

Digital Copyright Reform in New Zealand: An Own-Interest Approach for a Small Market Economy

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A. ABSTRACT

It is often stated that one of the underlying rationales for copyright protection is to encourage the creation and proliferation of copyrighted works. How much protection is needed to actually encourage the creation of copyrighted works is frequently debated. The basic contention is that over-protection may in fact have the opposite effect to encouraging creativity. In the digital age the battle over what is the appropriate level of copyright protection has become a worldwide debate. Some countries maintain that a high level of protection is a benefit not only for their own economies, but also for the world economy. Others regard lower levels of protection as necessary to foster growth and, in some instances, copyright-related technology transfer. A small market economy, such as New Zealand, finds itself in the middle ground in this debate. With interests in common with both the developed and the developing world, New Zealand has created an own-interest approach to digital copyright protection. This chapter discusses that approach.

B. RECENT HISTORY OF NEW ZEALAND COPYRIGHT LAW

New Zealand has historically adopted the United Kingdom's copyright law either without alteration or with minor alterations to the substantive law.¹

* Many thanks to Mark Perry and Brian Fitzgerald who organized the conference at which an earlier version of this paper was presented.

1 *Copyright Act 1962* (N.Z.), 1962/33, repealed, for example, is much the same as the *Copyright Act 1956* (U.K.), 4 & 5 Eliz. 2, c. 74, repealed.

A digital copyright bill was introduced to the New Zealand Parliament in 2006 and was passed as an *Amendment Act* to the *Copyright Act 1994*.² This chapter discusses the approach of that *Amendment Act* and the circumstances and policy objectives that led to it.

In 1994 New Zealand's copyright law was substantially updated to reflect the developments similar to those that had been enacted in UK law some several years earlier.³ The 1994 Act was almost entirely drafted and conceived with a pre-digital technology mindset. It contains a prohibition on interfering with technological protection mechanisms,⁴ but in other respects was essentially "digital free." The 1994 Act, for example, continued to define communication rights in terms of broadcasts and cable programs. It would appear that the legislature took the view that as there was no treaty directly addressing digital copyright, it need not be considered in the 1994 reforms. This view was perhaps short-sighted as the diplomatic negotiations around digital technology and copyright were well underway at the World Intellectual Property Organization (WIPO), and the resulting copyright treaty, known as the *WCT*,⁵ arising from that series of WIPO negotiations came to fruition less than two years later. In any event, New Zealand is not a member of the *WCT* and the current law reform process does not make it clear that it will become a signatory of that treaty.⁶

Once a bill is introduced it is read in the House of Representatives (the House) and then it goes to a select committee process where it is discussed

2 N.Z., Bill 102-3, *Copyright (New Technologies and Performers' Rights) Amendment Bill*, 48th Parl., 2008 (assented to 11 April 2008), online: www.parliament.nz/en-NZ/PB/Legislation/Bills/b/2/a/00DBHOH_BILL7735_1-Copyright-New-Technologies-and-Performers-Rights.htm [*Copyright Bill*] and *Copyright (New Technologies) Amendment Act 2008* (N.Z.), 2008/27 [*Amendment Act*].

3 Many of the provisions of the *Copyright Act 1994* (N.Z.), 1994/143 [*Copyright Act 1994*], are adopted from the *Copyright, Designs and Patents Act 1988* (U.K.), 1988, c. 48.

4 *Copyright Act 1994*, *ibid.*, s. 226.

5 *WIPO Copyright Treaty*, 20 December 1996, S. Treaty Doc. No. 105-17 (1997), 36 I.L.M. 65 [*WCT*].

6 *Copyright Bill*, above note 2. The *Copyright Bill* stated in its opening commentary that "the bill takes into account international developments in copyright law, and incorporates many aspects of the two treaties negotiated by the members of the World Intellectual Property Organization (WIPO)—the *WIPO Copyright Treaty* and *WIPO Performances and Phonograms Treaty*." Even though New Zealand is not a member of the *WCT* it does, however, in some of its free trade agreements, agree to meet the standards of the *WCT*.

and public submissions are called for.⁷ Submissions were made and the select committee reported back to the House recommending a number of changes. Bills that have returned to the House from the select committee process are voted on in Parliament at what is known as the third reading.⁸ Although delay and further amendment often occur at the third-reading stage, bills can equally often occur with reasonable speed, particularly as the debate on the third reading is limited to two hours.⁹ The copyright bill did not speedily progress and debate was halted in late 2007. At that stage it looked like the law would not pass in a hurry, however, in April 2008 it was passed.

C. POLICY AS STATED IN THE *COPYRIGHT (NEW TECHNOLOGIES) ACT*¹⁰

Objectives and policies of the reform process were set out in the *Copyright Bill*. A statement of purpose of legislation is a standard procedure for New Zealand bills, but when the bill becomes an Act they are not necessarily included in the Act. Among the objectives stated were:¹¹

- a) to clarify the application of existing rights and exceptions in the digital environment;
- b) to create a technologically neutral framework to the *Copyright Act 1994*; and
- c) to maintain the balance between creators, owners, and users in the digital world.

The need for clarification of existing rights and exceptions in the digital environment arises, in part, because the *Copyright Act 1994* was potentially ambiguous. Like many pre-digital copyright laws, it has the potential to

7 Public submissions were also called for at the policy discussion paper stage which precedes the drafting of the bill.

8 For discussion of New Zealand legislative process, see Geoffrey Palmer & Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government*, 4th ed. (South Melbourne: Oxford University Press, 2004).

9 *Ibid.* at 196.

10 The bill was originally entitled the *Copyright (New Technologies and Performers' Rights) Amendment Act*, but the select committee recommended the shortening of the title because “[a]lthough the bill does amend some provisions concerning performers’ rights, all these amendments relate only to making these provisions technologically neutral.” See *Copyright Bill*, above note 2 at 2.

11 *Ibid.* at 1.

capture as infringements some digital world activities that arguably ought not to be infringements, such as functional transient copies, which might be made in order to view a website.¹²

The desire for a technologically neutral framework is laudable. In relation to infringement this is achieved by the inclusion of a right to communicate to the public, replacing the right tied to the technology of broadcasting and cable programming.¹³ In many respects the *Amendment Act* is potentially technologically constrained; for example, it provides copyright protection for specific technologies such as technological protection mechanisms (TPMs) and circumscribed permitted acts that are based primarily around known and technologically specific modes of communication.¹⁴

Additionally, the general policy statement that was included with the bill when it was first read provided: “[t]he key principle that guides copyright reform in New Zealand is the enhancement of the public interest—copyright law must benefit New Zealand as a whole and contribute to overall growth and development.”¹⁵ This policy principle, with its focus on growth and development, suggests that the most important goal of the reform is the maximizing of economic benefits. The use of “overall” to qualify growth and development seems to suggest that the relevant growth and development is not necessarily confined to copyright-related businesses and industries. One would hope that the interests of copyright owners are primarily relevant. Notably, however, the traditional copyright justifications of protecting the authors and creators of copyrighted works have been subsumed into the contribution to overall growth and development. This focus on growth and development is consistent with the stated objectives of the ministry responsible for intellectual property policy: the Ministry of Economic Development.¹⁶

12 Such transient copies would have to be an infringement because s. 2 of the *Copyright Act 1994* states that copying means “in relation to any description of work, reproducing or recording the work in any material form.” It was therefore possible to argue that something that is transient is not material, but such an argument is not clear-cut and has not been tested before the New Zealand courts.

13 *Copyright Bill*, above note 2, provides for a technology-neutral right to communicate to the public and a category of “communication work” which means “a transmission, or the making available by a communication technology, of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme.”

14 Discussed below note 50.

15 *Copyright Bill*, above note 2, s. 102-1.

16 For information regarding the Ministry of Economic Development see their website, online: www.med.govt.nz.

Of note is that growth and development of New Zealand culture, whatever that may be, is not expressly excluded from the principle.

Defining the scope of a copyright law that would contribute to New Zealand's growth and development is a potentially complex matter. New Zealand is a developed country and therefore it might be expected to follow the lead of many developed countries and have strong copyright protection. Indeed, that has been the position of New Zealand's copyright policy in the twentieth century. However, New Zealand does not have a large economy and although copyright is important for many domestic interests, New Zealand is often described as a net-user of copyrighted works. In effect this means that New Zealand imports more copyrighted works than it makes for the domestic market or exports. This so-called net-user status suggests that the best way for copyright law to contribute to growth and development is to ensure that the law protects the interests of users.¹⁷ It can be argued that it is in the users' interest to protect copyright so that users benefit from the creation of copyrighted works. Alternatively, it can be argued that overly protective copyright laws do not encourage innovation and creation and place unduly high costs on users of copyrighted works.

The objective, set out above, to maintain the balance between owners and users in the digital world suggests maintaining the current balance. Why the current balance is the appropriate balance was not explained in the *Copyright Bill* or in any of the policy papers that preceded it.¹⁸ This policy objective does implicitly acknowledge that the balance is different in the digital world and the balance should not be shifted towards either owners or users. New Zealand's current copyright law purports to achieve balance through the framework, familiar in countries whose copyright law comes directly from the UK, of giving copyright owner's rights and addressing certain categories of user needs through a series of statutorily defined permitted acts.¹⁹ The copyright law does not give "rights" to users. Users are required to show that their otherwise infringing use is justified under one of some forty-plus detailed provisions. The *Amendment Act* continues this approach of per-

17 Difficulties arise with the concept of being a net-user as not all uses of copyrighted works are the same. In small developed countries in particular, there may be net-users of some works and net-owners of others suggesting that net-user/net-owner status is not necessary clean-cut.

18 The policy papers leading up to the drafting of the bill can be found on the Ministry of Economic Development's website, "Policy/Discussion Papers," online: www.consumeraffairs.govt.nz/publications/index.html#policy.

19 For owners' exclusive rights, see *Copyright Act 1994*, above note 3, s. 16 and for users' permitted acts, see ss. 40–91.

mitted acts for users by drafting additional permitted acts to the existing framework.

I submitted to the *Copyright Bill* select committee that increasing copyright protection in the digital world, including protecting technological protection mechanisms, tips the balance in favour of owners, and it is only because of that tipping of the balance that the need for some of the new detailed permitted acts arises. I also submitted that the need for New Zealand to consider permitted acts as equal in status to copyright-exclusive rights is crucial in the digital age. Recognizing not only the rights of owners, but also the rights of users, is more likely to achieve the bill's stated aim of balancing the interests of users and owners. Users' interests are inevitably secondary to owners' rights if the terms of their use are always defined as permitted acts (i.e., "an exception" to owners' rights). Treating users as having rights puts users and owners on a more even footing.

New Zealand copyright law has, particularly since 1994, been framed around the approach that copyright is a property right and that permitted acts are somehow taking away from that property right. An approach that would better reflect the balance of rights is to define the boundaries of the property right—that is, what a copyright owner has the exclusive right to do—as being delineated in part by what others may do. In this sense, users' rights do not take a bite out of the property owners' apple, but users' rights define the shape of that apple in the first place. Such an approach could be thought of as more aligned to the US's "fair use" approach and the rights of users.²⁰ The historical basis for copyright permitted acts in New Zealand is not the same as the "fair use" approach, but the broad policy objective to achieve a balance of users and owners rights is not different.

In reality, however, New Zealand's position in copyright law is now primarily driven by its trading interests. New Zealand is highly dependent on international trade, particularly trade in agricultural products. In this trading context the Government of New Zealand does not treat intellectual property as a matter of purely domestic policy, but as an area of law that is directly linked to concerns of the World Trade Organization.²¹

20 For a discussion of fair use in the digital context see Jane C. Ginsburg, "Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the U.S. Experience" (2005) 29 Colum. J.L. & Arts 11 at 30 [Ginsburg].

21 In particular, WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [*TRIPS Agreement*].

It is clear that some types of digital copyright reform might be beneficial for economies that are larger and have a greater volume of copyright industries than New Zealand. That does not necessarily mean, however, that a high level of copyright protection is problematic for an economy such as New Zealand's. However, it may very well be that New Zealand would be prepared to entertain high-level copyright protection, of the kind found in the US free trade agreement with Australia,²² in order to obtain other gains, particularly in relation to market access for agricultural products. So copyright law may not necessarily contribute to the growth and development of local copyright industries, but it might indirectly contribute to the growth and development of agriculturally based industries. Such growth and development may be difficult to measure, particularly in the short term.

The above statements of policy objectives in the reform process are the tests by which some of the proposed reforms are measured in this chapter. The next section discusses some of the key reforms in the *Amendment Act*.

D. THE APPROACH OF THE AMENDMENT ACT

In this section the *Amendment Act*'s approach to certain key digital copyright concepts is outlined.

1) Communication to the Public and Communication Work

The *Amendment Act* provides for copyright owners to have the exclusive right to communicate works to the public.²³ In addition to providing a right to communicate, the *Amendment Act* introduces a category of work: "the communication work." A communication work would include a broadcast, a cable program, and any combination of those two, as well as other methods of communication with the public.²⁴

The communication work and the communication right are together framed in a technologically neutral way. Like the *WCT*, the means of making the work available to the public is not technologically specified. "Communicate" is defined as "to transmit or make available by means of communication technology, including by means of a telecommunications

22 *Australia-United States Free Trade Agreement*, Australia and United States, 1 January 2001, [2005] ATS 1, c. 21, online: www.dfat.gov.au/trade/negotiations/us_fta/final-text [*AUSFTA*].

23 *Amendment Act*, above note 2, s. 18, substituting a new s. 33.

24 *Ibid.*, s. 3.

system or electronic retrieval system”²⁵ Like in the *WCT*, “public” is not defined.²⁶ Courts interpreting this are likely to look at the interpretation of “public” under other provisions of the 1994 Act, which include small as well as larger audiences.²⁷

2) Permitted Act of Transient Copying

The *Amendment Act* provides a new permitted act of transient copying. It provides that a copy is not an infringement of copyright if the reproduction is

- (a) transient or incidental; and
- (b) is an integral and essential²⁸ part of a technological process for—
 - (i) making or receiving a communication that does not infringe copyright; or
 - (ii) enabling the lawful use of, or lawful dealing in, the work; and
- (c) has no independent economic significance.²⁹

There is no express guidance as to what “independent economic significance” means. The exception seems to suggest that transient copying is not an infringement because the copies have no independent economic value from the copyrighted work itself. It is clearly possible that a transient copy does not have an economic value that is attributable to copyright, but it seems quite probable that the communications system that creates the transient or incidental copy has an economic value independent of the copyrighted work. The phrase in that sense is not clear.

3) Copying a Sound Recording for Personal Use

A person can copy a sound recording for personal use provided certain conditions are met.³⁰ The select committee report refers to this provision as “format shifting.” The draft provision does not, however, expressly require

25 *Ibid.*

26 See discussion in Sam Ricketson & Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2d ed. (New York: Oxford University Press, 2006) at 12.58.

27 See Susy Frankel & Geoff McLay, *Intellectual Property in New Zealand* (Wellington: LexisNexis Butterworths, 2002) at 5.11.4.

28 “Integral and essential” was substituted in the select committee process for “a necessary,” see *Amendment Act*, above note 2, s. 23, inserting a new s. 43A(b).

29 *Amendment Act, ibid.*, inserting s. 43A.

30 *Ibid.*, s. 81A.

that the format be changed.³¹ Therefore, a person can copy a CD for use in an MP3 player or copy a CD so that she has two CDs—perhaps one for each CD player she owns. Such copying is only permissible provided that the conditions of the section are met.³² The conditions include that the sound recording is not itself an infringing copy³³ or cannot be borrowed or hired;³⁴ only one copy can be made for each device;³⁵ and the owner of the sound recording must be the owner of any copy and retain ownership of the sound recording.³⁶

In the first reading of the *Copyright Bill* the format-shifting provision had a sunset clause so that it expired two years after the date on which it came into force, but it may have been extended for further periods of two years. During the select committee process this sunset clause was removed.³⁷ The select committee report on the bill stated that it was removed because its inclusion “would create uncertainty to whether purchasers of sound recordings on older technology would be allowed to continue format-shifting those recordings for private and domestic use in the future.”³⁸

The select committee report notes that the reason for the proposed enactment of this permitted act is in recognition “that format shifting of music for private and domestic use is widespread.”³⁹ This recognition of reality is also used to reject a submission that format shifting be extended to other forms of media, such as DVDs. The committee was of the view that format shifting of other media is not widespread.⁴⁰ Such reasoning is predicated on a view of technology that is not forward-looking. It is highly possible that technology will develop so that format shifting of other media does become widespread. It is difficult to see that copyright law has a sensible policy basis if it amends itself simply because everyone commits an infringement anyway. Surely, the real question is whether other types of format shifting for personal use could be legitimate under the *Copyright Act 1994*.

31 *Ibid.*

32 *Ibid.*, s. 81A(1).

33 *Ibid.*, s. 81A(1)(b).

34 *Ibid.*, s. 81A(1)(c).

35 *Ibid.*, s. 81A(1)(g).

36 *Ibid.*, ss. 81A(1)(d) & (h).

37 *Copyright Bill*, above note 2, clause 44(3) struck out.

38 *Ibid.*, commentary at 5.

39 *Ibid.*

40 *Ibid.*

The provision also requires that the copy is for the owner of the sound recording or a member of that owner's household.⁴¹ The person who makes the copy has to retain ownership of it. So, presumably, if it is given to a member of the household and that member leaves, then the person who made the copy must be sure to get it back. There is an obvious unreality and impracticality to such a requirement. If one teenage member of the household copies a song for his elder sibling who then moves away to university, the younger sibling must make sure that this copy of the sound recording, perhaps made a few years ago, does not leave for university also. Further, copying for friends is perhaps as widespread, if not more so, than it is for members of a household.

Additionally, the select committee process recommended that another condition be added; that "the sound recording is not a communication work or part of a communication work."⁴² The exact meaning of this phrase is not clear. Infringing copies are not permitted to be copied under the format-shifting provision in any event. Therefore, if a communication work is illegitimately recorded it cannot be format shifted. The intention of this additional condition seems to be to exclude communication works from being unduly copied. However, the wording does not clearly reflect that intention. A sound recording once made from a communication work is no longer categorized, in copyright terms, as a communication work, rather it is a sound recording. There can of course be a sound recording and a communication work, or indeed several of each, of the same musical work, but that is a different point. The sound recording and the communication work are two separate works. Where a communication work is recorded, the recording cannot be both a communication work and a sound recording at the same time.⁴³ This is not simply a problem of semantics, but could lead to confusion. An example of potential confusion is illustrative. Suppose a person legitimately makes a sound recording of a communication work such as a radio broadcast. Under the *Amendment Act*, and the *Copyright Act 1994*, this kind of reproduction might be permitted if the purpose of the recording was to listen to the broadcast at a more convenient time.⁴⁴ This is known as time-shifting. Say the sound recording is made on a CD

41 *Amendment Act*, above note 2, s. 44, inserting s. 81A(1)(f).

42 *Ibid.*, s. 81A(1)(a).

43 The converse is not true: a sound recording can be communicated, and both works exist simultaneously at the time of communication.

44 See *Copyright Act 1994*, above note 3, s. 84 and *Amendment Act*, above note 2, s. 45, inserting s. 84.

but “A” wants to listen to it on his MP3 player. Then, in order to do so, “A” can format-shift the work. Under the format-shifting provision “A” must keep the original sound recording, but under the time-shifting provision “A” must destroy the copy made within a reasonable time after viewing it. It seems likely therefore that the intention of the legislature is that in such a situation both copies are destroyed. That intention, however, has not been made clear. The solution to this particular scenario is to amend the condition to: “the sound recording is not made from or is not a recording of a communication work.” This scenario illustrates the difficulties with drafting this kind of very specific permitted act. The policy of the permitted act can be lost in the detail and circumvented in the wake of unforeseen technological developments. In such a way the policy of copyright law is lost in a sea of statutory detail and the big-picture policy of copyright law becomes unfortunately indiscernible. But perhaps the icing on the cake of the permitted format-shifting act is the ultimate elevation of owners’ rights above users’ interests. The *Amendment Act* also makes it clear that the owner of copyright in a sound recording can contract out of this provision.⁴⁵

4) TPM Protection and Related Permitted Acts

Under the existing 1994 copyright law, copyright owners may take action against anyone who supplies or manufactures devices, or provides the means or information specifically designed to circumvent TPMs for the purpose of infringing copying.⁴⁶ The *Amendment Act* also extends this to prohibit conduct that involves obtaining a device to circumvent a TPM in order to infringe copyright.⁴⁷ In contrast to other jurisdictions, such as the US and Australia, there is no liability for the act of circumvention.⁴⁸ Broadly, the policy behind the provisions is that access controls can be circumvented but not copy controls.⁴⁹ Thus, the definition of TPM states:

for the avoidance of doubt, [TPM] does not include a process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it only controls any access to a work for non-infringing purposes (for example, it does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market

45 *Amendment Act, ibid.*, s. 81A(2).

46 *Copyright Act 1994*, above note 3, s. 226.

47 *Amendment Act*, above note 2, s. 89, inserting s. 226A(1).

48 See Ginsburg, above note 20.

49 *Copyright Bill*, above note 2, commentary at 8.

segmentation by preventing the playback in New Zealand of a non-infringing copy of a work.⁵⁰

This is consistent with other parts of copyright law which allow for parallel importation of copyrighted works.⁵¹ It would defeat New Zealand's parallel importation regime if a parallel import of a DVD, for example, was rendered ineffectual because regional coding prevented its playback.⁵²

Before the select committee process, the *Copyright Bill* contained a definition of the term "TPM spoiling device"; the term was amended to "TPM circumvention device" to remove the implication that circumvention was necessarily "spoiling."⁵³

Under the *Amendment Act* it is not permitted to sell⁵⁴ a TPM circumvention device if the seller knows or has reason to believe that it will be used to infringe copyright in a TPM-protected work. The person who has the rights in relation to the TPM is described as the "issuer" of the TPM rather than the owner of the TPM.⁵⁵ That person has the same rights of delivery in civil and criminal proceedings as a copyright owner would in respect of infringement of copyright.⁵⁶

The select committee report stated that the TPM provisions "are necessary to manage the risk of piracy of copyrighted works in a digital environment, and that they strike the correct balance between the interests of copyright owners and those of copyright users."⁵⁷ This policy, to maintain the balance between owners and users, is given effect by allowing the circumvention of TPMs in order to perform a permitted act.⁵⁸ Where this legitimate circumvention is not possible because of, for example, digital lock-up, the person seeking to perform a permitted act may seek assistance from a "qualified person" to effect the circumvention.⁵⁹ This elite group, of the so-called qualified includes educational establishments, prescribed

50 *Amendment Act*, above note 2, s. 89, inserting s. 226.

51 *Copyright Act 1994*, above note 3, s. 12.

52 Most DVD players sold in New Zealand play DVDs with any region code.

53 *Amendment Act*, above note 2, s. 89, inserting s. 226.

54 The provision makes it a prohibited act to "make, import, sell, distribute, let for hire, offer or expose for sale or hire, or advertise for sale or hire" a TPM circumvention device, *Amendment Act, ibid.*, s. 89, inserting s. 226A.

55 *Ibid.*, s. 226B.

56 *Ibid.*, s. 226B(3).

57 *Copyright Bill*, above note 2, commentary 8.

58 *Amendment Act*, above note 2, s. 89, inserting s. 226D(2)(a).

59 *Ibid.*, s. 226D(2).

libraries, and archives.⁶⁰ Although allowing circumvention for permitted acts is a starting point to balancing the interests of users and owners, the requirement that the permitted act may only be done by a select group shifts the balance back the other way. The *Amendment Act* then addresses a user's options if the user is prevented from exercising a permitted act because of a TPM.⁶¹ A person wanting to exercise the permitted act can either a) apply to the copyright owner to do so, or b) engage a statutorily deemed, qualified person.⁶² The qualified person is limited to only charging the total "cost of the provision of the service and a reasonable contribution to [their] general expenses."⁶³ This is unlikely to produce a boom in the business of being qualified to circumvent TPMs, but this attempt to control the price is, quite obviously, subject to potential dispute over what a reasonable fee is.

The *Amendment Act* purports to effect balance, but the moment TPMs are protected in their own right the balance shifts in favour of owners and it is very difficult to "unshift." It is interesting that New Zealand should now protect TPMs in this way when TPM protection has been in place for the better part of a decade in the US and the EU. Even some of its initial supporters now question the need for such protection. Most notably, however, in the ten years or more that TPM protection of this sort has not been in force, there is no New Zealand-based evidence that the failure to protect TPMs has led to any increase in piracy.

5) Decompilation of Software

The *Amendment Act* allows for decompilation of computer programs under certain conditions.⁶⁴ The primary condition is that the decompilation is for the purpose of creating an independent but interoperable program.⁶⁵ Decpile means

- (a) to convert a computer program expressed in a low level language into a version expressed in a higher level language; or
- (b) to copy the program as a necessary incident of converting it into that version.⁶⁶

60 *Ibid.*, s. 226D(3)

61 *Ibid.*, s. 226E.

62 *Ibid.*, s. 226E(2)

63 *Ibid.*, s. 226E(4).

64 *Ibid.*, s. 43, inserting s. 80A.

65 *Ibid.*, s. 80A(2)(a).

66 *Ibid.*, s. 80A(4).

A further subsection provides that decompilation is not permitted if the “lawful user” of a copy of the computer program uses “the information obtained from decompiling the computer program to create a program that is substantially similar in its expression to the program that has been decompiled.”⁶⁷ The select committee report urged the Ministry of Economic Development to monitor the effect of this provision to ensure that it is not used to restrict competition in the software market.⁶⁸ An agreement that attempts to prohibit or restrict this “permitted” decompilation shall have no effect.⁶⁹ Some submissions to the select committee process were concerned that this would mean that suppliers of computer software would not license New Zealand use.⁷⁰ Other submissions suggested that software contracts would apply foreign law to avoid this permitted act. This reasoning misunderstands the role of contract law and copyright law. This provision has the effect of making this a mandatory requirement of copyright law. Copyright is applied on a territorial basis so that even if an agreement between a New Zealand and, for example, a US software supplier purports to apply US law, New Zealand law and not US law will apply to the copyright, even though US law applies to the contract.

Other provisions allow for copying of a computer program to lawfully use the program. The section gives the example of copying to correct an error.⁷¹ It is also not an infringement to observe, study, or test a computer program to “determine the ideas and principles that underlie any element of the program.”⁷² Unlike the permitted decompilation act, the *Amendment Act* does not expressly provide that this permitted act cannot be contracted out of. The absence of express provisions regarding the other permitted acts in relation to computer programs suggests that they can be contracted out of. The drafters of the *Amendment Act* seem to assume that permitted acts can be contracted out of. This is consistent with the notion of permitted acts being exceptions, but the legitimacy of contracting out of permitted acts has not been tested in New Zealand law. Given the stated policy that permitted acts are designed to effect a balance between users and owners, it

67 *Ibid.*, s. 80A(3)(d).

68 *Copyright Bill*, above note 2, commentary 10.

69 *Amendment Act*, above note 2, inserting s. 80D.

70 New Zealand Law Society Submission, online: www.parliament.nz/NR/rdonlyres/CF21D3BE-051E-463E-9E50-6F2820474270/56459/NewZealandLawSociety3.pdf at para. 20.

71 *Amendment Act*, above note 2, inserting s. 80B. This permitted use cannot be contracted out of, see s. 80C.

72 *Ibid.*, s. 80C.

is questionable as to why it should be presumed, without further analysis, that these acts can be contracted out of.

6) Internet Service Provider Liability

Internet service providers (ISPs)⁷³ are not liable for infringing copyright or authorizing infringement if a person uses the services of an ISP when infringing copyright.⁷⁴ This exemption from liability is, however, subject to a copyright owner's right to injunctive relief.⁷⁵

For an ISP, storing (but not modification) of infringing material is not an infringement unless the ISP knows that the material stored is infringing or has reason to believe that it is infringing.⁷⁶ The *Amendment Act* implements a notice and takedown procedure. An ISP that "knows or has reason to believe that the material infringes copyright" must delete the material or prevent access to the material "as soon as possible after becoming aware of the infringing material."⁷⁷ A court, when deciding if an ISP "knows or has reason to believe that material infringes copyright," must take into account if the ISP has received a notice of infringement.⁷⁸

Submissions were made that a notice and notice procedure should be adopted, rather than a notice and takedown procedure.⁷⁹ A notice and notice procedure requires the ISP to notify its client of a copyright owner's complaint of infringement, but that notice alone does not require them to take down material. The suggestion of a notice and notice procedure was not adopted. Also, an ISP is not liable for copyright infringement in certain instances of caching material.⁸⁰

73 ISPs are defined to include those who provide "transmission, routing or providing of connections for digital online communications, between or among points specified by a user" and hosting services. *Ibid.*, s. 4.

74 *Ibid.*, s. 92B.

75 *Ibid.*, s. 92B(2)(a) and in relation to exclusion from liability for storing infringing material s. 92B(3) provides "However, nothing in this section limits the right of the copyright owner to injunctive relief in relation to [a user's] infringement or any infringement by the Internet service provider."

76 *Ibid.*, s. 92C(2).

77 *Ibid.*, s. 92C(2)(a).

78 *Ibid.*, s. 92C(3).

79 See InternetNZ, "Submission on the *Copyright Amendment Bill 2007*" (9 March 2007), online: www.internetnz.net.nz/issues/submissions/archive/2007/copyright/view.

80 *Amendment Act*, above note 2, new s. 92D.

E. THE OVERALL APPROACH TO PERMITTED ACTS

The policy to maintain the balance between users and owners in the digital world is difficult to achieve. Copyright protection of TPMs inevitably favours owners. Even though the policy is to maintain the existing balance the reforms beg the question of whether the balance is correct in the first place.

As discussed above, the distinctions between approaches to fair use and permitted acts are set in sharp relief in the digital age because permitted acts become harder and harder to exercise when copyright protection is given to technologies like TPMs. New Zealand's approach of permitted acts needs to be looked at carefully.⁸¹ While the proposals to allow circumvention of TPMs to undertake permitted acts and introducing the permitted acts of decompilation of computer programs, format shifting, and additional educational⁸² and archival⁸³ exceptions and the like are for the benefit of users, there is an overarching difficulty with this approach. In the digital environment, it is not clear that this sort of tinkering with permitted acts actually will achieve the policy objectives that the *Amendment Act* intended to implement. It is questionable whether rearranging and increasing permitted acts does enough to benefit those New Zealanders who are users. New Zealand, like Canada, has a fair dealing approach to copyright law specifying specific categories of permitted acts and requiring certain criteria to be met. Like Canada, New Zealand does not have a broad "fair use," US-style provision. Unlike Canada, the New Zealand courts, and it would seem copyright owners in practice, have not interpreted the law in the broad terms similar to that of the Canadian Supreme Court.⁸⁴ New Zealand has a fairly restrictive approach to permitted acts. It is questionable whether it is desirable or indeed necessary to retain that restrictiveness in the digital environment.

Neither the *Copyright Act 1994* nor the *Amendment Act* as a whole decisively demonstrates any overarching guiding principles of the scope of permitted acts. Such overall guiding principles are important so as not to eliminate permitted acts because of unforeseen technological or business

81 Others have suggested that the whole *Copyright Act 1994* needs to be overhauled.

There appears to be reluctance at the Ministry of Economic Development to do this as it is not a priority, given that the whole Act was overhauled in 1994. However, as that was a pre-digital Act the reluctance is not really justified.

82 *Amendment Act*, above note 2, s. 44A.

83 *Ibid.*, ss. 30–36.

84 See *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13.

nuances. I submitted to the select committee that guiding permitted-act principles be included in the *Amendment Act*. In the 1994 Act these general principles of guidance, which resemble US law, can be found as part of the general provision allowing fair dealing for research and private study in some circumstances. The relevant part of that provides:

In determining, for the purposes of subsection (1) of this section, whether copying, by means of a reprographic process or by any other means, constitutes fair dealing for the purposes of research or private study, a court shall have regard to—

- a) The purpose of the copying; and
- b) The nature of the work copied; and
- c) Whether the work could have been obtained within a reasonable time at an ordinary commercial price; and
- d) The effect of the copying on the potential market for, or value of, the work; and
- e) Where part of a work is copied, the amount and substantiality of the part copied taken in relation to the whole work.⁸⁵

These principles, or similar ones, should be elevated to be guiding principles for all permitted acts. This will enable courts and other interpreters of legislation to capture the meaning behind the exceptions and to achieve the Act's stated aim of maintaining a balance between users and owners of copyright protected matter.

F. CONCLUSION

The approach of drafting provisions specifically for New Zealand's interests is an important step towards developing a sound intellectual property law for New Zealand.⁸⁶ The disappointment with the *Amendment Act* is that it is not preceded by a full economic or social analysis of which approach to digital copyright protection would benefit New Zealand. The *Amendment Act* adopts the approach that digital copyright protection measures "are necessary to manage the risk of piracy of copyrighted works in the digital environment."⁸⁷ There is no conclusive evidence that in the last ten years

⁸⁵ *Copyright Act 1994*, above note 3, s. 43(3).

⁸⁶ I have argued elsewhere that development of a New Zealand intellectual property law for New Zealand is important. See Susy Frankel, "Towards a Sound New Zealand Intellectual Property Law" (2001) 32 V.U.W.L.R. 47.

⁸⁷ *Copyright Bill*, above note 2, commentary 8.

of the digital environment the balance has been tilted in the wrong direction in New Zealand. The opening passages of the select committee report indicate that the legislation will be reviewed in five years' time "to ensure that copyright legislation in New Zealand keeps pace with technological advances."⁸⁸

88 *Ibid.*, commentary 1.