

Copyright (New Technologies and Performers' Rights) Amendment Bill

Government Bill

Explanatory note

General policy statement

Copyright is a property right that exists in original works. The Copyright Act 1994 (the **Act**) gives copyright owners exclusive rights that allow them to control certain aspects of a work's exploitation, while at the same time providing limited exceptions to these rights for copyright users. In this way, the Act seeks to provide incentives to ensure the creation, production, and distribution of new creative works in a manner that meets society's needs. Given the rapid changes in digital technology since the Act came into force, the government undertook a review to assess the applicability, adequacy and operation of the Act in the face of this technological change and the development and adoption of new technologies.

Intellectual property has a major role to play in achieving an inclusive economy for the benefit of all New Zealanders and supporting research and development, while minimising regulatory barriers to innovation. Copyright is of central importance to the information and communication technology and creative industries, and to furthering growth and innovation in New Zealand. Digital technology presents significant opportunities to open new markets for creators, owners and users of copyright material, as well as potential risks. The Bill seeks to maintain the careful balance of objectives and interests reflected in the Act, and to clarify how the Act should apply in an increasingly digital world.

The issues involved are multi-faceted and potentially far-reaching, and the amendments are set in the context of a robust analytical

framework for copyright policy. The key principle that guides copyright reform in New Zealand is the enhancement of the public interest—copyright law must benefit New Zealand as a whole and contribute to overall growth and development. In determining what policy decisions are in the public interest, the government considered a number of aspects, including economic, legal, social and cultural objectives, and these are often overlapping.

The Bill amends the Act to clarify the application of existing rights and exceptions in the digital environment and to take account of international developments. It also seeks to create a more technology-neutral framework for the Act. It is not intended to change the balance between protection and access already established in the Act, but to ensure that the balance continues to operate in the face of new technologies.

The Bill gives effect to the Government's decisions to—

- provide a limited exception to the reproduction right for transient copying undertaken by computers or communication networks as a result of an automatic or inevitable technical process;
- amend existing rights to broadcast or include a work in a cable programme service in order to provide a technology-neutral right of communication to the public and extend copyright protection to a technology neutral category of communication works;
- repeal section 88 of the Act, which allows cable programme services to retransmit free-to-air television broadcasts without the permission of the broadcaster;
- limit the potential liability of Internet service providers for both primary and secondary infringement in appropriate circumstances;
- amend the provision relating to technological protection measures—
 - so that the prohibition against the making, importing, hiring, and selling of devices, services, or information designed to circumvent “copy protection” be expanded to cover devices, services, or information that circumvent technological protection measures that protect all rights provided to copyright owners (including communication, not just copying); and

- to facilitate the actual exercise of permitted acts where technological measures have been applied:
- introduce an offence (carrying a sentence of a fine not exceeding \$150,000 or a term of imprisonment of up to 5 years, or both) for commercial dealing in devices, services, or information designed to circumvent technological protection measures:
- provide protection for electronic rights management information that identifies content protected by copyright and the terms and conditions of use, but not for the tracking functions associated with this technology:
- introduce an offence provision (carrying a sentence of a fine not exceeding \$150,000 or a term of imprisonment of up to 5 years, or both) for commercial dealing in works where the electronic rights management information has been removed or altered:
- clarify and amend the exceptions to copyright owners' exclusive rights, particularly in relation to fair dealing, library, archival, and educational use, and time shifting:
- introduce new exceptions for format-shifting of sound recordings for private and domestic use, and for decompilation and error correction of software.

These amendments will be fully reviewed within 5 years of their enactment to ensure that they operate effectively and continue to be appropriate.

Reproduction

The Bill aims to address concerns regarding the scope of the definition of copying and its application to digital reproduction. In the interests of clarity and simplicity, the definition of copying is amended to clearly apply to digital copying of works in all forms.

Under the Act, liability for unauthorised copying can currently arise in relation to such transient or incidental copies that are a necessary part of the computer or communications processes, for example, when browsing websites on the Internet. This has implications for individual computer users as well as organisations like Internet service providers. The Bill, therefore, amends the Act to introduce a limited exception from infringement for such copying where the resulting copies have no independent economic significance.

Communication

It is clear that, in a digital world of almost instantaneous communication, the ability to control communication of copyright works is as significant as the ability to control copying. Control over communication is necessary to encourage investment in, and provision of, the efficient online distribution methods demanded by consumers. The Act provides copyright owners with technology-specific rights to broadcast a work or include a work in a cable programme service. While the definitions of these rights are relatively broad, it is not clear that they cover all aspects of communication and making available of works, particularly as technology continues to develop. The Bill, therefore, amends the Act by creating a technology-neutral right of communication to the public.

Consistent with the technology-neutral communication right, the Bill extends the protection currently afforded to signals that carry programme content in broadcasts and cable programmes to all "communication works".

The Bill also repeals section 88 of the Act, which allows a cable programme service to re-transmit free-to-air television broadcasts without the permission of the broadcaster, as the provision is no longer suitable to achieve the original policy objectives of encouraging competition and improving quality of television reception.

Internet service liability

Copying is a central function of the Internet and central to the services provided by Internet service providers (ISPs). Material may be reproduced at many stages during the course of a transmission and it may be virtually impossible to identify when and where many of these copies are made. Thus, where the material being copied is subject to copyright protection, an ISP may face potential liability for both primary and secondary infringement of copyright. There is a public interest in ensuring cost-effective access to the Internet, which may be affected by uncertain or increased liability for ISPs.

Consistent with changes in other countries, the Bill introduces a definition of ISP and a range of provisions that limit ISP liability for copyright infringement in specific circumstances. In terms of primary liability, the Bill provides that an ISP is not liable where it is merely providing the physical facilities to enable a communication to take place. With regard to secondary liability, the Bill limits liability in respect of caching and storing of infringing material

where the ISP does not know or have reason to believe that the material is infringing, and acts within a reasonable time to delete it or prevent access to it upon obtaining such knowledge.

These limitations of liability will not exclude the possibility of copyright owners obtaining injunctive relief in respect of ISPs.

Technological protection measures

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

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

The focus of section 226 will continue to be on the link between circumvention and copyright infringement, and on the making, sale, and hire of devices or information rather than on actual circumvention. While actual circumvention may not be prohibited, any unauthorised use of the material that is facilitated by circumvention will continue to be an infringement of copyright. Consumers should, however, be able to make use of materials under the permitted acts or view or execute a non-infringing copy of a work. This is consistent with New Zealand’s position on parallel importation of legitimate goods, for example, genuine DVDs, from other jurisdictions. New provisions are introduced to enable actual exercise of permitted acts where TPMs have been applied.

The offence provision introduced in the Bill for commercial dealing in circumvention devices, means and information is intended as an additional deterrent for such activity.

Copyright management information

The Bill introduces a new provision to protect against the intentional removal and alteration of copyright management information (CMI) and commercial dealing in copyright material where the dealer

knows that CMI has been removed or altered. For the purposes of the Bill, CMI refers to the information that identifies content protected by copyright and the terms and conditions of use. This information provides copyright owners with a crucial tool in identifying legitimate copies of work and identifying pirated copies and their source. It does not include those aspects of CMI that track the use of copyright material, given that this lies outside the scope of copyright protection and raises privacy issues. An offences provision is also introduced in relation to commercial dealing.

Permitted acts

The “permitted acts” or exceptions to the exclusive rights of copyright owners contained in the Act provide an important balance between protection and incentives for copyright owners and access for users. They were, however, developed primarily in the analogue and hard copy world. The Bill seeks to clarify how they should apply in the digital environment, starting from the premise that existing exceptions should apply to digital works unless there are cogent reasons to the contrary.

The current permitted acts do not cover all the uses of copyright material by users, including educational establishments, libraries, and archives. The incentives of a copyright regime would cease to operate effectively if the exceptions were so broad as to negate the rights granted. Instead, they are provided where activity is seen as having particular social value or in circumstances where enforcement of rights would be impractical and undesirable. New Zealand is also a party to a range of international intellectual property agreements, most notably the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, which place limits on the extent to which exceptions can be made to the exclusive rights.

In addition to updating existing permitted acts for fair dealing and for libraries, archives, and educational establishments, the Bill also introduces new exceptions for private copying of sound recordings in very specific circumstances and for limited decompilation and error correction of software.

Clause by clause analysis

Clause 1 sets out the title of the Bill.

Clause 2 provides that the Bill comes into force on a date to be appointed by the Governor-General by Order in Council. This is necessary to allow for regulations to be amended.

Parts 1 and 2

One of the purposes of the Bill is to update the terminology used in the Copyright Act 1994 in light of the widespread use of digital technology. In particular, the Bill strips the Act of all references to **broadcast** and **cable programme**, and versions of those terms, and substitutes **communication work** where those terms are used as nouns (“a broadcast”, “a cable programme”) and **communicate** or **communicate to the public** in the case of a verb (“to broadcast”). **Communication work** and **communicate** are now defined in section 2(1) (*clause 3*).

Many of the amendments to the Bill simply substitute **communication work** and **communicate** or their variants for outdated terminology, without any other substantive change. Often the relevant provisions have been rewritten, either because that is the easiest way of making the amendment, or because they can be more clearly expressed, or because this is a good opportunity to bring them up to date with current drafting practice. These provisions require no further comment and are found in the following clauses of the bill:

- *clause 4* (new section 3);
- *clause 5* (repeals section 4);
- *clause 6* (amends section 5(2));
- *clause 7* (new section 6(2));
- *clause 8* (amends section 10(4));
- *clause 9* (new section 12(5)(a));
- *clause 10* (amends section 14);
- *clause 11* (new section 16(1)(f));
- *clause 12* (new section 20);
- *clause 13* (new section 22(4));
- *clause 14* (new section 23(2));
- *clause 15* (new section 24);
- *clause 16* (amends section 32(2));
- *clause 17* (new section 33);
- *clause 19* (new section 37(2));
- *clause 20* (new section 41);

- *clause 21 (new section 42(2)):*
- *clause 26 (new section 45(1)):*
- *clause 27 (new section 47(2)):*
- *clause 28 (new section 48):*
- *clause 38 (amends section 58(2)):*
- *clause 39 (amends section 68):*
- *clause 40 (amends section 69(1)):*
- *clause 41 (new section 70(2)):*
- *clause 42 (amends section 73):*
- *clause 45 (new sections 82 to 84):*
- *clause 47 (repeals section 86):*
- *clause 46 (amends section 85):*
- *clause 48 (new sections 87 to 87B):*
- *clause 49 (repeals section 88):*
- *clause 50 (new section 89):*
- *clause 51 (new section 90(1)):*
- *clause 52 (amends section 91):*
- *clause 55 (amends section 94):*
- *clause 56 (amends section 95(1)(c)):*
- *clause 57(2) (new section 97(8)(b)):*
- *clause 58 (amends section 99):*
- *clause 59 (amends section 101):*
- *clause 60 (new section 102(4)):*
- *clause 61 (new section 103(4)):*
- *clause 62 (amends section 105):*
- *clause 63 (new sections 112 to 112B):*
- *clause 64 (amends section 128):*
- *clause 65 (amends section 131(4)):*
- *clause 67 (amends section 148):*
- *clause 68 (amends section 156):*
- *clause 69 (new section 163):*
- *clause 70 (amends section 164):*
- *clause 71 (amends section 165(2)):*
- *clause 72 (new section 166(1)):*
- *clause 73 (amends section 168(1)(e)):*
- *clause 74 (amends section 169):*
- *clause 75 (amends section 170(4)(a)):*
- *clause 76 (new section 171(1)(b)):*
- *clause 77 (new section 172):*
- *clause 78 (new section 175(1)):*
- *clause 80 (amends section 178):*

- *clause 81* (amends section 179);
- *clause 82* (amends section 184);
- *clause 83* (*new section 187*);
- *clause 84* (*new sections 188 to 188B*);
- *clause 85* (repeals section 189);
- *clause 86* (*new section 190*);
- *clause 87* (*new section 191*);
- *clause 88* (*new section 198(2)(b)*);
- *clause 90* (amends section 227(1));
- *clause 91* (amends section 228(1)(b));
- *clause 92* (amends section 229);
- *clause 93* (*new section 230(1)(d)*);
- *clause 94* (*new section 232(2)(d)*);
- *clause 95* (amends section 234(c)).

There are a number of other clauses that effect minor “housekeeping” changes:

- *clause 18(1)* replaces “or” with “and” in section 35(1)(c), so that the provision refers to importation into New Zealand other than for “private and domestic use”, which is the phrase used in section 35(3)(d) and in other provisions in the Act;
- *clause 18(2)* replaces “this Act” in section 35(5) with a reference to the Copyright (Parallel Importation of Films and Onus of Proof) Amendment Act 2003;
- *clause 54* updates section 93(2) so that it includes references to some of the new provisions introduced by the Bill, and *clause 57(1)* performs the same function for section 93(3);
- *clause 66* updates a reference to the Companies Act 1993.

That leaves the following clauses or groups of clauses that do make significant changes to the Act arising from the advent of digital technology. They are:

- *clauses 22, 23, and 79* (*new sections 43(4), 43A, and 175A* relating to transient reproductions);
- *clause 24* (*new sections 44(4A) and (4B)*), which relate to copying for educational purposes;
- *clause 25* (*new section 44A*), which relates to storing for educational purposes);
- *clauses 29 to 37* (introducing changes relating to digital copies);
- *clause 43* (*new sections 80A to 80C*, which relate to computer programs);

- *clause 44 (new section 81A*, which relates to copying sound recordings for private and domestic use):
- *clause 53 (new sections 92A to 92D*, which relate to Internet service provider liability):
- *clause 89 (new sections 226 to 226J*, which relate to technological protection measures and copyright management information).

These are discussed in turn.

Clauses 22, 23, and 79—transient reproductions

New section 43A (clause 23) provides that a transient reproduction of a work does not infringe copyright in the work, if the conditions in section 43A are met. There is a consequential amendment (*clause 22*) to section 43, which allows fair dealing with a work for research or private study, but in subsection 43(4) excludes the making of more than 1 copy on any 1 occasion—subsection (4) now makes it clear that copy in this context does not include a transient reproduction. A corresponding exemption from infringement of copyright for a transient reproduction of a recording of a work is introduced in *new section 175A (clause 79)*.

Clause 24—copying for educational purposes, etc

New section 44(4A) (clause 24) allows a digital copy that has been made under section 44(3) or section 44(4) to be supplied to an authenticated user (defined in *new section 44(4B)*).

Clause 25—storing for educational purposes

New section 44A (clause 25) permits an educational establishment, subject to conditions, to store a work that is made available on a website or other electronic retrieval system.

Clauses 29 to 37—changes relating to digital copies

Clause 36 inserts *new sections 56A to 56C* and *clause 37* inserts *new section 57A*—these are the key provisions in this group of amendments. Collectively they—

- regulate access to users of a digital copy of a work acquired by a prescribed library or archive (*new section 56A*):

- impose additional conditions on the supply by a librarian of a prescribed library, or archivist of an archive, of a copy of a work in digital format (*new section 56B*):
- impose additional conditions on making digital copies by a librarian of a prescribed library (*new section 56C*):
- require that the declaration that is made by the librarian of a prescribed library, or an archivist of the archive, in compliance with those conditions must be retained and made available (*new section 57C*).

Clause 43—computer programs

Clause 43 inserts *new sections 80A to 80C*. Section 80A provides for decompilation by the lawful user of a copy of a computer program expressed in a low level language without infringement of copyright in the program. However, this is subject to conditions in section 80A(2). Section 80B provides that the lawful user of a computer program may copy or adapt it without infringement of copyright in the program, if the conditions in section 80B(1)(a) and (b) apply. Section 80C provides that a contractual term or condition has no effect to the extent that it prohibits or restricts decompilation under the conditions set out in section 80A or section 80B, or prohibits or restricts the use of any device or means to analyse the program.

Clause 44—copying sound recording for private and domestic use

New section 81A (clause 44) allows copying of a sound recording, subject to a number of conditions. If those conditions are satisfied, the copying of the sound recording does not infringe copyright in the sound recording or in a literary or musical work contained in it. The conditions are set out in *new section 81A(1)(a) to (g)* and include the conditions that the copy is made by the owner of the sound recording, that it is made for that person's private and domestic use, and that 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. There is a sunset clause attached to *new section 81A(1)*—under *new section 81A(3)* it expires after 2 years after the date on which it comes into force, unless renewed by the Governor-General by Order in Council.

Clause 53—Internet service provider liability

New sections 92A to 92D (clause 53) address the issue of the liability of an Internet service provider (the **ISP**) for infringement of copyright in 3 circumstances. First, an ISP does not infringe copyright in work merely because a user of the ISP's services used those services in infringing copyright in that work (*new section 92B*). Secondly, an ISP does not infringe copyright in a work by storing material without modification unless the ISP knows or has reason to believe that the material infringes the copyright and does not block the material, ie, delete it or prevent access to it (*new section 92C*). Thirdly, *new section 92D* gives an ISP a limited exemption from infringement of copyright through caching material (caching, defined in *new section 92D(4)*, is a form of storage but is automatic and temporary). The exemption is subject to conditions, for example, the exemption doesn't apply if the ISP modifies the material, and the exemption is lost if the ISP does not block the material after becoming aware that the material has been blocked or ordered by a court to be blocked at source. Finally, to qualify for the limitations on liability in *new sections 92B to 92D* an Internet service provider must have adopted and reasonably implemented a policy that provides for the termination of the accounts of repeat infringers.

Clause 89—technological protection measures and copyright management information

Clause 89 introduces *new sections 226 to 226J*. These provisions divide into two sub-groups—those that relate to technological protection measures (**TPMs**) and those that relate to copyright management information (**CMI**).

The TPM provisions (*new sections 226 to 226E*) are designed to reinforce the effectiveness of TPMs. Broadly speaking, a TPM is a technology (for example, a device embedded in a DVD) to foil copyright infringement. What the TPM provisions do is twofold. Broadly, they prohibit and criminalise, ie,—

- prohibit commercial conduct that undermines a TPM by putting a TPM spoiling device into circulation or providing a service, including publishing information, in relation to overriding the TPM. Contravention has civil consequences—specifically, the issuer of work protected by a TPM is protected as if the conduct was an infringement of copyright;
- make prohibited conduct a criminal offence.

There is a knowledge element for both prohibition and offence, ie, the knowledge of the use to which the TPM spoiling device or the service or published information will, or is likely to, be put. There are, however, some limits on prohibition where the TPM spoiling device has a legitimate use.

The CMI provisions follow the same pattern. Subject to exceptions, they prohibit interference with CMI attached to, or embodied in, a copy of a work, and prohibit commercial dealing in a copy of a work if the work's CMI has been removed or modified without authority. Contravention of the prohibition provisions is an offence, and there is a knowledge element for prohibited conduct and the offences.

Regulatory impact statement

Digital copyright review

Nature and magnitude of the problem and the need for Government action

The Copyright Act 1994 (the Act) was drafted before the widespread uptake of digital technology. Digital technology has enabled copyright works to be created, protected, and distributed in new ways. It has also allowed increased avenues for infringement.

With the development of digital technology, 3 problems arise:

- there is increased risk of the production and distribution of high quality infringing copies of copyright works:
- there is a significant degree of uncertainty regarding the application of provisions of the Act to digital works:
- the Act is not consistent in all areas with our major trading partners and with emerging international standards.

It is difficult to quantify objectively the economic losses that arise from these problems. For copyright infringement, industry figures suggest significant annual losses (music industry: US\$4.3 billion worldwide, NZ\$114 million in New Zealand; computer industry: US\$11 billion worldwide; motion picture industry: US\$3 billion for the US, US\$4 million for New Zealand). With regard to uncertainty of the legislation, parties incur costs, for example, through obtaining legal advice. More general losses are suffered by the community as a whole if the incentives do not exist to create and distribute copyright works using new technologies.

Public policy objective(s)

The objective of copyright policy is to provide incentives for the creation and dissemination of, and investment in, creative works to meet society's needs and encourage further innovation. Copyright also aims to minimise costs to society by providing users with certain exceptions to copyright owner rights. These objectives are consistent with the Government's Growth and Innovation Framework, particularly in relation to the creative industries and the information and communication technology sector.

Feasible options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s)*Status quo*

Copyright is regulated by the Act. Copyright subsists in original works, for example, literary, dramatic, musical and artistic works, films, and sound recordings. Copyright also protects the signals that carry content in broadcasts and cable programmes. Thus, there may be copyright in a film and a separate copyright in the signal that carries that film when it is broadcast on television.

Copyright owners have a range of exclusive rights in respect of their works, in particular, copying and issuing copies to the public. Transient copying (ie, automatic and inevitable copying that takes place during the operation of computer or communication networks) potentially gives rise to liability for copyright infringement. Internet service providers could also potentially be liable for storing or transmitting copyright material on behalf of third parties. Copyright owners also have an exclusive right to broadcast their works or include them in a cable programme service. An exception exists for cable programme services to retransmit free-to-air television broadcasts without the permission of the broadcaster.

In the electronic environment, it is prohibited to supply or manufacture devices or means, or to supply information, specifically designed to circumvent "copy protection" mechanisms (ie, technological mechanisms applied to a digital work that prevent copying of the work) intended to be used to make infringing copies of copyright works. Civil penalties only apply to infringement of this provision.

In addition to the rights provided to copyright owners, there is also a series of exceptions for users, allowing them to use copyright

material in certain limited circumstances; for example, news reporting, research and private study, and copying by libraries and educational institutions.

Preferred option

The preferred option clarifies, and in some cases extends, existing regulation under the Act in the following ways:

- provides an exception for transient copying in certain circumstances;
- replaces copyright owner's existing technology-specific rights to control distribution via broadcasting and cable programme services with a technology-neutral right applying to all forms of communication of copyright works to the public;
- provides copyright protection for all communication works (for example, transmission via the Internet), not just the signals that carry content in broadcasts and cable programmes;
- repeals the exemption for cable programme services to retransmit free-to-air broadcasts without the permission of the broadcaster;
- limits liability for Internet service providers for both primary and secondary infringement in appropriate circumstances, including to allow caching (ie, storage of Internet documents on the service provider's servers to be retrieved at a later time);
- prohibits the supply or manufacture of devices, means, or information that circumvent technological protection mechanisms, where circumvention could enable infringement of any of the copyright owner's exclusive rights (eg, technological devices on music CDs that prevent the content from being copied), and provides criminal penalties for large scale commercial dealing in circumvention devices, means, or information;
- introduces protections for electronic rights management information (**ERMI**) that identifies content protected by copyright and the terms and conditions of use, and providing criminal penalties for large scale commercial dealing in copyright material where the dealer knows that ERMI has been removed or altered;
- clarifies the extent to which digital material can be made available by libraries and archives, clarifies the extent of

educational use and time-shifting, and introduces exceptions for format shifting, decompilation and error correction.

Net benefit of the proposal, including the total regulatory costs (administrative, compliance and economic costs) and benefits (including non-quantifiable benefits) of the proposal

Copyright owners

Clear and transparent copyright law in the digital environment reduces the need for legal advice or time consuming, costly litigation. It also potentially reduces rates of piracy as a result of clear guidance as to what constitutes infringement. Increased certainty is created by New Zealand's law being more in line with our major trading partners.

There are increased incentives for investment in creative industries, information communication technology development and new business models for delivery of copyright works (such as on-demand services).

Users of copyright material

Certainty in how the exceptions in the Act apply to digital works allows users (in particular, libraries and educational institutions) to make use of digital technology with confidence. Where breach of copyright occurs, however, the clarity provided by the amended legislation may lead to an increased risk of liability for users of copyright works.

Increased certainty also encourages continued supply of copyright works and means of distribution (by Internet service providers, for example) within New Zealand and from overseas, setting conditions to encourage continued access to information and innovations necessary for cumulative innovation.

Where uncertainties in the application of the exceptions provided in the Act are clarified, it may be, for example, that some libraries and educational establishments will be prevented from making particular uses of copyright material without a licence from the copyright owner. This involves both financial and administrative costs. However, as libraries and educational institutions are already significant users of copyright licenses, many of these uses may already be covered by the licensing arrangements.

The Government

Substantive compliance with new international standards and practices are also bringing New Zealand's copyright law more closely in line with its trading partners.

The proposed offence provisions may place small additional demands on already stretched police resources. It is possible, however, for copyright owners to bring private prosecutions.

Consultation undertaken

All stakeholders (including copyright owners, creators, individual users, libraries, educational establishments, the information technology sector, Internet service providers, broadcasters, academics, legal practitioners and government agencies) from both New Zealand and overseas have had a number of opportunities to contribute to the development of policy advice during a thorough consultation process.

The following government agencies were consulted: Treasury, Ministry for Culture and Heritage, Te Puni Kōkiri, Ministry of Justice, Ministry of Foreign Affairs and Trade, Ministry of Education, the National Library, Archives New Zealand, New Zealand Customs Service, New Zealand Police, and the Department of the Prime Minister and Cabinet. No concerns were raised with the preferred option.

Hon Judith Tizard

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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. 5
- (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. 10

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**. 15
- (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
- “**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 5
- “**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 10
- “**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** 15
- “**TPM spoiler** has the meaning given to it in **section 226**
- “**TPM spoiling 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: 20
- “(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” 25
- (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;—” 30
- (5) Section 2(1) is amended by repealing paragraphs (c) to (e) of the definition of **material time** and substituting the following paragraphs: 35
- “(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”. 5
- 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— 10
- “(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 15
- “(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,— 20
- “(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.” 25
- 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: 30
- “(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.” 5
- 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”. 10
- (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: 15
“(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: 20
“(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: 25
“(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: 30
“(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** 5
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— 10
“(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: 15
- “(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,— 20
 “(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: 25
 “(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— 30
“(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,— 35
 “(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. 5
- “(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.” 10
- 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”. 15
- 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.” 20
- 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”. 25
- 19 Providing means for making infringing copies**
Section 37 is amended by repealing subsection (2) and substituting the following subsection: 30
- “(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.” 35

- 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 5
 - “(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 10
 - “(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.” 15
- 21 Criticism, review, and news reporting** 20
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.” 25
- 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.” 30

- 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— 5
- “(a) is transient or incidental; and
 - “(b) is a necessary 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 10
 - “(c) has no independent economic significance.”
- 24 Copying for educational purposes of literary, dramatic, musical, or artistic works or typographical arrangements** 15
Section 44 is amended by inserting the following subsections after subsection (4):
- “(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.” 20
- 25 New section 44A inserted**
The following section is inserted after section 44:
- “44A Storing for educational purposes** 25
- “(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 the page or pages in which the work appears if—
- “(a) the material is stored for an educational purpose; and 30
 - “(b) the material—
 - “(i) is displayed under a separate frame or identifier; and
 - “(ii) identifies the author and source of the work; and
 - “(iii) states the name of the educational establishment and the date on which the work was stored; and 35
 - “(iv) identifies the course of instruction for which the material is stored; and

- “(c) the material is restricted to use by authenticated users;
and
“(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. 5
- “(2) **Subsection (1)** does not apply, and the educational establish-
ment 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. 10
- “(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 verifica- 15
tion 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 substi- 20
tuting 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 sub- 25
section (2).”
- 27 Performing, playing, or showing work in course of
activities of educational establishment**
Section 47 is amended by repealing subsection (2) and substi- 30
tuting 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 pur- 35
poses of section 32(2).”

28 New section 48 substituted

Section 48 is repealed and the following section substituted:

“48 Educational establishment may record communication work

“(1) A recording 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 is made or communicated for the establishment’s educational purposes. 5 10

“(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 of the communication work by or on behalf of educational establishments are available under a licensing scheme; and 15

“(ii) the establishment knew that fact; or

“(b) the communication of a recording of a communication work or a copy of a recording if or to the extent that— 20

“(i) licences authorising the communication of the recording or a copy of that recording by or on behalf of educational establishments are available under a licensing scheme; and 25

“(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

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** 5
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** 10
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. 15
(2) Section 55 is amended by adding the following subsection:
“(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— 20
“(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; and 25
“(d) it is not reasonably practicable to purchase a copy of the original item.”
- 35 Copying by librarians or archivists of certain unpublished works** 30
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:

“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.

“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:

- “(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 5
- “(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. 10

“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: 15

- “(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 20
- “(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.” 25

37 New section 57A inserted

The following section is inserted after section 57:

“57A Retention and inspection of declaration 30

- “(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. 35

- “(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— 5
- “(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 10
- “(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 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.” 15
- 38 Copying by Parliamentary Library for members of Parliament** 20
- 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** 25
- (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”. 30
- 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: 35

- “(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.” 5
- 42 Representation of certain artistic works on public display**
- (1) Section 73(2) is amended by repealing paragraph (c) and substituting the following paragraph: 10
“(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.” 15
- 43 New sections 80A to 80C inserted**
The following sections are inserted after section 80: 20
- “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. 25
- “(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 30
“(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 35

- “(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 5
- “(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 10
- “(e) the lawful user uses the information obtained from decompiling the computer program to do any act that is restricted by copyright. 15
- “(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 20
- “**high level language** means a machine-independent computer programming language
- “**low level language** means a computer programming language in electronic machine-readable form. 25
- “**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 30
- “(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. 35
- “(2) This section does not apply to copying or adapting that is permitted under **section 80A** or **section 80C**.

“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 5
- “(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.” 10

44 New section 81A inserted

The following section is inserted after section 81:

“81A Copying sound recording for private and domestic 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: 15
 - “(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; 20
 - and
 - “(d) the owner acquired the sound recording legitimately; and
 - “(e) the copy is used only for that owner’s private and domestic use; and 25
 - “(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 any copy that is made under this section. 30
- “(2) **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.
- “(3) This section expires after 2 years after the date on which it came into force, but— 35
 - “(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: 5

“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. 10

“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. 20

“(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. 25

“(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. 30

“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— 35

- “(a) makes the recording solely for A’s private and domestic use; and
- “(b) makes the recording solely for the purpose of viewing or listening to the recording at a more convenient time; and 5
- “(c) is not able lawfully to access the communication work on demand; and
- “(d) 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— 10
- “(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 15
- “(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. 20
- “(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. 25

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.” 30

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**”. 35
- (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 5
 - “(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”. 10
- 47 Section 86 repealed**
Section 86 is repealed. 15
- 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) does not infringe any copyright in— 20
- “(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— 25
- “(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 30
 - “(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 35
 - “(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. 5
- “(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): 10
- “(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. 15
- “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 20
- “(b) is not a satellite transmission or an encrypted transmission; and
- “(c) is shown or played simultaneously upon reception of the communication work. 25
- “(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. 30
- “(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 35
- “(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. 5
- “(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): 10
- “(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. 15
- “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.” 20
- 49 Section 88 repealed**
- Section 88 is repealed. 25
- 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. 30 35

- “(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: 5
- “(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; 10
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** 15
- (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. 20
- “(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)”. 25
- (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** 30
- The following heading and sections are inserted after section 92:
- “Internet service provider liability*
- “92A Limitations on liability in sections 92B to 92D apply only to qualifying Internet service provider** 35
- 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** 5
- “(1) This section applies if a person (A) infringes the copyright in a work by using the services of an Internet service provider.
- “(2) Merely because A uses the services of the Internet service provider in infringing the copyright, the Internet service provider, without more,— 10
- “(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. 15
- “(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.
- “92C Internet service provider liability for storing infringing material** 20
- “(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.
- “(2) The Internet service provider does not infringe copyright in the work by storing the material unless— 25
- “(a) the Internet service provider—
- “(i) knows or has reason to believe that the material infringes copyright in the work; and
- “(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 30
- “(b) the user of the service is acting under the authority and control of the Internet service provider. 35
- “(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.
- “92D Internet service provider does not infringe copyright by caching infringing material** 5
- “(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 10
 - “(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. 15
- “(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— 20
- “(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. 25
- “(3) Nothing in this section limits the right of the copyright owner to injunctive relief against the Internet service provider.
- “(4) In this section,—
- “**cache** means the storage of material by an Internet service provider that is— 30
 - “(a) automatic; 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 35
- “**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): 5
 - “(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): 10
 - “(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): 15
 - “(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): 20
 - “(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): 25
 - “(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): 30
 - “(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): 35
 - “(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): 40

- “(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): 5
- “(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”. 10
- (2) Section 94(6)(b) is amended by omitting “broadcast or included in a cable programme” and substituting “communicated to the public”. 15
- (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** 20
- 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: 25
- “(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): 30
- “(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): 35

- “(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): 5
- “(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: 10
- “(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.” 15
- 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”. 20
- (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”. 25
- (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”. 30
- 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,— 35
- “(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—”. 5
- (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— 10
- “(a) makes a deletion or any deletions from the film that is or are reasonably required to enable A to— 15
- “(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.” 20
- 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— 25
- “(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.” 30
- 61 False representation as to literary, dramatic, or musical work**
Section 103 is amended by repealing subsection (4) and substituting the following subsection: 35

- “(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.” 5
- 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”. 10
- 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”** 15
- “(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. 20
- “(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 25
“(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 30
“(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, 35

- 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** 20
- (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”.
- 65 Criminal liability for making or dealing with infringing objects** 30
- 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: 35

- “(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: 5
- “(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”. 10
- (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);—”. 15
- 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”. 20
- 69 New section 163 substituted**
- The principal Act is amended by repealing section 163 and substituting the following section: 25
- “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— 30
- “(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. 35

- “(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.” 5
- 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”. 10
- 71 Licences to reflect payments in respect of underlying rights**
- Section 165(2) is amended by— 15
- (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** 20
- 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**).” 25
- 73 Determination of equitable remuneration** 30
- Section 168(1)(c) 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”. 5
- (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”. 10
- 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** 15
- 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** 20
- Section 172 is repealed and the following section substituted:
- “172 Infringement by use of illicit recording**
- 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 25
- “(b) the recording is illicit; and
- “(c) A knows or has reason to believe that the recording is illicit.” 30
- 78 Incidental copying 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 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 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.”

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—
- 5 “(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
- 10 “(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:
- 15 **“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.
- 20 “(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.
- 30 “(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
- 35 “(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) 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 5
 - “(b) is not a satellite transmission or an encrypted transmission; and
 - “(c) is played or shown simultaneously upon reception of the communication work. 10
- “(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 15
 - “(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 20
 - “(b) goods or services are supplied at the venue or a place of which it forms part at prices that— 25
 - “(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. 30
- “(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: 35
 - “(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. 40

- “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.” 5
- 85 Section 189 repealed**
Section 189 is repealed.
- 86 New section 190 substituted** 10
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. 15
- “(2) A body must not be prescribed for the purposes of **subsection (1)** if it is established or conducted for profit.” 20
- 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— 25
- “(a) the communication work falls within a prescribed class; and 30
- “(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.” 35

- 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.” 5
- 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” 10
- “226 Definitions of TPM terms**
In **sections 226A to 226E**, unless the context otherwise requires,—
 “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 15
 “TPM spoiler means a person who contravenes **section 226A**
 “TPM spoiling device means a device or means that— 20
 “(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 25
 “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, let for hire, offer or expose for sale or hire, or advertise for sale or hire, a TPM spoiling 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. 30
“(2) A person (**A**) must not provide a service, including the publication of information, if— 35

- “(a) the service or the information is intended to enable or assist persons 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 work that is protected by a technological protection measure. 5
- “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. 10
- “(2) The issuer of the TPM work has the same rights against a TPM spoiler 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 device as a copyright owner has in relation to an infringing copy. 15
- “(4) Sections 126 to 129 (which relate to certain presumptions) apply in relation to proceedings under this section. 20
- “(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** 25
- “(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 30
- “(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. 35

“(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.

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

“(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. 5

“(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 device to enable a qualified person to— 10

- “(a) exercise a permitted act; or
- “(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— 15

- “(a) a prescribed library; or
- “(b) a prescribed archive; or
- “(c) an educational establishment.

“(4) A qualified person must not be supplied with a TPM spoiling device on behalf of a user unless the qualified person has first made a declaration to the supplier in the prescribed form. 20

“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— 25

- “(a) apply to the copyright owner or the exclusive licensee for assistance enabling the user to exercise the permitted act; 30
- “(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. 35

*“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.

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“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.

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“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.

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“(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.

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- “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. 5
- “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 10
“(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.” 15
- 90 Offence of fraudulently receiving programmes**
Section 227(1) is amended by omitting “broadcasting service or cable programme service” and substituting “communication work”. 20
- 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”. 25
- 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”. 30
(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,—”. 5
- 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: 10
“(d) it applies to communication works communicated from any Convention country as it applies to communication works communicated from New Zealand.”
- 95 Regulations**
Section 234(e) is amended by omitting “broadcasts or cable programmes” and substituting “communication works”. 15

