

INDUSTRIAL PROPERTY ADVISORY COMMITTEE

THE LEGAL PROTECTION
IN NEW ZEALAND FOR
COMPUTER PROGRAMS

Report to The Minister of Justice

18 March 1986

	T.M. Gault Q.C.	Chairman
	K.S. Dalefield	Member
	W.M. Gallagher	"
	W.L. Gillanders	"
	J.A. Liversage	"
Prof	H. McCallion	"
	C.W. Wadham	"

THE LEGAL PROTECTION IN NEW ZEALAND
FOR COMPUTER PROGRAMS

SUMMARY

This report follows one made on 10 December 1984 in which further submissions were sought on a number of points which the Committee considered to be important.

The Committee recognises that there is continuing development of the law in this area on an international basis where consensus is desirable to provide reciprocity between nations.

Consistent with the current international attitude the Committee concludes that the copyright law should be amended to confirm protection for computer programs, and an adoption of the form of amendment made to the United Kingdom Copyright Act 1956 is seen as a simple manner of effecting this.

Additional recommendations include the extension of the Copyright Act 1962, (1) to embrace computer programs within existing provisions which relate to the ownership of copyright in works which have been commissioned for payment; (2) to provide a right for authorised users of computer programs to make a back-up copy without committing infringement, similar to some of the provisions contained in the Australian Copyright Amendment Act, 1984; (3) to amend appropriately the definition of "plate" to embrace the rights of copyright owners in respect of infringing copies; (4) to reiterate for computer programs the existing provisions for other works in section 10 in regard to knowledge of potential infringement; and (5) to exclude from infringement by an author of a repetition of his style as now contained in subsection 9 of section 20.

The proposals are prefaced by a recommendation that they be implemented as a matter of urgency.

INTRODUCTION:

- 1.1 This study and associated recommendations follow a report on the same subject made to the Minister of Justice on 10 December, 1984.
- 1.2 We were assisted in the preparation of the first report by six submissions from interested persons and organisations but the Committee felt that there remained a body of unexpressed opinion which should be solicited. We therefore provided a preliminary report which traversed (1) solutions proposed, or protective legislation adopted, overseas, (2) some of the legislative options which seemed to us to be available in New Zealand, and (3) some preliminary views on the type of protection needed here together with comment on what we saw as some of the fundamental aspects of necessary legislation and supporting interpretive definitions. That report elicited a further fifteen submissions containing new or amplified matter. A list of all the persons or organisations providing submissions is attached as Appendix A.

REVIEW OF ADDITIONAL SUBMISSIONS RECEIVED

- 2.1 Our first report summarised the submissions received prior to that time and we now deal with the responses to the various topics which we raised in that report and the new matters which have been contributed. While the conclusions we have reached reflect our view of the appropriate means for protecting computer programs at present, we are aware that both the technological and legal approach to it are developing internationally. For this reason the appropriate means and procedures for protection will need to be kept under review.
- 2.2 As we have stated in other reports it is not possible to express in a succinct summary the same emphasis as that which occurs in the substantial helpful and additional material which we have received. While this report does not review all of the submissions received in any detail, they have been duly considered and have been found of considerable assistance in a difficult and technical area.
- 2.3 A set of papers has been provided to the Committee by Dr Fountain of the Department of Economics at the University of Canterbury. These result from a project set for the 1985 Stage II Economic students requiring a

critical economic analysis of the proposals as outlined in this Committee's preliminary report. It is in the patent area that the issue of social cost of a system of exclusive protection presents itself for analysis in the clearest way. Protection in the nature of copyright raises somewhat different considerations because it does not construct a market monopoly in the same way. The rights under copyright simply preclude copying and do not preclude independent work even though the result might be identical. The Committee is of the view that any assessment of a system of law as a whole should be undertaken in the course of a comprehensive review not only of the law of copyright as is being pursued by the Department of Justice at present but also of the laws of patents, designs and other fields where the product of intellectual creativity is recognised.

THE NATURE OF NECESSARY PROTECTION

- 3.1 While some submissions take the view that the Copyright Act 1962 already provides protection against unauthorised use of computer programs, there is a ready acceptance that it should be put beyond doubt by some legislative action. The view is also expressed in submissions that while protection is necessary in a form acceptable to the international community, which might ultimately dictate legislation directed solely to computer program and data storage rights, the short term and speedy solution lies in the provision of protection within our copyright legislation.
- 3.2 The submissions generally agree that such protection should in the meantime be linked to the 'literary works' category in the Copyright Act 1962.
- 3.3 In giving consideration to the means by which early confirmation of program protection could be achieved the Committee examined the suitability of existing copyright and patent legislation. In concluding that copyright was the appropriate vehicle we also expressed the opinion that confusion could be avoided by excluding the protection for programs, (as distinct from any new method of manufacture to fix them in some material form, or any new apparatus which they control), from patent law. Some have accepted that view, but others, while agreeing that there would be difficulty in applying the existing concepts of patent law to computer programs, have opposed prohibition of the use of the Patents Act since it is asserted that some circumstances may warrant such an approach.

- 3.4 The Institute of Patent Attorneys, while accepting that copyright should be the primary vehicle for protecting software, expresses a strong objection to the exclusion of computer programs from patent protection. While we are not satisfied that the objection is valid it will be seen from what follows that we are not making recommendations on this aspect. The Institute's proposal that the definition of "invention" should be recast to encompass computer operating system software is a question that should only be considered within a major review of that definition. Although we do not exclude the possibility of such a review in the future, we do not intend to indulge in such an exercise at the present time.
- 3.5 Our previous report referred to the proposals contained in a Canadian White Paper to embrace human-readable programs within the literary category of existing copyright law, but to provide different conditions of protection for machine-readable programs, (notably a 5 year term), since it is claimed that that material is not covered by international treaties. We do not consider it an appropriate approach to distinguish between the various forms of programs.
- 3.6 While we believe that in the long-run an international solution through the World Intellectual Property Organization will be necessary, in the meantime we think that an interim measure is desirable following the copyright law route. We note from a recent W.I.P.O. report that eleven major nations have indicated a preference for copyright legislation support for the protection of computer programs.
- 3.7 We have, of course, no intention of making any recommendation which would disturb the protection of software now achieved by the use of contractual provisions and by the law relating to confidentiality.

LEGISLATIVE ALTERNATIVES

- 4.1 Two submissions on this matter have been provided. the first suggests that the proposals to amend existing legislation are unavoidably cumbersome and questions whether extraction of relevant sections to a special Software Act might not be preferable. Whatever merit that proposal might have we suspect it would be offset by a need to provide comprehensive legislation which might be found within a short time to be out of step with international developments. We have referred in paragraph 5.4 of our first report to the delays which would be involved and to the reluctance which has been shown by nations with substantial experience and interests in this area to embark upon major legislation.

- 4.2 A second submission in this area offers the opinion that agreement in the international community is distant and domestic legislation is necessary. We agree with this.
- 4.3 We believe however that when W.I.P.O. has completed its draft treaty based upon international consultation there may then be a valuable basis for the preparation of comprehensive domestic law which will attract an increasing degree of international reciprocity.
- 4.4 We confirm the views expressed in our earlier report that the Copyright Act 1962 should be amended. We now have the benefit of the statutory amendments made to similar effect in the United Kingdom and Australia and we prefer (subject to some modifications) the U.K. provisions.

TERM OF PROTECTION

- 5.1 In paragraph 7.3 of our first report we posed the question of how long protection for computer programs should endure, and also whether a need exists to define the point at which a term commences. We commented that there appeared to be little support in the United Kingdom or Australia for a reduction of the term of protection for literary work when applied to computer programs. In both countries subsequent legislation has not reduced the existing term. On the other hand there have been proposals in the W.I.P.O. Model National Law for a term of from 20 to 25 years, and in Canada for a term in respect of machine-readable programs as low as 5 years.
- 5.2 Although our Copyright Act of 1962 prescribes, in respect of literary works, a minimum term of protection of 50 years from the end of the calendar year in which the author dies, New Zealand is a signatory to the Rome text of the Berne Copyright Convention which provides latitude to adherents in regard to the term. It was for this reason that New Zealand did not ratify the subsequent Brussels revision which eliminates that option. Paragraph 47 of the Report of the Copyright Committee of 1959 states: "We are of the opinion therefore that there is no barrier legal or equitable arising from present New Zealand law, or from the international obligations of New Zealand, which can have any force to prevent New Zealand from altering the general term of copyright, even although the alteration may be made by way of reduction ...".

- 5.3 However the Universal Copyright Convention, of which New Zealand became a member in 1964, places, in Article IV(2)(a), a lower limit of 25 years on the term of published works from the date of publication.
- 5.4 Varying views have been put to us in the submissions received but a majority seem to think that the term normally applicable to literary works should apply. One of the reasons advanced is that the longer term will protect the original portion of the program which has been included in an updated version. Another states that while 20 years may be sufficient, the printing of such a program will automatically throw it into the literary category term, and it would seem inconsistent to have different periods for different classes of literary work.
- 5.5 There is criticism of proposals, such as the Canadian proposition, to provide different and shorter terms for machine-readable programs as opposed to human-readable programs. It is urged that we should make our term compatible with international obligations, and that due to the capability for instantaneous conversion between these forms the distinction is not a reality.
- 5.6 One submission calls for a term which (1) has regard for encouragement for the greatest possible distribution of software, (2) is extensive enough to provide adequate return for the investment in the production, and (3) has concern for international uniformity. While a term of 30-50 years is advanced by that submission as desirable, it prefers 50 years to conform with countries which have adopted the British common law model.
- 5.7 The Committee's conclusion on this aspect is that although in the long-run there may be international acceptance of a shortened term, in the interests of securing reciprocity during this international development period of protective law, and to avoid inconsistency between the different forms in which programs may exist, the present term for literary works should apply.
- 5.8 The Committee still is of the view that there would be real practical advantages in providing means by which the date of commencement of the copyright term can be ascertained in a particular case. This however is a general question, not confined to computer programs, and is better dealt with in a general review of the law.

OWNERSHIP

- 6.1 Our call for comment on this question has attracted substantial attention.
- 6.2 The Committee considers, and the majority of submissions support the view, that ownership of copyright in a computer program should reside in the author unless the work is performed for an employer, or has been commissioned from a contractor, for money's worth, when the employer or commissioner of the work should be deemed to be the copyright owner. This will necessitate amending s.9(3) of the Copyright Act 1962 by inserting a reference to a literary work in the form of a computer program.
- 6.3 Disagreement with this view outlined in the previous paragraph has been expressed by a software developer who states that this proposition strikes at the economic viability of program generation since a software firm will lose its economic base where multiple use is possible. This is not accepted by the Committee and reference is made to the availability of contractual arrangements to vary the operation of section 9(3) and (4) of the Copyright Act 1962.
- 6.4 We see no reason to change our view that in any particular case the normal principles of copyright law should prevail.
- 6.5 Some attention has been given overseas to the ownership of computer output where there has been a contribution of data in conjunction with the use of a program but no clear conclusion appears to have been reached. For example in the Whitford Report in the United Kingdom it was asserted that the author (owner) could be none other than the person or persons who devised the instructions and originated the data used to control and condition the computer to produce the particular result. However the United Kingdom Government Green Paper argues that the author is a third person who is responsible for running the data through the programmed computer in order to create the new work.
- 6.6 We received no submissions in response to paragraphs 7.6 and 7.7 of our earlier report to compel us to express a different view in relation to ownership of any copyright in the output of computers. Accordingly we think ownership of the copyright in computer produced output can be resolved case by case by established principles and there is no need to make any recommendation other than that relating to section 9(3) of the Copyright Act 1962.

PROGRAMS FIXED IN SEMICONDUCTOR CHIPS

- 7.1 There appears to be general acceptance in the submissions we have received that programs embodied in semiconductor chips should be regarded as 'adaptations' or 'reproductions' of the source program. The Committee believes that the storage of program material in chip form is covered by the British amendment provisions with which it agrees.
- 7.2 Referring to protection for semiconductor chips and fabricating masks, we believe that the Copyright Act 1962 already provides all the protection required, particularly in the light of the additional protection which exists as a result of the repeal of the non-expert test in section 20(8) by the Copyright Amendment Act 1985.
- 7.3 We have received from the New Zealand Institute of Patent Attorneys a recommendation that New Zealand should seek a proclamation from the United States that its Semiconductor Chip Protection Act of 1984 will be extended to cover New Zealand chip mask owners. Independently of this report we have asked the Department of Justice to give consideration to the making of such an application to the U.S. Government in recognition of the provisions of our Copyright Act in relation to three-dimensional reproductions of two-dimensional works.

USE AS A RESTRICTED ACT

- 8.1 The Committee concluded from its preliminary study that the making of 'use' a restricted act was unnecessary since loading of the program would involve reproduction or adaptation which are restricted acts under the Copyright Act 1962. We responded to an early submission that a computer program copyright owner should enjoy control over use with the observation that terms of sale or licensing conditions could impose any special necessary restraints. With a few exceptions most of the submissions accepted that a right of control over use was an unnecessary addition to the Copyright Act. Included in those accepting the Committee's view are the N.Z. Computer and Office Products Industry Federation, the N.Z. Computing Services Association, the N.Z. Computing Society, and the Copyright Council of New Zealand.
- 8.2 Opposing views were expressed by the New Zealand Law Society and a prominent New Zealand software developer since 'loading', 'reproduction' and

N 532
'adaptation' would not, in their view, provide protection where business associates, prospective customers and others have access to programs where the owner has no control over the initial loading.

8.3 The Committee is concerned that some misapprehension may have arisen as a result of its earlier report. The view of the Committee has been that the use of a computer program in all cases must be preceded by loading or storage of that program in a computer. If this is correct then the owner of the copyright in the program will have sufficient control over unauthorised use of the program if loading and storage are infringing acts. If the Committee is incorrect and from a technical point of view the loading and storage of a computer program is not an essential pre-requisite to its use in a computer then the position might be otherwise. The use in our preliminary report of the word "loading" was not intended to indicate an intention that there be any statutory provision directed specifically to the loading of a program into a computer. It was intended to regard the loading of a program into the computer as inevitably involving reproduction of the program. Since the preliminary report was written the United Kingdom Amending Act has become available and the matter there has been dealt with by reference to "storage" which in the Committee's view is preferable and overcomes the problem of dealing both with loading and reproduction in this respect. In the view of the Committee the manner in which this point is dealt with in the United Kingdom provisions avoids the need for making use of a computer program a restricted act under the Copyright law so as to involve infringement.

346.9310482

REPRODUCTION AND ADAPTATION

9.1 When we wrote our first report on this topic, we had available definitions which had been adopted in the Australian Copyright Amendment Act 1984, and some dissimilar proposals which had been raised in the United Kingdom. We therefore thought it desirable to invite comment in this area and we are grateful for the submissions on reproduction and adaptation which we have received. We now have the amendments to the Copyright Act 1956 which have been adopted in the United Kingdom and these are appended to this report as Appendix B.

493386

9.2 The Committee notes that although some of the initial proposals made in the United Kingdom tried to deal in detail with the transformations of form which can occur in the use of a program, as 'adaptations' or

'reproductions', the final legislative provisions simply state that "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, is an adaptation of the program", and that "references to the reduction of any work to a material form, or to the reproduction of any work in a material form, shall include references to the storage of that work in a computer".

9.3 The United Kingdom legislation appears to deal with the question in a simple yet encompassing fashion and in the interim the Committee believes that the general form of the final United Kingdom definition should be adopted.

9.4 A recently published commentary on the statutory amendment in the United Kingdom dealing with the protection of computer programs has raised a question of whether it might be appropriate to incorporate a provision directed to computer programs corresponding to that applicable to artistic works in section 20(9) of the New Zealand Copyright Act 1962. That provision appears to the Committee to be designed essentially to ensure that an artist is not precluded from employing similar style and work methods in a subsequent work. This seems to be an area where there might be potential for a computer program writer to face similar difficulties. It is to be expected that a program writer presented with a similar problem involving similar logic would employ the same work style or approach in writing a subsequent program. To do so should not constitute infringement of the copyright in an earlier program unless he imitates, copies, or repeats substantially the earlier program as written.

9.5 Accordingly we recommend that a provision corresponding to section 20(9) of the Copyright Act 1962 be incorporated making provision for computer programs.

9.6 A further point arises in relation to matters of reproduction and adaptation insofar as they constitute infringement of copyright. This relates to relief in respect of infringing copies. A remedy of delivery up of infringing copies is important to a plaintiff to ensure against further or continuing infringement, and while we think the matter might be sufficiently covered by the existing definition of "infringing copy" in section 2 of the Copyright Act 1962, we think it may be desirable to amend the definition of "plate" to include tapes, discs, and micro chips in which computer programs or reproductions thereof are embodied. This will make it

clear that the provisions of section 25 of the Copyright Act 1962 will be available to a plaintiff in respect of infringing copies in whatever form they may appear in the case of computer programs.

PENAL PROVISIONS

10.1 It has been put to us that the damage arising from unauthorised copying of computer programs is enormous and that to reflect this the existing penalties should be increased substantially as should the maximum period of imprisonment in respect of subsequent convictions. While some submit that the provisions of the Australian Copyright Act should be adopted, others regard them as insufficient.

10.2 In paragraph 7.14 of our earlier report we noted that the Australian proposals included the acts of advertising for sale, and the transmission over a communication link, of an unauthorised copy, as offences. We observe in regard to the last matter, that to constitute an offence the amended Australian Act requires that the transmitted program must be received and recorded to create a copy.

10.3 We consider that the offences already encompassed by section 28(1), (a), (b) and (c) of the Copyright Act 1962 would be construed to cover these activities. The increase of fines should be considered against a broad background when the general review of the Copyright Act 1962 takes place.

FAIR DEALING

11.1 Some concern has been voiced about the need for special fair dealing provisions in the Copyright Act in respect of computer programs. The New Zealand Computer Society (Inc) expresses the opinion that computer programs do not lend themselves to being used and studied in the same way as other literary works, and that such programs should therefore be excluded from the embrace of sections 19(1) and 21 of the Copyright Act 1962. These sections refer respectively to general fair dealing, and exceptions for seats of learning. The readiness of commercial program owners to grant to universities and schools permission to use their programs as a way of advertising their products is also cited in support of that contention.

- 11.2 On the other hand input from the Universities of Otago and Waikato suggests that the fair dealing section (Part III) of the Copyright Act 1962 should be revised if software is to be treated as 'literary work', and particularly in regard to the implications of 'research and private study', 'reasonable proportion', and 'performance', as they affect universities and schools. The readiness of software suppliers to accept the present provisions is questioned, and the need for a 'special exemption' section in the Act is raised.
- 11.3 Another suggestion in this area states that the doctrine of fair use, developed within British common law, does not sit easily in respect of computer software. It asserts that a statutorily defined exception to the extent of copyright in regard to programs should be provided, and a suggested form is "for the purposes of academic research or for scholarly criticism, except in such circumstances as where the copy is used to gain a pecuniary advantage", the last term being defined to include, copies made to obviate purchasing further copies, or copies made for resale or further publication.
- 11.4 We recognise that the difficult question of drawing the line between public use of copyright works and the protection of authors and other creators is likely to arise in context of the general review of copyright law by the Department of Justice. We are not convinced that any special use rights are justified for computer programs that would not apply equally to sound and video tapes. The New Zealand provisions for educational use of copyright works already are more liberal than other countries.
- 11.5 Comment has been provided on circumstances where a purchaser subsequently finds that the program is an illegal copy, it being suggested that until that discovery is made the purchaser should be free from liability, but that he should then be required to surrender the copy in exchange for the value of the storage medium. It is also suggested that there should be a right of action for recovery of damages by the purchaser against the 'pirate'. We believe that the principles of law already embodied in the Copyright Act 1962 are sufficient to deal with this matter.
- 11.6 In paragraph 7.13 of our first report we commented on the desirability of permitting purchasers of programs to reproduce a 'back-up' copy to guard against accidental destruction or mutilation of the purchased copy. Such provisions have been included in the U.S. and Australian

Copyright Act amendments. Generally submissions have supported this proposal. One submission has recommended the use of the term 'authorised user' to ensure that the right extends to licensees. The New Zealand Institute of Patent Attorneys feels that such a provision is not really meaningful or important since in the majority of cases there will be permission to make 'back-up' copies and that such a legislative exemption would seem mainly to protect a 'pirate'.

11.7 Most forms of computer program fixation are highly susceptible to impairment and a single distortion in a sequence of instructions can make it unusable. The Committee believes that the making of a genuine archival or back-up copy should not involve an act of infringement and if statutory provisions to that effect are considered appropriate the provision inserted as Section 43A(1) and (2)(a) of the Australian Copyright Act of 1984 should suffice. (See Appendix C). We do not agree with subsection 2(b) of Australian section 43A, and consequently subsection 3(b).

11.8 Beyond the comments already made above we are not satisfied that there is any case in the area of fair use for treating computer programs differently from other copyright works.

RESTRAINT ON IMPORTATION OF ILLEGAL REPRODUCTIONS

12.1 Two submissions are concerned about the inadequacy of Section 29 of the Copyright Act 1962 to authorise the prohibition of importation of computer programs which, if made in New Zealand, would constitute infringement of copyright. The concern arises from the restriction of the section to 'printed copies' of 'published works'.

12.2 While the assessment by the Customs Department of the content of printed copies is readily possible from their visual appearance, the same cannot be said of programs fixed on magnetic tape or discs, or those in the form of a ROM. Due to the large variety of computer systems, the ascertainment of program content will be much more difficult than that involved for video tapes but the provisions of the Copyright (Customs) Regulations of 1963 seem to impose on the applicant for prohibition of the import, the obligation to supply such evidence as might be necessary to determine identity between the protected work and the sample import.

12.3 The Committee believes that section 29 of the Copyright Act 1962 should be clarified to embrace computer programs in whatever form they are fixed, but considers that this matter may await resolution until there is a general revision of the Act.

12.4 A point which has come to the attention of the Committee as a result of a recent commentary on the new United Kingdom provisions relates to the position of the importer of a copyright work. At present an importer infringes (secondary infringement) only if he has the specific knowledge required by S.10 of the Copyright Act 1962. However, bearing in mind the provisions of S.6 of that Act which make it an infringement (primary infringement) to authorise reproduction, and the proposal that storage of a computer program in a computer should be an infringement, it would follow that an importer might well become a primary infringer by authorising storage of a copy of the computer program simply by selling an imported copy. The result would be that an importer of a copy of a computer program would be in a disadvantageous position as opposed to the importer of a copy of any other copyright work because of the knowledge requirement. For this reason it seems appropriate to ensure consistency with the position of the importer of other works. To this end it seems desirable that there should be a provision to the effect that reproduction of a computer program by the storage or use in a computer of that program in a form imported shall not infringe the copyright in that program unless to the knowledge of the person making the reproduction or any person authorising the reproduction the making of that imported form of the program constituted infringement of copyright, or would have constituted infringement of copyright, if that form had been made in New Zealand.

GENERAL FACTORS AFFECTING OUR RECOMMENDATIONS

13.1 So long as New Zealand law provides protection for other forms of intellectual innovation there should be legislation in New Zealand which confirms that original computer programs are protected against unauthorised reproduction. Not only will this provide clear jurisdiction for our courts and allow the computer programming industry to proceed with greater confidence, but hopefully it will attract reciprocal protection in other countries for the innovative work of our nationals.

- 13.2 Inadequacies in copyright legislation in some common law countries have been highlighted by legal decisions which have necessitated urgent legislative action. It is important that some of the uncertainties expressed in those decisions should not be repeated in this country.
- 13.3 There is a burgeoning software industry in New Zealand which needs the assurance of local protection against unauthorised copying and which deserves assurances of reciprocal treatment in other countries in return for the protection available here.
- 13.4 Some members of our Committee have expressed a need to be vigilant that this country does not provide protection for the nationals of countries which do not reciprocate. However it is felt that there is a substantial existing and developing protection internationally with which New Zealand should conform and which will provide a satisfactory basis for reciprocity. Accordingly we favour reform, but with the same cautious restraint as in other countries of interest to New Zealand in framing additional provisions in this area.
- 13.5 We also made reference to the provision by W.I.P.O. of a model national set of laws for nations wishing to introduce sui generis legislation, and of its continuing efforts to draft a treaty for international reciprocal protection. Such a treaty will be of value but it is estimated that it will not be completed for some years yet. For this reason some positive progress must be made through copyright law as is the current trend internationally.
- 13.6 Although our close trading ties and agreements with Australia make it desirable that our industrial and intellectual property law should be in close accord and our aim should be to achieve maximum compatibility in this area of law, we have preferred the United Kingdom approach to the same effect.
- 13.7 Our Committee believes that there is a need for prompt legislative recognition that computer programs, in all their various forms, are protected in New Zealand against unauthorised reproduction. Present uncertainty, emphasised in submissions from the industry, leads us to recommend that this be done as a matter of urgency and not deferred to be dealt with in the context of the general review of copyright which has just begun.

- 13.8 It seems to us that it is important to avoid as far as possible future conflict on the meaning of special terms and to that end amending legislation should be kept to a minimum. We are attracted to the simplicity of the United Kingdom Copyright (Computer Software) Amendment Act of 1985 and we see advantage in being guided by the development of case law in a country which will have a higher incidence of litigation.

RECOMMENDATIONS:

- 14.1 That these recommendations should be implemented as a matter of urgency and not be deferred for treatment within the general revision of copyright law.
- 14.2 That the Copyright Act 1962 should be amended to apply in relation to a computer program as it applies in relation to a literary work and that it should be a retrospective amendment, as in the British Amending Act, since it is intended as a confirmation of existing rights.
- 14.3 That for the purpose of achieving that result the Copyright Act 1962 should provide, in relation to a computer program, that 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, is an adaptation of the program.
- 14.4 That references in the Copyright Act 1962 to the reduction of any work to a material form, or to the reproduction of any work in a material form, shall include references to the storage of that work in a computer.
- 14.5 That the definition of "plate" in subsection 1 of section 2 of the Copyright Act 1962 should be amended to include recording tapes and discs, semiconductor chips, and other storage forms in which computer programs or reproductions thereof are embodied.
- 14.6 That subsection 3 of section 9 of the Copyright Act 1962 should be amended to include literary work in the form of a computer program.
- 14.7 That the Copyright Act 1962 should be amended to ensure that in respect of imported copies of computer programs the position on infringement by authorised storage in a computer is consistent with the provisions of section 10 of that Act in relation to the requirement of actual knowledge.

14.8 That an equivalent of subsection 9 of section 20 of the Copyright Act 1962 should be incorporated in that Act to extend that provision to computer programs.

14.9 That a provision should be inserted in the Copyright Act 1962 to allow as fair dealing the making of a back-up copy of a computer program by an authorised user.

* * * * *

APPENDIX A

LIST OF PERSONS, FIRMS AND ORGANISATIONS
MAKING SUBMISSION ON THE LEGAL PROTECTION
IN NEW ZEALAND FOR COMPUTER PROGRAMS

COPYRIGHT COUNCIL OF NEW ZEALAND (INC.).
GLAXO NEW ZEALAND LIMITED.
HAMEL, MR M.J.A. (2)
MAGEE, MR S.M.B.
MONSANTO COMPANY.
NEW ZEALAND COMPUTER AND OFFICE PRODUCTS INDUSTRY FEDERATION
(INC.). (3)
NEW ZEALAND COMPUTING SERVICES ASSOCIATION (INC).
NEW ZEALAND COMPUTER SOCIETY (INC).
NEW ZEALAND INSTITUTE OF PATENT ATTORNEYS (INC.). (3)
NEW ZEALAND LAW SOCIETY.
PROGENI SYSTEMS LIMITED. (2)
ROXBURGH, MR A. UNIVERSITY OF OTAGO.
UNIVERSITY OF CANTERBURY, DEPARTMENT OF ECONOMICS.
UNIVERSITY OF OTAGO, DEPARTMENT OF COMPUTER SCIENCE.
UNIVERSITY OF WAIKATO, COMPUTER COMMITTEE.

* * * * *



Copyright (Computer Software) Amendment Act 1985

1985 CHAPTER 41

An Act to amend the Copyright Act 1956 in its application to computer programs and computer storage.

[16th July 1985]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) The Copyright Act 1956 shall apply in relation to a Copyright in computer program (including one made before the commencement of this Act) as it applies in relation to a literary work and shall so apply whether or not copyright would subsist in that program apart from this Act.

(2) For the purposes of the application of the said Act of 1956 in relation to a computer program, 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, is an adaptation of the program.

2. References in the Copyright Act 1956 to the reduction of any work to a material form, or to the reproduction of any work in a material form, shall include references to the storage of that work in a computer.

3. Where an infringing copy of a computer program consists of a disc, tape or chip or of any other device which embodies signals serving for the impartation of the program or part of it, sections 21 to 21B of the Copyright Act 1956 (offences and search warrants)

shall apply in relation to that copy as they apply in relation to an infringing copy of a sound recording or cinematograph film.

Short title,
interpretation,
commence-
ment and
extent.
1956 c. 74.

4.—(1) This Act may be cited as the Copyright (Computer Software) Amendment Act 1985.

(2) This Act shall be construed as one with the Copyright Act 1956 and Part V of that Act (extension and restriction of operation of Act) shall apply in relation to the provisions of this Act as it applies in relation to the provisions of that Act.

(3) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(4) Nothing in this Act shall affect—

(a) the determination of any question as to whether anything done before the commencement of this Act was an infringement of copyright or an offence under section 21 of the said Act of 1956; or

(b) the penalty which may be imposed for any offence under that section committed before the commencement of this Act.

(5) This Act extends to Northern Ireland.

APPENDIX C

AUSTRALIAN COPYRIGHT AMENDMENT

ACT 1984

SECTION 43A

Backup copy of computer program

"43A(1) Subject to sub-section (2), the copyright in a literary work being a computer program is not infringed by the making of a reproduction of the work, or of a computer program being an adaptation of the work, if -

- (a) the reproduction is made by, or on behalf of, the owner of the copy (in this section referred to as the 'original copy') from which the reproduction is made; and
- (b) the reproduction is made for the purpose only of being used, by or on behalf of the owner of the original copy, in lieu of the original copy in the event that the original copy is lost, destroyed or rendered unusable.

"(2) Sub-section (1) does not apply to the making of a reproduction of a computer program or of an adaptation of a computer program -

- (a) from an infringing copy of the computer program; or
- (b) contrary to an express direction by or on behalf of the owner of the copyright in the computer program given to the owner of the original copy not later than the time when the owner of the original copy acquired the original copy.

"(3) For the purposes of this section -

- (a) a reference to a copy of a computer program or of an adaptation of a computer program is a reference to any article in which the computer program or adaptation is reproduced in a material form; and
- (b) a reference to an express direction, in relation to a copy of a computer program or of an adaptation of a computer program, includes a reference to a clearly legible direction printed on the copy or on a package in which the copy is supplied".

* * * * *

