

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301

SPECIAL MENTION

NEW ZEALAND

In July 2007, the Commerce Committee of New Zealand's parliament issued its long-awaited report on the Copyright (New Technologies and Performer's Rights) Amendment Bill. This extensive proposed amendment to the New Zealand copyright law was already problematic in several respects, but the changes proposed by the Commerce Committee, if adopted, would make the legislation significantly worse. IIPA makes this Special Mention submission to urge the U.S. government to engage actively with New Zealand to seek a satisfactory resolution of numerous issues in this legislation, 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. (The Commerce Committee proposals would increase this risk, since they would exclude any technology that "controls access to a work for non-infringing purposes," a description that could be applied to almost any access control, since circumvention could lead to a non-infringing use.) 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 encryption research) regardless of whether they constitute infringement. These provisions risk in effect condoning the development of a public marketplace in circumvention tools.

2. Internet Service Provider (ISP) Liability Limitation: Although there were some problems with these provisions in the original bill (e.g., it appears to immunize an ISP that receives a direct financial benefit from infringing activity on its network), the Commerce Committee changes would greatly intensify them. For example:

- ISPs could claim the shelter of a liability "safe harbor" even if they had not implemented a policy for terminating the accounts of subscribers who repeatedly infringe copyright. The

“repeat infringer” policy is a threshold requirement for ISP liability limitation in the laws of virtually every country that addresses the issue. The Commerce Committee’s recommendation to drop it would eliminate an important incentive for cooperation in combating online piracy.

- Criminal liability for recklessly providing a false take-down notice, which the Commerce Committee would impose, is overkill, and would needlessly discourage use of a procedure which ought to be encouraged.
- Under the amendment bill, an ISP with “reason to believe” that material it is storing is infringing would have to cut off access to it in order to claim a liability safe harbor. The Commerce Committee would rewrite this provision so that, absent actual knowledge of infringement, only a takedown notice from the right holder would trigger this responsibility. This unduly restrictive test would create a perverse incentive for ISP inaction, even when the ISP is aware of facts from which infringement is apparent.
- The ability of the courts to issue injunctions against ISPs – a critical enforcement tool, even in situations where ISPs do not face monetary damages -- would be severely curtailed under the Commerce Committee version. Even infringing activity that takes place under the authority and control of the ISP would be entirely immune, so long as it could not be proven to have been carried out “on behalf of or at the direction of” the ISP. Another amendment recommended by the Commerce Committee would create ambiguity about whether any injunction could be issued against an ISP that qualifies for a safe harbor, or whether its activities that enable infringement would be placed entirely beyond the reach of the courts.

3. Communication Works: On the path to creating a technologically neutral and comprehensive exclusive right of communication to the public, the drafters of the amendment bill strayed by establishing a broad and unprecedented new category of protected work – a “communication work” – that overlaps confusingly with the previously defined categories found both in New Zealand’s law and that of most other countries. Worse, the amendment defines as the author of such a work whoever transmits it, makes it available, or arranges to do so, as long as that person “has responsibility to any extent for its contents” – potentially a nearly limitless set. These novel definitions threaten to disrupt well-established licensing and payment structures, and to complicate the application of treaty obligations. IIPA urges New Zealand instead to ensure that the owners of rights in existing categories of works enjoy the exclusive right to control all the various forms of delivering such works to the public, and the unencumbered ability to enter into contractual arrangements for that purpose. This approach should achieve the intended objective of the drafters in a less disruptive manner.

4. Transient Copying Exception: The amendment bill 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 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.

5. 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.

6. Exception for Time-Shifting of Works Disseminated by Broadcast, Cable or Internet: While this provision remains relatively narrowly crafted, its interaction with other provisions of the law still demand careful review. For example, someone trafficking in tools for circumventing technological

measures used in connection with streaming dissemination of copyright material could defend against liability by claiming that his customers might use the tool in order to exercise this exception.

7. 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.

Copyright law revision gives New Zealand an opportunity to provide itself with useful new 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, and to position itself as a more attractive free trade agreement partner. The significant flaws in the pending legislation – including the unhelpful changes proposed by the parliamentary committee – undermine these goals. IIPA urges the U.S. government to deliver these messages in its bilateral discussions with New Zealand, and to seek to turn the revision process in a more constructive direction during 2008.

USTR's February 4 announcement that it will "begin a detailed exploratory process to determine whether it should participate in the full Trans-Pacific Strategic Economic Partnership" – the so-called P-4 Agreement among New Zealand, Brunei, Singapore and Chile – may provide a valuable platform in this regard. Among other benefits, this initiative could provide the framework for persuading New Zealand to agree to meet stronger intellectual property standards based on those in the FTAs that the U.S. has already concluded with Singapore and Chile. IIPA supports this process and encourages New Zealand to keep this goal in mind as it proceeds with copyright law revision.

New Zealand 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.