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COPYRIGHT AND ITS DIGITAL CHALLENGE

A COMPARISON OF NEW ZEALAND AND GERMAN COPYRIGHT LAW

Dr. Daniel Gutman

A thesis submitted for the degree of

Master of Laws

at the University of Otago, Dunedin

New Zealand

17 October 2006
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<td>§</td>
<td>Symbol for “section” in statutes, especially used in Germany and Austria</td>
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<td>AC</td>
<td>Appeal Cases</td>
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<tr>
<td>ACWSJ</td>
<td>All Canada Weekly Summaries &amp; Judgments</td>
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<td>All England Law Reports</td>
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<td>ANZC&amp;L</td>
<td>Journal for the Australian and New Zealand Societies for Computers and the Law</td>
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<td>ALR</td>
<td>Australian Law Reports</td>
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<td>AIPJ</td>
<td>Australian Intellectual Property Journal</td>
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<tr>
<td>BGer</td>
<td>Swiss Federal Court (<em>Schweizerisches Bundesgericht</em>)</td>
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<td>BGH</td>
<td>German Federal Court of Justice (<em>Bundesgerichtshof</em>)</td>
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<td>BVerfG</td>
<td>German Federal Constitutional Court (<em>Bundesverfassungsgericht</em>)</td>
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<td>CA</td>
<td>Court of Appeal (New Zealand)</td>
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<td>Ch</td>
<td>Chancery Division of the High Court of Justice (UK)</td>
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<td>CDPA</td>
<td>UK Copyright Designs and Patent Act</td>
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<td>C&amp;L</td>
<td>Computers &amp; Law</td>
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<tr>
<td>Copyright Act</td>
<td>New Zealand Copyright Act 1994</td>
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<tr>
<td>CR</td>
<td>German journal for computer and law (<em>Computer und Recht</em>)</td>
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<tr>
<td>DC</td>
<td>District Court (Australian)</td>
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<td>DMCA</td>
<td>US Digital Millennium Copyright Act of 1998</td>
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<tr>
<td>DRM</td>
<td>digital right management system</td>
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<tr>
<td>DSL</td>
<td><em>Digital Subscriber Line</em> (broadband Internet connection)</td>
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<td>EC</td>
<td>European Court of Justice</td>
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<td>ECDR</td>
<td>European Copyright and Design Reports</td>
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<td>European Court of Human Rights</td>
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<td>EMLR</td>
<td>Entertainment and Media Law Reports</td>
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<td>Entertainment Law Review</td>
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<td>EU</td>
<td>European Union</td>
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<td>FCA</td>
<td>Federal Court of Australia</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<td>FCAFC</td>
<td>Federal Court of Australia Full Court</td>
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<td>Fleet Street Reports</td>
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<td>HL</td>
<td>House of Lords</td>
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<td>International Review of Law Computers &amp; Technology</td>
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<td>IPQ</td>
<td>Intellectual Property Quarterly</td>
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<tr>
<td>ISP</td>
<td>Internet Service Provider</td>
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<td>JLIS</td>
<td>Journal of Law and Information Science</td>
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<td>K&amp;R</td>
<td>German journal for communication and law (<em>Kommunikation &amp; Recht</em>)</td>
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<td>Law Journal Reports, Privy Council</td>
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<td>NJW</td>
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<td>NZLR</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<tr>
<td>OGH</td>
<td>Austrian Federal Court of Justice (<em>Oberster Gerichtshof</em>)</td>
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<td>OH</td>
<td>Outer House (Scottish Court of Session)</td>
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<td>Abbreviation</td>
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<td>OJ</td>
<td>Official Journal of the European Communities (the subsequent “L” in “OJ L” stands for journal issues regarding legislation, contrary to “C” in “OJ C” which stands for issues containing “information and notices”)</td>
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<td>OLG</td>
<td>Appellate Court of the respective German court district (Oberlandesgericht)</td>
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<td>technological protection measure</td>
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<td>UMTS</td>
<td>Universal Mobile Telecommunications System</td>
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<td>German term (pronounced ’oor-hey-ber-resht’), describing the German system of copyright law – since Urheberrecht and copyright is not absolutely the same and for drawing a distinction between the two legal systems compared in this thesis, this German expression is subsequently used for German copyright</td>
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<td>WIPO</td>
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1. **Initial Position**

1.1 **Introduction**

DVD\(^1\), DSL\(^2\), DRM\(^3\) – no doubt, we have approached the Digital Age. The transmission of enormous amounts of data in seconds and the access to information at any time and from any place, provide an outstanding new opportunity of knowledge availability throughout the world. However, while this development offers new opportunities for consumers and users as well as for authors and publishers,\(^4\) it also attracts new risks, problems, concerns and legal uncertainty, particularly with regard to copyright:

A large proportion of the content on the Internet is copyright protected – texts, pictures, films, music. According to the estimation of Hobbes’ Internet Timeline\(^5\), in June 2005, the Internet contained more than 70 Mio websites (with each consisting of a number of webpages). Furthermore, according to the University of California’s (Berkeley) IT project “How much information?”,\(^6\) in summer 2003, the volume of information on the Internet measured 167 terabyte (= 183,618,441,838,592 byte) where 23% of the webpages included images, 4% contained movies or animations, and about 20% contained Javascript computer code – all potential copyright works.

Additionally, many activities that are common in the context of the everyday usage of the Internet and digital devices are still unclear from a legal point of view. Many legal systems have already amended their copyright law concerning digital aspects, and some countries, such as New Zealand, are still in the process of doing so.

For the copyright industry, for instance music companies, the Internet provides worldwide, rapid and almost costless distribution to a broader consumer market.\(^7\) In 2004, the digital music market was worth $ 330 million, which is approximately 1.5

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\(^1\) Digital Versatile Disk.

\(^2\) Digital Subscriber Line.

\(^3\) Digital Right Management.

\(^4\) Apple’s online music store iTunes sold 800,000 songs in its first weeks, see Cook, *Anti-circumvention: What protects the content protectors*, (2005) 15 C&L, 26, 26.


percent of the worldwide record company revenues. On the other hand, authors and publishers fear a lack of control. Hence, for understandable reasons, the copyright industry wants to control the extent of use of these works. For example, the music industry is concerned to ensure that a piece of music is downloaded only for remuneration from digital on-line-shops like “iTunes” and not free of charge from peer-to-peer-networks like “kazaa”. Likewise, an online news magazine can only be profitable if its articles are not freely available with unlimited usability. Therefore, the copyright industry has worked at a great pace to develop technological protection systems to control the use of copyright works. These are called “Technological Protection Measures” (TPM). TPMs provide the basis for “Digital Right Management Systems” (DRM) which enable rightholders to manage the rights and usages in a more sophisticated manner. However, TPMs and DRMs do not provide an absolute protection. They can be circumvented. Therefore, the copyright industry seeks additional legislative support for TPMs to help fight piracy, which has become a substantial economic problem for copyright owners.

However, users have a justified interest in using copyright works for a wide range of purposes such as private and domestic use or study. Furthermore, it is a basic goal of copyright not only to protect the interest of the authors but also to provide wide public access to and usability of information and works. A printed newspaper article can easily be cut or photocopied and passed to family members or friends, but this is not possible if an article from an on-line magazine is technologically protected.

Therefore, the legal system and in particular the copyright statutes have to consider the interests of authors and the interests of users as well as the rapid technological development to ensure a balanced legal position and a high standard of legal certainty. This requires effective protection for authors against piracy as well as the securing of the justified interests of users in respect of knowledge availability. It is essential to avoid a situation where the technological computer “code” dominates the statutory “code” resulting in a technological "copyright law" which overrides the democratically legitimzed copyright legislation with its various permitted use exceptions.

Due to globalization, such problems are no longer local but universal. The European Union member Germany has to master the same legal challenges as are

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encountered about 23,500 flight kilometres away, in the remote but nevertheless economically and culturally highly developed Pacific state of New Zealand.

For this reason, the copyright law offers not only an interesting comparison of the worldwide current legal developments, but also an outstanding opportunity for the comparison of the legal systems in principle. Here the question arises, which method is superior if at all: the harmonized and centralized legislation of the strongly bureaucratic European Community with its population of 453 million, or the individual legislation of a state with only 4 million inhabitants. It is the joint experience of 25 countries and the manpower of thousands of magistrates in the European Commission versus the lithe and lissom legislation of New Zealand. What leads to a better response to present challenges? Which judicial system is able to accommodate the technical developments effectively and fast?

1.2 APPROACH AND EMPHASES OF THIS THESIS

This thesis focuses on a comparison of New Zealand and German copyright law. Nevertheless, in respective contexts, reference is made to particular aspects of foreign law. This is due to the common approach taken by New Zealand and other Commonwealth countries where similar provisions and comparable case law are seen as influential in other jurisdictions. However, this practice is not followed in Germany, where one could hardly find a case that refers to foreign case law (except the European Court of Justice). The reason behind this different approach might be that, firstly, Germany (with a population of more than 82 million) has a sufficient amount of national case law and academic writing – contrary to the smaller number of law publications in New Zealand (with around 4 million citizens). Secondly, Germany has a language that is common only with Austria and parts of Switzerland – contrary to hundreds of million of English speaking people throughout the world. Finally, the German law does not have the same legal roots in common with other states – unlike New Zealand, Australia, Canada, the United States and the United Kingdom. Since Australian and New Zealand copyright law has a common origin in English law and since both countries’ legislation still has much in common, the Australian approach can often be considered as a starting point. The law of the United States of America and of Canada sometimes provides interesting aspects, too. Similarly, in the context of German law, other European countries’ legal systems as well as EU directives are
considered. The current law of the United Kingdom lies somewhere between New Zealand law (due to the history) and German law (due to the EU directives).

The first part (chapter 2) of the thesis provides an introduction to New Zealand copyright and German copyright (“Urheberrecht”). The history and the fundamentals should give the reader a brief overview of and an insight into both legal systems. Since it is unlikely that readers are professionals in both legal systems, this introduction might be helpful for understanding the subsequent analyses.

Chapter 3 surveys selected aspects of copyright and its digital challenge. In particular, common internet activities like creating and hosting a website, browsing on the internet, hyper-linking and data transmissions by internet service providers are analysed from a legal point of view. For better understanding, every chapter includes a short explanation of the respective technical process.

Chapter 4 gives an overview of typical digital copyright infringements, known as “piracy”, provides statistical figures regarding the extent of piracy, and analyses the consequences.

Chapter 5 deals with copyright protection measures. Present technological protection measures are described, and the legal support for technological protection measures is reviewed.

The fifth part of this thesis (chapter 6) focuses on the balance between technological protection measures and permitted uses. As already mentioned in the introduction, technological protection measures have an extensive factual impact on legally permitted uses. This chapter surveys and discusses solutions to control, restore and ensure a fair balance between technological protection measures and permitted uses.

The last part (chapter 7) evaluates the legislative systems of both countries with regard to copyright law and provides a brief summary.
2. **OVERVIEW OF NEW ZEALAND AND GERMAN COPYRIGHT**

> "Whenever a copyright law is to be made or altered, then the idiots assemble."[^9]

2.1 **INTRODUCTION TO COMMON LAW SYSTEM AND CIVIL LAW SYSTEM**

Since New Zealand is part of the Commonwealth, most present laws are based on and continue to be influenced by United Kingdom law. Furthermore, New Zealand adopted United Kingdom’s case law system, also described as the common law system.

In a case law system, the law consists of statute law enacted by the legislature and judge-made law embodied in reports of decided cases. Both form the present law. Judgments are not only binding inter partes but also bind other courts in the jurisdiction at a lower level in the judicial hierarchy. Judges are not restricted to interpreting statutes but they can also develop the common law.

Germany’s legal system is a typical continental Europe civil law system. Due to its European Union membership, EU directives have influenced the present law.

In a civil law system, only statutes form the law. Older cases are not legally binding on other judges. Hence, in general, the civil law system does not know precedent cases or *stare decisis*. There is only one exception: pursuant to Section 31(1) of the German Code of Constitutional Proceedings ("Bundesverfassungsgerichtsordnung") decisions of the German Federal Constitutional Court ("Bundesverfassungsgericht") bind all other courts and authorities. However, since the German Constitutional Court only decides whether a statute or a court decision is inconsistent with the German Constitution ("Grundgesetz"), the factual influence of the German Constitutional Court on the “daily legal business” is marginal.[^10]

[^9]: Mark Twain, 1902-1903 (http://www.twainquotes.com/Copyright.html).

[^10]: From 7 September 1951, when the German Federal Constitutional Court was established to 31 December 2004, only 3,566 out of 146,457 filed complaints were successful. More than 97% of the annual complaints are rejected without a first hearing — see German Constitutional Court: http://www.bundesverfassungsgericht.de/texte/deutsch/organisation/statistik_2004/A-I-1.html and http://www.bundesverfassungsgericht.de/texte/deutsch/organisation/statistik_2004/A-IV-1.html. To get an impression of these figures, it has to be considered that the German courts have
Theoretically, a local court judge can decide his case contrary to a very recent court of appeal decision, even if all facts are comparable. Nevertheless, since it is easy to appeal, most judges consider the decisions of higher courts, particularly the judgments of the German Federal Court of Justice (Bundesgerichtshof).\textsuperscript{11}

Another fundamental difference between the case law and civil law system is that judges in a civil law system are, with some very rare exceptions of long standing customary law, only empowered to interpret statutes. A civil law court cannot extend the law beyond the boundaries of the given statutes and it cannot “create new law”. Recently, the German Federal Court of Justice (Bundesgerichtshof) had to decide whether an unwritten, non-statutory permitted use of copyright material could apply due to the conflicting constitutional right of freedom of expression. The Court negated and clarified\textsuperscript{12}

\textit{“Eine - der urheberrechtlichen Regelung [...] nachgeschaltete - allgemeine Güter- und Interessenabwägung überschreitet die Kompetenzen der Zivilgerichte”}

Translation:

\textit{“A consideration of general aspects - beyond the scope of the copyright statute [...] - exceeds the competence of the civil courts.”}

This is contrary to the approach of the common law. For instance, Lord Phillips MR of the Court of Appeal (UK) considered a non-statutory defence of public interest in \textit{Ashdown v Telegraph Group Ltd}, which also dealt with the question of freedom of expression:\textsuperscript{13}

\textit{“The other restriction which requires consideration is the defence to a claim for breach of copyright that can be mounted on the basis of "public interest". This is not a statutory defence, but one which arises at common law[...]”}

\textsuperscript{11} See subchapter 2.4.6(c) for an example of strong factual case law in German copyright.

\textsuperscript{12} \textit{Zulässige Karikatur des Bundesadlers} [2003] GRUR 956, 957 (BGH).

\textsuperscript{13} \textit{Ashdown v Telegraph Group Ltd} [2002] Ch 149, para 34.
However, it has to be noted, that the present British copyright law as well as the current New Zealand copyright law are entirely creations of statute with very little space for common law.  

### 2.2 PURPOSE OF COPYRIGHT

In general terms, the purpose and function of copyright is to protect the results of artistic and intellectual endeavour. However, it does not protect ideas or concepts as such but only the artistic expression of those ideas. This is one of the basic principles of the common law system, for instance in New Zealand:

> "Copyright does not protect a general idea or concept."  

So too in the civil law system, for instance in Germany or Austria:

> „Richtig ist, daß sich abstrakte Gedanken und Ideen nicht schützen lassen; sie [...] können nicht durch das Urheberrechtsgesetz monopolisiert werden."

Translation:

> “It is true, that abstract thoughts and ideas can not be protected; they [...] shall not be monopolised by copyright law.”

This basic principle is now global standard and clarified in various international agreements, for instance in article 9 (2) of the Agreement of Trade-Related Aspects of Intellectual Property Rights 1994 ("TRIPS") and in article 2 of the World Intellectual Property Organisation Copyright Treaty ("WCT"):

> "Copyright protection shall extend [respective: ‘extends’ in WCT] to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."
At a deeper level, copyright law reflects particularly two aspects: the economic utilisation of a work and the moral non-economic rights of the author.

Traditionally, the Anglo-American copyright system primarily focuses on the economic side of works, often detached from the author’s personality. In comparison, many copyright laws of central European countries emphasise not only on economic utilisation of works but also the moral right aspect and the deep personal relationship between the author and his work. For instance, section 11 of the German Urheberrechtsgesetz expressly states this relationship. It reads:

“Das Urheberrecht schützt den Urheber in seinen geistigen und persönlichen Beziehungen zum Werk und in der Nutzung des Werkes."

Translation:
“The copyright protects the author in his intellectual and personal relationship to his work as well as the use of the work.”

Actually, the economic rights under many central European countries’ laws, such as German law, are based on and derive from moral aspects. The German Federal Constitutional Court (Bundesverfassungsgericht) has expressly clarified the derivation of the economic aspects from the moral aspects:\[21\]

“[D]as vom Urheber geschaffene Werk und die darin verkörperte geistige Leistung in vermögensrechtlicher Hinsicht Eigentum im Sinne des Art. 14 Abs. 1 Satz 1 GG ist. Aus seiner verfassungsrechtlichen Gewährleistung erwächst dem Urheber die Befugnis, dieses "geistige Eigentum" wirtschaftlich zu nutzen."

Translation:
“[T]he work created by the author and his creative effort that is embodied in this work is property in terms of article 14 (1) (1) of the Basic Constitutional Law of the Federal Republic of Germany [(Grundgesetz)]. Based on this constitutional guarantee, the author has the authority to use this intellectual property in an economic way.”

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The respective emphases are also reflected in the names of the national laws. The laws of New Zealand, Australia, the United Kingdom and the United States are called “copy”-right and deals with the rights in respect of the material “copy”. By contrast, the central European laws are named “Urheberrecht”22, “droit d'auteur”23, “diritto d'autore”24, “derecho de autor”25, “direito de autor”26, “auteursrecht”27 and “prawo autorskie”28 – translated: “rights of the author”. These central European expressions reflect how the author and his personal relationship to his work takes priority.

However, during the last century and due to international treaties, particularly the most important29 Berne Convention30, many countries31 have ensured at least a basic standard of moral rights. Paragraph one of article 6bis of the Berne Convention, Paris 1971 reads:32

“Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”

Article 6bis(1) has changed very little since first enacted in Rome on 2 June 1928,33 which is the latest revision that New Zealand has signed.34

22 German and Austrian.
23 French.
24 Italian.
25 Spanish.
26 Portuguese.
27 Dutch.
28 Polish.
29 The Berne Convention is the oldest copyright convention and has the most signatories. See also, for instance Bing, Copymarks: A Suggestion for Simple Management of Copyrighted Material, (2004) 18 IRLCT, 347, 351.
31 Until 30 May 2005, 162 countries signed the Berne Convention, including New Zealand, Australia, United Kingdom and all other members of the European Union – see WIPO: http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15.
From a political and national economic point of view, the purpose of copyright law is to ensure the steady “production” and dissemination of economically and culturally important expression in the general public interest. The basic idea of copyright law is to provide an incentive for creators to create and for publishers to publish works. Copyright law stimulates creative endeavour of authors by protecting the work, and ensuring monetary benefit for the author of the work.

On the other hand, copyright law also serves the public interest by securing a broad accessibility and usability of copyright works. Access to information is considered to be the foundation of a democratic society. This approach is acknowledged in most national jurisdictions. In recent times, it has also been anchored in international agreements. For instance, the preamble of the WCT recognises

“the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”

In strictly economic terms, the goal is to ensure that the disadvantages resulting from higher prices and reduced access to works (due to a strict copyright protection) are outweighed by the benefits from increasing copyright work production (due to the very same strict copyright protection).

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35 Recital 12 of the EU Information Society Directive states that “adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint.”
36 For an explanation of the ‘virtuous cycle’ of reward and creativity that encourages innovation for the benefit of the community see Vietri, The free flow of Information or the flow of free information? (2005) 4 NZIPP 48, 48.
37 Mitre 10 (New Zealand) Ltd v Benchmark Building Supplies Ltd [2003] 3 NZLR 186 (HC), para 69.
40 This balance was reflected in, for instance, the New Zealand Copyright Act, see Cabinet Economic Development Committee, Digital Technology and the Copyright Act 1994: Policy Recommendations (25 June 2003, http://www.med.govt.nz/buslt/int_prop/digital/cabinet/index.html), para. 15 and 36; This balance was also mentioned in the decision of the German Federal Constitutional Court (Bundesverfassungsgericht) Kirchenmusik [1980] GRUR 44, 46 (BVerfG) and in recital 31 of the EU Information Society Directive which states: “A fair balance of rights and interests between [...] rightholders and users of protected subject-matter must be safeguarded.” For a general consideration of this approach see Correa, Fair Use in the Digital Era (2002) 33 IIC, 570, 573.
41 Smillie, Digital Copyright Reform in New Zealand, [2004] EIPR, 302, 302. Although Smillie claims that principle only for New Zealand’s law, it seems to be a considered aspect in other law
Finally, an important goal of copyright law is to ensure legal certainty for everyone – authors, right owners as well as users – regarding the scope of protection of works.

2.3 HISTORICAL DEVELOPMENT

For those who are relatively new to this subject, either in general or with respect to one of the discussed jurisdictions, the subsequent subchapters present a brief copyright history. It is useful to have a basic understanding of the history in order to comprehend any real and present world phenomenon.

2.3.1 From Antiquity to 17th Century

Unlike personal and real property, it took a long time for intellectual property to be legally acknowledged.

The Antiquity and the Middle Ages did not know any kind of copyright. Artistic and intellectual work was of no economic value. Authors and artists were in need of funding by kings, peers and rich patrons. Additionally, it has to be considered that printing and copying devices were not invented at that time. Copyright infringement meant the hard work of handwriting, with only a limited number of people able to do so.

This situation changed after Johannes Gutenberg\footnote{With full name: \textit{Johannes Gensfleisch zur Laden zum Gutenberg}, born around 1400 in Mainz, Germany, and died 1468.} invented the printing press around 1450 in Germany, which allowed mass production of printed material as well as “mass reprinting”. Subsequently, printers and publishers – at that time more than authors – demanded legal protection of their work and investments. In continental Europe, especially in some parts of today’s German territory, sovereigns granted privileges for printing monopolies in the 16th and 17th centuries.\footnote{Ellins, \textit{Copyright Law, Urheberrecht und ihre Harmonisierung in der Europäischen Gemeinschaft} (Duncker & Humblot, Berlin 1997), p 59.}
In England, William Caxton established printing in 1478\textsuperscript{44} and shortly after, the Crown granted printing patents to publishers who were members of an association called the Stationers’ Guild. These printing patents protected only publishers not authors.\textsuperscript{45}

\subsection{2.3.2 Developments in 18\textsuperscript{th} and 19\textsuperscript{th} Centuries}

The 18\textsuperscript{th} century was a milestone for the British and German as well as for the European copyright:

In 1710\textsuperscript{46} the United Kingdom Parliament passed the Statute of Anne,\textsuperscript{47} entitled:

\begin{quote}
“An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned”
\end{quote}

It is believed that the Statute of Anne was the first modern copyright statute in the world.\textsuperscript{48} The Statute of Anne mentioned authors and publishers but granted the author “the sole liberty of printing and reprinting” of books. It prohibited unauthorised copying for a period of up to 28 years.\textsuperscript{49} After this period, the exclusive rights expired and the work entered the public domain. In the case of \textit{Donaldson v Beckett}\textsuperscript{50} of 1774, the publishers argued a perpetual post-publication common law copyright in addition to the rights under the Statute of Anne in 1774, but the House of Lords rejected this argument. In this judgment, the House of Lords further clarified that the

\begin{flushright}
\textsuperscript{44} Clair, \textit{A History of Printing in Britain} (Cassell, London 1965), p 112.
\textsuperscript{46} Some sources date it 1709, due to a later change in the calendar system. The British Crown introduced the Gregorian calendar by enacting the \textit{Act 24 Geo. II., c. 23} of 1731, which entered into force on 1 January 1753. However, in terms of our modern calendar, the Statute of Anne entered into force on 10 April 1710.
\textsuperscript{49} The protection was firstly limited to 14 years but if the author was still alive when that term expired, all rights returned to the author for another 14 years. See paras II and XI of the Statute of Anne; see also Kingsbury, \textit{Intellectual Property} (LexisNexis Butterworths, Wellington 2002), p 1.
\textsuperscript{50} \textit{Donaldson v Beckett} (1774) 4 Burr 2408.
\end{flushright}
Statute of Anne had replaced any former copyright law based on common law. From that time on, the British copyright law was a creation of statute.\(^{51}\)

The Statute of Anne was replaced by the Copyright Act 1814\(^ {52}\) and later the Copyright Act 1842,\(^ {53}\) which stipulated that exclusive rights lasted for 42 years or – and this was completely new – until seven years after the death of the author, whichever was the longer.\(^ {54}\) The principle of copyright *post mortem auctoris* was born.

At the same time, influenced by the natural rights theory, German jurists and philosophers also rebelled against the feudal system of privileges and developed a theory and a system of intellectual property rights that considered not only the interests of publishers but also authors. Their new system provided protection against copyright infringement for both authors and publishers. Consequently, the German states *Kursachsen, Baden* and *Preußen* enacted laws in the late 18\(^{th}\) and beginning 19\(^{th}\) century that abolished the system of privileges and introduced statutory rights.\(^ {55}\)

Until the German Empire (“Deutsches Reich”) was founded in 1871, most of the German states had more or less far-reaching copyright statutes and bilateral agreements. In 1871 and 1876, the first Germany-wide copyright acts\(^ {56}\) came into force. These copyright acts covered a wide range of creative works – literature, drama, music, photography, painting and illustration. Copyright in works continued for 30 years after the death of the author; the principle of *post mortem auctoris* had found its way into the continental European copyright system, too.\(^ {57}\)

The 19\(^{th}\) century was also the beginning of international agreements regarding intellectual property rights and particularly copyright. On 9 September 1886 Belgium, France, Germany, Italy, Spain, Switzerland, Tunisia and United Kingdom became the

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\(^{51}\) And this finding of the House of Lords is still manifested in section 225 (2) of the New Zealand Copyright Act.

\(^{52}\) Act 54 Geo. III. c. 156.

\(^{53}\) Act 5 & 6 Vict. c. 45.

\(^{54}\) Ibid, s 3.


\(^{57}\) Sec 8 (1) of the German *Urheberrechtsgesetz* 1870.
first parties of the Berne Convention.\footnote{See above, footnote 30 on page 9.} The Convention has been amended several times but is still one of the most important international copyright agreements and has currently 162 contracting parties.\footnote{See above, footnote 31 on page 9.}

### 2.3.3 20th and 21st Centuries

In the 19th and 20th centuries, New Zealand became progressively independent from the United Kingdom and enacted its first combined copyright statute in 1908, which consolidated a number of acts of the Colonial legislature, for instance the Fine Arts Copyright Act 1877 and the Photographic Copyright Act 1896. Shortly after, the new Copyright Act 1913, which mirrored the UK Copyright Act of 1911 in large parts, was enacted.\footnote{For the early history of New Zealand copyright enactments see Ministry of Economic Development, \textit{The Commissioning Rule, Contracts and the Copyright Act 1994 – A Discussion paper} (March 2006, http://www.med.govt.nz/upload/33784/discussion.pdf), para. 21 ff.} This statute was later replaced by the Copyright Act of 1962. The present copyright statute, the Copyright Act 1994\footnote{\textit{An Act to consolidate and amend the law relating to copyright"}; it came into force on 1 January 1995.} (“Copyright Act”) is still based on the English copyright system but differs in many details.

The Federal Republic of (Western) Germany enacted its present copyright statute (“\textit{Urheberrechtsgesetz}”\footnote{Pronounced ‘oor-hey-ber-reshts-gea-sets’; \textit{“Gesetz über Urheberrecht und verwandte Schutzrechte”}; it came into force on 1 January 1966, lastly amended on 10. September 2003; an English translation of the consolidated Act, including the amendments of 1998 is available online at http://www.wipo.int/clea/docs_new/en/de/de080en.html.}) in 1965, which became present law in 1990 in the then reunited Germany.

However, copyright is still a rapidly changing field of law. Since 1994, the New Zealand \textit{Copyright Act} has been amended five times, the German \textit{Urheberrechtsgesetz} not less than 14 times.\footnote{28 times in total after 1965.}

In recent times, international agreements have had a big impact on the national copyright law. New Zealand and Germany are signatories to the aforementioned Agreement of Trade-Related Aspects of Intellectual Property Rights 1994 (“\textit{TRIPS}”). Additionally, Germany and 58 other members\footnote{By 30 May 2006.} of the World Intellectual Property
Organization ("WIPO") acceded to the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT")\(^{65}\) in 1996, jointly called the WIPO Internet Treaties. As yet, New Zealand has not acceded to these treaties, but is considering signing.\(^{66}\)

Furthermore, several directives of the European Union influenced the German Urheberrechtsgesetz, in particular the directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC)\(^{67}\), the directive of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (92/100/EEC)\(^{68}\), the directive of 11 March 1996 on the legal protection of databases (96/9/EC)\(^{69}\) and most recently as well as most intensively the directive of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC)\(^{70}\).

### 2.4 Fundamentals of Copyright and ‘Urheberrecht’ – A Brief Comparison

In order to understand the challenges that the New Zealand and German copyright system currently face and their approach to solving these problems, it is fundamental to have a brief overview of the two copyright systems and their respective functions. The following subchapters attempt to survey the major aspects.

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\(^{70}\) [2001] OJ L 167, p 10, which was to be implemented in national law by 22 December 2002; however, all EU member states except Greece failed to implement it in due time; Germany, for instance, enacted the amendments in September 2003, Austria in June 2003 and the United Kingdom in October 2003; Belgium and Sweden did not even manage to implement these amendments by the end of 2004; for further dates see: von Lewinski, *Rights Management Information and Technical Protection Measures as Implemented in EC Member States* (2004) 35 IIC, 844, 844, Footnote 2.
2.4.1 Work Categories

Initially, copyright law protected only books because almost no other type of work was significant, and no copyright relevant technology other than printing had been invented. Later, other types of intellectual and creative work became popular, for instance, music and film. With the development of new technology, for instance sound recording devices, video recorders and cable transmission, these types of works also required copyright protection.

Hence, the present copyright law considers a wider range of works. Pursuant to section 14 (1) of the New Zealand Copyright Act, copyright exists in

- literary, dramatic, musical, or artistic works
- sound recordings
- films
- broadcasts
- cable programmes
- typographical arrangements of published editions

In section 2 of the Copyright Act all these terms and types of work are defined and explained in detail. For instance

“Literary work” means any work, other than dramatic or musical works, that is written, spoken or sung; and includes – (a) a table or compilation; and (b) a computer program”

The approach of the German copyright Act (Urheberrechtsgesetz) is slightly different. Section 1 of the Urheberrechtsgesetz states that the works of following categories are protected under the statute:

- literature
- science
- art

However, unlike the New Zealand Copyright Act, the German Urheberrechtsgesetz does not provide static or exhaustive definitions of each of the main work categories. Section 2 of the Urheberrechtsgesetz provides only examples of what section 1 of the Urheberrechtsgesetz shall include particularly. Section 2 (1) reads:
„Zu den geschützten Werken der Literatur, Wissenschaft und Kunst gehören insbesondere:
1. Sprachwerke, wie Schriftwerke, Reden und Computerprogramme;
2. Werke der Musik;
[...]”

Translation:
“Protected literary, scientific and artistic works include in particular,
1. works of language, such as writings, speeches and computer programs;
2. musical works;
[...]”

The approach of giving a very broad definition (in the case at hand: works of literary, scientific and artistic works) and subsequently providing some detailed examples in particular, instead of giving a narrow definition is typical for a civil law statute. Since courts are not authorised to create new law, a wide scope for interpretation is needed to avoid a systematic inflexibility with regard to new developments. However, the given examples ensure that the respective judge’s interpretation follows the legislative intention.

Additionally, pursuant to sections 4 and 87a ff of the Urheberrechtsgesetz, compilations, database works and databases that contain arranged works, data or other elements can be subject to protection under the Urheberrechtsgesetz. The protection of databases, which prohibits the further use of substantial parts of the database without consent of the rightholder, is due to the EU Database Directive of 1996.71 This database protection is strictly speaking alien to German and central European copyright systems, since it does not require creativity as precondition for protection but only a certain amount of investment of capital or labour.72 Therefore, it is often referred to as sui generis right.

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72 For the general requirement of creativity under German law see next subchapter.
The present New Zealand copyright law does not provide specific database protection. Unlike German/EU database protection, New Zealand copyright law does not protect the raw factual content of databases. However, in practice, the New Zealand copyright in compilations will often lead to a similar result. This is because creativity is generally not a precondition of copyright protection under New Zealand law.

Pursuant to the Urheberrechtsgesetz, music recordings and broadcasts do not attract copyright, but are the subject of so-called “neighbouring rights”.

Additionally to the authors’ protection of copyright works, the New Zealand Copyright Act as well as the German Urheberrechtsgesetz provide protection for the performance of works (so-called “performers’ rights”).

Both legal jurisdictions provide a similar system of exclusive rights for works, despite their differences in origin and preciseness of definitions. In both jurisdictions, this system of copyrights and related rights results in complex multiple layers of applying exclusive rights. If a live performance of a song is recorded and subsequently broadcast on TV, five layers of independent rights become relevant: copyright in the lyrics of the song, copyright in the notation of the sounds, performer’s rights to consent to recording a live broadcast, copyright/related right of the producer of the sound recording, and copyright/related right in the broadcast. Hence, if somebody wants to utilise this broadcast, for instance, by recording it on DVD and selling it, five different licences will be necessary – under the German Urheberrechtsgesetz as well as under the New Zealand Copyright Act.

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74 For the protection of raw data see The British Horseracing Board Ltd v William Hill Organization Ltd [2005] GRUR 244 (EuGH).


76 See next subchapter for a broader overview.
2.4.2 Originality

Section 14 (2) of the Copyright Act provides that a work must be original to qualify for copyright protection. Particularly, a copy of another work is not an original work. This provision ought to ensure that the scope of copyright protection is restricted to expenditure of sufficient “labour, skill and capital”\textsuperscript{77} or “time, skill, labour, or judgment”\textsuperscript{78} or “skill and labour”\textsuperscript{79}. Although “skill” and “judgement” refer to subjective skills of the creator of the work, the New Zealand copyright law does not necessarily require the most subjective endeavour of creativity. This distinction between labour, capital, skill and judgement on one hand and creativity on the other hand can be related back to the origins and fundamental philosophies of the different copyright systems. The purpose of Commonwealth copyright is not to protect the artistic feelings and thoughts of the authors which they express in their works. Instead, copyright secures the monetary aspect of endeavour in the form of labour, capital, skill and judgement that is worth being protected against infringement from an economic point of view.

The view that creativity is not a precondition for an original work from a Commonwealth law point of view is supported by the recent decision of the Canadian Supreme Court which held in the case of \textit{CCH Canadian Ltd v Law Society of Upper Canada}\textsuperscript{80} that

“[…] creativity is not required to make a work ‘original’.”

Likewise, the Federal Court of Australia stated in the case of \textit{Desktop Marketing Systems Pty Ltd v Telstra Corporation}\textsuperscript{81} that

“Authorship (likewise originality) does not require novelty, inventiveness or creativity […]”

The threshold test for originality is “not high”\textsuperscript{82}. In \textit{Land Transport Safety Authority of New Zealand v Glogau},\textsuperscript{83} a case that dealt with copyright protection of a compilation, the Court of Appeal agreed with the High Court that

\textsuperscript{77} Lord Atkinson per \textit{Macmillan & Co Ltd v Cooper (K&J)} (1923) 93 LJPC 113.
\textsuperscript{78} \textit{The University of Waikato v Benchmarking Services Limited} (2004) 8 NZBLC 101,561, para 27 (CA).
\textsuperscript{79} \textit{Land Transport Safety Authority of New Zealand v Glogau} [1999] 1 NZLR 261, 270 (CA).
“the extent of skill and labour required for copyright in a compilation is ‘low’: all that is required is that it be ‘more than minimal’, and ‘more than negligible’.”

Similarly, the Canadian Judge McLachlin CJ described the Canadian threshold for originality as:

“The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.”

Pursuant to section 2 (2) of the Urheberrechtsgesetz, a work must an “individual and intellectual creation” of the author, which also implies that the work is original and not copied. The emphasis lies on the subjective creative aspect as a result of personal and artistic thoughts of the author which he individually expresses in the form of the specific work. According to the roots of the creative author’s right, objective aspects like the amount of capital or labour are not relevant in determining whether the work attracts copyright protection. This is the approach adopted by many continental European copyright statutes, such as in Austria.

However, pursuant to the prevailing German case law, the threshold is also very low and little creativity is required to qualify for copyright protection:

“Das Urheberrecht schützt [...] auch die sogenannte kleine Münze, bei der bereits ein geringer Grad individuellen Schaffens und eine geringe Gestaltungshöhe als ausreichend angesehen wird.“

Translation:
“The copyright also protects [...] the so-called ‘small coin’, for which already a low level of individuality and a low level of design are to be considered as sufficient.”

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84 Land Transport Safety Authority of New Zealand v Glogau [1999] 1 NZLR 261, 270 (CA).
86 Inkassoprogramm [1985] GRUR 1041, 1048 (BGH).
87 Section 1 (2) of the Austrian Urheberrechtsgesetz (Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte, lastly amended on 16 February 2006).
There are no clear definitions or established criteria for the determination of whether the amount of creativity is sufficient for attracting copyright protection. It depends on the facts of the case at hand.\textsuperscript{89} Roughly speaking, any work qualifies for copyright protection which is not too commonplace or too ordinary, and which includes a minimum of creative thoughts.

As an example, the Federal Court of Justice (BGH) denied copyright protection of a specifications sheet in an invitation to tender documentation for a huge pipeline project due to a lack of creativity. It argued that the content and design of the (extensive) documentation was dictated by function.\textsuperscript{90}

In contrast, the Federal Court of Justice (BGH) granted copyright protection to a bulletin issued by a health insurance company to employers, which pointed out the most relevant regulations for employers and partly contained text extracts of these regulations. The court argued that the selection, combination and arrangement of these materials met the requirements of individual creativity,\textsuperscript{91} even though most of the actual text was quoted from free and non-protected sources.

The result of this German case is very similar to the result of the New Zealand case \textit{Land Transport Safety Authority of New Zealand v Glogau}.\textsuperscript{92} Mr. Glogau had developed a log book for taxi drivers. The log book had included substantial contributions of the government regarding content sources and format. There was only little which was genuinely original in the log book. Nevertheless, the court held that the requirements of originality were met according to the low threshold which was necessary.

### 2.4.3 Copyright Owner

Pursuant to section 21 (1) of the New Zealand \textit{Copyright Act}, the person who creates the work is also the first owner of any copyright in the work. However, if the author creates the work as an employee, the employer is the copyright owner. If the work is made pursuant to commission, the principal is in many cases the first owner of

\begin{itemize}
  \item \textsuperscript{89} \textit{Anwaltsschriftsatz} [1986] GRUR 739, 740 (BGH).
  \item \textsuperscript{90} \textit{Ausschreibungsunterlagen} [1984] GRUR 659, 660 (BGH).
  \item \textsuperscript{91} \textit{AOK-Merkblatt} [1987] GRUR 166, 167 (BGH).
  \item \textsuperscript{92} \textit{Land Transport Safety Authority of New Zealand v Glogau} [1999] 1 NZLR 261 (CA).
\end{itemize}
the copyright in the work.\textsuperscript{93} This commissioning rule is, however, currently under review.\textsuperscript{94}

This differs from section 7 of the German Urheberrechtsgesetz and the general approach of the continental European “author’s right”, which provides that the creator is and remains without exception the owner of the copyright in the work. Hence, only a natural person can be author and copyright owner, not a legal entity, even if the work was created in course of an employment or commission.\textsuperscript{95} Furthermore, pursuant to section 29 (1) of the Urheberrechtsgesetz, the ownership of copyright itself is not assignable but only inheritable. In these aspects, the German Urheberrechtsgesetz distinguishes between core copyright on one hand and neighbouring rights and performers’ rights on the other hand which can be assigned, owned by a legal entity and are usually owned by the employer. For instance, if a sound recording is produced, the production company is the owner of the producer’s right, even if an employee made the recording.

However, the author of a copyright work can grant extensive and exclusive licences in respect of his work to a third person by contract under German law.

2.4.4 Exclusive Economic Rights of the Author

The owner of the copyright in a work has numerous exclusive rights. These rights secure the economic benefit of the copyright work. Without authorisation of the copyright owner, these acts of using the work are restricted and generally result in a copyright infringement. Under New Zealand law, section 16 of the Copyright Act confers on copyright owners exclusive rights to

- copy the work
- issue copies of the work to the public
- perform/play/show the work in public
- broadcast the work or include the work in a cable programme service

\textsuperscript{93} This commission rule does not apply to all work categories but many, see section 21 (2) and (3) of the Copyright Act.

• adapt the work

Section 2 of the Copyright Act provides more detailed definitions of these terms.

Section 15 of the German Urheberrechtsgesetz provides that the author has the exclusive right to exploit his or her work in any material or immaterial manner. The section then gives examples by mentioning what particularly shall be included:

• copying the work
• issuing copies of the work to the public
• exhibiting the work in public
• reciting, performing and presenting the work in public
• making the work available to the public
• broadcasting the work, including satellite and cable transmission
• communicating the work by means of video and audio recordings
• communication of broadcasts

Sections 16 to 22 of the Urheberrechtsgesetz further expands on these rights.

Section 23 of the Urheberrechtsgesetz sets out the exclusive rights of the author to adapt and to transform the work.

2.4.5 Moral Rights

As already mentioned in the introduction to copyright’s function and purpose, moral rights have become an important aspect of copyright protection in the 20th century, particularly due to the Berne Convention.

Although the Anglo-American copyright system does not emphasise moral rights – and the USA in particular is still very reluctant to accept moral rights – the present New Zealand Copyright Act (since 1994)\textsuperscript{96} as well as the United Kingdom Copyright Designs and Patent Act makes provisions for moral rights.

The New Zealand Copyright Act confers the following moral rights:

\textsuperscript{95} See also Vinck in Fromm and Nordemann, Kommentar zum Urheberrechtsgesetz und Urheberwahrnehmungsgesetz (9th edition, Kohlhammer, Stuttgart, Berlin, Cologne 1998), § 2, No. 12.

\textsuperscript{96} Van Melle, The Copyright Act 10 Years On (2004) 4 NZIPJ 2, 2.
the right to be identified as the author of a work or director of film – *Copyright Act*, s 94

- the right of an author or director of a film to object to derogatory treatment of a work – *Copyright Act*, s 98

- the right against false attribution – *Copyright Act*, s 102

- the right to privacy of certain photographs and films – *Copyright Act*, s 105

However, the *Copyright Act* provides many exceptions to these moral rights; for instance, section 97 of the *Copyright Act* contains a long list of exceptions to the right to be identified. Additionally, the author must assert his rights to be identified pursuant to section 96 in order to secure his rights under section 94. Furthermore, any of these moral rights can be waived by an instrument in writing, pursuant to section 107 of the *Copyright Act*. Moral rights, although now present under New Zealand law for more than 10 years, have not resulted in significant litigation.  

The German *Urheberrechtsgesetz* also provides the following (basic) moral rights:

- the right to be identified as the author of the work including the right to decide whether the work shall be labelled and if so, with what name or pseudonym – *Urheberrechtsgesetz*, s 13

- the right to object to any derogatory treatment of a work – *Urheberrechtsgesetz*, s 14

Additionally, the German *Urheberrechtsgesetz* provides regulations, which are – even from a continental European “rights of the author’s” point of view – far reaching. The regulations also have an economic effect. They confer the following rights:

- the right to decide whether the work shall be published and if so, in which way – *Urheberrechtsgesetz*, s 12 (1)

- the right to give notice to the public of the unpublished work and its content – *Urheberrechtsgesetz*, s 12 (2)

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97 Although there has been some litigation such as *Mitre 10 (New Zealand) Ltd v Benchmark Building Supplies Ltd* [2004] 1 NZLR 26, that briefly addressed the topic of moral rights, apparently no litigation succeeded or discussed it broadly; see also Van Melle, *The Copyright Act 10 Years On* (2004) 4 NZIPJ 2, 2.

98 For instance, the regulations of s 42 and 32a of the German *Ueberrechtsgesetz* are completely unknown in Austria.
the right to demand access to the original work or a copy of the work from present possessors, if necessary in order to make further copies or adaptations – Urheberrechtsgesetz, s 25

the right to revoke a licence, if the licensee has not or has not adequately exercised its rights for a period of time, and if this affects the author’s legitimate interests – Urheberrechtsgesetz, s 41

the right to revoke a licence, if the author changes his artistic or creative conviction (but the author has to compensate the licensee) – Urheberrechtsgesetz, s 42

the right to claim five percent of the revenue of any subsequent sale, if the seller, purchaser or broker is a professional art dealer – Urheberrechtsgesetz, s 26

the right to retroactively re-negotiate a contract, if performance and counter-performance became unbalanced to the detriment of the author (so-called “bestseller-rule”) – Urheberrechtsgesetz, s 32a

The system of waiving moral rights is complex under German law. Some provisions are mandatory; some provisions can be waived by oral or even by implicit agreement. However, the core of moral rights is indefeasible. For instance, the right to object to gross derogatory treatment, even if the author has generally given his consent to modifications of his work.

The right to privacy is not regulated by the Urheberrechtsgesetz but by section 22 of the German Artistic Copyright Act of 1907 (Kunsturhebergesetz), which has been replaced by the present Urheberrechtsgesetz in 1965 – with the exception of the privacy rights. Furthermore, the German right to privacy is affected and influenced by article 8 of the Convention for Protection of Human Rights and Fundamental Freedoms.

The different significance and scope of moral rights under German and New Zealand copyright law is due to and relates back to the different origins and

99 This right does not include a moral right to copy or to issue further copies to the public, but only a moral right to access the work for personal copies.

100 Namensnennungsrecht des Architekten [1995] GRUR 671, 673 (BGH).


102 See, for instance, the decision Caroline von Hannover v Germany in German: [2004] NJW 2647 (ECHR) and in English: [2004] IIC 672 (ECHR).
fundamentals of both legal systems. Moral rights or “author’s personality rights” (Urheberpersönlichkeitsrecht), as they are named in German, represent and emphasise the personal relationship between the author and his work apart from economic aspects. The objective of strong moral rights is to protect the author’s creative interests against harm, even if that harm would not have monetary consequences. In contrary, a legal system which is focused on economic aspects and which does not emphasise the personal relation between author and work, does by nature not regard moral rights as fundamental. It is therefore understandable that the German Urheberrechtsgesetz has developed more stringent moral rights than the New Zealand Copyright Act.

### 2.4.6 Exceptions/Permitted Use

Copyright law does not only one-sidedly secure the exclusive rights of copyright owners but also considers the rights of others to use those works. Therefore, the copyright laws all over the world provide exceptions for permitted uses. The objective of such exceptions is the dissemination of knowledge and the creative arts and the encouragement of production of secondary works.

(a) Overview to Exceptions under New Zealand Law

Part III (Acts Permitted in relation to Copyright Works) of the New Zealand Copyright Act includes not less than 54 sections – more than a fifth of the total number of sections in the Act. These exceptions confer rights to others to use copyright material without a licence and without the consent of the copyright owner. These permitted uses for particular purposes consider and secure public interests in using works.

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The Copyright Act distinguishes between fair dealing permitted uses and absolute exceptions. Application of the fair dealing provisions requires consideration and a number of factors. For instance, in deciding whether a use amounts to a fair dealing for the purposes of research or private study protected under section 43 (3) Copyright Act, the court must consider the respective purpose of the copying, the nature of the work copied, whether the work could have been obtained within reasonable time at an ordinary commercial price, the effect of the copying on the potential market or value of the work, and the amount and substantiality of the part copied. In contrast, non-fair-dealing provisions provide that a use of a work is not a copyright infringement if the specific statutory requirements are met.

Whilst fair dealing provisions allow a broader flexibility they also lack legal certainty due to the reluctance of the courts and the legislature to set down a definitive interpretation of the term “fair dealing” and its scope. However, there is case law that limits the scope of section 43 to the use of the purpose of diligent and systematic enquiry or investigation. Blanchard J defined “research or private study” as

“The defendants, by means of the Oxford Dictionary, defined research as the searching into a matter or subject or the investigation or close study of it. That definition seems appropriate. ‘Research’ and ‘study’ are obviously connected with one another. Research involves the study of things, including written materials or those captured in electronic form.”

Furthermore, he cited Beaumont J of the Federal Court of Australia in relation to the definition of research:

“a diligent and systematic enquiry or investigation into a subject in order to discover facts or principles”

Hence, section 43 of the Copyright Act is limited insofar as it does not permit, for instance, the reproduction of a copyright protected item for the purpose of

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107 Television New Zealand Ltd v Newsmonitor Services Ltd [1994] 2 NZLR 91, 105 (HC); In a later judgment, Salmon J per Copyright Licensing Ltd v University of Auckland [2002] 3 NZLR 76, 86 (HC) agreed with Blanchard J’s definition of “study and research” under section 43 of the Copyright Act.
108 De Garis v Neville Jeffress Pidler Pty Ltd (1990) 18 IPR 292, 298 (FCA)
entertainment. Furthermore, section 43 of the Copyright Act protects only one single copy of a work. On the other hand, Blanchard J held that research need not be private but could also be something of which a business organisation is capable.

The other fair dealing provision of the Copyright Act is section 42 which provides that a fair dealing for the purposes of criticism, review, and news reporting is a permitted use.

The following sections provide absolute exceptions without qualification by reference to fair dealing:

- Incidental copying of copyright works – Copyright Act, s 41
- Educational purposes – Copyright Act, s 44 – 49
- Libraries and archives – Copyright Act, s 50 – 57
- Public administration, including judicial proceedings – Copyright Act, s 58 – 66
- Minor exceptions in respect of literary, dramatic, musical and artistic works, including, for instance use of recording of spoken words, provision of Braille copies, public reading and recitation, works on public display, scientific abstracts, folk-songs, objects in 3 dimensions, industrially applied works, reconstruction of buildings – Copyright Act, s 67 – 78
- Exceptions in respect of computer programmes, sound recordings and films, including rental by educational establishments and libraries, back-up copying of computer programmes, playing of sound recordings for non-profit purposes – Copyright Act, s 79 – 81
- Exceptions in respect of broadcasts and cable programmes, including recording for maintaining, for complaining, for time shifting, for archiving and for media monitoring, photographing of TV broadcasts, free public playing or showing, retransmission in cable programme service, subtitles copies of broadcast – Copyright Act, s 82 – 91

Section 92 of the Copyright Act contains clarifications regarding adaptations and section 93 prohibits subsequent dealings with permitted-use copies.

Additionally, section 66 (1) of the Copyright Act states

“Where the doing of a particular act is specifically authorised by an enactment, the doing of that act does not infringe copyright [...]”.

and 225 (3) of the Copyright Act explicitly states:

“Nothing in this Act affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.”

These sections approve exceptions beyond the scope of the Copyright Act authorised by other statutes as well as – at least theoretically – the common law.¹⁰⁹

It is interesting to note that New Zealand copyright law as well as the copyright laws of many other Commonwealth countries provide only narrowly drafted exceptions for specific purposes.¹¹⁰ There are neither broad and general exceptions such as the US fair use provision, nor exceptions for the broad area of domestic and private use, as in many central European countries.¹¹¹

Although the time shifting exception of section 84 of the Copyright Act is not limited to study and research but is also applicable for the purpose of entertainment, the scope of this provision is nevertheless rather limited, too. Time shifting is only permitted for the specific works of broadcasts and cable programs and additionally, the recording must not be retained for any longer than necessary to be viewed or listened to, or to launch a complaint. A subsequent use is prohibited. Technically, it is therefore an infringement to copy a music CD to an audio tape for the purpose of listening to the music on a car stereo that does not have a CD player,¹¹² although the practice of format shifting is “already common and thought by many consumers to be legal”.¹¹³ Accordingly, the New Zealand Government proposes to introduce a new exception for the special case of format shifting of sound recordings for private and


¹¹⁰ Kingsbury, Finding the copyright balance: originality, authorisation and fair dealing in Canadian and New Zealand law (2005) 4 NZJP 68, 71 generally concludes that these users’ rights are restrictive, although this is not yet clarified by statute or case law. See for instance Copyright Licensing Ltd v University of Auckland [2002] 3 NZLR 76 (HC), para 24 which refers to Longman Group Ltd v Carrington Technical Institute Board of Governors [1991] 2 NZLR 574 (HC): “I therefore consider the particular subsections without any predisposition that they are to be interpreted either strictly in favour of the copyright holder or liberally in favour of educational users who seek to be freed from the bounds of copyright protection.”

¹¹¹ See next subchapter.


domestic use.\footnote{Cabinet Economic Development Committee, Digital Technology and the Copyright Act 1994: Policy Recommendations (25 June 2003, http://www.med.govt.nz/buslt/int_prop/digital/cabinet/index.html), para. 47 a.} However, it is not obvious why this exception of format shifting should be limited to sound recordings and not apply to other works,\footnote{Smillie, Digital Copyright Reform in New Zealand, [2004] EIPR, 302, 311.} like movies, pictures, electronic books, digital text items, etc.

(b) Overview to Exceptions under German Law

The German Urheberrechtsgesetz provides only 34 sections regarding exceptions, but some of them are both long and complex. For instance, section 53 of the Urheberrechtsgesetz comprises 575 words and is difficult to understand without a law degree. The various attempts of the EU to harmonise the exceptions, such as the EU Information Society Directive\footnote{Directive of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC), see above footnote 70 on page 15.}, has not eased the situation, but only expanded the amount and complexity of specific exceptions. Like New Zealand law, the German legislators generally drafted the exceptions narrowly for specific purposes.\footnote{Albeit not section 53, which covers a broad range of permitted uses.} But additionally, the German courts interpret them restrictively:

\begin{quote}
"§ 53 UrhG [...] ist – wie alle [...] Schranken der §§ 45 ff Urheberrechtsgesetz – eng auszulegen."
\end{quote}

Translation:

"Section 53 Urheberrechtsgesetz [...] shall – like all [...] exceptions in sections 45 ff – be interpreted restrictively."

This approach is different from New Zealand courts’ interpretation. In the case of Copyright Licensing Ltd v University of Auckland\footnote{Copyright Licensing Ltd v University of Auckland [2002] 3 NZLR 76 (HC), paras 24, 82.} Salmon J took a neutral position:

\begin{quote}
"I do not find it necessary to take a strict approach to the interpretation of the section. The answers to the question flow from the plain, ordinary meaning of the words used. In my opinion a charge is made in each of the circumstances referred to."
\end{quote}
The *Urheberrechtsgesetz* contains the following exceptions:

- Temporary, transient and incidental reproduction as an essential part of a technological process without independent economic significance – *Urheberrechtsgesetz*, s 44a
- Administration of justice and public safety – *Urheberrechtsgesetz*, s 45
- Copying for the benefit of people with a disability – *Urheberrechtsgesetz*, s 45a
- Religious, school, instructional and educational purposes, including reproduction in collections, broadcasting and making works available in these contexts – *Urheberrechtsgesetz*, s 46 – 47 and 52a
- Reproduction of public speeches – *Urheberrechtsgesetz*, s 48
- Uses for reporting concerning issues of the day – *Urheberrechtsgesetz*, s 49 – 50
- Quotation (subject to the acknowledgement of source) – *Urheberrechtsgesetz*, s 51 and 63
- Public communication for non-profit purposes – *Urheberrechtsgesetz*, s 52
- Exceptions for private and other personal use and, additionally, limitations of reproduction for school and educational purposes – *Urheberrechtsgesetz*, s 53
- Reproduction by broadcasting companies for transmitting and relaying – *Urheberrechtsgesetz*, s 55
- Reproduction and public communication by commercial enterprises [TV/CD shops] for product promotion – *Urheberrechtsgesetz*, s 56
- Reproduction, distribution and public communication of incidental and insignificant parts of copyright works – *Urheberrechtsgesetz*, s 57
- Catalogue illustrations for exhibitions and auctions – *Urheberrechtsgesetz*, s 58
- Reproducing works located on public places – *Urheberrechtsgesetz*, s 59
- Right of the commissioner to reproduce a portrait – *Urheberrechtsgesetz*, s 60
- Exceptions in respect of computer programs, including error correction, making of a back-up copy, and decompilation – *Urheberrechtsgesetz*, s 69d and 69e
- Exceptions in respect of databases – *Urheberrechtsgesetz*, s 55a and 87c
The German *Urheberrechtsgesetz* does not provide explicit fair dealing provisions. But some exceptions require that the usage must be reasonable in respect of its purpose, which in essence demands the court to consider the same criteria, although the *Urheberrechtsgesetz* does not expressly provide specific criteria. Furthermore, many sections have requirements with undefined terms, which gives the courts broad scope for interpretation. Particularly section 53 of the *Urheberrechtsgesetz* provides permitted uses for a wide range of purposes, including any “private” and some “other personal use”. It is rather broad and partly requires considering whether the use is reasonable. Most litigation and most of the academic writing regarding exceptions deal with section 53, which contains a complex system of exceptions and counter-exceptions.

“Private use” means domestic and completely non-commercial.\(^{120}\) Ultimately, under section 53 (1) of the *Urheberrechtsgesetz*, a natural person is entitled to copy any copyright work – except computer programmes – for any “private” purpose, including copying of newspaper articles for private study as well as reproducing a movie DVD for entertainment.

The scope of the exception for “other personal” purposes, for instance in course of one’s profession (but still personal and not for another person), is much narrower, particularly regarding copying of digital material. It allows only the acts of copying a newspaper article, copying a book which has been off the market for more than two years, copying a news broadcast, copying an item for a personal archive. For personal scientific purposes, however, subsection 53 (2)(1) of the *Urheberrechtsgesetz* provides another broad permitted use exception. “Scientific” use requires a methodical and systematic ambition to discover facts or principles.\(^{121}\) Copying for that purpose is only restricted by the requirement of “reasonableness”. Hence, this permitted use exception is comparable to the New Zealand “research or private study” exception.

The number of copies that a person can legitimately make of one work under section 53 of the *Urheberrechtsgesetz* is limited to a maximum of seven. This figure is not provided by statute, but the German Federal Court of Justice (*Bundesgerichtshof*)

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established this quantity in its decision in 1978.\textsuperscript{122} Although the German legal system does not follow formal precedent cases, this decision is a good example of \textit{de facto} use of precedent by German courts.\textsuperscript{123}

\hspace{2cm}(c) Remuneration

The aforementioned far-reaching exception for private use under German law is accompanied by remuneration provisions. Sections 54 to 54h of the \textit{Urheberrechtsgesetz} provide obligations for remuneration for reproduction under various permitted use exceptions. These remunerations are indirect and mostly charged in a lump sum, for instance as a fee from the manufacturer and importer of copying appliances and recording mediums, such as photocopying machines, scanners, video-recorders, and even standard personal computers\textsuperscript{124} as well as videotapes, audiotapes and blank CD-ROMs. In addition, operators of photocopiers in copy shops, schools and libraries have to pay a recurring remuneration. These claims are asserted through collecting societies. The collecting societies calculate annually the royalties and distribute the proceeds, for example in the area of academic writing, equally to the author and the publisher.

In contrast, the copyright owner does not get any remuneration for permitted uses under New Zealand law – except for the few permitted uses of section 54 (2)(d) – copying by librarians for collections of other libraries, sections 63 (2), 64 (2) and (3) – use of copyright material for services of the Crown / Crown use, and section 91 (2)(d) – recording by media monitors.\textsuperscript{125}

\begin{flushright}
\textsuperscript{122} Vervielfältigungsstücke [1978] GRUR 474 (BGH).
\textsuperscript{123} The maximum of seven copies is now accepted throughout the subsequent case law and in most of the academic writing.
\textsuperscript{124} Urheberrechtsabgabe auf Computer [2006] GRUR-RR, 121 (OLG Munich).
\textsuperscript{125} Particularly in regard of copying for private research and study, it is at least questionable whether this non-remuneration regulation is fair to the right holders; see for instance Vietri, \textit{The free flow of Information or the flow of free information?} (2005) 4 NZIPJ 48, 51.
\end{flushright}
(d) Comparison

Whereas the exclusive economical rights granted under both legal systems are comparable, the approaches regarding permitted uses are rather different, particularly in the field of private use and levy schemes.

The finding is surprising insofar as New Zealand copyright law does not provide legal means for getting an indirect remuneration for domestic copying, which is almost impossible to control, although it is (due to its philosophical origin) in general particularly concerned about securing the economic aspect of copyright use. On the other hand, one can hardly find a systematic link between the moral right origin of German copyright law and levy schemes that result in monetary benefits for the author. One would expect a moral right based copyright law system to provide narrower exceptions and a stronger control over whether a work is copied and by whom, to secure the personal interests of the author. In contrast, a copyright system, whose main goal is to secure the economic utilisation of works, would theoretically be well served by broad exceptions and indirect remuneration regulations for minor uses. Notwithstanding, the New Zealand Government considered (among other reasons, such as high administrative costs and “unfairness” to legitimate users of copying material, which are questionable, since the praxis in central Europe shows that this approach works rather well) the systematic difference as an argument not to introduce levy schemes:

“The European concept of ‘authors’ rights’ is philosophically different from the common law concept of copyright as an economic right. Thus European schemes are not directly relevant to the New Zealand situation.”126

However, one could argue that the Anglo-American copyright system is more concerned about the general balance between work usability and encouraging of production of works as a matter of public interests whilst the Author’s rights perspective focuses more on each particular work and every use of it. Since (minor) permitted uses without remuneration are not that likely to discourage authors from producing more works, Anglo-American systems might tolerate a higher amount of private use which is not compensated for.

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In conclusion, it seems that different approaches regarding exceptions are usually more influenced by the national history of the specific country than by the philosophical background. The difficulties of harmonizing the different exceptions of the EU member states were the main reason for delaying the EU Information Society Directive until 2001. Moreover, the permitted uses regulations of the EU member states are still very different, although most of them follow the same philosophical author’s rights approach.

2.4.7 Dealing with Rights in Copyright Works – Licences, Assignments and Collecting Societies

For all restricted uses that are not covered by exceptions, the user has to purchase a licence from the copyright owner.

The New Zealand Copyright Act as well as the German Urheberrechtsgesetz distinguishes between two kinds of licences: exclusive and non-exclusive licences. Exclusive licences exclude all other persons (including, if not otherwise stipulated, the author) from using the work in relation to the respective exclusive right. Although the German Copyright Act does not allow the assignment of copyright itself, in practice an almost identical result can be achieved by virtue of an exclusive licence.

Pursuant to sections 2 (definition of “exclusive licence”) and 114 of the New Zealand Copyright Act, an assignment of copyright as well as the grant of an exclusive licence must be in writing.

In contrast, the German Urheberrechtsgesetz does not require a written agreement. Licences are often granted orally or even implicitly. Since the lack of written agreements often causes uncertainty, sections 31 and 37 of the Urheberrechtsgesetz provide that the scope of a licence must be interpreted narrowly in favour of the author. In cases of uncertainty, the scope of the licence shall be determined narrowly in accordance with the limited purpose of the licence. For instance, if a photographer has a contract with a print newsmagazine that obliges him to provide photos exclusively, the newsmagazine is not allowed to subsequently include the provided photos in a CD-ROM version of its magazine. This is due to the implied limited

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purpose of the initial contract. The interpretation rule of sections 31 and 37 Urheberrechtsgesetz in connection with the general expectation that a print magazine company publishes photos only in print issues prevails over the exclusiveness of the granted licence.\textsuperscript{128}

Apparently, neither the New Zealand Copyright Act nor any other Anglo-American countries’ statutes provide a similar interpretation rule. Considering the fact that important agreements, which grant exclusive licences or assign copyright must be in written form (which often results in a more detailed agreement), such an interpretation rule is less important. Nevertheless, Commonwealth case law establishes a comparable principle for implied licences that requires the court to consider the nature and the purpose of the respective engagement:

“The engagement for reward of a person to produce material of a nature which is capable of being the subject of copyright implies a permission, or consent, or licence in the person giving the engagement to use the material in the manner and for the purpose in which it was contemplated between the parties that it would be used at the time of the engagement.”\textsuperscript{129}

It is often hard to identify the respective copyright owner and in many cases large amounts of copyright protected work are used. Therefore many rights are administered by collecting societies\textsuperscript{130} for better accessibility and centralized copyright clearance.\textsuperscript{131} These collecting societies grant blanket licence schemes based on sample surveys as well as transactional licences for specific uses.\textsuperscript{132} In Germany, as well as in

\textsuperscript{130} For instance in New Zealand: Copyright Licensing Limited for books, periodicals and journals; Screen Producers and Directors Association and Screenrights for films, TV and radio; Australasian Performing Right Association Ltd (APRA) and Recording Industry Association of New Zealand Inc (RIANZ) for music related licences; and for instance in Germany: Verwertungsgesellschaft Wort (VG Wort) for any kind of literature, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA) for music related licences; Verwertungsgesellschaft Bild und Kunst (VG Bild-Kunst) for photography and fine arts; Verwertungsgesellschaft für Nutzungsrechte an Filmwerken mbH (VGF) for films.
\textsuperscript{131} Sheat, Copyright licensing – The benefits of collective licensing organisations for owners and users of printed copyright works (1999) 2 NZIPJ 81, 81 and 83.
\textsuperscript{132} Sheat, Copyright licensing – The benefits of collective licensing organisations for owners and users of printed copyright works (1999) 2 NZIPJ 81, 82.
many other central European countries, collecting societies also claim remuneration for uses under the statutory exceptions.\textsuperscript{133}

\subsection*{2.4.8 Duration of Copyright}

As mentioned previously, the New Zealand as well as the German copyright law provides \textit{post mortem auctoris} protection. After the term of copyright ends, the work enters the public domain and is no longer subject to exclusive rights under the copyright law.

Under New Zealand law, pursuant to section 22 of the \textit{Copyright Act}, copyright in most categories of works (literary, dramatic, musical, or artistic work) expires 50 years after the end of the year in which the author dies. In case of computer-generated works, works of unknown authorship, sound recordings, films, broadcasts and cable programmes the period of copyright protection expires 50 years after the end of the year in which the work is made, or the year in which the work is first made available to the public.

Since the enactment of the German \textit{Urheberrechtsgesetz} in 1965,\textsuperscript{134} section 64 provides 70 years of copyright protection \textit{post mortem actoris} for all types of copyright works, including, for instance, films. The protection of neighbouring rights and performers’ rights expires 50 years after the year in which the work was made or was first made available to the public.

In 1993, article 1 of the EU council directive of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (93/98/EEC)\textsuperscript{135} forced all EU member states to enact a copyright protection of at least 70 years \textit{post mortem actoris} for all literary works, artistic works and film works. The minimum term for other rights, such as neighbouring rights (e.g. for broadcasting companies regarding their broadcasts) and performer’s rights (e.g. the exclusive right of the singer to record his live performance), is 50 years after the first performance.

\textsuperscript{133} See above, subchapter 2.4.6(b).

\textsuperscript{134} For further information about copyright duration under German copyright law, see Nordemann in Fromm and Nordemann, \textit{Kommentar zum Urheberrechtsgesetz und Urheberwahrnehmungsgesetz} (9th edition, Kohlhammer, Stuttgart, Berlin, Cologne 1998), § 121 No. 6.

Many countries, particularly in the EU, have often amended their copyright law regarding the duration of copyright. Additionally, many statutes provide transitional provisions for works made prior to the commencement of the amendment. Therefore, it can be rather complex to calculate whether an older work, for instance made by a German author who died before the Urheberrechtsgesetz entered into force in 1965, is still protected.\footnote{For an overview of durations of copyright under NZ law confer Frankel and McLay, *Intellectual Property in New Zealand*, (LexisNexis Butterworths, Wellington 2002), p 207f and under German law confer Nordemann in Loewenheim, *Handbuch des Urheberrechts*, (C.H. Beck, Munich, 2003), § 22, Rn. 211ff.}

Considering the philosophical background of New Zealand and German copyright law, it is rather surprising that the German Urheberrechtsgesetz provides a longer protection of copyright than the New Zealand Copyright Act, since a longer protection post mortem auctoris secures more the economic interest (of the publisher) than the personal relationship between the author (who is already dead when the protection period actually begins) and his work. On the other hand, a longer duration of protection post mortem is not a great incentive for authors to produce more works. One could therefore argue that it is of limited importance for Anglo-American copyright systems.

### 2.4.9 Infringements

The use of copyright material in an act, which is restricted by the exclusive rights of the author without the cover of an exception and without the consent of the copyright owner, is a primary copyright infringement.

Section 29 (1) of the New Zealand Copyright Act states:

> “Copyright in a work is infringed by a person who, other than pursuant to a copyright licence, does any restricted act.”

The German Urheberrechtsgesetz does not explicitly provide a similar statement regarding “infringing” acts. However, section 97 of the Urheberrechtsgesetz prescribes the legal consequences in case of an

> “[...] unlawful infringement [...] of [...] copyright or any other right under this act [...]”

\[136\]
This includes at least an implicit definition of infringement, since “unlawful” is commonly understood as without consent of the author and without legal justification by statutory exception or otherwise.\(^{137}\)

Both national laws provide civil liability provisions in case of infringement, including relief by way of injunctions, damages, accounts and orders for delivery up.\(^{138}\) The civil liability is generally strict but an innocent infringer cannot be sued for damage remedies.\(^{139}\)

The secondary infringements prohibited by sections 35 - 39 of the New Zealand Copyright Act including the act of importing and possessing infringed copies (with knowledge or constructive knowledge) in the course of business, or providing means for making infringing copies, are unknown to the German copyright law. According to the decision of the Court of Appeal of Berlin (KG Berlin),\(^{140}\) it is not a copyright infringement to buy and to possess unauthorised copies of music works with the intention to sell these copies, because the acts of buying and possessing do not violate exclusive rights.

Additionally, section 16 (1)(i) of the New Zealand Copyright Act gives the copyright owner the exclusive right to authorise another person to do any act which is restricted by copyright. The German Urheberrechtsgesetz does not expressly provide a similar provision. However, according to general principles of German law, a person can be liable under criminal and/or civil law for abetment or incitement if he deliberately facilitates another person’s infringement.\(^{141}\) Furthermore a person can be subject to an injunction if they causally contribute to a copyright infringement. This is due to the strict liability doctrine. However, case law has limited this strict liability and considers the kind of participation and the possibilities of control on a case-by-case basis for keeping this liability within reasonable bounds.\(^{142}\)

The New Zealand Copyright Act as well as the German Urheberrechtsgesetz also provide criminal provisions. Both laws’ criminal provisions require a subjective

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\(^{138}\) Sections 120 ff of the Copyright Act and sections 97 ff of the Urheberrechtsgesetz.

\(^{139}\) Section 121 (1) of the NZ Copyright Act and section 97 (1) of the German Urheberrechtsgesetz.

\(^{140}\) *Verbreiten von Raubkopien* [1983] NSitZ, 561 (KG).

\(^{141}\) *Kopierläden* [1984] GRUR 54 (BGH).

\(^{142}\) *Internet-Versteigerung* [2004] GRUR 860, 864 (BGH) and *Möbelklassiker* [1999] GRUR 418, 419 (BGH) and for a further discussion in context with ISP liability see chapter 3.2.4(b)ii.
element. However, under section 131 ff of the New Zealand Copyright Act only commercial or business-related acts qualify for criminal liability, for example, the making of infringing copies for sale. The maximum conviction is a fine of up to $150,000 or imprisonment for up to 5 years. Under section 106 of the German Urheberrechtsgesetz the maximum conviction for a copyright infringement, even in the case of making copies (exceeding the exception of section 53 of the Urheberrechtsgesetz) or violating other exclusive rights for the purpose of domestic or private use,\textsuperscript{143} is up to 3 years imprisonment or a fine that can reach the multiple annual income of the offender\textsuperscript{144}. For professional infringement, the maximum term of imprisonment is 5 years.

2.4.10 Parallel Importing

The New Zealand approach to importing copyright material is different from the German and European approach. Since the New Zealand Copyright (Removal of Prohibition on Parallel Importing) Amendment Act 1998, a lawfully made copy of a copyright work from any other country can, pursuant to section 12 (5a) Copyright Act, be imported into New Zealand and legally sold to third parties. According to section 17 (2) of the Urheberrechtsgesetz, which implements article 9 (2) of the Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property,\textsuperscript{145} the selling of copyright protected items that were imported from a non-EU member state is prohibited without the consent of the copyright owner. In contrast, if a copy of a work is lawfully released to the public in one state of the European Union, the distribution right is exhausted. The copy can subsequently be distributed in any

\textsuperscript{143} Though, the German government is currently considering whether they should introduce a copyright amendment bill that excludes minor copyright infringements from criminal liability, for instance in regard of so called schoolyard-criminality (school students exchanging piracy copies for domestic use); see Voregger, Straffrei bei Bagatelfällen? (19 December 2005, Spiegel, http://www.spiegel.de/netzwelt/politik/0,1518,391198,00.html).

\textsuperscript{144} The amount of a fine under German criminal law generally bases upon the offender’s personal and financial situation, particularly considering the actual net income to secure that such fines are equally “fair” and “punishing” for both poor and rich; see section 40 of the German Criminal Code (Strafgesetzbuch).

country within the EU without further consent. However, pursuant to article 3 (3) of the Information Society Directive there is no such exhaustion if the work is released only by means of online communication to the public.

2.5 CONCLUSION OF COMPARISON

The comparison of the New Zealand and the German copyright shows that both systems provide a comparable level of copyright protection, in spite of their different origins and philosophical backgrounds. The protected categories of works and the exclusive rights are comparable in both legal systems. However, the New Zealand copyright law focuses slightly more on the public interest whilst the German law places more emphasis on the interests of the author and copyright owner. The moral rights under German law are much more far-reaching in favour of the author; for instance the author’s right to access his work after selling it, the rights to revoke a licence, and the right to claim a percentage of subsequent sales. Additionally, the duration of copyright protection under the German law is 20 years longer – 70 years instead of 50. Although the German Urheberrechtsgesetz provides a wide range of permitted uses, especially with regard to private use, most exceptions come with rights to remuneration. Since it is doubtful that many people actually apply for a licence for minor uses, for instance domestic copying of entertainment material, this approach again favours the author. Furthermore, the German law’s far-reaching criminal liability provisions protect the interests of the authors and copyright owners. The parallel importing policy also exemplifies New Zealand’s approach to benefit users as consumers. New Zealand resellers can import cheap copyright material from countries that are supplied by international copyright industry companies with copyright material for a lower price due to their lower buying power and the lower overall price level in these countries – to the detriment of the profit margin of copyright owners.

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146 See also Shiell, *Viral Online Copyright Infringement in the United States and the United Kingdom (Part II)* [2004] ENTLR 107, 109.
147 See also Recital 29 of the *Information Society Directive*.
148 See above subchapter 2.4.6(c).
However, the reason for that different approach might be that New Zealand is a net importer of copyrighted material,\(^\text{150}\) heavily importing from English speaking countries, like the United Kingdom and particularly the United States of America as the world largest copyright exporter\(^\text{151}\). Hence, from a national point of view, it is a reasonable objective not to overstate the copyright protection in favour of foreign copyright owners as New Zealand citizens would have to pay for it.

On the contrary, Germany has an important domestic market in respect of copyright materials. For instance in 2002, almost 80,000 book titles were published and only less than 6,300 were translated from foreign languages.\(^\text{152}\) Therefore, German copyright law has to take both the user’s and the author’s interests into well-balanced consideration.


3. **COPYRIGHT AND ITS DIGITAL CHALLENGE**

“There's no reason to throw out copyrights just because you're on the Internet... Deal with it.”

3.1 **BRIEF INTRODUCTION TO THE INTERNET AND THE DIGITAL AGE**

Once initiated by the US Department of Defence as a standardised military communication system in the 1960s,\(^\text{154}\) the Internet has become almost indispensable to the everyday life of many people and to the businesses of many companies. In general terms, the Internet is a decentralised networking system that links computers and computer networks around the world.\(^\text{155}\) The most popular application is the WorldWideWeb (WWW), whose precondition – the hypertext markup language – was invented by Tim Berners-Lee in 1989. In 1991, approximately four million users were online.\(^\text{156}\) The number of Internet-users has risen rapidly since then to an estimated 26 Mio in 1995, 201 Mio in 1999, 605 Mio in September 2002\(^\text{157}\) and 972 Mio in November 2005\(^\text{158}\). By the end of 2005, more than 77% of the population of New Zealand and 57% of the German population used the Internet.\(^\text{159}\) In addition to the Internet, other modern digital communication devices push the digital age forward, for instance UMTS (Universal Mobile Telecommunications System) jointly with multimedia mobile phones, which make digital information available anywhere.

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\(^{154}\) Black, *Internet-Technologien der Zukunft* (Addison-Wesley, Munich 1999), No. 1.5.1.

\(^{155}\) For further details on the history and the functionality of the Internet see Evans, *Protection of Data on the Internet* [2002] IPQ 50 ff.


3.2 **SPECIFIC COPYRIGHT ASPECTS OF THE DIGITAL WORLD**

Many popular activities in the digital world seem to be simple and easy from the user’s point of view. However, the technical process in the background is complex and likewise the legal evaluation of these activities can be complicated.

The following subchapters attempt to review the most common aspects of the digital world – protection of digital works, making digital works accessible on the Internet (web-hosting), accessing digital works via the Internet (web-browsing, including RAM and cache copying and data transmission), linking to digital works on the Internet (hyperlinking), sharing of digital works (p2p-filesharing) and ISP liability. The advantage of this structural approach is that the legal aspects of the Internet world are reviewed in the context of their actual appearance – copyright law has always followed technology invention and not the other way around.

For a better understanding, the following subchapters start with a short introduction from the user’s point of view and a brief overview of the specific technical process, and then analyse the copyright-related aspects.

### 3.2.1 **General Protection of Digital Material**

(a) **Introduction**

Nowadays, a large proportion of creative work is originally created digitally on computers, with digital cameras, etc. Additionally, many works that were originally in analogue format have been subsequently digitised for online use with a scanner or other digital recording device.

(b) **Copyright Aspects**

The first question regarding digital material is how copyright law treats digitally created or digitised works.
i Under New Zealand Law

The New Zealand Copyright Act does not provide specific requirements for the form of storage of a copyright work – neither analogue nor digital. The definition of copyright work of section 2 of the Copyright Act refers only to types of works, described in section 14 (1), not types of storage.

Moreover, several aspects of the Copyright Act indicate, that digital and analogue creations attract equal copyright protection: First, section 2 Copyright Act refers to computer programs and to works which are generated by computers (computer-generated works) as potentially protected works. Computer programs and computer-generated works are always created with computers and therefore digitally stored. Second, section 15 (1) of the Copyright Act, which defines recording as a precondition of subsistence of copyright in literary, dramatic or musical works, does not require a specific form of recording. Instead, recording in “writing” or technology-neutral “otherwise” is regarded as sufficient.

In the decision Video Ezy International (NZ) Ltd v Roadshow Entertainment (NZ) Ltd Paterson J confirmed that a digital storage format (on digital versatile disks) is equal to an analogue storage format (on video tapes) regarding the copyright protection of a film work: 160

“In my view both videos and DVDs come within the plain meaning of the definition of ‘film’.”

In the Australian case of Roland Corporation v Lorenzo and Sons Pty Ltd 161 Pincus J held that the work in question (a manual) was made when it was first stored on the computer disk, even before it was printed out.

Likewise, there is, for instance, no reason to treat a photograph differently depending upon whether it is stored analogue on a light sensitive film or digitally in bits and bytes on a hard drive – both are artistic works. 162

With regard to exceptions, the present New Zealand Copyright Act does not distinguish between uses of analogue and digital works. The proposed copyright

161 Roland Corporation v Lorenzo and Sons Pty Ltd (1991) 22 IPR 245, 253 (FCA).
amendment is intended to continue and further clarify this general approach, subject to some rare exceptions where digital use would upset the balance between protection for copyright users and access for users: 163

“The exceptions to the exclusive rights of copyright owners contained in the Act were developed primarily in the analogue and hard copy world. The Digital Copyright Review sought to determine 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 following proposed changes to the permitted acts are, for the most part, intended simply to clarify the extent of the exceptions in the digital environment.”

In summary, permitted uses in relation to analogue works can also be performed in relation to digital works. 164

ii Under German Law

The German copyright law similarly does not distinguish between works that are created by analogue or by digital means. The Urheberrechtsgesetz does not require a specific form of storage. 165 The embodiment of a work in digitised form does not change the classification and copyright law assessment of the specific work. 166

However, the Urheberrechtsgesetz distinguishes between analogue and digital uses of copyright works regarding permitted uses. An analogue reproduction can be lawful whilst a digital scan of the same item and for the same purpose might be prohibited. This is due to the EU Information Society Directive 167 and its implementation into national law. For instance, pursuant to section 53(2)(1)(4)(a) of the

167 See footnote 70 on page 15.
Urheberrechtsgesetz a printed newspaper article can be copied on paper for occupational use without consent from author, but pursuant to section 53(2)(3) of the Urheberrechtsgesetz an online article must not be saved on a further storage medium for the same purpose.

3.2.2 Making Digital Material Available to the Public (Hosting Digital Material)

(a) From the User’s Point of View

Nowadays, not only institutions and professional companies are represented on the Internet by websites but private users also have their own sites. Publishing a website or other digital files, like pictures and music pieces, on the Internet has become easy. Many companies offer convenient and inexpensive domain registration services and with the right tools, it is just a mouse click to get the web pages or other digital material online – potentially accessible by hundreds of millions of people worldwide, 24 hours a day, 7 days a week.

(b) Technical Process

The technical process of getting a website or other digital files online is rather simple. Specific tools (an online service or a computer application) reproduce a copy of local files via FTP (File Transfer Protocol) on the hard disc of a host computer that is connected with the Internet. Since every computer that is connected to the Internet has a unique address (a 32 bit IP-address) it can be unambiguously reached. The DNS (Domain Name System) simplifies the way to address the respective host computer by providing automatic background translations from domain-names into IP-addresses (e.g. www.otago.ac.nz into 139.80.64.99).

In summary, publishing a webpage or other material on the Internet consists of the act of, firstly, copying some digital files to an Internet-server and, subsequently, keeping them accessible so users are able to browse.
(c) **Copyright Aspects**

The activity of hosting digital material on a web-server so that it is accessible to other users raises the questions of whether, firstly, the process of copying the material to a web-server’s hard drive triggers the reproduction right, and secondly, the act of making (and keeping) it available triggers other exclusive rights. These questions are of particular importance if somebody makes digital material available online without being the author and without consent of the copyright owner.

i Under New Zealand Law

The definition of copying as a restricted exclusive right pursuant to section 16 (1)(a) of the Copyright Act does not specify whether copying of digital works to hard discs triggers the reproduction right. The definition of copying of section 2 reads:

“**copying**

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

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

[...]

The New Zealand Copyright Act does not provide a definition of “material form” – unlike, for instance, the Australian Copyright Act 1968.\(^\text{168}\)

However, the wording of paragraph b) – “any medium” and “any means” – indicates a broad understanding of copying that is not limited to traditional formats. But b) is only applicable to certain work categories. Copies of other works, for instance sound recordings or films, must fall within the ordinary meaning of “material form” of paragraph a) in order to be copyright protected. However, the definition of paragraph a) also refers to “any” form and thus allows a wide and technology neutral

\(^{168}\) Section 10 of the Copyright Act 1968 reads broadly:

“‘material form’, in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced)”.

interpretation. Laddie, Prescott and Vitoria also clarify that “any physical reproduction of a work is necessarily one in a material form”.

A hard drive stores information physically (albeit in digital and binary “0” and “1” format) in magnetic patterns. The English High Court found in the case of *R v Inland Revenue Commissioners*:

“For the data on the hard disk is stored in magnetic form. Although the data may be regarded for some purposes as contained in separate files, they are all stored on the same physical object, namely the hard disk.” [emphasis added]

Basically, hard drives work like tape recorders that save works on audio or video tapes and are therefore very similar to other traditional storing and copying devices. Unlike copies in Random Access Memory (RAM), hard discs do not store information in form of impulses that are dependant on a steady supply of electric power.

Even under the former Australian law, which provided a rather narrow definition of material form since its amendment in 1984 that qualified what had been the general understanding of material form before, hard disc copies were considered reproductions pursuant to copyright law. The Federal Court of Australia held in the case of *Microsoft Corporation v Business Boost Pty Ltd* that

“[…] unauthorised copying of computer programs onto a hard disc does amount to copyright.”

Hence, it is obvious that the act of copying a digital work on a hard drive of an Internet-connected web-server for the purpose of making the material available for

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172. It is clear from the case law that copies of works on video tapes are reproductions in “material form”, see for instance *Green v Broadcasting Corp of NZ* [1988] 2 NZLR 490, 503 (CA).

173. Whether RAM copying triggers the right to copy is discussed below in chapter 3.2.3(c)i(i).

174. Section 10 of the former Australian Copyright Act 1968, as amended 1984, read:

“[…] material form, in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage from which the work or adaptation, or a substantial part of the work or adaptation, can be reproduced.”


other users amounts to an exercise of the right to copy pursuant to subsection 16 (1)(a) of the Copyright Act.177

Since no permitted use exception applies in the case of copying a digital work on an Internet-server for the purpose of making it available to other Internet-users, this act is an infringement if it happens without the consent of the copyright owner.

Furthermore, the act of hosting a webpage also seems to fit under the definition of cable programme service or, in case of wireless data transmission, broadcasting pursuant to section 16 (1)(f) of the Copyright Act. The definition of cable programme service (section 4 (1) of the Copyright Act) reads:

“[C]able programme service means a transmission service where the transmission is
(a) for reception at 2 or more places, either simultaneously or at different times, in response to requests by different users; or
(b) for presentation to members of the public; but does not include a transmission service that is, or so far as it is, excepted by or under any provision of subsections (2) to (4) [...]”

The definition of broadcast (section 2 of the Copyright Act) reads:

“[B]roadcast means a transmission, whether or not encrypted, of a programme by wireless communication, where the transmission is
(a) capable of being lawfully received, in New Zealand or elsewhere, by members of the public; or
(b) for presentation to members of the public in New Zealand or elsewhere[...]”

The definition of “cable programme service” under New Zealand law is similar to the former law of the United Kingdom.178 Under UK law, English courts deemed that


178 Section 7(1) of the CDPA.
the inclusion of a copyright work in one’s website constitutes an infringement of copyright by including the work in a cable programme service.179

However, one must note that Smith J stated his finding in the case of Sony Music Entertainment (UK) Limited v Easyinternetcafe Limited180 as an obiter dictum:

“Therefore if this question had arisen I would have concluded that the transmission of the material via the internet would be a cable programme service [...]”

His Honour did not provide any reasoning whatsoever for his findings but only referred to the case Shetland Times Ltd v Wills.

Shetland Times Ltd v Wills181 required only a prima facie case to be made out and his Honour observed:

“The resolution of the above issues may in the end turn on technical material not available to me at the hearing on interim interdict.”

That decision, however, does not duly consider that the Internet is interactive and data is transmitted over two-way networks, whereas cable programmes and broadcasts are only sent one-way. In Shetland Times Ltd v Wills Hamilton J considered only that the website allowed users to send their suggestions and comments to the website operator via Email while determining whether the criteria of interactivity is met. His Honour did not consider that Internet websites do not provide a preset programme that simply starts on request of the user (like TV or radio programmes), but communicate with the user in a kind of dialogue. Different menus offer a variety of interactive response opportunities to the user throughout the Internet session. Section 4 (2)(a) of the Copyright Act indicates that interactive transmission networks shall not be included in the definition of cable transmission.

It is therefore arguable – contrary to the prima facie reasoning in the Shetland case – that the Internet is distinctive and completely different from cable programmes and

broadcastings due to its interactivity\(^{182}\) with the exception of webcasting which is similar to traditional TV and radio but delivered via Internet.

Furthermore, the workings of the definitions of cable programme service and broadcasting refer to “the transmission”. In the context of Internet webpages, however, it might be that a published webpage is never accessed and, hence, the work is never transmitted. The possibility of transmission is not similar to an actual transmission.

Additionally, in a practical sense, neither the owner of the webpage nor the user know whether a respective transmission occurs via wireless transmission or via a cable connection, or both ways. It is possible that some data packages are transmitted via satellite and wireless LAN\(^{183}\) whilst other parts of the webpage are transmitted only by Ethernet cable LAN. If the rights to include a work in cable programme services and broadcasts applied, this would mean that different definitions of rights cover different parts of the webpage being viewed – without the possibility to make meaningful distinctions as to which right covers which parts.\(^{184}\)

Hence, the definitional problem, whether Internet data transmission is “cable transmission” or “broadcasting” (or neither one) in terms of copyright law results at least in extensive legal uncertainty.\(^{185}\)

Furthermore, the right to issue a copy to the public pursuant section 31 of the Copyright Act could apply. Section 9 (1) of the Copyright Act defines the act of


\(^{183}\) LAN = Local Area Network.

\(^{184}\) This problem is also raised by Evans, *Protection of Data on the Internet* [2002] IPQ 50, 60f.

\(^{185}\) This issue is of little practical importance if the website owner holds a licence since the rights to include a work in a cable programme service and to broadcast are often licensed as a group. But the distinction might become important if the website owner includes a work without consent and the rightholder is required to argue and proof that the website infringes the right to broadcast and/or the right to include a work in a cable programme service.
issuing a copy to the public broadly as the “act of putting into circulation copies not previously put into circulation”.

Although the legislator obviously thought of hard copy items when it drafted sections 9 and 31, the wording of the definition of section 9 (1) does not limit the application of this provision to analogue hard copies. Thus, the right to issue copies to the public can also apply in regard to digitally stored works.

However, it is questionable whether sections 9 and 31 of the Copyright Act apply if not the tangible copy (the medium which embodies the digital work) circulates to another person’s hand but a (new) copy of the digital work circulates to a different person’s storage medium over the Internet. The reason for this definitional uncertainty is the difference between online and offline distribution. In the offline world, the act of issuing a copy requires a previous act of copying. The right to copy prohibits an act that is different from the act which is prohibited by the right to issue these copies to the public. Both acts can be conducted by different persons at a different time. In contrast, in the online world, both acts are coalesced, for instance by sending a photograph via email to other people. In this example, the sole act of sending the email creates new copies in the receivers’ mailboxes and, at the same time, puts the work into circulation. However, since such a coalesced act does not need the double-protection of the right to copy and the right to issue this copy, there is no need to stretch the definition of the right to issue copies to the public beyond the act of putting tangible copies\(^\text{186}\) into circulation.

In conclusion, since present New Zealand law does not provide an exclusive right for “making available to the public” (like the exclusive right of technology neutral communication to the public, which was included by the WIPO as article 8 in its WCT 1996; or section 31 (1)(a)(iv) of the Australian Copyright act as amended by the Digital Agenda Act), it is at least arguable that no other exclusive right but the right to copy (the digital work on a server computer’s hard drive) applies. For the future, however, the New Zealand Government also proposes to include a technology-neutral communication right.\(^\text{187}\)

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\(^{186}\) Bentley and Sherman, *Intellectual Property Law* (Oxford University Press, Oxford 2001), 137 also limit the scope of the right to issue copies under UK law to tangible copies.

The German definition of the right to copy pursuant to section 16 (1) of the Urheberrechtsgesetz is very broad. It reads:

“Das Vervielfältigungsrecht ist das Recht, Vervielfältigungsstücke des Werkes herzustellen, gleichviel ob vorübergehend oder dauerhaft, in welchem Verfahren und in welcher Zahl.“

Translation:

“The reproduction right is the right to produce copies of the work, no matter if temporary or permanent, by any means and in any number.”

This definition of the right to copy implements article 2 of the EU Information Society Directive, whose objective is to provide a broad definition of copying, according to the official comment of the EU legislator in recital 21:

“This Directive should define the scope of the acts covered by the reproduction right [...] A broad definition of these acts is needed to ensure legal certainty within the internal market.”

Considering the wording of the Act and the objective of the Directive, the copying of a webpage or any other digital work on a Internet-server’s hard drive is – without doubt – a reproduction pursuant to section 16 (1) of the Urheberrechtsgesetz.

In contrast, the application of the right to issue a copy to the public pursuant to section 17 (1) of the Urheberrechtsgesetz is out of question, since – according to the prevailing opinion and with similar arguments as considered under New Zealand law – this provisions requires the distribution of a material hard copy of a work. Hence, a digital online distribution is not sufficient to trigger section 17 (1) of the Urheberrechtsgesetz.

Additionally, section 19a of the Urheberrechtsgesetz provides an exclusive right to make a work available to the public by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. This section mirrors article 3 (2) of the EU Information Society Directive and is – though expressed in technology neutral terms – especially directed at the

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\[188\] See, for instance: Nordemann in Fromm and Nordemann, Kommentar zum Urheberrechtsgesetz und Urheberwahrnehmungsgesetz (9th edition, Kohlhammer, Stuttgart, Berlin, Cologne 1998), §
Internet. Infringement of this right commences at the time when a copyright protected work is made available for interactive use. Actual transmission of data is not a precondition.\(^{189}\)

Hence, a person who wants to make copyright protected works available to the public by copying them to an Internet-accessible computer requires the consent of the copyright owner with regard to the right to copy and the right to make the work available.

### 3.2.3 Browsing on the Internet

**(a) From the User’s Point of View**

When the user enters a valid Internet-address in the input field of the web-browser or clicks on a link on a webpage, the requested webpage pops up in the web-browser of the local computer.

**(b) Technical Process**

On closer examination, many technical processes are involved in browsing on the Internet.

The content of the webpage (or any other element) that the user wishes to access by entering its Internet-address in his web-browser is copied from the hard disc of the host computer into the working memory (the Random Access Memory – RAM), which stores information not permanently but only in electronic impulses while power turned on. In the RAM, the data is fractionalised into small data portions according to the standardised Transmission Control Protocol/Internet Protocol (TCP/IP).\(^{190}\) Since most of the Internet consists of “Ethernet” network technology, the “Maximum Transmission Unit” – the size of one package – is usually limited to 1500 bytes.\(^{191}\)


\(^{191}\) Cisco Systems Inc., *Cisco Documentation,*
These data packages are transmitted from the host computer to the user’s computer separately via multiple computers (called routers), operated by various Internet Service Providers (ISP) by copying these packages from station to station and deleting them afterwards. Every data package is intelligently routed via the way that is fastest at that specific moment. For instance, an image on a webpage with the size of 150 kb (=153600 bytes), hosted on a German Internet-server is fractionalised in more than 100 data packages. Afterwards, perhaps 30 packages are routed via Germany-Poland-Ukraine-Russia-China-Japan-Indonesia-Australia to a New Zealand user whilst the other 70 packages are routed via Germany-France-United Kingdom-United States-Fiji to New Zealand, depending on the local traffic in the specific millisecond.

In the RAM of the user’s computer, the multiple data packages are reassembled to the original element. Subsequently, a copy of the element is made into the memory of the computer’s graphics card and displayed on the screen. The web-browser simultaneously copies the opened webpage, including all images and other elements, to another part of the RAM and to a specific part of the local hard disc, which is reserved for caching. These two caches reduce bandwidth usage and web site access times by directly providing requested elements of the respective webpage on subsequent occasions it is accessed.

A further reproduction process occurs if a proxy server (also called proxy cache) is involved in the data transmission. It is also a cache – not on local computers but situated between users and the open Internet. When a proxy server receives a request from one of the connected users, it looks for the specific element in its cache. If the requested element is found, the proxy server returns it immediately. Otherwise, it fetches it from the remote server, returns it to the requester and saves a copy in the cache. Proxy servers usually use expiry algorithms to remove files, according to their age, size, and access history. There are transparent and non-transparent proxy servers. For using a non-transparent one, the user has to configure his Internet-browser accordingly. Transparent proxy servers are used by ISPs in the background without the knowledge of the user.

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192 For an overview to proxy servers, see: SOCAN v. Canadian Assn. of Internet Providers [2004] SCCDJ 2155, para 23.
Summarised, web-browsing includes multiple reproductions of the elements of the requested webpage – in RAM and on hard drive caches. Some copies, particularly the RAM copies, are automatically deleted when the Internet-browser session is terminated or the computer is switched off. In contrast, hard disc caches usually keep copies for a longer period, even if the computer is switched off in the meantime. The technical view on Internet-browsing furthermore shows that the transmission of a work is not carried out by sending the item as a whole but rather in small packages.

(c) Copyright Aspects

From a legal point of view, the question arises, whether, and if yes, which of these copying processes are legally relevant as reproductions under the copyright law.

(i) RAM Copying

Subchapter 3.2.2(c)i has argued, that the act of more permanent storing of digital material on a hard disc, a magnetic storage medium, implicates the right to copy in material form pursuant to section 16 (1) of the Copyright Act. The question at hand, however, is, whether more transient and incidental copying processes that lead to reproductions in form of electronic impulses in RAM also implicate the exclusive right to copy. This question does not only arise in Internet-related situations but also in most other contexts of digital work usage, since the use of digital works involves in most cases an automatic creation of temporary copies.

A transient RAM copy triggers the right to copy if the definition of “copying” of section 2 of the Copyright Act applies. The definition distinguishes between paragraph b) which requires works to be “stored” “in any medium by any means” and paragraph a) which requires the copy to be in “material form”. Paragraph b) is only applicable to literary, dramatic, musical and artistic work whereas paragraph a) applies to all work categories.

Apparently, there is no New Zealand case law that provides further clarification regarding transient copying of copyright works in RAM. However, other Anglo-
American case law has already dealt with temporary RAM copying and might provide some guidance.

In the United Kingdom, temporary RAM copying had been treated as a reproduction pursuant to section 17 of the Copyright, Designs and Patents Act 1988, even before the EU Information Society Directive was implemented. However, section 17 of the UK Copyright, Designs and Patents Act 1988 is more specific regarding transient copying than the New Zealand Copyright Act. It reads:

“(6) Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work.” [Emphasis added]

Considering that the present New Zealand Copyright Act of 1994 is in large parts modelled on the UK Act of 1988, one could argue that either the New Zealand legislator deliberately omitted the inclusion of transient and incidental copies to exclude it, or that the reference to “any material form”, “any medium” and “any means” was understood to be broad enough to cover any reproduction, even a transient one. Since the omission was not debated in the public parliamentary process it is arguable that it was an oversight rather than a deliberate exclusion. One must also note that paragraph (6) of the UK CDPA only clarifies what should be deemed included. The word “include” does not necessarily extend a definition but can also be understood as an emphasis on an aspect, which is a part of the definition anyway.

Regarding the requirement of “material form” such a broad interpretation is supported by the English case Bookmakers’ Afternoon Greyhound Services Ltd v Wilf Gilbert (Staffordshire) Ltd, which considered the 1956 Act. The Act did not provide an extended definition as included in the current CDPA. However, the court held even

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a transient materialisation of a work on a TV monitor a reproduction pursuant to copyright law.\textsuperscript{197}

In the Australian case of \textit{Microsoft Corporation v Business Boost Pty Ltd},\textsuperscript{198} Tamberlin J also held that the act of copying computer software in RAM is a reproduction in “material form” pursuant to copyright law. He stated that the duration of the storage is not a relevant factor, but he did, however, not elaborate how the specific requirements were met.

In contrast, Australian courts recently held the exclusive right to copy not applicable for RAM copies.\textsuperscript{199} In the case of \textit{Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd}, Emmett J held that a temporary reproduction of a portion of a movie into the RAM of a DVD player does not meet the requirements of the right to copy.\textsuperscript{200} The High Court of Australia also held in the case of \textit{Stevens v Kabushiki Kaisha Sony Computer Entertainment}\textsuperscript{201} that a reproduction of a portion of a video game in the RAM of a console did not trigger the right to copy. The High Court agreed to the decision of the Federal Court that these data were not in a “material form” but only “electronic impulses” which did not meet the requirement of “material form” in the ordinary meaning.\textsuperscript{202} However, both Australian decisions referred to paragraph 28 of the Explanatory Memorandum to the Bill for the 1984 Amendment Act and noted that “in some circumstances the electronic impulses stored in RAM are in material form”.\textsuperscript{203} In the \textit{Stevens} case, the Australian High Court distinguished RAM copies in “material form” from “non-material” by considering the reproducibility of the respective copy. The reproducibility was an aspect of the definition of “material form” provided by former law. However, such a requirement of “reproducibility” is not an element of the New Zealand definition of “material form”\textsuperscript{204}

\textsuperscript{197} Bookmakers' Afternoon Greyhound Services Ltd v Wilf Gilbert (Staffordshire) Ltd [1994] F.S.R. 723, 738 (Ch).
\textsuperscript{198} Microsoft Corporation v Business Boost Pty Ltd (2000) 49 IPR 573, 576 (FCA).
\textsuperscript{200} Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd (2001) 53 IPR 242 (FCA), para 103.
and it is also interesting to note that the Australian copyright law in its present form (after the enactment of the Australian US Free Trade Agreement Implementation Act 2004204) dropped the requirement of reproducibility. Australian law now defines “material form” more broadly as to overcome the Stevens v Sony interpretation:205

“[...] any form (whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced).”

Current Australian copyright law does not distinguish between various forms of copying. Hence, every kind of RAM copying and caching206 falls within the definition of the right to copy,207 (though this definition of copying comes along with an exception for temporary copies, see below208).

Hence, much speaks for a broad understanding of “material form” under New Zealand law including transient RAM copies.

Regarding the requirement of “storage” in paragraph b) of the definition there is even less clarification available from the case law. The English criminal case R v Gold in 1988209 favoured a narrow approach to “recorded or stored”. Although this case did not deal with copyright law but with the Forgery and Counterfeiting Act 1981 the question arose whether information in form of electronic impulses are “recorded” or “stored” in an “instrument”. Lord Brandon held that:210

“[...] 'stored' [is a word] in common use which should be given [its] ordinary and natural meaning [. It] connote[s] the preservation of the thing which is the subject matter of [it] for

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204 The act received the Royal Assent on 16 August 2004, but the majority of provisions came into force on 1 January 2005; see for more details of that act: Corbett, Copyright law in Australia: what price free trade? (2004) 4 NZIPJ 5, 5.
205 Section 10 of the Copyright Act 1968.
208 See subchapter 3.2.3(c)(ii)(v).
an appreciable time with the object of subsequent retrieval or recovery.”

The court concluded that the data in the form of an account number and a password which were typed into the memory of a remote computer did neither connote recording nor storing because it was expunged momentarily and could not be retrieved or recovered by the user.

However, this situation is different from RAM copies of fetched webpages (or other material) in a very broadly usable computer system which can be further reproduced. Once copied in the RAM cache, the webpage and its respective elements are easily available for a variety of subsequent – and permanent – re-uses, storages and further uses, for instance by copying elements to the hard drive or by printing them. Any item that is downloaded from the Internet and saved on the hard drive or printed, is actually a reproduction of the RAM copy. Additionally, although the RAM is usually cleared when the computer is switched off, it is easily possible to re-fetch and subsequently use the specific content for a long period of time – even without getting online and apart from the existence of the source copy. If one, for instance, writes a master of laws thesis, starts several Internet-browser sessions, browses through various law databases, opens many documents parallel and does not shut the computer off for a week, one can print these documents or send them via email one week later (out of the RAM copy), even if one has no connection to the Internet in this very moment or the University has terminated the access to these databases.

According to United States case law, a reproduction in the RAM, for instance by loading a computer program, is also copying within the meaning of the United States Copyright Act 1976:

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212 However, a computer can (theoretically) run for many years without being switched off – with resulting in a transient RAM copy which is anything but transient.

227 MAI Systems Corp. v Peak Computer Inc, 991 F.2d 511, 518 (9th Cir. 1993).
“[…] a ‘copying’ for purposes of copyright law occurs when a computer program is transferred from a permanent storage device to a computer's RAM.”

Although the wording of the US Copyright Act is not identical to the New Zealand Copyright Act, the reasoning of MAI Systems Corp. v Peak Computer Inc supports the argument that the current definition of the New Zealand Copyright Act is sufficient broad to include RAM copying.

Section 17 U.S.C. § 101 of the US Copyright Act defines “copies” as:

“[…] material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived reproduced, or otherwise communicated for a period of more than transitory duration.”

One can see that the wording of the US definition expressly requires – stricter than the New Zealand law – a fixation that is “sufficiently permanent or stable to permit it to be perceived reproduced, or otherwise communicated for a period of more than transitory duration”. Nevertheless, the US court deemed a temporary RAM copy as sufficiently “fixed”:

“[B]y showing that Peak loads the software into the RAM and is then able to view the system error log and diagnose the problem with the computer, MAI has adequately shown that the representation created in the RAM is ‘sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.’ After reviewing the record, we find no specific facts (and Peak points to none) which indicate that the copy created in the RAM is not fixed.”
More recent US decisions agree that RAM copying is copying in terms of copyright.\textsuperscript{228}

In summary, there are good arguments for including copies, which are made in temporary storage mediums, such as RAM, while browsing on the Internet, within the definition of “material form” as well as “storage” and consequently “copying” under New Zealand law.

The New Zealand Government also intends to statutorily confirm that temporary digital copying is a restricted act (albeit subject to a “technical process” exception as discussed below, see subchapter 3.2.3(c)(v)).\textsuperscript{229} This approach seems desirable in the interests of legal certainty. To exclude some forms of copying from the definition of the right to copy would result in heavy definitional problems and would also controvert the technologically-neutral intention. It would result in many hard to answer questions. Should a RAM cache copy be generally excluded from the scope of the reproduction right by definition while a hard disc cache copy is included? What if a 20 kilobyte user’s hard disc cache is cleared every second but a two gigabyte company’s RAM cache that could store, for instance, every street map of New Zealand runs night and day? Is a copy of a work on a rewritable CD more permanent than a copy on a memory stick? A definition by its nature should provide certainty and not ambiguity as to whether a technical “copying” is also a “copying” in terms of copyright in the specific case. Moreover, a legal definition of a term would never be capable of establishing understanding within the population if it differed from the literal meaning of the word. The legal term of “copying” should therefore be identically to the broad literal word “copying”. Furthermore, the copyright law is traditionally based on the principle of strict and clear exclusive right definitions and more complex permitted use provisions that permit more finely calibrated exceptions.


(ii) Copying in the Course of Data Transmission

It is questionable whether the transmission of data on the Internet through routers itself can infringe the right to copy pursuant to section 16 of the Copyright Act.

It is common ground that there are three requirements to establish an infringement by copying:\(^\text{230}\)

\[\text{"a) The reproduction must be either of the entire work or of a substantial part;}\]
\[\text{b) There must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof;}\]
\[\text{c) There must be some causal connection between the copyright work and the infringing work. The copyright must be the source from which the infringing work is derived." [emphasis added]}\]

The last requirement is obviously met. The other two requirements have to be analysed. Regarding the requirement of substantial part, the question whether a copyright work is infringed depends more on the quality than on the quantity of what has been taken.\(^\text{231}\) In the case \textit{Nationwide News Pty Ltd v Copyright Agency Ltd}\(^\text{232}\) the Australian Federal Court of Justice held:

\[\text{"In determining whether the quality of what is taken makes it a ‘substantial part’ of the copyright work [...] it is important to inquire into the importance which the taken portion bears in relation to the work as a whole; is it an essential or material part of the work?"}\]

In the case of \textit{Kabushiki Kaisha Sony Computer Entertainment v Stevens}, the Full Court of the Federal Court of Appeal of Australia described the storage in RAM of a two Megabyte portion of a video game as a “substantial part” because\(^\text{233}\)

\[\text{"[...] it allows the game to be played, albeit at one level only. In other words, the instructions stored in the RAM ordinarily incorporate some elements of the game that give it originality."}\]

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\(^{230}\) Randerson J per \textit{The University of Waikato v Benchmarking Services Limited} (2004) 8 NZBLC 101,561 (CA), para 29.

\(^{231}\) Randerson J per \textit{The University of Waikato v Benchmarking Services Limited} (2004) 8 NZBLC 101,561 (CA), para 29.

\(^{232}\) \textit{Nationwide News Pty Ltd v Copyright Agency Ltd} (1996) 65 FCR 399 (FCA).

In the same case, the High Court pointed out that “substantiality is a question of degree which depends upon the circumstances of each particular case” but, finally, denied substantiality due to an unsatisfactory basis of evidence.\footnote{Stevens v Kabushiki Kaisha Sony Computer Entertainment (2005) 65 IPR 513, [2005] HCA 58, paras 95-98.}

Notwithstanding, a 2,048 Kilobyte piece of a video game, which is stored in the RAM of a video game controller and which enables the user to see a full picture, listen to some sounds and to interact with the game, is to be distinguished from a 1.5 Kilobyte data piece that flows freely on the Internet. As reviewed in the subchapter regarding the technical process,\footnote{See subchapter 3.2.3(b).} there is no bigger part of the work being copied whilst transmitted by routers. After leaving the host computer, the work is fractionised in data packages with the size of 1,500 byte. On their way, these packages travel via different ways and different relay stations. It is therefore doubtful that a bigger part of the work is stored on the same computer at one time. In most cases, these small and unessential packages, which are routed over the Internet, are neither qualitatively nor quantitatively a material and substantial part of the original work due to the lack of any usability.

The case\footnote{Stevens v Kabushiki Kaisha Sony Computer Entertainment (2005) 65 IPR 513, [2005] HCA 58, paras 95-98.} Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd\footnote{Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd (2001) 53 IPR 242 (FCA).} is another case that recently dealt with the requirement of “substantial part”. Emmett J found:\footnote{Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd (2001) 53 IPR 242 (FCA), paras 64 ff.}

“It is common ground that, in the case of the storage in RAM of the audio, video and caption content of a DVD, only a tiny fraction of the motion picture is stored at any one time.\[…\]

I consider that the ephemeral embodiment of tiny fractions [...] does not constitute the act of making a copy of the motion picture or cinematograph film.\[…\]

It is clear that neither the whole nor any substantial part of a cinematograph film or motion picture is ever embodied in the RAM of a DVD player or personal computer at any given time. The mere fact that, over a period of time [...] tiny parts are...
sequentially stored [...] does not mean that the [work] is embodied in such a device. As a result, a consumer[...] does not, for the purposes of the Act, make a copy of the whole or a substantial part of the [work]."

The finding of His Honour with regard to “substantial part” supports a fortiori the conclusion that an even smaller piece of a work in Internet-routers does not result in a copyright infringement.

The consideration of the requirement of sufficient objective similarity leads to the same result:

The data packages are not similar to the original work (neither the webpage as a whole nor its elements) in terms of human perception but only contain abstract data pieces of bits and bytes. Additionally, since most works in digital form are compressed, for instance images as JPG\(^{238}\), music as MP3\(^{239}\) or film as MPEG\(^{240}\), these sole pieces of works are useless without the other parts. Contrary to analogue portions of a work, for instance, an image, a data package that includes less than 1% of a mean compressed JPG cannot be made visible. The data package usually cannot even be identified as a part of the specific work.

A consideration of the US case Marobie-Fl, Inc. v. National Association of Fire and Equipment Distributors and Northwest Nexus, Inc\(^{241}\) does not lead to a different result. In that case, the company Northwest tried to argue that the copy on the Internet-user’s computer was not reproduced from the copy on Northwest’s hard drive because the work in question was first copied in parts from the hard drive to the RAM of Northwest’s computer and then transmitted over the Internet to the user. This line of argument could not succeed, since it is obvious that the user’s copy is a reproduction of the work stored on Northwest’s computer, even if the work was not loaded from the hard drive to the RAM and over the Internet in one piece. In contrast,

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\(^{238}\) JPG/JPEG = Joint Photographic Experts Group. It is the most popular image compression algorithm on the Internet.

\(^{239}\) MP3 = Moving Picture Experts Group III Audio Layer. It was invented by the Erlanger Fraunhofer Institut für integrierte Schaltungen in the early 90s. It is the most popular audio compressing algorithm. It filters out the frequencies of music songs that the human ear cannot hear anyway. That results in a size reduction of up to 90%, almost without quality reduction; for further details see Selby, *The Legal and Economic Implications of the Digital Distribution of Music – Part I* [2000] ENTLR 4, 6 f.

\(^{240}\) MPG/MPEG = Moving Picture Experts Group, a film compressing algorithm.

the point, which this subchapter tries to make, is that the very small pieces of the work can not be considered as separate and independent copies of the work during their transmission over the Internet via thousands of Internet-routers after they have left the source computer. These routers neither copy – different from Northwest’s computer in the Marobie v National Association case – the whole work nor substantial parts of it. If one of these data pieces were stopped (for instance, in Thailand on their way from a New Zealand website to a German user) and printed or displayed on a computer, it would not have any similarities with the original work. Intermediary Internet-routers do not copy whole works or substantial parts of works. They copy only small and abstract data pieces.

In conclusion, it is highly doubtful that the transmission of little pieces of works over the Internet could be held to infringe copyright.  

(iii) Hard Drive Caching

As described in the subchapter about the technical process, browsing involves not only RAM copying but results also in other copies in hard drive caches. Although these copies are not permanent but rather temporary, too, it is more obvious that hard drive caching involves a copyright relevant reproduction. According to the line of argument of the above subchapter about RAM copying, one can argue that hard drive caching triggers a fortiori the right to copy. Even the findings of the Australian courts in the case of Stevens v Kabushiki Kaisha Sony Computer Entertainment and the narrow approach of the English case R v Gold have no merits in this context. It is not only obviously possible but also rather easy to re-access, retrieve and reproduce the material that is physically stored in the hard drive cache of the Internet-browser without further knowledge or additional tools (for instance with the Microsoft Internet Explorer: TOOLS – OPTIONS – GENERAL – SETTINGS of temporary Internet files – SHOW FILES).

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243 As discussed in chapter 3.2.3(c)ii(i).

244 R v Gold [1988] 1 AC 1063.
(iv) **Implied Licence**

However, regarding all these copying processes on the Internet, the aspect of an implied licence must be considered.

The Supreme Court of Western Australia stated in *JWH Group Pty Ltd v Kimpura Pty Ltd*:

"[A] licence to [...] reproduce [...] a work in which copyright resides in the author, may be implied from conduct."

In the case of *FAI Insurances Ltd v Advance Bank Australia Ltd*, Pincus J also held that if a person approved a (copyright protected) form for a particular purpose, he could not have intended to have a monopoly of this form. Instead, there was an implied licence to use this form for the purpose for which it was intended.

The person who places a webpage or other material on the Internet usually intends that other people visit and fetch it. At least he must be aware that a freely accessible webpage on the internet will be subject to various reproductions while being fetched and viewed by others. It would be contradictory behaviour if one were to make a webpage accessible and subsequently asserts a copyright claim against someone for actually visiting that webpage.

However, such an implied licence has to be interpreted restrictively. It covers only the particular purpose of the regular use which was intended or could be duly expected by the website owner.

In the Australian case *Trumpet Software Pty Ltd v Ozemail Pty Ltd* Heerey J considered two criteria for determining the scope of an implied licence:

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245 *JWH Group Pty Ltd v Kimpura Pty Ltd* (2004) 61 IPR 295 (WASC), para 68.
246 *FAI Insurances Ltd v Advance Bank Australia Ltd* (1986) 68 ALR 133 (FCA).
“[…] whether the supposed condition is necessary to give business efficacy […] and whether it is so obvious that it ‘goes without saying’.”

His Honour applied these criteria to an implied licence between a shareware manufacturer and a distributor. He concluded that the implied licence allowed a distribution of the software in question accompanied by other software as a bundle and granted the distributor the right to make any charge or commercial gain but denied an implied right to alter the software.

Applying these criteria to websites, one can argue that those reproductions are covered by an implied licence, which are usually involved in browsing on the Internet. But the user can hardly imply that he can also use the digital material found on the Internet for purposes other than necessary for browsing. There is no reason for the website owner to grant broad implicit licences without remuneration and “without saying”. Moreover, in many cases, website owners do not hold exclusive licences for all purposes but only specifically restricted online licences for their webpage. Likewise, a customer who buys a magazine can not imply that he is allowed to use the included pictures in his own brochures and publications.

However, implied licence cannot be relied upon if the person who made the webpage available to the public had not been authorised to use the embedded work for online usage himself.

Additionally, an implied licence could theoretically be excluded by means of an explicit statement on a webpage, like “only for US residents”. In the English High Court decision *Sony Computer Entertainment v Edmunds*251 Jacob J held that a label on a video game CD-ROM that stated “for Japan only” could limit a licence to use in this regional area. Likewise Laddie J stated in *Kabushiki Kaisha Sony Computer Entertainment v Ball*252 that the label on a video game CD which declared the software to be compatible only with a specific device, excluded any suggestion of a licence for other devices. However, the validity of such an exclusion of an implied licence depends on the factual circumstances, which have to be considered on a case-

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250 *Trumpet Software Pty Ltd v Ozemail Pty Ltd* (1996) 34 IPR 481, 499-500 (FCA).
252 *Kabushiki Kaisha Sony Computer Entertainment v Ball* [2004] EWHC 1738 (Ch), para 31 f.
by-case basis. In *Ticketmaster Corp v Tickets.com Inc*[^253] Hupp J stated with regard to restrictions of use of Internet websites (in the case at hand an exclusion of deep-linking and a prohibition of use of the information included in the website for commercial purposes):

> “It cannot be said that merely putting the terms and conditions in this fashion [the conditions were provided at the bottom of the webpage in small print, so that users would not necessarily notice them] necessarily creates a contract with any one using the website.”

But his Honour mentioned that a website which requires the user to click on a *agree terms and conditions* button before entering the site might be regarded differently.

(v) **Permitted Use Justification**

Moreover, RAM copying and other forms of caching could be justified by statutory exceptions. Particularly, the permitted use for research or private study outlined in section 43 of the *Copyright Act* is rather broad and is not limited to non-commercial use.[^254] Consequently there would seem to be advantages in the context of any kind of caching and browsing.[^255] However, the limitation in paragraph (4) to only one copy makes the exception inapplicable, since browsing on the Internet technically results in the making of more than one copy, as explained above.

Since the present New Zealand *Copyright Act* does not provide a specific exception for temporary reproductions, like section 43B of the Australian Copyright Act, there is no statutory exception for browsing on the Internet.[^256] But the New Zealand Government intends to introduce exceptions for temporary copying. They may include


[^254]: See above subchapter 2.4.6(a); *Television New Zealand Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91, 105 (HC) and also Kingsbury, *Finding the copyright balance: originality, authorisation and fair dealing in Canadian and New Zealand law* (2005) 4 NZIPJ 68, 74.

• “temporary reproductions as part of the technical process of making or receiving communication”;257
• “copies that are technically required for the viewing of or listening to a work by a member of the public to whom a copy of the work is lawfully made available”;258
• “routine temporary storage in the random access memory (‘RAM’) of a computer for the purpose of executing an authorised program or browsing the Word Wide Web”.259

Such exceptions would be broader than the Australian exceptions provided by sections 43A and 43B of the Copyright Act 1968. Section 43A (2) provides that the exception pursuant paragraph (1) for temporary copies as technical part of a communication does not apply if the “making of the communication is an infringement of copyright”. And the exception provided by section 43B for temporary reproductions of works as part of a technical process of use is subject to the conditions that the reproduction “is not made from an infringing copy of the work” (paragraph (2)(a)) and that this use does not “constitute an infringement of the copyright in this work” (paragraph (2)(b)). Hence, the scope of the Australian exceptions is rather limited.260 They do not apply if the user browses on a webpage which contains copyright infringing images. The user would in that case infringe copyright by caching this material, too. Regarding web-browsing, Australian copyright Act law does not provide much more certainty than the doctrine of implied licence.

However, the exception proposed by the New Zealand government for browsing on the Internet is limited to RAM copying and does not deal with the problem of copies which are stored in hard drive caches while browsing.

ii Under German Law

(i) RAM and Cache Copying

Since the implementation of article 2 of the EU Information Society Directive\textsuperscript{261} in national law in 2003, it has become clear that the exclusive right to copy pursuant to section 16 (1) of the Urheberrechtsgesetz includes any reproduction of a work, “direct or indirect, temporary or permanent, by any means and in any form”. The definition of reproduction is extremely broad and includes all kinds of RAM copying\textsuperscript{262} and other forms of caching.\textsuperscript{263}

(ii) Copying in the Course of Data Transmission

Like the New Zealand law and due to the same reasons, it is also questionable under German law whether the transmission of 1.500 byte TCP/IP portions of a work can be seen as a reproduction and as a potential copyright infringement.\textsuperscript{264} According to the German case Vorentwurf II\textsuperscript{265}, the exclusive right to copy a work applies only if the copied part of the work would attract copyright protection itself (if it were an independent creation). A small data piece, which has no similarities with the source and can furthermore not be made perceivable would, hence, not attract copyright protection as a work.

The “making available right” pursuant to sections 15 (2)(2), 19a Urheberrechtsgesetz, however, is not applicable to the act of mere data transmission. The official comment of the EU legislator, recital 27 of the Information Society Directive clarifies that

\begin{itemize}
\item \textsuperscript{260} Corbett, Copyright law in Australia: what price free trade? (2004) 4 NZIPJ 5, 7.
\item \textsuperscript{261} See above footnote 116 on page 29.
\item \textsuperscript{262} Ausschnittdienst [2004] GRUR-RR 228, 231 (KG Berlin).
\item \textsuperscript{264} Loewenheim in Schricker, Urheberrecht (C.H. Beck, 2nd edition, Munich 1999), § 16, No. 23; same result under English law: Shiell, Viral Online Copyright Infringement in the United States and the United Kingdom (Part II) [2004] ENTLR 107, 108.
\item \textsuperscript{265} Vorentwurf II [1988] GRUR 533 (BGH).
\end{itemize}
“[t]he mere provision of physical facilities for enabling or making a communication does not itself amount to communication within the meaning of this Directive.”

(iii) Implied Licence and Permitted Use Justification

The aspect of an implied licence, which is also available under German law,\textsuperscript{266} must be considered\textsuperscript{267} as analysed before under New Zealand law.

Furthermore, there are some statutory exceptions: Although the restricted right to copy is accompanied by the exception of article 5 (1) of the EU Information Society Directive (mirrored by section 44a of the Urheberrechtsgesetz) which permits certain temporary copies, RAM copies and caching activities of the user are not covered.\textsuperscript{268} Article 5 (1) of the EU Information Society Directive and 44a of the Urheberrechtsgesetz are only applicable if the reproduction is made in the course of “a transmission in a network between third parties by an intermediary” or in the course of “a lawful use”. The user who browses on the Internet is not transmitting data “between third parties” as an “intermediary”.\textsuperscript{269} He initiates a transmission for himself. The other alternative of “lawful use” does not provide relief either. If the reproduction and caching is lawful, either by implied or explicit licence or by virtue of another statutory exception, the user does not need a further justifications. If the user’s activity is not covered by one of these justifications, he acts unlawfully and subsequently cannot rely on article 5 (1) / section 44a.\textsuperscript{270} This regulation is rather paradoxical but it is required by EU law. It can be regarded as clarification that a lawful use is also lawful in a digital surrounding.

Nevertheless, browsing (involving RAM copying and other caching) by the user can be covered by the exception provided by section 53 (1) of the Urheberrechtsgesetz, which allows analogue as well as digital copying for private use. The most recent amendment of section 53 clarifies that the private user can rely on

\textsuperscript{266} Kandisky II [1971] GRUR 362, 363 (BGH); Block in Wandtke and Bullinger, Praxiskommentar zum Urheberrecht (C.H. Beck, 2nd editionMunich 2006), Vor §§ 31ff, No. 45.

\textsuperscript{267} Von Welser in Wandtke and Bullinger, Praxiskommentar zum Urheberrecht (C.H. Beck, 2nd edition, Munich 2006), § 44a, No. 5 and 17.

\textsuperscript{268} See in context of P2P, but likewise: Shiell, Viral Online Copyright Infringement in the United States and the United Kingdom (Part II) [2004] ENTLR 107, 112.

\textsuperscript{269} Ausschnittdienst [2004] GRUR-RR 228, 231 (KG Berlin).

\textsuperscript{270} Ausschnittdienst [2004] GRUR-RR 228, 231 (KG Berlin).
that exception even if the source of his copying is unlawful, as long as the source is not “obviously unlawful”\textsuperscript{271}. However, article 5 (2)(b) of the Information Society Directive has clarified that this exception is restricted to private use and excludes direct and indirect commercial purposes,\textsuperscript{272} so that any commercial or occupation-related Internet activity does not fall within the exception. The “professional” Internet-user can only rely on implied licences of the webpage owner but faces – at least theoretically – liability if the fetched webpage contains infringing elements itself.

\textbf{3.2.4 ISP Liability}

\textbf{(a) Introduction}

As explained in subchapters 3.2.2(b) and 3.2.3(b), Internet Service Provider (ISPs) are involved in the acts of hosting material on the Internet (hosting provider) and communicating this material between Internet-servers and Internet-users (access provider). The question is whether they can be held liable for any copyright infringement.

\textbf{(b) Copyright Aspects

\textit{i Under New Zealand Law}

\textbf{(i) Liability for Providing Access}

It is arguable that the mere transmission of small data pieces via Internet-routers is not a copyright relevant reproduction.\textsuperscript{273} It is also arguable that a liability for direct infringement requires a positive voluntary act in relation to a copyright work. Section 29(1) of the \textit{Copyright Act} expressly requires that the infringer is “doing” something:

\begin{quote}
“Copyright in a work is infringed by a person who, [...] \textbf{does} any restricted act.”
\end{quote}

The (access-providing) ISP and its employees do not copy actively. The data transmission on the Internet is a non-manual, automatic process, initiated by the user.

\textsuperscript{271} Section 53 (1)(1) \textit{Urheberrechtsgesetz}.

who addresses the specific webpage. Hence, the ISP merely provides the infrastructure, which the Internet user uses. In the decision of the English High Court in *Sony Music Entertainment (UK) Ltd v Easyinternetcafé Ltd*, Smith J stated:²⁷⁴

“It would be absurd if the recipient of a fax over which he has no control could be said to be infringing it [copyright] merely because his machine is the one that prints the transmission. Generally, the owner of a fax machine cannot stop material being sent. He is an involuntary copier. The same occurs in relation to the Internet Service Provider.”

However, the question arises whether the ISP is indirectly liable for infringing copyright in the work that is finally transmitted. According to New Zealand law, not only the exercise of copyright owners’ exclusive rights but also authorising such an exercise can be an infringement of copyright pursuant to sections 16 (1)(i) and 29 (1) of the *Copyright Act*. This liability is strict in the sense that it is no defence to show that one reasonably believed the authorised act would not infringe copyright.²⁷⁵ This approach is similar to, for instance, the law of the United Kingdom,²⁷⁶ Australian law²⁷⁷ and the Canadian law²⁷⁸.

Recently, the New Zealand Court of Appeal dealt with the question of authorisation in the case of *Heinz Wattie’s Ltd v Spantech Pty Ltd*.²⁷⁹ The court held that Heinz Wattie’s infringed the copyright in an architectural building plan by directing the building contractor what was to be built. Even though Heinz Wattie’s did not know that the actual building infringed copyright in the plaintiff’s architectural plans, it was held to have authorised the infringement conducted by the building company. The court emphasised that mere innocence is not a defence to a claim for infringement of copyright.²⁸⁰

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²⁷³ See subchapter 3.2.3(c)(ii).
²⁷⁶ Section 16 (2) of the UK CDPA.
²⁷⁷ Section 36 (1) of the Australian Copyright Act 1968.
²⁷⁸ Section 3 (1) of the Canadian Copyright Act 1985 – C-42; see also Kingsbury, *Finding the copyright balance: originality, authorisation and fair dealing in Canadian and New Zealand law* (2005) 4 NZIPJ 68, 70.
The factual situation of this case is similar to the older English case *Falcon v Famous Players Film Company* of 1926\(^{281}\) in which Bankes L.J. defined “to authorise” as to “sanction, approve and countenance”. The court held that the act of supplying a film to a cinema amounts to “authorisation” of the act of exhibiting the film.

However, these two cases dealt with situations where the defendant induced, incited or persuaded an individual infringer and identifiably procured a particular infringement. This is different to a situation where an ISP only provides a technical infrastructure for many users, which could be used for infringements but also for a variety of legal purposes. This might have been the reason for the New Zealand court of Appeal in the *Heinz Wattie’s* case to clarify explicitly that it is not to be taken as generally deciding the extent to which other Anglo-American cases has modified the concept of authorisation.\(^{282}\)

Regarding the factual aspects, the following cases seem to be more applicable to the ISP liability issue:

In the New Zealand case *Australasian Performing Right Association Limited v Koolman*\(^{283}\) in 1968, the Supreme Court stated that the question of “authorisation” in any particular case is largely one of fact. In the case in question, the court held that the owner of a club, who booked a band and permitted the band to select the music it played impliedly authorised the band to infringe copyright by playing a protected song without consent of the copyright owner.

Some years later, in 1976, Gibbs J also followed the wide approach to authorisation in the Australian case of *Moorhouse v University of New South Wales*.\(^{284}\) His Honour held a library, which provided a photocopying machine to its customers, liable for having authorised its patrons’ infringements:

“[A] person who has under his control the means by which an infringement of copyright may be committed -- such as a photocopying machine -- and who makes it available to other persons, knowing, or having reason to suspect, that it is likely to

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\(^{281}\) Bankes L.J per *Falcon v Famous Players Film Company* [1926] 2 KB 474 (CA UK).

\(^{282}\) *Heinz Wattie’s Ltd v Spantech Pty Ltd* (2005) 67 IPR 666 (CA), para 36 – the court addressed the *Amstrad, Moorhouse, Sherman* and *Grokster* cases.


\(^{284}\) *Moorhouse v University of New South Wales* [1976] RPC 151, 159 (HCA).
be used for the purpose of committing an infringement, and omitting to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from its use.”

In the following decades, courts favoured narrower definition of “authorisation”:

In 1988, the House of Lords considered extensively the question of authorisation in the case of CBS Songs Ltd v Amstrad Consumer Electronics plc. It decided that the mere selling of twin-deck tape-recorders (which enabled customers to reproduce copyright protected audio tapes) did not constitute authorisation of copyright infringements. The House of Lords argued that, firstly, the recorders could also be used for lawful purposes, secondly, the manufacturer had no actual means to prevent an infringing use of the recorders after it was sold, and thirdly, the manufacturer did not expressly encourage the buyers to infringe copyright. Lord Templeton stated with regard to authorisation that:

“[A]n authorisation means a grant or purported grant, which may be express or implied, of the right to do the act complained of. Amstrad conferred on the purchaser the power to copy but did not grant or purport to grant the right to copy.”

The House of Lords referred to the English case CBS Inc v Ames Records and Tapes Ltd in which Whitford J held that a record library which lent out records and simultaneously offered blank tapes for sale did not authorise the infringement of copyright in the records. His Honour said:

“Any ordinary person would, I think, assume that an authorisation can only come from somebody having or purporting to have authority and that an act is not authorised by somebody who merely enables or possibly assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act.”

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287 CBS Inc v Ames Records and Tapes Ltd [1981] 2 All ER 812 (Ch).
288 CBS Inc v Ames Records and Tapes Ltd [1981] 2 All ER 812 (Ch), 822.
Moreover, in a recent judgment, the Supreme Court of Canada stated:

“[A] person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law”  
[emphasis added]

The court concluded – contrary to the older Australian Moorhouse v University of New South Wales case – that a library does not infringe copyright in way of authorising by maintaining self-service photocopiers. Even if there was evidence of the photocopiers having been used to infringe copyright, the library lacked sufficient control over the patrons to conclude that it authorised the infringements.

In the case of Australasian Performing Right Association Ltd v Metro on George Pty Ltd\textsuperscript{290} the Federal Court of Australia went even further and stated:

“ [...] mere facilitation of the infringing conduct is insufficient [to constitute authorisation], as is knowledge that there is a likelihood that there will be infringing use.”  
[emphasis added]

The court referred to the case Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia\textsuperscript{291} and pointed out the importance of control for determining authorisation:

“The presence or absence of control [is] the ‘critical distinction’ between the circumstances in [...] Amstrad [...] and Moorhouse.”

The court held the owner of a bar responsible for having authorised unlicensed performance by some promoters and bands. However, contrary to the above discussed New Zealand case Koolman, the liability was not based on the mere fact that the defendant had let the venue to unlicensed performers but on the fact that he had been put on notice about the unlicensed promoters without taking any action. The defendant permitted the unlicensed situation to continue.

\textsuperscript{289} CCH Canadian Ltd. v Law Society of Upper Canada [2004] 1 S.C.R. 339, para 38.
\textsuperscript{290} Australasian Performing Right Association Ltd v Metro on George Pty Ltd [2004] FCA 1123, para 18.
\textsuperscript{291} Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia (1993) 176 CLR 480.
The present Australian copyright statute focuses now explicitly on the aspect of “the extent (if any) of the person’s power to prevent the doing of the [infringing] act” and “whether the person took any reasonable steps to prevent or avoid the doing of the act” in determining whether an authorisation happened. On the other hand, sections 39B and 112E of the Australian Copyright Act as amended by the Digital Agenda Act, clarify regarding (Internet) communication that a person, who provides facilities for making a communication is not taken to have authorised an infringement merely because another person uses the facility in a copyright infringing manner.

The Australian case *Universal Music Australia Pty Ltd v Cooper* considered the intention and the control possibilities of the person who contributed to another person’s direct infringement for determining whether he authorised the infringement. The court held that the owner of a website, which had provided thousands of hyperlinks to infringing copies of music files on the Internet, had authorised infringements in the form of other peoples’ downloads from these linked sites. The court argued that

“The website is clearly designed to, and does, facilitate and enable this infringing downloading. [...] The defendant] could have prevented the infringements. [...] He] clearly had sufficient control [...]”

In the case of *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* the Federal Court of Australia concluded that a person who provided infrastructure which could be used for exchanging (downloading and uploading) illegal copies of copyright works did not authorise copyright infringements by its users merely because it had provided the facilities. But, the person was nevertheless held to have authorised its users’ infringing acts of unlawfully making copies of sound recordings and of unlawfully communicating sound recordings to the public. The court reasoned that the defendant, which operated the infrastructure, undertook positive acts that had the effect of encouraging users to make infringing copies

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292 See sections 36 (1A)(a) and 101 (1A)(a) of the Australian Copyright Act.
294 *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972.
295 *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, para 84 ff.
296 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.
297 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, para 401.
knowing that the shared files were largely copyright protected works. The website of the defendant promoted the opportunity to share material which is usually copyright protected. Additionally, the court considered that the defendant had the power to prevent (albeit not completely but in large parts) and to reduce the sharing of copyright material (by means of a filter), but had decided not to do so.

The Canadian case *SOCAN v. Canadian Assn. of Internet Providers* also distinguished between mere infrastructure providing and acts where more control was possible. Regarding infrastructure providing, the court held:

“[…] the Copyright Act, as a matter of legislative policy established by Parliament, does not impose liability for infringement on intermediaries who supply software and hardware to facilitate use of the Internet.” [emphasis added]

The court stated that ISPs might be liable under the concept of authorisation if they are fixed with notice and fail to take available steps to stop the infringement.

Although the New Zealand *Copyright Act* does neither provide any liability limitations for mere providing of infrastructure nor any detailed criteria for interpreting the word “authorisation”, like the Australian statute, it seems likely that courts would follow a distinguished approach. Considering the more differentiating findings of the newer decisions of various Commonwealth countries’ courts it seems unlikely that the mere providing of infrastructure which “technically” allows a copyright infringement “to take place” would be sufficient for having authorised a copyright infringement. ISPs do not purport to grant any right in copyright works and as far as they indirectly permit the reproduction of infringing material by facilitating the infrastructure, one has to determine whether they are able to control the content of their transmissions. In general, ISPs are unable to check whether the transmitted data pieces are parts of infringing copies of works and they most likely expect customers to act in accordance with the law.

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298 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, para 405 f.

299 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, para 411 f.


301 This result is also supported by Kingsbury, *Finding the copyright balance: originality, authorisation and fair dealing in Canadian and New Zealand law* (2005) 4 NZIPJ 68, 71 and 74.
On the other hand, if the ISP – in a particular case – encouraged its users to infringe copyright or omitted to exercise control possibilities which were at hand although it knew about infringements, it might be held liable, particularly according to the reasoning of the recent Australian cases *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* and *Universal Music Australia Pty Ltd v Cooper*.

However, as a general conclusion, one can argue that ISPs generally do not infringe copyright even if illegal copies of copyright protected works are transmitted on their networks. This is consistent with the tradition of “not to shoot the messenger” for the content of the message.302

The New Zealand Government intends to introduce a clarification into future law, which – like the Australian law – will state that the mere provision of physical facilities for enabling or making a communication does not itself constitute an infringement of copyright, or an authorisation of such infringement.303

Apart from these authorisation issues, an ISP could be held liable pursuant to section 37 (2) of the *Copyright Act*. However, section 37 (2) requires the ISP to know or to have reason to believe that infringing copies of the work will be made by means of the reception of the transmission. Such knowledge or constructive knowledge will be unlikely in most cases. Additionally, one could argue against application of this provision that ISPs do usually not transmit “the work” but only very small data pieces.

(ii) Liability for Proxy-Caching

Another question of ISP liability arises if the ISP is not only involved as an intermediary in the process of copying works from Internet-server computers to computers of user, but deliberately stores whole copies of the accessed work for further reproductions. Proxy-caching systems enable ISPs, which directly connect computers of their users to the Internet, to reassemble the single data pieces to a

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302 The “don’t shoot the messenger” approach is explained and discussed by Sutter, ‘*Don’t shoot the Messenger?*’ The UK and Online Intermediary Liability (2003) 17 IRLCT, 73, 73; it is also considered by Wilcox J per *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, para 418.

whole work copy. Although ISPs do not voluntarily decide which particular works shall be stored in their caches, they set up general rules for what is to be stored. ISPs have therefore access to and control over these caches. One could therefore argue that ISPs either infringe copyright directly (by deciding that a whole copy of the work is to be stored and controlling the copying process) or infringe copyright indirectly (by having the power to control what is stored in their caches). Considering these aspects, the Supreme Court of Canada held in the case of *SOCAN v. Canadian Assn. of Internet Providers*:305

“[W]here an ISP in Canada creates a [proxy-]"cache" of internet material, even for technical reasons, they no longer act as a mere intermediary and are liable for copyright infringement to that extent.”

It is therefore likely that an ISP would be held liable for proxy caching under present New Zealand law, too. Although one could argue an implied licence against such a liability, the application of that doctrine is questionable since proxy-caches do not only store a copy of the fetched work for the single browsing user but for an unlimited amount of users that use the respective network. The impact of proxy caches on the use of works and the loss of control is much bigger. It is therefore doubtful that website owners give their consent implicitly to such a form of storage. Additionally, proxy caches are not as necessary for browsing as other incidental reproductions.306

Regarding this ISP caching issue, the New Zealand Government proposes to introduce a liability limitation for ISPs, modelled on the UK/EU regulations, rather than on section 43A of the Australian Copyright Act.307 Under Australian law, it is uncertain whether proxy caching qualifies as a “temporary reproduction of the work

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306 Apparently, the only effective way to exclude proxy-caching is the use of secure connection protocols (SSL), as usually used for online banking. Those connections are handled by different ports that are generally not cached by proxies. However, the speed of non-proxy-cached online banking illustrates that proxy-caching is not absolutely necessary for a reasonably quick online communication.

or adaptation as part of the technical process of making or receiving a communication”.\textsuperscript{308} Strictly speaking, proxy-caching is not a part of the communication process but rather an additional reproduction for speeding up subsequent transmissions. The EU regulations are broader, see below.\textsuperscript{309}

(iii) Liability for Hosting

Liability questions also arise in the context of ISPs letting space on Internet-servers to customers. In the US case \textit{Religious Technology Center v Netcom On-Line Communication Services}\textsuperscript{310} a provider which stored copies of material that was uploaded by its users was held not to be directly liable for the copying. But although ISPs usually neither act actively nor decide what particular material is copied on their hard drives, they could potentially be held liable under authorisation aspects. One must consider that hosting theoretically allows a broader control over the stored material than mere access providing. Nevertheless, the requirement of completely monitoring all the material hosted by hosting providers could be unduly burdensome and potentially impossible.\textsuperscript{311} Hence, only if the hosting-provider is fixed with knowledge regarding a specific infringement but does not delete or block the access to that material, liability could be reasonable in accordance with the Canadian case of \textit{SOCAN v. Canadian Assn. of Internet Providers}\textsuperscript{312}. The US decision \textit{Religious Technology Center v Netcom On-Line Communication Services}\textsuperscript{313} also recognises:

\begin{quote}
Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party. [...] This distinction [whether the host-provider received
\end{quote}

\begin{footnotes}
\item[309] See subchapter 3.2.4(b)ii.
\item[310] \textit{Religious Technology Center v Netcom On-Line Communication Services} 907 F Supp 1361, 1368 (N.D. Ca. 1995).
\item[312] \textit{SOCAN v. Canadian Assn. of Internet Providers} [2004] SCCDJ 2155, para 110.
\item[313] \textit{Religious Technology Center v Netcom On-Line Communication Services} 907 F Supp 1361, 1370 (N.D. Ca. 1995).
\end{footnotes}
notice of the infringement] may be relevant to contributory infringement [...].”

Furthermore, hosting providers face a potential liability under the aspect of secondary infringement liability pursuant to section 36 (a) of the Copyright Act, because it is arguable that they possess the copy, stored on their computer hardware. Secondary infringement liability also requires knowledge or reason to believe that an object is an infringing copy.

The New Zealand Government analysed the liability limitation for hosting providers under present UK law, which in large parts based on article 14 of the EU E-Commerce Directive, and proposed to introduce a similar liability limitation. However, instead of actual knowledge of illegal activity, the Government proposes to model the liability limitation on the secondary infringement requirement of “constructive knowledge”.

ii Under German Law

(i) Liability for Providing Access

Although it is arguable that the mere act of transmitting data pieces over the Internet does not result in a reproduction pursuant to copyright law, the EU Information Society Directive provides an additional exception in favour of ISPs and their reproduction processes in routers whilst transmitting data. Article 5 (1) reads:

“Temporary acts of reproduction [...], which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
(a) a transmission in a network between third parties by an intermediary, or
(b) a lawful use

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314 For an overview to article 14 of the EU Information Society Directive see subchapter 3.2.4(b)ii.
of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right [...].”

Section 44a *Urheberrechtsgesetz*, which implements article 5 (1) of the EU Information Society Directive as a permitted use exception, has almost the same wording.

Additionally, ISPs are privileged by article 12 of the EU directive of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (2000/31/EC)\(^{317}\) (subsequently referred to as the EU E-Commerce Directive). Article 12, which is implemented in German law as section 9 of the German Teleservices Act (*Teledienstegesetz*)\(^ {318}\), reads:

“1. [...] an ISP] is not liable for the information transmitted, on condition that the provider:
(a) does not initiate the transmission;
(b) does not select the receiver of the transmission; and
(c) does not select or modify the information contained in the transmission.
2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.”

However, this provision provides only protection against monetary awards and criminal penalties, but not against injunctive relief.\(^ {319}\) Hence, although the German *Urheberrechtsgesetz* does not expressly prohibit the authorisation of another person’s infringement (like section 16 (1)(i) of the New Zealand *Copyright Act*), an indirect liability could nevertheless apply. According to German case law, the strict liability of section 97 of the *Urheberrechtsgesetz* applies also to persons, who do not exercise

the main act of infringement but who contribute to the infringement by any means.\footnote{Internet-Versteigerung [2004] GRUR 860, 864 (BGH).}

A person who contributes to a copyright infringement can be ordered to refrain from this contribution. However, this indirect liability cannot be unreasonably extended to any person who makes a causal contribution to the infringement whatsoever. The case law has therefore set up criteria to determine what kind of contribution triggers liability:

\[\text{„[D]ie Haftung [...] setzt die Verletzung von Prüfungspflichten voraus. Deren Umfang bestimmt sich danach, ob und inwieweit dem als Störer in Anspruch Genommenen nach den Umständen eine Prüfung zuzumuten ist.}\]

Translation:

\[\text{“[T]he liability [requires] the violation of control duties. The scope [of these duties] has to be determined on a case-by-case-basis, considering whether and [if yes:] to what extent the person can reasonably be expected to exercise such a control.”}\]

In the case Internet-Versteigerung,\footnote{Internet-Versteigerung [2004] GRUR 860, 864 (BGH); with further references.} the German Federal Court of Justice (Bundesgerichtshof) held that Internet auction companies are not generally obliged to check all auctions for infringements, since the effort required would be highly unreasonable. But if such a company becomes aware of a typical kind of infringement, it must check suspicious cases for obviously similar infringements, for instance by means of automatic software. In determining the extend of control duties, the court noted that the company received a percentage of the selling price and therefore indirectly participated in the infringement. A general obligation to monitor the information which is transmitted or stored or actively to seek facts or circumstances indicating illegal activity would, however, be inconsistent with article 15 of the EU E-Commerce Directive. Article 15 (1) reads:

\[\text{“Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.” [emphasis added]}\]

Germany implemented it in national law as section 8 (2) of the Teledienstegesetz:
“Diensteanbieter im Sinne der §§ 9 bis 11 sind nicht verpflichtet, die von ihnen übermittelten oder gespeicherten Informationen zu überwachen oder nach Umständen zu forschen, die auf eine rechtswidrige Tätigkeit hinweisen. Verpflichtungen zur Entfernung oder Sperrung der Nutzung von Informationen nach den allgemeinen Gesetzen bleiben auch im Falle der Nichtverantwortlichkeit des Diensteanbieters nach den §§ 9 bis 11 unberührt.”

Translation:
“Providers in terms of section 9 to 11 are neither obliged to monitor the information which they transmit or store, nor obliged to seek facts or circumstances indicating illegal activity. The liability limitations of sections 9 to 11 do not affect any obligations of the providers to remove or disable the access to the information pursuant to other statutes.”

The German implementation is partly different from, for instance, the English. Section 97a (1) of the CDPA requires the ISP to have knowledge of the infringement as a precondition for injunctions:

“The High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.”

Positive knowledge is not a requirement of liability under German law.

Contrary to the aforementioned Internet-Versteigerung case, a non-profit company, which administers German Top-Level-Internet-Domains (.de) was not held to have infringed trade mark rights by not checking whether registered domain names violate rights in trade marks, even though a particular infringement had already occurred before. The court concluded that an automatic registration system whose objective is only to register domains quickly and cheaply does not result in any control duties whatsoever, even if the violations are obvious.

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322 Internet-Versteigerung [2004] GRUR 860 (BGH).
323 The strict liability for trade mark infringements is similar to copyright law.
In the case Kopierläden,\textsuperscript{325} the Federal Court of Justice (Bundesgerichtshof) held that a person who provided self-copying copying machines had not participated in infringements conducted by his customers. Moreover, the owner of the machines had no duties to control his customer’s copies. Such a control duty was considered unreasonable and impracticable. It would furthermore have violated the customers’ right to privacy if they had to disclose their material. The court stated that the copy-shop owner had carried out all reasonable and necessary steps to protect copyright by including a clause in his general terms and conditions which reminded customers to consider copyright law. In this decision, the German court is more align with the Canadian Supreme Court in \textit{CCH Canadian Ltd. v Law Society of Upper Canada} \textsuperscript{326} rather than with the strict Australian \textit{Moorhouse v University of New South Wales} \textsuperscript{327} decision.

However, in light of these cases, ISPs are generally not liable for the mere act of providing technical means that could be used for reproducing infringing copies on the Internet, if no specific circumstances indicate such an infringement is likely and the ISP does not participate or benefit from the infringement. Notwithstanding, German ISPs should include for reasons of precaution a copyright clause in their general terms and conditions that reminds users to adhere to copyright law.

(ii) Liability for Proxy-Caching

However, the liability limitations of section 44a of the \textit{Urheberrechtsgesetz} and section 9 of the \textit{Teledienstegesetz} do not apply to proxy caching, since proxy caching is not transient as required pursuant to article 5 (1) of the EU Information Society Directive and section 44a of the \textit{Urheberrechtsgesetz}. The requirement of “transient” means that the copy is stored only for a very short moment.\textsuperscript{328} The period of storage in proxy caches does also not meet the requirement of being “not stored any period longer than is reasonably necessary for the transmission” as required by article 12 of

\textsuperscript{325} \textit{Kopierläden} [1984] GRUR 54 (BGH).

\textsuperscript{326} \textit{CCH Canadian Ltd. v Law Society of Upper Canada} [2004] 1 S.C.R. 339, see discussion above in chapter 3.2.4(b)(i).

\textsuperscript{327} \textit{Moorhouse v University of New South Wales} [1976] RPC 151 (HCA), see discussion above in chapter 3.2.4(b)(i).

\textsuperscript{328} \textit{Ausschnittdienst} [2004] GRUR-RR 228, 231 (KG Berlin).
the EU *E-Commerce Directive* and section 9(1) of the *Teledienstegesetz*. The objective of proxy caching is to keep the copy for the next (and not current) transmission.

Nevertheless, European ISPs can rely on the liability limitation provided by article 13 of the EU E-Commerce Directive. It justifies ISP caching for the purpose of more efficient onward transmissions, which proxy-caching epitomises. Article 13 of the EU E-Commerce-Directive parallels section 512 (b) of the US Digital Millenium Copyright Act (DMCA), which also provides a similar broad liability limitation for ISPs that justifies the storage of copies of works for a limited time to fulfil subsequent requests of their user without retrieving the material from the original source on the Internet.

Article 13 reads:

“1. [...] the ISP] is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;
(b) the provider complies with conditions on access to the information;
(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.”

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Article 13 of the Directive has been accordingly implemented in German law as section 10 of the German Teleservices Act (Teledienstegesetz).

Although article 13 of the EU E-Commerce Directive is limited to temporary storages, its definition is broader than the requirement of transient in article 5 (1) of the EU Information Society Directive. The literal meaning of the word “temporary” indicates also a non-permanent storing but not as short as transient, which means very short and momentary.  

If proxy-caching were excluded, one could hardly think of a situation where article 13 of the EU E-Commerce Directive applied. Proxy-caches are a typical infrastructure for making communication more efficient.

Notwithstanding, ISPs that have control over their proxy cache might held to be liable under the strict liability doctrine and potentially face injunctions (which are not excluded by article 13 of the EU E-Commerce Directive and section 8 (2) and 9 to 11 of the Teledienstegesetz) if further aspects indicate an actual infringement.

(iii) Liability for Hosting

Regarding hosting, ISPs are privileged by section 11 of the German Teledienstegesetz which mirrors article 14 of the EU E-Commerce Directive. Article 14 (1) reads:

“1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:
(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.[...]”

Pursuant to article 14 (3) of the EU E-Commerce Directive (and section 8 (2)(2) of the German *Teledienstegesetz*), this article does not prevent a court or administrative authority from requiring the service provider to terminate or prevent a continuing infringement. Hence, as in regard to proxy-caching, ISPs might be held liable under the strict liability doctrine for having infringed copyright and might face injunctions, depending on the circumstances.

### 3.2.5 Hyperlinking

**From the User’s Point of View**

From the user’s point of view, a hyperlink is something hidden behind a line of text or an icon on a webpage that leads to an other webpage or element, which opens if it is clicked with the mouse.

**Technical Process**

Hyperlinking is a central feature of and fundamental to the Internet. Without hyperlinks the accessibility and usability of the Internet would be rather uncomfortable because the main idea and functionality of websites, consisting of several webpages that are linked to each other, as well as search engines (like www.google.com) and web directories (like www.yahoo.com), that contain billions of links to other websites, are based on hyperlinks. It is said that hyperlinks are the “essence of the Internet”. However, the function of hyperlinks is rather simple. Clicking a hyperlink on a webpage is equal to copying the Internet-address of the respective link target and entering it into the input field of the web-browser. A hyperlink on a webpage is comparable to a reference provided by an index or footnote – combined with the benefit of an automatic lookup function. The embedding of a hyperlink in a webpage is carried out by linking the Internet-address of the target webpage to an element of the present webpage, usually text or image. The link can be put in place without the

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involvement of the operator of the website which it is being linked to. Additionally, the person who embeds the hyperlink into his webpage can do so without having ever accessed or copied the target material. For instance, the embedding of the HTML function

\[
\text{<a href="http://www.otago.ac.nz/law/gfx/law_01.gif">LOGO</a>}
\]

in the source code of any webpage would result in a hyperlink, displayed as the text “LOGO”. If a user clicks on “LOGO”, he will be guided to the University of Otago Law Faculty’s website and would see the University’s emblem in his web-browser. That works, even if the creator of the respective webpage has never seen the emblem himself.

(c) Copyright Aspects

From a copyright point of view the question arises whether the embedding of a hyperlink into one’s webpage, which links users to a copyright protected item on another person’s website, infringes copyright.

Under New Zealand Law

There are no New Zealand cases of hyperlinking which have been decided as yet.

However, the question whether hyperlinking infringes copyright has been a subject of judicial consideration and academic writing in other Anglo-American countries. For instance in the United States, Hupp J in a decision, dated 27 March 2000, explained:

“[…] hyperlinking does not itself involve a violation of the Copyright Act since no copyright is involved. The customer is automatically transferred to the particular genuine web page of the original author. There is no deception in what is happening. This is analogous to using a library’s card index to get reference to particular items, albeit faster and more efficiently.”

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In the recent US case *Perfect 10 v. Google, Inc* the court referred to *Ticketmaster Corp v Tickets.com* and held (for a preliminary injunction) that Google is not liable under copyright aspects for setting hyperlinks to pictures of Perfect 10. The court concluded that Google neither infringes copyright directly nor materially contribute to any direct infringement of its users by mere setting of hyperlinks.

Likewise, Tamberlin J judged in *Universal Music Australia Pty Ltd v Cooper* under Australian law that

“[...] when a link to a music file is activated, the remote computer on which the file is stored is directed to, and does automatically, transfer a copy of the file from the host server directly to the computer of the user activating the link. [...] The music file is not sent to, downloaded on or saved to [the linking] website or the host server of the [linking] website.”

Thus, the person who set the hyperlink does not undertake an act of reproduction. Additionally, Tamberlin J held that the mere act of setting up a hyperlink does not result in an act of transmitting or communicating a work to the public:

“[The person who set the link] did not communicate the sound recordings to the public [...] because no sound recordings were actually stored on the website and the sound recordings were made available for downloading by the remote websites linked to via the website.

[...] I am of the view that [the person who embedded the hyperlinks] cannot be said to have transmitted the sound recordings.”

These decisions seem to be inconsistent with the Scottish case *Shetland Times Ltd v Wills*, which is said to be one of the first link-litigation cases. In that case, Lord Hamilton granted a preliminary injunction against the embedding of links to the plaintiff’s webpage due to infringement of the right to include a work in a cable programme service.

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337 *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, para 20.
338 *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, para 66.
However, it must be noted that, firstly, this decision is dated October 1996, a time when the Internet was relatively new and the respective technical processes were not thoroughly analysed from a legal point of view. Secondly, the case involved an interlocutory proceeding requiring only a *prima facie* evaluation. Lord Hamilton admitted that:

“The resolution of the above issues may in the end turn on technical material not available to me at the hearing on interim interdict.”

Since the case was finally settled, the interim decision in the case of *Shetland Times Ltd v Wills* cannot be invoked as a strong authority. The reasoning in the more recent decisions is more convincing. Additionally, from a technical point of view, the assumption of the court in the *Shetland* case was wrong that the mere act of embedding a hyperlink involves any act of data transmission (broadcasting, cable transmitting or any other form of technology neutral transmission), which is conducted by the person who set up the link. Instead, the data which represents the linked work is directly transmitted from the linked website to the user. The linking website provides only the Internet address of this work. There is also academic writing in the United Kingdom which expresses the opinion that “linking *per se* does not need permission” – contrary to the *Shetland* case. The Australian academic writing also supports this approach.

Although there has not been any hyperlinking decision in New Zealand, it seems reasonably clear that the mere setting of a link to another webpage does not require any permission from the linked site under New Zealand copyright law. Consideration of the technical process shows that the act of setting a hyperlink itself is neither accompanied by a reproduction process nor does it initiate a direct data transmission from the person who sets the link or his website. Thus, hyperlinking in general does not trigger any exclusive right.

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342 Evans, *Protection of Data on the Internet* [2002] IPQ 50, 67, who, however, mentions that the ability to link to a page might be contractually waived by a “click-wrap” agreement.
344 See also for this conclusion under New Zealand law: McClintock and Murphy, *CCH New Zealand Online Library – E-Commerce Collection – Intellectual Property – Copyright Commentary* (February 2006, http://www.cch.co.nz/nxt/gateway.dll/Commentary%20and%20Cases/NLEC/E-
Nevertheless, the owner of the linking webpage could be held liable to have authorised another person’s direct infringement pursuant to sections 16 (1)(i) and 29 (1) Copyright Act according to the reasoning of the Australian hyperlinking case "Universal Music Australia Pty Ltd v Cooper." However such a liability depends on the factual basis of the case, particularly knowledge and control possibilities. In "Universal Music Australia Pty Ltd v Cooper," the defendant had not only included one normal link in his homepage but thousands of links to obviously infringing copies of music. It is therefore unlikely that the mere setting of a hyperlink to incidentally illegal material would trigger liability, if there are no further aspects, which indicate an authorisation.

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ii Under German Law

On 17 July 2003, the German Federal Court of Justice terminated a long academic discussion about whether a hyperlink that is embedded into one’s webpage is a copyright infringement. The court held:

"Die Bekl. greifen durch das Setzen von Hyperlinks auch dann nicht in Vervielfältigungsrechte ein, wenn die Datei, zu der eine Verknüpfung hergestellt wird, ein geschütztes Werk enthält. Durch einen Hyperlink wird das Werk nicht i.S. des § 16 UrhG vervielfältigt [...] Ein Link ist lediglich eine elektronische Verknüpfung der den Link enthaltenden Datei mit einer anderen in das Internet eingestellten Datei. Erst wenn der Nutzer den Link anklickt, um diese Datei abzurufen, kann es zu einer urheberrechtlich relevanten Vervielfältigung - im Bereich des Nutzers - kommen."

"Die Kl. kann einen [...] Anspruch [...] auch nicht auf eine Verletzung ihr zustehender urheberrechtlicher Nutzungsrechte an der Zugänglichmachung [...] stützen, weil das Setzen eines Hyperlinks auf eine Webseite mit einem urheberrechtlich geschützten Werk nicht in solche Rechte eingreift."

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345 See for a discussion of this case and other authorisation aspects subchapter 3.2.4(b)i(i) and also Sainsbury, The Copyright Act in the Digital Age (2000) 11 JLJS, 182, 193.

Translation:

“The defendants do not infringe the right to copy by setting a Hyperlink, even if the file, which is linked to, contains a copyright protected work. A hyperlink does not copy the work in terms of section 16 Urheberrechtsgesetz. A Link is only an electronic connection of the file that contains the Link to another file on the Internet. A reproduction that might be copyright relevant does not happen until a user clicks the link for opening the respective file, and then the reproduction is in the sphere of the user.”

“The plaintiff can [...] furthermore not substantiate his claim [...] by means of the right to make a work available to the public [...], because the setting of a Hyperlink to a website that contains a copyright protected work does not infringe such a right.”

This German Federal Court of Justice followed two lines of arguments. First, setting up a hyperlink does not involve an act of copying the linked material by the person who embedded the link. Second, the person who set up a hyperlink does not make the (linked) work available to the public. He provides only the Internet address of a work which is already available to the public. Although this judgment is – due to the German civil law system – not formal precedent, it is most unlikely that any other court will diverge from this well reasoned decision.

However, the owner of the linking webpage could be held liable under strict liability aspects if he linked to an illegal copy of a work which resulted in a copyright infringement when opened by another person.347 Contrary to US copyright law,348 neither the EU E-Commerce Directive nor the German law provides an explicit liability limitation for hyperlinking. Hence, one must evaluate the factual circumstances. However, it is unlikely that the mere setting of a hyperlink would trigger liability. The control duty which one could reasonably expect349 from a person who sets up a link to another Internet-webpage seems to be rather low if no further circumstances indicate that the linked webpage contains illegal material.

347 See subchapter 2.4.9.
348 Section 512(d) of the DMCA.
349 See subchapter 2.4.9.
3.2.6 Peer-to-Peer File Sharing

(a) From the User’s point of View

Peer-to-peer file sharing (P2P) has recently become very popular. Many software programs and infrastructure services like Kazaa Networks, Grokster, eDonkey and its relative eMule (and the former platform Napster, which eventually declared bankruptcy and closed down in May 2002\textsuperscript{350}) have made file sharing (particularly the exchange of music files) very easy.

(b) Technical Process

The background technological process is rather simple: users make their stored digital files public to other users and can likewise search and download the files of other users. The exchange of file-indexes happens via decentralised and steadily changing servers whilst the actual file transfer (via modern P2P networks)\textsuperscript{351} occurs directly between the users without intermediary servers.

(c) Copyright Aspects

Simply speaking, the act of file sharing via P2P networks involves only technical processes and hence raises legal questions that are already discussed in the above subchapters: accessing and downloading files (like browsing) and copying copyright protected material on hard drives and making this material available.\textsuperscript{352} In summary, sharing copyright works without consent of the respective rightholder is a copyright infringement and no permitted use exceptions apply.\textsuperscript{353}

\textsuperscript{350} Napster was legally challenged by the US copyright industry, see A&M Records Inc v Napster Inc 114 F 2d 896 (ND Cal 2000) and appeal 239 F 3d 1004; for an interesting analysis of the Napster case from an economic point of view see Gordon and Watt, The Economics of Copyright, (Edward Elgar, Cheltenham/Northampton 2003), p. 16 ff.

\textsuperscript{351} Contrary to older networks like, for instance Napster, where a centralised server was necessary as a “clearing house” to manage the download/upload processes.

\textsuperscript{352} The Court of Appeal in Hamburg has recently held in the case Kein Auskunftsanspruch gegen Access-Provider [2005] MMR 453, 454 that the right to make works available to the public pursuant to section 19a Urheberrechtsgesetz applies; see for an overview also: Shiell, Viral Online Copyright Infringement in the United States and the United Kingdom (Part II) [2004] ENTLR 107, 107.

\textsuperscript{353} See the analyses of the respective acts in the above subchapters; and also Harvey, internet.law.nz (LexisNexis, 2nd edition, Wellington 2005), p. 712 f.
Regarding P2P networks, the primarily discussed question is therefore whether, and if so to what extent, the network/software providers are liable for infringements.

Under New Zealand law

The Ministry of Economic Development stated in its 2002 Internal Working Paper:

“In New Zealand [...] the copyright system is unlikely to impose liability on file sharing services [...] it is unlikely to capture a service such as Napster, or indeed the less centralised services that are now developing. The service is not itself involved in copying infringing material directly and it unlikely that they would be caught by the authorisation factors.”

Likewise, Harvey comes to the conclusion that such an intermediary network or application provider would generally not be liable as primary or secondary infringer or for unlawful authorisation.

However, it has to be considered that the recent 2005 United States Supreme Court decision MGM v Grokster found the P2P company Grokster to be liable due to its active steps to encourage infringement, for instance, by means of communicating that copyrighted files could be downloaded. Wilcox J also followed this approach in the Federal Court of Australia in Universal Music Australia Pty Ltd v Sharman License Holdings Ltd. His Honour concluded that Sharmann, which ran the network “Kazaa”, authorised its users’ infringing acts. According to the judgment, it undertook positive acts that had the effect of encouraging users to make infringing copies whilst it knew that the shared files were largely copyright protected works. Additionally, his Honour considered that the defendant failed to prevent or at least to reduce the sharing of copyright material, even though it had the power to do so.

Although the New Zealand Copyright Act provides no further definition of “authorisation” and the New Zealand case law deals only with hardly comparable cases.

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357 Universal Music Australia Pty Ltd v Sharman License Holdings Ltd [2005] FCA 1242.
situations of rather specific involvement, it is – considering other Commonwealth cases regarding authorisation\textsuperscript{359} – likely that New Zealand courts would hold such a network provider liable if its activities exceed the scope of mere infrastructure providing and if it has the power to control infringing conduct. Hence, the assumptions of the Ministry of Economic Development in 2002 and of Harvey seem to be rather unrealistic in hindsight, particularly regarding Napster-like networks whose centralised server systems allow much power to control the exchanged material.

\textit{ii} Under German law

There is no German case law and little academic writing regarding P2P network liability. The reason might be that, first, no German P2P network exists, and second, before the right to make a work available to the public was implemented and section 53 (1) of the \textit{Urheberrechtsgesetz} was amended (now excluding copies that are made from “obviously” illegal sources) in late 2003, it was questionable whether file-sharing by users was actually illegal.

The question whether a P2P provider could be held liable for indirect infringement according to the general criteria,\textsuperscript{360} is not clarified yet. However, the liability limitations of the sections 9 to 11 of the \textit{Teledienstegesetz} (article 12 to 14 of the EU E-Commerce Directive) do not apply, since modern P2P providers provide only software and neither directly transmit data in a communication network nor cache or store data.\textsuperscript{361} P2P software enables users only to connect to each other and exchange files without any further involvement of the P2P software creator. The wording of the EU E-Commerce Directive is, particularly regarding article 12,\textsuperscript{362} more restricted than, for instance, section 112E of the Australian Copyright Act 1968\textsuperscript{363}.

\textsuperscript{358} Universal Music Australia Pty Ltd v Sharman License Holdings Ltd [2005] FCA 1242, para 405 f and 411 f; see also the discussion of this case in subchapter 3.2.4(b)i(i).

\textsuperscript{359} For a broad discussion of authorisation see 3.2.4(b)i.

\textsuperscript{360} See for the aspect of indirect infringement under German law subchapter 3.2.4(b)ii.

\textsuperscript{361} See also Spindler and Leistner, \textit{Die Verantwortlichkeit für Urheberrechtsverletzungen im Internet - Neue Entwicklungen in Deutschland und in den USA}, [2005] 10 GRURInt 773, 788.

\textsuperscript{362} Article 12 (1) reads: “where [a …] service is provided that consists of the transmission in a communication network of information”

\textsuperscript{363} The liability limitation of section 112E (1) is broader and includes a person “who provides facilities for making, or facilitating the making of, a communication”; Universal Music Australia
Considering the reasoning in the case Kopierläden\(^{364}\) one could argue that the including of a clause in general terms and conditions which reminds customers to act according to copyright law excludes liability. However, according to the factual findings of *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*, a variety of control possibilities exists and P2P file sharing usually involves a typical form of infringing. Hence, following the case *Internet-Versteigerung*,\(^{365}\) P2P network providers might be subject to a broader control duty with regard to recurring infringements and held to be liable if they failed to carry out this duty.

### 3.3 Conclusion

German case law and recent statutory amendments (which were significantly influenced by EU directives, particularly the EU Information Society Directive) have eliminated some legal ambiguities that remain under New Zealand law, such as the questions whether temporary copying and caching while browsing is included in the definition of the right to copy, whether hyperlinking requires the consent of the owner of the linked webpage, and whether the act of making available material on the Internet triggers a communication right.

However, uncertainties remain in both legal systems; for instance, the scope of implied licences while browsing, the liability of browsing users (albeit in Germany only regarding “professional” users) and the scope of liability for indirect and contributory infringement. Although two EU directives have already dealt with ISP liability limitations, the legal situation regarding injunctive relieve is still uncertain under German law, let alone the general liability of other intermediaries such as P2P network providers. This shows how difficult it is for copyright law to cover and to follow technological developments. However, one can argue under both legal systems that ISPs which provide mere infrastructure are not liable for any copyright infringement of their users unless they have knowledge about it or neglect control duties. The result under New Zealand law, however, bases on the evaluation of very little New Zealand case law but rather on the interpretation of Anglo-American

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364 *Kopierläden* [1984] GRUR 54 (BGH), see discussion under subchapter 3.2.4(b)iii(i).

365 *Internet-Versteigerung* [2004] GRUR 860 (BGH) see discussion under subchapter 3.2.4(b)iii(i).
decisions that base on a different legal system. It will be interesting to observe whether the actual implementation of New Zealand’s proposal for ISP liability limitation will provide more certainty than the recent EU and German amendments.
4. **Piracy in the Digital Age – a Survey**

“In former times, pirates were only found on the oceans, nowadays, they lurk digitally and online on all continents.”

4.1 **Typical Digital Copyright Infringements**

One can infringe copyright in many ways. However, nowadays, most infringements happen digitally. Although there are still unauthorised reprints of books on the global piracy markets, unauthorised reproductions of CD-ROMs and DVDs containing films, music and computer programmes constitute the largest part of the present offline piracy. The types of infringements range from unlawful copying of a video game for relatives and the reproduction of a DVD movie for a handful of remote friends accompanied by a generous compensation for outlays, to organised crime syndicates trafficking thousands of pirated music CDs through various regional flea markets.

All these types of offline infringements have a counterpart in the online world, though the scope of online – particularly Internet – infringements are even broader. Illegal websites offer pirated software, video games, music and videos by subscription for remuneration to worldwide customers. Private users exchange copyright protected pictures, software and music files via peer-to-peer services, not only with friends but also with potentially millions of strangers. Additionally, millions of colourful private and business webpages are created every month – often including pictures, text and street maps, etc. that are copied from other webpages without the consent of the copyright owners. Likewise, many elements that are included in print products, for instance advertisement brochures, are unlawfully copied from the Internet.


368 See for instance the former German company GATEL, which was said to run the world largest illegal download server by offering more than 11 terabytes of pirated films, before it was shut down by German officials in September 2003, see Motion Picture Association of America, 2004
4.2 Extent of Piracy – Some Statistical Figures

It is impossible to give a precise figure for the extent of piracy due to a high number of unreported cases and a lack of exhaustive surveys. However, one finds some statistics that allow a good estimation of the extent of piracy in specific fields, particularly software, music and movies. The following statistics illustrate the scale of piracy.

4.2.1 Movie Piracy

In 2002, the US entertainment industry lost worldwide an estimated US$ 3.5 billion due to movie piracy – compared to an estimated US$ 2.2 billion lost in 1997. In the first six months of 2004, more than 32,000 pirated DVDs were seized in Australia alone and 17% of Australians illegally downloaded movies from the Internet. In New Zealand, the annual losses are estimated US$ 4 million. In 2003, European officials seized 72.8 million pirated movie items, around 6% of these seizures occurring in Germany. According to the estimations of the Motion Picture Association of America, Germans illegally downloaded more than 13.3 million movies from the Internet in the first eight months of 2003.

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than 1.6 million movie counterfeits were seized in 2003, and the total piracy level is 20%.\textsuperscript{377}

In less developed countries, the situation is even worse: In China, the piracy level in relation to movies (DVDs and videocassettes) is an estimated 95%\textsuperscript{378} and in Russia 75%.\textsuperscript{379} Furthermore, Russia is considered to serve as a manufacturing and distributing centre for much of the pirated material around the world.\textsuperscript{380}

### 4.2.2 Music Piracy

Music companies also face high piracy rates. According to a recent estimation of IFPI, which represents the worldwide music recording industry, “one in three discs sold worldwide is a pirate copy”.\textsuperscript{381} In 2004, 1.5 billion pirated items, worth US$ 4.6 billion at pirate prices were illegally sold – not including music pieces that are digitally distributed via Internet\textsuperscript{382} – and officials seized more than 28,000 CD-R burners that were used for manufacturing counterfeits.\textsuperscript{383}

IFPI’s evaluations also confirm that the piracy levels in developing countries, particularly China, parts of Asia and Latin America, reach over 50% whilst the piracy rates in New Zealand, Australia, United States, Germany, Austria, United Kingdom etc. are under 10%.\textsuperscript{384} Despite these comparable low piracy rates, the annual losses alone in New Zealand are an estimated NZ$ 114 million.\textsuperscript{385}


### 4.2.3 Software Piracy

With regard to computer software, the piracy level is likewise high. In 2004, the global piracy rate regarding personal computer software was 35\% -- software worth US$ 90 billion was installed but the world spent only US$ 59 billion for commercial packaged PC software. Two third of the countries that were studied by the Business Software Alliance (BSA) and the International Data Corporation (IDC) in 2004 had a piracy rate exceeding 50\% and even the median was above 60\%\footnote{BSA and IDC, \textit{Second Annual BSA and IDC Global Software Piracy Study 2005} (May 2005, http://www.bsaau.com.au/bsaaweb/main/downloads/05-BSA-IDC-Glob-Pir-Soft-Study.pdf), p. 3 and 9.}.

As in respect of music and movies, China (piracy rate of 90\%) and Russia (piracy rate of 87\%) can also be found in the software Top 10 list of the countries with the highest piracy rates, among other emerging markets in Asia and Latin America.

New Zealand’s software piracy rate of 23\% is the second lowest after the United States (21\%). Germany is in the 10\textsuperscript{th} place with 29\% whilst the Australian piracy rate is 32\%.\footnote{IFPI, \textit{The recording industry 2005 commercial piracy report}, (June 2005, http://www.ifpi.org/site-content/library/piracy2005.pdf), p. 10.} Even the relatively low piracy level in the EU resulted in losses of more than US$ 12 billion in 2004, and of that amount, US$ 2.3 billion are due to German piracy. In New Zealand, the impact of piracy is comparatively low; the losses were
estimated US$ 24 million.\textsuperscript{394} Regarding the whole global IT sector, which adds approximately US$ 1.7 trillion (this is US$ 1,700,000,000,000) annually to global economic prosperity, a 10 point drop in piracy rate over four years would add 2.4 million new jobs and US$ 400 billion to economic growth.\textsuperscript{395}

### 4.2.4 Miscellaneous Piracy

Even smaller scale piracy reaches impressive levels. The German company GEKA (\textit{Gesellschaft für kartographische Abdruck- und elektronische Vervielfältigungsrechte}), which is not an authorised collecting society but nevertheless represents most of the German copyright owners in maps and cartography, estimates that more than 25\% out of the approximately 8 million maps on German webpages are infringing copies.\textsuperscript{396} Based on an average price for a three-year online licence of € 200, annual losses total € 130 million (NZ$ 250 million). The GEKA systematically searches on the Internet for webpages including maps that were copied without consent from German online mapping services, like \url{www.stadtplandienst.de}, a German counterpart of \url{www.wises.co.nz}. The GEKA pursues between 30 and 240 infringements every business day.\textsuperscript{397}

### 4.3 Reasons for High Infringement Rates

First, there is generally a lower sense of injustice in the population in respect of intellectual property infringement\textsuperscript{398} than, for instance, in respect of theft of physical property. This attitude is supported by the typical legal course of action in the context of intellectual property crimes in many countries. If physical property is stolen, usually a prosecution follows, but intellectual property infringements are seldom as seriously

\begin{itemize}
  \item \textsuperscript{395} BSA and IDC, \textit{Expanding the Frontiers of our Digital Future} (December 2005, \url{http://www.bsa.org/idcstudy/pdfs/White_Paper.pdf}), p. 3.
  \item \textsuperscript{396} Private email from Dr Hans Biermann, managing director of GEKA GmbH, dated 7 April 2006.
  \item \textsuperscript{397} Private email from Dr Hans Biermann, managing director of GEKA GmbH, dated 7 April 2006.
\end{itemize}
regarded.\textsuperscript{399} In New Zealand, for instance, copyright infringement for a private, non-commercial purpose does not even result in criminal liability. Hence, enforcement of copyright is usually a matter of civil law, which is difficult, expensive and time consuming.\textsuperscript{400} A person who infringes copyright, particularly in a work of a minor rightholder (other than Microsoft, etc. who usually take more rigorous steps), will seldom have to fear legal consequences.\textsuperscript{401} For instance in the United Kingdom, not many more than 100 civil actions for copyright infringements reach the courts each year.\textsuperscript{402} Civil remedies offer only little deterrent.\textsuperscript{403} Additionally, it is more difficult to protect intellectual property than physical property. It cannot be locked away as easily.\textsuperscript{404} Contrary to physical property, it is even harder to detect a “theft” of copyright, because nothing disappears.\textsuperscript{405}

The situation becomes most complicated if more than one country is involved in the piracy activities due to a lack of international legal consensus regarding intellectual property enforcement.\textsuperscript{406} This is usually the situation when the almost anti-territorial Internet is involved. If, for instance, a United States citizen offers an Australian software product on a server that is located in Russia for German customers, the practical and legal questions will be highly complex. Enforcement of copyright is therefore important for combating piracy. So in many countries, constructive reviews of enforcement provisions were or still are on the agenda, for

\begin{itemize}
\item \textsuperscript{399} Young and van Melle, \textit{Equal protection for IP – enforcement} (2004) 3 NZIPJ 251, 251.
\item \textsuperscript{400} See Costelloe, \textit{The New Digital Copyright Law in the Media, Entertainment and Communications Industries} (2001) 12 AIPJ 19, 31, who regards enforcement of the (in Australia) newly clarified rights as the challenge for the right holder.
\item \textsuperscript{402} Phillips, \textit{The Risk That Rewards: Copyright Infringement Today} [2001] ENTLR 103, 104.
\item \textsuperscript{404} Though Technological Protection Measures try to achieve a similar result, see chapter 5.
\item \textsuperscript{405} For a further and more illustrated comparison of criminal acts regarding physical and intellectual property see Young and van Melle, \textit{Equal protection for IP – enforcement} (2004) 3 NZIPJ 251, 252; see also Phillips, \textit{The Risk That Rewards: Copyright Infringement Today} [2001] ENTLR 103, 104.
\end{itemize}
instance in Australia\textsuperscript{407} or the EU\textsuperscript{408}. These reviews are due to Article 14 (2) WCT which provides that the parties shall ensure enforcement procedures are available “to permit effective action against any act of infringement of [copy] rights”.

Thirdly, infringing copyright is easy and convenient. With a standard personal computer, practically anybody can make large quantities of infringing copies of films, music and other works at home – and this is the novelty of the digital world – a quality that is 100\% identical to the original.\textsuperscript{409} In contrast to analogue reproduction processes, copying is no longer accompanied by a lack of quality. Neither is it expensive. Cheap, easy to hide and portable facilities allow “more professional pirates” a substantially reduced market entry and low production costs.\textsuperscript{410} Additionally, the internet provides the opportunity to distribute infringing copies broadly, instantaneously and in a manner that is difficult to trace. The increasing availability of connection bandwidth (for instance ADSL broadband)\textsuperscript{411} and the improvement of data compression (for instance MPEG and MP3 which combines high quality and small size) also support this trend\textsuperscript{412} and enable users and professional pirates to exchange and distribute even bigger works like movies and computer games\textsuperscript{413} and not only smaller music pieces.

\begin{thebibliography}{100}
\end{thebibliography}
Fourthly, the Internet is tempting. Millions of mostly unprotected images, texts and music songs are only one mouse click away. It is easier to copy a map from an internet service for using on one’s own webpage than to draw a map oneself or even to scan a paper map (which would nevertheless be prohibited as well). Likewise, it is more convenient to download a pirated piece of music by means of a peer-to-peer service than to drive to the next music store and buy a whole CD. Illustratively, in Napster’s heyday in 2001, an estimated 10,000 music files were shared per second,414 and the Kazaa software was the most downloaded application with more than 229 million downloads from www.download.com by the middle of 2003.415 The music industry claims that the fall in sales revenues since 1999 is solely due to the rise of illegitimate file-sharing.416 Additionally, many still hold the common assumption that any material that is freely accessible on the internet can be copied without restrictions.417

In New Zealand, the parallel importing policy also supports piracy, albeit not in the online context. Multiple importing and distribution channels might provide cover for illegal copies making them harder to detect and to police,418 even though the Copyright (Parallel Importation of Films and Onus of Proof) Amendment Act 2003 considered and mitigated the link between piracy and parallel importation by creating a presumption of infringement in the absence of contrary evidence.419

4.4 ECONOMICAL AND CULTURAL CONSEQUENCES OF PIRACY

Piracy results in reduced monetary rewards for authors and the copyright industry.420 Authors and artists who even without piracy often live close to the margin of subsistence cannot live on their creative works and have to cease their creative careers. Additionally, worldwide copyright industry companies, particularly movie companies, publishing houses and music labels have to focus on works with lower risk

416 Stromdale, The Problems with DRM, [2006] ENTLR 1, 2; though the economic statistical analysis are debatable, see Gordon and Watt, The Economics of Copyright, (Edward Elgar, Cheltenham/Northampton 2003), p. 18 f.
419 Section 35 (2)(a) of the Copyright Act see also Young and van Melle, Equal protection for IP – enforcement (2004) 3 NZIPJ 251, 253.
and higher profit margins. New and unknown artists and authors of non-bestsellers will not get a chance to publish their works. These developments in turn mean that the scope and range of creative works, which form the basis of a country’s culture, are less varied.\footnote{See above, subchapter 4.2.} Furthermore, high national piracy rates might deter copyright-related companies from investing in these countries, or entrepreneurs from starting such companies up. In summary, good copyright protection (including a good copyright practice) is important for the cultural and economic development of any country and society.\footnote{See the commentary of the former German Minister of Justice Däubler-Gmelin, \textit{Private Vervielfältigung unter dem Vorzeichen digitaler Technik}, [1999] ZUM 769, 773.}

Despite these macroeconomic aspects, copyright infringements also have a negative microeconomic effect: The cost of piracy is borne by honest consumers,\footnote{Vietri, \textit{The free flow of Information or the flow of free information?} (2005) 4 NZIPJ 48, 52} because fewer people must pay a bigger portion of fixed costs like research and development expenses.\footnote{Young and van Melle, \textit{Equal protection for IP – enforcement} (2004) 3 NZIPJ 251, 252.}
5. **TECHNOLOGICAL COPYRIGHT PROTECTION MEASURES**

"The answer to the machine is in the machine."  

5.1 **THE TECHNOLOGY**

5.1.1 **Introduction**

The purpose of Technological Protection Measures (TPMs) is to use technology to respond to the technological challenge which copyright currently faces. The basic idea of TPM is to lock the copyright protected digital work away and to control and manage the usage of digital works.  

Although the roots of TPMs go back to 1976, when a basic form of technological protection was implemented in Betamax video recorders, TPMs have recently become more present, more advanced and also more important. In the present digital age, TPMs (also known as DRM – Digital Right Management Systems) are widely considered as increasingly important in facilitating new forms of digital distribution. In 2001, the MIT Technology Review considered Digital Rights Management systems to be one of the top ten emerging technologies that will change the world.

The ordinary user faces TPMs in connection with music, film, ebooks or software purchases. Microsoft users, for instance, have to register their purchased copy of

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427 DRM and TPM are often used as synonyms, though DRMs are usually based on TPMs and actually provide a more complex and more sophisticated control, like a pay-per-view billing function. Nevertheless, since TPM and DRM stand for the same kind of technological idea, the following chapters will not distinguish between these two techniques.


430 For an overview see Stromdale, *The Problems with DRM*, [2006] ENTLR 1,2; and for ebook and music TPMs see Akester and Akester *Digital Rights Management in the 21st Century*, [2006] EIPR 159, 161.
Windows XP to successfully install and run it.\textsuperscript{431} Some music CDs include copy protection that prevents it from being played on a PC or copied by means of a CD-burner. Online purchased films, that are downloaded from the Internet, often expire after several days and cannot be viewed afterwards. Electronic e-books are only readable on certain devices.\textsuperscript{432}

5.1.2 Function of TPMs

Since there is no defined standard in the field of TPM and DRM and the technological approaches are multifarious\textsuperscript{433} it is almost impossible to provide an exhaustive definition or description.

However, the international Organisation for Economic Co-operation and Development’s (OECD) Working Party on the Information Economy provides a description of key procedures of DRM:\textsuperscript{434}

- the encryption of content to keep it unavailable to unauthorised users
- the establishment of a licence system for controlling who can access the content and what can be done with it in specific circumstances
- the authentication of the identity of the user, a required step for accessing the different usage rights awarded by the licence.

TPMs can mainly be divided into two groups: devices that prevent and inhibit unauthorised access to content, and devices that control copying.

Most TPMs consist of software. The rightholders usually identify and control the use of their copyright works by implementing identifications and usage rules into each distributed item. When the user wants to access or copy this work, the player/reader software (like Adobe’s Acrobat Reader,\textsuperscript{435} Microsoft’s Windows Media Player or

\begin{footnotesize}
\textsuperscript{432} Mitchell, High Crimes and Misdemeanours: Breaking the Codes of E-books and DVDs, (2003) 14 C&L, 33, 34.
\textsuperscript{435} See for instance the DRM description of Adobe’s Acrobat Reader: http://www.adobe.co.uk/epaper/features/drm/drmtools.html.
\end{footnotesize}
RealNetwork’s Realplayer) on the PC or playing device checks whether the user has the right to do so, according to the initially embedded information.\textsuperscript{436} To ensure that these TPMs are not ineffective when played on players without these protection-checking facilities, the works are usually encrypted, which disables non-authorised playing software from reading these works.

However, there are also hardware solutions. Most popular is the chip, which is included in all DVD players that allows or denies the playing of a DVD due to its embedded regional code.\textsuperscript{437} The DVD industry divided the earth into several regions (for instance North America, Europe, Asia, etc). DVD players which are sold in one of these regions are restricted to playing only DVDs with a matching region code. It is therefore impossible to play a DVD that is sold on the German market in a New Zealand purchased DVD player.

The Sony Playstation console likewise contains an embedded chip that checks the legitimacy of the inserted game CD/DVD in reference to both piracy and region code.\textsuperscript{438} Original CDs/DVDs incorporate an code in hidden sectors that cannot be reproduced by most conventional copying devices. The player verifies whether the game is original and whether the region codes of player and game match.

A more sophisticated and also much broader approach is the incorporation of the Trusted Platform Module in the Intel manufactured central processing units\textsuperscript{439} of personal computers, which allow a wide range of hardware based security features.\textsuperscript{440} IBM has developed a similar hardware-based encryption tool for various purposes,

\textsuperscript{436} See also the introduction to DRM of Chang, \textit{Does Lessis’s Criticism of Digital Rights Management Target One Technology That the Information Industries Desire More Than They can Actually Provide}? (2005) 19 IRLCT, 235, 238.


\textsuperscript{440} Stromdale, \textit{The Problems with DRM}, [2006] ENTLR 1,2; Chang, \textit{Does Lessis’s Criticism of Digital Rights Management Target One Technology That the Information Industries Desire More Than They can Actually Provide}? (2005) 19 IRLCT, 235, 238.
called SecureBlue\textsuperscript{441}. Hardware TPMs have the advantage that they cannot, or at least cannot easily, be circumvented.\textsuperscript{442}

Since the music industry is (or at least claims to be) the biggest victim of online piracy, it was one of the first to develop protection technology and now has a wide range of TPMs to control its copyright. Due to a lack of agreed standards, music is presently protected by many TPM/DRM systems, most of them labelled with mystic abbreviations, for instance DOI, UMID, ISAN, GUID, ISWC or Grid.\textsuperscript{443}

\subsection*{5.2 The Legal Support For Technological Protection Measures}

However, TPMs do not provide absolute protection. As the technology that protects copyright material develops, just one step behind is usually the development of devices which enable circumvention.\textsuperscript{444} All TPMs are capable of being circumvented by hackers.\textsuperscript{445} A popular example is the attempt of the movie industry to prevent infringement of its movie DVDs by means of an encryption procedure, called Content Scramble System (CSS). Shortly after, DeCSS, a decryption tool became widely available, free of charge on the Internet and made the CSS-encryption, to a large extent, ineffective.\textsuperscript{446}

Therefore, in the last decade of the 20\textsuperscript{th} century, the idea arose to legally protect not only the copyright work itself but also to secure the technological protection measures by means of legal sanctions. The approach was manifested in the 1996 WIPO Internet Treaties\textsuperscript{447} and remains one of the most controversial aspects of

\textsuperscript{443}Stromdale, \textit{The Problems with DRM} [2006] ENTLR 1, 3.
\textsuperscript{447}See article 11 of the WCT and article 18 of the WPPT.
international copyright law. Such legal backing of TPMs results in a multi-layered protection of copyright works. First, the exclusive rights of copyright legally protect the work, secondly, TPMs technologically secure the protection of the exclusive rights and, thirdly, anti-circumvention law supports TPMs.

The right to copy is probably the most important and also the most vulnerable exclusive right of the copyright owner in the digital environment. The general approach of protecting a copyright work against unauthorised exercise of the right to copy is therefore apparent and reasonable from a legal point of view. However, the copyright industry also tries to control access to a work. This is new to the copyright regime. According to the copyright tradition, the exploitation of a work is defined as public dissemination (of copies of the work), but copyright has never been about regulating access to or use of works. But although the mere act of accessing a work does not breach copyright, one has to consider that the acts of accessing and copying are often related in digital environment. Different jurisdictions have different approaches to the protection of access control TPMs.

It is widely argued that provision of effective remedies against circumvention require the prohibition of certain preparatory acts in respect of circumvention devices (such as the making, selling, or letting for hire of such devices). Such provisions are able to prevent circumvention in a larger scale. It is often easier and more effective to close down an illegal distributor of circumvention devices than to prosecute each act of circumvention. Some countries rely only on this kind of remedy whilst other states combine the prohibition of preparatory acts with the prohibition of the act of circumventing.

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450 E.g. reading a book, watching TV in analogue world.
451 E.g. accessing a webpage for reading the content.
The legal protection of TPM usually goes along with provisions that secure electronic rights management information (ERMI), which are used by rightholders to identify, track and assist with the utilisation of works. The managing of digital rights by means of TPMs often requires information embedded in the copy of the work. A popular way of embodying such digital right management information in works is digital watermarking. Thus, provisions of both kinds are considered necessary to support a technical control system effectively.\footnote{Barczewski, \textit{International Framework for Legal Protection of Digital Rights Management}}

The following subchapters analyse the legal support of TPMs and ERMI under present New Zealand and German law. Additionally, reference is made to selected aspects of the law of other countries, for instance the United States of America, Australia, the United Kingdom and Austria, as well as to selected aspects of EU directives and international agreements. Furthermore, the proposed changes to New Zealand copyright law are considered.

\section*{5.2.1 International Agreements and the US Digital Millennium Copyright Act}

The WIPO Internet Treaties (WCT and WPPT) are the only international treaties, which deal with legal TPM support. In older copyright agreements, such as the Berne Convention and the more recent TRIPS, similar provisions are completely absent.

The WIPO Internet Treaties do not provide a precise definition of TPM. The rather short article 11 WCT (and similarly article 18 of the WPPT) reads:

\begin{quote}
"Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."
\end{quote}

The WIPO Internet Treaties neither distinguish between different kinds of TPMs nor provide any interpretation for “adequate legal protection” or “effective legal remedies”. According to a narrow interpretation of the wording, the treaties focus on
protection against the act of circumvention itself rather than on the supply of devices used to accomplish circumvention.\footnote{Barczewski, International Framework for Legal Protection of Digital Rights Management Systems, [2005] EIPR 165, 166.} However, it is widely acknowledged that these treaties leave it to the contracting parties to decide whether to prohibit the act of circumvention itself, or preparatory acts regarding the supply of circumvention devices, or both.\footnote{See for instance Smillie, Legal support for technological protection measures (2004) 3 NZIPJ 278, 279; Wand, Technische Schutzmaßnahmen und Urheberrecht (C.H. Beck, Munich 2001), 41; the Cabinet Economic Development Committee, Digital Technology and the Copyright Act 1994: Policy Recommendations (25 June 2003, http://www.med.govt.nz/buslt/int_prop/digital/cabinet/index.html), para. 56(m) also considers the proposed amendments (that do still not prohibit the act of circumventing itself) as “substantially consistent” with the WCT and WPPT.} Regarding the “legal remedies”, the WCT does not require any specific civil and/or criminal remedies.\footnote{See also Smillie, Legal support for technological protection measures (2004) 3 NZIPJ 278, 279; Wand, Technische Schutzmaßnahmen und Urheberrecht (C.H. Beck, Munich 2001), 41.}

Digital rights management information protection was, like the TPM circumventing regulations, first introduced by article 12 of the WCT and article 19 of the WPPT. Article 12 of the WCT (and the very similar article 19 of the WPPT) read:

“(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.”
Contrary to the TPM regulations, these ERMI provisions are more detailed and self-explaining. However, the definition of “rights management information” is very broad. It is not restricted to copyright-related information but also includes any contractual information, like “terms and conditions of use”. The ERMI protection allows rightholders to use copyright law for enforcing contractual interests – clearly an advantage beyond the borders of traditional copyright law.

The United States of America were the first to implement the WCT and WPPT regulations and to introduce broad legal support for TPMs. The Digital Millennium Copyright Act (DMCA) entered into force on 28 October 1998 and must obviously be recognised by all other jurisdictions that followed. Thus, it is worth having a brief look at it.

The central provision of the DMCA regarding TPMs is section 1201. Subsections 1201(a)(2) and (b)(1) prohibit the manufacturing, importing, offering to the public, providing, and otherwise trafficking in “any technology, product, service, device, component, or part thereof, that”

- is primarily designed or produced for the purpose of circumventing a TPM, or
- has only limited commercially significant purpose or use other than to circumvent a TPM, or
- is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a TPM

This provisions address both categories of TPMs – copy control systems and access control systems. However, the section that protects TPMs against the act of circumventing itself distinguishes between these two types of TPMs. Subsection 1201 (a)(1)(A)(1) reads:

“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”

[emphasis added]

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457 The US Congress passed the bill on 12 October 1998 and President Clinton signed it on 28 October 1998.
Thus, the act of circumventing TPMs that technologically prohibit the copying of works is not prohibited.\footnote{US Copyright Office Summary, \textit{The Digital Millennium Copyright Act of 1998} (December 1998, http://www.copyright.gov/legislation/dmca.pdf), 4.} This distinction between access control and copy control TPMs is meant to accommodate copyright law exceptions like fair use. The intention of the DMCA is to avoid a negative effect on permitted use exceptions.\footnote{See below, subchapter 6.2.2(b).} Nevertheless, the approach of providing a stronger protection for access TPMs than for copy TPMs is surprising, since the US copyright law does not provide an exclusive right to access a work.

The TPM provisions of the DMCA require neither an element of knowledge nor an intention to infringe copyright. Section 1203 of the DMCA provides civil remedies (injunctions, damages awards, recovery of costs, remedial modification or destruction of any devices involved) for committing a prohibited act of circumventing a TPM or making/selling/etc a circumvention device. Section 1204 provides criminal penalties against deliberately circumventing a TPM or committing prohibited preparatory acts like making/selling/etc. The penalties range up to a US$ 500,000 fine or up to 5 years of imprisonment for a first offence and up to a US$ 1 million fine or up to 10 years of imprisonment for subsequent offences.

The Courts of the United States of America have tended to take a broad view of the scope of legal support for TPMs. The DMCA has given rise to many cases in recent years and almost any technology in question has been held to qualify as a TPM the protection of the act.\footnote{Dusollier, \textit{Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work} [2005] EIPR, 201, 202 with further reference to US cases.} For instance, a hardware chip in a Sony Playstation that checks whether the game CD is licensed for the specific geographical region (and that only runs the game if the authentication is successful);\footnote{Considered as an access control device, see \textit{Sony Computer Entertainment America, Inc. v. Gamemasters}, 87 F. Supp. 2d 976 (N.D. Cal. 1999).} a software control procedure that checks an authentication sequence for granting access to a specific audio or video file;\footnote{\textit{RealNetworks Inc. v Streambox Inc.} (2000) WL 127311 (W.D. Washington).} an encryption system that protects access to content on movie DVDs;\footnote{\textit{Universal Studios, Inc. v. Corley}, 273 F.3d 429 (2d Cir. 2001).} copying and distribution restrictions in digitally formatted books (so called “ebooks”).\footnote{A criminal case: \textit{United States v Elcom Ltd}, 203 F. Supp. 2d 1111 (N.D. Cal. 2002).}
Beyond these cases, where TPMs had the common feature of protecting copyright material like video games, movies and books, the copyright anti-circumventing regulations were also argued in cases that dealt with durable goods – products whose value is independent of any ancillary copyright material. For instance, a printer and printer toner cartridge manufacturer implements a chip including a computer program in its toners that communicates with the printer. Once empty, the chip indicates “empty” and the printer refuses to print, even if the toner has been refilled in the meantime. Another company programmed a microchip that mimicked the authentication sequence to allow interoperability between printers and cartridges refurbished by third parties. The printer manufacturer successfully sued the company who manufactured the microchips in the first instance on basis of the US copyright law which prohibits circumventing of TPMs that control the access to copyright works. It argued that its original toner cartridges control the access to the computer program in the printer and if the toner cartridge chip is circumvented, the software in the printer can be accessed and the user can “make use” of the program.\footnote{Lexmark International Inc. v Static Control Components Inc., 253 F. Supp. 2d 943, 946 (E.D. Ky. 2003); for a further discussion of this case and reference to similar cases see Higgs, The DMCA and Durable Goods Aftermarkets (2004) 19 Berkeley Tech. L.J. 59, 69 ff.} However, this “escapade” of applying copyright TPM protection was subsequently stopped by the court of appeal. The court of appeal disagreed with the prior instance in determining whether the unmodified toner cartridges control the access to the printer software. It held that the computer program in the printer is not effectively protected by the authentication sequence in the toner cartridges but can be accessed in other ways.\footnote{Lexmark International Inc. v Static Control Components Inc., 387 F.3d 522, 546 ff (6th Circ 2004).} Second, the court draw an distinction between TPMs that protect the access to copyright material and TPMs that merely secure the execution of functional software procedures. It pointed out:\footnote{Lexmark International Inc. v Static Control Components Inc., 387 F.3d 522, 548 (6th Circ 2004).}

"Unlike the code underlying video games or DVDs, ‘using’ or executing the Printer Engine Program does not in turn create any protected expression. Instead, the program's output is purely functional [...] [T]he Printer Engine Program is not a conduit to protectable expression [...] Because Lexmark's authentication sequence does not restrict access to this literal code, the DMCA does not apply."

\footnote{Lexmark International Inc. v Static Control Components Inc., 387 F.3d 522, 546 ff (6th Circ 2004).}
\footnote{Lexmark International Inc. v Static Control Components Inc., 387 F.3d 522, 548 (6th Circ 2004).}
Nevertheless, the US copyright regime in respect of TPM protection is generally considered to strongly benefit rightholders, going far beyond the requirements of the WCT and WPPT. 468

The ERMI requirements were implemented by section 1202 of the Digital Millennium Copyright Act. The section prohibits removal and alteration of ERMI and provision of false ERMI, as well as distributing such items. The DMCA also provides detailed definitions and some limitations on liability with regard to ERMI. The civil and criminal remedies provided for TPM protection are also applicable for the ERMI protection, but a subjective element is required. 469

5.2.2 German and EU Law

The German Urheberrechtsgesetz implemented two different EU directives which deal with TPM protection – the EU Computer-Directive 470 (regarding TPMs that protect computer programs) and the EU Information Society Directive (regarding TPMs that protect all other types of works).

(a) Computer Programs

Article 7 (1)(c) of the EU Computer-Directive of 1991 reads:

“[…] Member States shall provide, in accordance with their national legislation, appropriate remedies against a person committing any of the acts listed […] below:
(c) any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program.”


The implementation in German law in 1993\(^\text{471}\) as section 69f of the German Urheberrechtsgesetz reads:

"(1) Der Rechtsinhaber kann von dem Eigentümer oder Besitzer verlangen, daß alle rechtswidrig hergestellten, verbreiteten oder zur rechtswidrigen Verbreitung bestimmten Vervielfältigungsstücke vernichtet werden. [...]"

(2) Absatz 1 ist entsprechend auf Mittel anzuwenden, die allein dazu bestimmt sind, die unerlaubte Beseitigung oder Umgehung technischer Programmschutzmechanismen zu erleichtern."

Translation:

"1) The right holder may require from owners or possessors that all unlawfully manufactured or distributed copies of works or all copies of works intended for unlawful distribution be destroyed. [...]"

(2) Subsection (1) shall apply mutatis mutandis to any means of which the sole intended purpose is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program." [Emphasis added]

Neither the Directive and the EU legislators’ comments in the recitals nor the Urheberrechtsgesetz provide any further definitions of the used terms. However, the wording “any technical device” allows a broad interpretation of protected TPMs, including hardware and software devices that provide any form of protection for computer programs.\(^\text{472}\) It is not clear whether this provision is limited to TPMs that prevent copyright infringement or whether it also protects TPMs that prevent acts which are only unauthorized, for instance by virtue of contractual agreements.\(^\text{473}\)

In contrast, both the Directive and the national law make clear that they apply only to circumvention devices whose sole intended purpose is to facilitate circumvention.


\(^{472}\) Wand, Technische Schutzmaßnahmen und Urheberrecht (C.H. Beck, Munich 2001), 146; Grützmacher in Wandtke and Bullinger, Praxiskommentar zum Urheberrecht (C.H. Beck, 2nd edition, Munich 2006), § 69f, No 15; likewise the UK decision Kabushiki Kaisha Sony Computer Entertainment v Ball [2004] EWHC 1738 (Ch), para 43 considered hardware and software TPMs as protected.

Hence, devices that can be used for both legal and illegal purposes are not prohibited.474

Civil or criminal remedies, other than orders for destruction, are absent. The given liability is strict and does not require any subjective element such as knowledge. However, if the TPM is embodied in the computer program and the removal of this protection also results in an alteration of the work itself, the full range of civil and criminal remedies apply.475 The scope of application of this provision is limited to TPMs that protect computer programs.

Due to its restriction to computer programs and the limited remedy of destroying orders, section 69f (2) of the Urheberrechtsgesetz is of rather little practical importance.

(b) Other Works

The EU introduced a much broader legal backup for TPMs in the Information Society Directive of 2001, which implemented the WCT and WPPT requirements. The scope of the Directive does, however, not include TPMs that protect computer programs. The official comment of the EU legislator in recital 50 states:

“Such a harmonised legal protection does not affect the specific provisions on protection provided for by [Computer-]Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive.”

The German legislator followed this distinction, despite the fact that this distinction is highly questionable, since there seems to be no policy reason for installing two different levels of protection for different works.476 However, section 69f of the Urheberrechtsgesetz remains in force for computer programs and sections 95a to 95d


475 Dongle-Umgehung [1997] CR 337 (OLG Düsseldorf); Umgehungsprogramm [1996] CR 341 (OLG Karlsruhe) – both decisions mentioned that TPMs are protected by section 69f but since the plaintiffs did not claim destroying of any devices, the judgments did not consider section 69f deeply.

of the Urheberrechtsgesetz now deal with TPMs that protect other works. Section 69a (5) clarifies that these newly introduced provisions do not apply to computer programs. The Austrian and the United Kingdom copyright law also distinguish between TPMs that protect computer programs and other works.477

Article 6 of the EU Information Society Directive and sections 95a ff of the Urheberrechtsgesetz prohibit, like the US Digital Millennium Copyright Act, both the act of circumventing itself and preparatory acts.

i Prohibition of the Act of Circumventing

Section 95a (1) of the Urheberrechtsgesetz implements article 6 (1) of the EU Information Society Directive and proscribes circumventing. But unlike the Digital Millennium Copyright Act, a subjective element of knowledge or constructive knowledge is required. Section 95a (1) reads:

“Wirksame technische Maßnahmen zum Schutz eines nach diesem Gesetz geschützten Werkes oder eines anderen nach diesem Gesetz geschützten Schutzgegenstandes dürfen ohne Zustimmung des Rechtsinhabers nicht umgangen werden, soweit dem Handelnden bekannt ist oder den Umständen nach bekannt sein muss, dass die Umgehung erfolgt, um den Zugang zu einem solchen Werk oder Schutzgegenstand oder deren Nutzung zu ermöglichen.“

Translation:

“Effective technological measures, which protect a work or another subject-matter that is protected by this Act, shall not be circumvented without authorisation of the right owner. This applies to a person who knows or should know that the act of circumventing is carried out to access or to use a work or subject-matter.”

The UK and Austrian copyright law implemented similar provisions in section 296ZA of the UK CDPA and section 90c (1)(1) of the Austrian Urheberrechtsgesetz.

477 Section 296 of the UK CDPA and section 90b of the Austrian Urheberrechtsgesetz apply to computer programs while section 296ZA ff of the UK CDPA and sections 90c and 90d of the Austrian Urheberrechtsgesetz apply to all other works; for a discussion of the distinguishing in
However, the act of circumventing a TPM that protects a non-copyright item or a copyright work whose protection has expired, is not prohibited and does not trigger liabilities. The provision is expressly limited to works or subject-matters “that [are] protected by this act”.

ii Definition of TPM

In regard of the definition of technological measures section 95a (2)(1) of the Urheberrechtsgesetz almost adopts the wording of the EU Information Society Directive. The Austrian definition of TPMs is consistent with the German. Likewise, almost all EU member states have followed the EU Information Society Directive very closely or have even precisely copied most of the wording.\footnote{See von Lewinski, Rights Management Information and Technical Protection Measures as Implemented in EC Member States (2004) 35 IIC, 844, 846.}

Article 6 (3)(1) EU Information Society Directive reads:

"
For the purpose of this Directive, “technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matters, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law."

This definition is very broad. Since the rightholder obviously never authorises the use which he restricts by means of TPMs, almost any technology meets these criteria and is then addressed by this provision.\footnote{Dusollier, Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work [2005] EIPR, 201, 203.} Additionally, Section 95a (2)(2) of the Urheberrechtsgesetz (which mirrors article 6 (3)(2) EU Information Society Directive) clarifies that both access and copy control TPMs are protected:

“access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism”
The approach to treat both types of TPMs (access and copy controls) equally is stricter than, for instance, the US approach, which distinguishes between access and copy control TPMs with regard to the act of circumventing.

However, all provisions of the EU Information Society Directive and of the Urheberrechtsgesetz that refer to TPMs require the TPM to be “effective” to be legally protected.\(^{480}\) Although section 95a (2) Urheberrechtsgesetz (which mirrors article 6 (3)(2) EU Information Society Directive) provides a definition of “effective”,

> “Technological measures shall be deemed effective where the
> use of a protected work or other subject-matter is controlled by
> the rightholders through application of [an access control or a
> copy control TPM]”

there is still some ambiguity:

If a TPM was “effective” it would not need additional legal support because a circumvention-proof technological protection would already be sufficient; in contrast, if a TPM was not sufficiently “effective” and therefore actually needed legal protection, it would not benefit from the new legal support of the directive due to the fact that it is not “effective”. Hence, to give some effect to this provision, “effective TPM” has to be considered as not absolutely “effective” but as a device, which is seriously designed to protect a work against circumvention in the normal course of its operation\(^{481}\) from the point of view of a normal user rather than an expert hacker.\(^{482}\)

iii Prohibition of Preparatory Acts

Regarding preparatory acts, the German Urheberrechtsgesetz implemented the wording of the EU Information Society Directive, which is very similar to the DMCA. Pursuant to section 95a (2) Urheberrechtsgesetz (which mirrors article 6 (2) of the

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\(^{480}\) See for instance section 95a (1) Urheberrechtsgesetz which prohibits circumventing itself or section 95a (3) Urheberrechtsgesetz regarding preparatory acts like selling/renting/etc. of circumvention devices or section 108b (1) Urheberrechtsgesetz which provides criminal remedies.


EU Information Society Directive) the following preparatory acts are prohibited in relation to circumvention devices:

- manufacture,
- importation,
- distribution,
- sale,
- rental,
- advertisement for sale or rental,
- possession for commercial purposes.

Additionally, the provision of services that are related to circumvention is prohibited. The United Kingdom implemented the prohibition of these preparatory acts in sections 296ZB and 296ZD of the UK Copyright Designs and Patent Act, and Austria in section 90c (1) and (3) of the Austrian Urheberrechtsgesetz.

The EU Information Society Directive does not prohibit the private possession of circumvention devices. However, recital 49 clarifies that the national law of the member states may nevertheless prohibit private possession of such devices. Germany did not exercise that option. Thus, private possession is not prohibited under German law. The United Kingdom and Austria also decided not to exercise the option to prohibit the possession of circumvention devices for private purposes.

There is also no specific German copyright law provision which prohibits the publishing of information that helps to circumvent TPMs (if it is not an advertisement for sale or rental). Nevertheless, civil remedies could be available by virtue of the general provision of sections 823 (2) and 1004 of the German Civil Code (Bürgerliches Gesetzbuch – BGB) in connection with the prohibition of specific preparatory acts pursuant to section 95a (3) Urheberrechtsgesetz. Sections 823 (2) and 1004 of the German Civil Code provide civil remedies like injunctions and damages where a protective law provision of any German law statute is violated. A protective law provision in this context is a section that prohibits a specific behaviour.

483 EU Information Society Directive, recital 49.
484 Like section 226 (2)(b) of the New Zealand Copyright Act or section 296 (1)(b)(ii) of the United Kingdom Copyright Designs and Patent Act.
485 Which is a strict liability.
486 Pursuant to section 276 of the German Civil Code (BGB), damage remedies require a deliberate or negligent act.
to the advantage of other persons. Section 95a of the *Urheberrechtsgesetz* is such a protective law provision because it protects copyright owners. According to these principles, the Court of Appeal in Munich has recently held an online newspaper company liable for publishing an online article that described a circumvention device and included a hyperlink to the webpage of the distributor of that circumvention device.\(^{487}\) The court argued that the publisher knew about the fact that the linked webpage offered a circumvention device which was prohibited pursuant to section 95a of the *Urheberrechtsgesetz* and contributed to the prohibited act of selling this circumvention device by leading potential buyers to this website.\(^{488}\)

The decision of the Court of Appeal in Munich has many similarities with the US case *Universal City Studios, Inc v Corley*\(^{489}\) (reported as *Universal City Studios, Inc. v. Reimerdes* at first instance).\(^{490}\) The US courts also held that the publishing of a hyperlink on a webpage that refers to a website where a circumvention device can be downloaded, is an unlawful act. The courts reached this result by taking a broad view of what amounts to “offering, providing or otherwise trafficking in” a circumvention device. The Court of Appeal for the Ninth Circuit upheld the District Court’s finding that persons are liable for such a hyperlink who

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\text{“(a) know at the relevant time that the offending material is on the linked-to site, (b) know that it is circumvention technology that may not lawfully be offered, and (c) create or maintain the link for the purpose of disseminating that technology.”} \(^{491}\)
\]

iv Definition of Circumvention Device

To avoid a situation where almost any technical device is considered as an unlawful circumvention device and triggers legal consequences, both the EU Information

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\(^{487}\) *Link auf Website mit Kopierschutzumgehung nicht mehr von Pressefreiheit gedeckt* [2005] MMR 768 (OLG München). However it has to be noted that the publishing company filed an appeal on an institutional issue and claims a violation of freedom of press – the appeal is still pending at the German Federal Constitutional Court.

\(^{488}\) *Link auf Website mit Kopierschutzumgehung nicht mehr von Pressefreiheit gedeckt* [2005] MMR 768, 772 (OLG München).


\(^{490}\) *Universal Studios, Inc. v. Reimerdes*, 111 F Supp 2d 294 (SDNY 2000).

Society Directive and the Urheberrechtsgesetz⁴⁹² narrow the definition of illegal circumvention devices (and services) to

“devices, products, components or the provision of services which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or
(b) have only a limited commercially significant purpose or use other than to circumvent, or
(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.”

Despite this definition, from a practical point of view, it will often be difficult to distinguish between lawful and unlawful devices.⁴⁹³ Particularly the primary purpose of designing, producing and adapting as required by subsection (c) is usually difficult to determine and even harder to prove.

The approach of article 6 (2)(c) of the EU Information Society Directive to define circumventing measures as devices which are “primarily designed, produced or adapted” to circumvent TPMs is different from article 7 (1) of the EU Computer-Directive, which defines more strictly that circumvention devices must have a “sole intended purpose” of facilitating unauthorised removal or circumvention of TPMs. Since both directives and their national pendants are still in force, circumvention devices can be subject to different legal definitions, depending on whether they help to circumvent either TPMs that protect computer programs or other copyright works.

However, the German Court of Appeal in Munich recently interpreted the scope of section 95a (3) of the Urheberrechtsgesetz broadly and rejected the argued defence that the circumvention device for circumventing a TPM which protects a movie DVD could be used for lawful purposes (circumventing the TPM to exercise the exception for the purpose of domestic use).⁴⁹⁴ The court argued that the device in question could – at least – also be used for infringing purposes. This approach of rejecting such a non-infringing defence is consistent with the finding of the English Chancery

⁴⁹² Article 6 (2) of the EU Information Society Directive section 95a (3) of the Urheberrechtsgesetz.
⁴⁹⁴ Link auf Website mit Kopierschutzumgehung nicht mehr von Pressefreiheit gedeckt [2005] MMR 768, 770 (OLG München). See for a further discussion of this case also chapter 5.2.2(b)iii.
Division in the case of *Kabushiki Kaisha Sony Computer Entertainment v Ball*[^495^]. The English court rejected the argued defence that the specific circumvention device could also be used for non-infringing purposes, such as making a back-up copy under a permitted use exception or running the game in non-authorised players.[^496^] The English TPM protection provisions address all circumvention devices which (without authorisation) circumvent TPMs, whose main purpose is to prevent infringements of copyright. Knowing or having reasons to believe that the circumvention device would be used to make infringing copies is not a requirement of liability.[^497^]

v ERMI Protection

Article 7 of the EU Information Society Directive required the member states to implement an ERMI protection according to the WCT and WPPT. Article 7 reads:

> “1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:
> (a) the removal or alteration of any electronic rights-management information;
> (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,
> if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the sui generis right provided for in Chapter III of Directive 96/9/EC.

[^495^]: *Kabushiki Kaisha Sony Computer Entertainment v Ball* [2004] EWHC 1738 (Ch), para 31 f.

[^496^]: *Kabushiki Kaisha Sony Computer Entertainment v Ball* [2004] EWHC 1738 (Ch), para 30; see for a discussion of this case also Cook, *Anti-circumvention: What protects the content protectors*, (2005) 15 C&L, 26, 27 f for a discussion of various distinctions of these two TPM protection schemes.

2. For the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject-matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC.”

Germany implemented article 7 in section 95c of the Urheberrechtsgesetz. Although the Urheberrechtsgesetz uses another structure, the content of the provision is equal. Subjective elements are required for triggering liability. All other EU member implemented article 7 similarly, without changes of the contents.498

The wording of article 7 of the EU Information Society Directive (and hence 95c of the Urheberrechtsgesetz) is rather clear, self-explanatory and has not resulted in a broader academic discussions.499

vi Legal Sanctions

Articles 6 (1), (2), 7 (1) and 8 (1) of the EU Information Society Directive dictates only that the

“Member States shall provide adequate legal protection [... and] appropriate sanctions and remedies”

against circumvention of TPMs, preparatory acts regarding TPMs and certain acts regarding ERMI.

499 Likewise, the commentaries only provide very shallow explanations to section 95c, see for instance Wandtke and Ohst in Wandtke and Bullinger, Praxiskommentar zum Urheberrecht (C.H. Beck, 2nd edition, Munich 2006), § 95c, No 1.
The Directive does not define the terms “adequate legal protection” and “appropriate sanctions and remedies” with regard to TPMs but recital 58 specifies:

“The sanctions [...] should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.”

Sections 108b and 111a of the Urheberrechtsgesetz provide criminal sanctions for the circumvention of TPMs with the intention to facilitate the access or usage of copyright works, for the intentional removal or alteration of ERMI, for the distribution of such altered works, and for preparatory acts in respect of circumvention devices, like making/selling/etc. The maximum penalty is imprisonment for up to one year (three years if in course of business) or a monetary fine. However, if a person circumvents a TPM or alters a ERMI or commits a preparatory act regarding circumvention devices for his own or for a very close person’s private use of the work, criminal provisions do not apply.\(^{500}\)

The German Urheberrechtsgesetz does not provide specific civil remedies against the circumventing of TPMs or against preparatory acts. The civil remedy provisions of sections 97 ff of the Urheberrechtsgesetz require – according to the prevailing opinion – that an exclusive right of the author is violated.\(^{501}\) Although some authors found arguments to stretch the scope of the definition of rights mentioned in sections 97 ff to cover the circumvention prohibitions,\(^{502}\) it is not persuasive. “Rights” usually entitle a person to something. Section 95a (1) of the Urheberrechtsgesetz in contrast forbids something.\(^{503}\)

However, since section 95a (1) Urheberrechtsgesetz is a protective law provision, copyright owners can rely on the general civil remedy provision in sections 823 and

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\(^{500}\) Section 108b (1)(2) of the Urheberrechtsgesetz.

\(^{501}\) Dreier in Dreier and Schulze, Urheberrechtsgesetz (C.H. Beck, Munich 2004), § 97, No. 3; in the case Link auf Website mit Kopierschutzumgehung nicht mehr von Pressefreiheit gedeckt [2005] MMR 768, 772 (OLG München) the court also applied sections 823 and 1004 of the German Civil Code (BGB) and not section 97 Urheberrechtsgesetz; see for a discussion of this case above subchapter 5.2.2(b)iii.


1004 of the German Civil Code (Bürgerliches Gesetzbuch) which provides the full range of civil remedies.\textsuperscript{504} The same applies to the provisions protecting ERMI.

Most EU member states implemented civil and criminal remedies for the act of circumventing as well as specific preparatory acts (like dealing etc.) that are similar to the provisions that apply in the case of copyright infringement itself.\textsuperscript{505}

In the United Kingdom, the Copyright and Related Rights Regulations 2003, which implemented the EU Information Society Directive into national law, made it a criminal offence to create, import or promote circumvention devices or facilitate circumvention services (section 296ZB).\textsuperscript{506} These offences carry similar potential prison terms as the offence of copyright infringement itself – up to two years. Additionally, sections 296ZA (3), 296ZD (2) and 296 ZG (3) and (4) of the CDPA make circumvention of TPMs, specific preparatory acts with regard to TPMs, removing/alteration of ERMI and dealing in works with altered ERMI equivalent to infringing copyright, which results in civil remedies.\textsuperscript{507}

Sections 90c and 91(1) of the Austrian Urheberrechtsgesetz provide civil and criminal remedies against the act of circumventing TPMs, specific preparatory acts regarding TPMs, removal/altering ERMI and dealing in works with altered ERMI.\textsuperscript{508} The penalties are lower than in Germany: imprisonment for up to six months or up to two years if in the course of business.

5.2.3 New Zealand Law

The present New Zealand Copyright Act deals with TPMs only in section 226. This section is – compared to other nations’ laws – rather short and, apparently, there is also no New Zealand case law referring to it. However, section 226 of the New

\begin{footnotesize}
\begin{itemize}
\item[504] For a description of sections 823 and 1004 BGB see subchapter 5.2.2(b)iii; also Spieker, Bestehen zivilrechtliche Ansprüche bei Umgehung von Kopierschutz und beim Anbieten von Erzeugnissen zu dessen Umgehung? [2004] GRUR 475, 481 f.;
\item[508] See also Dillenz and Gutman, Urheberrechtsgesetz und Verwertungsgesellschaftsgesetz (Springer, Vienna 2004), § 90c, No 78 and 83
\end{itemize}
\end{footnotesize}
Zealand Copyright Act is modelled on and almost mirrored section 296 of the UK Copyright, Designs and Patents Act 1988 before it was amended in 2003 to meet the requirements of the EU Information Society Directive. The English cases consider TPM protection and provide some interpretation of the original UK provision: Sony Computer Entertainment v Edmunds\textsuperscript{509} and Kabushiki Kaisha Sony Computer Entertainment v Ball.\textsuperscript{510}

Prohibited Acts

Under present New Zealand law, there is no general prohibition on the act of circumvention itself, either in the context of domestic use or in relation to commercial use. Section 227 of the Copyright Act prescribes only the act of fraudulently receiving a programme included in a broadcasting service or cable programme service with intent to avoid payment for it. Since most pay-channels are protected by a technological decoder, this provision implies that the technology shall not be circumvented. But section 227 is not an explicit anti-circumvention provision.

Notwithstanding, a person, who successfully circumvents a TPM and subsequently copies the work in the absence of a permitted use defence faces liability for infringing copyright.\textsuperscript{511} However, section 226 of the Copyright Act itself focuses on preparatory acts: Section 226 (1)(a) and (2)(a) Copyright Act prohibit the making, importing, selling, letting for hire, offering or exposing for sale or hire and advertising for sale or hire of circumvention devices. The wording of the provision indicates that it is primarily directed against acts with commercial connotations.\textsuperscript{512} Private dissemination in the form of, for instance, giving it away free of charge or lending is not prohibited.

Section 226 (1)(a) and (2)(b) of the Copyright Act prohibits the publishing of information intended to enable or assist persons to circumvent TPMs to make infringing copies.

Liability under section 226 (1)(a) of the Copyright Act requires knowledge or reasons to believe that the device, means or information will be used to make

\textsuperscript{509} Sony Computer Entertainment v Edmunds (2002) 55 IPR 429, 432 (Ch).
\textsuperscript{510} Kabushiki Kaisha Sony Computer Entertainment v Ball [2004] EWHC 1738 (Ch).
\textsuperscript{511} See also Sainsbury, The Copyright Act in the Digital Age (2000) 11 JLIS, 182, 187.
infringing copies. It would seem that knowledge would follow the specific design or adaptation of the device. However in the case of Kabushiki Kaisha Sony Computer Entertainment v Ball, Laddie J clarified that knowledge that a device “might be” used to make infringing copies does not meet the requirement of knowing or having reason to believe that it will be, and therefore does not trigger liability.

In addition to these prohibitions of preparatory acts, subsection (1)(b) provides a delivery up provision against circumvention devices that a person has in his or her possession, custody, or control with the intention that it should be used to make infringing copies of copyright works.

The Ministry of Economic Development wants to retain the current focus on preparatory acts like selling/letting for hire/etc. It does not want to extend the liability to the act of circumvention itself. The Ministry considered the suggestion that such an extension would be beneficial in terms of addressing copyright infringement where circumvention occurs on a commercial scale but doubts that circumvention of that scale would occur in New Zealand. The approach to prohibit only preparatory acts has New Zealand in common with Australia. Australian law does not prohibit the act of circumvention itself, despite rightholders’ lobbying. However, the Digital Agenda Review, commissioned by the Australian Government proposed to amend the law to include a prohibition of any act of circumventing and the recent Review of technological protection measures exceptions by the Australian House of Representatives found that the present law is inconsistent with Australia’s obligations under article 17.4.7 of the Australia-United States Free Trade Agreement. It seems likely that the Australian legislation will be amended to prohibit the act of circumvention.

516 Sections 116A and 132 (5A)-(5J) of the Australian Copyright Act prohibit only preparatory acts.
Definition of TPM

The definition of “copy-protection” in section 226 (3) Copyright Act reads:

“[…] any device or means intended to prevent or restrict copying of a work or to impair the quality of copies made.”

A question arises as to how broad the requirement of “intend to prevent or restrict copying” is to be interpreted.

The Full Court of the Federal Court of Australia favored a broad interpretation of the Australian definition of TPM in the case of Kabushiki Kaisha Sony Computer Entertainment v Stevens:\textsuperscript{520}

“[…] in the sense of deterrence or discouragement of infringement, which results from a denial of access to, and therefore prevention of use of, a program copied in infringement of copyright [...]”

The judgment of Sackville J at first instance in the Federal Court was narrower:\textsuperscript{521}

“[A] ‘technological protection measure’, as defined, must […] 'physically' prevent [...] or inhibit [...] the person from undertaking acts which, if carried out, would or might infringe copyright in the work. [...] It is necessary for the applicants to demonstrate that the protective devices are designed to function, by their own process or mechanisms, to prevent or hinder acts that might otherwise constitute an infringement of copyright.”

The TPM in question was a combination of an authentication sequence in a video game console and specific information on game CDs which checked whether an inserted CD was genuine and authorised. The TPM did, however, not directly prevent or inhibit the reproduction of original CDs.

The High Court of Australia has now reversed the Full Court’s decision and upheld Sackville J’s findings.\textsuperscript{522} The findings of the High Court and the Federal Court are persuasive and it is likely that New Zealand courts would follow these decisions. The


\textsuperscript{521} Kabushiki Kaisha Sony Computer Entertainment v Stevens [2002] FCA 906, para 115 and 118.

wording prevent or restrict implies that the means must hinder any infringement and not only deter or discourage the user from copying.

But the definition of TPM raises not only questions regarding the intended function of the TPM device. It is also unclear whether access control measures are legally protected. Section 226 Copyright Act refers expressly only to copy control devices and the wording of section 226 indicates a narrow interpretation: Subsection 226 (3) refers to the “impairment of quality”, which is a copying matter, and subsection 226 (1)(b) refers strictly to “infringing copies”.

On the other hand, it is often hard to distinguish between the technical act of accessing and copying in the digital world. A digital work is usually copied in temporary memory while being accessed, since in many case it cannot be perceived without such reproduction processes. If one regards RAM copying as a reproduction under copyright law, almost any act of accessing a work automatically triggers the right to copy the work. Hence, most access control TPMs are also copy control TPMs. So in Sony Computer Entertainment v Edmunds, Jacob J reasoned that former section 296 of the UK CDPA was applicable, although the TPM in question was actually a device that controlled the access to specific video games. Sony implemented a hardware chip in its Playstations, which checked whether the inserted CDs are neither unauthorised copies nor restricted to a different region code. If this check failed, the Playstation would not allow the game to be played. The game on the CD could not be accessed. The defendant sold devices on the UK market which allowed users to play video games in a Sony Playstation that are either pirated or restricted to other regions by circumventing Sony’s checking routine. His Honour concluded that Sony’s TPM was a “copy control” device since it prevented the reproduction of the game in the RAM of the console. The same reasoning was adopted by Laddie J in Kabushiki Kaisha Sony Computer Entertainment v Ball.

However, if New Zealand courts chose not to adopt such a broad definition of the right to copy and instead preferred the more restrictive definition regarding RAM

524 As favoured by most countries. The New Zealand Government proposed to amend the present definition of “copying” to make this clear: See above section 3.2.3(c)(i)
526 Sony adopted the approach of movie DVD region zones and divided the earth in three regions.
copies provided by the Australian High Court in the case of Stevens v Kabushiki Kaisha Sony Computer Entertainment, they may disagree with the results of Sony Computer Entertainment v Edmunds and Kabushiki Kaisha Sony Computer Entertainment v Ball.

The New Zealand Government considered and expressly referred to Sony Computer Entertainment v Edmunds during the current copyright review and concluded that such a result should be avoided in New Zealand courts. The Government states that the “focus of section 226 should continue to link circumvention to copyright infringement.” The Ministry of Economic Development argues that it is not the “role of copyright to prevent access control technology, which is used in some cases to price discriminate and control geographical distribution of works.” This would be inconsistent with the parallel importing policy. Apart these regional zone encodings, the Ministry is not rigorously against access control devices but does not intend to provide “assistance” from copyright law. But the proposal does not provide a solution for how to deal with access control devices that also control (incidental) reproductions into RAM.

However, the New Zealand Government intends to extend the scope of protection for TPMs to devices that protect not only the right to copy against infringement but also the other exclusive rights.

iii Definition of Circumvention Device

A circumvention device is defined in section 226 (2)(a) of the Copyright Act as

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529 As discussed in chapter 3.2.3(c)(i).
“any device or means specifically designed or adapted to circumvent the form of copy-protection employed”

Hence, the scope of TPMs is comparably limited and focuses only on devices that are specifically designed for the purpose of circumventing the particular device in question. Devices that could be used for circumventing but are designed for other purposes are not included in the definition and subsequently not prohibited. However, the fact that a circumvention device could also be used for non-infringing purposes, is not a strong defence. On this point it is likely that New Zealand courts would follow the finding of Jacob J in Sony Computer Entertainment v Edmunds. His Honour rejected the defendant’s argument that the device is not “specially designed or adapted” because the device in question could also be used for legal uses, for instance, allowing a disc to be read which contained nothing of the plaintiff’s copyright works.

iv ERMI Protection

The present New Zealand law does not provide provisions that protect ERMI.

However, it is proposed that legal protection of ERMI should be implemented to ensure consistency with the WIPO Internet Treaties. The proposal provides remedies and for large commercial scale activity also criminal provisions against intentional removal and alteration of ERMI and commercial dealing in copyright material where the dealer knows that ERMI has been removed or altered. Due to the reluctance to allow copyright law to be used to enforce contractual licences that

535 Since there are and most likely will be very few circumventing devices whose scope of operation is strictly limited to circumvention of TPMs which block non-infringing acts, like region code bypassing. See also Smillie, Legal support for technological protection measures (2004) 3 NZIPJ 278, 278.
restrict use to a greater extent than copyright itself, digital information which allows the tracking of the use of the copyright material will not be legally protected.

Legal Sanctions

Section 226 (1)(a) of the Copyright Act gives the person who issues copies of a copyright work in electronic form to the public, the same rights as a copyright owner has in respect of an infringement of copyright. Thus, the present New Zealand law provides the full range of civil remedies against persons who commit the specified prohibited preparatory acts (like selling/letting for hire/etc.). Additionally, Section 226 (1)(b) of the Copyright Act makes the delivery up provisions of sections 122 and 132 applicable in relation to circumvention devices that a person has in their possession, custody or control with the intention that it should be used to make infringing copies.

Criminal provisions are currently absent.

Although the Ministry of Economic Development initially regarded criminal provisions concerning circumventing as unnecessary, the later Cabinet Paper proposes to introduce criminal provisions for large scale commercial dealing in circumvention devices. The proposed maximum penalty is NZ$ 150,000 or up to five years of imprisonment. Criminal remedies are considered to provide a greater deterrent. Such criminal provisions would bring New Zealand law closer to many other countries' copyright schemes, including Germany, the United Kingdom, the United States and also Australia.

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544 Smillie, Digital Copyright Reform in New Zealand, [2004] EIPR, 302, 309.
545 As analysed above.
546 Section 132 (5A) and (5B) of the Australian Copyright Act provide criminal sanctions.
5.3 CONCLUSION

The conclusion of this chapter is consistent with the result that was found in the general comparison of the two countries’ copyright law in chapter two: New Zealand is more reluctant to implement a tougher and more deterrent protection for TPMs than Germany. The act of circumventing is not prohibited whilst German law provides civil remedies against circumventing on a commercial scale as well as against circumventing for private and domestic use. Contrary to German law, New Zealand law prohibits only preparatory acts in respect of devices that are specifically designed for circumventing, excluding devices that are not specifically designed but that can be used for circumventing. Furthermore, New Zealand law has not expressly included access control TPMs in its anti-circumvention provisions. Additionally, German law provides criminal remedies against specific preparatory acts and against the act of circumventing for commercial purposes. ERMI are also legally protected. Similar provisions are absent in present New Zealand copyright law.

Although the New Zealand Government has proposed some (smaller and rather unsubstantial) amendments, such as introducing ERMI protection and criminal provisions against large scale commercial dealing in circumvention devices, both laws will still have different levels of TPM protection. For instance, New Zealand law will not provide provisions that prohibit the act of circumventing itself and New Zealand will adhere to the requirement that circumvention devices must be specifically designed for circumventing. Additionally, access control TPMs will most likely not be protected under New Zealand law.

From a New Zealand point of view, such a lower protection is reasonable and justified. First, a tougher TPM protection would – like a tough copyright policy in general – primarily be of advantage to foreign copyright industries and to the detriment of New Zealand copyright users. Second, as chapter 4 has pointed out, the piracy rates in New Zealand, for instance regarding music, are comparatively low. There is, apparently, no urgent need for stronger copyright protection or enforcement in New Zealand.

This result of comparison, however, applies only to TPMs that protect works other than computer programs. The differentiation of German (and EU) law between TPMs that protect computer programs and other works results in a very weak protection for computer programs (only delivery up provisions) and a strong protection for other works. This is rather confusing, not justified by any policy reason and inevitably leads to uncertainty. Due to this distinction, some acts may be permitted under German law in relation to TPMs that protect computer programs while the same act is illegal in respect of other TPM protected works. Hence, one big advantage of New Zealand copyright law regarding TPM protection is that it does not distinguish between different work categories.

The second conclusion is that the global tendency to provide (stricter) remedies against circumventing of TPMs and/or against specific preparatory acts like dealing in such circumvention devices under copyright law, even if no copyright has actually been infringed, has generally extended the scope of copyright law beyond its traditional borders in favour of copyright owners. In combination with the broad definition of TPM, including those that control access to works\(^{548}\), the implementation of legal TPM support represents a “powerful weapon for rightholders”\(^{549}\).

\(^{548}\) Most likely not in the near future in New Zealand, though.

6. BALANCE OF TPMs AND PERMITTED USES

“It would not be possible for Noah to do in our day what he was permitted to do in his own...The inspector would come and examine the Ark, and make all sorts of objections.”

6.1 CONCERNS

Regarding TPMs, concerns have arisen that the copyright industry intends to exercise absolute control over access to contents and knowledge beyond the borders of mere copyright protection. User groups foresee a “technical monopoly”, a “paracopyright”, and a general tension between what core copyright law allows and what technology prohibits. TPMs – legally backed by strong anti-circumvention provisions – allegedly upset the traditional public interest of balancing the rightholders’ and users’ interests in copyright. The fear is that TPMs also control and prohibit free access to and free copying of works that are or have fallen into the public domain, and in particular, impede the uses which are permitted pursuant to statutory exceptions. TPMs usually do not distinguish between infringing and non-infringing uses – they prevent both.

550 Mark Twain, 1892, (http://www.twainquotes.com/Law.html).
There is also a concern for privacy regarding TPM, since any online purchased licence for digital content as well as subsequent usage of that licence provides the seller with the possibility to collect personal data and enables him to create a precise user profile by monitoring the media use. This knowledge of who consumed what and when not only allows for customers to be categorised for marketing purposes but also raises fears of a future where companies, secret services and other organisations – whether illegal or not – pool, exchange and gather data about the political, cultural, sexual, religious etc. preferences of individuals.

Additionally, the use of TPM could affect the right to freedom of expression, as laid down in, for instance, article 10 of the European Convention of Human Rights, article 5 of the German Constitution (Grundgesetz) and section 14 of the New Zealand Bill of Rights Act 1990.

6.2 Solutions for Balancing TPMs and Permitted Uses

6.2.1 A Brief Overview of Theoretical Approaches

Before chapter 6.2.2 analyses actual approaches of specific jurisdictions, the following subchapters provide a very brief overview of some theoretical solutions for securing a fair balance between TPMs and permitted uses.

(a) Voluntary Steps by Rightholders

The easiest way to keep the balance between TPMs and permitted uses fair, would be for the rightholders to provide the means which are necessary to enable the beneficiaries to exercise their permitted uses. Rightholders could implement procedures in their TPM devices that automatically consider legislative exceptions

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(which seem not to be satisfactorily available yet), or provide circumvention devices on application, or provide additional copies on application, for instance a free copy for the purpose of study. To enforce such “voluntary steps” by rightholder, one could implement penal provisions, which are modelled on most countries’ antitrust law. Those provisions could punish rightholders who do not “voluntarily” provide the means to enable the exercise of permitted uses. However, it would result in a high administrative effort to detect, check and prosecute breaches, since most cases occur on a small scale and the rightholders will likely dispute the factual basis of each allegation.

However, although copyright industry companies are usually very familiar with the copyright law system, they are very reluctant to impair their TPM protection and they definitely do not want to circulate circumvention devices (which might be prohibited in most jurisdictions anyway, since there is no specific exception for rightholders to distribute circumvention devices). The general disadvantage of providing circumvention devices instead of additional work copies is that these circumvention devices are put into circulation out of the rightholders’ control. Additionally, the administrative effort on both sides – the user’s and the rightholder’s – for such an application procedure seems to be unreasonable in the context of many minor usages, for instance the copying of a small newspaper article.

(b) Trusted Third Party Escrow Agent

Trusted third parties, for instance collecting societies, could manage the enforcement of permitted uses by handling and evaluating applications of users and subsequently providing either means to circumvent TPMs or additional free copies of the work for the specific purpose. However, that would require, first, a neutral third party, which results in the problem that neither the copyright industry nor consumer

555 It appears to be difficult for the specific devices to distinguish between different legislative regimes and to consider all aspects of, for instance fair dealing and fair use, which even lawyers and judges are hardly able to consider exhaustively, although their ability to allow fair use might improve; see Akester and Akester Digital Rights Management in the 21st Century, [2006] EIPR 159, 161 and Harvey, internet.law.nz (LexisNexis, 2nd edition, Wellington 2005), p. 640.

556 See for this approach also Metzger/Kreuzer, Richtlinie zum Urheberrecht in der „Informationsgesellschaft“— Privatkopie trotz technischer Schutzmaßnahmen?, [2002] MMR, 139, 140.

557 For an overview to this approach see Burk and Cohen Fair use infrastructure for copyright management systems, (2001) 15 Harv. JL & Tech, 41, 63.
councils are keen to fund such an organisation. Secondly, these organisations would need high expertise in both legal and technical knowledge to verify whether the requirements for the specific exception are met. Thirdly, this approach would require much administrative effort to avoid too many loopholes. A user could apply for more than one additional free copy of a work from different branches of the escrow agent.

(c) Users’ Self-Help Right

From the user’s point of view, a self-help right in form of a general permission to circumvent TPMs for exercising permitted uses, is most favoured. However, circumvention devices can usually not distinguish between lawful and unlawful purposes. Hence, if there were no general prohibition of circumvention devices, any dealing in and any possession of such devices would be subject to the defence that only lawful purposes are intended.

(d) User’s Right to Sue

Users could be entitled to sue the specific rightholder to enable the exercise of his permitted use. However, time requirements and the high costs of litigation usually make it unreasonable to litigate to enforce a permitted use, such as the exception to copy a work for studying purposes. Thus, it is generally not a practicable solution.558

6.2.2 Analysis of Actual Legal Approaches

(a) Approach of International Agreements

The WCT and the WPPT, which first made provisions for legal protection of TPMs, limit the scope of lawful protection to technological measures which are implemented by rightholders in connection with their protected rights. Where a work is not protected or the specific usage is justified by an exemption, the requirement of

TPM support does not apply.\(^{559}\) However, the treaties do not provide any directions as to how the continued exercise of permitted uses can be achieved.

**(b) Approach of the United States of America**

The US copyright law provides specific exceptions to the prohibition of the of circumventing TPMs, but their scope is very limited. These exceptions apply for non-profit libraries, archives and educational institutions; law enforcement agencies; for reverse engineering; encryption research; security testing activities; for the protection of minors and for personal privacy.\(^{560}\)

Additionally, section 1201 (c)(2) expressly states that nothing in section 1201 shall affect “defences to copyright infringement, including fair use”. De facto, the US Copyright Act favours an approach of not supporting but tolerating a (albeit limited) self-help right to enforce permitted uses like fair use. The act of circumventing a TPM that controls the possibility of copying a work is not prohibited by law – contrary to the prohibition of circumventing access control devices.\(^{561}\) This distinction was employed to ensure that the public retains the ability to make fair use of copyrighted works to which they have access. But since the fair use exception is not a defence to the act of gaining access to a work, circumvention of access control measures is prohibited.\(^{562}\) Considering that, firstly, the making and selling of circumvention devices that enable circumvention of copy control measures is prohibited, and secondly, the circumvention of TPMs that combine copy control with access control

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\(^{559}\) See article 11 of the WCT which reads “that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law”, see also Rieber-Mohn, _Harmonising Anti-Circumvention Protection with Copyright Law: The evolution from WCT to the Norwegian Anti-Circumvention Provisions_ (2006) 37 IIC, 182, 185; Barczewski, _International Framework for Legal Protection of Digital Rights Management Systems_, [2005] EIPR 165, 166; Smillie, _Legal support for technological protection measures_ (2004) 3 NZIPJ 278, 279.


is not allowed, the concession to fair use is rather limited: \(^{563}\) How can the user acquire the necessary circumvention device when the making and selling of it is prohibited? Which copyright owner will implement a (circumventable) copy control device without also including a (non-circumventable) access control element?

However, there is still (albeit theoretical) hope for the future of the users’ rights in the US copyright system: Pursuant to section 1201 (a)(1)(B)-(E), the US Government is required to evaluate the impact of the prohibition against the act of circumventing access control measures at intervals of three years to consider whether users of a work in a particular class of works are or are likely to be adversely affected by virtue of the prohibition in making non-infringing uses. So far, this process has not proved particularly helpful to users. \(^{564}\)

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\(^{564}\) US Copyright Office Summary, *The Digital Millennium Copyright Act of 1998* (December 1998, http://www.copyright.gov/legislation/dmca.pdf), 5; At the time of the last evaluation in 2004, the Copyright Office received 83 proposals of exemptions but announced only four (minor) classes of works subject to the exemption from the prohibition against circumvention of technological measures that control access to copyrighted works:

“(1) Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites, or portions of websites [but not applications that protect against damage to a computer or prevent receipt of email]

(2) Computer programs protected by dongles (security or copy protection devices for commercial microcomputer programs) that prevent access due to malfunction or damage and which are obsolete.

(3) Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access. [with definition of obsolete formats]

(4) Literary works distributed in e-book format when all existing e-book editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the e-book’s read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format”


The first review in 2001 resulted in two similar exemptions:

“(1) compilations consisting of lists of websites blocked by filtering software applications; and

(2) literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence”

(c) **Approach of the European Union**

By contrast to the US law, the EU Information Society Directive does not recognise specific exceptions to the ban on circumventing TPMs. However, the official comments of the EU legislator, the recitals, clarify that no provision of the directive shall hinder research into cryptography or prevent the normal operation of electronic equipment and its technological development.\(^{565}\) Although recital details are not as formally binding as the wording of the directive itself is, they provide guidance for interpreting and “determin[ing] the purpose or scope of [a] provision”\(^{566}\) and are therefore broadly considered by national legislators in the process of implementing EU law into national law.

The EU legislator nevertheless recognised the tension between TPMs and permitted uses:

> "A fair balance of rights and interests between [...] rightholders and users of protected subject-matter must be safeguarded."\(^{567}\)

However, the EU (rather optimistically) assumed that the rightholders would take voluntary measures to enable users to carry out their permitted uses according to the law. If voluntary measures fail, article 6 (4)(1) of the EU Information Society Directive requires the EU member states to take “appropriate measures” to ensure that rightholders make available to the beneficiary of specific exceptions or limitations the means of benefiting from these exceptions.

Article 6(4)(1) of the EU Information Society Directive reads:

> “Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from

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565 Recital 48 of the EU Information Society Directive.


567 Recital 31 of the EU Information Society Directive.
that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.”

The EU legislator clarified in recital 51 that the member states are not required to implement “appropriate measures” immediately but only if voluntary measures or agreements are absent “within a reasonable period of time”. A definition of “reasonable period of time” is, however, not provided. The definition of “appropriate measures” was also left to the member states without any further guidance from the EU.\(^{568}\) However, many academic writers interpret the EU Information Society Directive to exclude the possibility of a self-help right.\(^ {569}\) A legitimate self-help right to circumvent TPM in order to exercise legally permitted uses would bear the risk that pirates would seek to defend unlawful circumvention of TPM and, even more, to defend acts of putting circumvention devices into circulation by claiming that they were circumventing for lawful purposes\(^ {570}\) or putting devices into circulation for such purposes. Therefore, under the EU Information Society Directive, statutory permitted use exceptions neither justify nor excuse any act of circumvention.\(^ {571}\)

The obligation of article 6 (4)(1) of the EU Information Society Directive to provide “appropriate measures” applies, for instance, to the exceptions for reproductions on paper, reproductions for the benefit of non-commercial libraries, educational establishments, social institutions and persons with disabilities, for the benefit of public safety, judicial proceedings and scientific research.\(^ {572}\) However, it has to be noted, that such “appropriate measures” are only permitted but not mandatory regarding the exception of copying for private and domestic use.\(^ {573}\) Additionally, the


\(^{570}\) For instance circumventing TPMs to allow other users to exercise their permitted use under section 53 of the Urheberrechtsgesetz.

\(^{571}\) See also Dusollier, Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work [2005] EIPR, 201, 203.

\(^{572}\) Article 6 (4)(1) of the EU Information Society Directive enumerates the exceptions of Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e).

\(^{573}\) See article 6 (4)(2) EU Information Society Directive; Germany included only some domestic and private uses in the balancing provisions, see the next subchapter below.
“appropriate measures” of the member states shall not prevent rightholders from adopting “adequate measures” regarding the number of reproductions.\textsuperscript{574} Hence, even if the rightholders are forced to secure the exercise of permitted uses in general, they still can limit the number of copies, for instance to one, instead of the seven copies that are usually regarded as appropriate under the German private use provision.\textsuperscript{575}

Furthermore, pursuant to article 6 (4)(4) of the EU Information Society Directive the duty to carry out such “appropriate measures” does not apply where the work in question has been made available to the public via an on-demand service on “agreed contractual terms”.\textsuperscript{576} In other words, rightholders can circumvent any mandatory permitted use in respect of works distributed online by using a TPM accompanied by a simple contracting-out clause.\textsuperscript{577} According to the wording of the Directive, it does not even need an explicit contracting-out clause. Hence, if the relationship between a owner of a commercial website and a user is based on any contractual agreement whatsoever, the owner of the website can lawfully exclude any permitted use in regard to the works provided simply by using strict TPMs.

Furthermore, the Directive does not restrict the legal support for TPMs to situations where rightholders protect their exclusive rights against infringement.\textsuperscript{578} According to the wording of article 6 (4)(3), the EU Information Society Directive protects all TPMs that prevent non-authorised activities in regard to copyright works – either infringing or just unwanted. The tension resulting from the fact that rightholders can prevent the access to works by means of TPMs even though they have not an exclusive right to control the access under copyright law, is also not addressed in the EU Information Society Directive or its recitals.

In conclusion, it can be said that these provisions actually shift the traditional balance of exclusive rights and permitted uses in the digital world in favour of rightholders. According to the general approach of the EU Information Society

\textsuperscript{574} See article 6 (4)(2) EU Information Society Directive.
\textsuperscript{575} See above subchapter 2.4.6(c).
\textsuperscript{576} Article 6 (4) last sentence of the EU Information Society Directive reads “made available to the public on agreed contractual terms”.
Directive, TPMs prevail over the exercise of exceptions to copyright.\textsuperscript{579} This is particularly demonstrated by the lack of specific balancing provisions in the Directive.

However, there is still hope\textsuperscript{580} regarding a due balance between users’ interests and TPMs:\textsuperscript{581} Similar to the US law, article 12 (1) of the EU Information Society Directive requires a periodical review of the application of the directive, particularly in the light of the development of the digital market.\textsuperscript{582}

(d) Approach of Germany

The German Urheberrechtsgesetz provides only one general exception from the prohibition of circumvention and the prohibition of preparatory acts like selling/letting for hire/etc. Section 95a (4) of the Urheberrechtsgesetz provides that TPMs shall not affect the provision of services by public authorities for the purpose of public safety and administration of criminal justice.

As regards other statutory exceptions, German copyright law combines four parallel approaches to secure the balance between TPMs and specific permitted uses. First, a right to file an action for users, second, an administrative fine for rightholders

\textsuperscript{579} Spindler, Europäisches Urheberrecht in der Informationsgesellschaft [2002] GRUR, 105, 115; Dusollier, Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work [2005] EIPR, 201, 203.

\textsuperscript{580} But the room for optimism seems to be rather limited, considering how long the Member States had already worked on the present provisions of the Directive until a consensus was reached.


\textsuperscript{582} Until now, the EU Commission raised the general question of how to make TPM/DRM systems more interoperable for reaching a wider acceptance by all stakeholders, including consumers – see European Commission, Communication from the Commission to the Council, the European Parliament and the European Economic and Social - Committee The Management of Copyright and Related Rights in the Internal Market COM/2004/0261 and European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - eEurope 2005 Action Plan: An Update, COM/2004/0380. Additionally the Commission noticed that private copying levies (which are not harmonised within the EU) and DRM/TPM systems might cause problems and inconsistencies, see European Commission, Intellectual Property Rights and Digital Rights Management Systems, Factsheet 020 (September 2004) http://europa.eu.int/information_society/doc/factsheets/020-ipr_drm-october04.pdf; However, the Commission has not yet proposed specific solutions: “It is also considered that since DRM is still at an early stage of development, no phasing out scenario can be established on the basis of the existing DRM systems.” – see European Commission, Summary of the consultation on the High Level Group final report on Digital Rights Management by the European Commission (April 2005 http://europa.eu.int/information_society/eeurope/2005/all_about/digital_rights_man/doc/drm_workshop_2005/drm_report_on_the_hlg_consultation.doc), p. 2.
who do not provide sufficient means for enabling specific permitted uses, third, informing the customer which works are protected by TPMs, and fourth, partly tolerating circumventing for private use.

Section 95b (1) and (2) of the Urheberrechtsgesetz gives the user the right to file an action if the rightholder does not provide “the means”\textsuperscript{583} to enable the user to benefit from permitted uses. Additionally, pursuant to section 95d (2) Urheberrechtsgesetz, works that are protected by TPMs must show a valid address of the rightholder to ensure that the customer can actually sue the rightholder under section 95b of the Urheberrechtsgesetz. Not only private persons but also consumer rights protection associations can file actions for injunctions pursuant to sections 2a and 3 of the German Act on Claims to Cease and Desist (Unterlassungsklagesetz) against a rightholder who violates section 95b (1) of the Urheberrechtsgesetz.\textsuperscript{584}

Additionally, section 111a (1) of the Urheberrechtsgesetz states that rightholders who do not provide the means which enable users to exercise permitted uses, and rightholders who do not mark their products as TPM protected, commit a regulatory offence which attracts a fine of up to € 50,000 in the first case and € 10,000 in the latter case.

However, these provisions apply only to specific permitted uses. These permitted uses are enumerated in section 95b (1) to (3) Urheberrechtsgesetz and include exceptions for administration of justice and public safety, exceptions for disabled persons and specific exceptions for the benefit of churches, schools, educational institutes and broadcasting companies. Furthermore, specific exceptions for private usage are privileged, like reproductions on paper or paper-like materials, reproductions for non-profit archives and any kinds of reproductions for personal scientific\textsuperscript{585} purposes. However, the broad permitted use to copy works on any material other than paper for the user’s private purpose, for instance copying a DVD

\textsuperscript{583} Section 95b (1) of the Urheberrechtsgesetz does not specify „means“. Hence, copyright owners can freely choose how to reach the goal of enabling users to exercise their permitted use exceptions.


\textsuperscript{585} For definition of “scientific” see above 2.4.6(b).
for entertainment, is not included. The act of circumventing a TPM is thus prohibited and a self-help right does not exist, even if the act of copying itself is allowed due to the permitted use of domestic and private use.

Additionally, in accordance with article 6 (4)(4) of the EU Information Society Directive and its implementation in section 95b (3) of the Urheberrechtsgesetz, these aforementioned provisions which protect users’ interests in exercising permitted use exceptions do not apply if the work in question was made available interactively on agreed contractual terms. With the increasing distribution of works via interactive online networks by contractual agreement, all “balancing provisions” will be of little practical value in the future.

Since many TPM protected works are already embodied in digital form and since the user obviously wants to copy these works on a digital non-paper storage medium, it is rather illusory to call the above-mentioned approaches a balance between TPMs and the exception for private use. One will see whether university professors will actually sue music companies for failing to enable them to exercise the permitted use of copying a TPM protected music CD for scientific use or whether users will sue online news magazines for failing to provide the necessary means to print a TPM protected article.

However, these TPM provisions are consistent with the German tradition, which sees the permitted use exceptions not as rights that one are entitled to but as defences that justify the exercise (if technically possible) of an exclusive right without the consent of the rightholder.

Nevertheless, the German Urheberrechtsgesetz also implemented two approaches that do not provide legal means for users but strengthen their de facto position:

Section 95d of the Urheberrechtsgesetz dictates that rightholders have to mark products that are protected by TPMs. This provision should provide consumers the opportunity to choose whether they want to buy works that are protected and

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586 section 95b (1)(6)(a) of the Urheberrechtsgesetz; see also Stickelbrock, Die Zukunft der Privatkopie im digitalen Zeitalter [2004] GRUR 736, 740.
588 Bundesministerium der Justiz (German Ministry of Justice), FAQs zur Novellierung des Urheberrechts (2004, http://www.kopien-brauchen-originale.de/enid/2fcbd8ae9f1a10e74f20ca2e80e5008a.55a304092d09/5n.html); Flechsig, Urheberrecht in der Wissensgesellschaft, [2004] ZRP 249, 252.
therefore of more limited use. The impact of this provision is bigger than one would expect. Since many customers avoid buying works (for instance music CDs) that are protected by TPMs and therefore do not play in some car stereos or computer CD-ROM drives, some music labels have returned to selling unprotected CDs. The rightholder’s failure to mark protected works can be fined as a regulatory offence.

Furthermore, the act of circumventing TPMs for private use is excluded from criminal liability, which may give the user some relief, although it is still prohibited and will attract civil liability if the rightholder chooses to sue.

With regard to the tension between TPMs and public domain works, the German law specifies that the act of circumventing is only prohibited if the TPM actually protects a copyright protected work or other subject-matter. However, since the preparatory acts provisions (making/selling/etc.) of the Urheberrechtsgesetz do not distinguish between the purposes of the actual use, any device which is potentially capable of circumventing a TPM that protects a work must not be made/sold/etc.

Due to the requirements of the EU Information Society Directive, the German anti-circumvention provisions are not limited to the purpose of preventing acts that infringe exclusive rights but apply to all acts in regard to copyright works that are not authorised by the author. However, in the digital environment, there are only very few possibilities of using a work without triggering the right to copy pursuant to the broad definition of reproduction.

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589 For instance Universal Music feared a slump in sales and partly returned to selling unprotected CDs on the German market, due to customers’ reluctance to buy restricted music CDs, see Theurer, Die Musikindustrie zweifelt am Kopierschutz (Frankfurter Allgemeine Zeitung, 4 Juni 2004, http://www.faz.net/s/RubE2C6E0BCC2F04DD787CDC274993E94C1/Doc~EC158BDE6F1404D6D8A8BAD5AA28D1357--ATpl--Ecommon--Scontent.html).
590 Section 111a (1) of the Urheberrechtsgesetz.
591 Expressly stated in Eigentumsverletzung durch Kopierschutz [2005] MMR 751, 752 (BVerfG); see also above, subchapter 5.2.2(b)vi.
593 See also Wandtke and Ohst in Wandtke and Bullinger, Praxiskommentar zum Urheberrecht (C.H. Beck, 2nd edition, Munich 2006), § 95a, No 56.
(e) **Approach of Austria**

The Austrian copyright law does not provide any provisions which balance TPMs and permitted uses at all.\(^{594}\) The Austrian government intends to survey whether the “voluntary measures” by rightholders that are anticipated by the EU Information Society Directive are appropriate and sufficient.\(^{595}\)

(f) **Approach of the United Kingdom**

In the UK, section 296ZE CDPA provides that a person, or a representative of a class of such persons, is entitled to complain to the Secretary of State if a TPM prevents him from carrying out any permitted use in respect of a work. Although not required by the EU Information Society Directive, this procedure is also available for a person who relies on the fair dealing exception for the purpose of private study.\(^{596}\) The Secretary of State may then give a direction requiring the right-owner to ensure that the complainant can benefit from the permitted act. A failure to comply with such a direction is actionable at the suit of the complainant.\(^{597}\) Although from a theoretical point of view this approach looks interesting and balanced, in practice, the costs and time involved will deter most private users from invoking the process. Additionally, the Secretary of State is under no obligation to take any action and there is no right of appeal from his decision.\(^{598}\)

It is doubtful whether this weak process can be considered consistent with the EU requirement of “appropriate measures”\(^{599}\).

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\(^{594}\) See also Dillenz and Gutman, *Urheberrechtsgesetz und Verwertungsgesellschaftsgesetz* (Springer, Vienna 2004), § 1, No 65.


(g) **Approach of Denmark**

Danish law combined the two approaches of, first, empowering an administrative tribunal to determine whether rightholders have to provide means for enabling permitted uses, and secondly, granting a subsequent self-help right. The procedure pursuant to article 75d of the Danish Copyright Act (ophavsretslovens) provides the user with the possibility to apply to the Copyright Licence Tribunal\(^\text{600}\) for an order requiring the rightholder to make available to the user the means which are necessary to enable the user to exercise his permitted uses. If the ordered rightholder fails to provide such means within four weeks, the user may circumvent the TPM in question.\(^\text{601}\) Such a self-help right might be inconsistent with the requirements of the EU Information Society Directive.\(^\text{602}\) However, one should note that the broad exception for private and domestic use is not included in this balancing provision. Moreover, the factual problem of how to circumvent a TPM if preparatory acts such as making and dealing in circumvention devices are prohibited and therefore the necessary devices are not lawfully available, is not expressly addressed.

(h) **Approach of France**

In France, there is also ambiguity regarding the tension between TPM and permitted use, since the French law does not address this matter.\(^\text{603}\) Based on this uncertainty, different French courts have come to different results. In April 2005 the Court of Appeal of Paris (cour d'appel de Paris) held that a user who sued a movie rightholder, was entitled to the right to exercise his statutory exception of private use, even though the copy of the work was protected by means of TPMs. The court ordered the rightholder to remove the TPM from the movie DVD so that the user would be able to copy the movie on a video tape for further use.\(^\text{604}\) Subsequently, in a decision, dated 28 February 2006, the French Federal Court of Justice (Cour de

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600 That also determines copyright remuneration rights.
602 See above subchapter 6.2.1(c).
Cassation) overturned the judgment of the Court of Appeal and decided that TPMs legally prevail over the permitted uses. The court argued that:

“[…] la copie privée ne constituait qu’une exception légale aux droits d’auteur et non un droit reconnu de manière absolue à l’usager […]”

Translation:
“[…] the permitted use of private copying constitutes only a legal exception to the exclusive rights of the author but gives the user not an absolute right […]”

That reasoning is consistent with the German approach, which considers the copyright exceptions as defences to infringement but not as rights that one can assert against rightholders.

(i) Approach of Australia

Section 116A (3) of the Australian Copyright Act implements the approach of enabling specific permitted uses by allowing the supply of circumvention devices for such works that are not readily available in a non protected-form if the following preconditions are satisfied:

“(a) the person is a qualified person; and
(b) the person gives the supplier before, or at the time of, the supply a declaration signed by the person:
   (i) stating the name and address of the person; and
   (ii) stating the basis on which the person is a qualified person; and
   (iii) stating the name and address of the supplier of the circumvention device or circumvention service; and
   (iv) stating that the device or service is to be used only for a permitted purpose by a qualified person; and
   (v) identifying the permitted purpose by reference to one or more of sections 47D, 47E, 47F, 48A, 49, 50, 51A and 183 and Part VB; and

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606 See above subchapter 6.2.2(d).
(vi) stating that a work or other subject-matter in relation to which the person proposes to use the device or service for a permitted purpose is not readily available to the person in a form that is not protected by a technological protection measure.”

A “qualified person” is the beneficiary of the specific permitted use exceptions.

However, the approach causes the problem that the once issued circumvention devices is subsequently out of the rightholder’s control. The person can use the device also for other purposes which are not covered by permitted use exceptions, or can pass the circumvention device to other people. Additionally, the broad exception of fair dealing is not included, although the latest digital agenda reviews, commissioned by the Australian Government, proposed to include fair dealing for some purposes.

With regard to the tension between TPMs and public domain works, the Australian law specifies that the circumvention provision of section 116A (1)(a) Copyright Act 1968 applies only if the TPM in question protects a copyright work or another subject-matter. However, since most circumvention devices are not solely designed for circumventing TPMs which protect public domain works, but also allow circumvention of TPMs which protect copyright works, in practice, all circumvention devices are banned.

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607 See also the comments to the New Zealand proposal to implement a similar system in below subchapter 6.2.2(j).


“The Committee recommends that the proposed exceptions to liability for TPM circumvention for:
- Fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice; and
- The inclusion of copyright material in broadcasts and the reproduction of copyright material for broadcasting purposes

[... be included as permitted exceptions [...]”.

609 Section 10 defines a TPM as:

“a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter by either or both of the following means:
(a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject-matter) with the authority of the owner or exclusive licensee of the copyright;
Notwithstanding, it must be noted that the High Court of Australia has adopted an interpretation of TPMs which favours the consumers’ interest in accessing works and making broad use of goods they have purchased, to the detriment of the rightholders’ interest in strict TPM enforcement.\textsuperscript{610} In \textit{Stevens v Kabushiki Kaisha Sony Computer Entertainment}\textsuperscript{611} the High Court of Australia decided that the selling of circumvention devices was not illegal, even though the seller knew that his devices could be used to play illicit copyright video games. It is interesting to note the general tendency of the court towards a narrow TPM regime to the benefit of permitted use exceptions. For example Kirby J observed:\textsuperscript{612}

“[..] Sony’s [expansive] interpretation of s 116A [(1)] would enable rights holders effectively to opt out of the fair dealing scheme of the Act. This would have the potential consequence of restricting access to a broad range of material and of impeding lawful dealings as permitted by Div 3 of Pt III of the Copyright Act. [..] Potentially, this could have serious consequences for the operation of the fair dealing provisions of that Act. This is not an interpretation that should be readily accepted.”

\[emphasis added\]

(j) Approach of New Zealand

The present New Zealand copyright law does not specifically address the problem of balancing TPMs and permitted use exceptions. This might be due to the fact that the act of circumvention is not prohibited and that there are no criminal offence provisions. Apparently, TPM issues have been of little practical relevance and have not resulted in any litigation. Hence, it seems that there has been no need for further legislative consideration. Additionally the present New Zealand \textit{Copyright Act} does not provide a broad exception for private and domestic use, which was the initial

\textsuperscript{610} See also Van Melle, \textit{Even Stevens – The right balance for digital copyright law?} (2005) 4 NZIPJ 113, 113

\textsuperscript{611} \textit{Stevens v Kabushiki Kaisha Sony Computer Entertainment} (2005) 65 IPR 513, [2005] HCA 58. One must note that this decision based on a former and now reversed definition of “material form” which had allowed the court’s narrow interpretation. See footnote 174 for former law and footnote 168 for the present definition. Nevertheless, the approach of the judge remains interesting.

point of many academic discussions in that context in most countries. However, the situation might change when the newly proposed exception for format shifting for sound recordings has been enacted and millions of private users want to duplicate TPM protected music CDs or copy digitally purchased music files on other storage mediums. Moreover, after the introduction of criminal sanctions for some preparatory acts – as proposed by the New Zealand Government – it will be harder to get circumvention devices for the purpose of (lawfully) circumventing TPMs to exercise permitted uses.

Under present law, one could consider the requirement of knowledge pursuant to section 226 as an aspect which (indirectly) provides balance between protection of TPMs and permitted use exceptions. A person who does a preparatory act triggers liability only if he knows or has reason to believe that the devices, means, or information will be used to make infringing copies. However, regarding circumvention devices which can be used for both illegal and legal circumventions, the seller faces a high risk of being held liable or at least being sued. Additionally, there is the uncertainty whether access control TPMs are broadly protected or not.

The proposed copyright amendment recognises only specific exceptions to the TPM provisions for error correction in computer programs, interoperability of software, encryption research and similar purposes. In relation to other permitted uses and non-copyright prohibited acts, the Government’s Cabinet Position Paper allows for the interpretation that the carrying out or supporting of a self-help right in the form of circumventing could be approved or even encouraged by stating:

“Copyright owners should not, for example, be able to take action in respect of circumvention devices, means or information where the purpose of the circumvention (and the provision of the device, means or information) is to enable a


\[614\] Most devices combine both purposes, see the Australian *Stevens v Sony* case (see footnote 175) or the English *Sony v Edmunds* case (see footnote 509).

user to exercise a permitted act, or to view or execute a legitimate non-infringing copy of a work."

But the actual implementation of that approach would wear away any effect of the current and proposed legal TPM support. It would not only allow the use of circumvention devices for enabling a user to exercise a permitted act (which is not prohibited at all under New Zealand law) but also provide a defence for any act of supplying such devices. It is hardly possible to restrict the field of application of a circumvention device to the enabling of permitted uses, for instance for studying, without providing means for circumventing other, non-permitted purposes as well.

One could ask why manufacturers and suppliers of circumvention devices shall be treated differently from manufacturers and suppliers of copying devices or other items that could be used for both lawful and unlawful uses. First, circumvention devices are more likely to be used for illegal purposes. The act of selling a kitchen knife is not restricted, although it can be used for murder. Contrary, the act of selling a pistol is restricted and generally unlawful, since it is more likely that it will be used for a criminal act. Second, New Zealand implemented the approach that the act of circumvention itself does not trigger liability (unlike the act of illegal copying or the act of murder). Thus, a strict control of manufacturing and supplying is the only way to prevent circumvention. A different result, however, might apply for circumvention devices which are restricted to circumventing TPMs that clearly do not protect works against copyright infringement but only against other uses, like region code encodings. Devices that facilitate only such lawful uses are rare. Nevertheless, if it was intended by the Government to privilege such regional code circumvention devices, it could resolve any such uncertainties and clarify this matter by introducing an explicit exception for supply of devices for circumventing of region code protections. The wording of the present Act, which refers to “any device or means specifically designed or adapted to circumvent the form of copy-protection employed”

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is not clear with regard to this issue, particularly considering the *Sony v Edmunds*\(^{618}\) case.

The New Zealand Government also recognised the problem of permitting a broad self-help right accompanied by a broad availability of circumvention devices for such uses and restricted this approach by means of a two-step-system.\(^ {619}\) The proposal combines the voluntary approach of the EU\(^ {620}\) and the Australian approach of permitting supply of circumvention devices on receipt of a declaration.\(^ {621}\) At the first stage, the user who wants to exercise a permitted use which is impeded by a TPM, has to apply to the copyright owner to take the steps required to permit that specific use. At the second stage, if the copyright owner fails to provide the necessary voluntary steps:

> “[T]he act would allow the provision or manufacture of circumvention devices, means or information, on receipt of a declaration from a library, archive or educational establishment that circumvention is required for the purposes of exercising a permitted act.”\(^ {622}\)

However, the first step is without any time limit restriction and could present a serious impediment to research and study.\(^ {623}\) Furthermore, one has to see whether the administrative effort on both sides will be reasonable, particularly in the context of minor uses.

The second step also causes many problems.\(^ {624}\) Firstly, the authorised libraries and establishments need to be legally trained to be able to judge whether the specific case justifies a declaration. Although librarians already deal with some copyright issues (like research or private study) in their daily work, the new provision would require an extension of their scope of expertise to all permitted uses. Additionally, a broad technical understanding will be required if such declarations are to be issued precisely regarding specific TPMs and circumventing devices. A further problem is that the

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\(^{618}\) See footnote 525.

\(^{619}\) See also Smillie, *Legal support for technological protection measures* (2004) 3 NZIPJ 278, 282.

\(^{620}\) Article 6 (4)(1) EU *Information Society Directive*, see above subchapter 6.2.2(c).

\(^{621}\) Section 116A (3) of the Australian Copyright Act, see above subchapter 6.2.2(i).


once handed out circumvention device is subsequently out of the rightholder’s control. The person can use the device for further circumventions which are not covered by permitted uses without any legal consequences, since the use of circumvention devices is not prohibited under New Zealand law. The person who obtained the device can also hand it over to other persons without legal consequences, since the acts of borrowing TPMs and giving them away as gifts are not prohibited pursuant to section 226 Copyright Act, let alone the illicit market for these devices. Moreover, the proposal does not provide precise legal means against the decision of the specific institution. Shall the user sue the library if it rejects the user’s application for a declaration or shall he complain to an arbitration board or ombudsman? And can copyright owners challenge the practice of a library to allow all applications without further review?

Nevertheless, it is interesting to note that the proposed New Zealand approach does not distinguish between different permitted uses, as almost every other country does, but treats all exceptions (including fair dealing) equally.

However, neither the present nor the proposed law deals expressly with the problem that TPMs can also be (mis-)used for protecting non-copyright-protected items, like public domain works, although the Government intends to keep the focus of section 226 on the link between circumvention and copyright infringement. Admittedly, since the act of circumventing itself is not prohibited, there is hardly an opportunity to distinguish: it is impracticable to prohibit the selling of devices that enable users to circumvent TPMs protecting copyright protected movies, and at the same time permit the selling of devices that enable the user to circumvent TPMs protecting old public domain movies. The proposed “prescription”-system would also hardly be practicable, since the authorised facilities would have to evaluate whether the respective item, which often will not be accessible due to a copy/access control TPM, is already public domain or still protected by copyright law. It would be a demanding challenge for any librarian to estimate the kind of the work, the author

624 See also Smillie, Digital Copyright Reform in New Zealand, [2004] EIPR, 302, 309.
625 Although any subsequent act of copying might trigger liability for infringement of copyright, the idea and objective of legal TPM support to provide an additional layer of protection is not met.
627 Meaning: Getting a circumvention device on declaration like a "prescription".
and the year of the author’s death by looking at the outside of the user’s computer case.

6.3 THE PROBLEM OF CONTRACTING OUT

The question arises whether statutory permitted use exceptions and/or provisions that secure the balance between TPMs and such exceptions (as analysed in the foregoing chapter) can be excluded by contract law. The concern is that the balance between copyright owners and copyright users could easily be upset by virtue of contractual agreements, particularly in the form of a standardised “shrink-wrap” agreement or its online counterpart, the “click-wrap” agreement. “Shrink-wrap” agreements are announcements on product packages, which usually state that the user’s act of unwrapping the package is regarded as an agreement to the specific contractual clauses provided. “Click-wrapping” describes the same principle but by virtue of a mouse click instead of unwrapping. Many jurisdictions have a general tendency to recognise contractual terms in shrink-wrap and/or click-wrap agreements as valid and enforceable. However, the specific problem of whether such attempts to restrict the user’s action beyond the limits set by copyright law are valid, is seldom specifically addressed.

6.3.1 Under New Zealand Law

The present New Zealand Copyright Act makes no specific provision as to whether contracting out of permitted uses is valid and enforceable in general. However, with regard to back-up copies of computer programs, section 80 (3)(b) of the Copyright Act provides that this exception does not apply “contrary to an express direction by or on behalf of the owner of the copyright”. One could argue that this provision implies that such directions or contractual agreements are invalid with regard to all other permitted use exceptions (which do not expressly allow contrary directions).

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There is no doubt that the balance between rightholders’ and users’ interests which is embodied in the current copyright law system in the form of exclusive rights and permitted uses would be heavily disrupted if copyright owners always got the opportunity to opt out by virtue of contract law. However, New Zealand, as an Anglo-American country, favours the legal principle of freedom of contract, which generally allows parties to contract out of a statutory provision if the statute does not expressly or impliedly prohibit such a contracting out. Whether and if yes to what extent New Zealand copyright law implies that permitted use exceptions are mandatory as fundamental public law and policy has not been clarifying by the courts, yet. Neither did the present Governmental proposal to amend the Copyright Act address this issue, even though the New Zealand Law Society’s Electronic Commerce Committee’s early submission of 2001 pointed out the problem and suggested to introduce that the new Act should answer that:

“[…] any exceptions, permissions or rights of fair dealing contained in the Copyright Act will be available to users notwithstanding any contractual stipulations to the contrary.”

The Ministry noted the concern but took the position that its review did “not encompass broader licensing or contractual issues.” However, the Ministry’s subsequent proposal is inconsistent with the approach not to encompass contractual issues. The Ministry recommends the inclusion – in conjunction with the proposal to add a new exception for the purpose of software decompilation – that

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630 See above subchapter 2.2.
631 See also Smillie, Digital Copyright Reform in New Zealand, [2004] EIPR, 302, 309.
“[a]ny term or condition of an agreement that purported to prohibit copying for these purposes would be deemed to be void.”\textsuperscript{636}

This provision could give reason to imply – contrary to the possible implication deriving from the aforementioned section 80 (3)(b) regarding back-up copies – that all other permitted uses are subject to exclusion by contractual agreements.\textsuperscript{637}

Hence, the opting out question under New Zealand law remains open.

The additional question whether provisions that secure the balance of TPM protection and permitted use exceptions are legally protected against contracting out does not apply, since present New Zealand copyright law does not recognise such “balancing” regulations. However, the proposed amendments to the Copyright Act suggest that users can apply for a “prescription” to get a circumvention device which enables them to exercise their permitted use exceptions.\textsuperscript{638} Notwithstanding, the proposal does not provide any provision that clarifies whether rightholders can prohibit such an application of the user by contractual agreements.

More recently, the New Zealand Government has initiated a broad review of this contracting out issue. It pointed out that the importance of this question has increased in the digital environment where such contractual agreements are often combined with TPMs.\textsuperscript{639} The Government asked for submissions about whether the copyright owner’s freedom of contract is or should be limited by rules of copyright law.\textsuperscript{640} It wants to evaluate that:

“[…] how the interaction between contract and copyright law is affecting the market in New Zealand and the extent to which this

\begin{footnotesize}

\textsuperscript{637} See also Smillie, Digital Copyright Reform in New Zealand, [2004] EIPR, 302, 309.

\textsuperscript{638} See above 6.2.2(j).


\end{footnotesize}
may or may not be giving rise to problems for creators, owners and users of copyright-protected material.”

Under Australian law, there is currently the same uncertainty regarding the possibility of contracting out of exceptions. This subject was thoroughly analysed by the Australian Copyright Law Review Committee in 2002-2003. The Committee concluded that the fair dealing exceptions and the provisions relating to libraries and archives should be mandatory. It also recommended that the provisions in section 116A of the Australian Copyright Act, which secure the balance of TPMs and exceptions, should not be capable of being excluded by contract. More recently, the House of Representatives Standing Committee on Legal and Constitutional Affairs also recommended that:

“[T]he legislation [...] should nullify any agreements purporting to exclude or limit the application of permitted exceptions [...]”

Furthermore, it stated:

“The widespread use of exclusionary or limiting agreements, particularly when presented to copyright users as virtual faits accomplis in the form of end user licence agreements, could easily render the very concept of permitted exceptions meaningless.”

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On the contrary, the US case law follows a different approach to favour a strong principle of freedom of contract.\textsuperscript{647} For instance, the U.S. Court of Appeals for the Federal Circuit stated in the case of \textit{Bowers v. Baystate Technologies Inc}\textsuperscript{648} that “the Copyright Act does not pre-empt or narrow the scope of […] a contract claim” based on a shrink-wrap agreement. The court held a shrink-wrap agreement valid which contained a prohibition against all “reverse engineering” of the software in question, although the act of “reverse engineering” was considered a permitted use under the statutory exception of fair use.

However, one has to consider that the ideal form of the principle of freedom of contract requires equally strong parties. In the context of a relationship between international rightholder companies and single users, the parties do not always enjoy equal bargaining power.\textsuperscript{649}

### 6.3.2 Under German Law

The German \textit{Urheberrechtsgesetz} does not expressly clarify whether statutory permitted uses can be waived by contractual agreements and neither does the EU Information Society Directive. Moreover, as far as it is apparent, this question has never been of significance in German (or Austrian) case law or academic writing. Furthermore, it seems like there has never been a serious attempt to contract out of a German statutory copyright exception. The reason might be that copyright owners have received remuneration for most acts which are covered under the permitted use exceptions, indirectly charged on storing media, from copy-shops etc. However, the circumstances are different in the digital environment. Rightowners do not get a monetary reward for every use of a work that is transmitted over the Internet. Moreover, contrary to, for instance, the acts of copying music CDs to blank audio CDs, the acts of storing music in MP3 format on hard drives cannot be levied as easily. It is much harder to calculate a reasonable and fair fee to levy on the storage medium. First, some people may save 10,000 music songs on a 20 GB hard drive while other people never use hard drives to store copyright works. Moreover, hard


\textsuperscript{648} \textit{Bowers v. Baystate Technologies Inc} 320 F.3d 1317 (Fed. Cir. 2003).
drives can be re-used indefinitely. Thus, the copyright industry might become more and more interested in controlling private uses in the digital world – by TPMs and by contractual agreements.

Nevertheless, the German Federal Court of Justice (Bundesgerichtshof) has often mentioned as an introductory statement to the German copyright system that:


Translation

“The copyright act [Urheberrechtsgesetz] generally contains an exhaustive regulation of the rights that derive from the copyright [Urheberrecht]. The scheme of the author’s exclusive right provided by law is the result of the legislator’s consideration of the author’s interest to have as far-reaching and as absolute rights in the work as possible, and the interests of the user to have as unrestricted and as far-reaching access to and usage of the copyright protected works as possible. [...] the capacity of the author’s rights are restricted by the exceptions of the copyright act [Urheberrechtsgesetz], which takes the opposed interests of the public as well as of specific user groups into consideration.”

It is therefore highly doubtful that any court would allow the balance of exclusive rights and exceptions, which builds the basis for the German copyright law, to be upset by contractual agreements.\textsuperscript{651} The German Civil law system is based on and dominated by statutory regulation and therefore has a restrictive approach to waging statutory provisions.

The view that statutory exceptions could not be waived by contractual agreement is also supported by section 49 (1) of the \textit{Urheberrechtsgesetz}. The section allows newspaper and broadcasting companies to reproduce, distribute and broadcast single broadcast commentaries or articles of other newspapers and broadcasts if they concern political, economic or religious issues of the day. However, this permitted use is expressly subject to the unique condition that the specific articles or commentaries

\begin{quote}

\textit{``nicht mit einem Vorbehalt der Rechte versehen sind.''}
\end{quote}

Translation

\begin{quote}

\textit{``do not contain a statement reserving rights.''}
\end{quote}

Such a regulation would be unnecessary if any permitted use was subject to a contractual opting out possibility.

On the other hand, article 9 (1) of the EU \textit{Computer-Directive} has required the member states to provide that “any contractual provisions contrary to” the exceptions for decompilation for the purpose of achieving interoperability, making back-ups, observing, studying or testing the functioning of the program in order to determine the ideas and principles “shall be null and void”.\textsuperscript{652} Article 15 of the EU Database-Directive dictates another exclusion of contracting out in regard to the usability of databases.\textsuperscript{653} But the scope of this provision is rather limited. It clarifies only that reproductions and adaptations of database elements are permitted to the extend which is necessary for using the database by the authorised user. It is self-evident that the user must be able to do the acts that are necessary to use the database. However, these two provisions are mandatory EU law and, thus, provide little information about

\begin{footnotesize}

\textsuperscript{651} See also Schack, \textit{Schutz digitaler Werke vor privater Vervielfältigung: zu den Auswirkungen der Digitalisierung auf § 53 UrhG} [2002] ZUM 497, 502; and Guibault \textit{Copyright Limitations and Contracts} (Kluwer Law International, The Hague/London/Boston 2002), 291, 298, who states that the courts in Netherlands and Germany “might be more inclined to invalidate restrictive licence terms” and might find that such an “agreement […] is contrary to the public interest”.

\textsuperscript{652} Implemented in national law as sections 69d (2) and 69g (2) of the \textit{Urheberrechtsgesetz}.

\textsuperscript{653} Implemented in national law as section 55a of the \textit{Urheberrechtsgesetz}.
\end{footnotesize}
the original systematic and philosophic approach of German copyright law towards contracting out.

At least, the German law would never permit statutory regulations which are of benefit to consumers to be waived by means of general terms and conditions of standardized agreements like click-wrap or shrink-wrap.\textsuperscript{654} Section 307 of the German Civil Code (\textit{Bürgerliches Gesetzbuch}) provides that as a general rule:

\begin{quote}
\textit{(1) Terms in general terms and conditions are ineffective if they are to the unreasonable disadvantage of the contractual partner [...]}
\end{quote}

\begin{quote}
\textit{A unreasonable disadvantage is, in the case of doubt, a term that}
\end{quote}

\begin{quote}
\textit{1. is inconsistent with a fundamental idea of a statutory provision [...]}
\end{quote}

The scope of practical application of section 307 is hard to determine, since the decisions of the courts depend highly on the specific circumstances. But, for instance, in the case \textit{Rücklastschrift- und Scheckrückgabe-Klauseln}\textsuperscript{655} the German Federal Court of Justice (\textit{Bundesgerichtshof}) held invalid a clause in the general terms and conditions of a bank which imposed on customers a strict liability for damages for any breach of duty regarding return debit notes. The court argued that it is a fundamental idea of the German Civil Code (\textit{Bürgerliches Gesetzbuch}), expressed in section 276, that a liability for damages requires not only an objective breach of duty but also fault in the form of negligence or intention of the defendant. A strict liability would be of unreasonable disadvantage to the customer.

\textsuperscript{654} Meckel in Dreier and Schulze, \textit{Urheberrechtsgesetz} (C.H. Beck, Munich 2004), Vor §§ 44a, No 17 mentions that the permitted use exception to make a copy for private and domestic use could not be waived by means of a sticker on the wrapping of a work.

In light of the aforementioned, repeated statements of the German Federal Court of Justice (Bundesgerichtshof) regarding the importance of permitted use exceptions, it is highly likely that the well-balanced consideration of statutory exceptions must be considered a fundamental idea of the copyright law system, which would be unreasonably disadvantaged by contracting out through acceptance of standardised terms and conditions.  

Moreover, although foreign judgments are not considered as authorities in the German legal system, it is at least interesting that the Swiss Federal Court (Schweizerisches Bundesgericht) has held that

“Die Schrankenbestimmungen des Urheberrechts haben zwingenden Charakter.”

Translation:
“The exceptions of the copyright law have a mandatory character.”

Despite the finding that it is highly doubtful that statutory copyright exceptions could be waived by virtue of contractual agreements alone, it is clear that such exceptions can be waived by means of contract in combination with the use of TPMs in an interactive and digital surrounding. Section 95b (3) of the Urheberrechtsgesetz states that the provisions which require rightholders to enable users to exercise their permitted use exceptions in regard to TPM protected works do not apply if the work has been made available interactively and on agreed contractual terms. Hence, if rightholders want to contract out of permitted use exceptions for works on the Internet, they can easily do so by combining a TPM with any contractual agreement. Users could not make copies of such works for private purposes (even though the act of copying itself would be covered by section 53 (1)), because the act of circumventing would trigger liability under the anti-circumvention provisions.

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656 For this aspect see also Guibault, Copyright Limitations and Contracts (Kluwer Law International, The Hague/London/Boston 2002), 294 f.
657 As already mentioned in the subchapter 1.2.
659 Which implemented article 6 (4)(4) of the EU Information Society Directive.
6.4 CONCLUSION

The first conclusion of this chapter is that neither the theoretical nor the actual approaches to balancing TPMs and permitted uses are particularly persuasive. It is difficult to react to the technology of TPM-systems with legislative answers. The best solution for protecting exclusive rights and simultaneously securing the exercise of permitted use exceptions would be the development of TPMs that are intelligent enough to emulate the legal scheme of copyright law. However, the legislator can hardly dictate what kind of technique is to be invented and the copyright industry has an understandable reluctance to implement permitted use features in their devices voluntarily.

For the time being, the tension between the technological protection of works and permitted uses is a complex field of law, which will remain a “work in progress to be tested by reality for some time”. However, since the rigorous support of TPMs has already found its way into many national copyright laws whilst the “balancing regulations” are still poorly conceived, the copyright balance has in fact shifted in favour of rightholders to the detriment of users. Thus, the fears and concerns mentioned in the introduction to this chapter appear neither unrealistic nor unfounded. Maybe, the implementation of broad legal support for TPMs has been overhasty.

This chapter also indicated once again that New Zealand is a net importer of copyright material and focuses on its citizens’ interests, who are mainly copyright users and not copyright owners. In contrast to New Zealand, German law focuses on stricter TPM protection. Although the German legislature recognised the tension between TPMs and permitted uses, the balancing provisions that the Urheberrechtsgesetz actually provide are not very effective. This is to the detriment of the user, whose statutory exceptions become almost worthless if the work is TPM protected. This is particularly the case regarding the important exception of private and domestic use, and in context with the interactive Internet, where the provisions that balance TPMs and permitted use exceptions are not applicable if the user and the rightholder have a contractual relationship.

On the contrary, although New Zealand law does yet not expressly provide any balancing provisions at all, users benefit from the fact that the act of circumvention itself is not unlawful. New Zealanders can circumvent TPMs in order to exercise permitted uses without fear of legal consequences, though the availability of required devices might be difficult. Although the proposal of the New Zealand Government, which provides a mix of voluntary steps and the possibility to get a circumvention device on “prescription”, is still rather weak, one has to consider that TPM protection will generally be kept at a comparatively low level.

With regard to contracting out, the present legal situation is reversed. Although there is still uncertainty in both legal systems, it is more likely under German law than under New Zealand law that contracting out agreements (particularly in form of click-/shrink-wrap agreements) to the detriment of the user will be deemed invalid. However, this advantage for the benefit of German users is restricted to non-interactive usage only. Nevertheless, New Zealand users could still be hopeful that the Australian approach to a general protection of permitted uses against contracting out will find its way into the copyright system. The process of legislative consideration has already been initiated by the Ministry of Economic Development’s recent discussion paper.663

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7. **Evaluation of the Two Legal Systems / Summary**

As already concluded at the end of chapter 2, the general copyright protection in New Zealand and Germany is broadly comparable, although New Zealand as a net importer of copyright material favours a more consumer-focused approach whilst the German Urheberrechtsgesetz emphasises a stronger protection of authors and copyright owners. The “traditional” copyright law of most countries, including New Zealand and Germany, has been affected by international agreements, such as the Berne Convention and the TRIPS. These agreements required signatories to bring their copyright law on a comparable level.

In contrast, the more “digital” the copyright subject is, the more the two legal systems differ, particularly with regard to TPM support. Germany is an early signatory to the WIPO Internet Treaties and was also obliged to comply with the EU Information Society Directive. New Zealand is not bound by these international agreements and apparently saw no need for an early implementation of a tougher copyright scheme.

7.1 **Time Aspect**

New Zealand’s approach to the digital revolution focused on extensive analysis rather than speedy response. To take a more pessimistic view, one could say that the New Zealand Parliament is “notoriously slow to address new technologies”. It was not until 2001 that the New Zealand Government initiated its review of the digital challenge to the copyright. The ensuing discussion paper and the subsequent process considered the experiences of foreign enactments of the European Union Information Society Directive 2001, the Australian Copyright (Digital Agenda) Act 2000 and the United States Digital Millennium Copyright Act 1998. A Copyright (New Technologies and Performers’ Rights) Amendment Bill was expected to be introduced into the Parliament in 2004 but has still not appeared. Roughly speaking, New Zealand’s latest proposal for a copyright amendment takes advantage

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of many years of foreign legislative development and debate, for instance six years of debate in Australia, another six years in the EU and five years of United States research.

7.2 Effectiveness

The New Zealand government is of the opinion that while some clarifications are necessary to keep the copyright system in shape, few major changes are required. Compared with other nations (particularly Germany), the current provisions regarding TPM support are very short and the protection is rather basic (e.g. no prohibition of the act of circumventing itself, no criminal provisions). Provisions that deal with the balance between TPM protection and the exercise of permitted use exceptions are currently completely absent. Many questions, for instance the legal protection of access control TPMs, the copyright relevance of hyperlinks and RAM reproductions, the applicability of the right to include a work in cable programme service/broadcasting to the Internet, and ISP liability are still unresolved.

Although the proposed amendment to the Copyright Act will answer most of these questions, there will remain some uncertainties, for instance, regarding authorisation issues, liability for hyperlinking, the scope of the definition of legally backed TPMs and whether the scope of the exception for browsing on the Internet includes cache-copying. Considering that these problems have not been finally solved by earlier amendments of other jurisdictions but were academically discussed, one would have expected New Zealand’s late legal revision to be more exhaustive and clarifying.

Regarding TPMs, which will become “dominating” in the near future, all countries have to keep an eye on the balance between TPMs and permitted use exceptions to ensure that TPMs do not upset the balance of copyright. Germany tried to balance the

very strict legal TPM support, which was dictated by the EU, with a complex bundle of provisions that secure permitted uses. Several approaches, such as a duty to inform customers about implemented TPMs, a right to file an action for users, an administrative fine and an exclusion from criminal liability for “domestic” circumvention, were combined. However, the tension between TPM protection and permitted use exceptions has not been solved satisfactorily, particularly in the digital environment where in most cases all these “balancing provisions” do not apply.

Hence, for the time being, one cannot say that the New Zealand copyright law is generally worse than other countries’, particularly since effective (and fair) balancing solutions are apparently not yet available. The basic New Zealand solution of providing only one short section directed at trafficking in circumvention devices and not prohibiting the act of circumventing itself, combined with a (albeit rather weak) right to get a circumvention device on “prescription”, has its advantages. It offers legal certainty and provides legal freedom for users. Copyright law is difficult enough and the average consumer might be glad not to need a PhD in law to understand a further, most complex circumvention and TPM/exception balancing scheme.

However, it is predictable that all countries will have to reconsider their copyright law at regular intervals for keeping it aligned with the technological developments, particularly in the field of TPM.

7.3 INDEPENDENCE VS SUPRANATIONAL CONFEDERATION

Since New Zealand is not bound in a supranational confederation as Germany is in the European Community, its legislation seems to be more independent of outside influences. Although it is true that no foreign body or committee can legally dictate to New Zealand what to enact, it has to be considered that New Zealand is relatively small in terms of population and therefore has limited economic power on the global market. Hence, in bilateral or multi-lateral agreements New Zealand is mostly a junior partner. Additionally, New Zealand has to bring its copyright law into close alignment with its major trading partners and with international standards, for instance the WIPO agreements, in order to avoid a situation where foreign copyright owners

670 Cabinet Economic Development Committee, Digital Technology and the Copyright Act 1994: Policy Recommendations (25 June 2003,
become reluctant to release their works on the New Zealand market. These aspects might result in strong *de facto* dependence on dominant trading nations’ demands. A good example of such domination in the global market is the influence of the United States of America on the recent Australian copyright legislation. The United States almost dictated the Australian US Free Trade Agreement Implementation Act 2004, which partly mirrors current United States copyright law. The United States consider their copyright regime to be “the standard international model for implementation of the WCT.” Therefore, the free trade agreement between Australia and the US is believed to have set an important precedent for any subsequent free trade agreements between the United States and other nations. Moreover it is specifically regarded as a chilling illustration of a possible future for New Zealand.

Hence, it is questionable whether New Zealand will be able to retain its approach to not prohibiting the act of circumventing TPMs itself. Most major trading partners, such as the United Kingdom, the United States and Germany have already implemented tougher legal protection. Australia, whose law is particularly important for New Zealand according to the Australia New Zealand Closer Economic Relations (CER) Trade Agreement, is committed to implementing a prohibition of the act of circumvention in accordance with the Australia-United States Free Trade Agreement.


675 It entered into force on 1 January 1983 and is a comprehensive set of trade and economic arrangements and agreements which underpin substantial flows of merchandise trade, services, investment, labour and visitors between the two countries. One objective of CER is to harmonise the business law. Section 5 (d) of the memorandum of 1 July 1988 (http://www.dfat.gov.au/geo/new_zealand/anz_cer/259.pdf) expressly refers to copyright law: “It is desirable that the process of harmonisation and co-operation be continued with a view to achieving a mutually beneficial trans-Tasman commercial environment, including the removal of any impediments to trade that may arise out of differences between the business laws and regulatory practices of the two countries. [...] This program will include the following areas: [...] (d) copyright law, including support of appropriate international conventions, and the protection of computer software and integrated circuits”
A downside of the supranational independence is, however, that New Zealand was not forced to react to the digital impact quickly. Whilst Germany and other EU member states faced potential consequences for delayed implementations, New Zealand apparently lacked the necessary motivation to modify its copyright law precipitously. Although this delay has apparently not caused major practical consequences, there has been a longer legal uncertainty.

Nevertheless, this supranational freedom allows New Zealand to avoid legal oddities such as the European countries’ distinction between computer programs and other works in respect of circumvention provisions, which is due to the implementation of two different EU directives.

However, it seems that the effectiveness of copyright law and the ability to solve modern challenges do not necessarily depend on whether a country is independent or bound in a supranational organisation like the EU. Many EU member states (for instance Austria, France, Denmark and the UK) have also not made adequate provision for securing the balance between TPMs and permitted uses.

### 7.4 Commonwealth Case Law vs Central European Civil Law

In summary, Germany was able to outdo New Zealand with regard to legal certainty in modern fields of copyright law, particularly regarding the topics considered in chapter 3. This is surprising insofar as New Zealand’s jurisdiction has two (theoretical) advantages: the flexibility of a case law system and the accepted approach of considering other Commonwealth countries’ cases, which allows to “borrow” and adopt foreign jurisdictional “wisdom”.

However, the differences between case law and civil law systems have become smaller. Firstly, Central European countries have developed to some extend a rather strong *de facto* case law, which helps to interpret statutes and provides legal certainty and eventually “forms law” in a comparable way. Additionally, many parts of the law in Commonwealth states are nowadays heavily stamped by exhaustive and exclusive statutes, which almost completely eliminate radical “law-making” case law. Copyright law is a prominent example.\(^{676}\) This minimises the flexibility of the system. Secondly,

\(^{676}\) See section 225 (2) of the *Copyright Act.*
the Commonwealth countries have drifted more and more apart from the “common wealth” of a joint basis of laws by enacting more independent and more differing statutes. Thus, a decision of an English court, a United States court, or a Canadian court, or even an Australian court cannot automatically be applied to a New Zealand situation due to a different wording of the underlying statutes.

In conclusion, the nature of the legal system – whether civil law or common law – does not seem to be of importance for the ability to master new legal challenges.

7.5 General Epilogue

Worldwide, copyright law is facing a digital challenge. The main approaches of clarifying Internet-related questions, of providing TPM support and of trying to balance TPMs and permitted uses are considered by almost any modern democratic legislator – from Germany to New Zealand. The pace, the intensity and the details of implementation are different, though.

However, all nations’ attempts to solve present uncertainties and problems, particularly regarding the question of how to balance TPM support and permitted uses, are not yet satisfactorily completed. One could say that the increasing implementation of DRM and TPM creates as many copyright problems as it solves, and will therefore keep the copyright law in the legislative focus. For this reason, the politicians of all countries should be frank and honest to declare that they are, as yet, not able to achieve both provision of strong TPM protection while securing a satisfactorily balance between exclusive rights and permitted uses. The contradictory present behaviour of governments and legislators throughout the world, claiming that this balance is still important and prevailing but actually doing nothing to secure it effectively, is just a veil.

Considering the ever increasing globalisation, it is interesting to observe whether the laws of most remote countries such as New Zealand and Germany will follow the general tendency of the global market to move together. The repeated reference to developments of foreign legislations, for instance in New Zealand Government

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discussion papers, indicates that this is the case. With regard to copyright law, it will be of particular interest whether (or how long) New Zealand will be capable of defending its more user-friendly approach against future pressure from the economic superiority of the United States of America and the European Union – whose power to dictate a stricter copyright scheme is ironically based on 750 million potential copyright users.

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