

New Digital Copyright Legislation: Major Changes for Film, music and software providers, Users and ISPs

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In December 2006, Government introduced a new Bill to deal with changes necessary to handle the digital world.

The movie, music and software industries are getting more runs on the board, as we noted in our August online article, *Music, Movie and Software Providers Convert Arch-Nemesis Internet Piracy Channels into Great New Channels to Market*. (www.wigleylaw.com).

Now there's change in the legislation as well, as NZ moves its copyright law forward. The *Copyright (New Technology and Performers' Rights) Amendment Bill* is designed to:

- reflect the realities of the digital age;
- retain the existing balance of protecting copyright owners while permitting appropriate access.

Where that balance lies is controversial. Some commentators are suggesting the line is badly drawn: others say it works well.

There's until 16 February to suggest changes to the Select Committee, unless that time line is extended.

While this Bill provides advantages for users (eg: it legitimises format shifting (transferring music from CDs to iPods)), the Bill also helps content providers and provides protection for ISPs.

There will, we expect, be public focus on some issues that don't matter so much in practice. For example, format shifting is nowhere near as significant as other issues.

In this article we briefly summarise some of the key changes (there are a number of other points in the Bill that are relevant to particular stakeholders (eg; recording by media monitors; the software industry; and use of material for educational purposes)):

Wider Protection for Movies and Other Digital Content

The existing Act provides protection for transmitted works. But that protection is outmoded by digital developments. Now we have wider protection where, for example, a movie is made available online. The commentary to the Bill notes, "*Control over communication is necessary to encourage investment in, and provision of, the efficient online distribution methods demanded by consumers*". The Bill creates a technology-neutral right of communication to the public along with copyright protection of that content.

Like all law in this area, legislation doesn't provide full protection in practice, but it goes some way to help.

There's a specific change that will benefit free-to-air television broadcasters: the aim is that a cable programme service can't retransmit their broadcasts without permission.

Technology Protection

There are also provisions which are aimed at stopping people from overcoming and

cracking technological protection mechanisms such as software embedded in DVDs to foil copyright infringement. It's a judgment call as to how far these provisions should reach. Some say the approach here goes too far: others say it is not far enough.

Time Shifting

Recording a work, such as a movie, for later viewing is legitimised. But as the example given in the Bill shows, that doesn't extend to recording for multiple subsequent use (eg: downloading online music for repetitive listening).

Format Shifting

The Bill will allow a legitimate owner of a **sound** recording (this will include CDs but exclude DVDs for example) to make a copy, such as on an iPod or an MP3 player. Use is limited to that person's own private and domestic use.

However the provider that sells the CD (or similar item) can contractually specify that this may not happen. If a music label chose to take this path, it would be difficult although not insurmountable. The solution would probably raise the same sort of issues that arise in relation to "*shrink wrap*" licences of software (for which, in New Zealand at least, there is legal uncertainty). While the recording labels, etc may be concerned that allowing format shifting is the "*thin end of the wedge*" in dealing with rampant piracy, the reality is that format shifting (of legitimately owned recordings) is widespread anyway.

Transient Copying

What's often not appreciated is that it's not only the pirate that is liable for breach of copyright. Others that participate in some way (eg; a company unknowingly carrying pirated material on its servers) can be in breach as well. Typically, liability is lower, but liability does exist.

Some protection is given by the proposed Act. An organisation which receives the breached material briefly (on a transient basis) has some defences available. The Bill aims to minimise copyright breach in those circumstances.

That doesn't get an employer off the hook, necessarily, where its employee keeps

infringing material on the employer's servers (unless somehow the employer squeezes into the "ISP" definition (see the next paragraph)).

ISPs

In addition there are specific protections for ISPs around transient copying. There are further protections where the ISP records or caches pirated material without its knowledge, so long as:

- it deletes infringing material and prevents access to it, as soon as the ISP becomes aware of the breach (and gives notice to the user); and
- the ISP has a policy that allows early termination of customers that are repeat copyright infringers (we deal with this below).

In many situations, the only party a content provider could sue would be the ISP. For this and other reasons, rights to seek an injunction against the ISP are preserved.

Of course, many ISPs do more than what "*pure*" ISPs do (which is enabling transmission of content). ISPs will still need to think about whether some of their activities are outside this protection.

Particularly important for the ISP is that, to get this protection, it must have "*adopted and reasonably implemented a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers*".¹ Assuming the Bill is enacted in its present form, this means that ISPs will need to be looking at introducing a new policy and possibly amending their terms and conditions with their customers. This would be best practice anyway, so ISPs should address this as soon as possible.

In summary, there are some major changes to our copyright legislation, in parallel with other changes overseas, with some gains and losses for copyright owners and users alike.

¹ Clause 53 of the Bill.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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