

7 May 2007

The Chair  
Commerce Select Committee

## **OFFICIALS' REPORT ON THE COPYRIGHT (NEW TECHNOLOGIES AND PERFORMERS' RIGHTS) AMENDMENT BILL**

- 1 This report is divided into two sections – a Covering Report, and Clause by Clause Analysis. The Covering Report provides, for the Committee's convenience, detailed reasoning for officials' recommendations on the key issues raised by submitters on the Bill. It also discusses a number of issues that were unrelated to the purpose of the Bill and therefore fall outside its scope.
- 2 The Covering Report addresses:
  - Permitted acts related to educational establishments and libraries (pages 3-6);
  - Permitted act related to format-shifting (pages 7-8);
  - Internet Service Provider (ISP) liability (pages 8-11);
  - Technical Protection Measures (TPMs) (pages 11-16); and
  - Matters outside the Bill, including director's rights, orphan works, access to works by the blind, and the issue of e-cast and the Screenrights Licensing Scheme (pages 16-20).
- 3 A report covering the repeal of section 88 of the Act (relating to retransmission of free to air broadcasts) will be provided separately prior to the Select Committee meeting on 10 May.
- 4 The Clause by Clause Analysis provides a more detailed commentary on the issues raised by submitters. The main table addresses all issues relating to the Bill, except those relating to the repeal of section 88, which will be provided separately. All matters outside of the Bill are listed in a separate table.

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## OFFICIALS' REPORT ON THE COPYRIGHT (NEW TECHNOLOGIES AND PERFORMERS' RIGHTS) AMENDMENT BILL: COVERING REPORT

5 This Covering Report addresses:

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### Permitted Acts Related to Educational Establishments and Libraries

#### *Clause 25 – Storing for educational purposes*

- 6 Clause 25 is intended to give educational establishments a narrow exception to enable them to copy and store pages from websites for educational purposes. A number of submissions suggested that the drafting of this provision needed clarification.
- 7 New section 44(1)(d) attracted the most comment, particularly from educational establishments. This provision is intended to prevent educational establishments from storing website page(s) until after the pages are removed from the website. During consultation, website owners argued against allowing educational establishments to store website pages because some website owners derived income from advertising on the website pages linked to the number of hits the website page received. There was a concern that allowing educational establishments to copy and store pages could reduce the number of hits on those website pages and, therefore, their earnings potential. Subsection 44(1)(d) was included to address their concerns.
- 8 Many educational establishments, however, were concerned that subsection 44(1)(d) would be an impractical condition to comply with. A website page cannot be physically copied after it had been removed by the website owner and it would require the educational establishment to continuously monitor the website page(s) in question. In order to ensure that the provision can be effective in practice, the Ministry recommends that new section 44(1)(d) be deleted from the Bill.

#### *New Section 56A – Libraries and archives may allow access to work in digital format*

- 9 New section 56A was intended to clarify that libraries and archives may allow their users to access digital copies of works held by them by either on-site

terminals or by remote access by authenticated users. Because the Bill creates a new right of communication for copyright owners, libraries and archives otherwise would be prevented from communicating digital copies of works within their collections without the authorisation of the copyright owner. This situation needs to be contrasted with the supply of paper copies of works, where libraries are free to allow users to access (including lending) paper copies of works without the authorisation of copyright owners.

- 10 While many submitters, especially from libraries, welcomed the provision as clarifying existing practice, some concerns were raised with the drafting of the provision. A number of submitters suggested that the separate and different conditions for on-site access and remote access under subsections (2) and (3) should be combined into a single set of conditions. The Ministry agrees with submitters on this point and recommends combining of the separate conditions imposed for both on-site and remote access.
- 11 Several copyright owner groups submitted that libraries and archives should not be permitted to allow their users to supply digital copies of works, raising concerns that do so would undermine existing and potential new markets for the supply of digital copies of works by copyright owners. The Ministry notes, however, that libraries and archives already supply digital copies of works to their users but copyright owner groups have not supplied any evidence that their interests are being undermined by such activities.
- 12 The Ministry recommends that section 56A should be amended to clarify that a prescribed library or archive does not infringe copyright in a work by communicating a digital copy of a work via the internet or other electronic retrieval system to an authenticated user if-
  - a The library or archive had lawfully obtained the digital copy;
  - b the library or archive must ensure that all users are informed in writing about the limits of copying or communication allowed by the Act, including that a digital copy may only be copied or communicated by the user in accordance with the provisions of the Act;
  - c the digital copy must be communicated in a form that cannot be altered or modified; and
  - d the number of users who may only access the digital copy at any one time must be equal to or less than the number of digital copies of the work that the library is lawfully permitted to hold in its collection.
- 13 Furthermore, the Ministry recommends that the provision be amended to clarify that only those persons who have a legitimate right to use the services of the library or archive and that the digital copy of the work may be allowed accessed through a verification process that verifies that the user is entitled to access the digital copy.
- 14 The Ministry notes in particular that section 56A does not prevent copyright owners from specifying conditions of access to digital copies for libraries and

archives under licence agreements related to the purchase of those digital copies of works.

*Sections 56B and 56C – additional conditions for supply of a work in digital format by libraries and archives*

- 15 Sections 56B and 56C specify additional conditions for requests to libraries for digital copies of works, and on their supply by libraries. Many copyright owner groups welcomed the stricter conditions on the supply of digital copies of works by libraries and archives and argued that such conditions should also apply to the supply of paper copies by libraries and archives.
- 16 Many submitters, especially from libraries and archives, however, raised concerns about the additional conditions being imposed by sections 56B and 56C. They argued that the conditions made the process of obtaining copies of works from libraries and archives overly bureaucratic; amounted to an unnecessary invasion of privacy; and imposed unnecessary compliance costs upon libraries and archives. These submitters also argued that the supply of digital copies should not be treated any differently to supply of paper copies.
- 17 The Ministry has reviewed the conditions currently imposed by sections 56B and 56C and agree that there is scope for simplifying and rationalising some of those conditions. The Ministry notes in particular that New Zealand libraries and archives have a good reputation for respecting copyright and for understanding of copyright law and limits on copying of copyright protected works.
- 18 Copyright owners have not provided any evidence (anecdotal or otherwise) that libraries; archives and their users exploit sections 51 to 54 and 56 to the detriment of the legitimate interests of copyright owners. If there was significant abuse of these provisions by libraries and archives, provisions like those currently prescribed in the Bill would be more easily justified to remind librarians, archivists and users of the limits to copying under these provisions.
- 19 The Ministry recommends that the condition that a person must make a written request for a digital copy of a work and the need for that person to state the purpose for which the material will be used should be deleted. The Ministry notes that whenever a person requests a copy of work from a library, the library will currently make a written copy of the request (that, for example, identifies the requestor and the work to be supplied). It is therefore usual for a record to be kept by libraries and archives of copying done on behalf of users and copyright owners can seek an order for discovery of these records through the courts. Furthermore, sections 51 to 54 and 56 only allow libraries and archives to supply a copy of work to the requester for the purposes of research or private study (and no other reason).
- 20 The Ministry also recommends that the condition that a librarian or archivist must make a declaration in writing that the provisions of the Act governing the supply of a digital copy have been complied with under sections 56B(b) and 56C(b), and the requirement to retain that declaration for three years, be deleted. While such a declaration may serve to remind the librarian and archivist of the provisions permitting copying of works protected by copyright and give copyright owners

some assurance that the provisions of the Act have been complied with, such a provision creates additional and unnecessary compliances costs for libraries and archives, particularly when compared to supply of paper copies of works where such declarations are not required to be made and kept.

- 21 Furthermore, the Ministry recommends that the condition that the librarian or archivist must only supply the person who made the request with a copy of the work, and no other person, be deleted because it is redundant. There is nothing under sections 51 to 54 and 56 that permit a library or archive to supply copies of works requested to a person other than the person who made the request.
- 22 Finally, the Ministry recommends that remaining the conditions imposed by sections 56B(d) and (e) and 56C(b) and (c), which require libraries and archives to supply requestors a notice setting out the terms of use of the copy, and which require the library or archive to destroy any digital copy of the work made to supply the requestor, should be retained. In particular, it is important that Act clearly specifies that libraries and archives should not use the exceptions under sections 51 to 54 and 56 as a means to digitise their paper collections without regard to the interests of the copyright owner. The condition that the librarian or archivist must, as soon as reasonably practical, destroy any additional copy made in the process of supplying the requestor with a digital copy of the work is therefore an important safeguard for copyright owners.

### **Permitted Acts - Format Shifting**

- 23 Many submissions welcome the inclusion of clause 44, which provides a limited exception for copying sound recordings (i.e. music) for private and domestic use (“format shifting”), but were concerned that the exception was limited to only sound recordings, that copyright owners could contract out of the exception and that the provision had a two year sunset clause.
- 24 Copyright owner groups, particular from the music industry, were not satisfied that the exception met the three-step Berne test<sup>1</sup>, especially as no provision was being made for a blank levy to be charged on media and/or devices for distribution back to copyright owners and, in particular, the music industry.
- 25 While the attached table recommends several minor amendments to be made to clarify some of the conditions imposed under new section 88A(1) to address some of the issues raised by submitters, the Ministry does not recommend that the provision should be extended to encompass all forms of copyright works.
- 26 At this point of time the Ministry does not consider that such a broad extension of the provision to other works can be justified under the Berne three-step test. In particular, it is not clear that the significant problems traditionally associated with private copying of music (i.e. widespread copying of music into new formats and/or across different devices in the absence of mechanisms which would

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<sup>1</sup> New Zealand is a member of the Berne Convention for the Protection of literary and Artistic Works and it requires that member States must satisfy a three-step test be before granting any new exceptions or permitted acts (the “Berne three-step test”). The steps are that any exception must be confined to certain special cases; that it should not conflict with a normal exploitation of the work; and it should not unreasonably prejudice the legitimate interests of the author.

enable this to occur legitimately), are currently present in other types of copyrighted works, such as films.

- 27 The Ministry notes that the rapid advance of technology may, however, see similar problems developing for the likes of movies and video clips that have existed with sound recordings. The Ministry will continue to monitor the situation and, along with other provisions in the Bill, review it in five years time.
- 28 The Ministry also recommends that subsection 81A(3), relating to the two year sunset clause for the music format-shifting exception, be deleted. This clause was included to ensure that the exception remained in place only as long as was necessary to enable the development of sound recordings to be sold subject to licenses that authorise a level of private copying. It does not, however, give sufficient certainty to the purchasers of sound recordings recorded on older technology that they will continue to be able to format shift those recordings for private and domestic use. In addition, the five-year review of the provisions in the Bill will provide an opportunity to consider whether the exception continues to be justified in light of evolving industry practice.

## **ISP Liability – Notice and Takedown Provisions**

### *Background*

- 29 Clause 92C of the Bill provides a limited exception from liability under the Act for ISPs that are storing infringing material. Under the clause, an ISP will not be liable unless it knows, or has reason to believe, that the material it is storing infringes copyright and it does not delete or prevent access to the material as soon as possible once it becomes aware. This has been described as a form of “notice and takedown” provision.
- 30 The purpose of this provision is to provide greater certainty for ISPs about the circumstances in which the storage of infringing material will give rise to liability. The provision clarifies that storage of infringing material by an ISP will not breach copyright. However, there are limits around the provision, to take account of circumstances where an ISP has some awareness that material is infringing and has the ability to remove that material. These limits reflect the unique position of the ISP. While it does not control the content of its subscribers’ websites, it is in a position to be able to control whether that material continues to be available to the public through its services.

### *Submissions*

- 31 A number of submissions have opposed the provisions in the Bill that would require an ISP to take down material once they become aware that it is infringing (which is likely to be when they receive notice). A number of submitters considered that it should be replaced with a “notice and notice” scheme. Some of the key concerns raised are:
- the notice and takedown provisions of the new section 92C are a disruption to legitimate use of the internet for commerce and private

activities and there is substantial evidence of misuse of equivalent provisions in the US;

- the cost of processing a large number of take down notices places a high potential cost on the provider;
- copyright holders have previously used the courts to request removal of infringing material or find the names of the end user who has posted it. This should continue to be the case;
- the Bill does not envisage codification of “notice and take-down” standardised procedures for removal of infringing content, which are found in US legislation;
- there should be offence and penalty provisions for the wilful and vexatious misuse of the notice provisions; and
- the current provisions place too much burden on an ISP to determine whether material breaches copyright.

32 Other submitters have supported the current notice and takedown type provisions. Key arguments in favour of retention are that:

- the notice and takedown provisions are widely used internationally;
- notice and notice would be an inadequate response to infringing material; and
- a wait period would defeat the value of such a provision.

#### *International comparisons*

33 The provisions in the Bill have been described as “notice and takedown” provisions. The US, the EU and Australia currently have notice and takedown type provisions, along with a number of other countries.

34 The US provisions provide a detailed procedure for the take down of material on notice to the ISP that material is infringing. A copyright owner submits a notification to the ISP. If, upon receiving a proper notification, the ISP promptly removes or blocks access to the material identified in the notification, the provider is exempt from liability and from claims based on its having taken down the material.

35 The procedure gives the subscriber the opportunity to respond to the notice and takedown by filing a counter notification. If the subscriber serves a counter notification complying with statutory requirements then unless the copyright owner files an action seeking a court order against the subscriber, the service provider must put the material back up within 10-14 business days after receiving the counter notification. Penalties are provided for knowing material misrepresentations in either a notice or a counter notice.

- 36 Under EU Directives, an ISP will not be liable for hosting information, provided they do not have actual knowledge that the activity is illegal and, upon obtaining such knowledge, act quickly to remove it. This provision requires that a determination is made as to whether or not the ISP had actual knowledge of the illegitimate nature of the content in question. Unlike the US legislation, no time table scale is given as to how soon the ISP should act upon receiving notice of the offending material, which is accessible through their service.
- 37 Internationally there has been some concern raised about the effect of the US provisions, including their use to constrain freedom of speech. The detailed procedural requirements have also come under some criticism.
- 38 The approach in the New Zealand Bill is more aligned to the EU provisions, and draws heavily on the UK Electronic Commerce (EC Directive) Regulations 2002. The Bill requires infringing material to be removed where an ISP knows or has reason to believe the material is infringing. In practice, where an ISP receives notice from a right-holder that material is infringing, they will have reason to believe the material is infringing. However, because the provision only applies where the material infringes copyright, the ISP is able to undertake its own assessment of whether the material is infringing if they wish.
- 39 In practice, it is likely that the ISP would generally take the material down to avoid liability. However, the ISP may make a decision to retain or restore the material where the person posting the material is able to make a convincing case to the ISP that the material is not infringing.
- 40 Because of the greater flexibility in the New Zealand Bill, there is potentially less likelihood that some of the suggested effects of the US provision (including inhibition of freedom of speech), would be seen in New Zealand. However, this will depend on how ISPs deal with notices on a practical basis.
- 41 Some submitters have made reference to Canadian proposals to introduce a notice and notice scheme (notice and notice procedures are discussed further below). A Bill to introduce such a scheme was introduced into the Canadian parliament. However, the Bill has not proceeded since a change in government in 1995.

#### *Notice and Notice Provisions*

- 42 A number of submitters have proposed that the current provision in the Bill be replaced with a “notice and notice” provision. The key features of this provision would be:
- An ISP would be required to forward any notice it receives to its allegedly infringing customer;
  - If no response is received from the customer within 10 working days, the ISP would take down the material and notify the copyright owner.
- 43 The notice and notice provisions proposed by Internet NZ and other submitters would address concerns about the potential for notice and takedown provisions to have a chilling effect on free speech. However, this system would not provide

an effective mechanism for removal of material that may be clearly infringing. Some submitters have referred to the economic harm that could result from infringing material remaining on websites for even a short period of time.

- 44 The Bill maintains the ability for a right holder to seek an injunction to remove infringing material.<sup>2</sup> It has been suggested by some submitters that the ability to seek an injunction negates concerns about clearly infringing material remaining on websites. There are, however, costs to a right-holder in seeking an injunction which are difficult to quantify because they depend on the complexity of the case. The timeframe for an injunction to be heard depends on the urgency of the matter and the type of injunction. For example, an interim injunction is usually held urgently (within a week) and is granted until a specified date or a further order of the Court. A notice and takedown system would generally mitigate the need for a right-holder to seek an injunction.

### *Recommendation*

- 45 It is recommended that current notice and takedown procedures in new section 92C of the Bill be retained.

## **Technical Protection Measures**

### *Background*

- 46 The Copyright Act currently includes specific provisions directed against devices designed to circumvent electronic “copy-protection”. The current legislation prohibits an individual:
- making, importing, selling, or offering or advertising for sale or hire devices or means intended to be used to defeat copy-protection mechanisms used on electronic copies of copyright works and
  - publishing information intending to enable or assist persons in circumventing copy-protection.
- 47 The purpose of the TPM provisions in the Bill is to give copyright owners a more comprehensive right relating to the protection of TPMs in response to technological developments and the increased risk of piracy. The copyright owner will have the ability to take action in respect of devices, means or information where circumvention could enable infringement of all the copyright owner's exclusive rights, not just copying. In addition, criminal offence provisions are introduced for limited circumstances. The Bill also introduces new provisions to enable the actual exercise of permitted acts where TPMs have been applied.

### *Submissions*

- 48 Generally, many copyright holders were in favour of a broader definition of TPMs and a more restrictive process relating to the exercise of a permitted act where a TPM has been applied to a work. Submissions from copyright users or

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<sup>2</sup> Some submitters have also raised more technical concerns about the effect of these provisions. These concerns are addressed in the attached clause by clause analysis.

consumer orientated persons and organisations, on the other hand, questioned the very existence of the TPM provisions and called for a less restrictive process to undertake a permitted act. It appears that some of the proposed provisions are not well understood and that the policy intention is not always clear. The Ministry does not consider any major shift in policy necessary but recommends various amendments to the current provisions to clarify the policy intent. Some of the key concerns raised are:

- TPM provisions are unnecessary, go beyond the protection of copyright and allow for a range of detrimental effects harmful to individuals and businesses.
- The definition of TPMs should explicitly include access control TPMs, regardless of any link to copyright infringement.
- The current definition might extend to regional zone blocking measures.
- The act of circumvention should also be prohibited.
- The exercise of a permitted act should not be restricted insofar as the beneficiary of a permitted act would have to engage a qualified person where he or she cannot perform the permitted act because of the application of a TPM.
- The definition of “qualified person” is too narrow. It should include people in the security, IT and research community.
- The proposed procedure in sections 226D and 226E to perform a permitted act is inappropriate. A state intervention mechanism with some type of complaint procedure would be more appropriate.

### *Comment and Recommendation*

#### Protection of TPMs

- 49 The TPM provisions respond to the increased risk of piracy of copyright works in the digital environment. New Zealand is not immune to piracy and TPMs are seen necessary to protect digital works in New Zealand. The proposed TPM provisions are narrow in scope and would not support any control over material beyond copyright as they continue to focus on the link between TPMs and control of rights conferred by copyright, not protecting TPMs regardless of any link to copyright protection.
- 50 The development and employment of TPMs have raised issues beyond the realm of copyright law. They often relate to disclosure issues, such as insufficient or incorrect information to consumers concerning technological protected materials and their usability restrictions, and could often be addressed by contract law, privacy laws or consumer protection laws. The issuer of a TPM would still need to comply with those other existing laws as the TPM provisions do not ‘trump’ any other laws. Finally, some of the outlined concerns are unlikely to occur at a large scale as consumer acceptability is going to continue to be key

to the successful operation of a business. If TPMs are designed in a way that consumers refuse to accept, or in a way that is not user-friendly, this is likely to discourage consumers from using protected works.

- 51 The Ministry recommends retaining the existence of provisions protecting TPMs.

#### The scope of TPM protection

- 52 The current definition of a TPM does not differentiate between access, use or copy protection measures because it is often difficult to distinguish between access, use and copying in the digital environment. However, it retains its focus on the protection of TPMs where circumvention would result in a breach of any of the exclusive rights conferred on owners by the Copyright Act, regardless of their categorisation. The proposed definition is therefore arguably narrower than in many other jurisdictions, including Australia. Australia has amended its definition of TPM by including access control measures as a result of its obligation under the Free Trade Agreement with the US.
- 53 The policy position is to ensure that TPM protections under the Bill are not unduly restrictive and do not place undue limits on a user's ability to make use of copyright works. Thus, the TPM provisions, including the definition, continue to focus clearly on the link between TPMs and control of rights conferred by copyright, not simply protecting TPMs regardless of any link to copyright protection. Consequently, only technological measures which prevent acts that are copyright infringements are protected, but not technologies aimed at blocking other acts which the right holder did not authorise.
- 54 While some TPMs that use access control components as part of a measure to prevent the unauthorised exercise of any of the exclusive rights conferred by the Copyright Act might fall within the definition of a TPM, other access protection measures, such as regional zone access protections (to allow the playing of legitimately purchased DVD movies or games etc. from other zones), are not linked to copyright infringement. The mere access to a copyright work does not constitute an infringement of copyright because mere access to a work is not reserved to the copyright owner. Many distribution models that use access control measures focus on users experiencing a copyright work in a way that would not infringe copyright, for example, by playing a computer game, reading a literary work or viewing an artistic work.
- 55 Copyright owners can continue using TPMs that control access, however, without assistance from the Act. Owners could, for example, continue to rely on other legal measures, such as the law of contract, where an access protection measure is circumvented. It is not the role of the Copyright Act to protect access control technology, which is used in some cases to price discriminate and control geographical distribution of works, to the detriment of New Zealand users.
- 56 The Ministry recommends retaining the current scope of TPM protection. However, for the avoidance of doubt the Ministry recommends amendment to section 226 to clarify that a measure solely designed to control market segmentation is not a TPM.

## Liability for the act of circumvention of a TPM

- 57 The current provisions provide copyright owners with a right of action in relation to the manufacture of and dealing with devices or means specifically designed or adapted to circumvent a TPM. The act of circumvention is not itself prohibited.
- 58 There are many circumstances where users of copyright works might want to circumvent a TPM for legitimate purposes. By prohibiting the actual circumvention the Act would prima facie prohibit that conduct. Also, prohibiting the dealing with circumvention devices and the provision of circumvention services already provides an effective way of controlling the circumvention of TPMs. Further, where the act of circumvention occurs in the course of business, the person would often be liable for copyright infringement anyway, for example for possessing or dealing with an infringing copy. In light of this, the extension of liability to actual circumvention is not considered justified.
- 59 The Ministry recommends retaining the current focus on circumvention devices or means and that liability not be extended to the act of circumvention itself. The 5 year review of all proposed amendments to the Copyright Act will provide a further opportunity to review the necessity of prohibiting the act of circumvention.

## Exercise of permitted acts

- 60 The TPM provisions are not intended to be used against actual users who engage in the act of circumvention to exercise a permitted act as the act of circumvention is not prohibited. The provisions in the Bill intend to provide a beneficiary of a permitted act, who hasn't itself the ability to circumvent with the option of seeking assistance from the copyright owner or a qualified person. The current provisions require the user to initially rely on voluntary assistance from the rights holder. If that fails, certain, trusted organisations (so called "qualified persons") may be supplied with a circumvention device to facilitate the circumvention. Qualified person means a prescribed library, a prescribed archive or an educational establishment.
- 61 The policy intention is that TPM spoiling devices could only be obtained by those qualified persons. The devices could not be supplied to any other parties, in particular, members of the general public. A declaration would need to be made to the manufacturer or supplier before the device could be made, imported, sold or let. This mechanism is designed to prevent the unrestricted distribution of TPM spoiling devices in a manner that would undermine the effectiveness of the TPM protections. It appears that the proposed provisions are not always well understood and amendments are recommended to clarify the policy intent.
- 62 The Ministry, however, does not recommend the unrestricted supply of circumvention devices for the exercise of a permitted act where a TPM has been applied. Permitting the unrestricted and unsupervised manufacture and sale of TPM circumvention devices to any user would enhance the risk of misuse and therefore undermine the effectiveness of the TPM protections. However, beneficiaries of a permitted act can already utilise a circumvention device to exercise a permitted act as the possession of such device and the actual act of circumvention is not prohibited.

- 63 The Ministry recommends retaining the current overall procedure to rely on voluntary assistance from the rights holder or the assistance of a qualified person. Having this process in place would not only prevent the unrestricted distribution of TPM circumvention devices in a manner that would undermine the effectiveness of the TPM protections, it would also allow libraries, archives and educational institutions to directly, and therefore more efficiently, engage in the circumvention of TPMs as a beneficiary of a permitted act, such as copying for educational purposes. Further, this option does not involve significant setup costs.
- 64 However, the Ministry recommends amendment to section 226E to allow the user to seek assistance from the qualified person without the prior application to the copyright owner. The user should, however, still be able to apply to the copyright owner. Although the application to the copyright owner is considered an effective and useful starting point, it is potentially onerous for users having to seek the copyright owner's assistance first before approaching a qualified person and showing they have made a reasonable effort. It might also put some further administrative burden on the qualified person to assess whether the user has appropriately followed the process.
- 65 The Ministry considers that the organisations currently falling under the definition of "qualified person" would have sufficient expertise to facilitate the circumvention of TPMs for the purposes outlined in section 226D, which include educational establishments, such as universities with IT research units.
- 66 It is accepted that the recommended process has the potential to take some time for people other than the "qualified persons" who would like to exercise a permitted act. There is also the potential that a qualified person will be unable to assist, for example where it is unable to get hold of the circumvention device. However, it is not anticipated that overall these will be significant barriers to the exercise of permitted acts.
- 67 There are also some practical issues associated with any of the proposed alternatives to the provision. Currently, the scope of the definition of "qualified person" is limited to certain, trusted agencies. Widening the scope of the definition of "qualified person" would require licensing or assessment of the persons or organisations to ensure that they can be trusted to undertake the circumvention. Similarly, any complaint mechanism would require an assessment of the legitimacy of the complaint. The establishment of either a licensing scheme or a complaint procedure would be administratively complex and there would be some associated fiscal cost to government. Given that many circumventions would be undertaken for the benefit of existing trusted agencies and that those agencies are also likely to be capable of assisting other beneficiaries of permitted acts, the Ministry does not consider that the costs associated with establishing a licensing scheme or a complaint procedure would justify the procedure.
- 68 On balance, the current provisions (with drafting clarification) are considered the most effective and efficient way of balancing the concerns of copyright owners (in terms of their ability to protect effectively protect their works in a digital environment) and the interests of copyright users in making legitimate use of

works. We note, in particular, that the definition of a TPM in the New Zealand legislation is narrower than that in many other jurisdictions, and that the provisions in the Bill do preserve the ability of users to circumvent TPMs to exercise *all* permitted acts (such as the fair dealing provisions).

## **Matters outside of the Bill**

69 A number of submissions to the Select Committee raise new issues with the Copyright Act that were unrelated to the purpose of the Bill and therefore fall outside its scope. All issues falling outside of the scope of the Bill are listed in the second table of the Clause by Clause analysis. Some of these issues will require further investigation and analysis (including consultation with interested parties) before the Ministry would be in a position to recommend what changes, if any, may be necessary to the Act. These issues are discussed below.

### *Directors' Rights*

70 The Screen Directors Guild of New Zealand (the "Guild") made a submission calling on film directors to be defined under the Copyright Act as "authors" and, therefore, copyright owners of the films in line with United Kingdom legislation. Furthermore, they proposed that the moral rights provisions of the Act to be amended to specifically include "directors" as "authors" of works.

71 Directors in New Zealand cannot claim copyright, nor can they enjoy the primary use of exploitation rights that flow from owning copyright. These benefits and privileges reside solely with the films producers. New Zealand directors must therefore rely solely on contractual arrangements for remuneration for their contribution to the creation of films.

72 The rationale for the current position is two-fold. Historically films are viewed in common law jurisdictions as technological productions of existing works, not artistic creations, and therefore producers are seen as the author of the film. Producers are the investors who bring together all the component artistic contributions of a film. Secondly, such an approach is designed to concentrate ownership in the hands of the person best placed to exploit copyright financially.

73 Civil jurisdictions have historically treated directors as the primary creators of films and as first owners of copyright. In recent years, however, common law jurisdictions like the United Kingdom and Australia have amended their copyright legislation to allow the directors to be recognised as authors of films.

74 The Guild argue that a change to the Copyright Act in New Zealand is necessary for the creation of job security and growth for the film industry in New Zealand as it will enable directors to stay in New Zealand and do their best films and programmes here.

75 The Ministry has been aware of this issue since 2003. Because of limited resources available to the Ministry at that time, the decision was taken to prioritise the work on the digital review of the Copyright Act and to commence work on reviewing the commissioning rule in the Copyright Act. The Ministry still considers that the issue raised by the Screen Directors Guild is important, but

further work on this issue needs to be undertaken including consultation with other interested parties, such as New Zealand producers. The Ministry proposes to commence work on this matter in early 2008 following the completion of its review of the commissioning rule and its legislatively-mandated review of parallel importing exceptions.

### *Orphan Works*

- 76 Susan Corbett and Geoff McLay made submissions on the need for the Act to be amended to provide a process that enables permitted works protected by copyright to be copied when the copyright owner is either unknown completely, could not be located or, in some extreme cases, when the owner had ceased to exist. Such works are often referred to as “orphaned works”.
- 77 The Ministry notes that orphan works are an issue under discussion internationally, and some overseas jurisdictions have already addressed the use of orphan works by introducing procedures that often depend upon the existence of some form of public office responsible for administering copyright protection. In New Zealand no such office exists; the only public office related to copyright is the Copyright Tribunal, but this tribunal is only for adjudicating on disputes related to collective licensing regimes rather than the administration of copyright protection. There would, therefore, be no straightforward way of incorporating these sorts of provisions into the Copyright Act.
- 78 This issue is, however, becoming increasingly important, and links to broader issues about availability and accessibility of culturally significant material. The Ministry for Culture and Heritage (“MCH”) is currently undertaking preliminary work on a review of the regulatory environment relevant to digital broadcasting, including rights issues relating to the accessibility to broadcasters of archived material and back-catalogues, including “orphaned” broadcast content. MCH is also reviewing measures to ensure the availability for study and historical research of films, television programmes and music funded by public organisations. The Ministry will be working with MCH to identify mechanisms to address concerns about access to orphaned works.

### *Access to Works by the Blind*

- 79 The Royal New Zealand Foundation of the Blind and the Association of Blind Citizens of New Zealand Inc sought through their submissions amendments to the section 69, which prescribe certain conditions under which organisations may make adaptations of works for print-disabled persons without infringing copyright. These submitters highlighted a number of difficulties concerned with the distribution of adapted works to print-disabled persons, including to print-disabled persons overseas, such as sending and receiving copies of adapted works to and from overseas organisations servicing print-disabled persons.
- 80 Because of the territorial nature of copyright protection, issues around distribution of copies works adapted for print-disabled persons are international in nature and therefore are unlikely to be addressed solely through amendments to our own Copyright Act. While the Ministry is particularly sensitive to the needs of print-disabled people, we require more time to investigate the nature of the

issues raised in these submissions to ensure that any amendments the Ministry might recommend for the Copyright Act adequately and fairly addresses both the rights of copyright owners and the needs of print-disabled people.

- 81 The Ministry will be undertaking further work on this issue, in consultation with the Royal New Zealand Foundation of the Blind, the Association of Blind Citizens of New Zealand and copyright owner groups, with the intention of reporting back Ministers on options by September 2007. The Ministry notes that any legislative amendments could potentially be included in legislation being contemplated to implement the outcome of the Ministry's review of the commissioning rule.

*Section 48 (E-Cast and the Screenrights Licensing Scheme)*

- 82 E-Cast is a New Zealand private company that has developed a service to deliver video and related material over the Internet. One of their services is a digital audio-visual recording and distribution service to New Zealand educational establishments. This service was designed to operate under the Screenrights licensing scheme in accordance with section 48 of the Copyright Act.
- 83 Of particular concern to e-Cast is the impact of the draft Bill on a part of their service known as "ready-to-watch". The object of this service appears to be to provide copies of off-air recordings of national and international broadcast television programmes to educational establishments.
- 84 Section 48(1) of the Copyright Act currently provides that a recording of a broadcast or cable programme may be made by or on behalf of an educational establishment without infringing copyright. This exception does not apply if or to the extent that licenses authorising the recording of a programme by or on behalf of an educational establishment are available under a licensing scheme. The Amendment Bill amends section 48 to refer to a recording of a communication work or the communication of such a recording, but does not alter the other provisions.
- 85 The issue for e-Cast is the interpretation of the words "by or on behalf of an educational establishment" in section 48. E-Cast is not an educational establishment, so cannot avail itself of the exception in s48 in its own right. There is doubt as to whether the "ready-to-watch" service by e-Cast can be considered to be making recordings "on behalf of an educational establishment". In light of this, Screenrights is reluctant to grant a licence to E-cast on the basis that such a license could be illegal, exposing Screenrights to the threat of legal action from the owners of the copyright in any programmes recorded under the licence.
- 86 The Ministry considers that the problem could be resolved by an amendment to the definition of "educational establishment" in the Act to include organisations whose principal functions include the provision of educational materials to educational establishments, similar to the definition of in the Australian Copyright Act. While the Ministry has done some initial consultation with Screenrights on this issue, it is unlikely to be resolved within time allotted for the Committee to report back on the Bill. The implementation and drafting of a suitable provision will require some consultation with stakeholders to ensure an appropriate scope

of the provision. As with the issues raised by The Royal New Zealand Foundation of the Blind and the Association of Blind Citizens of New Zealand Inc, the Ministry is therefore proposing to do some further work on this issue and report back to Ministers in September 2007.