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COPYRIGHT FOR FOODIES

This article is an updated version of a paper delivered to a food writers' conference in 1994. It deals with the basics of the New Zealand law of copyright as it affects food writers, eg

- What should food writers be doing to protect their copyright interests?
- To what extent can you quote from other people's copy?
- When you write for a magazine, who owns the copyright?
- When you sell your writings, does your client get the copyright, or do you keep it?
- Where do we draw the line between "ideas" (there is no copyright in ideas) and copyright-protected works?
- Does copyright apply differently as between books, periodicals, magazines, videos, digital and online material?

Where does copyright law come from?

Our copyright law comes from statute, ie it came into existence only when parliament passed the first Copyright Act. It did not just develop, as did most of the more important areas of our law eg, contract, tort, equity.

The New Zealand Copyright Act 1994, like most other countries' copyright laws, is based on international conventions.

What is copyright?

Copyright is the right to reproduce and use a wide variety of original artistic works, including the "literary works" of food writers. More importantly, copyright is the right to exclude all others from using the work: it is the "*exclusive right*" to reproduce the work.

How copyright comes into existence

Copyright "*exists*" in every original "*work*", regardless of artistic merit. Copyright "works" include literary, dramatic, musical and artistic works; sound recordings; films; broadcasts; cable programmes; typographical arrangements.

There is no registration requirement: copyright comes into being automatically when the "work" is made, provided it is *original* (means: not copied), and is made in some "*material*" form.

To attract copyright protection the work must also be made by a "*qualified person*", meaning a New Zealander or New Zealand resident. But by virtue of international copyright conventions, nationals of most countries are also in effect "qualified persons".

Although you do not have to, you should always mark the internationally recognised copyright symbol on any work you make, eg "© *John McBride 2007*". It is also advisable to assert your "moral rights" (see below), in which case you can mark the work: *"© John McBride 2007; all moral rights asserted*".

Who owns copyright?

The basic rule is that the first owner of copyright in a literary work is the author.

However there are important exceptions to that general rule. If the food writer produced the literary work in the course of his/her employment, that employer becomes the first owner of the copyright. Thus if you are employed by a magazine and write the article in the course of that employment, the magazine owns the copyright.

That exception to the "author is first copyright owner" rule applies only to "employees". It does not apply to independent contractors/freelancers. Thus where a food writer produces an article on commission from a magazine, the basic rule says the writer owns the copyright.

The basic rule, and the exceptions, are all general presumptions as to ownership of copyright. They can be reversed ("*excluded*") by specific agreement. An "*excluding agreement*" can be written, or verbal, or might be "implied" eg from the past relationship between the writer and the person commissioning. That can lead to uncertainty and argument, so where you are producing work on commission from a newspaper or magazine, it is prudent to specify in writing at the outset that you the writer will own the copyright.

Dealings in copyright

Once copyright comes into existence, it can be bought and sold ("*assigned*"), leased ("*licensed*"), and divided up in any way, as can any piece of property. Be warned however that an assignment of copyright, and an exclusive licence to use it, must be in writing and signed.

Duration of copyright

Copyright in a literary work lasts 50 years from the end of the year in which author dies.

Infringement of copyright

The main acts of infringement of copyright in a literary work are: reproducing it, publishing it, broadcasting it, giving a public performance of it, or making an adaptation. Importing or selling copyright works is also prohibited.

Obviously you are only guilty of infringement if you do these things without permission of the copyright owner.

To infringe, you only have to take a "*substantial part*" of the original. What is/not "substantial" is a matter for lawyers and judges to argue about. It used to be assumed that you could take 10% of a copyright literary work without infringing. However as far back as 1990 in the case of *Longman Group Limited v Carrington Technical Institute* [1], the New Zealand High Court held that there was no such thing as a "10% rule". If the part which was reproduced was "*of importance and significance and essential to the*

[1] [1991] 2 NZLR 574; (1990) 4 TCLR 220; 2 NZIPR 264 (HC)

integrity of the work" then it was "*substantial*" and reproducing it amounted to infringement.

What happens when the alleged infringer says "I didn't copy", but the work looks very similar to the original? The copyright owner has to prove that the infringing work was "derived" from the first work. However the Court accepts that there will seldom be direct proof of copying, so relies on inference drawn from "object similarity" plus evidence the defendant had access to the first work [2]. In short: "if it looks like a duck and it quacks then it probably is a duck".

Remedies

The remedies for infringement of copyright are especially wide. They include injunction, claims for damages, and an account of all the profits made by the infringement. Additional damages may be awarded if the infringement was flagrant.

How does the copyright law apply to foodies?

There is no specific mention in the Copyright Act about culinary recipes, or writings based around recipes. In a New Zealand case about copyright in kiwifruit packaging, a High Court Judge did say: "A recipe for a rice pudding might be susceptible of literary copyright" [3].

Recipes

Logically, a recipe containing no more than a list of ingredients and quantities and methods could attract copyright as a literary work. "Literary work" is defined in the New Zealand Copyright Act as including "tables and compilations". There is no requirement for any literary or artistic merit. Indeed copyright has been found to exist in quite minimal works: eg lottery tickets, and a staggering amount of law as to artistic copyright in New Zealand is to be found in cases about plumbing connections. If the written form of the first recipe is reproduced lock stock and barrel, or close to it, there could well be an infringement case.

But in practice, a person asserting copyright in such a minimal "work" as a simple list of ingredients, quantities and methods is going to have real problems proving infringement. They would have to prove that their work was "original". That does not mean "novel" but only original in the sense that the writer expended some skill and labour on it, rather than copying it from someone else. However I predict that a very large number of recipes (I mean recipes in the sense of the list of ingredients, quantities and methods) are copied.

The person asserting copyright infringement would then have to prove that the defendant did in fact "copy" the list. Where the copyright work is quite complex, an imitator can make quite substantial changes to it and still be said to have copied substantial parts of it. It will still "look like a duck", and the more minor changes there are, the louder it "quacks". But the simpler the copyright work is, the easier it is for another person to produce a new work that does the same job, or incorporates the same idea, but is sufficiently different that it cannot be said to be copied.

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[2] Eg see *Henkel KgaA v Holdfast NZ Ltd* [2007] 1 NZLR 577 (NZ Supreme Court)

[3] *Plix Products Limited v Frank M Winstone (Merchants) Limited*, (1984) 1 TCLR 176, at pages 199-200. (The case went to the Court of Appeal but not to do with Prichard J's reference to the rice pudding. The Court of Appeal judgment is *Plix Products Limited v Frank M Winstone (Merchants) Limited*, 1985 CA 178/84; [1985] 1 NZLR 376; (1985) 1 TCLR 259; (1985) 5 IPR 156 (CA))

Articles

Where the recipe is part of an originally written article, copyright exists in the article as a whole. In this respect, an article about food is no different from any other short literary work. So long as it is original, copyright clearly exists in it.

The "idea/expression" dichotomy

It is well established that there is no copyright in ideas. Copyright exists only in the particular way the author has expressed the idea in the work. The idea/expression dichotomy represents a logical trade off between the interests of a free flow of information and knowledge, and the interests of rewarding creative persons for their efforts.

Thus a new style or system of food preparation will not be protected by copyright. If the person who thinks of the idea writes an article expressing the idea, the article is protected by copyright, but the idea is not.

Protecting ideas

How do you protect ideas? The best way to protect an idea which represents a new invention is to apply for and obtain a patent. However it would be very difficult to patent a recipe, because the "novelty" and "non obviousness" requirements could not be met.

To some extent you can utilise the law of confidentiality. The law says that if you give another person confidential information, they cannot use or disclose it without your permission. If they do, you can restrain them by injunction. You can also stop every person they pass the information on to. To succeed in a breach of confidence action, you have to show that the information was confidential, and that you passed it over in circumstances in which it was clear that it was given in confidence.

The law of confidentiality has the important drawback that, as soon as the information passes into the public domain you cannot say it is confidential, even if you have a contract saying it was.

However the law of confidentiality is a valuable tool for a creative person who has developed an idea which can be commercially exploited. For example you develop an idea for a business to instruct fat cat city lawyers how to cook truffles. You have a 2 page outline and some illustrations, which you take to a production house. They are interested, but turn you down for "budget constraint" reasons. A year on you see that a remarkably similar business is being launched. Its publicity does not use a single phrase that is "yours" but clearly the idea was yours and they simply reworked it.

Provided you can establish the idea you gave them was sufficiently "developed", the Court is likely to accept that you gave the idea "in confidence" to the production house. You would be entitled to stop them from exploiting the idea, or to be awarded damages, or they might be required to disgorge the profits they had made from exploiting the idea.

In practice of course you are unlikely to be able to afford a court action. However you can still make use of the law of confidentiality by making it clear, when you are imparting your developed idea to some other person, that they must not use or disclose it without your permission. Confidential ideas should be submitted in writing, and only after the recipient has signed an acknowledgement that the idea is a "developed business idea" which is submitted in confidence and not to be used or disclosed without your prior written permission.

Use of recipes

It does not infringe the food writer's copyright for the reader to execute the recipe. Or as the judge said of the rice pudding (in the case about the kiwifruit packaging): "But no-one would suggest that to make a rice pudding by following a recipe would infringe the literary copyright within the recipe".

However it would be an infringement to broadcast the recipe, publish it elsewhere, or give a public performance of it, eg use it in public by cooking the dish on a television programme.

Perhaps the "performance" of the recipe in a private cookery class can be regarded as a public performance, making it an infringing act. But I believe you would be in some difficulty arguing that a restaurant has infringed copyright in one of your recipes by cooking it. Certainly the presentation of the finished product on the restaurant customer's plate is "public", but the "performance" is out the back.

Quoting from other people's works

There are various "*fair dealing*" exceptions to copyright protection. These give a certain amount of scope to quote from other people's articles and recipes. To take advantage of the "fair dealing" exceptions, you have to give a sufficient acknowledgement to the original author.

"Fair dealing" includes reproducing part of the copyright work for the purposes of criticism or review. There are also a number of "fair dealing" exceptions by which educationalists and libraries can use portions of copyright works.

You should not assume that your right to reproduce another writer's article "*for the purposes of criticism or review*" gives you open slather to quote from their work. You have to acknowledge the other writer. You have to establish that your quotation is put in "for purposes of criticism or review". And you would also have to establish that the extract you reproduced was "*fair*" in terms of that purpose. Quotations should not be too lengthy. You can probably quote a particular recipe for the purpose of discussing its merits. However if you copy a number of recipes, outside the framework of an announcement or review, you would be infringing any copyright that does exist in the original.

Videos / DVDs

Copyright exists in videos and DVDs as "*cinematographic works*", ie exactly the same as movies. The owner of copyright in a movie or video is the "*maker*". There is a fair scope for argument as to who is the maker of a movie or video, so in practice the production agreements usually state specifically who owns the copyright. If you allow your recipe or technique to be used in a video/DVD, without any specific agreement, it would be implied that you had licensed the video maker to use whatever literary copyright you had in your recipe or presentation. You should therefore ensure that you have a written contract with the production house.

Moral rights

The New Zealand copyright law provides for "*moral rights*". This includes the right of the author of a literary work to be identified as the author, when the work or some adaptation of it is performed in public or included in some kind of film. You would also have the right to object to any "*derogatory treatment*" of your work. "Moral rights" are most important to writers who have passed their copyright to somebody else, eg the magazine they work for, or a publisher. Moral rights need to be asserted for the law to apply, but if asserted they enable the writer to continue to be credited with the

authorship of the work, and to ensure that the work is preserved and protected in accordance with the writer's intentions.

Of course if you as the writer still own the copyright in your work, you would not have to rely on your "moral rights". You could simply withhold permission to publish your work or have it used in another format, unless the publisher or production company agrees to give you whatever credit you want and agrees to publish the work in a form you approve of. But if you lost the ownership of copyright, "moral rights" afford you a degree of protection. The last thing you want is to have the publisher (to whom you have given copyright) republish the work, using your name, but making some variations which spoil the original recipe.

Conclusion

If food writers are looking for protection for their creative work, they should utilise the law of copyright to the maximum. You should also look beyond copyright, to the law of confidentiality, by which you can obtain a much broader protection of your ideas, at least up until the point that they are released into the public domain.

Important note: This paper contains general information and opinions, and should not be used or relied on in the absence of specific legal advice.