

Electronic issues forum: copyright and the internet

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Synopsis of Paper

Librarians are often concerned with the copyright implications of downloading and distributing material from the Internet and may also be involved with establishing and maintaining on-line databases of one form or another. The paper discusses the limitations of the "prescribed library" regime for permitted copying, when it comes to dealing with on-line databases. It looks at some of the difficulties in determining whether an on-line service is a "cable programme service" for the purpose of the Copyright Act. The move towards sui generis protection of databases at the international level is discussed and the paper looks briefly at the treatment of databases under New Zealand law. Issues such as tracking copyright infringement in an electronic environment, and the use of "framing", are discussed. Finally, the paper looks at the use of meta tags to facilitate inclusion of Web sites in search engine results, and some of the pitfalls that may be present.

Librarians and Copyright

For librarians copyright often raises concerns in two contexts when using electronic materials: the implications of downloading and distributing material from the Internet or other on-line sources, and the establishing and maintaining of databases to which users (usually within the organisation but sometimes from outside as well) may have on-line access.

Sourcing Materials On-line

Where a library is specifically licensed to use electronic materials, the terms of the licence in question prevail. Librarians need to make sure they are familiar with those terms. Are there any restrictions on making multiple copies, or using materials for commercial purposes? If what is about to be done does not fall within the terms of the licence, the librarian will need to become familiar very quickly with the provisions of Part III of the Copyright Act 1994 (permitted uses of copyright material).

Note that the provisions in Part III governing permitted copying by librarians of prescribed libraries do not expressly apply to "cable programmes". The term "cable programme" has a much broader meaning under the Copyright Act than it has in ordinary usage. Broadly speaking, most materials that are sourced on-line are likely to be cable programmes in terms of the Act. A "cable programme" is defined as any item included in a "cable programme service". Most Web sites will be cable programme services, as will most on-line databases. In *Shetland Times v. Dr Jonathan Wills & Anor* [1997] FSR 604, the Court appears to have been prepared to accept that there was an arguable case that headlines from an Internet news site were copyright material, so that their unauthorised inclusion on another Web site infringed copyright. (Note, however, that this case turned on its own facts to a large extent.)

Infringement of a Cable Programme by Copying

Cable programmes are infringed, firstly, by unauthorised copying. Merely accessing something on a computer screen is likely to constitute "copying". However, placing material on the Internet in a way that allows unrestricted access amounts to the grant of an implied licence to all other Internet users to view such material on their computer screens. The implied licence argument probably extends to printing off material from the Internet, providing there is no stated restriction to the contrary on the

Web site in question - and provided the person putting the material on the Internet in the first place was the copyright owner or had the copyright owner's full permission to do so. If not, the fair dealing provisions in the Copyright Act may cover taking a copy for the librarian's own private study or research - if that is what the librarian is doing it for.

The difficulty from a librarian's perspective is that copies are generally made for supply to third parties - not for the librarian's own use. Broadly speaking, the same principles will apply as for the copying of hard copy materials and the distribution of such copies - except that, as noted above, the provisions governing copying by librarians of prescribed libraries may not apply in so far as the material copied is a cable programme. Any copying therefore needs to be done pursuant to a licence (express or implied) or within the remaining exemptions in Part III of the Copyright Act.

The Parliamentary Library has a special exemption from copyright infringement in section 58 of the Copyright Act which permits its officers to supply recordings of cable programmes (or transcripts of such recordings) to MPs in certain circumstances. However, the section is not without its own difficulties.

Establishing On-Line Databases

Many librarians will be involved in maintaining in-house databases for use by other staff (and possibly by third parties). In addition, they may have a role in the establishment of their organisation's Web site. Each brings its own problems.

Storing copyright material in an electronic database involves a form of copying and therefore must either be done pursuant to a licence or come within one of the permitted acts in Part III of the Copyright Act if it is not to amount to an infringement of copyright.

Infringement of a Cable Programme by Including It in Another Cable Programme

Such storage may also involve the inclusion of a work in a cable programme service - which is different type of copyright infringement.

Permission to copy a "literary work", such as an article from a legal periodical, does not necessarily cover the inclusion of such a work in a "cable programme service".

When is something a cable programme service? An in-house on-line database is not a cable programme service if, for example, its contents are used solely for purposes internal to the running of a business, and not "by way of rendering a service or providing amenities for others", and if the service is not connected to any other "telecommunications system". (A "telecommunications system" is defined as "a system for conveying visual images, sounds, or other information by electronic means".)

This raises a host of questions. Is a Government Department a "business" for this purpose? If not, do different rules apply to an in-house on-line database in Government? And when is a "cable programme service" used solely for purposes internal to the running of the business? Does this preclude allowing on-line access to third parties? Does it preclude remote (ie off-site) access? If an in-house database is used in the course of preparing opinions for clients or for preparing Court documents, does that mean that it is used "by way of rendering a service...for others"?

Damned if you do and damned if you don't

If an in-house on-line database is not a cable programme service, it removes one layer of concerns about copyright infringement when it comes to incorporating material into the database, but it also

removes one layer of protection when it comes to a third party exploiting the contents of the database without authority.

Web Sites

What about Web sites? Ordinarily, each Web page will comprise a cable programme service. It is important, therefore, to ensure that appropriate licences have been obtained for the inclusion of any material that is copyright.

A very recent case involving copyright infringement by inclusion in a Web site concerned a book by Abraham Maslow, the famous American psychologist, perhaps best known for his theory of a hierarchy of human needs. In that case, Maslow's daughter claimed that she owned the copyright in a book written by her father - *Eupsychian Management: A Journal* and that it was infringed by the defendant when he made it available via the Internet. The defendant, for his part, maintained that he had the authority to post the book on his Web site through a limited one-time use licence he received in 1987 for classroom use by posting the book on two computer bulletin board services. An interim injunction was granted restraining publication via the Internet.

As noted above, under New Zealand law it is a copyright infringement to include a "cable programme" in a "cable programme service". A Web site may be treated as a cable programme service for this purpose. What then, is a cable programme in this context? It is any item included in another cable programme service. However, that does not mean Web site operator A cannot use the word "cat" on his or her Web site because it is already used on Web site B. What is protected is the item in the form in which it is embedded or encoded in the Web site.

The *Shetland Times* case (mentioned above) appears to provide a good example of the inclusion of an item from one cable programme service in another cable programme service, although the legal analysis employed in that case did not pursue this point. In that case the defendant used the plaintiff's news headlines (which appeared on the plaintiff's front web page) as links to the text of the plaintiff's news articles, by-passing the plaintiff's front page in the process, and making it seem that the articles were those of the defendant.

Database Protection

The subject of database protection is a fraught one at the international level at present. The EC Database Directive is intended to harmonise copyright protection of databases as well as to create a new (sui generis) right, separate from copyright, to prevent unauthorised use of database contents. It will not be necessary for copyright to subsist in a database before it can qualify for protection under the new database right. Generally speaking, database protection will last for 15 years under the Directive.

The World Intellectual Property Organisation (WIPO) is also looking at sui generis database protection.

In New Zealand, databases are dealt with under copyright law and are treated as a compilation (ie a form of "literary work"). As such a modicum of originality is required in compiling the database, but it is not necessary that the content of the database consist of copyright works. The database may consist of a compilation of data, for example, in which copyright does not subsist - even though copyright subsists in the database itself.

Tracking Copyright Infringements on the Internet

One of the headaches for intellectual property owners has been tracking down infringing material on the Internet. Similarly, for persons wanting to incorporate into a Web site material sourced from the Internet, it has sometimes been equally difficult to work out how to obtain approval for such inclusion.

The development of digital "watermarks" will enable copyright material to be embedded with a digital watermark which is invisible to the ordinary viewer but can be read with a special reader. (Another term that is sometimes used here is "digital object identifier".) This will facilitate the detection of copyright infringement. It can also provide an easy means of securing the necessary consents to use copyright material, as links to appropriate licensing bodies can be included in the watermark, so that it serves as an on-line routing system for obtaining copyright clearances by payment of a royalty on-line.

Technological solutions of this type have, however, raised privacy concerns. There is a growing demand that electronic copyright management systems should not enable the development of databases tracking individual user's viewing habits, and that individuals should be able to pay to download copyright material while retaining their anonymity.

"Framing"

Framing occurs when a Web site provides hypertext links to content on other Web sites through "frames" bearing the URL and logo of the original Web site. This allows the Web site that provides the "frame" to be what some have described as a "parasite", presenting other sites' content while using the original site's own advertising.

Earlier this year several on-line news service providers took legal action against a Web site that was framing some of their on-line news service content. The plaintiffs alleged, among other things, that the defendant was infringing copyright in doing so. This appears to have been despite the fact that, although it was open to the plaintiffs to do so, they had not chosen to protect their content by limiting access to those persons who had presubscribed, and that some of the plaintiffs actually used means to defeat framing.

One of the plaintiffs employed technology that caused the defendant's frame to disappear after a short period, while other sites were configured in such a way that the defendant's frame disappeared once the user clicked on hypertext links beyond the home page. The plaintiffs argued that the existence of technological means of protecting their content should not operate to deny them a remedy for copyright protection.

The claim was settled in June of this year, when the defendant agreed not to frame the plaintiffs' Web sites. One of the terms of the settlement was that the defendant was permitted to link to the plaintiffs' sites (minus frames), but had to use plain text links - and not the plaintiffs' logos - to do so. Moreover, the consent to the provision of links to the plaintiffs' sites on the defendant's Web site could be withdrawn by any plaintiff on 15 business days' notice. However, the defendant (quite properly) reserved the right in such circumstances to advance as a defence the argument that plain text linking did not infringe the plaintiffs' legal rights.

The use of hypertext links from one Web site to another permeates the Internet. A subcommittee of the American Bar Association Business Law Section has prepared guidelines and model clauses in respect of Web linking agreements in Web Linking Agreements: Contracting Strategies and Model Provisions. . It is important, however, to remember that US copyright law is not necessarily the same as New Zealand copyright law. Moreover, other areas of law such as trade mark law and the Fair Trading Act may have application to linking.

The provision of links needs to be treated warily. Is a trade mark involved? Is any form of graphic, logo, or characteristic font from the site to which the link points being used? Could the link be taken to imply an association with the site to which the link points, or some sort of endorsement of that site? If so, it may be unwise to include the link without permission.

What About Shareware and Freeware?

Even use of shareware and freeware downloaded from the Internet can raise copyright issues because such programs often exclude use for commercial purposes - and this will catch most if not all transactions within law firms. Once more, the key lies in the fine print. Always check the licence terms.

Non-Copyright Issues

Librarians are used to grappling with issues of copyright, but traditionally have had less need to be familiar with trade mark law. An interesting illustration of the pitfalls that await legal information providers who try to ensure that their Web sites attract maximum coverage on popular search engines can be found in a US case *Oppedahl & Larson v Advanced Concepts*, DC Colo, Civil Action No. 97-Z-1952.

Oppedahl & Larson (earlier in the news for registering "patents.com" as a domain name) are a Colorado law firm specialising in intellectual property law. They maintain their own Web site. On using an Internet search engine to search for the terms "Oppedahl" and "Larson" they found, to their surprise, that three other Web sites, having no connection to Oppedahl & Larson, were thrown up by the search. What was even more surprising was that the names "Oppedahl" and "Larson" did not appear in the text that was visible to viewers at these three sites.

Oppedahl & Larson allege in their claim that the three sites in question had embedded the names in meta tags which appeared in underlying source documents that were not visible to viewers but were picked up by search engines, thus allowing the sites in question to capitalise on Oppedahl & Larson's reputation in the intellectual property field. Oppedahl & Larson sought, among other things, punitive damages and an account for profits. The outcome of the case has not yet been reported.

Biography of the writer

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Cathie Harrison is a lawyer specialising in aspects of the law relating to communications, such as privacy law, intellectual property, entertainment law, and the law relating to Internet services. She has been in legal practice for 17 years, and was a partner in the Wellington office of Chapman Tripp Sheffield Young for six years, leaving that firm in mid-1995 to establish her own specialist law firm, Harrisons. She has a longstanding interest in the Internet, is a member, of the Internet Society, and has spoken on legal issues relating to the Internet at a number of conferences. Cathie is a co-author of Butterworth's new text on Copyright and Design and has written various articles on matters relating to intellectual property and the Internet. Cathie is also an associate member of the Commerce Commission.