

LIBRARY AND INFORMATION ASSOCIATION OF NEW ZEALAND AOTEAROA (LIANZA)

Initial Statement on the Proposed Copyright Act Review 2018

To: The Ministry of Business Innovation and Employment

Introduction

1. The Library and Information Association of New Zealand Aotearoa / Te Rau Herenga o Aotearoa (“LIANZA”) is a non-profit, membership based organisation that advocates on behalf of library and information professionals within the sector. LIANZA represents public, educational, commercial, industrial, legal and government libraries in New Zealand.
2. LIANZA welcomes the proposed Copyright Act 1994 Review (“the Review”).
3. LIANZA considers that the balance in the current law has become weighted too heavily in favour of rightsholders, and does not respond adequately to the technological changes that have occurred since the Copyright Act was passed.
4. LIANZA favours a technology neutral copyright framework that preserves existing Part 3 (“Acts Permitted”) rights, while also clarifying the limits of those rights. It is submitted that these rights are an essential counterweight to the rights granted to copyright owners, but that confusion over the scope of these rights makes them difficult to use.
5. LIANZA has participated in the galleries, libraries, archives and museums (“GLAM”) sector engagement with the Ministry of Business, Innovation and Employment (“MBIE”). This has been a valuable process, and has identified issues that the library sector is having with current law, and we thank MBIE for this opportunity. This statement supports that engagement by setting out some of the library sector’s current copyright concerns.

6. Additionally, in 2017, the LIANZA Standing Committee on Copyright (“LSCC”) surveyed librarians on their experiences with copyright. This statement sets out some of the findings of that survey. A copy of the survey questions is appended to this submission. Further detail of the responses received to this survey can be provided if this is desirable.

Submission Scope:

7. There are a number of points LIANZA wishes to make in relation to copyright law reform. It is not necessary or appropriate to make all of these points at this point in the Review process, and this statement confines itself to an initial statement of the copyright issues affecting libraries, and suggested principles to guide this Review.

Support of Universities New Zealand Submission:

8. While our submissions are focused on the impact of copyright law on library and information service providers, we have had the benefit of reviewing, in draft, the submission of Universities New Zealand. We support that submission.

Library Concerns

Introduction:

9. Copyright is an area of law that directly impacts upon library and information service providers. This is recognised in current law by the “permitted acts” provisions of the Copyright Act that pertain to libraries and archivists (ss 50-57A).
10. In general, libraries are making some use of all the exceptions, although the degree to which these are used varies. The most widely used exceptions include copying for the collections or users of other libraries, copying for preservation or replacement, and making a backup copy.
11. From our 2017 survey results, it appears that circumventing a Technical Protection Measure (“TPM”) is something libraries have been asked to do somewhat regularly, in line with the terms of s 226D of the Copyright Act, for example by circumventing regional codes for lawfully acquired content. Any changes to current copyright law concerning TPMs that prevented libraries from circumventing a TPM where doing so would not infringe copyright law is opposed by LIANZA.
12. LIANZA members have explicitly noted that the library exceptions are confusing, and uncertainty around the scope of these exceptions makes it difficult to be confident when relying upon them. Libraries appreciate flexibility in applying exceptions, but would be

more confident in applying these if the copyright legislative framework was supportive of inadvertent transgressions by libraries.

Projects:

13. Libraries have a vital community role in facilitating access to information. This includes a role in preserving and making available heritage materials, and many libraries want to provide online access to parts of their collections.
14. Our survey revealed that a number of library projects have had to be abandoned, restricted, or changed because of copyright concerns. These concerns are particularly apparent when libraries wish to post material online or carry out digitisation projects, and all formats are impacted. Locating the copyright owner can be challenging, and in many cases libraries are digitising for preservation purposes but are unable to share that material with their communities.
15. Similarly, public displays, and library activities, can be curtailed by copyright. One librarian commented in response to the 2017 survey that “[copyright law] has heavily influenced our choice of the material we use in public space. In effect, instead of being able to rely on exceptions, we are guided by the overhead of compliance”.

Orphan Works:

16. Orphan works remain problematic, and compliance is very resource intensive, particularly when works have many copyright owners (e.g. periodicals). The lack of prescription as to what constitutes a “diligent search” exacerbates this. There is significant variance across the sector in ability to commit resources, in risk appetite, and in policies.

Obsolete Formats:

17. Current copyright law is format specific. This makes the law unable to maintain currency with technological change. A framework that is technologically neutral is critical for librarians to fulfil their roles. Under the current law, libraries are struggling to work with material in obsolete formats. While the main problem lies with VHS tapes, material held on reel-to-reel tape, vinyl, floppy disks, CD ROMs, microfiche and even DVDs is often inaccessible as the hardware is no longer available to libraries or their users.
18. It is difficult to obtain permission to convert materials as the publishers have often gone out of business, or simply do not give permission. If permission is given, the requested fee is sometimes too high for the library to pay. Some libraries manage this by deliberately keeping and maintaining old hardware and equipment, or by sourcing alternative resources instead.

19. However, material in obsolete formats is often weeded (removed from a library collection), leading to a loss of otherwise useful material (including New Zealand resources).
20. The overall effect of this situation is that older, valuable or useful material is no longer accessible and in many cases is being removed from library collections. For heritage material, this is a serious issue.
21. A related issue is that there is currently no provision for format shifting of films, videos, etc. either into digital format or into other formats. A change to the law to allow this under certain circumstances, particularly for educational or library purposes, would be helpful.

Copying for the collections of other libraries:

22. Libraries need to be able to supply copies of periodical articles and other types of materials for the collections of other libraries, not just copies of books, as allowed for under s 54 of the Copyright Act 1994.

Back-up copies:

23. Libraries need to be permitted to make back-up copies of media such as sound and visual recordings (s 80 of the Copyright Act 1994 applies only to computer programs).

Abstracts:

24. Section 71 of the Copyright Act 1994 needs to be extended to permit the copying of abstracts of articles that are not on a scientific or technical subject (e.g. education, humanities, law, social sciences).

Licenses:

25. Contracting out of copyright law is increasingly occurring, particularly as libraries provide access to publisher databases of materials, rather than purchase these materials themselves.
26. Libraries are increasingly offered contracts on terms that are more restrictive of the use that can be made of materials than would be the case under the Copyright Act 1994. In general, these licenses restrict the uses that can be made of electronic materials (for example by only allowing print materials to be used when filling interloan requests), and may restrict access to the materials to a specified number or class of users (for example, restricting access to their databases to postgraduate students)

27. A related problem is publisher websites that restrict a download to one computer with no print options, so user needs cannot be met because material cannot be passed on to them.
28. Libraries are concerned that licensing models could render the library exceptions in Part 3 of the Copyright Act ineffectual. LIANZA considers that the Act should be amended to state clearly that licence agreements and contracts issued by copyright holders should not override the legislative rights given to copyright users by copyright law, and in particular do not prevent or restrict the exercise of the Permitted Acts.

Crown Copyright:

29. The key issue here is that it is often very difficult to identify which Department or Crown Agency is the rights-holder for any given material. Confusion over ownership extends to the Departments and Agencies themselves, making them reluctant to provide rights-holder approval where this is needed. The term of 100 years for Crown Copyright exacerbates this issue. LIANZA also notes that a 100 year term for Crown Copyright is somewhat at odds with the aim of the New Zealand Government Open Access and Licensing framework (NZGOAL).

Infringing File Sharing Regime:

30. Libraries (and/or their governing bodies) may face prosecution, and even loss of Internet access, if library users are found to be unlawfully downloading in-copyright materials using library-supplied Internet-access computers. Libraries resist a role as the “copyright police” and should be exempt from liability for user behaviour where reasonable steps have been taken to promote compliance.

Term:

31. The current term of protection (of 50 years from the death of the creator) creates difficulties for libraries. These difficulties include identifying an author, ascertaining their death date, and determining whether the work is in copyright or not (the orphan works problem); the inability to make content available which is still protected by copyright term; and the costs and delays incurred by compliance.
32. An extension of term would impact detrimentally on libraries by:
- a. Increasing the cost of copyright licenses, and thereby limiting budget available for other materials or activities.
 - b. Limiting the role of libraries in preserving cultural heritage.
 - c. Increasing costs as a result of need for libraries to retain and maintain physical collection items longer (e.g. newspapers, obsolete format materials).
 - d. Making digitisation projects more difficult.
 - e. Increasing the problem of orphan works.

The Value of the Public Domain

33. The public domain is considered to be a part of the common cultural and intellectual heritage of humanity, and can be a source of inspiration, imagination, and discovery for creators. Works in the public domain are not subject to any restrictions, and may be freely used without permission, for commercial and noncommercial purposes. This balances the rights conferred during the period of copyright protection, and it is important to remember that copyright is, arguably, a right that controls access (through controlling physical and digital reproduction) more than controlling “creative” copying.
34. When works pass out of copyright, what that means is that reproduction and access to the works for the benefit of humanity as a whole is facilitated, and this can be to the author’s benefit as well – if we think of what has survived from antiquity, so often it is the works of the popular artists like Aristophanes, and that is due in part to the fact that multiple copies of their work survived. Author-focused arguments that term extension benefits authors by giving them incentive to create have some validity (it is trite to say a long dead author will not create anything new if term is to be extended from 50 to 70 years after death, because the essential point is that publishers who are assured of a longer term of exclusive protection are more likely to support creators); however, the benefit to humanity, and to author reputation as a result, of works being preserved is also important, and that is why libraries argue against term extension.

Review Principles

Suggestions for Principles to Frame a Copyright Review

35. We suggest the following principles to guide the Review:
- a. Acknowledgement and respect of authorship and creation, and recognition of the importance of maintaining incentives for the creation of works.
 - b. Acknowledgement and respect of the fact that the creation of new work depends on people’s ability to access and use existing works, i.e. the value of a rich public domain.
 - c. Recognition that supporting creators to rework or transform works can create new value.
 - d. Recognition of the need for alternative solutions as the market won’t always ensure that copyright works are available.
 - e. Support for all people to be able to enjoy access to creative works, and the importance of copyright law and policy in facilitating access to works by people, including those with disabilities.
 - f. Acknowledgment of the importance of flexibility, including, but not limited to a legislative framework which is technology neutral.
 - g. Acknowledgment and support of the work of libraries, archives, museums and galleries in protecting and making accessible heritage information.
 - h. Recognition of indigenous people’s rights to protect their cultural heritage.
 - i. Recognition that compliance shouldn’t be burdensome.

Concluding Remarks

36. For the reasons set out above, LIANZA welcomes the Review, but believes it is vital that the Review be broad-ranging and comprehensive. We submit that a Review based upon the principles set out in paragraph [35] would achieve this. We also submit that the scope of this Review should take into account the library-specific issues identified in this submission.



Jennifer Campion, Chair

LIANZA Standing Committee on Copyright

15 December 2017.