public is a restricted act only in relation to a sound recording, film, or communication work. The showing of an in-copyright artistic work in public is therefore not a breach of any copyright in that work.

Showing work in public does not fall within the definition of "publication" given in section 10(1). And section 10(4)(b)(i) specifically states that the exhibition of an artistic work does not constitute publication.

Conclusion

(1) Copyright is likely to have expired for at least some of the posters. These may therefore be copied, exhibited, displayed or used in any way.

(2) If any poster shows the name of the author or artist, then unless that person has been dead for more than 50 years, permission to <u>copy</u> should be sought from that author or artist or the copyright owner. However, permission to <u>display</u> the work is not required.

(3) For posters likely to be still in copyright which do not show the name of the author, artist or copyright owner, permission to <u>display</u> the work is not required. Permission to <u>copy</u> the work will be required unless it is believed that copyright is owned by the Theatre.

175. I know that it is not permissible to upload in-copyright material to the Internet without the copyright owner's permission. But does this rule also apply to intranets? My organisation has a secure intranet which is only accessible to staff – are we permitted to upload in-copyright articles and book chapters to it?

Copying work

Section 2(1) of the Copyright Act 1994 defines copying as "in relation to any description of work, reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means". Section 16(1) states that copying a work is one of the acts restricted by copyright. Section 29(1) states that "Copyright in a work is infringed by a person who, other than pursuant to a copyright licence, does any restricted act". And section 30 states that "The copying of a work is a restricted act in relation to every description of work".

Therefore, copying an in-copyright work and then uploading the copy to an intranet or other secure server is a breach of copyright, unless you have permission from the copyright owner, or have a licence from the copyright owner which allows this.

Communicating digital copy

However, Section 56A permits the librarian of a prescribed library to communicate (that is, transmit or make available by means of a communication technology, including by means of a telecommunications system, electronic retrieval system or computer network such as an intranet) a digital copy of a work to an authenticated user, provided that:

- *the librarian has obtained the digital copy lawfully;*
- *the librarian ensures that each user is informed in writing about the limits of copying and communication allowed by the Act, including that a digital copy of the work may only be copied or communicated by the user in accordance with the provisions of the Act (a sample written notice, which could be included as part of the login process to the digital file in which the digital copy is stored, is given in Appendix 3 of the LIANZA* Copyright Guidelines *at http://www.lianza.org.nz/sites/lianza.org.nz/files/lianza_copyright_guidelines_may_2011.pdf);*
- *the digital copy is communicated to the user in a form that cannot be altered or modified; and*
- *the number of users who access the digital copy at any one time is not more than the aggregate number of digital copies of the work that the library has purchased, or for which it is licensed.*

"Authenticated user" means a person who has a legitimate right to use the services of the library, and who can access the digital copy only through a verification process that verifies that the person is entitled to access the digital copy.

So, section 56A allows the librarians of a prescribed library that has already lawfully obtained a copy of a work in digital format to communicate that copy to its users without obtaining permission from the copyright owner, provided that the conditions listed above are met.

Conclusion

If your Library already has the articles or book chapters in digital form, and if these digital copies were obtained lawfully, then you may make these works available on your intranet without obtaining further permission from the copyright owner, provided that the above four conditions are complied with.

But if your library does not already have the works in digital format, then you may not make copies (either by re-keying or scanning) and make them available on your intranet.

176. My library has recently purchased a magazine on which was attached a "free" DVD – a documentary of a local family which we wish to remove from the magazine and add to our documentary collection, to be issued as a stand-alone DVD. What is the copyright position?

When your library purchased the magazine and attached DVD, you in effect purchased the DVD, and therefore the right to make whatever use of the DVD you wish – provided that (1) there was nothing attached to the DVD (or in the magazine) that restricted use in some way; (2) you do not make a copy of the DVD (copying would of course be a breach of copyright in the DVD), and (3) you do not in any other way breach the copyright in the DVD (you are, I am sure, well aware that when you purchase a work, you do not purchase the copyright in that work).

If the author/producer of the work wished to place restrictions on use of the work post-purchase, these restrictions should have been clearly stated on the DVD, so that you had the opportunity to return the magazine and DVD for full refund if you were unwilling to comply with those restrictions.

I believe that your library has the right to catalogue the magazine and the DVD, and issue the DVD separately from the magazine.

Entry of a record for the DVD in your library's catalogue, and/or on Te Puna, is more likely to enhance sales of the magazine and attached DVD, rather than hinder sales.

Section 10(1)(a) of the Copyright Act 1994 defines "publication" as meaning "the issue of copies of the work to the public", which phrase is in turn defined in section 9(1) as meaning "the act of putting into circulation copies not previously put into circulation". The DVD is therefore a publication, and two copies should have been deposited with the National Library of New Zealand under the legal deposit provisions of Part 4 of The National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003. Copies of works received under legal deposit are of course catalogued by the National Library on Te Puna, and listed in the monthly New Zealand National Bibliography.

177. A library user has requested a copy of an article from a periodical via interloan. The article will be supplied as a pdf and I know it is ok for her to print it out when she gets it to keep as a hard copy. However her manager has requested she

put the hard copy in a folder in her department so that other colleagues can read it too. My first reaction was to say no she couldn't because it was supplied for her personal study/research, however Section 53(3) does seem to suggest that her colleagues can read it (for their own study/research) as long as they don't make further copies. Therefore putting it in a folder with a note saying it can be read but not photocopied seems permissible. My assumption is also that she cannot forward the pdf to anybody else via email. Am I right?

My reading of section 53 is that a copy supplied for the user of another library is supplied for the requester's own research or private study, and may not be used for any other purposes – for example, copies supplied under this section are not supplied for users other than the requester, or for the collections of the other library (which supply is covered by section 54). Placing the copy or copies in a folder for others to peruse is surely akin to adding it to the collections of the requesting library – and section 54(1)(a) states that such copying must be "from a published edition that is a book", thereby excluding copies of periodical articles.

It seems to me that the intent of section 53(3) is to make clear that the requester (the person to whom the copy is supplied) may use the copy only for the purposes of his or her own research or private study. The reference in this sub-section to "any person" who "otherwise comes into possession of" the copy is surely just to cover the possibility that someone other than the requester may come across the copy, and where this happens, the same provision applies. Such other person would not, of course, have complied with section 53(2), which requires that the person requesting the copy assures the requesting library that the copy is being requested for the purposes of research or private study.

You are correct that the requester may not forward the pdf to anyone else.

178. Could you please provide us with some guidance on copying the same music track from a library-owned CD to several ipods. The music is to be used by librarians presenting free story-time sessions to pre-school groups in the library and in pre-schools. We are using CDs to support these sessions but are exploring the issues around using ipods.

Section 81A of the Copyright Act 1994 permits the owner of a sound recording to make a copy of that sound recording, but only "for that owner's personal use or the personal use of a member of the household in which the owner lives or both" (s. 81A(1)(f)).

There is no provision in the Copyright Act for format shifting or copying of sound recordings – this is permitted only of personally-owned sound recordings, and only for personal use.

To make copies you would need to obtain permission from the copyright owner(s) of the sound recordings.

179. At my institution we have a drive on our server with a huge number of photo images on it. Most images are unnamed, and staff have no idea whether or not the images are automatically available for institution-wide usage, or whether they have to check with the photographer regarding each image – which could be difficult if the photographer is no longer employed or is unknown. Who owns the copyright in the photographs?

Section 21(2) of the Copyright Act 1994 is very clear. It states: "Where an employee makes, in the course of his or her employment, a literary, dramatic, musical, or artistic work, that person's employer is the first owner of any copyright in the work".

Section 21 (3) goes on to state that "where a person commissions, and pays or agrees to pay for, the taking of a photograph ..., and the work is made in pursuance of that commission, that person is the first owner of any copyright in the work".

This means that if an employee of your institution took a photograph as an employee of the institution, or alternatively if your institution commissioned someone to take a photograph, in either case any copyright in the photograph is owned by your institution.

The above would not apply only if your institution had entered into a contract or licence agreement with the photographer, under which any copyright was agreed to be passed over to the photographer. I should have thought that this would be very unlikely.

Note that section 2(1) of the Act includes "photograph" in the definition of "artistic work".

I think you will be quite safe in assuming that any copyright in the photographs on your server is owned by your institution.

180. Is it permissible for my library to put a digital copy of each chapter of a book onto e-reserves in a sequential manner, i.e. only one chapter would be available at a time and the digital copy would be destroyed when it was removed from e-reserves. My university library often has the situation where a required book is not available for purchase, and the lecturer has a personal copy. My reading of section 51 is that it seems to permit this.

No. In my view, section 51 does not allow copying for either digital or print course reserve collections. Sections 51 and 52 of the Copyright Act 1994 relate to copying by librarians for their own library users, as a consequence of a request by or on behalf of a person who wishes to use the copy for research or private study. And the section is very clear that only a "reasonable proportion" of a book may be copied. "Reasonable proportion" of a work is less than a complete work, and the phrase should be interpreted in light of s. 43(3) (fair dealing) and s. 44(3)(f)(ii) (the 3% / 3 pages / 50% rule) (see my answer to Question 146 above).

The question of making copies by a librarian under sections 51 and 52 was addressed in the Salmon Judgment (see NZLR *2002 v. 3 p. 76-98). At paragraph 103 the*

Judgment states, in relation to sections 51 and 52, that "it is implicit that a request must be made by, or at least on behalf of, the person wanting to use the copy for the purposes of research or private study". Copies made by librarians for course reserve collections do not meet this requirement.

Paragraph 112 of the Judgment elaborates further on what might be called "copying of an entire work by stealth", and reaffirms that "the librarian can only make a copy under s 51 as a result of a request, therefore he cannot of his own volition" make copies for course reserve collections.

It is, of course, always open to the lecturer to place her/his personal copy of the book in the library's print course reserve collection, from which it may be loaned to students.

181. Someone in the HR section of the government department of which I am librarian wants to use a periodical article in a training pack – approximately 200 copies. Do I need to go to the author (or in this case, the people who manage the author's estate), or is there a company in New Zealand that deals with copyright?

If the periodical article is published by a commercial publisher, copyright ownership in the article is more likely to be owned by the publisher, rather than the author of the article. You could therefore approach the publisher, or alternatively Copyright Licensing New Zealand, whose website at http://www.copyright.co.nz/ gives their contact details.

182. Is it correct that, when an author transfers copyright ownership in a work to a publisher, unless the author specifies otherwise by way of contract, the transfer gives the publisher the sole right to copy the work, be it in a published form or otherwise. So if, for example, the author transferred copyright to the publisher, and the contract did not make provision for permitting the author to post a pre-print version of the journal article on Internet websites, then the author would not be able to post such pre-prints, because copyright in the work is now solely vested with the publisher.

The rights transferred from an author to a publisher will be determined by the contract signed between the author and the publisher, and will almost certainly differ between publishers. You are correct that, if the contract did not make provision for the author to post a version of the article on a website, then the author would not be able to do so – because the author is bound by the terms of the contract he/she signed with the publisher.

183. Please clarify what the phrase "obtained lawfully" would likely mean in the context of section 56A of the Copyright Act 1994. (a) Does it mean an e-book or an e-article in digital form having been obtained under ss 51-53? (b) Or is it in relation to the library being a subscriber to an aggregator, e.g. EBSCO, Elsevier, etc? (c) Or is it where the library has purchased a work from the publisher? (d) Or does it relate to downloading works (e.g. journal articles) from Internet websites?

(a) *No. Section 56A(1) states that "The librarian of a prescribed library or the archivist of an archive does not infringe copyright in a work by communicating a digital copy of the work to an authenticated user if the following conditions are met: (a) the librarian or archivist has obtained the digital copy lawfully ...". This does not apply to copies obtained under ss. 51-53, because in each of these sections it is stated that the person to whom the copy is supplied under these sections "may use the copy only for the purposes of research or private study" – i.e. for that person's own research or private study, and not for the research or private study of any other person.*

(b) *No. If the library is a subscriber to an aggregator service such as Ebsco or a publisher service such as Elsevier, the library is bound by the licence agreement signed between the library and the aggregator or publisher. Each licence agreement will be different (and almost certainly long and complicated). Some licence agreements may allow the library to make copies of specific articles and place these on a server for access by staff, but this seems unlikely and unnecessary: all the library needs to do is make a list of the specific URLs of the articles and place this list on its server. Its staff can then click on the URL links and be taken to the specific articles in the aggregator / publisher database, so no copying is involved.*

(c) *No. Purchase of a work does not include purchase of copyright in that work, so purchase of a work does not permit the library to make a copy and place this on a server for use by staff.*

(d) *No. There is copyright in most works on the Internet, so unless it is clearly stated that copyright in the work has been waived or that free use may be made of the work (or that the work is subject to a creative commons licence that permits copying), works downloaded from the Internet may not be copied and placed on a server by the library.*

184. (a) It seems to me that if one can satisfy paragraphs (a) through (d) of s. 56A(1) of the Act, one could store digital copies of periodical articles on a central server for reference use by organisational staff, although one must ensure each of those conditions are met.

(b) It seems to me that if we were wanting to store works on a server for wider use, we would need to obtain permission from the copyright holder. This could be the author if copyright ownership in the articles has not been passed over to the publisher, or the publisher if copyright has been transferred.

(a) *You are correct: s. 56A(1) does allow the librarian of a prescribed library to place digital items on a server and make these available to its users – provided that the conditions listed in this sub-section are complied with. There are no particular difficulties with (b), (c) or (d); the problem is with (a) ("the librarian or archivist has obtained the digital copy lawfully"). If, for example, the author of an unpublished work gives a digital copy to the library with permission that it may be placed on a library server for access by the library's users, then the library has "obtained the digital copy lawfully" and may do so. Likewise, if the licence agreement with a database provider (aggregator or publisher) permits this, then the library may do so.*

However, without permission from the copyright owner, placing material on a library server for access by users is not permitted by section 56A.

Note also that s.56A applies to work already in digital format: this section does not permit a library to digitise a print work.

(b) *You are correct.*

185. Is a school library permitted to make photocopies of the covers of magazines that they subscribe to and use these for display purposes?

No, not without permission from the publisher. Copying a work is one of the acts restricted by copyright (section 16(1)(a)), and section 30 states that "The copying of a work is a restricted act in relation to every description of copyright work". By copying a book cover, you are infringing the copyright in the artistic work on the cover, and are also infringing the copyright in the typographical arrangement (section 14(1)(e)). I suggest that you either use the original covers for your display, or write to publishers to get blanket permission.

186. A user of the local Museum wishes to copy, and make changes to, a map published in a 1923 issue of the *Journal of the Polynesian Society*. The map was probably drawn by Theodore Rigg, a former employee of my Institution. What is the position regarding copyright?

If Theodore Rigg worked for your Institution and was therefore an employee, then copyright in the map will be owned by your Institution under section 21(2). If your Institution commissioned Rigg to make the map, then copyright in the map will be owned by your Institution under section 21(3).

However, under section 21(4), "subsections (2) and (3) apply subject to any agreement to the contrary". So if copyright in the map was passed to the Polynesian Society as part of the agreement to publish, they will own the copyright.

Theodore Rigg died in 1972, so if he retained copyright ownership in the map, this copyright will not expire until 2022 (section 22(1): "50 years from the end of the calendar year in which the author dies").

If the user wishes to copy the map from a print issue of the JPS*, then I think in the first instance she should seek permission from the Polynesian Society (http://www.thepolynesiansociety.org/index.html) regarding copyright in the map. At the same time she could also discuss with them the changes she wishes to make to the map.*

187. We wish to use the RAPT tool which is described in a table published in a number of different academic journals. Would this table be copyrighted? We are having trouble finding out who has copyright in this tool.

Copyright is concerned (among other things) with copying. Certainly there is copyright in the article, and in the table, and making copies beyond what is permitted by the Copyright Act (or, if relevant, by the licence agreement your library has with the publisher of the electronic version of this journal) will determine what copying you may undertake. However, my understanding of your question is that you do not want to copy the article or the table, but rather wish to make use of the RAPT tool described in the table in the article.

I am unable to find in the article any claim from the author that the tool may be used only with permission, and I should have thought, therefore, that you may use it without getting permission, and may adapt it to your own needs as you wish. You should of course acknowledge the source.

However, it is possible that there is copyright in the RAPT tool, so if you are concerned you could contact the original developers of the RAPT tool: the American Congress of Rehabilitation Medicine and the American Academy of Physical Medicine and Rehabilitation.

188. My university no longer supports video players in its teaching labs, so DVDs are required for teaching purposes. We always try to purchase new copies in DVD format, but sometimes these are not available. Are we able to format shift from video to DVD format?

This question is covered by my answer to Question 106 (above).

In my view, if you are willing to argue that you are replacing the video in your library collection because it is "at risk of loss, damage, or destruction", then you may do so under the provisions of section 55(3) (and note the additional provisions of that sub-section), and the replacement copy may be in DVD format. If, however, the purpose is format shifting, or if the video is not in your library collection, then no you may not.

189. For how long may staff (mainly scientists) store journal articles? For some staff their research projects can run for years or in some cases for their entire careers.

In interpreting the Copyright Act 1994 as amended, you need to take into account the definitions given in the Act, and the section of the Act under which the copying has been undertaken.

(1) Definitions

"Copying" is defined in section 2(1) as meaning "in relation to any description of work, reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means ...". No time-limit is imposed on how long a copy may be stored for, or in what medium a copy may be stored. So, a print copy may be stored (say in a vertical file) for the life of the person who made the copy or for whom the copy was made, or longer, and a digital copy likewise.

(2) Relevant section

If I have understood you correctly, the copies of journal articles you refer to will have been made under one of the following three sections:

(a) Section 43: Research or private study

This section applies where the copy (print or digital) is made by a person for that person's own research or private study. Provided that the "fair dealing" requirements set out in subsection (3) are complied with, copying of the work for the purposes of research of private study "does not infringe copyright in the work". Subsection (4) states that only one copy of the same work, or same part of the work, may be made. The inference of section 43 is that the copying must be for that person's own research or private study, and not for the research or private study of any other person. A copy made under section 43, therefore, may be stored for as long as the person who made the copy wants to store it, and may be copied and stored in either print or digital format for that person's own research or private study.

(b) Section 52: Copying by librarians of articles in periodicals

This section authorises the librarian of a prescribed library to make a copy (print or digital) for "supply to any person" without infringing copyright. Only one copy of the article may be supplied, and the person to whom the copy is supplied "may use the copy only for the purposes of research or private study". Again, there is no restriction on how long the person to whom the copy is supplied may store it, and the copy should be stored in the format (paper or digital) in which it was supplied by the librarian.

(c) Section 53: Copying by librarians for users of other libraries

This section authorises the librarian of a prescribed library to make a copy of a periodical article for supply to another library without infringing copyright. The person in the other library for whom the copy is being supplied must have requested the copy "for the purposes of research or private study", and may use it "only for the purposes of research or private study". Again, there is no restriction on how long the person to whom the copy is supplied may store it, and the copy should be stored in the format (paper or digital) in which it was supplied by the librarian.

(3) Storage in digital format

So, there is no limit on how long the person who made the digital copy or for whom the digital copy was made may store it. However, since the copy was made for that person's own research or private study, it may not be used by anyone else – it cannot be placed on a server and be accessed by a number of different people (the other members of a research team, for example).

Provided that only the person who made the digital copy or for whom the digital copy was made can access it, it is immaterial whether it is stored on a memory stick or in a private section of a corporate server. (Private section means a section that only the person can access).

(4) Another option for making periodical articles available to members of a team

If your library has subscriptions to the electronic journals in which the required articles are published (either directly from their publishers, or via aggregators such as Ebsco or ProQuest), a list of the article URLs may be given to the members of the research team (there is no copyright in a URL), and each member may then access the articles on the publisher or aggregator server – in this case no copying is being undertaken, so no breach of copyright is involved. Making a print or digital copy of these articles will be governed by the licence agreement signed by the library with the electronic journal publisher or aggregator, but most if not all licence agreements permit this.

190. Do the LIANZA *Copyright Guidelines* and online learning course on copyright cover schools and school libraries?

Yes – all schools covered by the Education Act 1989 or the Private Schools Conditional Integration Act 1975 are included in the definition of "educational establishment" in section 2(1). And the definition of "prescribed library" in section 50(1) includes libraries maintained by educational establishments.

191. A library user has asked about copyright ownership of a book she has written, based on an interview with the person who is the subject of the book, with some additional material written to add substance. The author was not commissioned to write the book by the person she interviewed. That person has now died, and the author is dealing with a relative, who may possibly pay the printing costs of the book. The printing firm says that copyright is owned by the person written about. Is this correct?

No. With regard to the interview and any sound recording of it, section 5(1) of the Copyright Act 1994 makes clear that "the author of a work is the person who creates it". Sub-section (2) further states that the person who creates a work shall be taken to be "(b) in the case of a sound recording or film, the person by whom the arrangements necessary for the making of the recording or film are undertaken". These (taken together) mean that copyright in the interview and any sound recording of the interview is owned by the person who recorded it, not by the person who was interviewed or by the heirs or successors of the person interviewed.

With regard to the additional text, section 21(1) states that "the person who is the author of a work is the first owner of any copyright in the work".

Your question implies that the same person did both. So copyright is owned by that person.

192. My library would like to advertise new DVDs added to the library's audiovisual collections by reproducing the case slips (those colour images which advertise the DVDs inside the cases) in our in-house magazine, on our library website and in our online catalogue. Would doing any or all of these be a breach of copyright?

Two separate sources have advised us that case slip images may be reproduced on our website without breaching copyright – is this true? We have tried, without success, to obtain permission from the relevant movie companies and DVD distributors.

The New Zealand Copyright Act 1994 section 14(1) states that there is copyright in "original works", including (a) "literary, dramatic, musical, or artistic works" and (e) "typographical arrangements of published editions". The former covers any artistic work (illustrations, photographs, images) on the DVD case slips; the latter covers the arrangement and layout of the text and illustrations on the case slips. I cannot, therefore, understand how it could be argued that there is no copyright in the case slips, or that case slips may be reproduced on your website (or in your in-house magazine, or anywhere else) without first obtaining permission from the copyright owners. (The same principles apply to book covers).

As far as I can see, the New Zealand Copyright Act does not allow copyright to be breached on the grounds that you have been unable to obtain any reply to your requests for permission from the movie companies or DVD distributors – although of course, if it came to a court case, this would be a factor that the judge might take into account.

One possible way around this is for your letters or emails seeking permission to copy to include wording such as "this is the second time I have contacted you seeking permission to copy. If I have not heard from you by [date] I shall assume that you have given permission". However, there are at least two problems with this approach: (1) I am not at all sure that a court would accept this procedure ("if I do not receive a reply I will assume that you are giving permission") as authority to breach copyright (I would not if I were a judge, or when I'm a judge); and (2) copyright may well not be owned by the organisation to which you write – copyright in illustrations or photographs, for example, may be owned by others. I think, therefore, that there could be significant risk in adopting this approach.

193. With regard to the previous question, doesn't section 51 permit DVD case slips to be reproduced? Each reproduced DVD image on our library's website is being provided to only one person at a time (the patron who logs in) and is for the purpose of research, permitting the patron to research what is available in the library catalogue.

I do not think so. Section 51 permits the librarian of a prescribed library to copy only "a reasonable proportion of any literary, dramatic, or musical work ...". Surely, you are copying the whole of the work (the wording and artistic work on the case slip).

The February 2002 Judgment of Salmon J. (see New Zealand Law Reports *2002 v. 3 p. 76-98) at para 103 makes clear that librarians under ss.51-52 may copy for their clients only in response to a specific request. This is stated clearly in LIANZA's publication* The Copyright Act 1994 and Amendments: Guidelines for Librarians *(7th edition, May 2011) which at para 11.2 states "There must be a specific request to the librarian to provide a copy by the person wanting the copy".*

You are not making the copy at the request of a specific user, who wants to use the copy for his or her research or private study. Rather, you are making the copy to place it on your library's website, where it may be viewed by anyone. This is covered by section 56A, "Library or archive may communicate digital copy to authenticated users". But this section applies only to already-digitised works which the librarian or archivist has obtained lawfully; section 56A does not authorise the making of a digital copy of a non-digital work. (Section 56A also specifies that communication may be made only to authenticated users, defined in sub-section (2), which would not apply to users of your library's website – but since section 56A does not apply to non-digital works acquired by the library, in the present instance this requirement is not relevant).

In my view, section 51 does not permit copying by librarians of prescribed libraries for their library websites. And section 56A does not permit communication (which includes placing material on a website) of works not already in digital format when obtained by the library.

194. I have asked our New Zealand book supplier if we may use in our catalogue, on our website and in our newsletters the images of book and DVD covers that they have on their website, and they have said that we may. Is this compliant?

This would be compliant with copyright law only if your book supplier owns the copyright in the images (which seems most unlikely), or if they have already obtained written permission from the copyright owners. Before re-using the images you would need to check that these permissions covered all the copyright owners (including owners of the illustrations, images or photographs) of all the books and DVDs whose covers you wish to copy.

195. The University Library holds the original set of letters of John W. C. Galbraith which were written between 1880 and 1881. Are we allowed, under New Zealand copyright law, to make these letters available for digitisation by a commercial publisher, so that they are available to researchers in New Zealand and world-wide?

John W. Cameron Galbraith was born in 1860, so must have died by 1960 (and probably long before), so copyright in the letters will have expired.

Section 115 of the Copyright Act 1994, "Copyright to pass under will with unpublished works", states that, if an unpublished work is bequeathed under will to a person (which presumably would include an institution) by a copyright owner, copyright in the work passes along with it.

Schedule 1 section 40(2) clarifies section 115 by stating that, "In the case of an author who died before 1 April 1963, the ownership after the author's death of a manuscript of the author, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work that has not been published or performed in public, is prima facie proof of the copyright being with the owner of the manuscript".

But since John W. C. Galbraith would have been dead before your University came into existence he could not have bequeathed in his will the letters to the University, so the above two points do not apply in the present case.

Section 117, "Right to make conditions in respect of certain unpublished works", states that, in respect of unpublished works transferred or bequeathed to an institution "subject to any conditions prohibiting, restricting, or regulating publication of the work for a specified period or without any limit on the period", any publication of the work in breach of such conditions "shall, notwithstanding that the copyright in the work may have expired, be actionable as if copyright continued to exist in the work and the publication were an infringement of the copyright".

Section 117 is silent about what happens if the unpublished works were transferred to an institution without any conditions. I would assume that where this is so, the normal copyright duration of "50 years from the end of the calendar year in which the author dies" (section 22(1)) applies.

If so, the University Library may certainly authorise a publisher to digitise and make the letters available.

196. I would like to offer in the library a programme showing DVDs to children during the school holidays. Is there a spatial licence that can be purchased to show DVDs in the library?

Under the Copyright Act s.16(1)(d) and (e), playing or showing a work in public is a restricted act. Unfortunately, none of the exceptions in the Act (e.g. sections 47, 57, 81, 87, 87A) apply to what you want to do. Your library would therefore need to get prior permission from the copyright owner.

I am not aware of any licence that would allow a public library to play a film, video or DVD to library users – I suggest you contact Copyright Licensing New Zealand, to see if they offer such a licence. Their website is at http://www.copyright.co.nz/ which gives contact details.

It is, of course, always open to you to contact the publishers of the DVDs you wish to show, to ask their permission.

197. Scientists at my Institute are always coming out with new journal articles. Is it permissible to list the articles on our website? What about PDFs of the actual articles?

There is no copyright in bibliographic citations, so you are certainly free to publish a list of these, either as a print publication or as a list on your website.

Publishing PDFs of the actual articles is a different matter.

If your Institute owns copyright in the articles or other publications, then you may certainly do so. The Institute will own copyright in the publications of the Institute

itself (e.g. its annual reports, etc), and in the publications of its employees (under section 21(2)) unless copyright has been passed back to the employees, or unless copyright has been passed to the journal publishers of the articles as part of the publication process (as is normally the case for articles published in commercially-published journals).

If your Institute does not own copyright in the articles or other publications, then you may not publish copies of these without the permission of the copyright owners.

Note than many commercial publishers in the "copyright" section of their websites give details of what they permit regarding re-publication of journal articles that they have published.

198. Who is responsible if copyright is breached by an individual staff member?

This question is really about employment law, not copyright law.

My understanding is that employers are responsible for what their employees do. But I should have thought that, if the employee has been given instruction but fails to comply, then after due warning the employee would be responsible for the breach of copyright. However, I am not an expert on employment law, and if this issue is of concern to you I suggest that you or your organisation should seek advice from a lawyer.

199. My Institute produces a large number of reports, most of which are commissioned by other organisations or individuals. In the majority of cases these reports are confidential documents. Do the fair dealing provisions of the Copyright Act apply to confidential reports?

This is a tricky question: on the one hand, you do not want to encourage people to make copies of or from these confidential reports, but on the other hand you do not (and should not) want to deprive them of their rights under New Zealand Copyright law.

There is no question: the organisation that commissions and pays for the report owns the copyright in that report (section 21(3)).

However, these reports (if I have understood you correctly) are unpublished works. Section 56 deals with copying by librarians and archivists of unpublished works. Sub-section (1) states that the librarian of a prescribed library may make a copy for supply to any person of an unpublished work in the library, but sub-section (2) qualifies this by stating that "This section does not apply if the copyright owner has prohibited copying of the work ..." Therefore, you as librarian may not copy these confidential reports without first getting permission.

That leaves the question of copying by users under section 43, copying for research or private study, which allows "fair dealing" with a work, provided that the copying falls within the provisions of sub-section (3). Section 43 does not state that the section does not apply to unpublished works. But I think it would be very difficult to justify before a

Court that copying from an unpublished work, which the copyright owner has stated is confidential, could possibly satisfy all the provisions of sub-section (3).

In sum: if the copyright owner has stipulated that the work is confidential, and has authorised your library to hold a copy on the strict understanding that the work is confidential, then I do not see how either the librarian (under section 56) or library users (under section 43) may copy any of the report without the prior written permission of the copyright owner.

Query: your email does not state whether your Library users may access or read the confidential reports, so I am unclear about this. Obviously, if they are not permitted to access the reports then they cannot copy from them.

200. The great grand-daughter of an important New Zealand author is planning to publish one of his manuscripts, which he wrote over a number of years and completed in 1958. Although he did try to get it published, this did not happen in his lifetime. He died in 1976. Who owns the copyright in the published version, and for how long will the copyright last?

Copyright in the original work expires at the end of the period of 50 years from the end of the calendar year in which the author died (section 22(1)), i.e. in this case 31 December 2026.

There will also be copyright in the typographical arrangement of the published edition, which will expire at the end of the period of 25 years from the end of the calendar year in which the edition is first published (section 25), i.e. in this case 31 December 2038.

As the author is dead, copyright in the work will have passed at his death to whoever he named in his will or to whoever his estate was bequeathed to; and if that person is also dead, then to whoever that person named in his/her will or to whoever that person's estate was bequeathed to. I presume in this case copyright in the work is owned by the great grand-daughter – unless she has passed copyright ownership over to whoever is publishing the work, in which case that publisher will own the copyright and should be named on the title-page verso.

The normal way of claiming copyright is to print a ©, the name of the copyright owner, and the year of publication on the verso of the title-page. A statement about copyright can also be added if desired, e.g.

> *This book is copyright. Apart from fair dealing for the purposes of research or private study, or criticism, review and news reporting, as permitted by the Copyright Act 1994, no part may be reproduced by any process without the prior written permission of the copyright owner.*

Some publications have more detailed copyright statements.

201. As part of our city's "Words on Walls" initiative, we would like to have a number of quotations painted on some of the library's walls. Are we in danger of breaking copyright?

While there is copyright in the works from which the quotations are taken, there is no problem with using single quotations from these works without first seeking copyright permission, provided that the author of the quotation is cited – as you plan to do. In my opinion, use of the quotations as you have described is not a breach of copyright.

202. Two academic staff are re-publishing in e-book format a book they authored as a print book. The publisher of the print book has declined to reprint it, but has passed permission to the authors to self-publish. Unfortunately, the permissions that the original publisher gained to use some images have expired, and the authors need to re-seek permission. We are trying to track down information about the copyright where the publisher no longer exists. I have suggested that, where they cannot get permission to copy a diagram from another work, where possible they should place a properly attributed link to the diagram in the text. I should appreciate your views on this.

Copyright in a work (artistic or otherwise) continues for 50 years after the end of the calendar year in which the author died (section 22(1)). The authors' problem is that they do not know whether the authors of the images passed copyright in the images to their own original publishers as part of the licence to publish, or whether they retained it. If the authors can trace the addresses of the original authors of the images, then they should seek permission to copy from them. However, this may not be possible. But copyright continues whether or not the copyright owner(s) can be traced – and this applies even if the publisher is no longer in existence. I cannot see anything in the Copyright Act 1994 allowing the copying of works that are still in copyright without permission, just because the copyright owner(s) cannot be traced.

There is no copyright in a hypertext link, and there is no breach of copyright in inserting URL links into the text, since no copying is being undertaken. However, these URL links would need to be in place of the diagrams or images to which links are made – the authors cannot include in their e-book a copy of the images, and try to get around not having permission to do so just by providing URL links to the original publications in which the images first appeared.

The authors' options, therefore, would appear to be:

(a) Contact the original authors of the images for permission to copy. This may not be possible.
(b) In the e-book version, remove the copies of the images used in the printed edition and replace these with hypertext links to the original images. This will be possible only if the original images are available on the Internet.
(c) Find other images for which it is possible to obtain permission to copy.

203. A related issue is around the IP and copyright of the authors' own diagrams. They have developed their own models and published a diagram (created by them) in a journal. Do they have the right to re-create their diagram in their e-book? They are not asking if they may copy the diagram from the journal – rather, they are asking if they may re-do the diagram (it is still going to look pretty similar because they are discussing the same model) – or have they lost all rights to reproduce the diagram in any form?

"Copying" is defined in section 2(1) as meaning, "in relation to any description of work, reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means". From the information you have given me it would seem that the authors are not copying their own original diagrams, but rather are creating new diagrams, i.e. new original works, even if these new works are very similar to the old. It should be easy for them to include in the new diagrams small changes (such as differently-worded captions or labels, new dates, etc) to make it clear that these are new works, not copies of the original diagrams.

In sum, I should have thought that, provided they are not copying the original diagrams but are producing new diagrams, they could not be considered to be in breach of any copyright in the original diagrams.

204. A scientist at the organisation of which I am librarian authored a paper, based on a technical report published by my organisation, which was published by an association in its conference proceedings on its website, where copyright in the article is attributed to the university that organised the conference. No copyright document was signed in this process. Now a different organisation wishes to re-publish the paper in its *Transactions*, and has asked the scientist to sign copyright in the paper over to them. But can the scientist do this, if she does not own the copyright?

As author of the paper, the scientist owns copyright in the paper (section 21(1)), unless she wrote the paper as an employee, in the course of her employment, in which case the employer (your organisation) owns the copyright (section 21(2)). This latter applies unless your organisation passes copyright ownership back to its employees in order to facilitate publication, as many of the universities do.

Unless there was an agreement (stated or implied) that copyright in papers presented at the conference passes to the university (as organiser of the conference) or to the association (as publisher of the conference papers), then copyright in the scientist's paper continues to be owned either by her, or by her employer (unless it passed copyright ownership back to her).

There are thus four possible copyright owners of the paper:

the scientist (as author)
your organisation (as employer)
the university (as organiser of the conference)
the association (as publisher of the conference papers) – but note that the association is not claiming copyright ownership

The difficulty is completion of the new publisher's form, which asks the author to assign copyright of the paper to it. Clearly, the author is unable to do this if she does not own copyright in the paper.

I suggest that the following steps be taken:

(a) Clarify whether the scientist wrote the paper as an employee, in the course of her employment, and if so, whether the employer retained copyright ownership or passed copyright ownership back to the scientist to facilitate publication. This step will determine whether the scientist or her employer owns the copyright in the original paper.

(b) Contact the university, and ask on what grounds they are claiming copyright ownership of the conference papers – i.e. clarify if there was a stated or implied agreement that copyright in papers presented at the conference passes to the university. (There does not seem to be any need to contact the association, as it is not claiming copyright ownership, even though as publisher it might well have done so).

If it is established after taking the above two steps that the scientist in fact owns the copyright, then she can sign the form, which seems to me to be pretty reasonable.

If, however, it is established that either your organisation or the university owns the copyright, then I suggest that the scientist signs the form, but attaches a qualifying note which states that she does not own the copyright but that [whichever other party] does, then leave it to the new publisher to determine how they wish to proceed – probably it will ask whoever turns out to own the copyright to sign a transfer of copyright form.

I cannot see that copyright in other versions of the paper (for example your organisation's original technical report) is affected, because, while the scientist's conference paper may have used this source (and no doubt others as well), her paper is a new work in which there is separate copyright.

SUBJECT INDEX

SECTION INDEX

Schedule 1

Section	Question
40	195