12 February 2007

LIBRARY AND INFORMATION ASSOCIATION OF NEW ZEALAND AOTEAROA (LIANZA)

Submission on the Copyright (New Technologies and Performers' Rights) Amendment Bill

To the Commerce Committee

(1) LIANZA, the Library and Information Association of New Zealand Aotearoa / Te Rau Herenga o Aotearoa, representing 459 public, educational, commercial, industrial, legal and government libraries in New Zealand, welcomes the opportunity to make the following Submission on the Copyright (New Technologies and Performers' Rights) Amendment Bill.

(2) In this Submission, comment is made only on matters of direct relevance to libraries.

GENERAL PRINCIPLES

(3) LIANZA strongly supports the main intentions of Copyright law and the Bill:

- to provide incentives to ensure the creation, development and dissemination of copyright works;
- to ensure a proper balance between the protection provided to authors and copyright owners, in order to encourage creativity, and the needs of society and copyright users to benefit from the ideas and knowledge incorporated within publications, whether these are in printed or digital format;
- to clarify the application of the law in the digital environment;
- to create a more technologically-neutral framework for Copyright law.

(4) LIANZA welcomes many of the specific provisions of the Bill, and in particular:

- clarification that the definition of copying includes digital copying;
- replacement of references to "cable programme", "broadcast", etc with "communication work";

- replacement of references to “broadcast” with “communicate”;
- provision of a limited exception to reproduction rights for transient copying;
- limitation of ISP liability for copyright infringement, including caching;
- amendment of the provisions relating to technological protection measures, to enable the exercise of permitted acts where TPMs have been applied;
- limitation of the protection provided for electronic rights management information, to exclude those aspects of CMI that track the use of copyright material;
- introduction of new exceptions for format-shifting.

CLAUSE 25 : NEW SECTION 44A : STORING FOR EDUCATIONAL PURPOSES

(5) LIANZA notes the provisions of new section 44A (Storing for educational purposes), but is extremely disappointed that no similar provision is made to allow libraries to record, store and make available to their users digital material that is published on a website. Increasingly, valuable material of historical, political, economic, social and scientific interest is published on websites, and such material may disappear for all time if the material is withdrawn or the website is closed. If libraries are to fulfil their mission of preserving and making available significant informational materials to present and future generations of researchers, it is important that they be given the right to store publications from websites, as currently they store printed materials, albeit with appropriate safeguards. Such safeguards could include: identification of the author and source of the work; and identification of the library and the date on which the work was stored. LIANZA ***recommends*** that such a provision be added to the Bill. This might be done by adding a new section 52A, to read as follows:

> “52A : Storing by libraries
>
> The librarian of a prescribed library does not infringe copyright in a work that is made available on a website or other electronic retrieval system by storing the page or pages in which the work appears if---
> (a) the material is stored so that it may be made available to library users; and
> (b) the material---
> (i) is displayed under a separate frame or identifier; and
> (ii) identifies the author and source of the work; and
> (iii) states the name of the library and the date on which the work was stored.”

(6) LIANZA sees no point in prohibiting access until the works are removed from the original websites, since this will create very considerable additional work for librarians, in checking on a regular basis whether or not the works are still on the websites, and if they are not, then changing the links from the websites to the location where the materials are stored. If works are publicly available on websites, it would seem to be immaterial whether the library, in making the material available to its users, provides links to the works on the original websites or to the copies of the works on the library’s server. There would be no impact on the commercial interests of the website owners, as they have made the material freely available on their websites. However, if this is deemed to be unacceptable for some reason, a new subsection (c) could be added to the new section 52A proposed in paragraph (5) above, to read as follows:

> “(c) the material is not available until it has been removed from the website or other electronic retrieval system on which it has been made available.”

CLAUSE 34 : NEW SECTION 55(3) : COPYING BY LIBRARIANS OR ARCHIVISTS TO REPLACE COPIES OF WORKS

(7) LIANZA is reasonably happy with the wording of new section 55 subsection (3) (a), (b) and (d). However, there are some concerns about subsection (3)(c), which requires that “the original item is not accessible by members of the public after replacement by the digital copy”. In a limited number of cases it may be a requirement of scholarship that a researcher have access to the original work – for example, to examine paper

quality, watermarks, foliation symbols, etc that can not be distinguished in the digital copy.

LIANZA therefore ***recommends*** that section 55 new subsection (3)(c) be re-worded to read:

> "(c) the original item is not accessible by members of the public after replacement by the digital copy, except where the purposes of research require it; and"

CLAUSE 36 : NEW SECTION 56A : ALLOWING ACCESS TO WORKS IN DIGITAL FORMAT

(8) Clause 36 proposes a new section 56A (Library or archive may allow access to work in digital format), which details the conditions under which librarians of prescribed libraries may provide access, on-site or remotely, to copies of works that the library or archive obtains in digital format. LIANZA is unclear as to the exact meaning of "obtains" in this context. Presumably, the provisions of new section 56A apply to works that libraries or archives have purchased in digital format; and to works that have been digitised by the library or archive under the provisions of new section 55(3) (Copying by librarians or archivists to replace copies of works). The provisions would also apply to works copied from websites, if LIANZA's recommendation in paragraph (5) above is accepted.

(9) However, the majority of works in digital format that libraries provide access to for their users are digitised works (e-journals, e-books, e-reference works) which are subscribed to via electronic publishers and aggregators. In many instances libraries do not own these works, but rather lease access to them from the database providers. But whether leased or owned, electronic resources are almost always subject to separate licence agreements signed with the database providers, which detail the terms under which the materials may be made available. LIANZA is unclear as to whether such works come under the meaning of "obtains". It is LIANZA's understanding that, where a licence agreement exists, the terms of that licence agreement take precedence over legislative provisions. However, the present wording of new section 56A implies that this section overrides the provisions of the legal licence agreements signed by libraries with the database providers. LIANZA's view is that such works should not fall under the provisions of new section 56A, and therefore ***recommends*** that they should be explicitly excluded from it. This might be done by adding an additional subsection to section 56A:

> "This section does not apply to works in digital format which are subject to licence agreements negotiated with the vendor or lessor."

(Please see also paragraph (11) below).

(10) LIANZA also has very considerable difficulty with the wording of subsections (2) and (3) of new section 56A. In LIANZA's view, the two restrictions on on-site access (that all users are informed about the limits of copying or communication allowed by the Act, and that works in digital format may be copied or communicated by a user only in accordance with the provisions of the Act) should apply also to remote access; and that the two restrictions on remote access (that the work in digital format must be in a form that cannot be altered or erased, and that the work in digital format may be accessed only by a person who has a legitimate right to use the library, i.e. an authenticated user) should apply also to on-site access.

LIANZA therefore ***recommends*** that subsection (2) of new section 56A should read:

"(2) On-site and remote access is subject to the following restrictions:
(a) the librarian or archivist must ensure that all users are informed in writing about the limits of copying or communication that is allowed by this Act;
(b) the work in digital format may be copied or communicated by a user only in accordance with the provisions of this Act;
(c) the work in digital format must be in a form that cannot be altered or erased;
(d) the work in digital format may be accessed only by a person who has a legitimate right to use the library or archive (in this subsection called an authenticated user)."

Subsection (3) should then be deleted, and subsection (4) renumbered.

(11) With regard to subsection (4), if new section 56A does not apply to digital works which are subject to licence agreements signed between libraries and database providers, as recommended in paragraph (9) above, then subsection (4)(b) should be deleted. Subsection (4)(a) should then be incorporated into subsection (2)(e), to read as follows:

"(e) the work in digital format may be accessed at any one time only by so many users as the number of that work in digital format that the library or archive has purchased."

Subsection (3) then becomes the wording recommended in paragraph (9) above:

"(3) This section does not apply to works in digital format which are subject to licence agreements negotiated with the vendor or lessor."

CLAUSE 36 : NEW SECTION 56B : COPYING BY LIBRARIANS OF PARTS OF PUBLISHED WORKS; OF ARTICLES IN PERIODICALS; OF CERTAIN UNPUBLISHED WORKS

(12) LIANZA believes that libraries should have few problems in complying with the five provisions of new section 56B, but notes that the declaration in writing required by subsection (b), and the retention of the declarations required by section 57A, will create considerable additional work for librarians, to little or no purpose (please see also paragraph (14) below).

CLAUSE 36 : NEW SECTION 56C : COPYING BY LIBRARIANS FOR USERS OF OTHER LIBRARIES; FOR COLLECTIONS OF OTHER LIBRARIES

(13) LIANZA believes that libraries should have few problems in complying with the three provisions of new section 56C, but notes that the declaration in writing required by subsection (b), and the retention of the declarations required by section 57A, will create considerable additional work for librarians, to little or no purpose (please see also paragraph (14) below).

CLAUSE 37: NEW SECTION 57A : RETENTION AND INSPECTION OF DECLARATION

(14) LIANZA believes that libraries should have few problems in complying with the five provisions of new section 57A, but notes that the making and retention of the declarations for three years will create considerable additional work for librarians, to little or no purpose. The present Act in section 54(2)(b-c) already requires libraries to make and keep records of books copied for their collections by other libraries, and to permit the inspection of these records by copyright owners. As far as LIANZA is aware, no copyright owner has ever asked to inspect such records since the Act came into force in January 1995. New section 57A is, in effect, requiring libraries to undertake very substantial record-keeping: each year more than 33,000 copies are supplied on Inter-Library Loan to other libraries in electronic format through transmission by Ariel or other means. To keep records of these 100,000 transactions over three years will be very onerous; and it is extremely improbable that copyright owners (in most cases, overseas journal publishers) will ever wish to inspect the declarations – particularly since, as required by subsection (4)(a), the declarations will be filed in chronological order, and not sorted by copyright owner. (Sorting by copyright owner would be impossible, since in most cases librarians will not know who the copyright owner is).

(15) LIANZA is very concerned at the duplication of recording that will be required: retention of the declarations by supplying libraries under new section 57A, and also retention of records of books copied for their collections by requesting libraries under present section 54(2)(b-c). LIANZA believes that it is books copied for collections of other libraries, and not periodical articles supplied to the users of other libraries, that copyright owners may wish to check up on (although, as noted above, they have apparently not chosen to do so in the last 12 years). LIANZA very strongly ***recommends***, therefore, that new section 57A should be deleted entirely from the Bill, since present section 54(2)(b-c) adequately provides for record-keeping sufficient to protect the rights of copyright owners.

(16) If this recommendation is not accepted, and the decision is taken (against LIANZA's advice) to retain new section 57A, then it would be more logical for new section 57A to be re-numbered as section 56D, so that it precedes present section 57 of the Act.

DIGITISING OF WORKS

(17) LIANZA is extremely disappointed that the Bill does not allow libraries to digitise works in their collections, not to preserve or replace them, but rather to use the advantages that digitisation permits in order to make the works more widely available outside the library (for example, at times when the library is closed, or to people living some distance from the library), or to provide electronic access features such as keyword searching which are not available in the print environment.

(18) It is true that many of the works which libraries may wish to digitise are out of copyright, and therefore the provisions of the Copyright Act do not apply. However, there is one specific class of in-copyright material which libraries in educational institutions wish to digitise, but which they are apparently not permitted to do under current copyright law.

(19) Most libraries in educational institutions maintain short-term "Course Reserve" collections. These are materials (mainly, books and periodical articles) which are prescribed reading for specific courses and which therefore are in such heavy demand for the duration of the course that they cannot be allowed to go on loan out of the library. And because most educational institutions have large numbers of enrolled "distance" students (that is, students who live at a distance from the institution, and undertake their studies remotely), such students are unable to come to the library to read the course materials held in its Course Reserve collection.

(20) It is true that much course material is made available directly to students through print or electronic course-packs, which are copied under licence agreements signed with RROs (reproduction rights organisations) such as Copyright Licensing Limited. However, there will always be materials that have not been included in course-packs which lecturers require students to read, and the most cost-effective way of achieving this is to permit libraries in educational institutions to digitise such materials and make these available electronically to their students.

(21) LIANZA therefore ***recommends*** that an amendment to permit copying by libraries in educational institutions for Course Reserve collections be included in the Bill. This might be done by adding a new section 55A, to read as follows:

"55A : Copying for course reserve collections

(1) The librarian of a prescribed library in an educational institution may make a digital or print copy of any item (the original item) in the collection of the library without infringing copyright in any work included in the item if---

(a) the copy is to be held in the library's course reserve collection; and

(b) the copy is restricted to use by authenticated users; and

(c) the copy is deleted or destroyed within a reasonable time after the material becomes no longer relevant to the course of instruction for which it was copied.

(2) In subsection (1), authenticated user means a person who is a registered user of the library."

TECHNOLOGICAL PROTECTION MEASURES

(22) In both the Act and the Bill, the library provisions consistently refer to "the librarian of a prescribed library". LIANZA therefore ***recommends*** that in new section 226D, subsection (3)(a) should be changed to read:

"(a) the librarian of a prescribed library"

(23) And since there is no such entity as "a prescribed archive", LIANZA ***recommends*** that in new section 226D, subsection (3)(b) should be changed to read:

"(b) the archivist of an archive"

TITLE

(24) Since there is nothing in the Bill that deals with performers' rights, LIANZA ***recommends*** that reference to performers' rights should be deleted from the title of the Bill and subsequent Act.

ORAL SUBMISSION

(25) LIANZA would like to appear before the Committee, to make an oral submission. If this is approved, its representative will be:

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