Copyright (New Technologies and Performers' Rights) Amendment Bill

Government Bill

As reported from the Commerce Committee

Commentary

Recommendation

The Commerce Committee has examined the Copyright (New Technologies and Performers' Rights) Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

This bill amends the Copyright Act 1994 to address the emergence of technologies such as the Internet. It seeks to maintain the existing balance between the interests of the owners and those of the users of copyright works. It also seeks to create a more technology-neutral framework for the Copyright Act.

This bill takes account of international developments in copyright law, and incorporates many aspects of the two treaties negotiated by the members of the World Intellectual Property Organisation (WIPO)—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

The Ministry of Economic Development advised us that this legislation will be reviewed in five years' time to ensure that copyright legislation in New Zealand keeps pace with technological advances.

This commentary addresses the key issues considered, and explains the substantive amendments recommended. Technical and minor amendments are not discussed.

Title

We recommend that the title be changed from "Copyright (New Technologies and Performers' Rights) Amendment Act" to "Copyright (New Technologies) Amendment Act". Although the bill does amend some provisions concerning performers' rights, all these amendments relate only to making these provisions technologically neutral.

Copying for educational purposes

We recommend amending new section 44(4A) (clause 24) to make it clear that the section, which describes one of the conditions under which copying for educational purposes would be allowed, applies to copies communicated electronically.

Storing for educational purposes

We recommend several amendments to new section 44A (clause 25), which sets out the conditions under which an educational establishment would be allowed to store pages from websites.

We recommend amending new section 44A(1)(b)(ii) to make the requirement to identify the author dependent on the author's identity being known. As authors of works available on the Internet are often unidentifiable, we consider that it would be unrealistic to require educational establishments to identify authors in every case.

We recommend that new section 44A(1)(b)(iv) be deleted. This section provides that an educational establishment storing pages from websites must identify the course of instruction for which the material is stored. We consider this requirement impractical, as the same website page could be used in many courses. This requirement could also reduce the flexibility of assembling teaching components and thus stifle innovation in the use of the Internet for teaching.

We also recommend that new section 44A(1)(d) be deleted. This section requires that the material concerned cannot be made available to authenticated users until it has been removed from the original website or other electronic retrieval system. This proposal is impractical because a website page cannot be physically copied after it has been removed from the site, and this section would require an educational establishment to continuously monitor the website pages concerned.

Copying by librarians and archivists for replacement

In the bill as introduced, a librarian of a prescribed library or an archivist may make a digital copy of any item in the library or archive's collection to replace the original item, provided that the conditions stated in paragraphs (a) to (d) of new section 55(3) are satisfied (inserted by clause 34(2)).

The condition in new section 55(3)(c) is that the original item is not accessible by members of the public after replacement by the digital copy. However, some researchers may want to compare the original item with the digital copy to examine features such as the paper quality, watermarks, and foliation symbols, which cannot be distinguished in a digital copy. We therefore recommend that new section 55(3)(c) be amended to add an exception for access for research purposes where the nature of the research requires or would benefit from access to the original item.

We recommend that new section 55(4) be inserted into clause 34(2) to make this clause consistent with section 55(1)(b) of the Act. This amendment would allow a digital copy to be made to replace an item in a prescribed library or archive under limited circumstances.

Conditions for libraries and archives making and supplying digital copies

New section 56A (clause 36) sets out some of the conditions under which a prescribed library or archive would be permitted to communicate digital copies of copyrighted works to authenticated users. Some submitters were concerned that this section would harm the interests of copyright owners, who they believe would consequently have fewer market opportunities to supply digital copies of their works. However, we are not satisfied with evidence offered in support of this claim. Noting that libraries and archives are already allowed to supply digital works to their users under existing laws, we consider that the new section 56A should be retained, subject to the following amendments.

We consider that all the conditions in new section 56A should apply whether access to the digital copies in question is provided by means of terminals on-site or off-site, as we consider that it is impossible, in practical terms, to differentiate between on-site and off-site access. We also recommend defining "authenticated user" in this section in a more restrictive way.

We recommend that new sections 56B(a) and 56C(a) (clause 36) be deleted. These provide that a person or a library must make a written request for a digital copy of a work, and must state the purpose for which the material will be used. We consider that this condition is unnecessary in the light of the current practice of copying such requests, thus identifying the requester and the work. Also, sections 51 to 54 and 56 of the principal Act allow libraries and archives to supply a copy of work only for the purposes of research or private study.

We recommend that new sections 56B(b) and 56C(b), which require a written declaration that certain provisions of the principal Act have been complied with, also be deleted to reduce compliance costs for libraries and archives.

We recommend deleting new section 56B(c) as we consider that nothing under the principal Act would permit a library or archive to supply copies of works requested to anyone other than the person who made the request, making this provision redundant.

Observing, studying, or testing of computer program

We recommend inserting new section 80BA (clause 43) to clarify that a lawful user of a computer program may observe, study, or test the functioning of the program under certain circumstances without infringing copyright.

Communications works

The bill makes a number of amendments to the provisions regarding transmitted works such as broadcast and cable television programmes.

Format-shifting for personal use

New section 81A (clause 44) provides a limited exception for copying sound recordings for personal use. In other words, "format-shifting" of music would be allowed if certain conditions were met.

Some submitters asserted that a person who purchases a copy of a sound recording on CD, for example, should be allowed to copy it to another format without restrictions. However, we are of the view that such a person does not acquire copyright in the sound recordings concerned; the copyright owner retains the exclusive right to control copying of his or her works under section 16 of the principal Act. We therefore recommend retaining the restrictions on copying

sound recording for personal use, which are set out in sections 81A(1) in clause 44, subject to some recommended amendments.

We recommend amending new section 81A(1)(e) to clarify that the copy must be solely for the personal use of the person who made it or of a member of his or her household if the format-shifting exception is to apply.

We recommend amending new section 81A(1)(g) so that a person who has purchased a copy of a copyrighted sound recording must retain possession of both the original copy and any copy made under this clause. A member of the public would therefore not be able to retain the copy if they sold the original CD.

We recommend that new section 81A(2) be amended to make it clearer that copyright owners always have the option of contracting out of all of the permitted acts, including those in new section 81A.

We recommend that new section 81A(3) be deleted. This subsection provides that new section 81A expires two years after enactment unless the Governor-General extends the expiry date by Order in Council. In our opinion, this subsection would create uncertainty as to whether purchasers of sound recordings recorded on older technology would be allowed to continue format-shifting those recordings for private and domestic use in the future.

Some submitters were concerned that new section 81A is limited to sound recordings only. We do not believe that an extension of the provision to other works such as films would be justified under the Berne Convention for the Protection of Literary and Artistic Works, of which New Zealand is a member. Furthermore, we consider that format-shifting of music for private and domestic use is widespread, while format-shifting of other types of copyrighted works is not. We therefore do not recommend extending the exception in new section 81A.

Time shifting

New section 84, inserted by clause 45, provides an exception for recording for the purpose of viewing or listening at a more convenient time. In other words, this section allows time shifting of communication work under certain conditions.

We recommend amending new section 84(1)(a) to make it clear that the recording must be solely for the personal use of the person who made it or of a member of his or her household if the time-shifting exception is to apply.

We also recommend rewording section 84(1)(c) to clarify that a time-shifted recording must not be made from an on-demand service.

Free public playing or showing of communication work that is simultaneous with reception

We recommend amending new section 87A(1)(b) (clause 48) and new section 188A(1)(b) (clause 84) to clarify that new sections 87A and 188A apply to free-to-air broadcasts, but not to subscribed broadcasts such as cable programmes. New sections 87A and 188A provide for an exception for the situation where a communication work for which no subscription fee is charged is shown or played simultaneously with its reception.

Reception and retransmission of broadcast in cable programme service

The majority of us are concerned about the effect of clause 49, which repeals section 88 of the principal Act, on the delivery of broadcasts to remote areas. We therefore recommend that clause 49 be amended to retain section 88 of the principal Act.

As section 88 contains a number of technologically specific terms that will not be used elsewhere in the principal Act after its amendment, we recommend the insertion of new subsection (4) to preserve the definitions of these terms for the purposes of section 88 only.

Internet service provider obligations

We recommend amending the definition of "Internet service provider" in clause 3(2) to ensure that a person who hosts material on websites or other electronic retrieval systems that can be accessed by a user falls within the definition.

Requirement for a policy to terminate accounts of repeat copyright infringers

We recommend that new section 92A (clause 53) be deleted as the standard terms and conditions of agreements between an Internet service provider and its customers usually allow for the termination of accounts of people using the services for illegal activity. Moreover, new section 92C already requires an Internet service provider to delete infringing material or prevent access to it as soon as possible after becoming aware of it.

Liability if user infringes copyright

We consider that the wording of new section 92B (clause 53) is unsatisfactory because it could expose Internet service providers to liability for copyright infringement where a person had infringed the copyright concerned before using the services of the Internet service provider to send or distribute the infringing content. We recommend that new section 92B be amended to clarify that this section would apply only if a person infringed copyright in a work by using Internet services of the Internet service provider. We also recommend the addition of a definition of "Internet services" in this section.

Liability for storing infringing material

In clause 53, we recommend amending new section 92C(2)(a) and inserting new section 92C(2)(ba) to make it clearer when Internet service providers would be required to take material down.

We also recommend amending new section 92C(2)(b) to provide that an Internet service provider would become liable for copyright infringement by storing infringing material if a user of the service committed an act of copyright infringement on behalf of, or at the direction of, the Internet service provider. We were concerned that the bill as introduced was unclear whether students of educational institutions or employees of companies would be considered to be acting under the authority and control of an Internet service provider if those educational institutions or the companies provided them with email services. We believe that our recommended amendment will remove this uncertainty.

We recommend clarifying new section 92C(4) and new section 92D(3) by providing that nothing in new section 92C or 92D limits the right of the copyright owner to seek injunctive relief in relation to either a user's infringement or any infringement by the Internet service provider.

We recommend inserting new section 92CA (clause 53) to prescribe the requirements for the notice of infringement that is referred to in new section 92C(2)(ba)(i). We also recommend inserting new section 92CB to set out offences in relation to notices of infringement. The maximum penalty for such offences would be a fine of $50,000 for an individual, and a fine of $100,000 for a body corporate.

Unjustified proceedings

We recommend inserting clause 64A to amend section 130(1) so that a person can bring proceedings against a person who has brought unjustified proceedings for contravention of new section 226A, which sets out prohibited conduct in relation to technological protection measures.

Use of recording without the consent of the performer

We recommend amending new section 172 (clause 77) to provide that a person would infringe a performer's rights if he or she showed or played in public, or communicated to the public, a recording that he or she knew or had reason to believe was made without the consent of the performer. We consider that the original wording of section 172 could unintentionally erode the performer's right to control unauthorised use of his or her performances, and would therefore fail to maintain the existing balance between the performer's interests and users' interests. Our recommended amendment would address this concern.

Technological protection measures

We recommend retaining all the proposed provisions (new sections 226 to 226J) in clause 89, which relate to technological protection measures (TPM), subject to our proposed amendments. We consider that these provisions are necessary to manage the risk of piracy of copyrighted works in a digital environment, and that they strike the correct balance between the interests of copyright owners and those of copyright users.

We recommend that the definition of technological protection measures in new section 226 be amended to specifically exclude controls on access to a work for non-infringing purposes, such as geographic market segmentation. We consider that the principal Act is not intended to protect access-control technologies that are used to price-discriminate or control the geographical distribution of works to the detriment of users in New Zealand. The principal Act and this bill protect only technological measures that prevent copyright infringements. For example, regional zone access protections, which prevent users from playing DVDs purchased from other zones, are not linked to copyright infringement and therefore should not fall within the definition of a TPM under new section 226.

We recommend deleting references to "TPM spoiler", and substituting the term "TPM circumvention device" for "TPM spoiling device", so that the language in the bill is consistent with that used by the courts.

We recommend that new section 226E (clause 89) be amended to allow a user to seek assistance from a qualified person to exercise a permitted act using a TPM circumvention device without prior application to the copyright owner. We also recommend inserting new section 226E(4) to ensure that such persons cannot charge unreasonably high fees for such assistance. We recommend the addition of a new regulation-making power in new section 226D(3)(d) that allows the Governor-General to specify persons as qualified persons by Order in Council.

Some submitters are concerned that the act of circumventing a TPM is not itself prohibited by the bill. However, we consider that there are many circumstances where users of copyright works may want to circumvent a TPM for legitimate purposes, such as fair dealing with a work for the purposes of research and private study. Also, this bill provides an effective way of controlling the circumvention of TPMs by prohibiting dealings with circumvention devices and the provision of circumvention services. Furthermore, where the act of circumvention occurred in the course of business, the person committing the act would often be in breach of the principal Act, for example, by possessing or dealing with a copy that infringes copyright.

Issues not leading to amendments

We believe that several issues discussed during the hearing of evidence and consideration are noteworthy, although they did not result in any recommended amendment to the bill.

Decompilation of computer program

Some submitters are concerned about the effect of new section 80A(3)(d) (clause 43), which provides that it would be illegal for a user of a copy of a copyrighted computer program to use the information obtained from decompiling the program to create a substantially similar program.

We consider that new section 80A(3)(d) would not prohibit decompiling a copy of a copyrighted computer program for the purpose of developing other products that would be easily distinguishable from

the original program and therefore would not act as a barrier to innovation.

To ensure that new section 80A(3)(d) is not used to restrict competition in the software market, we do however urge the Ministry of Economic Development to monitor closely the effect of this new section after the enactment of this legislation.

"Notice and takedown" provision

We note concerns raised by submitters, but consider that the "notice and takedown" provision proposed in new section 92C (clause 53) is consistent with the comparable legislation in other jurisdictions such as the United States of America, the European Union, and Australia. An Internet service provider is in a unique position to be able to take down infringing and potentially harmful material, and should have an obligation to do so when it becomes aware of the material.

Issues requiring further review

We have identified several significant policy issues that are outside the scope of this bill or cannot be resolved within the scheduled time frame for the passing of this legislation. We urge the Associate Minister of Commerce to review these issues without delay.

Off-air recordings of television programmes to educational establishments

The Ministry of Economic Development is reviewing the effect of new section 48 (clause 28) to establish whether it would apply to off-air recordings of broadcast television programmes provided to an educational establishment by an external agent. We were not able to resolve this issue in the time available. The ministry will report to the Associate Minister of Commerce in September 2007.

Directors' rights

A submitter asserted that film directors should be defined as "authors"under the principal Act and thus as the copyright owners of films. This is an issue which requires attention. However, it cannot be considered as part of this reform. One of the reasons for this is that other interest groups that may want to make submissions have not had an opportunity to do so. The Ministry of Economic Development has advised us that it will commence work on this issue in early 2008.

Orphaned works

Some submitters suggested that the principal Act should provide a process that enables the legitimate copying of "orphaned works"—copyright works whose copyright owner is unknown, cannot be located, or has ceased to exist.

The Ministry of Economic Development gave us an undertaking that it would conduct a review of this issue and report to the Associate Minister of Commerce in 2007.

Access to works for print-disabled persons

Some submitters sought amendment to section 69 of the principal Act, which prescribes the conditions under which organisations may make adaptations of works for print-disabled people without infringing copyright. They highlighted the issue of the distribution of adapted works to print-disabled persons, by sending copies of adapted works to and receiving copies from overseas organisations serving print-disabled persons.

The Ministry of Economic Development advised us that it will consult the Royal New Zealand Foundation of the Blind, the Association of Blind Citizens of New Zealand, and copyright owner groups on this issue. The ministry intends to report to the Associate Minister of Commerce by September 2007 on the options for addressing the issue.

Appendix

Committee process

The Copyright (New Technologies and Performers' Rights) Amendment Bill was referred to the committee on 12 December 2006. The closing date for submissions was 9 March 2007. We received and considered 66 submissions from interested groups and individuals. We heard 45 submissions, which included holding hearings in Auckland.

We received advice from the Ministry of Economic Development, and independent specialist advisory services were provided to us by Earl Gray and Geoff McLay.

Committee membership

Gerry Brownlee (Chairperson)

Charles Chauvel (until 21 February 2007)

Gordon Copeland (Deputy Chairperson)

Dave Hereora (from 21 February 2007)

Shane Jones

Hon Luamanuvao Winnie Laban

Simon Power

Maryan Street

Lindsay Tisch

Dr Richard Worth

Nandor Tanczos was a non-voting member for the consideration of this item of business.

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (unanimous) Subject to this Act,	Text struck out unanimously
New (majority) Subject to this Act,	Text inserted by a majority
New (unanimous) Subject to this Act,	Text inserted unanimously
⟨*Subject to this Act,*⟩	Words struck out by a majority
(*Subject to this Act,*)	Words struck out unanimously
Subject to this Act,	Words inserted unanimously

Hon Judith Tizard

Copyright (New Technologies (*and Performers' Rights*)) Amendment Bill

Government Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Copyright (New Technologies (*and Performers' Rights*)) Amendment Act **2006**.

2 Commencement

(1) This Act comes into force on a date to be appointed by the Governor-General by Order in Council.

(2) One or more Orders in Council may be made appointing different dates for the commencement of different provisions.

2A Principal Act amended

This Act amends the Copyright Act 1994.

Part 1
Amendments to Parts 1 to 5 of Copyright Act 1994

3 Interpretation

(1) Section 2(1) is amended by repealing the definition of **broadcast**.

(2) Section 2(1) is amended by inserting the following definitions in their appropriate alphabetical order:

"**CMI** or **copyright management information** has the meaning given to it in **section 226F**

"**communicate** means to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system, and **communication** has a corresponding meaning

"**communication work** means 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

Struck out (unanimous)

"**Internet service provider** means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing

New (unanimous)

"**Internet service provider** means a person who does either or both of the following things:

"(a) offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing:

"(b) hosts material on websites or other electronic retrieval systems that can be accessed by a user

"**TPM** or **technological protection measure** has the meaning given to it in **section 226**

"**TPM work** has the meaning given to it in **section 226**

Struck out (unanimous)

"**TPM spoiler** has the meaning given to it in **section 226**

"**TPM (*spoiling*) circumvention device** has the meaning given to it in **section 226**."

(3) Section 2(1) is amended by repealing paragraphs (a) and (b) of the definition of **copying** and substituting the following paragraph:

"(a) means, in relation to any description of work, reproducing, recording, or storing the work in any material form

(including any digital format), in any medium and by any means; and".

(4) Section 2(1) is amended by repealing paragraph (d) of the definition of **copying** and substituting the following paragraph:

"(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—".

(5) Section 2(1) is amended by repealing paragraphs (c) to (e) of the definition of **material time** and substituting the following paragraphs:

"(c) in relation to a communication work, means when the work is made or received in New Zealand; and

"(d) in relation to a typographical arrangement of a published edition, means when the edition is first published".

(6) Section 2(1) is amended by omitting "broadcast, or cable programme" from paragraph (b) of the definition of **performance** and substituting "or communication work".

4 New section 3 substituted

Section 3 is repealed and the following section substituted:

"**3 Associated definitions for purposes of communicating**

"(1) References in this Act to a person communicating a work or making a communication work are—

"(a) to the person transmitting the work or making it available by means of a communication technology, if that person has responsibility to any extent for its contents; and

"(b) any person who makes with the person communicating the work the arrangements necessary for its communication.

"(2) For the purposes of this Act, in the case of communicating a work by satellite transmission,—

"(a) the place from which the work is communicated is the place from which the signals carrying the work are transmitted to the satellite: and

"(b) the person communicating the work is the person who transmits those signals to the satellite."

5 Section 4 repealed

Section 4 is repealed.

6 Meaning of author

Section 5(2) is amended by repealing paragraphs (c) to (e) and substituting the following paragraphs:

"(c) in the case of a communication work, the person who makes the communication work:

"(d) in the case of a typographical arrangement of a published edition, the publisher."

7 Meaning of work of joint authorship

Section 6 is amended by repealing subsection (2) and substituting the following subsection:

"(2) A communication work must be treated as a work of joint authorship in any case where more than 1 person is to be taken as making the communication work."

8 Meaning of publication

(1) Section 10(4)(a)(ii) is amended by omitting "the broadcasting of the work or its inclusion in a cable programme service" and substituting "the communication of the work to the public".

(2) Section 10(4)(b)(iii) is amended by omitting "the broadcasting of the work or its inclusion in a cable programme service" and substituting "the communication of the work to the public".

(3) Section 10(4)(d) is amended by repealing subparagraph (ii) and substituting the following paragraph:

"(ii) the communication of the work to the public."

9 Meaning of infringing copy

Section 12(5) is amended by repealing paragraph (a) and substituting the following paragraph:

"(a) section 85(4) (which relates to incidental recording for the purposes of a communication work):".

10 Copyright in original works

(1) Section 14 is amended by repealing subsection (1) and substituting the following subsection:

"(1) Copyright is a property right that exists, in accordance with this Act, in original works of the following descriptions:

"(a) literary, dramatic, musical, or artistic works:

"(b) sound recordings:

"(c) films:

"(d) communication works:

"(e) typographical arrangements of published editions."

(2) Section 14 is amended by repealing subsection (3).

11 Acts restricted by copyright

Section 16(1) is amended by repealing paragraph (f) and substituting the following paragraph:

"(f) to communicate the work to the public:".

12 New section 20 substituted

Section 20 is repealed and the following section substituted:

"**20 Qualification by reference to origin of communication work**

A communication work qualifies for copyright if it is made from—

"(a) a place in New Zealand; or

"(b) a place in a prescribed foreign country."

13 Duration of copyright in literary, dramatic, musical, or artistic works

Section 22 is amended by repealing subsection (4) and substituting the following subsection:

"(4) For the purposes of subsection (3), the circumstances in which a work may be made available to the public include,—

"(a) in the case of a literary, dramatic, or musical work,—

"(i) performance in public:

"(ii) communication to the public:

"(b) in the case of an artistic work,—

"(i) exhibition in public:

"(ii) the playing or showing in public of a film that includes the work:

"(iii) communication to the public."

14 Duration of copyright in sound recordings and films

Section 23 is amended by repealing subsection (2) and substituting the following subsection:

"(2) For the purposes of subsection (1), a sound recording or film is made available to the public when—

"(a) the work is first—

"(i) published; or

"(ii) communicated to the public; or

"(b) in the case of a film or film sound track,—

"(i) the work is first shown in public; or

"(ii) the work is first played in public."

15 New section 24 substituted

Section 24 is repealed and the following section substituted:

"**24 Duration of copyright in communication works**

"(1) Copyright in a communication work expires at the end of the period of 50 years from the end of the calendar year in which the communication work is first communicated to the public.

"(2) Copyright in a repeated communication work expires at the same time as copyright in the initial communication work expires.

"(3) There is no copyright in a repeated communication work that is communicated to the public after copyright in the initial communication work has expired."

16 Infringement by performance or playing or showing in public

Section 32(2) is amended by omitting "broadcast, or cable programme" and substituting "or communication work".

17 New section 33 substituted

Section 33 is repealed and the following section substituted:

"**33 Infringement by communicating to public**

Communicating a work to the public is a restricted act in relation to every description of copyright work."

18 Infringement by importation

(1) Section 35(1)(c) is amended by omitting "or" and substituting "and".

(2) Section 35(5) is amended by omitting "this Act" and substituting "the Copyright (Parallel Importation of Films and Onus of Proof) Amendment Act 2003".

19 Providing means for making infringing copies

Section 37 is amended by repealing subsection (2) and substituting the following subsection:

"(2) Copyright in a work is infringed by a person who, other than under a copyright licence, communicates a work to 1 or more persons, knowing or having reason to believe that infringing copies will be made by means of the reception of the communication in New Zealand or elsewhere."

20 New section 41 substituted

Section 41 is repealed and the following section substituted:

"**41 Incidental copying of copyright work**

"(1) Copyright in a work is not infringed by—

"(a) the incidental copying of the work in an artistic work, a sound recording, a film, or a communication work; or

"(b) the issue to the public of copies of an artistic work, the playing of a sound recording, the showing of a film, or the communication of a work to the public, in which a copyright work has been incidentally copied; or

"(c) the issue to the public of copies of a sound recording, film, or communication work to which **paragraph (a)** or **paragraph (b)** applies.

"(2) For the purposes of **subsection (1)**, a musical work, words spoken or sung with music, or so much of a sound recording or communication work as includes a musical work or those words, must not be regarded as incidentally copied in another work if the musical work or the words, sound recording, or communication work is deliberately copied."

21 Criticism, review, and news reporting

Section 42 is amended by repealing subsection (2) and substituting the following subsection:

"(2) Fair dealing with a work for the purpose of reporting current events by means of a sound recording, film, or communication work does not infringe copyright in the work."

22 Research or private study

Section 43 is amended by repealing subsection (4) and substituting the following subsection:

"(4) This section does not authorise the making of more than 1 copy of the same work, or the same part of a work, on any 1 occasion, but in this subsection **copy** does not include a non-infringing transient reproduction to which **section 43A** applies."

23 New section 43A inserted

The following section is inserted after section 43:

"**43A Transient reproduction of work**

A reproduction of a work does not infringe copyright in the work if the reproduction—

"(a) is transient or incidental; and

"(b) is (*a necessary*) an integral and essential part of a technological process for—

"(i) making or receiving a communication that does not infringe copyright; or

"(ii) enabling the lawful use of, or lawful dealing in, the work; and

"(c) has no independent economic significance."

24 Copying for educational purposes of literary, dramatic, musical, or artistic works or typographical arrangements

Section 44 is amended by inserting the following (*subsections*) subsection after subsection (4):

Struck out (unanimous)

"(4A) A digital copy of a work made in accordance with subsections (3) and (4) may be supplied to an authenticated user.

"(4B) In **subsection (4A)**, **authenticated user** 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.

New (unanimous)

"(4A) A copy of a work made in accordance with subsections (3) and (4) may be communicated to 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."

25 New section 44A inserted

The following section is inserted after section 44:

"44A Storing copies for educational purposes

"(1) An educational establishment does not infringe copyright in a work that is made available on a website or other electronic retrieval system by storing a copy of the page or pages in which the work appears if—

"(a) the material is stored for an educational purpose; and

"(b) the material—

"(i) is displayed under a separate frame or identifier; and

"(ii) identifies the author (if known) and source of the work; and

"(iii) states the name of the educational establishment and the date on which the work was stored; and

Struck out (unanimous)

"(iv) identifies the course of instruction for which the material is stored; and

"(c) the material is restricted to use by authenticated users.

Struck out (unanimous)

"(d) the material is not available for use by authenticated users until it has been removed from the website or other electronic retrieval system on which it has been made available.

"(2) **Subsection (1)** does not apply, and the educational establishment does infringe copyright in the work, if the educational establishment knowingly fails to delete the stored material

within a reasonable time after the material becomes no longer relevant to the course of instruction for which it was stored.

"(3) In **subsection (1)**, **authenticated user** means a person who—

"(a) is a participant in the course of instruction for which the material is stored; and

"(b) can access the stored material only through a verification process that verifies that he or she is entitled to access the stored material."

26 Copying for educational purposes of films and sound recordings

Section 45 is amended by repealing subsection (1) and substituting the following subsection:

"(1) Copyright in any work that is a film, sound recording, or communication work, or any work included in a film, sound recording, or communication work, is not infringed by the copying of that work in the circumstances set out in subsection (2)."

27 Performing, playing, or showing work in course of activities of educational establishment

Section 47 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The playing or showing, for the purposes of instruction, of a sound recording, film, or communication work to the audience described in subsection (1) at an educational establishment is not a playing or showing of the work in public for the purposes of section 32(2)."

28 New section 48 substituted

Section 48 is repealed and the following section substituted:

"**48 Educational establishment may (*record*) copy and communicate communication work**

"(1) A (*recording*) copy of a communication work(, *or a copy of that recording,*) may be made or communicated by or on behalf of an educational establishment, and subsequently communicated within that educational establishment, without infringing copyright in the communication work or in any work included in it, if the (*recording*) copy is made or communicated for the establishment's educational purposes.

"(2) However, **subsection (1)** does not apply to—

"(a) (*the making of a recording or*) the copying of a communication work if or to the extent that—

"(i) licences authorising the (*recording*) copying of the communication work by or on behalf of educational establishments are available under a licensing scheme; and

"(ii) the establishment knew that fact; or

"(b) the communication of a (*recording*) copy of a communication work (*or a copy of a recording*) if or to the extent that—

"(i) licences authorising the communication of the (*recording or a copy of that recording*) copy by or on behalf of educational establishments are available under a licensing scheme; and

"(ii) the establishment knew that fact."

29 Interpretation

Section 50(1) and (2) are amended by omitting "sections 51 to 56 of this Act" and substituting in each case "sections 51 to **56C**".

30 Copying by librarians of parts of published works

Section 51 is amended by adding the following subsection:

"(5) In this section, **copy** includes a digital copy, but in that case **section 56B** applies as well."

31 Copying by librarians of articles in periodicals

Section 52 is amended by adding the following subsection:

"(4) In this section, **copy** includes a digital copy, but in that case **section 56B** applies as well."

32 Copying by librarians for users of other libraries

Section 53 is amended by adding the following subsection:

"(5) In this section, **copy** includes a digital copy, but in that case **section 56C** applies as well."

33 Copying by librarians for collections of other libraries

Section 54 is amended by adding the following subsection:

"(5) In this section, **copy** includes a digital copy, but in that case **section 56C** applies as well."

34 Copying by librarians or archivists to replace copies of works

(1) Section 55(1) is amended by inserting "(other than a digital copy)" after "copy" in the first place where it appears.

(2) Section 55 is amended by adding the following subsections:

"(3) The librarian of a prescribed library or the archivist of an archive may make a digital copy of any item (the **original item**) in the collection of the library or archive without infringing copyright in any work included in the item if—

"(a) the original item is at risk of loss, damage, or destruction; and

"(b) the digital copy replaces the original item; and

"(c) the original item is not accessible by members of the public after replacement by the digital copy except for purposes of research the nature of which requires or may benefit from access to the original item; and

"(d) it is not reasonably practicable to purchase a copy of the original item.

New (unanimous)

"(4) The librarian of a prescribed library or the archivist of an archive may make a digital copy of any item (the **original item**) in the collection of the library or archive without infringing copyright in any work included in the item if—

"(a) the digital copy is used to replace an item in the collection of another prescribed library or archive that has been lost, damaged, or destroyed; and

"(b) it is not reasonably practicable to purchase a copy of the original item."

35 Copying by librarians or archivists of certain unpublished works

Section 56 is amended by adding the following subsection:

"(6) In this section, **copy** includes a digital copy, but in that case **section 56B** applies as well."

36 New sections 56A to 56C inserted

The following sections are inserted after section 56:

Struck out (unanimous)

"**56A Library or archive may allow access to work in digital format**

"(1) The librarian of a prescribed library or the archivist of an archive that lawfully obtains a work in digital format may allow users access to that copy by means of—

"(a) terminals on site (**on-site access**); or

"(b) terminals off site (**remote access**).

"(2) On-site access is subject to the following restrictions:

"(a) the librarian or archivist must ensure that all users are informed in writing about the limits of copying or communication that is allowed by this Act:

"(b) the work in digital format may be copied or communicated by a user only in accordance with the provisions of this Act.

"(3) Remote access is subject to the following restrictions:

"(a) the work in digital format must be in a form that cannot be altered or erased:

"(b) the work in digital format may be accessed only by a person who has a legitimate right to use the library or archive (in this subsection called an **authenticated user**).

"(4) In the case of both on-site access and remote access, 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—

"(a) the library or archive has purchased; or

"(b) for which it is licensed.

New (unanimous)

"56A Library or archive may communicate digital copy to authenticated users

"(1) The librarian of a prescribed library or the archivist of an archive does not infringe copyright in a work by communicating a digital copy of the work to an authenticated user if the following conditions are met:

"(a) the librarian or archivist has obtained the digital copy lawfully; and

"(b) the librarian or archivist ensures that each user is informed in writing about the limits of copying and communication allowed by this Act, including that a digital copy of a work may only be copied or communicated by the user in accordance with the provisions of this Act; and

"(c) the digital copy is communicated to the user in a form that cannot be altered or modified; and

"(d) the number of users who access the digital copy at any one time is not more than the aggregate number of digital copies of the work that—

"(i) the library or the archive has purchased; and

"(ii) for which it is licensed.

"(2) In **subsection (1)**, **authenticated user** means a person who—

"(a) has a legitimate right to use the services of the library or archive; and

"(b) can access the digital copy only through a verification process that verifies that the person is entitled to access the digital copy.

"56B Additional conditions for supply of copy of work in digital format by librarian or archivist under section 51, (*or*) 52, or 56

A copy of a work to which section 51, 52, or 56 applies must not be supplied in a digital format, by the librarian of a prescribed library or the archivist of an archive, to a person (**A**) unless the following conditions are also complied with:

Struck out (unanimous)

"(a) A must make a written request to the librarian or archivist for a digital copy identifying the work and stating the purpose for which the material will be used; and

"(b) 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; and

"(c) the librarian or archivist must supply the copy in question to A only, and not to any other person; and

"(d) the librarian or archivist must give A, when the copy is supplied, a written notice that sets out the terms of use of the copy; and

"(e) the librarian or archivist must, as soon as is reasonably practicable, destroy any additional copy made in the process of making the copy that is supplied to A.

Struck out (unanimous)

"56C Additional conditions for making digital copies under section 53 or section 54

A copy of a work to which section 53 or section 54 applies must not be supplied in a digital format to a library unless the following conditions are complied with:

"(a) the library requesting the supply of a digital copy must make the request in writing to the librarian supplying the copy, and must state in its request the purpose for which the copy is required; and

"(b) the librarian supplying the copy must declare in writing that the provisions of the Act governing the supply of the copy have been complied with; and

"(c) the librarian supplying the digital copy must, as soon as is reasonably practicable, destroy any additional copy made in the process of making the copy that is supplied.

New (unanimous)

"56C Additional condition for making digital copies under section 53 or 54

A copy of a work to which section 53 or 54 applies must not be supplied in a digital format to a library unless the librarian supplying the digital copy destroys, as soon as is reasonably practicable, any additional copy made in the process of making the copy that is supplied."

Struck out (unanimous)

37 New section 57A inserted

The following section is inserted after section 57:

"57A Retention and inspection of declaration

"(1) A librarian or archivist who makes a declaration under **section 56B or section 56C** must retain the declaration for the period of 3 years after it is made.

"(2) The copyright owner of the work to which the declaration relates or that person's agent may inspect the declaration by giving the librarian or archivist notice to inspect it during the ordinary working hours of the library or archive on a working day.

"(3) The notice to inspect must nominate a day for inspection that is not earlier than 5 working days after the librarian or archivist receives the notice.

"(4) Subject to **subsection (5)**, a librarian or archivist who has been given a notice to inspect in accordance with this section must—

"(a) if notice is given to inspect more than 1 declaration, arrange the declarations in chronological order; and

"(b) allow the copyright owner or that person's agent to inspect the declaration or declarations on the day nominated in the notice to inspect; and

"(c) provide the copyright owner or that person's agent with reasonable facilities and assistance for the purpose of the inspection.

"(5) A librarian or archivist who has been given a notice of inspection in accordance with this section may refuse inspection

Struck out (unanimous)

unless the identity of the person inspecting has been verified as the copyright owner or that person's agent by documentary or other evidence reasonably capable of establishing identity."

38 Copying by Parliamentary Library for members of Parliament

Section 58(2) is amended by omitting "broadcast or cable programme" in each place where it appears and substituting in each case "communication work".

39 Use of recording of spoken words in certain cases

(1) Section 68(1)(b) is amended by omitting "broadcasting or including in a cable programme service" and substituting "communicating to the public".

(2) Section 68(2)(a) is amended by omitting "broadcast or cable programme" and substituting "communication work".

40 Provision of Braille copies of literary or dramatic works

Section 69(1) is amended by inserting "or communicate" after "make".

41 Public reading or recitation

Section 70 is amended by repealing subsection (2) and substituting the following subsection:

"(2) Copyright in a work is not infringed by the making of a sound recording, or the communication to the public, of a reading or recitation that under subsection (1) is not treated as a performance in public, if the recording or communication work consists mainly of material in relation to which it is not necessary to rely on that subsection."

42 Representation of certain artistic works on public display

(1) Section 73(2) is amended by repealing paragraph (c) and substituting the following paragraph:

"(c) communicating to the public a visual image of the work."

(2) Section 73 is amended by repealing subsection (3) and substituting the following subsection:

"(3) Copyright is not infringed by the issue to the public of copies, or the communication to the public, of anything the making of which was, under this section, not an infringement of copyright."

43 New sections 80A to 80C inserted

The following sections are inserted after section 80:

"**80A Decompilation of computer program**

"(1) The lawful user of a copy of a computer program expressed in a low level language does not infringe copyright in the program by decompiling it, if the conditions in **subsection (2)** are met.

"(2) The conditions referred to in **subsection (1)** are that—

"(a) 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

"(b) the information obtained from the decompilation is not used for any purpose other than the objective referred to in **paragraph (a)**.

"(3) In particular, the conditions in **subsection (2)** are not met if—

"(a) the information necessary to create the independent program is readily available to the lawful user without decompiling the computer program; or

"(b) the lawful user does not confine decompilation of the computer program strictly to the steps that are necessary to create an independent program; or

"(c) the lawful user gives the information obtained from decompiling the computer program to any person when it is not necessary for creating an independent program to do so; or

"(d) the lawful user uses the information obtained from decompiling the computer program to create a program that is substantially similar in its expression to the program that has been decompiled; or

"(e) the lawful user uses the information obtained from decompiling the computer program to do any act that is restricted by copyright.

Struck out (unanimous)

"(4) In this section,—

"**decompile** means—

"(a) to convert a computer program expressed in a low level language into a version expressed in a high level language; or

"(b) 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.

New (unanimous)

"(4) In this section, **decompile** means—

"(a) to convert a computer program expressed in a low level language into a version expressed in a higher level language; or

"(b) to copy the program as a necessary incident of converting it into that version.

"**80B Copying or adapting computer program if necessary for lawful use**

"(1) The lawful user of a computer program (**A**) does not infringe copyright in it by copying or adapting it, if—

"(a) copying or adapting it is necessary for A's lawful use of the program (for example, to correct an error in the program); and

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

"(2) This section does not apply to copying or adapting that is permitted under **section 80A or section (*80C*) 80BA**.

New (unanimous)

"**80BA Observing, studying, or testing of computer program**

The lawful user of a computer program (**A**) does not infringe copyright in it by observing, studying, or testing the functioning of the program in order to determine the ideas and principles that underlie any element of the program if A does so while performing the acts of loading, displaying, running, transmitting, or storing the program that A is entitled to do.

Struck out (unanimous)

"**80C Certain contractual terms relating to use of computer programs have no effect**

A term or condition in an agreement for the use of a computer program has no effect in so far as it prohibits or restricts—

"(a) any activity undertaken in compliance with the conditions set out in **section 80A or section 80B**; or

"(b) use of any device or means to observe, study, or test the functioning of the program in order to understand the ideas and principles that underlie any element of the program.

New (unanimous)

"**80C Certain contractual terms relating to use of computer programs have no effect**

A term or condition in an agreement for the use of a computer program has no effect in so far as it prohibits or restricts any activity undertaken in accordance with **section 80A(2) or 80B(1)**."

44 New section 81A inserted

The following section is inserted after section 81:

"**81A Copying sound recording for (*private and domestic use*) personal use**

"(1) Copyright in a sound recording and in a literary or musical work contained in it is not infringed by copying the sound recording, if the following conditions are met:

New (unanimous)

"(aa) the sound recording is not a communication work or part of a communication work; and

"(a) the copy is made from a sound recording that is not an infringing copy; and

"(b) the sound recording is not borrowed or hired; and

"(c) the copy is made by the owner of the sound recording; and

"(d) (*the*)that owner acquired the sound recording legitimately; and

"(e) the copy is used only for that owner's (*private and domestic use*) personal use or the personal use of a member of the household in which the owner lives or both; and

"(f) no more than 1 copy is made for each (*type of*) device for playing sound recordings that is owned by the owner of the sound recording; and

"(g) the owner of the sound recording retains the ownership of both the sound recording and of any copy that is made under this section.

"(2) For the avoidance of doubt, **subsection (1)** does not apply if the owner of the sound recording is bound by a contract that specifies the circumstances in which the sound recording may be copied.

Struck out (unanimous)

"(3) This section expires after 2 years after the date on which it came into force, but—

"(a) the Governor-General may, by Order in Council made while this section is in force, extend the date of expiry for a further period of 2 years:

"(b) the Governor-General may extend the date of expiry under **paragraph (a)** more than once."

45 New heading and new sections 82 to 84 substituted

Sections 82 to 84, and the heading immediately above section 82 are repealed and the following heading and sections substituted:

"*Communication works*

"82 Recording for purposes of maintaining standards in programmes

The author of a communication work does not infringe copyright in it, or in any work included in it, by recording it, if the recording is made and used solely for the purpose of checking on the maintenance of standards in communication works made by the author.

"83 Recording for purposes of complaining

"(1) A person (**A**) does not infringe copyright in a communication work, or in any work included in it, by recording it or communicating it or both to a complaint authority, if the recording or the communication or both are done solely for the purpose of complaining to a complaint authority.

"(2) However, **subsection (1)** does not apply, and A does infringe copyright in the communication work recorded and in any work included in the recording, if A retains the recording for any longer than is reasonably necessary to prepare and despatch the complaint.

"(3) If a person infringes copyright under **subsection (2)**, the recording is treated as an infringing copy.

"(4) In this section and in **section 84**, **complaint authority** means any person or body that is responsible for dealing with complaints about the content of communication works, including the content of advertisements in communication works.

"84 Recording for purposes of time shifting

"(1) A person (**A**) does not infringe copyright in a programme included in a communication work, or in any work included in it, by recording it, if (*A*)—

"(a) A makes the recording solely for A's (*private and domestic use*) personal use or the personal use of a member of the household in which A lives or both; and

"(b) A makes the recording solely for the purpose of viewing or listening to the recording at a more convenient time; and

Struck out (unanimous)

"(c) is not able lawfully to access the communication work on demand; and

New (unanimous)

"(c) the recording is not made from an on-demand service; and

"(d) A has lawful access to the communication work at the time of making the recording.

"(2) However, **subsection (1)** does not apply, and A does infringe copyright in the communication work recorded and in any work included in the communication work, if—

"(a) A retains the recording for any longer than is reasonably necessary for viewing or listening to the recording at a more convenient time; or

"(b) in the event that the person who views or listens to the recording wishes to make a complaint to a complaint authority, A retains the recording for any longer than is reasonably necessary to prepare and despatch the complaint.

"(3) If a person infringes copyright under **subsection (2)**, the recording is treated as an infringing copy."

Example

A records a movie to be screened on television because she will be at work when it screens. She watches the movie on the weekend and then later tapes over it. Provided the conditions in s 84(1) are met, the copy that A makes is not an infringing copy.

B copies music from a streamed Internet audio service and keeps the copy as part of B's music collection, in order to listen to it multiple times on demand. Copies made for the home library or collection in this way are infringing copies."

46 Incidental recording for purposes of broadcast or cable programme

(1) The heading to section 85 is amended by omitting "**broadcast or cable programme**" and substituting "**communication**".

(2) Section 85 is amended by repealing subsection (1) and substituting the following subsection:

"(1) This section applies where, under an assignment or a licence, a person is authorised to communicate the following works to the public:

"(a) a literary, dramatic, or musical work, or an adaptation of that work; or

"(b) an artistic work; or

"(c) a sound recording or film."

(3) Section 85(2) is amended by omitting "broadcast or cable programme" and substituting "communication work".

(4) Section 85(3)(b) is amended by omitting "broadcasting the work or, as the case may be, including the work in a cable programme" and substituting "communicating the work to the public".

47 Section 86 repealed

Section 86 is repealed.

48 New sections 87 to 87B substituted

Section 87 is repealed and the following sections substituted:

"**87 Free public playing or showing of communication work**

"(1) The free public playing or showing of a communication work (other than a communication work to which **section 87A** applies or a communication work for which a subscription fee must be paid in order to receive it) does not infringe any copyright in—

"(a) the communication work; or

"(b) any sound recording or film included in the communication work.

"(2) For the purposes of this section, the public playing or showing of a communication work is not free if—

"(a) the audience has paid for admission to—

"(i) the place where the communication work is shown or played (which in this section is called the **venue**); or

"(ii) any place of which the venue is a part; or

"(b) goods or services are supplied at the venue or a place of which it forms part at prices that—

"(i) are substantially attributable to the facilities afforded for hearing or seeing the communication work; or

"(ii) exceed those usually charged there and that are partly attributable to those facilities; or

"(c) the venue is a hotel, motel, camping ground, or any other place that admits persons for a fee for purposes of temporary accommodation, and the audience is made up of persons residing at that hotel, motel, camping ground, or other place.

"(3) For the purposes of **subsection (2)(a)**, the following persons must not be treated as having paid for admission to the venue:

"(a) a person admitted as a resident or an inmate of a place (other than a hotel, motel, camping ground, or any other place to which **subsection (2)(c)** applies):

"(b) a person admitted as a member of a club or society where the payment is only for membership of the club or society and the provision of facilities for hearing or seeing communication works is only incidental to the main purposes of the club or society.

"87A Free public playing or showing of communication work that is simultaneous with reception

"(1) This section applies to the playing or showing of a communication work that—

"(a) is made for reception in the area in which it is played or shown; and

Struck out (unanimous)

"(b) is not a satellite transmission or an encrypted transmission; and

New (unanimous)

"(b) is not a communication work for which a subscription fee must be paid in order to receive it; and

"(c) is shown or played simultaneously upon reception of the communication work.

"(2) The free public playing or showing of a communication work to which this section applies does not infringe any copyright in—

"(a) the communication work; or

"(b) any sound recording or film that is played or shown in public by reception of the communication work.

"(3) For the purposes of this section, the public playing or showing of a communication work is not free if—

"(a) the audience has paid for admission to the place where the communication work is shown or played (which in this section is called the **venue**), including any place of which the venue is a part; or

"(b) goods or services are supplied at the venue or a place of which it forms part at prices that—

"(i) are substantially attributable to the facilities afforded for hearing or seeing the communication work; or

"(ii) exceed those usually charged there and that are partly attributable to those facilities.

"(4) For the purposes of **subsection (3)(a)**, the following persons must not be treated as having paid for admission to the venue:

"(a) a person admitted as a resident or an inmate of a place (including a person residing in a hotel, motel, camping ground, or any other place that admits persons for a fee for the purpose of temporary accommodation):

"(b) a person admitted as a member of a club or society where the payment is only for membership of the club or society and the provision of facilities for hearing or seeing communication works is only incidental to the main purposes of the club or society.

"87B Assessment of damages for infringement of copyright in sound recording or film

Where the making of a communication work is an infringement of copyright, the fact that the work was heard or seen in public by the reception of the communication work must be taken into account in assessing the damages for the infringement."

49 ⟨*Section 88 repealed*⟩

New (majority)

Section 88 is amended by adding the following subsection:

"(4) For the purposes of this section only,—

"(a) sections 3 and 4 of this Act before repeal by the Copyright (New Technologies) Amendment Act **2006** continue to apply as if they had not been repealed and as if references in those provisions to 'this Act' were references to this section; and

"(b) the definition of broadcast in section 2(1) of this Act before repeal by the Copyright (New Technologies) Amendment Act **2006** continues to apply as if that definition had not been repealed."

50 New section 89 substituted

Section 89 is repealed and the following section substituted:

"**89 Provision of subtitled copies of communication work**

"(1) A body prescribed by regulation made under this Act may, for the purpose of providing people who are deaf or hard of hearing, or physically or mentally disabled in any other way, with copies that are subtitled or otherwise modified for their special needs, make copies of a communication work and issue copies to the public, without infringing any copyright in the communication work or in any work included in the communication work.

"(2) A body must not be prescribed for the purposes of **subsection (1)** if it is established or conducted for profit."

51 Recording for archival purposes

Section 90 is amended by repealing subsection (1) and substituting the following subsection:

"(1) A person (**A**) does not infringe copyright in a communication work, or in any work included in it, by recording it or making a copy of a recording of it, if—

"(a) the communication work is in a class of communication work prescribed by regulations made under this Act; and

"(b) A makes the recording or the copy for the purpose of placing it in an archive maintained by a body prescribed by regulations made under this Act."

52 Recording by media monitors

(1) Section 91 is amended by repealing subsection (1) and substituting the following subsections:

"(1) This section applies to a recording, or a transcript of a recording, of a communication work that consists wholly or substantially of news or reports or discussions of current events.

"(1A) The person who makes the recording or transcript does not infringe copyright in the communication work, or in any work included in the communication work, if the conditions in **subsection (2)** are complied with."

(2) Section 91(2) is amended by omitting "subsection (1)" and substituting "subsection (1A)".

(3) Section 91(4) is amended by omitting "broadcasts or cable programmes" and substituting "the communication work".

53 New heading and new sections 92A to 92C inserted

The following heading and sections are inserted after section 92:

"*Internet service provider liability*

Struck out (unanimous)

"92A Limitations on liability in sections 92B to 92D apply only to qualifying Internet service provider

The limitations on liability in **sections 92B to 92D** apply only in respect of an Internet service provider that has adopted and reasonably implemented a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.

"92B Internet service provider liability if user infringes copyright

"(1) This section applies if a person (**A**) infringes the copyright in a work by using 1 or more of the Internet services of an Internet

service provider to do a restricted act without the consent of the copyright owner.

"(2) Merely because A uses the Internet services of the Internet service provider in infringing the copyright, the Internet service provider, without more,—

"(a) does not infringe the copyright in the work:

"(b) must not be taken to have authorised A's infringement of copyright in the work:

"(c) subject to **subsection (3)**, must not be subject to any civil remedy or criminal sanction.

"(3) However, nothing in this section limits the right of the copyright owner to injunctive relief (*against the Internet service provider in relation to A's, or a related, infringement*) in relation to A's infringement or any infringement by the Internet service provider.

New (unanimous)

"(4) In **subsections (1) and (2)**, **Internet services** means the services referred to in the definition of Internet service provider in section 2(1).

"92C Internet service provider liability for storing infringing material

"(1) This section applies if—

"(a) an Internet service provider stores (*(but does not modify)*) material provided by a user of the service; and

"(b) the material infringes copyright in a work (other than as a result of any modification by the Internet service provider).

"(2) The Internet service provider does not infringe copyright in the work by storing the material unless—

Struck out (unanimous)

"(a) the Internet service provider—

"(i) knows or has reason to believe that the material infringes copyright in the work; and

Struck out (unanimous)

"(ii) does not, as soon as possible after the Internet service provider becomes aware of the infringing material, delete the material or prevent access to it; or

New (unanimous)

"(a) the Internet service provider knows that the material infringes copyright in the work; or

"(ba) the Internet service provider—

"(i) has received a notice of infringement that complies with **section 92CA**; and

"(ii) does not, as soon as possible after becoming aware (whether as a result of receiving the notice or otherwise) of facts or circumstances that make it apparent that the material is likely to infringe copyright in the work, delete the material or prevent access to it; or

"(b) the user of the service who provided the material is acting (*under the authority and control of*) on behalf of, or at the direction of, the Internet service provider.

"(3) An Internet service provider who deletes a user's material or prevents access to it because the Internet service provider knows or has reason to believe that it infringes copyright in a work must, as soon as possible, give notice to the user that the material has been deleted or access to it prevented.

"(4) Nothing in this section limits the right of the copyright owner to injunctive relief (*against the Internet service provider*) in relation to a user's infringement or any infringement by the Internet service provider.

New (unanimous)

"92CA Notice of infringement

A notice referred to in **section 92C(2)(ba)(i)** must be—

"(a) properly completed; and

"(b) in the prescribed form; and

New (unanimous)

"(c) signed by the copyright owner or the copyright owner's duly authorised agent.

"92CB Offences in relation to notice of infringement

"(1) A person (**A**) commits an offence if—

"(a) A signs, or authorises another person to sign, a notice referred to in **section 92C(2)(ba)(i)**; and

"(b) the notice is false or misleading in a material particular; and

"(c) A knows that the notice is false or misleading in a material particular or is reckless as to whether it is or not.

"(2) A person (**B**) commits an offence if—

"(a) B has signed, or has authorised another person to sign, a notice referred to in **section 92C(2)(ba)(i)**; and

"(b) the notice is false or misleading in a material particular; and

"(c) after the notice is signed, B either knows that the notice is false or misleading in a material particular or is reckless as to whether it is or not; and

"(d) does not take all reasonable steps to withdraw the notice.

"(3) A person who commits an offence under this section is liable on summary conviction,—

"(a) in the case of an individual, to a fine not exceeding $50,000; and

"(b) in the case of a body corporate, to a fine not exceeding $100,000.

"(4) For the avoidance of doubt, if an individual acting on behalf of a body corporate commits an offence under this section, the body corporate also commits the offence.

"92D Internet service provider does not infringe copyright by caching infringing material

"(1) An Internet service provider does not infringe copyright in a work by caching material if the Internet service provider—

"(a) does not modify the material; and

"(b) complies with any conditions imposed by the copyright owner of the material for access to that material; and

"(c) does not interfere with the lawful use of technology to obtain data on the use of the material; and

"(d) updates the material in accordance with reasonable industry practice.

"(2) However, an Internet service provider does infringe copyright in a work by caching material if the Internet service provider does not delete the material or prevent access to it by users as soon as possible after the Internet service provider became aware that—

"(a) the material has been deleted from its original source; or

"(b) access to the material at its original source has been prevented; or

"(c) a court has ordered that the material be deleted from its original source or that access to the material at its original source be prevented.

"(3) Nothing in this section limits the right of the copyright owner to injunctive relief (*against the Internet service provider*) in relation to a user's infringement or any infringement by the Internet service provider.

"(4) In this section,—

"**cache** means the storage of material by an Internet service provider that is—

"(a) (*automatic*) controlled through an automated process; and

"(b) temporary; and

"(c) for the sole purpose of enabling the Internet service provider to transmit the material more efficiently to other users of the service on their request

"**original source** means the source from which the Internet service provider copied the material that is cached."

54 Subsequent dealings with copies made under this Part

Section 93 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions referred to in subsection (1) are as follows:

"(a) **section 43A** (which relates to transient reproduction of work):

"(b) section 44 (which relates to copying for educational purposes of literary, dramatic, musical, or artistic works or typographical arrangements):

"(c) **section 44A** (which relates to storing for educational purposes):

"(d) section 45 (which relates to copying for educational purposes of films and sound recordings):

"(e) **section 48** (which relates to recording by educational establishments of communication works):

"(f) section 49 (which relates to things done for the purposes of an examination):

"(g) section 51 (which relates to copying by librarians of parts of published works):

"(h) section 52 (which relates to copying by librarians of articles in periodicals):

"(i) section 53 (which relates to copying by librarians for users of other libraries):

"(j) section 55 (which relates to copying by librarians or archivists to replace copies of works):

"(k) section 56 (which relates to copying by librarians or archivists of certain unpublished works):

"(l) **sections 56A to 56C** (which relate to access to and copying of works in digital format):

"(m) section 58 (which relates to copying by the Parliamentary Library for members of Parliament):

"(n) section 69 (which relates to the provision of Braille copies of literary or dramatic works):

"(o) **section 80A** (which relates to the decompilation of computer programs):

"(p) **section 80B** (which relates to copying or adapting computer programs if necessary for lawful use):

"(q) **section 81A** (which relates to copying sound recordings for private and domestic use):

"(r) section 83 (which relates to recording for the purposes of complaining):

"(s) **section 84** (which relates to recording for the purposes of time shifting):

"(t) section 90 (which relates to recording for archival purposes):

"(u) **section 92B** (which relates to Internet service provider liability for storing infringing material):

"(v) **section 92C** (which relates to Internet service provider liability for caching infringing material)."

55 Right to be identified as author or director

(1) Section 94(2)(a) is amended by omitting "broadcast, or included in a cable programme" and substituting "or communicated to the public".

(2) Section 94(6)(b) is amended by omitting "broadcast or included in a cable programme" and substituting "communicated to the public".

(3) Section 94(8) is amended by repealing paragraph (a) and substituting the following paragraph:

"(a) the film is shown in public or communicated to the public; or".

56 Content of right to be identified

Section 95(1)(c) is amended by omitting "broadcast, cable programme" and substituting "communication work".

57 Exceptions to right to be identified

(1) Section 97 is amended by repealing subsection (3) and substituting the following subsection:

"(3) The right is not infringed by an act that, under any of the following provisions of this Act, would not infringe copyright in the work:

"(a) section 41 (which relates to incidental copying of a work):

"(b) section 42 (which relates to criticism, review, and news reporting):

"(c) **section 43A** (which relates to transient reproduction of work):

"(d) section 49 (which relates to things done for the purposes of an examination):

"(e) section 59 (which relates to parliamentary and judicial proceedings):

"(f) section 60 (which relates to Royal commissions and statutory inquiries):

"(g) section 67 (which relates to acts permitted on assumptions as to expiry of copyright or death of author in relation to anonymous or pseudonymous works):

"(h) **section 81A** (which relates to copying sound recordings for private and domestic use)."

(2) Section 97(8) is amended by repealing paragraph (b) and substituting the following paragraph:

"(b) a part of a film, if that part—

"(i) appears incidentally in another film, or is included in a communication work; and

"(ii) is not a substantial part of the film."

58 Content of right to object to derogatory treatment

(1) Section 99(1)(a) is amended by omitting "broadcasts, or includes in a cable programme" and substituting "or communicates to the public".

(2) Section 99(2)(a) is amended by omitting "broadcasts or includes in a cable programme" and substituting "communicates to the public".

(3) Section 99(4) is amended by repealing paragraph (a) and substituting the following paragraph:

"(a) shows in public, or communicates to the public, a derogatory treatment of the film; or".

(4) Section 99(4)(c) is amended by repealing subparagraph (i) and substituting the following subparagraph:

"(i) plays in public or communicates to the public; or".

59 Exceptions to right to object to derogatory treatment of films

(1) Section 101(3) is amended by repealing paragraphs (a) and (b) and substituting the following paragraph:

"(a) in relation to the communication of a film,—

"(i) complying with a duty imposed under section 4 of the Broadcasting Act 1989; or

"(ii) maintaining standards that are consistent with the observance of good taste and decency and the maintenance of law and order; or

"(iii) avoiding the commission of an offence; or

"(iv) complying with a duty imposed by or under any enactment—".

(2) Section 101 is amended by repealing subsection (6) and substituting the following subsection:

"(6) The right is not infringed, in relation to the communication of a film to the public, if the person (**A**) communicating the film—

"(a) makes a deletion or any deletions from the film that is or are reasonably required to enable A to—

"(i) follow guidelines as to the programmes that may be shown in particular time periods; or

"(ii) fit the film into the time scheduled to show it; or

"(b) communicates the film in separate parts because of its length; or

"(c) uses a clip of a film in an advertisement for the showing of the film."

60 False attribution of identity of author or director

Section 102 is amended by repealing subsection (4) and substituting the following subsection:

"(4) A person (**A**) infringes a right under subsection (2) if—

"(a) A performs a literary, dramatic, or musical work in public, or shows a film to the public, or communicates the work or film to the public; and

"(b) the work or film is accompanied by a false attribution; and

"(c) A knows or has reason to believe that the attribution is false."

61 False representation as to literary, dramatic, or musical work

Section 103 is amended by repealing subsection (4) and substituting the following subsection:

"(4) A person (**A**) infringes the right conferred by subsection (2) if A performs in public, or communicates to the public, a literary, dramatic, or musical work, accompanied by a false representation, and A knows or has reason to believe that the representation is false."

62 Right to privacy of certain photographs and films

(1) Section 105(1) is amended by repealing paragraph (c) and substituting the following paragraph:

"(c) not to have the work communicated to the public."

(2) Section 105(3)(a) is amended by omitting "broadcast or cable programme", and substituting "or communication work".

63 New sections 112 to 112B substituted

The principal Act is amended by repealing section 112 and substituting the following sections:

"**112 Warranty implied in certain licences**

"(1) This section applies to a licence that has been granted for—

"(a) the performance or communication to the public of a copyright work that is a literary, dramatic, or musical work or a sound recording or film; or

"(b) the inclusion of a copyright work that is an artistic work in a performance or a communication work.

"(2) A warranty is implied in the licence that the person by whom or on whose behalf the licence is granted is—

"(a) the owner of the copyright in the work, sound recording, or film that is the subject of the licence; or

"(b) authorised to grant the licence by the copyright owner.

"**112A Damages for falsely claiming copyright ownership or licence**

"(1) This section applies if—

"(a) a person (**A**) falsely claims to be, or to have been granted a licence by or on behalf of, the owner of the copyright in a literary, dramatic, musical, or an artistic work or a sound recording or film; and

"(b) A has threatened or commenced proceedings for preventing, or claiming damages in respect of, a performance or communication to the public of the work, sound recording, or film (which in this section is called the **event**); and

"(c) as a result of the threat or commencement of proceedings, the event has not taken place.

"(2) A court may award damages to compensate any of the following persons for any loss sustained because the event did not take place:

"(a) in the case of a threat of proceedings, the person to whom A made the threat:

"(b) in the case of the commencement of proceedings, a defendant:

"(c) any other person interested in the event.

"112B Provisions of sections 112 and 112A to have effect no matter what licence says

The provisions of **sections 112 and 112A** have effect no matter what any licence may say, and extend to all licences whether granted before or after the commencement of this Act."

Part 2
Amendments to Parts 6 to 11 of Copyright Act 1994

64 Presumptions relevant to computer programs, sound recordings, and films

(1) Section 128(5) is amended by omitting "public, broadcast, or included in a cable programme" and substituting "public or communicated to the public".

(2) Section 128(6) is amended by omitting "public, broadcast, or included in a cable programme" in each place where it appears and substituting in each case "public or communicated to the public".

New (unanimous)

64A Unjustified proceedings

Section 130(1) is amended by inserting "or a contravention of **section 226A**" after "copyright".

65 Criminal liability for making or dealing with infringing objects

Section 131(4) is amended by omitting "broadcast or cable programme" and substituting "communication work".

66 Works of more than one author

Section 147 is amended by repealing subsection (2) and substituting the following subsection:

"(2) In subsection (1), **group of companies** means a holding company and its subsidiaries as defined in sections 5 and 6 of the Companies Act 1993."

67 Licensing schemes to which sections 149 to 155 apply

(1) Section 148(a) is amended by repealing subparagraph (iv) and substituting the following subparagraph:

"(iv) relate to licences for copying the work or performing, showing, or playing the work in public or communicating the work to the public:".

(2) Section 148(b) is amended by omitting "broadcasts, or cable programmes" and substituting "communication works".

(3) Section 148(d) is amended by repealing subparagraphs (iii) and (iv) and substituting the following subparagraph:

"(iii) recording in the circumstances set out in sections 48(1) and 91(2);—".

68 Licences to which sections 157 to 160 apply

(1) Section 156(a) is amended by repealing subparagraph (iii) and substituting the following subparagraph:

"(iii) authorise the copying of the work or the performance, showing, or playing of the work in public or the communication of the work to the public:".

(2) Section 156(b) is amended by omitting "broadcast, or cable programme" and substituting "communication work".

69 New section 163 substituted

The principal Act is amended by repealing section 163 and substituting the following section:

"163 Licences for educational establishments in respect of works included in communication works

"(1) This section applies to references or applications made under this Part in relation to licences for—

"(a) the recording, for educational purposes, by or on behalf of educational establishments, of communication works that include copyright works; or

"(b) making copies of those recordings for educational purposes.

"(2) When this section applies, the Tribunal must, in considering what charges (if any) should be paid for a licence, have regard to the extent to which the owners of the copyright in the works included in the communication work have already received, or are entitled to receive, payment in respect of their inclusion."

70 Licences to reflect conditions imposed by promoters of events

(1) Section 164(1) is amended by omitting "broadcast, or cable programme" and substituting "or communication work".

(2) Section 164(2)(b) is amended by omitting "broadcast, or cable programme" and substituting "or communication work".

71 Licences to reflect payments in respect of underlying rights

Section 165(2) is amended by—

(a) omitting "broadcasts, or cable programmes" and substituting "or communication works"; and

(b) omitting "broadcast, or cable programme" and substituting "or communication work".

72 Licences in respect of works included in retransmissions

Section 166 is amended by repealing subsection (1) and substituting the following subsection:

"(1) This section applies to applications under this Part in relation to licences to include literary, dramatic, musical, or artistic works or sound recordings or films in a communication work when one communication work (in this section referred to as the **first transmission**) is, by reception and immediate retransmission, to be further communicated to the public (in this section referred to as the **further transmission**)."

73 Determination of equitable remuneration

Section 168(1)(e) is amended by omitting "broadcast or cable programme" and substituting "communication work".

74 Interpretation

(1) Paragraph (d) of the definition of **commercial exploitation** in section 169 is repealed and the following paragraph substituted:

"(d) communicating recordings or copies of recordings to the public".

(2) Paragraph (b) of the definition of **recording** in section 169 is amended by omitting "broadcast of, or a cable programme

that includes," and substituting "communication work that includes".

75 Application

Section 170(4)(a) is amended by omitting "broadcast or cable programme" and substituting "communication work".

76 Consent required for recording or live transmission of performance

Section 171(1) is amended by repealing paragraph (b) and substituting the following paragraph:

"(b) communicates live to the public the whole or any substantial part of a performance."

77 New section 172 substituted

Section 172 is repealed and the following section substituted:

"**172 Infringement by use of (*illicit*) recording made without performer's consent**

A person (**A**) infringes a performer's rights if—

"(a) without the performer's consent and by means of a recording, A shows in public, plays in public, or communicates to the public the whole or a substantial part of a performance; and

"(b) the recording (*is illicit*) was made without the performer's consent; and

"(c) A knows or has reason to believe that the recording (*is illicit*) was made without the performer's consent."

78 Incidental (*copying*) inclusion of performance or recording

Section 175 is amended by repealing subsection (1) and substituting the following subsection:

"(1) The rights conferred by this Part are not infringed by—

"(a) the incidental (*copying*) inclusion of a performance or recording in a sound recording, film, or communication work; or

"(b) the playing of a sound recording, the showing of a film, or the making of a communication work, where the performance or sound recording has been incidentally

(*copied*) included in that sound recording, film, or communication work; or

"(c) the issue to the public of copies of a sound recording, film, or communication work in which a performance or recording has been incidentally (*copied*) included."

79 New section 175A inserted

The following section is inserted after section 175:

"175A Transient reproduction of recording of performance

A reproduction of a recording of a performance of a work does not infringe the rights conferred by this Part in the recording if the reproduction—

"(a) is transient or incidental; and

"(b) is a necessary part of a technological process for the viewing of, or listening to, the recording by a member of the public to whom the recording is lawfully made available; and

"(c) has no independent economic significance."

80 Playing or showing sound recording, film, broadcast, or cable programme at educational establishment

(1) The heading to section 178 is amended by omitting "**broadcast, or cable programme**" and substituting "**or communication work**".

(2) Section 178(1) is amended by omitting "broadcast, or cable programme" and substituting "or communication work".

81 Recording of broadcasts and cable programmes by educational establishment

(1) The heading to section 179 is amended by omitting "**broadcasts and cable programmes**" and substituting "**communication works**".

(2) Section 179 is amended by omitting "broadcast or cable programme" and substituting "communication work".

82 Use of recordings of spoken works in certain cases

(1) Section 184 is amended by repealing subsection (1) and substituting the following subsection:

"(1) It is not an infringement of the rights conferred by this Part to use a recording of a reading or recitation of a literary work (or to copy the recording and use the copy) if—

"(a) it was made for the purpose of—

"(i) reporting current events; or

"(ii) communicating all or part of the reading or recitation to the public; and

"(b) the conditions in subsection (2) are complied with."

(2) Section 184(2)(a) is amended by omitting "broadcast or cable programme" and substituting "communication work".

83 New section 187 substituted

Section 187 is repealed and the following section substituted:

"187 Incidental recording for purposes of communication work

"(1) A person who proposes to communicate a recording of a performance to the public in circumstances not infringing rights under this Part does not require consent for the purposes of this Part to the making of the further recording if the conditions in **subsection (2)** are complied with.

"(2) The conditions referred to in **subsection (1)** are that the further recording—

"(a) must only be used for communicating it to the public in circumstances not infringing rights under this Part; and

"(b) must be destroyed within 6 months after first being communicated to the public, unless the Minister has authorised the preservation of the recording in the records of a government department or in the national archives because of its documentary character or exceptional importance.

"(3) A recording made in accordance with this section is treated as an illicit recording—

"(a) for the purposes of any use in breach of the condition in **subsection (2)(a)**; and

"(b) for all purposes after either of the conditions in **subsection (2)** is broken."

84 New sections 188 to 188B substituted

Section 188 is repealed and the following sections substituted:

"**188 Free public playing or showing of communication work**

"(1) The free public playing or showing of a communication work (other than a communication work to which **section 188A** applies or a communication work for which a subscription fee must be paid in order to receive it) does not infringe a right under this Part in relation to a performance or recording included in—

"(a) the communication work; or

"(b) any sound recording or film that is played or shown in public by reception of the communication work.

"(2) For the purposes of this section, the public playing or showing of a communication work is not free if—

"(a) the audience has paid for admission to—

"(i) the place where the communication work is shown or played (which in this section is called the **venue**); or

"(ii) any place of which the venue is a part; or

"(b) goods or services are supplied at the venue or a place of which it forms part at prices that—

"(i) are substantially attributable to the facilities afforded for hearing or seeing the communication work; or

"(ii) exceed those usually charged there and that are partly attributable to those facilities; or

"(c) the venue is a hotel, motel, camping ground, or any other place that admits persons for a fee for the purposes of temporary accommodation, and the audience is made up of persons residing at that hotel, motel, camping ground, or other place.

"(3) For the purposes of **subsection (2)(a)**, the following persons must not be treated as having paid for admission to the venue:

"(a) a person admitted as a resident or an inmate of a place (other than a hotel, motel, camping ground, or any other place to which **subsection (2)(c)** applies):

"(b) a person admitted as a member of a club or society where the payment is only for membership of the club or society and the provision of facilities for hearing or

seeing communication works is only incidental to the main purposes of the club or society.

"188A Free public playing or showing of communication work that is simultaneous with reception

"(1) This section applies to the playing or showing of a communication work that—

"(a) is made for reception in the area in which it is played or shown; and

Struck out (unanimous)

"(b) is not a satellite transmission or an encrypted transmission; and

New (unanimous)

"(b) is not a communication work for which a subscription fee must be paid in order to receive it; and

"(c) is played or shown simultaneously upon reception of the communication work.

"(2) The free public playing or showing of a communication work to which this section applies does not infringe a right under this Part in relation to a performance or recording included in—

"(a) the communication work; or

"(b) any sound recording or film that is played or shown in public by reception of the communication work.

"(3) For the purposes of this section, the public playing or showing of a communication work is not free if—

"(a) the audience has paid for admission to the place where the communication work is played or shown (which in this section is called the **venue**), including any place of which the venue is a part; or

"(b) goods or services are supplied at the venue or a place of which it forms part at prices that—

"(i) are substantially attributable to the facilities afforded for hearing or seeing the communication work; or

"(ii) exceed those usually charged there and that are partly attributable to those facilities.

"(4) For the purposes of **subsection (3)(a)**, the following persons must not be treated as having paid for admission to the venue:

"(a) a person admitted as a resident or an inmate of a place (including a person residing in a hotel, motel, camping ground, or any other place that admits persons for a fee) for the purpose of temporary accommodation:

"(b) a person admitted as a member of a club or society where the payment is only for membership of the club or society and the provision of facilities for hearing or seeing communication works is only incidental to the main purposes of the club or society.

"188B Assessment of damages for infringement of rights under this Part in relation to performance or recording

Where the making of a communication work is an infringement of rights under this Part in relation to a performance or recording, the fact that the work was heard or seen in public by the reception of the communication work must be taken into account in assessing the damages for the infringement."

85 Section 189 repealed

Section 189 is repealed.

86 New section 190 substituted

Section 190 is repealed and the following section substituted:

"190 Provision of subtitled copies of communication work

"(1) A prescribed body that makes a recording of a communication work for the purpose of providing people who are deaf or hard of hearing or physically or mentally disabled in any other way with copies that are subtitled or otherwise modified for their special needs, does not infringe any right under this Part in relation to a performance or recording included in that communication work.

"(2) A body must not be prescribed for the purposes of **subsection (1)** if it is established or conducted for profit."

87 New section 191 substituted

Section 191 is repealed and the following section substituted:

"**191 Recording of communication work for archival purposes**

"(1) Any person (A) who records, or makes a copy of a recording of, a communication work does not infringe any right under this Part in relation to a performance or recording included in the communication work if—

"(a) the communication work falls within a prescribed class; and

"(b) A makes the recording or the copy for the purpose of it being placed in an archive maintained by a prescribed body.

"(2) A body must not be prescribed for the purposes of **subsection (1)** if it is established or conducted for profit."

88 Criminal liability for making, dealing with, using, or copying illicit recordings

Section 198(2) is amended by repealing paragraph (b) and substituting the following paragraph:

"(b) communicated to the public."

89 New heading and new sections 226 to 226J substituted

Section 226 and the heading immediately above section 226 are repealed and the following heading and sections substituted:

"*Technological protection measures*

"**226 Definitions of TPM terms**

In **sections 226A to 226E**, unless the context otherwise requires,—

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"**TPM** or **technological protection measure** includes any process, treatment, mechanism, device, or system that is designed in the normal course of its operation to prevent or inhibit the unauthorised exercise of any of the rights conferred by this Act

"**TPM spoiler** means a person who contravenes **section 226A**

Struck out (unanimous)

"**TPM spoiling device** means a device or means that—

"(a) is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of a technological protection measure; and

"(b) has no significant application except for its use in circumventing a technological protection measure

New (unanimous)

"**TPM** or **technological protection measure**—

"(a) means any process, treatment, mechanism, device, or system that in the normal course of its operation prevents or inhibits the infringement of copyright in a TPM work; but

"(b) for the avoidance of doubt, does not include a process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it controls any access to a work for non-infringing purposes (for example, it does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market segmentation by preventing the playback in New Zealand of a non-infringing copy of a work)

"**TPM circumvention device** means a device or means that—

"(a) is primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention of a technological protection measure; and

"(b) has no significant application except for its use in circumventing a technological protection measure

"**TPM work** means a copyright work that is protected by a technological protection measure.

"**226A Prohibited conduct in relation to technological protection measure**

"(1) A person (**A**) must not make, import, sell, distribute, let for hire, offer or expose for sale or hire, or advertise for sale or

hire, a TPM (*spoiling*) circumvention device that applies to a technological protection measure if A knows or has reason to believe that it will, or is likely to, be used to infringe copyright in a TPM work.

"(2) A person (**A**) must not provide a service(, *including the publication of information,*) to another person (**B**) if—

"(a) (*the service or the information is intended*) A intends the service to enable or assist (*persons*) B to circumvent a technological protection measure; and

"(b) A knows or has reason to believe that the service (*or the information*) will, or is likely to, be used to infringe copyright in a TPM work (*that is protected by a technological protection measure*).

New (unanimous)

"(3) A person (**A**) must not publish information enabling or assisting another person to circumvent a technological protection measure if A intends that the information will be used to infringe copyright in a TPM work.

"226B Rights of issuer of TPM work

"(1) This section applies if a TPM work is issued to the public by, or under licence from, the copyright owner.

"(2) The issuer of the TPM work has the same rights against a (*TPM spoiler*) person who contravenes **section 226A** as a copyright owner has in respect of an infringement of copyright.

"(3) The issuer of the TPM work has the same rights under section 122 (order for delivery up in civil proceedings) or (*section*) 132 (order for delivery up in criminal proceedings) in relation to a TPM (*spoiling*) circumvention device as a copyright owner has in relation to an infringing copy.

"(4) Sections 126 to 129 (which relate to certain presumptions) apply in relation to proceedings under this section.

"(5) Section 134 (order as to disposal of infringing copy or other object) applies, with all necessary modifications, in relation to the disposal of anything that is delivered up under **subsection (3)**.

"**226C Offence of (*making, etc, TPM spoiling device*) contravening section 226A**

Struck out (unanimous)

"(1) Every person commits an offence who, in the course of business,—

"(a) either—

"(i) makes for sale or hire, imports, sells, lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, a TPM spoiling device; or

"(ii) publishes information intended to enable or assist persons to circumvent a technological prevention measure; and

"(b) does so, knowing that the TPM spoiling device or the information will, or is likely to, be used to infringe copyright in a work that is protected by the technological protection measure in question.

New (unanimous)

"(1) A person (**A**) commits an offence who, in the course of business, makes, imports, sells, distributes, lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, a TPM circumvention device that applies to a technological protection measure if A knows that it will, or is likely to, be used to infringe copyright in a TPM work.

"(1A) A person (**A**) commits an offence who, in the course of business, provides a service to another person (**B**) if—

"(a) A intends the service to enable or assist B to circumvent a technological protection measure; and

"(b) A knows that the service will, or is likely to, be used to infringe copyright in a TPM work.

"(1B) A person (**A**) commits an offence who, in the course of business, publishes information enabling or assisting another person to circumvent a technological protection measure if A intends that the information will be used to infringe copyright in a TPM work.

"(2) A person who commits an offence under (***subsection (1)***) this section is liable on conviction on indictment to a fine not exceeding $150,000 or a term of imprisonment not exceeding 5 years or both.

"226D When rights of issuer of TPM work do not apply

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"(1) The rights that the issuer of a TPM work has under **section 226B** do not prevent or restrict the exercise of a permitted act.

"(2) The rights that the issuer of a TPM work has under **section 226B** do not prevent or restrict the making, importation, sale, or letting for hire of a TPM (*spoiling*) circumvention device to enable a qualified person to—

"(a) exercise a permitted act under Part 3; or

Struck out (unanimous)

"(b) correct an error in a computer program; or

"(c) effect interoperability of software; or

"(d) undertake encryption research.

"(3) In this section and in **section 226E**, **qualified person** means—

"(a) the librarian of a prescribed library; or

"(b) (*a prescribed*) the archivist of an archive; or

"(c) an educational establishment; or

New (unanimous)

"(d) any other person specified by the Governor-General by Order in Council on the recommendation of the Minister.

"(4) A qualified person must not be supplied with a TPM (*spoiling*) circumvention device on behalf of a user unless the qualified person has first made a declaration to the supplier in the prescribed form.

New (unanimous)

"(5) In this section,—

"**archive** has the same meaning as in section 50(1)

"**archivist** includes a person acting on behalf of the archivist

"**encryption technology** means the scrambling and descrambling of information using mathematical formulae or algorithms

"**librarian** includes a person acting on behalf of the librarian

"**prescribed library** has the same meaning as in section 50(1).

"(6) In this section and in **section 226E**, **encryption research** means identifying and analysing flaws and vulnerabilities of encryption technology.

Struck out (unanimous)

"**226E User's options if prevented from exercising permitted act by TPM**

The user of a TPM work who wishes to exercise a permitted act allowed under this Act but cannot practically do so because of a TPM may—

"(a) apply to the copyright owner or the exclusive licensee for assistance enabling the user to exercise the permitted act:

"(b) engage a qualified person (*see* **section 226D(3)**) to exercise the permitted act on the user's behalf using a TPM spoiling device, but only if the copyright owner or the exclusive licensee has refused the user's request for assistance or failed to respond to it within a reasonable time.

New (unanimous)

"226E User's options if prevented from exercising permitted act by TPM

"(1) Nothing in this Act prevents any person from using a TPM circumvention device to exercise a permitted act under Part 3 or to undertake encryption research.

"(2) The user of a TPM work who wishes to exercise a permitted act under Part 3 but cannot practically do so because of a TPM may do either or both of the following:

"(a) apply to the copyright owner or the exclusive licensee for assistance enabling the user to exercise the permitted act:

"(b) engage a qualified person (*see* **section 226D(3)**) to exercise the permitted act on the user's behalf using a TPM circumvention device.

"(3) For the purposes of this section, a person (**A**) undertakes encryption research if A—

"(a) is either—

"(i) engaged in a course of study at an educational establishment in the field of encryption technology; or

"(ii) employed, trained, or experienced in the field of encryption technology; and

"(b) has either—

"(i) obtained permission from the copyright owner or exclusive licensee of the copyright to the use of a TPM circumvention device for the purpose of the research; or

"(ii) has taken, or will take, all reasonable steps to obtain that permission.

"(4) A qualified person who exercises a permitted act on behalf of the user of a TPM work must not charge the user more than a sum consisting of the total of the cost of the provision of the service and a reasonable contribution to the qualified person's general expenses.

"*Copyright management information*

"226F Meaning of copyright management information

In **sections 226G, 226H, and 226J CMI** or **copyright management information** means information attached to, or embodied in, a copy of a work that—

"(a) identifies the work, and its author or copyright owner; or

"(b) identifies or indicates some or all of the terms and conditions for using the work, or indicates that the use of the work is subject to terms and conditions.

"226G Interference with CMI prohibited

"(1) A person (**A**) must not remove or modify any copyright management information attached to, or embodied in, a copy of a work.

"(2) However, **subsection (1)** does not apply if—

"(a) A has the authority of the copyright owner or the exclusive licensee to remove or modify the copyright management information; or

"(b) A does not know, and has no reason to believe, that the removal or modification will induce, enable, facilitate, or conceal an infringement of the copyright in the work.

"226H Commercial dealing in work subject to CMI interference

"(1) A person (**A**) must not, in the course of business, make, import, sell, let for hire, offer or expose for sale or hire, or advertise for sale or hire, a copy of a work if any copyright management information attached to, or embodied in, the copy has been removed or modified without the authority of the copyright owner or the licensee.

"(2) However, **subsection (1)** does not apply if—

"(a) A has the authority of the copyright owner or the exclusive licensee to remove or modify the copyright management information; or

"(b) A does not know, and has no reason to believe, that the removal or modification will induce, enable, facilitate, or conceal an infringement of the copyright in the work.

"**226I Contravention of section 226G or (*section*) 226H**

A copyright owner or licensee of a work has the same rights in relation to a contravention of **section 226G or (*section*) 226H** as a copyright owner has in respect of an infringement of copyright.

"**226J Offence of dealing in work subject to CMI interference**

"(1) A person (**A**) who contravenes **section 226H** commits an offence if—

"(a) A knows that the copyright management information has been removed or modified without the authority of the copyright owner or licensee; and

"(b) A knows that dealing in the work will induce, enable, facilitate, or conceal an infringement of the copyright in the work.

"(2) A person who commits an offence under **subsection (1)** is liable on conviction on indictment to a fine not exceeding $150,000 or a term of imprisonment not exceeding 5 years or both."

90 Offence of fraudulently receiving programmes

Section 227(1) is amended by omitting "broadcasting service or cable programme service" and substituting "communication work".

91 Rights and remedies in respect of apparatus, etc, for unauthorised reception of transmissions

Section 228(1)(b) is amended by omitting "broadcasting service or cable programme service" and substituting "communication work".

92 Supplementary provisions as to fraudulent reception

(1) Section 229(2) is amended by omitting "broadcasting services or cable programme services" and substituting "communication works".

(2) Section 229(3) is amended by omitting "broadcasting service or cable programme service" and substituting "communication work".

93 Application to Convention countries

Section 230(1) is amended by repealing paragraph (d) and substituting the following paragraph:

"(d) apply in relation to communication works communicated from any Convention country as they apply in relation to communication works communicated from New Zealand,—".

94 Application of Act (other than Part 9) to other entities

Section 232(2) is amended by repealing paragraph (d) and substituting the following paragraph:

"(d) it applies to communication works communicated from any Convention country as it applies to communication works communicated from New Zealand."

95 Regulations

(1) Section 234(e) is amended by omitting "broadcasts or cable programmes" and substituting "communication works".

New (unanimous)

(2) Section 234 is amended by inserting the following paragraph after paragraph (e):

"(ea) prescribing the form of a notice of infringement for the purposes of **section 92C(2)(ba)(i)**:".

Legislative history

4 December 2006	Introduction (Bill 102–1)
12 December 2006	First reading and referral to Commerce Committee

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