Submission to the Select Committee

Copyright (New Technologies and Performers' Rights) Amendment Bill

(1) This submission is from Clark Thomborson of 5a Cranbrook Mews, Glendowie, Auckland. I am a Professor of Computer Science at the University of Auckland. I do not represent the views of my employer in this submission.

(2) I do not wish to appear before the committee to speak to my submission.

(3) I can be contacted on 09 3737 599 x85753 and 021 0466 034.

Summary

(4) I support the intent of this bill because I would like to have a clearer statement of copyright for works in digital form.

(5) I wish to make the following comments. The exceptions to copyright for works in digital form are, generally speaking, too narrowly drawn to serve the public interest. The bill has made some laudable progress toward technological neutrality, but it retains some specialised treatments for satellite transmissions and encrypted transmissions which I believe should be amended into a technologically-neutral form. I believe that the committee should redraft the bill to address these issues before its second reading.

Specific Comments

(6) Section 24. I support the intent of this section, which I understand to be to create a technology-neutral form of copyright in cases where the work is communicated rather than fixed in tangible form at the time of its first publication. I am concerned that this section may be misinterpreted, or that my understanding of its intent is incorrect. Would a first communication in New Zealand in 2007, of a lightly-edited version of a movie that was created overseas in 1940, create a communication work that would enjoy a 50-year term of copyright in New Zealand? Would the answer to my question depend on whether the overseas copyright on the underlying movie expires earlier than 2057? I believe that a copyright on a communication work should cover only the original aspects of that work. In cases where the communication work is merely a transmission or lightly edited version of a copyright work, no new rights should be created by a New Zealand broadcast. Creative and copyrightable aspects of a communication work could include the substantial choices made when editing a copyright movie for a New Zealand broadcast. Once a work goes out of copyright, there should be no restriction on any communication or publication of any copy of that work. The communication of a copyright work should never have the effect of increasing the effective term of copyright. I believe Section 24 should be redrafted to address these concerns.
(7) *Section 28*. I believe this section should be amended to specify an upper limit to the term of copyright in New Zealand. I believe an additional 25 years would be an appropriate upper limit, in consideration of a commonly-accepted theory of copyright as a limited-term monopoly that will encourage the creation and publication of original works, and as a way of forming a reasonable but quite definite compromise position with our TRIPS partners who have extended their domestic copyright for a longer term than our traditional term. I believe a definite term for copyright is in the public good, for otherwise copyright holders will suffer unnecessary costs when they try to determine the actual term they might enjoy in New Zealand. Out of fairness to our own authors, copyrights in overseas works must never have a substantially longer term than copyrights in New Zealand creations. When the indefinite provisions of Section 28 are interpreted to allow more than 100% (50 years) of additional coverage to overseas copyrights, I believe this is extremely unfair to our domestic authors. I firmly believe that copyright in New Zealand must have a definite term, not one that is subject to unrestricted change at any time due to legislative action overseas. I hope that the Select Committee will take this opportunity to put a definite and fair limit on the term of copyright in New Zealand.

(8) *Section 44(2)*. The “reasonable time” clause in this section limits the scope of the exception for “storing for educational purposes”. As drafted, this section would place an unnecessary burden on educational institutions, which may feel obliged to take steps to ensure that their instructors have destroyed any archival copies they may have retained of their instructional material. Maintaining records of what has been taught is an important part of educational practice. I hope that this section will be redrafted, or that some other exception will be created, that would clearly empower educators to retain archival copies of all material they have used in their teaching.

(9) *Section 57A* seems, in my reading, to be likely to result in a requirement being placed on any user of an archival service to waive the rights they would otherwise enjoy under our Privacy Act. If archivists and librarians were to require the signing of a waiver of privacy before allowing access to copyright works, this would have a chilling effect on research and study. The desire of a copyright holder to obtain detailed records of accession should not be allowed to take precedence over the privacy rights of the users of an archive. I believe this section should be redrafted so that the copyright holder is not allowed to view the declarations made under Section 57B or 56C (except under court order).

(10) *Section 57A*. To provide a suitable balance between copyright and privacy, archivists and librarians should be required to provide anonymised and generalised reports, on a cost-recovery basis, to documented copyright holders. Librarians and archivists should be given sufficient time, and allowed to recover the costs, of consulting as necessary with the Privacy Commission to design suitable reports. This section should, I believe, be redrafted to require that the reports be sufficiently detailed to have a high probability of revealing substantial abuses of copyright should these occur, and that they be sufficiently general to have a low probability of invading the privacy of legitimate users of the archive or library. For example the reports might contain counts of the total accessions and number of different accessors over the past year, summed over
general categories of archived material where there are 10 and 1000 works in each category.

(11) Section 80A provides a very narrow exception. It should be redrafted to provide a much broader exception. It may be convenient, for purposes of redrafting, to generalise the current concept of “software” to include any copyright work which was designed to have some operational or functional behaviour (as distinct from an artistic or aesthetically pleasing form or content). A permitted act on a functional work is to analyse it for the purpose of designing another functional work which operates independently with the analysed work or with another copyright work of similar function. If appropriately broadened, this legislation would encourage New Zealand’s designers of interoperable computer hardware, firmware, and other forms of functional copyright works. In its current form, this exception would tend to discourage such design by prohibiting the relevant analysis. As drafted, the exception clearly covers only a single type of analysis of software: its decompilation into a higher level language. Other types of analysis of copyright articles are in common use by reverse engineers but are not clearly covered by the proposed exception. For example the dynamic operation of a computer program may analyzed using a debugger. The operation of tamper-evident hardware may be understood by the construction of, and tampering with, a version of this hardware which incorporates some monitoring device. Any manufactured device may be analysed by constructing a model – arguably a digital copy – and then exploring its properties with the assistance of a computer or any other analytic device. I believe that all forms of analysis of a copyright work are just as socially desirable as the decompilation of a software work. Any form of analysis that is conducted for the purpose of designing an interoperable work, for restoring the function of a damaged copyright work, or for augmenting the functions of a functional work, should be a permitted act.

(12) Section 80C is very narrowly drawn. This section should be redrafted to invalidate any licence provision that would seek to prohibit or discourage an analysis of computer software and other functional copyright works. Licences which prohibit analysis and review are commonly offered for computer software on “academic discount”. To my knowledge the enforceability of such licence clauses have not yet been tested in courtroom proceedings. I would hope that they will never be tested, but I believe this is an excellent appropriate time to draft the law to make it clear that New Zealand would not enforce such licences.

(13) Section 111. As a general rule, all permitted acts should be limitations on contract enforcements. One approach to stating this rule would be to add a clause similar to 80C to every Section that states an exception to copyright. This would be very cumbersome. A much better approach, in my opinion, would be to revise Section 111 to make it clear that the New Zealand courts will not enforce licences which forbid or discourage permitted acts on copyright works. In any cases where this general approach is inappropriate, and I cannot think of any such cases offhand, specific copyright exceptions can be redrafted to declare the condition or conditions under which the exception may be limited by contract. In this regard the current drafting of Section 80C is extremely unfortunate, since it might be interpreted (by the absence of similar clauses in other
exceptions) as a statement of one of the very few limitations on the control copyright owners may exert, with the assistance of New Zealand courts, over how and when New Zealanders access, adapt, review, analyse, and archive a copyright work.

(14) Section 81A. The exception of this section is extremely narrow. It should be redrafted to apply to creation of copies for personal use of any copyright work, such as a video or a book. For example, when I purchase a book in hardcopy, I sometimes wish to scan this book to avoid the weight and wasted jetfuel of carrying the hardcopy on an overseas trip. The limitation of Section 81A(f) should therefore be removed, for in its present form it is an unreasonable intrusion on private arrangements that may involve the use of multiple devices that can handle the same format of files.

(15) Section 81A(a-e and g). The limitation to private and domestic use, in Section 81A(e) is more than sufficient to prohibit abusive “file-sharing”. I hope that other submitters will propose reasonable ways to prohibit this abuse without such a great extension of copyright protection beyond what is commonly accepted by generally law-abiding users in New Zealand. I can think of no good reason why a copyright holder should be given power, under New Zealand law, to restrict the ways, times and formats in which their material is accessed by private and domestic users.

(16) Section 84a. The exception of Section 84 is extremely narrow. It should be redrafted to make it clear that a person is allowed to make a recording on behalf of another member of their household.

(17) Section 84c. This section should either be omitted or greatly revised. Otherwise the time-shifting exception will be vacuous, in a not-unlikely future in which anything that is made available free-to-air on NZ broadcast media is also made available on demand but with unattractive license provisions, possibly including prohibitions on acts that would be permitted on a personal recording of the broadcast work.

(18) Section 87A(1)b. I am unable to discern any appropriate intent in the limiting of Section 87A, in section 87A(1)b, to communication works that are not “a satellite transmission”. Why should satellite transmissions, as opposed to radio-frequency transmissions from an antenna that is on the ground or sea somewhere, deserve specialised treatment in our law? Why should a copyright holder be given additional power to restrict the reception, decoding, and display of their communication work, merely by taking steps to ensure that the initial step in their broadcast distribution is made via satellite? I hope that this section is redrafted so that it has some understandable and reasonable intent. I do not think it appropriate to warp the law in an effort to preserve the current market conditions for SkyTV. Perhaps this phrase is nothing more than a confusing remnant of the technology-dependent language of the repealed section 87? Whatever its genesis, I believe this section should be redrafted to avoid making any distinctions
- on the mechanism of signal transmission (wired, fibre-optic, or wireless);
on the carrier (typically an electromagnetic wave at the present but other carriers may be devised in future);
- on the carrier frequency (from ULF to x-rays and beyond); or
- on the location of any transponders or repeaters (which may be located on a satellite, on the earth, on the surface of the ocean, or underneath the earth or ocean) which lie in the transmission path from the broadcaster to the intended recipients of the broadcast.

(19) Sections 188, 188A. The proposed sections 188 and 188A exclude works that are a “satellite transmission or an encrypted transmission”. As noted in my previous paragraph, I do not believe that satellite technology should continue to have special treatment in our copyright law. Furthermore I think these technological determinants would be very difficult and expensive to apply. It would be difficult to ascertain whether a signal received by a home multimedia system had been transmitted via satellite, and whether it had been encrypted at some point in its distribution. If the purpose of the encryption is to enforce a copyright, then this is the distribution of a TPM work and it should be treated uniformly as such in the law. The technologically-neutral intent of Sections 188 and 188A, in my understanding, is to define a copyright exception for clubs and other private organisations who may wish to form an audience for copyright works which are transmitted by broadcasts to a large collection of people, for example to the people who live in a geographical area defined by the visibility of a satellite. Section 188 apparently allows a time-shift and perhaps a format-shift of the copyright work. I think it should be redrafted into technology-neutral form as a club-viewing exception for communication works, that Section 188A be omitted, and that Section 188 clearly permit both format and time shifts in language similar to that used in Section 81A (if it is revised as per my suggestion above).

(20) Section 226. As drafted, this section offers some appropriate legal support to copyright holders, but it would criminalise many acts which I believe should instead be encouraged in a technologically-literate society. A thorough redrafting is necessary, to convey an intent of giving legal support to the operation of TPMs when these are used to enforce copyright, while declining to give legal support (in the form of criminal prosecutions) to TPMs when these are used to prevent or deter permitted acts.

(21) Sections 226D and 226E. The exception of this section should be broadened to make it clear that the copyright holder is not entitled to any additional payment, nor to impose any other unreasonable impediment, to any permitted act. Please see my comments on Sections 80C and Section 111 above: exceptions to copyright can easily become vacuous if the copyright holder is allowed to write arbitrary licences. If exceptions are appropriately defined in law, then TPMs should be acceptable to the copyright holder if affordable TPMs don’t allow very many unpermitted acts; and TPMs should be acceptable to the public if affordable TPMs don’t inhibit very many permitted acts. Section 226E is, I think, heading in the right direction, if it is understood as setting up something like a consumer-rights-enforcement process that would push the economic envelope in favour of more permissive TPMs. As drafted, however, it will present a considerable impediment to the exercise of permitted acts, and therefore will contradict
what I would hope is the intent of Section 226D(1). It is unreasonable to expect New Zealand educationists, archivists, and librarians to serve the function of “security guards” for the copyright holders, that is, to allow appropriate access in cases where the intended security regime is not operating properly.

(22) Section 226D(3). I recommend a fourth class of “qualified persons” be added to Section 226D(3), empowering “any person licensed by the New Zealand Government to assist users in permitted acts”. I believe that future TPMs, once such a licensing system is in place, would be rather generous in allowing permitted but questionable acts, and rather careful about preserving records that could be audited by the security guard. Copyright owners could, of course, hire their own security guards whether or not my suggested changes are made in Section 226D(3). However I believe this section should be redrafted so that New Zealanders are empowered to hire an independent, licensed, professional if they require assistance in performing a permitted act.

(23) Section 226E(b). I recommend that a third option be provided to the user, so that New Zealanders may take any reasonable step, including self-help, analysis, and repair or redesign of the TPM work, if they are unable to perform a permitted act and the TPM owner has refused to provide assistance. A copyright offense should occur only if a New Zealander engages in acts that are restricted under copyright, or if they engage in acts with the intent of destroying evidence of their prior acts with the TPM work. It is my understanding that such evidence may be retained in a properly operating TPM work, that such evidence can be made tamper-evident (so that a maliciously-destroyed TPM would be prima facie evidence of tampering if the TPM is appropriately designed to enable restriction-overrides with an audit record). I believe the complete, unanonymized audit record from a TPM should be disclosed to copyright holders under the provisions of the Privacy Act, that is, only if sufficient notice of the collection of personal information and its purpose had been given at the time the TPM work was licensed or sold to the user. Some reference to the Privacy Act should be included in this legislation to make it clear that the protection afforded to TPM works does not override the protection afforded to New Zealanders under other legislation, including the Privacy Act.

(24) Section 153 should be amended to give the Tribunal the discretion to award penalty damages in cases where a copyright owner has engaged in bait-and-switch or other deceptive marketing practice.

Conclusion

(25) If passed into law, this bill would clarify the restrictions of copyright, but it would not clarify many of the acts that I believe should be permitted. It should be redrafted to express, in a technology-neutral way, both the restrictions and the permissions of traditional New Zealand copyright.

Digitally signed by Clark Thomborson
DN: cn=Clark Thomborson, c=NZ, o=U of Auckland, ou=Computer Science, email=cthombor@cs.auckland.ac.nz
Reason: I am the author of this document
Date: 2007.01.22 18:36:10 +13'00'