

**Submission to the
Commerce Select Committee
on the
Copyright (New Technologies and
Performers' Rights) Amendment Bill 2006
Submitted 9 March 2007**



InternetNZ

The Internet Society of New Zealand (Inc)

KEY POINTS IN INTERNETNZ'S SUBMISSION

1

New Zealand should not take on de facto international treaty obligations without an informed debate which assesses the wider benefits and detriments to the New Zealand public interest. By dealing with copyright outside such a debate, New Zealand runs the risk of unduly restricting New Zealand consumers' legitimate uses of copyright material without any countervailing benefit.

2

TRANSIENT COPYING

The exception created for transient copying is useful and much needed for users and ISPs but requires changes. In particular, the requirement for any transient copy to have no independent economic significance is unnecessary.

3

ISP LIABILITY

InternetNZ's position is that ISPs in their normal operations perform a necessary function, just as telephone signal carriers do in respect of telephony. Therefore ISPs (including both transmitters and hosters of material) should not be liable for infringing material which they carry or store.

Rather than follow the US notice and takedown regime, InternetNZ proposes a more balanced *notice and notice* regime akin to that used in Canada.

4

TECHNOLOGICAL PROTECTION MEASURES (TPMs)

InternetNZ is against any TPM regime – such regimes have been shown not to achieve their desired results. Worse still, they unduly hinder users who need to take advantage of the exceptions granted for fair dealing and other permitted acts.

If a TPM regime is to remain, then, among other changes, copyright owners must be obliged to ensure that permitted acts are safeguarded.

5

PERMITTED ACTS

The decompilation exception needs to be expanded to cater for legitimate activities such as computer security.

The time shifting exception is unduly limited - there should no restriction on when and how many times a time shifted work should be able to accessed for private use.

The format shifting exception is somewhat of a *claytons* exception since it allows copyright owners to opt out by including overriding terms in their standard licences. This position should be reversed so that the act overrides any contrary licence terms. The two year sunset clause is also unwelcome.

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InternetNZ Submission to the Commerce Select Committee on the Copyright (New Technologies and Performers' Rights) Amendment Bill

INTRODUCTION

InternetNZ

1. This submission is from InternetNZ, the Internet Society of New Zealand (Inc).
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3. InternetNZ requests the opportunity to make a presentation to the Committee in support of this submission.
4. We are a membership-based not-for-profit organisation and have the management responsibility for the administration of the .nz domain name registry, a critical component of the Internet infrastructure in New Zealand.
5. Our mission is to protect and promote the Internet in New Zealand; we advocate the ongoing development of an open and uncaptureable Internet, available to all New Zealanders. The Society is non-partisan and is an advocate for Internet and related telecommunications public and technical policy issues on behalf of the Internet Community in New Zealand – both users and the Industry as a whole.
6. In developing this submission, InternetNZ has consulted with its members and with other parties, including ISPANZ (the Internet Service Providers Association of New Zealand (Inc)).
7. Further, we organised and funded seminars in Wellington and Auckland on 13 and 14 February 2007, to encourage discussion of the Bill and debate the issues it raises. These seminars were well attended by over 100 participants (including many specialist intellectual property lawyers, ISPs, computer security experts, music industry and other content generators and academic and library representatives). InternetNZ hopes the discussions they have generated will lead to other, reasoned submissions to the Committee on the Bill. They have helped the Society ensure its own position is well considered.
8. In this submission, **the Bill** refers to the Copyright (New Technologies and Performers' Rights) Amendment Bill 2006. **The Act** refers to the Copyright Act 1994 as currently in force.

Structure of this Submission

9. This submission deals with those matters addressed in the Bill that are of interest to InternetNZ and its stakeholders, as defined by our mission and vision. We do not attempt to comment on every aspect of the Bill.
10. The following matters are covered in subsequent sections:
 - A: InternetNZ's general policy position – see paragraphs **13** to **19**.
 - B: Transient reproduction¹ - see paragraphs **20** to **26**.
 - C: ISP liability including, in particular, the notice and takedown regime and caching² – see paragraphs **27** to **56**.
 - D: Technological Protection Measures / Copyright Management Information³ – see paragraphs **57** to **97**.
 - E: Exceptions (permitted acts), where we focus on the computer decompilation, format shifting and time shifting exceptions⁴ – see paragraphs **98** to **110**.
11. Each section outlines the principles that InternetNZ believes should apply and applies those principles to the proposed legislation. It then provides, by way of separate appendices, recommended amendments to the Bill that reflect InternetNZ's position, for the Committee's consideration.
12. InternetNZ's key amendments are briefly summarised on the first page of this submission - KEY POINTS IN INTERNETNZ'S SUBMISSION.

A: POLICY CONSIDERATIONS

13. InternetNZ supports the two fundamental policies on which the Bill is built; namely:
 - 13.1 The need for technological neutrality to overcome the difficulties which are now readily apparent in a Copyright Act, which, at 13 years old, does not cope well with digitization;
 - 13.2 The need for balance between protection and legitimate use of copyright works. InternetNZ supports a framework which encourages innovation by granting monopoly privileges but is also concerned to ensure that this monopoly is not unduly extended. We note that *The Bill is not intended to change the balance between protection and access already established in the Act, but to ensure that the balance continues to operate in the face of new technologies*⁵.
14. In particular, InternetNZ is concerned that the balance that is being promoted in the Bill is not in fact related to copyright at all. Rather, it is part of an attempt (whether

¹ The introduction of a transient reproduction exception (clause 23 of the Bill, which would introduce a new section 43A).

² Provisions relating to ISP liability (clause 53 of the Bill, which would introduce new sections 92A-92D)

³ Amendments to the current circumvention device prohibitions by introduction of a full technological protection mechanism (TPM) and copyright management information (CMI) regime (clause 89 of the Bill, which would introduce new sections 226-226J)

⁴ InternetNZ's focus is on decompilation (clause 43 of the Bill, which would introduce new sections 80A-80C), format shifting (clause 44 of the Bill, which would introduce a new section 81A) and time shifting (clause 45 of the Bill, which would introduce a new section 84).

⁵ Explanatory Note to the Bill p2.

intended or not) to bring us closer to the position forced on various countries by the US as a concession in their free trade agreements (as recently seen in Australia).

15. Since New Zealand is a net importer of commercial copyright works, any extension of overseas copyright owners' privileges will, by definition, advantage their interests to the detriment of New Zealanders who wish to use copyright works. If New Zealand is to make such a concession, then it needs to be balanced against any benefits that we might achieve under a free trade agreement or other relationship. What we should not do, in InternetNZ's opinion, is effectively grant overseas interests those enhanced privileges without any countervailing benefit to New Zealand. As the Explanatory Note to the Bill says:

The 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..."

16. Further, despite the fact that the Explanatory Note to the Bill implicitly recognises that copyright is a critical international bargaining chip by referring to the World Trade Organisation TRIPs agreement, there has been little or no consultation on these wider economic aspects. In InternetNZ's submission, if the likes of the International Intellectual Property Alliance⁶ wish New Zealand effectively to accede to the two WIPO internet treaties, then we should have that wider debate; we should not accede by stealth.⁷

17. That debate should also address the often conveniently overlooked fact that US consumers have significantly better fair use rights, which, because those rights originate from the US Constitution, provide a strong shield against excessive copyright protection. In InternetNZ's submission it is therefore disingenuous for the IIPA to suggest that the US Government should intervene in New Zealand's copyright debate, by writing:

"New Zealand's efforts fall far short of meeting international minimum standards, as reflected in the implementation of WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) ..."

18. The Select Committee will of course recognise the irony in US allied interests alleging that the permitted act exceptions in the Bill go too far or are not justified under Article 13 of TRIPs. The fact is that consumer use rights are already better safeguarded in the US and will remain better protected even if InternetNZ's suggestions are accepted.
19. Having said that, in general, InternetNZ is supportive of the direction of the Bill provided that the above imbalances are addressed. In particular, we are concerned that certain aspects of the Bill would, if passed:

- 19.1 **unduly extend the copyright owner's statutory monopoly** at the expense of legitimate use of copyright works and the innovation that copyright protection is intended to engender. This at a time when European jurisdictions appear to be moving towards less restrictive regimes and when the US has a comprehensive

⁶ As Professor Michael Geist, a leading North American international internet law expert describes it, "the IIPA, an association that brings together US lobby groups representing the movie, music, software, and publisher industries, last week [on 12 February 2007] delivered its annual submission to the US government featuring its views on the inadequacy of intellectual property protection around the world. The report frequently serves as a blueprint for the US Trade Representative's Section 301 Report, a government-mandated annual report that carries the threat of trade barriers for countries that fail to meet the US standard of IP protection." A copy of Professor Geist's most recent article on this is attached as **Appendix 6** to this submission, with his permission.

⁷ The IIPA itself recognizes that the copyright debate should be linked to bilateral trade. In its covering letter of 12 February 2007, it states with respect to New Zealand and other countries that it has listed for special attention that these "... merit attention by the U.S. Government in its bilateral engagements with those countries" (see <http://www.iipa.com/pdf/2007SPEC301COVERLETTERfinal02122007.pdf>)

and overarching *fair use* doctrine (unlike the narrowly confined permitted acts in New Zealand);

- 19.2 introduce **exceptions for internet service providers (ISPs)**, which, whilst better than nothing, **do not go far enough**;
- 19.3 place on **ISPs quasi-regulatory functions**, the costs and performance of which would be better borne by the parties to a copyright dispute themselves;
- 19.4 largely replicate the much **criticised US notice and takedown regime** which has been in place for over a decade, when, in InternetNZ's opinion, there are now better international models;
- 19.5 introduce **unwarranted support for technological protection measures** (including civil and criminal penalties for circumvention) leaving open the question of whether mechanisms such as DVD geographical zone control will be able to be imposed. Again, **legitimate access does not seem to be adequately safeguarded**;
- 19.6 rather than redressing the imbalance that digital technologies are said to have brought, the Bill would create a new imbalance by taking **too timid an approach to the permitted act exceptions**.

B: TRANSIENT REPRODUCTION

- 20. The text of the proposed section 43A, with InternetNZ's suggestions for amendment marked, is contained in **TEXT OF PROPOSED AMENDMENTS TO BILL**
- 21. Appendix 1.
- 22. Currently, the exclusive right of a copyright holder to prevent copying applies to that most fundamental of internet activities – viewing a webpage (since to view is to download, which in turn comprises the taking of a copy of the webpage). It is generally acknowledged however that in putting up the webpage, the webpage owner is impliedly licensing such downloading and therefore there is no breach of copyright.
- 23. The Bill attempts to enact this position by providing an exception to the general reproduction infringement provisions. This is to be welcomed. The exception however is very narrowly drafted and it must be remembered that, as an exception, it will be for a defendant to prove that it satisfies each limb of the test. If we cast the provision in that light it may be easier to determine whether it is adequate. A defendant will have to prove that its reproduction of the work:
 - 23.1 is **transient or incidental**; and
 - 23.2 is a **necessary** part of a technological process for:
 - 23.2.1 making or receiving a **communication that does not infringe copyright**; or
 - 23.2.2 enabling the **lawful** use of, or **lawful** dealing in, the work; **and**
 - 23.3 has **no independent economic significance**.

24. The words we have highlighted are the particular thresholds that the defendant will have to meet.
25. There are a number of problems with this as follows:
- 25.1 It is hard to understand why a recipient should have to prove that a communication that it has had no responsibility for, either does not infringe copyright, or, that it is *lawfully* using it. This might well mean that that a recipient who innocently views a webpage that turns out to be an infringing copy could not avail itself of this exception. It is difficult to understand why these added limbs are required when one considers the limbs which already need to be satisfied (*transient or incidental* and *necessary*).
- 25.2 The standard of being *necessary* itself may also prove troublesome. In our view this means that the defendant would need to show that without the specific part of the technological process in question, the communication, use, or dealing, referred to in paragraphs **23.2.1** and **23.2.2** could not take place. In other words, if there was some alternative means, then the exception would not apply. Given technological change and the desire for this Bill to introduce technological neutrality, this seems an unduly restrictive approach. We would suggest that the provision refer to *commonly accepted, usual* or *accepted industry practice* in addition to *necessary*.
- 25.3 Proving that something has **no** independent economic significance will, we think, be very difficult. Again, having satisfied the *transient or incidental* and *necessary* parts of the provision, we submit that nothing more is required.
26. One final point to note here is that the provision also needs to be looked at from an ISP point of view since it provides another potential defence for an ISP both in terms of primary infringement for its activities in incidentally copying material as it passes through its servers or is cached and in terms of secondary infringement for the provision of services which might enable one of its users to infringe. This might well be useful for an ISP since, as we shall see, the ISP liability provisions are somewhat limited.

C: ISP Liability

27. The proposed sections 92A-92D, with InternetNZ's suggestions for amendments marked, are contained in **Appendix 2**.
28. There are numerous issues with these provisions as outlined below.

ISP definition

29. The first and quite fundamental point to note is that the definition of ISP does not appear to include webhosting or anything other than mere transmission. ISP is defined as:
- an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing*
30. An entity that provides any of the services specified in the definition will be able to avail itself of the exceptions. However, an entity which provides only webhosting may not unless it can be argued that by hosting the material on its server it is somehow *providing [a] connection for digital communications, between ... [a user's computer and the webhoster's server]*. Obviously, this needs to be clarified since it would seem odd

that the same activity should be regulated differently depending on whether one fits within a definition or not.

31. This is particularly relevant for those who provide facilities enabling others to upload material over which they have, or exercise, no editorial discretion or control (e.g., some types of blogs, some online auction sites, social interaction sites (e.g., myspace, youtube etc). If an exception is to be created, then there is no reason why it should not extend to all.
32. Note also that although the definition is almost exactly the same as that used in the much maligned US Digital Millennium Copyright Act (**DMCA**), in the DMCA that more restrictive definition only applies to an ISP's **transitory communication** activities. There is a wider definition used for ISP activities of caching, storage and searching, viz:

a provider of online services or network access, or the operator of facilities therefor.

Ironically therefore, the safe harbour provisions will have the potential to protect more types of internet service providers in the US than in New Zealand.

33. InternetNZ suggests that the definition should be expanded to include hosting.

Policy qualification – proposed section 92A

34. To obtain the benefit of the exclusions of liability, the proposed section 92A states that an ISP must have:

adopted and reasonably implemented a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.

35. This appears to have been uplifted from the recently proposed amendments to the Australian Copyright Act, implemented as part of Australia's compliance with its obligations under its Free Trade agreement with the US. However, the provision is vague – what does reasonably implemented mean? What if the users do not have accounts (relevant again to blog or other forum social interaction type sites)? Why repeat infringers only and what does repeat mean – more than 1, many repeats ... of the same offence?
36. More seriously, if the intention is to effectively mandate that any repeat infringement results in a user's account being terminated then that is a draconian step which should only be taken as a last resort given the importance of internet access and the consequences which might flow from termination. Imagine for example, if a business heavily dependent on internet access were to have its account terminated because of repeat infringement by different employees. Other consequences might also flow (e.g., early termination may incur penalties where the account is for a fixed term).
37. One might conclude that this is a somewhat hastily thrown in attempt to have ISPs perform some sort of informal regulatory function. Given the importance of the exclusions of liability, to introduce this as a threshold test in breach of which the exclusions will not apply seems out of all proportion.
38. InternetNZ submits that the provision should therefore be deleted.
39. Instead, InternetNZ would be in favour of mandating, as was originally proposed in the Unsolicited Commercial Messages bill, that an ISP must abide by any code of practice developed by the industry. In that way industry itself can develop best practice.

Exclusion for user infringement - proposed section 92B

40. The proposed section 92B(1) states that the exclusion only applies if:

*a person (A) infringes the copyright in a work **by using** the services of an Internet service provider [emphasis added]*

41. If A illegally rips a song on her computer and then sends it via her ISP to a friend, without charge, it seems to us that the infringement has not taken place **by using** the ISP's services. The infringement has already taken place on A's computer and there is arguably no infringement by A in sending it to one person for no commercial gain. The ISP still needs the exclusion of liability however since it may be liable as a primary infringer for the copies that it takes as the song moves across its servers unless it can come within the transient reproduction exception – see paragraphs **20 - 26**. Given the importance of ISPs in the fabric of the internet, we see no reason to rely on the transient reproduction exception alone (note for example that the UK Electronic Commerce (EC Directive) Regulations 2002 implement a specific exception for ISPs acting as *conduits* (see Appendix 6)).

42. There are of course some infringements that do take place **by using** an ISP's services, For example, if, in the above example, A had illegally ripped the song from an online music source via the ISP, then the ISP may be liable for both primary and secondary infringement (the latter being the target of the exclusion as currently drafted).

43. It therefore seems to us that the proposed section 92B needs to be amended to cater not just for exclusion of liability for secondary infringement but also for primary infringement. Section 92B(1) might therefore read:

(1) This section applies if—

(a) a person (A) infringes the copyright in a work by using the services of an Internet service provider; or

(b) an Internet service provider transmits (but does not modify) material provided by A and the material infringes copyright in a work.

44. Similarly, the proposed section 92B(2) should also not be solely predicated on the ISP's services being used **in** the infringement.

45. The final point to note with respect to the proposed section 92B (and this applies to 92C and 92D also) is that the section specifically preserves the right of the copyright owner to apply for injunctive relief. We acknowledge that injunctive relief of some sort may be appropriate since it may be necessary for the ISP to do or refrain from doing something (and in fact, it should welcome the protection from action by the user that a court order will give). However, given that these provisions are designed to shelter the ISP from liability, specific provision should be made for an indemnity in terms of any costs (on a full solicitor client recovery basis) and for any loss or damage resulting from compliance with the injunction. It is usual for a party applying for an injunction to post security for costs and it needs to be made clear that this is in respect of the ISP's loss or damage even where the claim is successful (normally costs are only awarded to the successful party).

Exclusion for storage – proposed section 92C

46. Assuming that the definitional problem referred to in paragraphs **29 - 32** above can be overcome, the proposed section 92C sets out a *take down and notice* regime, which, if complied with will shelter an ISP from liability for storing infringing content.

47. There are a number of issues however:

47.1 The fundamental issue is that which exists with all so called *take down* regimes – and that is the potentially *chilling effect* on free speech and the potential for abuse by competitors. In order to avail itself of the exclusion, the ISP must delete the material or deny access as soon as it *knows or has reason to believe that the material infringes copyright*. Therefore, the understandable reaction of an ISP faced with a claim by an alleged copyright owner that its work has been infringed, is to delete or deny access and leave it for the author of the supposedly infringing material to gainsay that action. Examples of the over zealous and incorrect use of the DMCA notice and takedown system abound and include use of such notices to silence critics and take down competitors' material. A useful list of some of these can be found at:

http://www.eff.org/IP/P2P/20030926_unsafe_harbors.php

47.2 Further, such a regime is ineffective with respect to infringement over peer to peer networks since the allegedly infringing material is not hosted by the ISP but by the individual infringer.

47.3 It has to be said that the proposed section is not as problematic in this as the DMCA where, in response to the notice by complainant procedure, ISPs have allegedly paid only scant regard to whether copyright is in fact breached because (1) they are generally protected from suit by an author whose material has been wrongly taken down; and (2) there is a prescribed procedure for an aggrieved author to notify the ISP, following which the ISP puts the material back up again and then it is for the alleged copyright owner to take court action.

47.4 However, possibly in an attempt to ameliorate this problem, the Bill raises a number of concerns from an ISP perspective as follows:

47.4.1 There is no statutory protection for an ISP that deletes or takes material down only to find later that it in fact was not infringing. Whilst this may mean that less non-infringing material will be taken down, it may also mean that an ISP will have to conduct its own analysis of whether the material is infringing and could face a claim if it gets the decision wrong.

47.4.2 This conclusion is reinforced by the wording in 92C(2)(a)(i), where the ISP will not be liable unless it:

knows or has reason to believe that the material infringes copyright in a work

Sure, the copyright owner will have the burden of proving this if the ISP has not taken the material down but it is certainly a higher standard for the ISP to achieve than simply responding to a DMCA notice. In particular, the *reason to believe* wording introduces an objective element whereby it will be argued that the ISP, by virtue of certain facts, should have known that the material was infringing. In its position paper the Ministry of Economic Development specifically canvassed this point (see http://www.med.govt.nz/templates/MultipageDocumentPage____875.aspx at paras 91-94). This differs from the European approach where actual knowledge is required. Conversely, the proposed section 92C(2)(a)(ii) does seem to envisage that the ISP must actually be *aware* (rather than *should be aware*) so there is some confusion.

47.4.3 Finally, on a more technical note, the exclusion will only apply if the ISP *does not modify* the allegedly infringing material. After receiving material via the internet, the ISP's systems may reconfigure the material

in order to store it or there may be automatic change in its metadata. It could be argued that there has been a modification. This would obviously be an unintended consequence and one would hope that a Court would imply into the provision an allowance for automated processes, but it should perhaps be clarified.

48. For the above reasons, InternetNZ considers that the proposed regime should be changed. Having reviewed various overseas models, it would appear that the industry developed **notice and notice** regime used in Canada best balances the needs of copyright owners, the legitimate interests of users of the internet and the position of ISPs as innocent carriers of the material. The Canadian regime functions by virtue of industry agreement and by all accounts was so successful⁸ that it was enshrined in legislation proposed in 2005⁹ but the Government of the time collapsed and the proposed legislation has not proceeded.

Notice and notice proposal

49. Under InternetNZ's proposed *notice and notice* regime, an ISP will be required to forward any notice it receives from a copyright owner to its allegedly infringing customer. The ISP will also be required to retain, for a set period of time, information sufficient to identify the customer in question (and customers will have an obligation to keep their ISP updated with their contact details). Once the ISP has satisfied its notice obligation it will be shielded from any liability.
50. If no response is received from the customer within 10 working days, the ISP will take the material down or deny access and will notify the copyright owner accordingly. If a response is received it will be forwarded to the copyright owner and the ISP will only be required to take further action if ordered to do so by a court on application by the copyright owner. Anecdotal evidence from Canada is that over 90% of complaints result in the customer agreeing to take the material down. It is relatively rare for the customer to dispute the complaint, but important they are the party that makes that decision and bears the consequences; not the ISP.
51. 10 working days may seem a long period of time if the material in question is blatantly infringing. Two factors need to be taken into account however:
- 51.1 If New Zealand is to avoid the adverse consequences in terms of free speech that have been evident in the US, there must be sufficient time for an innocent user to respond. 10 working days allows for the fact that a user may be away from his or her email for a certain period.
- 51.2 This procedure is a fast-track, low-cost method for copyright holders anyway. In a typical infringement scenario, the copyright holder would have their lawyer write to the alleged infringer (that is if they could find any contact details) giving, usually, 7 days to *cease and desist*. Typically, even if the alleged infringer is minded to comply, some weeks will pass before the finer details are worked through. If the infringer is not minded to comply or, as is often the case, does not respond, then the copyright holder must issue proceedings for an injunction. In almost all cases, the time taken will far exceed 10 working days and will cost the copyright holder significantly more.

⁸ In 2003, the Canadian Association of Internet Providers in its submission on copyright reform in Canada, referred to anecdotal evidence that in 80-90% of the complaints, the infringing activity was terminated voluntarily and there were few repeated complaints relating to the same material and the same user – see Canadian Association of Internet Providers, *Re: 'Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act'—Review by the House of Commons Standing Committee on Canadian Heritage* (September 15, 2003), at <http://www.caip.ca/issueset.htm>

⁹ see background materials and a copy of the then proposed Bill C-60 at <http://www.strategis.ic.gc.ca/epic/site/crp-prda.nsf/en/rp01145e.html>

52. In InternetNZ's view therefore, the 10 working day period provides a good balance.
53. Through this regime, copyright owners will be able to notify users that their activities may be infringing the owner's copyright. If the user does nothing then the material will be taken down. If the user disputes the allegation then the status quo will be preserved (i.e., the material will remain) until the matter is resolved by the Courts. The ISP's record-keeping requirement will better enable identification of the parties alleged to be involved (although that information will only be available by Court order).

Exclusion for caching – proposed section 92D

54. It would appear that this provision has been strongly influenced by the UK Electronic Commerce (EC Directive) Regulations 2002 (see Appendix 5) (and this is borne out by the references to it in the MED position paper at http://www.med.govt.nz/templates/MultipageDocumentPage_____875.aspx).
55. InternetNZ is concerned that the reference to *automatic* caching may be too limiting. It may be argued that all caching is automatic in the sense that once the filter parameters are set by the ISP, even if for a specific website that it has decided needs to be cached, the caching is automatic.
56. However, that may not be how the provision is interpreted. In InternetNZ's view, the exception should extend to any caching that is performed in accordance with reasonable industry standards.

D: TECHNOLOGICAL PROTECTION MEASURES/COPYRIGHT MANAGEMENT INFORMATION

Technological Protection Measures - introduction

57. In looking at what is happening overseas, InternetNZ has come to the view that New Zealand should not adopt a regime which promotes Technological Protection Measures (TPMs).
58. InternetNZ respects the rights of copyright owners to choose how they wish to make their works available (provided consumer's legitimate interests are safeguarded). However, on balance, we consider that elevating that choice by granting it statutory protection is unwarranted.
59. Before we proceed with our reasons it is also useful to remember three things:
 - 59.1 Whatever position the Act takes with respect to TPMs does not affect the choice that copyright owners have as to whether or not they use them.
 - 59.2 Subject to our comments below with respect to ensuring that consumers' legitimate uses of copyright materials are not adversely affected, copyright owners are free to include in their licences terms which prohibit TPM circumvention. Breach of those terms will give a copyright owner a contractual claim.
 - 59.3 In addition, if copyright in the underlying work is infringed, the copyright owner will have available the usual action for breach of copyright.
60. In other words, it is important to remember that an absence of TPM circumvention prohibition does not leave the copyright owner without any protection – far from it.

61. InternetNZ submits that for a regime which potentially criminalises TPM circumvention to be given statutory recognition, its proponents must be able to show that actually works whilst at the same time ensuring that legitimate use is not limited. TPMs fail on both counts.

TPMs do not work

62. **TPMs will not significantly curb piracy.** As soon as a TPM is introduced it is cracked by large scale commercially driven pirating operations in countries outside New Zealand. Alternatively, low grade reproductions are made by physically recording music or movies. In fact the only people that are really inconvenienced by TPMs are those who wish to legitimately use the copyright work. Just as one recent example, the encryption system for HD-DVDs and Blu-ray discs has already been broken.
63. **Industry is now moving against TPMs.** Apple, one of the most successful implementers of a TPM regime with its iTunes system, is against TPMs and EMI is now said to be following suit.¹⁰
64. **Overseas jurisdictions are now moving against TPMs.** It is also becoming apparent that internationally the tide is turning against TPMs which unduly restrict legitimate access to, and use of, copyright works. For example, in the middle of 2006, France passed legislation effectively safeguarding format shifting and outlawing any TPMs which might prevent that.¹¹ Much was made at the time of the fact that this would mean that the TPM measures built into iTunes would be outlawed in France.
65. **New Zealand Government is against TPMs.** The New Zealand State Services Commission has directed other government departments not to use digital rights management and is trying to build a coalition with international governments to pressure platform manufacturers into neutering such systems. It has policy online at <http://www.e.govt.nz/policy/tc-and-drm>. Government itself has rejected untrammelled DRM - why is it trying to protect DRM across the rest of New Zealand?
66. **TPMs are unnecessary.** Numerous examples exist of commercially successful operations which do not rely on TPMs. For example, emusic.com, the most successful music download site behind iTunes, does not use TPMs.
67. **TPMs are a blunt instrument.** A TPM system cannot by itself identify what is copyrightable and what is non-copyrightable; what is legitimate and what is infringing. Therefore, one can end up with the ludicrous situation where a TPM system imposes its own digital rights management lock-up on works on which copyright has expired of which have otherwise entered the public domain. A useful discussion of this can be found on the publisher Jim Baen's site starting at <http://preview.baens-universe.com/articles/matterprin>.
68. **TPMs can change at the whim of the copyright owner.** Just as an example, last year, iTunes decided that instead of allowing 10 playlists it would only allow 7. It built that change into its TPM effectively forcing a change in the terms of the agreement between it and its users.
69. **TPMs can be harmful.** The Sony rootkit example is well known but there are other similar occurrences where TPMs have interfered with user's systems.¹² This should be

¹⁰ see Steve Jobs' recent musings at <http://www.apple.com/hotnews/thoughtsonmusic/>

¹¹ see *Dispositions Portant Transposition De La Directive 2001/29/Ce Du Parlement Européen Et Du Conseil Du 22 Mai 2001 Sur L'harmonisation De Certains Aspects Du Droit D'auteur Et Des Droits Voisins Dans La Société De L'information* at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MCCX0300082L> and the legislative history at <http://www.senat.fr/dossierleg/pjl05-26.html>

¹² For a scathing exposition of the TPM problems with Microsoft's Windows Vista see Professor Peter Gutman's paper at http://www.cs.auckland.ac.nz/~pgut001/pubs/vista_cost.html

expected – TPMs by their nature are complex. As another example, many TPM systems require registration online or regular contact with a copyright owner's server for verification. What happens if the server is down or the provider goes out of business or simply decides not to support that version anymore?¹³

70. **Summary.** In the face of the above it is therefore difficult to see how any statutory protection for TPMs can be justified. If copyright owners wish to use them then that is their choice but sanctioning what is already being shown to be a defective and outdated business model should not be part of New Zealand law.

TPMs prevent legitimate use

71. Perhaps even worse, TPMs unduly interfere with a user's legitimate use of copyright material. They do this by making exercise of the permitted act exceptions difficult or impossible without resort to technical expertise to circumvent the TPM.
72. Again, numerous examples of how TPMs do this can be found. Many of these are highlighted by Professor Michael Geist, a leading North American academic, in his *30 days of DRM* at <http://www.michaelgeist.ca/daysofdrm>. We come back to the issue of permitted acts later.
73. InternetNZ submits therefore that not only should the proposed sections 226-226E not be enacted but that the current section 226 should be repealed.

InternetNZ's fallback position

74. As we hope we have outlined above, New Zealand should not enshrine TPMs in statute. However, if, despite that submission and the many others that InternetNZ is aware of, a TPM regime is to be implemented then it needs to be examined closely, which we do in the following paragraphs.
75. Clause 89 of the Bill would delete the current section 226 of the Copyright Act 1994 (**the Act**) and replace it with sections 226-226E. These are set out in **Appendix 3**, marked up with changes suggested by InternetNZ.
76. To understand the issues with the proposed provisions, it is useful to look at how they would be argued by a copyright holder who has included a technological protection measure.
77. In order to invoke the provisions, it first needs to be established that the measure is a TPM. TPM is defined as:

*TPM ... includes any process, treatment, mechanism, device or system that is designed in the normal course of its operation to **prevent or inhibit the unauthorised exercise of any of the rights conferred by this Act.***[emphasis added]

78. This issue was at the heart of the two leading decisions which will be influential on a New Zealand Court, both of which concerned the sale of "mod" chips designed to avoid Sony's protection measures installed in its Playstation consoles. In the UK, such measures were considered to be TPMs and therefore covered by the UK equivalent to what is our current section 226. In Australia, the High Court, interpreting a provision which is very similar to that which is now proposed in the Bill, held that the Sony

¹³ In 2001, all DIVX DVDs became unplayable when the content provider decided to discontinue support. Microsoft recently did a similar thing with one of its portable formats.

protection device was not a TPM and therefore that the sale of the mod chips did not constitute a breach.¹⁴

79. The argument centres on whether the measure prevents or inhibits activities which could be restrained by a copyright holder under the Act. For example, does the device prevent or inhibit copying, or unauthorised communication (as the new transmission/distribution right will be termed)?
80. Unfortunately, in a digital world where the mere act of viewing may well involve copying, the answer is not always clear cut.
81. It seems to us therefore at this stage that there is still room for argument that the definition of TPM might cover a mechanism designed to ensure zone protection for example. We note in this regard that an exposure draft of proposed changes to the Australian TPM provisions (designed to satisfy Australia's obligations under its free trade agreement with the US), carries with it a note:

To avoid doubt, a device, product or component (including a computer program) that is solely designed to control market segmentation is not a technological protection measure.

82. Further, the proposed Australian reform will introduce a specific regime for **access control technological protection measures** which are designed to prevent *those who do not have the permission of the owner or exclusive licensee from gaining access to the work or other subject-matter*. That would also tend to suggest that, without such a provision (leaving only the bare TPM provision similar to that proposed for New Zealand), access control mechanisms are not covered.
83. MED policy at least appears to be that access control mechanisms are not intended to be covered (see the MED position paper at http://www.med.govt.nz/templates/MultipageDocumentPage_____876.aspx para 106 and the following Cabinet paper at http://www.med.govt.nz/templates/MultipageDocumentPage_____1024.aspx#P50_14032 para 29). However, this is a critical issue and needs to be put beyond doubt in the Bill.
84. InternetNZ strongly suggests that this issue be clarified so that it is clear that market segmentation and other distribution control type measures are not protected.
85. Assuming that the TPM owner is able to establish that the mechanism it has used is a TPM, it must then move to the proposed section 226A.
86. This section prohibits *trafficking* (paraphrasing s226A(1)) and publication (section 226A(2)) in relation to what are called TPM spoiling devices (the Australian provisions use the less pejorative term *circumvention device*).
87. Critical points to note in the definition of TPM spoiling device are:
- 87.1 The device must be **primarily designed** to circumvent;
- 87.2 The device must have **no significant** other application.
88. The definition is significantly different from the Australian provision in terms of its wording so we may find that we diverge somewhat when matters come before the Courts.

¹⁴ New Zealand now has its own Sony case, which, under the current s226 went the same way as the case in the UK (although it was not defended in New Zealand). see *Kabushiki Kaisha Sony Computer Entertainment and ors v Van Neen and anor* (Unrep Wellington HC, Mackenzie J, 14 December 2006).

89. Section 226A(1) then provides that a person may not *traffic* in a TPM spoiling device if that person *knows or has reason to believe that it will, or is likely to, be used to infringe copyright in a TPM work* (A TPM work is a copyright work protected by a TPM). The knowledge element here is one of the things that make the Bill substantially different from the US Digital Millennium Copyright Act (**DMCA**). However, the introduction of the *reason to believe* and *likely to* wording shifts the balance considerably in favour of the copyright holder by introducing an objective test. InternetNZ is against this – if criminal liability potentially attaches, then a subjective element of intention or guilty knowledge should be present.
90. In addition, the wording needs to be tidied up so that it is clear that infringement arises where the circumventer knows that once the TPM is circumvented, there will be a copyright infringement. At present, the act of removing the TPM itself is characterised as copyright infringement, which effectively renders the second part of the test in 226A(1) redundant.
91. InternetNZ is strongly against any prohibition on publishing material. The offence if one occurs is *trafficking*. Publication does not assist that and there are numerous reasons why circumvention information would be legitimately published. Examples include publication of information as to how to break TPMs protecting virus software. One only has to look at the DeCSS case¹⁵ or the Felten case¹⁶ to see how such provisions can be used to stifle free speech.
92. Having worked through the components of the infringement provisions, one would then need to determine whether the activity complained of falls within the exceptions which are set out in the proposed section 226D. The exceptions for error correction, interoperability and encryption research are relatively self explanatory. We cover certain *permitted acts* below.
93. There are a few other points to note:
- 93.1 It is always important to remember in any debate which refers to the US position that the US Constitution confers significant protections in relation to fair use. Fair use in the US of course is significantly wider than our fair dealing exception and other permitted acts. Therefore, when looking to achieve balance, a New Zealand TPM regime should either be more limited than would be the case on the US or the permitted acts should be widened.
- 93.2 In the US and Australia, it has been recognised that TPM technology as it is developed may have unforeseen consequences in restricting exercise of legitimate activities. Therefore, in both countries, a system of review has been built in. InternetNZ suggests that there should be a consultative process whereby a review can be initiated quickly and at low cost to participants without the need for a lengthy legislative process. The quasi-regulatory role of the Commerce Commission or Takeovers Panel may provide a template or perhaps the jurisdiction of the Copyright Tribunal could be extended.
- 93.3 The control vs access argument referred to in paragraphs **78 - 81** is often more about the practical difficulties faced by users who want to copy (or perform any other activity in respect of which a copyright holder is accorded privileges) for legitimate purposes but cannot do so because the TPM prevents it. For example TPMs which prevent any copying or which allow only degraded copies would prevent a reporter cutting and pasting from a work for the purposes of comment even though such excerpting is allowed under the fair dealing exception. Numerous other examples can be found.

¹⁵ http://www.eff.org/IP/Video/MPAA_DVD_cases/

¹⁶ http://www.eff.org/IP/DMCA/Felten_v_RIAA/

- 93.4 The Bill seeks to address this in a novel way. It provides in section 226E for a user faced with a TPM to apply to the TPM owner for *assistance enabling the user to exercise the permitted act*. If assistance is refused or no response is received within a reasonable time, the user may contract a qualified person (a prescribed library, prescribed archive or educational establishment) to *exercise the permitted act on the user's behalf using a TPM spoiling device*.
- 93.5 There are various changes that would need to be made to this in our view (assuming that this is the best approach). For example:
- 93.5.1 The obligation on the TPM owner to assist should be clarified and strengthened (including by the introduction of penalties for non-compliance).
- 93.5.2 Whilst it may be that qualified people in the education and library sectors will be called on in those spheres it is not appropriate or feasible for them to provide such services for private individual needs. If a user needs to use a TPM circumvention device simply to engage in activities that the Act has allowed (e.g., format shifting) and they cannot get any joy from the copyright owner, then they should be entitled to circumvent themselves.
- 93.5.3 The halfway house of a TPM owner agreeing to provide assistance but not doing so within a reasonable time needs to be covered (it is not at present).
- 93.6 Finally, we would suggest that there should be a specific provision prohibiting a TPM owner from including in any licence or otherwise attempting to maintain that a user is not entitled to engage in any permitted act. Similar provisions are included for example in the Consumer Guarantees Act 1993 and the Fair Trading Act 1986, prohibiting indications that those Acts do not apply. And in fact are included in the Bill in relation to the decompilation exception – see paragraph **102** below). In any case, it should be specifically stated that any licence or other terms are at all times subject to the permitted acts. In addition, breach of the copyright owner's obligations should be subject to sanction otherwise these may be overlooked

Copyright Management Information

94. We do not have much to say about the copyright management information (CMI) provisions in the proposed sections 226F-226J (see **Appendix 3**).
95. There should be an exception inserted into the proposed section 226G(2) to provide that CMI may be removed or modified if it is necessary for the use of the work without otherwise infringing copyright.
96. More importantly, in the US for example, an exception is made to enable a user to prevent his or her privacy being interfered with. Given that CMI processes (e.g., licence registration) are often coupled with collection of information, this should also be provided for in New Zealand.
97. Finally, we suggest a technical change to the proposed section 226H. There should be an exception added to subsection 2 where the *trafficker* is not aware that the CMI has been removed.

E: PERMITTED ACTS

98. The term permitted acts is not defined in the Copyright Act (although one of the parts of the Act has that heading) or in the Bill but is taken to refer to the various exceptions to the privileges given to copyright holders. These relate to fair dealing, use by educational institutions and the like.
99. We refer to our original premise – in reviewing the changes in the Bill, having been through the provisions themselves, one must look at the general exceptions to see whether what might appear to be unduly wide restrictions are brought back into balance.
100. Whether this review is the place to canvas the need in New Zealand to move towards a more holistic fair use exception is debatable. However, as we have pointed out, in assessing where the balance lies between undue extension of copyright protection on the one hand and inadequate protection on the other, it is important to remember New Zealand does not have the overarching fair use safeguards afforded to consumers in the US. If a TPM regime is to be introduced then it is therefore critical that the permitted act exceptions afford New Zealand consumers similar safeguards.
101. InternetNZ has focussed on three exceptions relevant to its objects. These are:
- 101.1 decompilation of computer programs;
 - 101.2 format shifting of a sound recording for private use;
 - 101.3 time shifting.

Decompilation – proposed sections 80A-80C

102. See text at **Appendix 4**.
103. InternetNZ supports these changes but sees a need to expand the exception to cater for other technical activities.
104. We see no reason why there should not be a statutory safeguard of a consumer's right to make a backup copy of any work.
105. Also, there the exception needs to be expanded to allow activities which might be necessary to circumvent a TPM in order to remedy a problem that the TPM has caused.

Format shifting – proposed section 81A

106. See text at **Appendix 4**, marked up with InternetNZ's suggested changes.
107. Broadly, the exception allows an individual to copy a legitimately obtained sound recording (and the musical and literary works contained in it) once to each of his or her own devices.
108. There are four issues that we identify with this provision:
- 108.1 The provision only applies to sound recordings. In light of recent developments with iPods, podcasts etc, the provision should be extended to apply to films and other artistic works. For example, why should the owner of a painting be restricted from taking a digital image of the painting for use as a screensaver.
 - 108.2 However, the proposed section 81A(2) will render the provision almost irrelevant in any case because it allows copyright owners to impose (by "agreement") their

own conditions which will override the exception. All commercial sound recordings, films etc inevitably contain such copyright notices either prohibiting or severely restricting any copying. For example, to subscribe to the New Zealand iTunes service one has to accept a restriction of copying to only 5 devices.

108.3 The provision allows *copying*. It is at least arguable that format shifting is not copying but is more akin to making an adaptation. Both should be covered.

108.4 The provision has a 2 year sunset clause meaning that it must be renewed by Order in Council or it will lapse. InternetNZ asks why it is fair for a provision which simply redresses a position that has become well out of balance with digital usage has such a *sword of Damocles* hanging over it when provisions such as the TPM/CMI regime, which have significant potential for limiting permitted acts, do not.

108.5 TPMs will potentially impact on a great many New Zealanders. InternetNZ therefore submits that if such a fundamental exception is to be removed, that should be the subject of the full democratic process usually adopted for legislation, including referral to select committee, rather than being able to be effected by order in council without public consultation.

Time shifting – proposed section 84

109. See text at **Appendix 5**.

110. InternetNZ can see no reason why a private user should not be able to access the material at any later stage as often as they like. In any case, we suspect that the proposed provision will be difficult if not impossible to enforce and that that may bring the law into disrepute.

CONCLUSION

111. In the following appendices, InternetNZ makes suggestions for changes to the Bill in line with the discussion in this submission.

112. Thank you for the opportunity to make this submission. We look forward to briefing the Committee when an oral hearing is scheduled.

For InternetNZ

Jordan Carter
Deputy Executive Director

9 March 2007

Appendix 1

TEXT OF PROPOSED AMENDMENTS TO BILL

Appendix 1 – Transient Reproduction

43A Transient reproduction of work

A reproduction of a work does not infringe copyright in the work if the reproduction—

(a) is transient or incidental; and

| (b) is a necessary commonly accepted industry standard 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.~~

Appendix 2

Appendix 2 – ISP Liability

Provisions as proposed in the Bill marked-up with InternetNZ's suggested changes

Definition of Internet Service Provider

Internet service provider means an entity offering as its business or part of its business:

(a) the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing; or

(b) storage of electronic material accessible by members of the public by reference to a particular online location.

Internet service provider liability**92A Limitations on liability in sections 92B to 92D apply only to qualifying Internet service provider**

The limitations on liability in sections 92B to 92D apply only in respect of an Internet service provider that complies with a generally accepted industry code of practice~~has adopted and reasonably implemented a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.~~

92B Internet service provider liability if user infringes copyright

~~(1) This section applies if a person (A) infringes the copyright in a work by using the services of an Internet service provider.~~

(1) This section applies if—

(a) a person (A) infringes the copyright in a work by using the services of an Internet service provider; or

(b) an Internet service provider transmits (but does not modify other than as an incidental part of the automatic operation of its systems) material provided by A and the material infringes copyright in a work.

(2) Merely because A infringes copyright and uses the services of the Internet service provider ~~in infringing the copyright~~, the Internet service provider, without more,—

(a) does not infringe the copyright in the work:

(b) must not be taken to have authorised A's infringement of copyright in the work:

(c) subject to subsection (3), must not be subject to any civil remedy or criminal sanction.

(3) However, nothing in this section limits the right of the copyright owner to injunctive relief against the Internet service provider in relation to A's, or a related, infringement

Appendix 2

provided that the actual costs incurred by the Internet Service provider as a result (on a full indemnity basis) shall be borne by the person seeking such relief (unless the Internet service provider files a defence in any way disputing the copyright owner's right to such relief).

"92C Internet service provider liability for storing infringing material

(1) This section applies if—

(a) an Internet service provider stores (but does not modify other than as an incidental part of the automatic operation of its systems) material provided by a user of the service; and

(b) the material infringes copyright in a work.

(2) The Internet service provider does not infringe copyright in the work by storing the material ~~unless—~~

(a) ~~provided that~~ the Internet service provider—

~~(i) knows or has reason to believe that the material infringes copyright in the work; and~~

~~(ii) —~~

(i) if it receives an Infringement Notice, without delay forwards that Infringement Notice electronically to the person who appears from the Internet service provider's records to be responsible for the material which is the subject of the Infringement Notice and informs the claimant in the Infringement Notice of its forwarding or, if applicable, of the reason why it was not possible to forward it; and does not, as soon as possible after the internet service provider becomes aware of the infringing material, delete the material or prevent access to it; or

(ii) retains, for a period that begins on receipt of the Infringement Notice and continues until the expiration of six months or, if the claimant in the Infringement Notice commences proceedings relating to the alleged infringement and so notifies the Internet service provider before the expiration of those six months, until the expiration of one year after being so notified, records that will assist in identifying the person to whom the material appears to belong; or

(b) unless the user of the service is acting under the ~~authority and direct~~ control of the Internet service provider.

(3) If, within 10 working days of the ISP forwarding the Infringement Notice to the person who appears from the Internet service provider's records to be responsible for the material which is the subject of the Infringement Notice, a response is received from that person, the ISP will forward that response to the claimant. If no response is received within that 10 working day period, the ISP will delete the infringing material or deny access to it and will notify both the claimant and the user.

~~(3) An Internet service provider who deletes a user's material or prevents access to it because the Internet service provider knows or has reason to believe that it infringes copyright in a work must, as soon as possible, give notice to the user that the material has been deleted or access to it prevented.~~

(3) An Internet service provider may charge reasonable fees with respect to its activities under section 92C, which fees shall be payable by the claimant immediately following issue of the Infringement Notice to the Internet service provider.

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(4) For the purposes of this section an **Infringement Notice** is a written notice issued to the Internet service provider in the form, if any, prescribed by regulation and must —

(a) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the copyright owner;

(b) identify the work or other subject-matter to which the claim of infringement relates;

(c) state the claimant's interest or right with respect to copyright in the work or other subject-matter;

(d) specify the exact location data for the electronic location to which the claim of infringement relates;

(e) specify the infringement that is claimed;

(f) specify the date and time of the claimed infringement;

(g) contain any other information is prescribed by regulation.

(45) Nothing in this section limits the right of the copyright owner to injunctive relief against the Internet service provider provided that the actual costs incurred by the Internet Service provider as a result (on a full indemnity basis) shall be borne by the person seeking such relief (unless the Internet service provider files a defence in any way disputing the copyright owner's right to such relief).

(6) An Internet service provider who deletes material or denies access to it under subsection (3) of this section shall not have any liability to the person who published that material or any person claiming through them for any reason, including if it is later found that the material was not infringing.

92D Internet service provider does not infringe copyright by caching infringing material

(1) An Internet service provider does not infringe copyright in a work by caching material if the Internet service provider—

(a) does not modify the material other than as a result of an industry standard process which is integral to such caching; and

(b) complies with any conditions specifically notified to it imposed by the copyright owner of the material for access to that material; and

(c) does not interfere with the lawful use of technology to obtain data on the use of the material; and

(d) updates the material in accordance with reasonable industry practice.

(2) However, an Internet service provider does infringe copyright in a work by caching material if the Internet service provider does not delete the material or prevent access to it by users as soon as possible after the Internet service provider became aware that—

(a) the material has been deleted from its original source; or

(b) access to the material at its original source has been prevented; or

Appendix 2

(c) a court has ordered that the material be deleted from its original source or that access to the material at its original source be prevented.

(3) Nothing in this section limits the right of the copyright owner to injunctive relief against the Internet service provider provided that the actual costs incurred by the Internet Service provider as a result (on a full indemnity basis) shall be borne by the person seeking such relief (unless the Internet service provider files a defence in any way disputing the copyright owner's right to such relief).

(4) In this section,—

cache means the storage of material by an Internet service provider that is—

(a) ~~automatic~~ reasonable industry practice; and

(b) temporary; and

(c) for the ~~sole~~ primary purpose of enabling the Internet service provider to transmit the material more efficiently to other users of the service on their request

original source means the source from which the Internet service provider copied the material that is cached.

Appendix 3

Appendix 3 – TPM/CMI Regime

InternetNZ's position is that TPMs should not be given statutory protection in New Zealand. If they are however, the following changes are suggested.

Technological protection measures**226 Definitions of TPM terms**

In sections 226A to 226E, unless the context otherwise requires,—

TPM or technological protection measure includes any process, treatment, mechanism, device, or system that is designed in the normal course of its operation to prevent or inhibit the unauthorised exercise of any of the rights conferred by this Act. To avoid doubt, a device, product or component (including a computer program) that is designed to control market segmentation is not a technological protection measure.

TPM ~~circumventerspoiler~~ means a person who contravenes section 226A

TPM ~~circumventionspoiling~~ device means a device or means that—

(a) is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of a technological protection measure; and

(b) has no significant application except for its use in circumventing a technological protection measure

TPM work means a copyright work that is protected by a technological protection measure.

226A Prohibited conduct in relation to technological protection measure

(1) A person (A) must not make, ~~import~~, sell, let for hire, offer or expose for sale or hire, or advertise for sale or hire, a TPM ~~spoiling-circumvention~~ device (or import such a device with the intention of doing any of those things) that applies to a technological protection measure if A knows ~~or has reason to believe~~ that it will, or is likely to, be used to infringe copyright in a TPM work.

(2) A person (A) must not provide a service, (not including the publication of information), if—

(a) the service ~~or the information~~ is intended to enable or assist persons to circumvent a technological protection measure; and

(b) A knows or has reason to believe that the once the technological protection measure is circumvented, copyright in the TPM work will be infringed. ~~service or the information will, or is likely to, be used to infringe copyright in a work that is protected by a technological protection measure.~~

226B Rights of issuer of TPM work

(1) This section applies if a TPM work is issued to the public by, or under licence from, the copyright owner.

(2) The issuer of the TPM work has the same rights against a TPM ~~circumventerspoiler~~ as a copyright owner has in respect of an infringement of copyright.

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(3) The issuer of the TPM work has the same rights under section 122 (order for delivery up in civil proceedings) or section 132 (order for delivery up in criminal proceedings) in relation to a TPM ~~spoiling~~circumvention device as a copyright owner has in relation to an infringing copy.

(4) Sections 126 to 129 (which relate to certain presumptions) apply in relation to proceedings under this section.

(5) Section 134 (order as to disposal of infringing copy or other object.) applies, with all necessary modifications, in relation to the disposal of anything that is delivered up under subsection (3).

226C Offence of making, etc, TPM ~~spoiling~~circumvention device

(1) Every person commits an offence who, in the course of business,—

(a) ~~either—~~

~~(i) makes for sale or hire, imports, sells, lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, a TPM ~~spoiling~~circumvention device (or imports such a device with the intention of doing any of those things); or~~

~~“(ii) publishes information intended to enable or assist persons to circumvent a technological prevention measure; and~~

(b) does so, ~~intending knowing~~ that once the technological protection measure is circumvented, copyright in the TPM work will be infringed~~the TPM spoiling device or the information will, or is likely to, be used to infringe copyright in a work that is protected by the technological protection measure in question.~~

(2) A person who commits an offence under subsection (1) is liable on conviction on indictment to a fine not exceeding \$150,000 or a term of imprisonment not exceeding 5 years or both.

(3) In determining whether any penalty is appropriate under section 226C(2), of, if it is, the level of such penalty, the Court shall, among other things, take into account:

(a) The value in New Zealand of the TPM work in question;

(b) The amount, if any, that the TPM circumventer has made from the TPM circumvention device in New Zealand;

(c) The number of TPM works that are involved.

226D When rights of issuer of TPM work do not apply

(1) The rights that the issuer of a TPM work has under section 225B do not prevent or restrict the exercise of a permitted act and a term or condition in an agreement for the use of a work has no effect in so far as it prohibits use of a TPM circumvention device, where such circumvention is necessary in order to exercise a permitted act.

(2) The rights that the issuer of a TPM work has under section 226B do not prevent or restrict the making, importation, sale, or letting for hire of a TPM ~~spoiling~~circumvention device to enable a qualified person to—

(a) exercise a permitted act; or

(b) correct an error in a computer program; or

(c) effect interoperability of software; or

(d) undertake encryption research (including publication of such research).

Appendix 3

(3) In this section and in section 226E, qualified person means—

- (a) a prescribed library; or
- (b) a prescribed archive; or
- (c) an educational establishment.

(4) A qualified person must not be supplied with a TPM ~~spoiling~~circumvention device on behalf of a user unless the qualified person has first made a declaration to the supplier in the prescribed form.

226E User's options if prevented from exercising permitted act by TPM

(1) The user of a TPM work who wishes to exercise a permitted act allowed under this Act but cannot practically do so because of a TPM may —

(a) apply to the copyright owner or the exclusive licensee for assistance enabling the user to exercise the permitted act. The copyright owner and the exclusive licensee at their cost shall be obliged to provide a TPM circumvention device or non-TPM work, or otherwise to take such steps as are necessary to enable to the user to exercise that permitted act, as soon as practicable:

(b) engage a qualified person (see section 226D(3)) to exercise the permitted act on the user's behalf using a TPM ~~spoiling~~circumvention device, but only if the copyright owner or the exclusive licensee has refused the user's request for assistance or failed to ~~comply~~respond ~~to~~with it within a reasonable time.

(c) use or have someone use on their behalf a TPM circumvention device in order to exercise the permitted act.

(2) The copyright owner shall not protect a work with a TPM which is likely to make it impossible for a user to exercise any permitted act in the same way that they would if the TPM were not in place.

(3) a copyright owner who breaches section 226E(1)(a) or section 226E(2) shall be liable for a fine of up to \$100,000 for each day that it is in breach. This subsection shall not come into force until the date which is one year after this subsection receives Royal assent and shall not apply with respect to any TPMs that have been issued prior to that date.

Copyright management information

226F Meaning of copyright management information

In sections 226G, 226H, and 226J **CMI** or **copyright management information** means information attached to, or embodied in, a copy of a work that

- (a) identifies the work, and its author or copyright owner; or
- (b) identifies or indicates some or all of the terms and conditions for using the work, or indicates that the use of the work is subject to terms and conditions.

226G Interference with CMI prohibited

(1) A person (A) must not remove or modify any copyright management information attached to, or embodied in, a copy of a work.

(2) However, subsection (1) does not apply if—

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(a) A has the authority of the copyright owner or the exclusive licensee to remove or modify the copyright management information; or

(b) A does not know, and has no reason to believe, that the removal or modification will induce, enable, facilitate, or conceal an infringement of the copyright in the work; or-

(c) removal or modification of the copyright management information is necessary for the use of the work without otherwise infringing copyright; or

(d) removal or modification of the copyright management information is necessary so that A's rights under New Zealand privacy law will not be infringed.

226H Commercial dealing in work subject to CMI interference

(1) A person (A) must not, in the course of business, make, import, sell, let for hire, offer or expose for sale or hire, or advertise for sale or hire, a copy of a work if any copyright management information attached to, or embodied in, the copy has been removed or modified without the authority of the copyright owner or the licensee.

(2) However, subsection (1) does not apply if—

(a) A has the authority of the copyright owner or the exclusive licensee to remove or modify the copyright management information; or

(b) A does not know, and has no reason to believe, that the removal or modification will induce, enable, facilitate, or conceal an infringement of the copyright in the work; or

(c) A does not know and has no reason to believe that the work had copyright management information which has been removed.-

226I contravention of section 226G or section 226H

A copyright owner or licensee of a work has the same rights in relation to a contravention of section 226G or section 226H as a copyright owner has in respect of an infringement of copyright.

"226J Offence of dealing in work subject to CMI interference

(1) A person (A) who contravenes section 226H commits an offence if—

(a) A knows that the copyright management information has been removed or modified without the authority of the copyright owner or licensee; and

(b) A knows that dealing in the work will induce, enable, facilitate, or conceal an infringement of the copyright in the work,

(2) A person who commits an offence under subsection (1) is liable on conviction on indictment to a fine not exceeding \$150,000 or a term of imprisonment not exceeding 5 years or both."

Appendix 4

Appendix 4 – Permitted Acts

Provisions as proposed in the Bill marked-up with InternetNZ's suggested changes

Computer Programs**80A Decompilation of computer program**

(1) The lawful user of a copy of a computer program expressed in a low level language does not infringe copyright in the program by decompiling it, if the conditions in subsection (2) are met.

(2) The conditions referred to in subsection (1) are that—

(a) decompilation is necessary to obtain information necessary for the objective of creating an independent program that can be operated with the program decompiled or with another program; and

(b) the information obtained from the decompilation is not used for any purpose other than the objective referred to in paragraph (a).

(3) In particular, the conditions in subsection (2) are not met if—

(a) the information necessary to create the independent program is readily available to the lawful user without decompiling the computer program; or

(b) the lawful user does not confine decompilation of the computer program strictly to the steps that are necessary to create an independent program; or

(c) the lawful user gives the information obtained from decompiling the computer program to any person when it is not necessary for creating an independent program to do so; or

(d) the lawful user 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; or

(e) the lawful user uses the information obtained from decompiling the computer program to do any act that is restricted by copyright

(4) In this section,—

decompile means—

(a) to convert a computer program expressed in a low level language into a version expressed in a high level language; or

(b) to copy the program as a necessary incident of converting it into that version

high level language means a machine-independent computer programming language

low level language means a computer programming language in electronic machine-readable form.

80B Copying, ~~or~~ adapting or reverse engineering computer program or TPM if necessary for lawful use

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(1) The lawful user of a computer program (A) does not infringe copyright in it or in any technological protection measure by copying, ~~or~~ adapting or reverse engineering it, if—

(a) ~~doing so copying or adapting it~~ is necessary for A's lawful use of the program (for example, to correct an error in the program); or

(b) to make one back-up copy of the program or any material which is protected by a technological protection measure; or

(c) that is necessary in order to disable a TPM so that A can engage in any permitted act or do any of the things referred to in sub-section (a) or (b) of this section and

~~(d)~~ a properly functioning and error-free copy of the program is not available to A within a reasonable time at an ordinary commercial price.

(2) This section does not apply to copying or adapting that is permitted under section 80A or section 80C,

80C Certain contractual terms relating to use of computer programs have no effect

A term or condition in an agreement for the use of a computer program has no effect in so far as it prohibits or restricts—

(a) any activity undertaken in compliance with the conditions set out in section 80A or section 80B; or

(b) use of any device or means to observe, study, or test the functioning of the program in order to understand the ideas and principles that underlie any element of the program.

Format Shifting

81A Copying sound recording, film or artistic work for private and domestic use

(1) Copyright in a sound recording, film or artistic work and in a literary or musical work contained in any of them is not infringed by copying the ~~work~~sound recording, if the following conditions are met:

(a) the copy is made from a ~~work~~sound recording that is not an infringing copy; and

(b) the ~~work~~sound recording is not borrowed or hired; and

(c) the copy is made by or under the direct authority of the owner of the ~~work~~sound recording; and

(d) the owner acquired the ~~work~~sound recording legitimately; and

(e) the copy is used only for that owner's private and domestic use; and

(f) no more than 1 copy is made for each ~~type of~~ device for ~~playing or showing~~playing sound recordings works that is owned by the owner of the ~~work~~sound recording; and

(g) the owner of the ~~work~~sound recording retains the ownership of any copy that is made under this section.

(2) A term or condition in an agreement for the use of a work has no effect in so far as it prohibits or restricts any activity undertaken in compliance with the conditions set out in

Appendix 4

~~section 81A Subsection (1) does not apply if the owner of the sound recording is bound by a contract that specifies the circumstances in which the sound recording may be copied.~~

~~(3) For the purposes of this section, references to copying include references to making an adaptation where it is necessary for the work to be adapted so that it can be played or seen on another device.~~

~~(3) This section expires after 2 years after the date on which it came into force, but~~

~~(a) the Governor General may, by Order in Council made while this section is in force, extend the date of expiry for a further period of 2 years;~~

~~(b) the Governor General may extend the date of expiry under paragraph (a) more than once.~~

Time Shifting**84 Recording for purposes of time shifting**

(1) A person (A) does not infringe copyright in a programme included in a communication work, or in any work included in it, by recording it, if A—

(a) makes the recording solely for A's private and domestic use; and

(b) makes the recording solely for the purpose of viewing or listening to the recording at a more convenient time; and

(c) is not able lawfully to access the communication work on demand; and

(d) knows that he or she has lawful access to the communication work in the same format at the time of making the recording.

~~(2) However, subsection (1) does not apply, and A does infringe copyright in the communication work recorded and in any work included in the communication work, if—~~

~~(a) A retains the recording for any longer than is reasonably necessary for viewing or listening to the recording at a more convenient time; or~~

~~(b) in the event that the person who views or listens to the recording wishes to make a complaint to a complaint authority, A retains the recording for any longer than is reasonably necessary to prepare and despatch the complaint.~~

~~(3) If a person infringes copyright under subsection (2), the recording is treated as an infringing copy.~~

Appendix 5

Appendix 5 - Electronic Commerce (EC Directive) Regulations 2002 (UK)

Mere conduit

17. - (1) Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service or the provision of access to a communication network, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where the service provider -

- (a) did not initiate the transmission;
- (b) did not select the receiver of the transmission; and
- (c) did not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access referred to in paragraph (1) include the automatic, intermediate and transient storage of the information transmitted where:

- (a) this takes place for the sole purpose of carrying out the transmission in the communication network, and
- (b) the information is not stored for any period longer than is reasonably necessary for the transmission.

Caching

18. Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where -

- (a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and
- (b) the service provider -
 - (i) does not modify the information;
 - (ii) complies with conditions on access to the information;
 - (iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
 - (iv) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

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(v) acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

Hosting

19. Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where -

(a) the service provider -

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.

Protection of rights

20. - (1) Nothing in regulations 17, 18 and 19 shall -

(a) prevent a person agreeing different contractual terms; or

(b) affect the rights of any party to apply to a court for relief to prevent or stop infringement of any rights.

(2) Any power of an administrative authority to prevent or stop infringement of any rights shall continue to apply notwithstanding regulations 17, 18 and 19.

Defence in Criminal Proceedings: burden of proof

21. - (1) This regulation applies where a service provider charged with an offence in criminal proceedings arising out of any transmission, provision of access or storage falling within regulation 17, 18 or 19 relies on a defence under any of regulations 17, 18 and 19.

(2) Where evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

Notice for the purposes of actual knowledge

22. In determining whether a service provider has actual knowledge for the purposes of regulations 18(b)(v) and 19(a)(i), a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to -

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(a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c), and

(b) the extent to which any notice includes -

(i) the full name and address of the sender of the notice;

(ii) details of the location of the information in question; and

(iii) details of the unlawful nature of the activity or information in question.

Appendix 6

Appendix 6 – Professor Michael Geist Article

US copyright lobby out-of-touch

Internet law professor Michael Geist takes a look at intellectual property protection in the US and finds it somewhat out of step with the rest of the world.

The International Intellectual Property Alliance, an association that brings together US lobby groups representing the movie, music, software, and publisher industries, last week delivered its annual submission to the US government featuring its views on the inadequacy of intellectual property protection around the world.

The report frequently serves as a blueprint for the US Trade Representative's Section 301 Report, a government-mandated annual report that carries the threat of trade barriers for countries that fail to meet the US standard of IP protection.

The IIPA submission generated considerable media attention, with the international media focusing on the state of IP protection in Russia and China, while national media in Canada, Thailand, and Taiwan broadcast dire warnings about the consequences of falling on the wrong side of US lobby groups.

While the UK was spared inclusion on this year's list, what is most noteworthy about the IIPA effort is that dozens of countries - indeed most of the major global economies in the developed and developing world - are singled out for criticism.

The IIPA recommendations are designed to highlight the inadequacies of IP protection around the world, yet the lobby group ultimately shines the spotlight on how US copyright policy has become out-of-touch and isolated from much of the rest of the globe.

The IIPA criticisms fall into three broad categories. First, the lobby group is very critical of any country that does not follow the US model for implementing the World Intellectual Property Organisation's Internet Treaties.

Those treaties, which create legal protection for technological protection measures, have generated enormous controversy with many experts expressing concern about their impact on consumer rights, privacy, free speech, and security research.

Double standards?

The US implementation, contained in the 1997 Digital Millennium Copyright Act, represents the world's most aggressive approach to the WIPO Internet Treaties, setting very strict limits on the circumvention of digital rights management systems and establishing a ban on devices that can be used to circumvent DRM, even if the circumvention is for lawful purposes.

Given the US experience, it is unsurprising that many countries have experimented with alternate implementations.

This experimentation invariably leads to heavy criticism from the IIPA as countries such as Canada, New Zealand, Japan, Switzerland, Hong Kong, South Korea, Israel, Mexico, and

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India are all taken to task for their implementation (or proposed implementation) of anti-circumvention legislation.

Further, countries that have not signed or ratified the WIPO Internet treaties (which still includes the majority of the world), face the wrath of the US lobby group for failing to do so.

Second, in a classic case of "do what I say, not what I do", many countries are criticised for copyright laws that bear a striking similarity to US law. For example, Israel is criticised for considering a fair use provision that mirrors the US approach.

The IIPA is unhappy with the attempt to follow the US model, warning that the Israeli public might view it as a "free ticket to copy." Similarly, the time shifting provisions in New Zealand's current copyright reform bill (which would permit video recording of television shows) are criticised despite the fact that US law has granted even more liberal copying rights for decades.

The most disturbing illustration of this double standard is the IIPA's criticism of compulsory copyright licensing requirements.

Countries around the world, particularly those in the developing world (including Indonesia, the Philippines, Lebanon, Kuwait, Nigeria, and Vietnam) all face demands to eliminate compulsory licensing schemes in the publishing and broadcasting fields.

Moreover, the report even criticises those countries that have merely raised the possibility of new compulsory licensing systems, such as Sweden, where politicians have mused about an Internet file sharing license.

Long list

Left unsaid by the IIPA, is the fact that the US is home to numerous compulsory licenses.

These include statutory licenses for transmissions by cable systems, satellite transmissions, compulsory licenses for making and distributing phonorecords as well as the use of certain works with non-commercial broadcasting.

Third, the IIPA recommendations criticise dozens of efforts to support national education, privacy, and cultural initiatives.

For example, Canada, Brazil, and South Korea are criticised for copyright exceptions granted to students and education institutions.

Italy and Mexico are criticised for failing to establish an easy method for Internet service providers to remove allegedly infringing content (without court oversight), while Greece is viewed as being offside for protecting the privacy of ISP subscribers.

Greece is also taken to task for levying a surcharge at movie theatres that is used to support Greek films.

Moreover, countries that have preserved their public domain by maintaining their term of copyright protection at the international treaty standard of life of the author plus an additional fifty years are criticised for not matching the US extension to life plus 70 years.

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There are literally hundreds of similar examples, as countries from Europe, Asia, Africa, North and South America are criticised for not adopting the DMCA, not extending the term of copyright, not throwing enough people in jail, or creating too many exceptions to support education and other societal goals.

In fact, the majority of the world's population finds itself on the list, with 23 of the world's 30 most populous countries targeted for criticism (the exceptions are the UK, Germany, Ethiopia, Iran, France, Congo, and Myanmar).

Countries singled out for criticism should not be deceived into thinking that their laws are failing to meet an international standard, no matter what US lobby groups say.

Rather, those countries should know that their approach - and the criticism that it inevitably brings from the US - places them in very good company.

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