

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

NEW ZEALAND

EXECUTIVE SUMMARY

New Zealand should follow through on its long delayed copyright law reform effort, but only after making substantial changes to the recommendations in its 2003 Cabinet Paper. These changes are needed to bring the New Zealand law up to the minimum standards embodied in the WIPO Internet Treaties, as well as to enable an effective response to a rising level of digital piracy within the New Zealand market. In particular, New Zealand should refrain from codifying exceptions for time and format shifting that could undermine innovative channels for delivering music and other copyrighted materials online. To encourage sound copyright law reform in New Zealand, USTR should place the country on its Special 301 Watch List for 2005.

New Zealand has not appeared on a USTR Special 301 list since 2002, and was last the subject of an IIPA filing in 1999.

COPYRIGHT AND RELATED LAWS¹

In 2005, New Zealand enters the fifth year of its effort to reform and modernize its Copyright Act. While to date no legislation has been formally introduced, a Cabinet Paper issued in June 2003 outlines the government's recommendations, at least as of that time. Although this blueprint included several positive features, following the blueprint would leave New Zealand short of meeting global minimum standards, as embodied in the WIPO Internet Treaties, for a 21st century copyright law. While IIPA encourages law reform and modernization in New Zealand, it urges the drafters to re-examine a number of issues before the legislation is brought forward. These include:

1. **Exceptions to protection.** The Cabinet Paper endorses a number of broad exceptions that clearly threaten to exceed the permissible limits set by treaties to which New Zealand belongs (e.g., Article 13 of TRIPS). For example:
 - **Format shifting of sound recordings.** The recommendation to allow unauthorized copying of sound recordings into an unlimited number of formats threatens the roll-out of new formats and the development of innovative consumer delivery mechanisms for such recordings. It could also undermine current efforts to curb unauthorized copying of CDs in New Zealand, through means such as unlicensed CD-R burning machines available in supermarkets.

¹ Because this filing focuses exclusively on law reform issues, we have not compiled information regarding piracy losses or levels in New Zealand. However, IIPA member associations do report growing digital piracy problems there. For example, the Motion Picture Association of America (MPAA) reports an increase in local pirate disc burning operations (along with continued piratical imports, mostly from Asia) and thousands of illegal downloads of movie files online. Entertainment software companies also report quite a bit of piracy via the Internet, as well as through other channels such as retail flea markets, small Internet cafés, and unauthorized copying of rental copies onto Xbox[®] consoles before sale (hard disc loading).

- Time-shifting. Allowing unauthorized time-shifting of all works communicated to the public (except for “some on-demand services”) would virtually eliminate the ability of right holders to experiment with diverse approaches to meeting consumer demand for electronically delivered materials, from permanent downloads, to temporary streams, to everything in between. Reduced access and choice for New Zealand consumers would appear to be the inevitable, though surely unintended, result.
 - “Making available” by libraries. A blanket statutory rule that libraries may make digital materials available to remote users without permission risks distorting the licensing marketplace for these materials. The likely result would be to reduce the practical availability of such materials to library patrons.
 - Temporary copies. Any exception to the reproduction right recognized in this area should not apply to the reproduction of copies that have themselves been made or placed online without the authorization of the right holder.
2. **Internet service provider liability**. The statutory regime should clearly spell out the pre-conditions for any remedial limitations; the availability of injunctive relief in all cases; and expeditious procedures for identifying ISP subscribers who are engaged in infringement. The mechanics of a notice-and-takedown system should also be addressed.
 3. **Technological protection measures**. Reform legislation needs to cover access control technologies, and to clearly prohibit the act of circumventing such measures. Exceptions to the prohibitions on trafficking in circumvention devices or services must be carefully limited, lest they swallow the rule altogether.
 4. **Rights management information**. RMI should be protected against deliberate tampering, even if the data serves “tracking functions.”

Prompt adoption of copyright reform legislation reflecting these changes should be a top priority for New Zealand, as it will enable the government to grapple more effectively with a growing digital piracy problem within the country, as well as to advance toward accession to the WIPO Internet Treaties.