

The New Copyright Legislation—an Analysis

Andrew Brown

Partner, Russell McVeagh McKenzie Bartleet & Co

In 1992 the Canadian writer and lawyer Lesley Ellen Harris commenced her book on Canadian copyright law with the following observation:

One of the basic problems in understanding copyright is that we cannot see it. Perhaps that is why people who would not dare steal a towel from a hotel room would, without a second thought, photocopy a book or reproduce a computer program.

This statement is a revealing one. The lack of understanding of copyright and the importance of copyright extends through many levels of society. It is also reflected amongst legislators. In the so-called information age and at a time when the Government is promoting New Zealand as a high value technology-based economy, we could possibly expect more understanding of copyright from our legislators and an enthusiasm for it. After all copyright underpins and supports so many important economic activities. Yet the Government appears to be something of a reluctant legislator in this field. During the course of the second reading of the copyright legislation the Minister of Justice the Hon Doug Graham stated:¹

Copyright is a troublesome subject. It excites intense passions among those whose interests are affected by it. Those include owners and users, as well as whether they be owner or user, or alternatively owners of different classes of copyright works who have conflicting interests. On occasions, and this is one such occasion, the legislature is obliged by external considerations to revisit the law. The external consideration in this case is the trade-related aspects of intellectual property (TRIPS) agreement, which forms part of GATT. The experience of revisiting the law, it seems from international experience, is not so enriching for those taking part in the legislative process as to encourage its repetition at more regular intervals.

The contrast between Australia and New Zealand in support for copyright as a vital economic right is quite marked. In Australia their Attorney General's department has a dedicated section of officials who closely monitor international and domestic copyright developments. Australia has been active in introducing regular amendments to its copyright legislation as needs have arisen or technology has changed.

The point in raising these issues is a plea for a more consistent support of copyright by governments in New Zealand—rather than the benign neglect which has occurred in this country. Strong rumours in Wellington suggest that with the break up of the Justice Department copyright will be transferring to the Ministry of Commerce. Given that the Ministry of Commerce already handles the other intellectual property statute based

¹ Parliamentary Debates 29 November 1994.

rights,² there would seem to be some sense in such a transfer of responsibility for copyright. It would also seem from the Ministry of Commerce's performance on the other statutory based rights that it is likely to be more enthusiastic for the subject.

The Copyright Act 1994 has its origins in the GATT TRIPS agreement. The TRIPS agreement required New Zealand to adhere to the 1971 Revision of the Berne Convention. Up until 1994 New Zealand had only adhered to the 1928 Revision despite subsequent revisions in 1948, 1967 and 1971. In order to comply with the 1971 Revision New Zealand was obliged to provide certain additional protections. In addition TRIPS required express protection for computer programs, compilations of data, certain rental rights, performers rights and border enforcement provisions. Faced with a need to meet the TRIPS requirements the Government had to decide whether to simply engraft these provisions on to the 1962 Act or to start again with a new statute. Public expectation of a new statute had been raised by the Justice Department in 1986 when submissions from interested parties had been sought and provided. But nothing had been done to action these submissions. Faced with this situation and a Copyright Act which had not been overhauled since 1962, the Government really had no choice. It decided on a new statute.

This decision (while very welcome) created some timing difficulties. The Government's desire to pass all GATT legislation by 1 January 1995 meant that there was no time for any real public consultation before the legislation was introduced. This was in marked contrast to the 1962 statute where there had been a special report by the Dalglish Committee in 1959 which had identified options and directions and a number of policy issues. The Dalglish report has been of considerable use to courts and lawyers in the past in assisting in the interpretation of some provisions in the 1962 Act. Unfortunately in the case of the 1994 statute there is no such report or even any Explanatory Memorandum (as is the case with new legislation in Australia). The timing also meant that there was very little time for public submissions. The bill was open for submissions for just six or so weeks.

The new statute is based on the English Copyright Designs and Patents Act 1988. It uses simpler more straightforward drafting and plain English language. Many of the changes are cosmetic rather than substantive. However, there are a number of significant changes. The programme for this seminar provides for others to deal with broadcasting, television and publishing. Also his Honour Justice Gault will be saying something on the transition provisions and a number of other important aspects of the Act. For my part I propose to deal with the main changes under five broad headings:

- I. Copyright works;
- II. Infringing acts and remedies;
- III. Border enforcement;
- IV. Moral rights;
- V. Performers' rights.

2 That is, trade marks, patents, registered designs and now geographical indications.

I COPYRIGHT WORKS

(1) Works

Under the new Act all the different types of subject matter in which copyright subsists are now called “works”.³ This replaces the previous distinction between Part I works (literary, dramatic, musical and artistic works) and Part II subject matter (sound recordings, films, broadcasts and typographical arrangements). A brand new category of works namely *cable programmes* has been added to the list.

Although (with the exception of cable programmes) the general categories of copyright works remain the same, the 1994 statute has introduced *new definitions* into the various categories of works. These new definitions are designed to accommodate the very substantial technology advances which have occurred since 1962.

(a) Computer programs and computer-generated works

One of the requirements of the TRIPS agreement was that specific protection be given to computer programs as literary works. This has now been done. As a matter of deliberate policy, there is no definition of computer program. It was thought that any definition would run the risk of being made out of date in the future.⁴

A literary work must be “written”. That term is also redefined⁵ to include:

... any form of notation or code, whether by hand or otherwise and regardless of the method by which, or medium in or on which, it is recorded;

The width of this definition will catch both object and source code as literary works.

While dealing with computers it is to be noted that a literary, dramatic, musical or artistic work which is *computer-generated* can attract copyright provided it meets the definition of one of those types of work. “Computer-generated” means that the work is generated by computer in circumstances such that there is no human author of the work.⁶ Computer-generated works are now relatively common. Weather maps and plans are just some examples. The inclusion of computer-generated works was something recommended by the Industrial Property Advisory Committee as long ago

3 Section 14.

4 Australia and the United States have statutory definitions whereas the United Kingdom and Hong Kong do not.

5 Section 2.

6 Section 2.

as 1984 and 1986.⁷ The author is defined (as with sound recordings and films) as the person by whom the arrangements necessary for the creation of the work are undertaken.⁸

(b) **Photographs**

The changes in photographic technology since 1962 have been very substantial.⁹ Photographs can now be recorded or stored in digital form by scanning an existing photograph or by using a photo-optic device to record an image digitally when a photograph is taken. The 1962 definition had a degree of foresight in covering “any product of photography or any process akin to photography” but raised interesting questions as to whether the photograph printed by an output scanner was a process “akin to photographic reproduction”. The new very wide definition will remove most doubts. Photograph now means:¹⁰

A recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced....

(c) **Multimedia works and databases**

One of the difficult issues facing the Justice Department was whether to create a special category of works for multimedia works—ie works which combine portions of text, sound, still photographs, film, and graphics which are played on a computer or television screens. These are all different types of copyright work (ie sound recordings, films, artistic works and literary works) so do not neatly fall within the definition of any one type of work. While each of the *underlying works* will have its own copyright, the multimedia work is a combination of all of these. Multimedia works can be constructed in a number of ways.

- by combining existing works
- by creating and compiling new works
- by combining newly created and existing works.

The solution adopted by the 1994 Act is to provide protection by means of an *inclusive* definition of “compilation” that covers different types of work in combination.¹¹

7 IPAC 10 December 1984 para 7.6–7; 18 March 1986 para 6.6.

8 Section 5

9 Brown & Grant, *The Law of Intellectual Property in New Zealand* para 4.22.

10 Section 2.

11 Section 2.

“Compilation” includes:

- (a) a compilation consisting wholly of works or parts of works; and
- (b) a compilation consisting partly of works or parts of works; and
- (c) a compilation of data other than works or parts of works;

The wide and inclusive definition of “compilation” is also intended to provide protection for databases.¹²

(d) **Dramatic works**

The definition of “dramatic works” has been widened to include choreographic works however they are recorded. Previously the definition contained a requirement that such works be reduced to writing before protection arose.¹³

(2) **Ownership**

One of the areas of the new Act which attracted the most lobbying was the issue of ownership. The main changes through ownership are:

- (a) the removal of the employee journalist exception. Under the 1962 Act the employer had:
 - Copyright in the work insofar as the copyright related to publication of the work in any newspaper magazine or similar periodical.
 - The right to reproduce the work for the purposes of its being published.
 - The right to broadcast the work.
 - Now the employer owns copyright outright¹⁴ as has been the case for all other types of work made during the course of an author’s employment.
- (b) The commissioning provisions have been widened to include computer programs.¹⁵ This overcomes a troublesome area in practice. In the past businesses commissioning software programs had a general expectation that they would own copyright in the software program—particularly where this had been custom designed for their business. Such businesses were often surprised and disadvantaged to discover that this was not the case. The law change now matches public expectation.

12 The European Community is presently considering separate sui generis legislation for databases.

13 Section 2 of the Copyright Act 1962.

14 Section 21(2).

15 Section 21(3).

- (c) Section 105 also creates certain rights of privacy where photographs (for example, wedding photographs) or a film is commissioned for private and domestic purposes but the commissioning party does not own copyright. An example would be where a bridal photographic studio by contract stipulates that it and not the commissioning party is to own copyright.¹⁶ In such circumstances the commissioning party has a right not to have copies of the work issued to the public, exhibited or shown in public or broadcast or included in a cable programme.¹⁷

(3) Term

Some small but significant changes have been made to the term of copyright:

- **Films**

Under the 1962 Act copyright was for 50 years from the end of the year during which the making of the film was completed.¹⁸ As required by TRIPS¹⁹ the 50 year period now dates in the year the film is made or is made available to the public whichever is the later.²⁰

- **Computer-generated works**

The term of such works is 50 years from the end of the calendar year in which the work is made.²¹

- **Photographs**

Previously the term was for 50 years from the end of the calendar year in which the original photograph was taken.²² It has now been decided to treat photographs the same as other artistic works so that copyright subsists for the life of the maker plus 50 years.²³

- **Works of artistic craftsmanship**

The Berne Convention requires that works of applied art receive protection for at least 25 years. Under the 1994 Act (as in 1962) the term “works of artistic craftsmanship” is used for this category. The category has been reasonably infrequently relied on being generally regarded as covering the artistic contributions of knick-knacks,

16 By virtue of section 21(4) an express contract overrides the commissioning provision in section 21(3).
17 This seems designed to overcome the sort of fact situation encountered in *Mail Newspapers Plc v Express Newspapers Plc* [1987] FSR 96.

18 Section 14(3) of the Copyright Act 1962.

19 Clause 23.

20 Section 23(1) 1994 Act.

21 Section 22(2) 1994 Act.

22 Section 14(3) 1962 Act.

23 Section 22(1) 1994 Act.

jewellery, gold and silverware, furniture, wallpaper and clothing.²⁴ The 1985 amendments to the 1962 Act had the effect of reducing the period of copyright protection for artistic works industrially applied to 16 years from first industrial application. It appears that this change did not comply with the Berne Convention in that it did not provide the 25 year period for those works which could be termed works of artistic craftsmanship. Section 75 of the new Act therefore confers 25 years protection on such works.

- **Crown copyright**

This is now extended from 50 years to 100 years from the end of the calendar year in which the work was made.²⁵

II INFRINGING ACTS AND REMEDIES

(1) Restricted acts

Copyright has always been based around a series of specified restricted acts. This format is continued in the new statute,²⁶ although the individual restricted acts have in some cases been amended.

(a) Copying a work

The primary restricted act is the *copying of a work*.²⁷ This is in turn defined²⁸ as “reproducing or recording the work in material form”. This largely repeats the old law. However there is more to the definition. Copying now:

Includes in relation to a literary, dramatic musical or artistic work *storing the work in any medium by any means*.

This means that the *use* of a computer program which involves storing the work on a hard disk or even in a transient form will be caught. This meets previous uncertainties in the old statute.²⁹

(b) Issuing copies to the public: rental rights

The previous confusing term “publishing a work” has been done away with. Under the old law the term “published” had two different meanings.³⁰ Now the restricted act is *issuing of copies to the public*. The term is further defined in s 9 to mean the act of putting into circulation copies not previously put into circulation. Once a copy *is* put into circulation in New Zealand, however, it is not an infringing act to subsequently distribute or sell it.

24 Brown & Grant, above, n 9, para 4.24.

25 Section 26(3). For typographical editions the period is 25 years.

26 Section 16.

27 Section 30.

28 Section 2.

29 Brown & Grant, above, n 9, para 4.96

30 In *Fabrics v Jaytex* [1982] AC 1; Brown & Grant, above, n 9, para 4.122.

This restricted act also introduces a new rental right covering:

- computer programs except in certain circumstances;
- sound recordings and films.

The effect of these new rental provisions is to make video rental a restricted act. The TRIPS agreement provided that rental was only required to be a restricted act where the “rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred ... on authors and their successors in title”.³¹ There was no evidence before the Justice Department of any such widespread copying of films in New Zealand because of rental, nor did film owners such as the Motion Picture Association of America actually seek this right in New Zealand. If anything video rental has expanded their market. The rental right in respect of films is not included in Australia, Canada or the US. However, the Justice Department decided to include this on the basis that future technology developments may make it easier to copy videos in future. It seems to be a case of wanting to avoid future amendments.

There is, however, a safeguard in s 234(1)(o) which allows regulations authorizing the rental to the public of copies of specified classes of computer programs, sound recording or films without the consent of the owner of the copyright in the work. This represents a fall back position so that if there is any abuse of the rental right or it is used in an anti-competitive way then exemptions can be provided by regulations.

(c) **Adaptation: computer programs**

As before the making of an adaptation is a restricted act in relation to literary, dramatic and musical works only. The term “adaptation” now specifically provides in relation to computer programs:

In relation to a literary work that is a computer program includes a version of the program in which it is converted into or out of a computer language or code or into a different computer language or code otherwise than incidentally in the course of running the program.

This means that it will usually constitute infringement to adapt a program designed for one type of computer for use on another. Potentially this could cover some of the “look and feel” cases of computer software infringement.

(d) Transmitting copies by telecommunications

Section 37(2) makes it a secondary infringement to transmit a work (ie any type of work including a computer program) by means of telecommunications system knowing or having reason to believe that infringing copies of the work will be made by means of reception of the transmission in New Zealand *or elsewhere*. This means that the transmission of any work by computer, through a modem or tied line or by fax will be covered provided the requisite knowledge can be proved.

(e) Providing means for making infringing copies

Section 37(1) is a new provision (again drawn from the United Kingdom) which makes it an infringement to make, import, process, sell, hire or offer for sale or hire an object which is specifically designed or adapted to making copies of a work. It is a requirement that the infringer must know or have reason to believe that the object is to be used to make infringing copies. Examples of such articles would be infringing plates or master tapes.

(f) Parallel imports

In 1994 an interdepartmental subcommittee considered the ban on parallel imports contained in the 1962 Act and commissioned a study from New Zealand Institute of Economic Research. The study apparently found no conclusive evidence that the ban led to across-the-board higher prices or anti-competitive behaviour. The Ministry of Foreign Affairs and Trade was also concerned that removal of the ban could seriously change New Zealand's trade relations with the United States. The decision was therefore to retain the ban.

The ban is now contained in ss 35 and 12. Section 35 provides that:

Copyright in a work is infringed by a person who other than pursuant to a copyright licence, imports into New Zealand otherwise than for that person's private and domestic use, an object that is and that the person knows or has reason to believe is an infringing copy of the work.

Section 12(3) relevantly defines infringing copy as:

An object that a person imports or proposes to import into New Zealand is an infringing copy.

- (a) If, had that person made the object in New Zealand, that person would have infringed the copyright in the work in question;...

Section 12(3)(a) clearly covers the parallel imports and if anything strengthens the ban against parallel imports.

Previously the wording of s 10(2) of the 1962 Act was not as clear and used the phrase “if ... the making of [the imported] article would have constituted such an infringement if the article had been made in the place into which it is so imported”. In the leading case of *Barson Computers NZ Ltd v John Gilbert & Co Ltd*³² Prichard J held that the identity of the maker was irrelevant. The question was simply whether anybody could legitimately manufacture the imported article without the consent of the person owning, by virtue of copyright, the sole manufacturing rights in New Zealand. This interpretation in fact accorded with the Australian statute and Australian authorities which expressly refer to the maker as being the importer.

The new provision moves further towards the Australian approach and makes it clear that a parallel import is an infringing copy if, had the importer made the object in New Zealand, that person would have infringed the copyright in the work in question.

The only slight drafting oddity in relation to parallel imports is that s 35 changes the words “without the licence of the owner of the copyright” to “*other than pursuant to a copyright licence*”. The new Act also defines “*copyright licence*” in s 2 as meaning “a licence to do or authorize the doing of any restricted act”. Neither importing or selling falls within the definition of “restricted act”. Rather these amounts to acts of secondary infringement. Technically this means that even if a exclusive distributor has been given exclusive rights to import and sell then that distributor is nonetheless still engaged in parallel importing. This is obviously a nonsense. This is unlikely to cause much problem in practice because the copyright owner in most cases is unlikely to want to sue its authorized distributor. However, this will need some legislative tidying up—perhaps by a return to the phrase “without the licence of the owner of the copyright”.

(g) **Possessing or dealing with an infringing copy**

The other secondary acts of infringement have always been selling, hiring or offering for sale etc. These are now contained in s 36 and have been slightly altered by the addition of the words “in the course of a business”. This is unlikely to unduly effect the operation of the provisions.

(2) **Remedies**

Most of the provisions of the 1962 statute as to remedies have been retained albeit in more straightforward wording. One exception is conversion

damages which are no longer available. The provisions governing *additional damages* have been slightly modified. Under the 1962 Act in order to obtain additional damages it was necessary to show:

- flagrancy;
- benefit accruing to the defendant; and
- that the court was satisfied that effective relief would not otherwise be available to the plaintiff (eg through normal damages).

This last requirement is now removed—although the court is still enjoined to have regard to “all the circumstances” whatever those may relevantly be.

The ability to order delivery up is retained in the new Act but with some statutory modifications.³³ Where an order for delivery up is made then the person holding the infringing copy or object must hold it pending the making of orders under s 134. Section 134 gives to the court power (on application) to:

- forfeit the infringing copy to the copyright owner;
- order that the infringing copy or copies be destroyed or otherwise dealt with as the court thinks fit.

In deciding what order (if any) to make the court is to have regard to whether remedies for infringement would be adequate to compensate the copyright owner and the need to ensure that no infringing copies find their way into the market in a way which might adversely affect the copyright owner. A procedure is also laid down for service of the application on persons having an interest in the infringing copy or object.

A brand new provision for New Zealand is s 130 which provides a remedy for unjustified proceedings. Where a persons brings proceedings alleging an infringement of copyright a court may on the application of any person against whom the proceedings are brought:

- (a) make a declaration that the bringing of proceedings was unjustified;
- (b) make an order for the payment of damages for any loss suffered by the person against whom the proceedings are brought.

No relief shall be granted if the plaintiff proves that the acts in respect of which the proceedings were brought constitute or would have constituted (if they had been done) an infringement of the copyright concerned. No doubt to the relief of all solicitors and barristers, the Act makes it clear that no liability can attach to acts done in his or her professional capacity on behalf of the client. It is important to note that the right applies only where proceedings are brought not were these are merely threatened.

Finally reference is made to several new presumptions. If proceedings are

brought in relation to computer programs and copies of the program as issued to the public contain in electronic form a statement of the name of the copyright owner or the country or year the program was first issued to the public, that statement is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved. A similar presumption has been introduced for films.

III BORDER ENFORCEMENT

The third broad area for consideration concerns border protection for copyright works.

The 1962 Act contained limited border protection provisions by virtue of s 29 and the Copyright (Customs) Regulations 1963. These enabled the copyright owner of any published literary, dramatic, musical³⁴ or artistic work to file a notice with Customs requesting them to treat any *printed copy* as a prohibited import. Both counterfeit and parallel imports were covered but the term “printed copy” introduced real restrictions. This term was narrowly interpreted by Customs—even though the term “print” had received a wider interpretation in another part of the Copyright Act in the *Wham-O* case.³⁵ The narrow interpretation of printed copy by Customs led to considerable ingenuity by copyright owners in the use of copyright in labels and manuals to inhibit importation particularly parallel imports.

Under the 1962 Act the role of Customs was front line and interventionist. If an imported printed copy was covered by the notice, then Customs could seize the copy as a prohibited import.

All this has been swept away in favour of a new regime. The GATT TRIPS agreement required³⁶ all GATT countries to implement border protection provisions for counterfeit trade mark or pirated copyright goods. (The obligations did not extend to parallel imports).

The border protection provisions required by TRIPS are now contained in Part VII of the 1994 Act and in new regulations, the Copyright (Border Protection) Regulations 1994. No longer is the border protection regime limited to printed copies of certain works. Instead the provisions are open to any owner of copyright in a literary, dramatic, musical, artistic work, typographical arrangement, sound recording or film.

In brief, there are two parts to the new regime:

(a) Pirated copyright goods

A copyright owner (or its agent) who fears the importation of pirated copies may file a notice with Customs in the form provided in the regulations. This notice identifies the work, the status of the author, first publication and contains a request to Customs to detain any pirated copy that is in or at any time comes into the control

34 The list included published editions of these three categories: s 29(1).

35 [1984] 1 NZLR 641 CA.

36 Section 4 of the TRIPS agreement: articles 51–60.

of Customs. The copyright owner must also provide a bond of \$5,000 to be held in a Customs trust account. (The sum may be set at a lower or higher figure where necessary.) In addition the copyright owner must complete a security document in which it agrees to the deduction of examination or other costs from the security and to indemnify Customs against any administrative or legal costs in acting on the notice. The period of the notice is no longer than five years or the period of copyright (that will expire before the five years).³⁷

Customs have stepped back from any enforcement of the notice in the form of permanent seizure and confiscation of any goods covered by the Notice. Customs will detain for ten working days goods which they consider may have infringed the copyright covered by the Notice. (On application supported by reasons this detention period can be extended by another ten working days.) During this ten working day period it is up to the copyright owner (or exclusive licensee) to take action against the goods and the importer through the courts. If notice of proceeding is not served on Customs within the ten working day detention period, then the goods will be released to the importer.

(b) **Parallel imports**

In the original 1994 Copyright Bill there was no border enforcement provision for parallel imports. However, late in the legislative process a provision was introduced as a result of lobbying. This is s 144 which comes into force on 1 April 1995.³⁸ Where parallel imports are suspected then notice can be given by the copyright owner requesting Customs to inform the copyright owner if they become aware of the intended import of any parallel import or if any parallel import comes into their control. This appears designed to operate as an early warning system but no more. There is no right of detention given to Customs and the onus is on the notice holder to take its own action through the courts. As before, the notice remains in force for five years (or the copyright period) unless it is earlier revoked by the copyright owner or by a court in the proceedings.

Customs may charge a fee for this notice. As yet no fee or any form of notice have been approved.

IV MORAL RIGHTS

The 1994 Act creates a new category of rights known as *moral rights*. The introduction of moral rights was not something required by the TRIPS agreement. Rather the thinking was that because New Zealand currently adheres to the 1928 Revision of the Berne Convention³⁹ which included moral rights, then it was proper and timely for New Zealand to provide for these.

37 Section 136(2).

38 Sections 144(5) and 1(2).

39 The effect of the 1994 Act is that (as required by TRIPS) New Zealand will be able to adhere to the 1971 Revision.

40 A Copyright Law Review Committee report of January 1988 stated (by a 5-4 majority) that it was inappropriate to introduce moral rights legislation in Australia.

Article 6 bis (1) of the Berne Convention provides for moral rights in the following terms:

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 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 honour or reputation.

The 1962 Act already had a type of moral right in s 62 which provided rights in respect of the false attribution of authorship. The 1994 Act retains and expands this right and also provides for certain new moral rights not seen before in this country.

Lest it be thought that New Zealand is some form of common law guinea pig in this regard, it should be noted that Canada has provided for moral rights in its legislation for many years. The United Kingdom introduced moral rights in its Copyright Designs and Patents Act 1988 and the New Zealand legislation heavily draws on this statute. Australia, after rejecting the proposal in 1988⁴⁰ now has announced that artists moral rights protection is a government priority.⁴¹ The United States also has legislation (the Visual Artists Rights Act 1990) which provides for moral rights for visual artists such as painters, sculptors and photographic artists.

So what are moral rights? There are various types of moral right—as many as four.⁴² However the two key moral rights and the ones which our statute enacts are:

- the *right of attribution* otherwise known as the right to be identified as author or director;
- the *right to integrity* otherwise referred to as the right to object to derogatory treatment of a work.

These *moral rights* are regarded as being distinct from the *economic rights* arising from copyright such as the right to reproduce, issue to the public and so on. One of the contentious issues relating to moral rights is whether these should be capable of waiver or assignment. Opponents of moral rights argue that if you can waive and/or assign moral rights for money then this merely turns moral rights into economic rights and defeats the whole purpose.⁴³

In New Zealand there is no provision for assignment but the moral rights can be waived⁴⁴—so the risk of moral rights becoming a type of economic right does exist.

(1) The right of attribution: the right to be identified as author or director

The author of a literary, dramatic, musical or artistic work that is a copyright

41 Ministerial statement from the Australian Ministers of Art and Justice, 26 August 1993. In June 1994 the Australian Attorney-General's department released a discussion paper on how moral rights might be implemented.

42 (1) Right of attribution;
 (2) Right to integrity;
 (3) The right to divulge or disclose the work;
 (4) The right to withdraw, repent or retract.

43 *Moral Rights in Australia*, Justice Sheppard, Copyright Reporter Vol 11 No 2, 7, 10.

44 Section 107 1994 Act.

work⁴⁵ has the right to be identified as the author.⁴⁶ Equally the director of a film has a right to be identified as director. The author of a literary work or dramatic work has a right to be identified as author whenever the work is published commercially, performed in public, broadcast or included in a cable programme or where copies of a film or sound recording including the work are issued to the public.⁴⁷ Similarly in respect of musical works or a literary work consisting of lyrics to be sung or spoken with music, the author has the right to be identified as author when ever the work is published commercially, copies of the sound recording are issued to the public, the film or soundtrack is shown in public or copies of the film are issued to the public.⁴⁸ In the case of artistic works the right arises (inter alia) wherever the work is published commercially.⁴⁹ The author of a work of architecture has the right to be identified as such on the building as constructed;⁵⁰ and a director of a film has a right to be identified as director when the film is shown in public, broadcast, included in a cable programme or when copies are issued to the public.⁵¹

The form of identification is, in short, to be clearly and reasonably prominent.⁵² An architect has the right to be identified on a building by appropriate means visible to persons entering or approaching the building.⁵³

A key aspect of this moral right is that it must be *asserted*. This obligation to assert the right to be identified can arise generally or in relation to any specific circumstance.⁵⁴ It can be done when assigning copyright in a work by including in the assignment a statement that the author or director asserts his or her right to be identified as author or director,⁵⁵ or it can be asserted at any time by an instrument in writing signed by the author or director.⁵⁶

There is a specific list of exceptions to the right to be identified.⁵⁷ This is to be contrasted with the proposed Australian approach which suggests that there can only be a moral right where it is reasonable in the circumstances. The right does not apply in relation to computer programs, computer-generated works, or designs of typeface.⁵⁸ Section 97 provides a further list of exceptions.

(2) **The right to object to derogatory treatment of a work**

This right is sometimes referred to as the right to integrity and is given to the author

45 As defined in s 14(1).

46 Section 94.

47 Section 94(2).

48 Section 94(4).

49 Section 94(6).

50 Section 94(7).

51 Section 94(8).

52 Section 95.

53 Section 95(1)(b).

54 Section 96.

55 Section 96(2)(a).

56 Section 96(2)(b).

57 Section 97.

58 Section 97(2).

of a literary, dramatic, musical or artistic work and the director of a film.⁵⁹ It is a right not to have any addition to, deletion from, alteration to or adaptation of the work where this is prejudicial to the honour or reputation of the author or director.⁶⁰ A Canadian example⁶¹ concerns a sculpture of geese in a shopping centre in Canada. One Christmas the owner of the centre adorned the necks of the geese with ribbons. An injunction was granted to prevent this from being done.

Again there are a number of widely worded exceptions.⁶² It does not apply to a computer program, any computer-generated work.⁶³ Nor does it apply to any work made for the purposes of reporting current events.⁶⁴

(3) **The right of false attribution**

This right has been extended and includes a right not to have a literary, dramatic, musical or artistic work falsely attributed to a person as author or, in the case of an artistic work,⁶⁵ the right not to have the work falsely represented as the unaltered work of the author if the work has been altered after the artist parted with possession.⁶⁶

Duration of rights and actionability

The right to be identified and the right to object to derogatory treatment of a work last until the copyright in the work expires.⁶⁷ The right to object to false attribution expires 20 years from the end of the calendar year in which the person entitled to the right dies.⁶⁸

A key question in all this is what is the effect of a breach of moral rights? This is provided for in s 125. A right of action accrues to the person entitled to the moral right. In proceedings for infringement of a moral right relief by way of damages and injunction is available to the plaintiff.⁶⁹ Where there is a breach of the right to object to derogatory treatment the court may, if it thinks it is an adequate remedy in the circumstances, grant an injunction on terms prohibiting the doing of any act unless a disclaimer is made in such terms and in such manner as may be approved by the court, dissociating the author or director from the treatment of the work.⁷⁰

Moral rights for performers?

The new Copyright Act confines moral rights to visual artists. Performers are excluded. Yet it can be convincingly argued that a performer who provides a memorable or role-defining performance in a play or in a television programme should have a moral right

59 Section 98(2).

60 Other than a translation of a literary or dramatic work; or an arrangement or transcription of a musical work involving no more than a change of key or register: s 98(1).

61 Cited by Sheppard, above, n 43, p8.

62 Sections 100 and 101.

63 Section 100(1).

64 Section 100(4).

65 Section 102(2).

66 Section 104(1).

67 Section 106(1).

68 Section 106(2).

69 Section 125(2).

70 Section 125(3).

to prevent a derogatory treatment of that performance.⁷¹ Such derogatory treatment can include the overdubbing of another's voice, out-takes being used out of context, the lifting of a performance for use in another work or doubles being used without the artist's consent.

V PERFORMERS' RIGHTS

Until now the New Zealand copyright legislation offered no protection for performers. If a "bootleg" or unauthorized recording of a singer or performer was made there was little of anything that the singer or performer could do to prevent this being commercialized in New Zealand. There were possible remedies under the Fair Trading Act 1986 if the bootleg recording was promoted as an authorized performance⁷² but if the recording was unashamedly promoted as a bootleg recording then few options were available.

It is beyond the scope of this paper to describe performers' rights in detail. It is sufficient to say that rights are now given to performers such as singers, actors and variety artists in the case of live performances in New Zealand or in other Convention countries or where the live performance is given by a person who is a citizen, domiciled or resident in New Zealand or in a Convention country. The rights are given not just to the performing artist but also to record companies with artists under exclusive recording contracts.

It is now a breach of the performer's right to make a recording of the whole or any substantial part of a performance or to broadcast this live or to include it in the cable programme. So if the New Zealand opera star Kiri Te Kanawa (as a New Zealand citizen) in the course of one of her periodic visits to New Zealand gave a concert in Auckland, it would be infringement of her rights for anyone such as the promoter to make a recording of her concert for commercial purposes without her consent.⁷³ Such a recording is known as an illicit recording.⁷⁴ It would also infringe Kiri Te Kanawa's rights if anyone showed in public or played in public or broadcast the illicit recording if that person had reason to believe it was an illicit recording.⁷⁵

Kiri Te Kanawa could also pursue anyone who copied (with knowledge) an illicit recording for a commercial purpose.⁷⁶ If the illicit recording was made in (for example) the United Kingdom then Kiri Te Kanawa would also have rights against any person who (amongst other things) imported, sold or offered for sale the illicit recording with knowledge.⁷⁷

The remedies vest not only in the performer but also in any company having an exclusive recording right to her performance.⁷⁸ Where infringement is shown the court has the power to grant Kiri Te Kanawa injunctive relief, damages or even additional damages.⁷⁹

71 *Moral Rights for Performers*, Steer, Copyright Reporter, July 1994, Vol 12 No.1 19,21.

72 Sections 9 and 13(3) of the Fair Trading Act 1986.

73 Section 171.

74 Section 169.

75 Section 172.

76 Section 173.

77 Section 174.

78 Sections 169 and 196(2).

79 Section 196(3) and (4).

Delivery up can also be granted.⁸⁰ The performers' rights exist for 50 years from the end of the calendar year in which the performance takes place.⁸¹ Performers' rights are not assignable but can be transmitted on death by testamentary disposition.⁸²

The statute also provides criminal penalties for making, dealing with, using or copying illicit recordings where the person knows it is an illicit recording⁸³ such penalties include fines of a maximum of \$5000 for every illicit recording up to a maximum of \$50,000 for the same transaction or to imprisonment for a maximum of three months.⁸⁴ Delivery up can be ordered⁸⁵ as well as reparation in appropriate cases.⁸⁶

There are exceptions covering fair dealing for the purposes of criticism or review and news reporting, applying or showing sound recordings in educational establishments and the recording of Parliamentary or judicial proceedings.

80 Section 197.

81 Section 193.

82 Section 194.

83 Section 198.

84 Section 198.

85 Sections 199 and 202.

86 Section 198(5).