

Chairman's Report - 2001

The Copyright Council met four times during the year 2001, three times in Wellington and once in Auckland. All meetings were well attended by members. Thanks must go to the New Zealand Film Commission for the use of their board room for Copyright Council meetings held in Wellington and also to RIANZ for the use of the board room for the Auckland meeting.

The main focus throughout the year was the same as for 2000: whether or not the Government would honour its pre-election promise to provide up to a two year window against the parallel importation of intellectual property goods. Despite continual lobbying by Copyright Council members throughout the year, a decision on this issue was not made until December when the government announced it would introduce legislation to ban parallel imports of films, videos and DVDs for nine months from a title's first international release. At the same time, government announced that changes would be proposed to existing legislation governing the onus of proof in piracy proceedings. This was important, bearing in mind the huge increase in pirated CDs, VCDs and DVDs coming into New Zealand from Asian countries over the last few years. Notwithstanding, it was noted that border control with regard to such goods had improved considerably.

Ministry of Economic Development released its discussion paper on *The Impacts of Digital Technology on the Copyright Act 1994* in July, seeking public comment by 12 October. Both the Copyright Council and a number of its members made submissions on the issues raised. It was important that the dialogue between the Copyright Council and the Ministry of Economic Development continue to ensure copyright legislation is updated and brought into line with the WIPO Internet Treaties.

The Creative Industries Working Group (CIWG) (comprising representatives from the Ministry of Economic Development, the Ministry for Culture & Heritage and Industry NZ), approached the Council in the latter half of the year advising that they wished to work with the Council to encourage the development of creative industries in New Zealand. They recommended that Council membership be extended to other trade associations working within the copyright sector. Invitations were extended to a number of organisations to bring them under the umbrella of the Copyright Council. CIWG has been working with members to obtain appropriate statistical information on the value of creative industries in New Zealand. To develop stronger ties and interaction between the Council and government, members of the CIWG were asked to attend future Council meetings as observers. This meant that all future Council meetings would be held in Wellington.

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Changes to Parallel Importing

New legislation to ban parallel imports of films, videos and DVDs will be introduced by the government in the first half of this year.

Parallel importing of these products will be banned for nine months from a title's first international release. This means that retailers or alternative suppliers will not be able to legally import copies of a motion picture title without the permission of the local copyright holder or authorised distributor for nine months after its first release. The aim is to provide the film distribution industry with a period of protection to allow for the orderly release of films, videos and DVDs.

The ban will not cover videos or DVDs imported for private or domestic use and will not apply to music recordings, books and software products. However, the government intends to keep these industries under review for the next three years.

Consultation during the legislation's development, revealed the separate issue of piracy, in particular the difficulties copyright owners faced in taking action against the importation of pirated material.

To address these concerns, legislation will be introduced to make changes to the onus of proof in civil copyright infringement proceedings. These changes will include a presumption that suspected imported goods are pirated, unless the defendant is able to prove otherwise. Legislation would also ensure that defendants who ought reasonably to have known that goods were pirated do not escape liability for copyright infringement. This means it will be easier for copyright holders to take action against people who blatantly import pirated material.

Customs seize pirated DVDs

The need for the new legislation was highlighted recently when Customs officers seized material from a man who arrived at Auckland International Airport carrying more than 100 copied items, including 30 *Lord of the Rings* DVDs, 15 *Harry Potter and the Philosopher's Stone* DVDs, as well as other block-buster movies and computer software. According to Customs officials, the material came from Pakistan and was likely to be pirated copies.

Bill Hood, Copyright Council member representing The Motion Picture Distributors Association of New Zealand, applauds The Customs Department for "The Herculean job" they are doing in seizing pirated DVDs at the border.

In fact, more than 250,000 counterfeit items have been stopped by New Zealand Customs officers in the past six years, with more than this reaching our shops.

High Court Decision provides clarification

Copyright Licensing Ltd (CLL) is pleased with the recent High Court decision that clarifies the scope of copyright exceptions provided under Part III of the 1994 Copyright Act.

Action was taken by CLL and New Zealand Universities to seek clarification as to the extent of free multiple copying of published copyright works allowed by Universities under the Act, without the need for a licence.

Justice Peter Salmon made it clear in his judgement that the exemptions provided for copying by educational institutions for educational purposes were quite separate from the other “fair dealing” sections in the Act that dealt with copying by libraries, copying for criticism or review, or research or private study. He emphasised that educational institutions could not make multiple copies of extracts on behalf of students “for research and private study”, or master copies of copyright material for students to copy for themselves. Unless an educational institution has a licence with CLL, any multiple copying from copyright works for students in course packs, workbooks or other forms, must be carried out under the specific “education” provisions contained in the Act.

The decision also made it clear that where the quantity of copying exceeded that allowed by the Act, then the provision no longer had any application and the copy became an infringing copy. Therefore, if an educational institution makes copies of more than three per cent or three pages of a work (which must not be more than 50 per cent of the work) without a licence from CLL, then they are infringing copyright.

This also applies to University Librarians who are not permitted to make multiple or repeated copies of a reasonable proportion of works for provision to individual students as part of course packs, where the multiple copying was undertaken at the same time. Such copying may however be done on successive occasions as requested by different students.

Andrew Brown, the Barrister acting on behalf of CLL, submitted that one of the major aims of the Copyright Act 1994 was to restrict the amount of free copying allowed by educational institutions to protect the interests of authors and publishers.

Software Copyright Battle

A significant High Court decision was recently made in Auckland on the ownership of copyright in modifications made to a software programme. Since designing the original payroll system and selling the rights to the programme to a client, the developer had made a lot of modifications to the original software, resulting in only a fraction of the original code remaining. The developer claimed that new rights existed in the modifications and that it owned these rights.

To collect royalties from the sales of the modified programme to new clients, the developer had to prove that separate rights existed in the modifications and that a degree of skill and labour had gone into their development. It was decided that the

development of the modifications did involve skill and labour of the developer and, because the original agreement between the parties did not include ownership of future modifications, that the developer owned the rights to the modifications. It was decided that the rights to the new program should be shared 75:25 between the developer and the owner of the original payroll system.

UNESCO Draft Recommendation undermines rights of Copyright Owners

At its General Conference held in Paris in October last year, UNESCO considered its strategy for 2002 to 2007. The main issue of concern was the role of Information and Communication Technologies (ICTs) in education, science, culture and communication and the need for UNESCO to address the “digital divide” by giving priority attention to ethical issues, cultural diversity, multilingualism and universal access to cyberspace. UNESCO has three strategic objectives relating to communication and information. These are to:

- Promote the free-flow of ideas and universal access to information
- Promote expression of cultural diversity in world information networks
- Promote access for all to information and communication technologies.

The meeting considered a draft recommendation on the promotion and use of multilingualism and universal access to cyberspace. There has been considerable objection by publishers and authors internationally, as it was seen to undermine the rights of copyright owners and more particularly, publishers and authors.

Whilst publishers and authors support the free-flow of ideas and universal access to information, it is important that the underlying concept of copyright protection is incorporated into the UNESCO strategy.

The key concern of publishers and authors is the lack of clarity about the boundaries between public domain information and what is protected by copyright. Kevin Chapma (President, BPANZ) and Kathy Sheat (Secretary, CC) met with New Zealand representatives of UNESCO attending the meeting of experts to provide their comments on an amended draft recommendation.

The International Publishers Association believes that the draft recommendation conflicts with important international copyright treaties and purports to redefine or renegotiate aspects of them, which UNESCO has no authority to do. This is likely to have a detrimental effect on publishing and the rights of creators. The IPA submits that the recommendation should:

- Recognise intellectual property rights as human rights
- Recognise the positive role of copyright
- Not prejudice existing or future international agreements

WIPO Internet Treaty comes into force

The World Intellectual Property Organisation (WIPO) recently announced that the WIPO Copyright Treaty (WCT) came into force on the 6th of March.

The treaty has been implemented wholly or partly by most of the 34 countries that ratified the treaty. So far 14 countries from Central and Eastern Europe, 13 countries from the Americas, 5 countries from Africa and 2 countries from Asia have ratified the WCT.

The WCT provides the legal framework necessary for protecting copyright and encouraging creativity on the Internet.

The main features of WCT

- Provision for rights holders to use technical measures to protect their work and prohibition to circumvent these measures (ie: encryption of content to restrict access to authorised users only)
- Legal ban on tampering with rights management information (ie: descriptive information such as the author's name, title of the work, or terms and conditions of the use of the work)
- Exclusive right for authors of communication to the public, including the right to make their work available on the Internet (ie: posting a work on a public website)
- Digital reproduction, including storage in digital form is protected by the exclusive right of reproduction
- Confirmation that the three step test provided by the Berne Convention and the TRIPS Agreement applies to copyright exceptions in the digital environment. This means that exceptions and limitations to copyright are only allowed in special cases that do not conflict with a normal exploitation of the work and the legitimate interests of the author are not unreasonably prejudiced

New Launch for Napster

Napster officials have announced that they are only weeks away from relaunching their website for paying subscribers.

Recently, Napster, who dealt with the free exchange of copyright music, were hit by music industry lawsuits and forced off the Internet by a federal judge.

Since late February, 20,000 United States volunteers have been testing the new site. New technology will allow Napster to filter out unauthorised music and concentrate on providing paying customers with music it has the right to distribute.

An official launch date has yet to be set, but fees of US\$5-10 have been suggested for 50 downloads per month.

Napster's biggest challenge will be to attract new and former users to its new user pays service. Its two main competitors are MusicNet (www.musicnet.com) and Pressplay (www.pressplay.com).

TV gets 'Napsterised'

Most people in the United States pay a monthly fee on their cable bill to get programmes. However, there is an increasing number who are using new technology to get these programmes for free, and then distribute them widely.

Using 'file sharing' programmes such as Morpheus, people are able to go online and download any episode of a television programme and watch the haul on their computer screen.

There is also a controversial new device called 'ReplayTV 4000' (basically a super smart video recorder), which lets people save television shows in digital format directly from their television. They can then send them over the Net to other Replay users. Some have even worked out how to copy Replay files to their personal computers, where they are uploaded by users of Morpheus for wider distribution.

Obviously this has angered television bosses. In fact, two lawsuits have already been filed - one against the makers of Replay, and the other against the creators of Morpheus and two other similar services - Grokster and Kazaa.

Napster was legally forced to stop the trading of copyrighted songs on the grounds that they had the ability to police activities of its users, and had profited by failing to do so. However, the owners of Morpheus, Kazaa and Grokster will be likely to argue that because they don't use a Napster-like central server, it is impossible for them to monitor the activities of the people who use them.

Jack Valenti, CEO of the Motion Picture Association of America (MPAA) is not concerned about the copying of a show for personal use, rather it is the wider distribution of these copied programmes that distresses him. "It's not ok to start sending it around and file sharing," he says.

While the legal battle rages, piracy is rife. The MPAA has discovered more than 5,000 locations for episodes of 'Friends'; 4,000 sites for 'The Simpsons' and 2,000 for 'The Sopranos'.

Did you know?

- The most popular activity of home users of the Internet is downloading free music. This accounts for 38 per cent of home use.
- Only 8 per cent of Americans over the age of twelve have paid for downloaded music.
- 81 percent of people who download free music state that their CD purchases have stayed the same, or in some cases increased since they began downloading.

(Source: New Zealand Herald 11/12/01)

British Telecom's Hyperlink Challenge

British Telecom has recently claimed in an American Court that it owns the patent on hyperlinks.

Hyperlinks are integral to the functioning of the Internet as they allow the user to move easily from one web page to another, simply by clicking on the highlighted link.

If British Telecom wins the copyright battle, the effects on every Internet and on-line user will be phenomenal. The ramifications for Internet Service Providers (ISPs) are also huge. British Telecom would hold the right to hyperlinking and could collect a fee every from the ISP every time a hyperlink is used. It could also bring large claims of damage against ISPs and sites for the use of hyperlinks. This, and the charging of fees could be seriously damaging to the workings of the Internet.

According to British Telecom, it filed a patent on hyperlinks in 1976. It has to argue successfully that what they had in 1976 applies to today's Internet, even though it wasn't around then. Defence attorneys argue that British Telecom filed the patent to allow for the future distribution of information to subscribers over telephones or televisions connected to a central computer. The idea of the Internet, a decentralised network of computers, was a remote fantasy.

The case has provoked howls of protest from computer programmers and Internet developers who argue that the concept of hyperlinks was around earlier than British Telecom's patent. According to computer gurus, hyperlinks were described in work produced by British and American inventors in the 1960s, well before British Telecom filed its patent. Among the evidence against British Telecom is a film clip that shows a 1968 demonstration of how clicking on certain words in a computer programme prompts a new page to appear. This public presentation was delivered to 1000 computer professionals at a computer convention in San Francisco.

A trial is scheduled for early September.

Criticism of United States Copyright Protection Bill

A controversial Bill introduced recently in the United States has created a furore among stakeholders. The proposed Consumer Broadband and Television Promotion Act would force manufacturers to include copyright protection technology in media devices, such as PCs and cable television decoders.

The bill aims to end the battle over who is responsible for protecting copyright content by forcing software and hardware manufacturers to include copyright protection in their products. It calls for the Information Technology (IT), consumer electronic and entertainment industries to come to an agreement on this issue within a year. If a decision is not made, the federal government will mandate the specifications.

Resistance to the Bill has come from several areas, including consumer advocate groups whose main concern is that the Bill will give entertainment companies even more power and will deny users basic rights. These include copying copyright material for their own personal use, which is currently allowed under United States law.

The Bill has drawn criticism from consumer market analysts who say it will have a dramatic effect on PC sales because people would not be as willing to purchase PCs loaded with anti-copying technology.

The IT Industry has voiced opposition to the bill as it believes it is technically impossible to protect a digital work once it has been placed on the Internet.

However, Hilary Rosen, President/CEO of the Recording Association of America believes the recording industry is suffering from the rampant distribution of works through CD ripping and burning technology. According to Hilary, the only solution is to create standards to prevent piracy, such as those outlined in the proposed Consumer Broadband and Television Promotion Act.

International Events

World Intellectual Property Day - 26 April

The second World Intellectual Property Day will be celebrated this year on the 26th of April. It provides an opportunity to highlight the significance of creativity and innovation in our lives.

Australia - Copyright Amendment (Parallel Importation) Bill

This bill was introduced into the House of Representatives on 13 March 2002. If the bill is passed into legislation, it will remove restrictions on the importation of legitimate copies of computer software, books and periodicals and sheet music.

Forum adopts Muscat Declaration on Traditional Knowledge

An International Forum has adopted the Muscat Declaration on Traditional Knowledge. The declaration recognises:

- The contribution of traditional knowledge in building bridges between cultures, creating wealth, promoting human dignity and cultural identity;
- That Intellectual Property is a legal mechanism that can be adapted to the specific features of traditional knowledge.

We welcome your contribution!

Articles for the next issue of *Copyright Council News* are welcome. The deadline for the next issue is:

30 April

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