

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

SPECIAL MENTION

NEW ZEALAND

In December 2006, New Zealand's government unveiled the long-anticipated Copyright (New Technologies and Performer's Rights) Amendment. This extensive amendment to the New Zealand copyright law contains many valuable improvements, but a number of its provisions are quite problematic. IIPA makes this Special Mention submission to urge the U.S. government to engage actively with New Zealand to seek a satisfactory resolution of issues including the following:

1. Treatment of Technological Protection Measures (TPMs): New Zealand's efforts to update its existing law fall far short of meeting international minimum standards, as reflected in the implementation of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) by nearly all of New Zealand's OECD cohorts. Among other problems with the new legislation:

- Narrow definitions risk excluding from coverage many technologies used by right holders to control access to their works (since only TPMs that are designed to prevent or inhibit infringement are covered). The definition of "TPM spoiling device" is also too narrow, and even a device "primarily designed or produced" for circumvention purposes would be legal if it had any other significant application. Coverage of circumvention services should also be broadened.
- The act of circumventing TPMs would never be prohibited, regardless of the circumventor's intent or motive, and even though the circumvention would leave a previously protected work "in the clear" for infringement by others.
- Liability for trafficking in "TPM spoiling devices" would require proof of knowledge that the device "will or is likely to be used to infringe copyright," a heavy burden that a clever defendant could make almost insurmountable by concocting a record that there might be non-infringing uses of works whose protection could be circumvented through use of the device.
- Traffickers would be permitted to supply libraries, schools or archives with circumvention devices or services, ostensibly for non-infringing purposes, and even for some others (such as software interoperability) regardless of whether they constitute infringement. These provisions risk in effect condoning the development of a public marketplace in circumvention tools.

2. Transient Copying Exception: The legislation proposes a new exception for incidental copying, but this should be limited to transient copies made in the course of a transaction authorized by the relevant rights holder. Careful crafting of this exception is needed, among other reasons, in order to maintain the proper balance of legal incentives for Internet Service Providers (ISPs), whose servers make unauthorized transient copies of copyright works

in the course of infringing communications, to cooperate with right holders to combat such infringements.

3. ISP Liability Limitation: The proposed language may sweep too broadly since it appears to immunize an ISP that receives a direct financial benefit from infringing activity on its network. The legislation also lacks a clear notice and takedown system.

4. Library Digital Dissemination: The conditions under which libraries would be allowed to provide digital remote access to materials in their collections must be narrowly circumscribed to avoid interference with the normal exploitation of those works and to meet the other criteria of the internationally accepted standards for exceptions and limitations on copyright (i.e., the “three-step” test codified in TRIPS Art. 13). It is questionable whether the provisions of the pending legislation achieve this.

5. Exception for Time-Shifting of Works Disseminated by Broadcast, Cable or Internet: While this provision is substantially narrower than in earlier iterations, it demands careful review, with particular regard to its enforceability and its interaction with other provisions of the law. For example, someone trafficking in tools for circumventing technological measures used in connection with streaming dissemination of copyright material could defend on the ground that his customers might use the tool in order to exercise this exception.

6. Computer Program Exceptions: Proposed new exceptions for, e.g., correcting errors in computer programs, must also be carefully analyzed for compatibility with the three-step test, bearing in mind once again the knock-on effect with respect to technological protection measures.

Since a parliamentary committee is slated to report the legislation by June, early engagement could help New Zealand ensure that the legislation provides useful tools for grappling more effectively with a growing digital piracy problem within the country, as well as to advance toward accession to the WCT and WPPT. The government should also take whatever steps are necessary to ensure that adequate legal prohibitions are in place against camcorder piracy – the unauthorized operation of audiovisual recording equipment in a theater while a film is being screened – since, on a worldwide basis, pirate audio-visual products are sourced to professional camcorder pirates over 90% of the time.