

BILLS DIGEST

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AMENDMENT BILL 2006**

Date of Introduction: 04 December 2006

Bills Digest No. 1485



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Published by the Parliamentary Library
Parliament Buildings, Wellington
New Zealand.

23 February 2007

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AMENDMENT BILL 2006**

Date of introduction: 04 December 2006
Portfolio: Commerce
Select Committee: 12 December 2006

PURPOSE

The aim of the Bill is to amend the Copyright Act 1994 (the Act).

BACKGROUND

"The Bill gives effect to the Government's decisions to:

- provide a limited exception to the reproduction right for transient copying undertaken by computers or communication networks as a result of an automatic or inevitable technical process;
- amend existing rights to broadcast or include a work in a cable programme service in order to provide a technology-neutral right of communication to the public and extend copyright protection to a technology neutral category of communication works;
- repeal section 88 of the Act, which allows cable programme services to retransmit free-to-air television broadcasts without the permission of the broadcaster;
- limit the potential liability of Internet service providers for both primary and secondary infringement in appropriate circumstances;
- amend the provision relating to technological protection measures to expand certain prohibitions and to facilitate the actual exercise of permitted acts where technological measures have been applied;
- introduce an offence (carrying a sentence of a fine not exceeding \$150,000 or a term of imprisonment of up to 5 years, or both) for commercial dealing in devices, services, or information designed to circumvent technological protection measures;
- provide protection for electronic rights management information that identifies content protected by copyright and the terms and conditions of use, but not for the tracking functions associated with this technology;

- introduce an offence provision (carrying a sentence of a fine not exceeding \$150,000 or a term of imprisonment of up to 5 years, or both) for commercial dealing in works where the electronic rights management information has been removed or altered;
- clarify and amend the exceptions to copyright owners' exclusive rights, particularly in relation to fair dealing, library, archival, and educational use, and time shifting;
- introduce new exceptions for format-shifting of sound recordings for private and domestic use, and for decompilation and error correction of software"¹.

MAIN PROVISIONS

Terminological changes

The Bill updates the terminology used in the Act in light of the widespread use of digital technology. It substitutes the terms "communication work"² and "communicate"³ for all references to broadcast and cable programmes, and versions of those terms, where those terms are used as nouns "(a broadcast", "a cable programme") and "communicate" or "communicate to the public" in the case of a verb ("to broadcast").

"Many of the amendments to the Bill simply substitute 'communication work' and 'communicate' or their variants for outdated terminology, without any other substantive change. Often the relevant provisions have been rewritten, either because that is the easiest way of making the amendment, or because they can be more clearly expressed, or because this is a good opportunity to bring them up to date with current drafting practice"⁴ (*Part 1, Clauses 4 - 17, 19 - 21, 26 - 28, 38 - 42, 45 - 52, 55 - 57(2), 58 - 63; Part 2, 64 - 78, 80 - 88, 90 - 95*).

Definition of "copying"

One important example of the terminological change described above is in relation to "copying". Section 2(1) of the Act provides that the term "copying" (and correspondingly for the terms "copy" and "copies"):

¹ Copyright (New Technologies and Performers' Rights) Amendment Bill 2006, Explanatory Note, General policy statement, pp. 2 and 3.

² The Bill defines the term "communication work" as " ... a transmission, or the making available by a communication technology, of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme" (*Part 1, Clause 3, definition of "communication work"*).

³ The Bill defines the term "communicate" as " ... to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system " (*Part 1, Clause 3, definition of "communicate"*).

⁴ Copyright (New Technologies and Performers' Rights) Amendment Bill, 2006 No 102-1, Clause by clause analysis, Parts 1 and 2, p. 7.

"(a) ... in relation to any description of work, [means] reproducing or recording the work in any material form; and

(b) ... includes, in relation to a literary, dramatic, musical, or artistic work, storing the work in any medium by any means; and

(c) ... includes, in relation to an artistic work, the making of a copy in 3 dimensions of a two-dimensional work and the making of a copy in 2 dimensions of a three-dimensional work; and

(d) ... includes, in relation to a film, television broadcast, or cable programme, the making of a photograph of the whole or any substantial part of any image forming part of the film, broadcast, or cable programme.

The Bill aims to address concerns regarding the scope of this definition in relation to digital reproduction.

The Bill amends this definition by amending paragraphs (a) and (d) so that the definition of "copying would read after this Bill is passed and come into force:

"(a) ... in relation to any description of work, [means] reproducing, recording or storing the work in any material form (including any digital format), in any medium and by any means

(b) ... includes, in relation to a literary, dramatic, musical, or artistic work, storing the work in any medium by any means; and

(c) ... includes, in relation to an artistic work, the making of a copy in 3 dimensions of a two-dimensional work and the making of a copy in 2 dimensions of a three-dimensional work; and

(d) ... includes, in relation to a film or communication work, the making of a photograph of the whole or any substantial part of any image forming part of the film or communication work (*Part 1, Clause 3(3) and (4), amending Section 2(1) of the Copyright Act 1994, definitions of "communicate and communication work"*).

Transient reproduction of work

The Bill provides that a reproduction of a work does not infringe copyright in the work if the reproduction:

- is transient or incidental;
- is a necessary part of a technological process for making or receiving a communication that does not infringe copyright or enabling the lawful use of, or lawful dealing in, the work; and
- has no independent economic significance.

The Act at present allows fair dealing with a work for research or private study but only one copy may be made on any one occasion. The Bill provides that this rule does not apply to a transient reproduction of a work. An exemption from infringement of copyright for a transient reproduction of a recording of a work is introduced in the Bill (*Part 1, Clause 22 (amending Section 43 of the Act by substituting subsection (4)), Clause 23 (inserting New Section 43A into the Act), and Clause 79 (inserting New Section 175A)*).

Copying for educational purposes

The Copyright Act 1994 provides that copyright in a literary, dramatic, or musical work or the typographical arrangement of a published edition is not infringed by the copying of part of the work or edition if: the copying is done by means of a reprographic process or by any other means, for an educational purpose, by or on behalf of an educational establishment, one or more copies of part of the work or edition is or are made on any one occasion and no charge is made for the supply of a copy to any student or other person who is to receive, is receiving, or has received a lesson and, in the period beginning with the commencement of this Act and the copying is of no more than the greater of three percent of the work or edition or three pages of the work or edition (except that where, applying this rule, the whole of a work or edition is copied, the copying permitted is no more than 50 percent of the whole work or edition) (*Section 44(3) and (4), Copyright Act 1994*).

The Bill provides that a digital copy of a work made in accordance with Section 44(3) and (4) may be supplied to an "authenticated user" which means a person who is a student or other person who is to receive, is receiving, or has received, a lesson that relates to the work". (*Part 1, Clause 24, amending Section 44 of the Copyright Act 1994 by inserting new subsections (4A) and (4B)*).

Storing for educational purposes

The Bill permits an educational establishment, subject to conditions, to store a work that is made available on a website or other electronic retrieval system (*Part 1, Clause 25, inserting New Section 44A of the Copyright Act 1994*).

Changes relating to digital copies

The Bill regulates access to users of a digital copy of a work acquired by a prescribed library or archive⁵. The librarian of a prescribed library or an archivist of an archive that lawfully obtains a work in digital format may allow users access to that copy by means of terminals on site ("on-site access"), or terminals off-site ("remote access"). On-site access is subject to the following restrictions: the librarian or archivist must ensure that all users are informed in writing about the limits of copying or communication that is allowed by the Bill; the work in digital format may be copied or communicated by a user only in accordance with the provisions of the Bill; the

⁵ The term "Prescribed library" means: the National Library, the Parliamentary Library, "every law library provided and maintained pursuant to section 26(2) of the Law Practitioners Act 1982" (after the Lawyers and Conveyancers Act 2005 comes into effect, this will read: "every law library provided and maintained under Section 375(1) of the Lawyers and Conveyancers Act 2006"), a library maintained by an educational establishment, government department, or local authority, a library of any other class of library prescribed by regulations made under this Act, not being a library conducted for profit. Libraries that are members of interloan and libraries of Crown entities are included by such regulations: see SR 1995/146/4.

work in digital format may be accessed at any one time only by so many users as the number of that work in digital format that the library or archive has purchased or for which it is licensed.

Remote access is subject to the following restrictions: the work in digital format must be in a form that cannot be altered or erased; the work in digital format may be accessed only by a person who has a legitimate right to use the library or archive (an "authenticated user"); the work in digital format may be accessed at any one time only by so many users as the number of that work in digital format that the library or archive has purchased or for which it is licensed (*Part 1, Clause 36, inserting New Section 56A*).

Additional conditions

The Bill imposes additional conditions on the supply by a librarian of a prescribed library, or archivist of an archive, of a copy of a work in digital format (for example, the librarian or archivist is only to respond to written requests for a digital copy identifying the work and stating the purpose for which the material will be used and the librarian or archivist must declare in writing that the provisions of the Act governing the supply of the digital copy have been complied with).

The Bill also imposes similar additional conditions on making digital copies by a librarian of a prescribed library, and requires that the declaration that is made by the librarian of a prescribed library, or an archivist of the archive, in compliance with those conditions must be retained for three years and made available for inspection by the relevant copyright owner in relation to the work (*Part 1, Clause 36, inserting New Sections 56A - 56C into the Copyright Act 1994; Clause 37, inserting New Section 57A into the Copyright Act 1994*).

Computer programs

The Bill provides for decompilation⁶ by the lawful user of a copy of a computer program expressed in a low level language without infringement of copyright in the program. But this is subject to the condition that 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 the information obtained from the decompilation is not used for any purpose other than that objective.

The Bill also provides that the lawful user of a computer program may copy or adapt it without infringement of copyright in the program if the lawful user of a computer program does not infringe copyright in it by copying or adapting it, if:

- copying or adapting it is necessary for the law user's use of the program (for example, to correct an error in the program); and

⁶ The Bill defines the term "decompile" to mean "to ... convert a computer program expressed in a low level language into a version expressed in a high level language" or "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. (*Part 1, Clause 43, inserting New Section 80A into the Copyright Act 1994, subsection (4), definitions of "decompile", "high level language" and "low level language"*).

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

The Bill provides that a contractual term or condition has no effect to the extent that it prohibits or restricts decompilation under the conditions set out above or prohibits or restricts the use of any device or means to analyse the program (*Part 1, Clause 43, inserting New Sections 80A - 80C into the Copyright Act 1994*).

Copying sound recording for private and domestic use

The Bill allows copying of a sound recording if:

- the copy is made from a sound recording that is not an infringing copy;
- the sound recording is not borrowed or hired;
- the copy is made by the owner of the sound recording;
- the owner acquired the sound recording legitimately;
- the copy is used only for that owner's private and domestic use;
- no more than one copy is made for each type of device for playing sound recordings that is owned by the owner of the sound recording; and
- the owner of the sound recording retains the ownership of any copy that is so made.

However, this provision has a sunset clause. It expires after two years after the date on which it comes into force unless the Governor-General, by Order in Council, made while the provision is in force, extends the date of expiry for a further period of two years and the Governor-General may so extend the provision more than once (*Part 1, Clause 44, inserting New Section 81A into the Copyright Act 1994*).

Technological protection measures

"Technological protection measures (TPMs) offer a means to combat the ease of reproduction and distribution that digital technology provides. There are, however, concerns about 'digital lockup' as such measures, by preventing access, cannot distinguish between infringing activities and permitted acts.

"The Bill amends the current 'copy-protection' provision in section 226, so that copyright owners will have the ability to take action in respect of devices, means, or information where circumvention could enable infringement of any of the copyright owner's rights, not just the reproduction right. In particular, this change recognises the increasing importance of rights of communication and the necessary incentives for the provision of online and digital services.

"The focus of section 226 will continue to be on the link between circumvention and copyright infringement, and on the making, sale, and hire of devices or information rather than on actual circumvention. While actual circumvention may not be

prohibited, any unauthorised use of the material that is facilitated by circumvention will continue to be an infringement of copyright. Consumers should, however, be able to make use of materials under the permitted acts or view or execute a non-infringing copy of a work. This is consistent with New Zealand's position on parallel importation of legitimate goods, for example, genuine DVDs, from other jurisdictions. New provisions are introduced to enable actual exercise of permitted acts where TPMs have been applied"⁷ (*Part 2, Clause 89, replacing Section 226 of the Copyright Act 1994 and inserting New Sections 226A - 226E*).

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⁷ Copyright (New Technologies and Performers' Rights) Amendment Bill 2006, Explanatory Note, General policy statement, p. 5.