

A BRIEF PERSPECTIVE: THE HISTORY OF COPYRIGHT IN NEW ZEALAND

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INTRODUCTORY REMARKS

I wanted to thank the Ngūnawal people for their welcome this morning. We from New Zealand believe in thanking the traditional owners, and in fact, in New Zealand, the real owners of the land. I see that Ruth has actually left so I hope that's passed on. The Attorney General did mention the Copyright Tribunal, this morning and Ben also mentioned that in his talk. I did want to briefly mention it and I hope at some stage during this day and a half (I chair the New Zealand Copyright Tribunal) that we can return to the modern role of the Copyright Tribunal.

Just to put an issue out there for you to think about, the modern role of the Copyright Tribunal might be a fast track mechanism that actually involves some due process, as opposed to those fast track mechanisms like notice and take down, where due process is arguably missing. So I say that provocatively. Not because I think tribunals are the answer, but it's certainly worth discussing.

I do want to thank Brian and Ben for organising the Conference. I'm not going to say much about them in the interest of keeping to time, but I am eternally grateful to Brian

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as an academic who is one of the Australians, and there are a few of them, who are aware that New Zealand is on the map. I say this facetiously of course.

I'd like to pay a personal tribute to Adrian Sterling. He was one of my teachers. In fact, I took a course at Queen Mary the first year that Adrian and Gerald Dworkin² offered the international copyright course. And in trueness to his statement about the role of authors, he took the class on a field trip. Among many places, we went to Keats's house, just to see copyright in action. He was never so blunt as to point out that we were in an author's house but the message filtered through. Thank you, Adrian and Caroline, for taking us there.

I want to add that I think copyright freedom is also about cultural freedom. If we reduce everything to economics, life is a bit sad. My father's an economist. I'm a lawyer – need we say more. It's about culture. It's about dynamic culture and it's also about cultural independence. More on that tomorrow perhaps.

Having said it's about culture, I'm now going to ironically turn to the price of cars. It was not until the price of cars became excessively beyond the reach of the average person in New Zealand that New Zealand changed its copyright law considerably from that of Britain. Through much of the 19th and 20th Centuries, New Zealand's copyright law was a replica of Britain's copyright law. The 1994 New Zealand Act saw some differences to that of the UK law, but for the most part, those differences did not signal any radical policy changes.

So why did the price of cars achieve this first major separation from UK law? Many of you will realise it's because New Zealand protects industrial design through copyright. There is a Registered Designs Act but the primary form of industrial design protection is copyright.

PROVENANCE OF NEW ZEALAND COPYRIGHT LAW

The history of copyright law in New Zealand unsurprisingly reflects New Zealand's history as a colony of England. New Zealand's modern copyright law draws heavily on United Kingdom legislation and cases from that jurisdiction are relied on and often followed in judgments of New Zealand courts. For most of the 20th century New Zealand copyright law was very similar to United Kingdom copyright law. Despite these close ties to United Kingdom copyright law, some significant differences can be found in New Zealand's law both before the 20th century and in the 21st century.

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COPYRIGHT LAW BEFORE THE 1913 ACT

The 18th ordinance enacted in New Zealand, after the signing of the Treaty of Waitangi³, was the Copyright Ordinance 1842.⁴ The passing of that law was something that the Governor of the day seemed to note as occurring early in the colony's life.⁵ The ordinance provided:⁶

An Ordinance to secure the Copyright of Printed Books to the Authors thereof.

WHEREAS it is desirable that the copyright of books should be secured by law to the authors thereof:

BE IT ENACTED by the Governor of New Zealand, with the advice and consent of the Legislative Council thereof, as follows:

1. The author of any book which shall hereafter be printed and published, and his assignees, shall have the sole liberty of printing and reprinting such book for the full term of twenty-eight years to commence from the day of first publishing the same, and also, if the author shall be living at the end of that period, for the residue of his natural life.

2. If any person shall during the period or periods aforesaid print reprint or import, or cause to be printed re-printed or imported, any such book without the consent in writing of the author or assignee of the copyright thereof, or shall, knowing the same to have been so printed reprinted or imported without such consent as aforesaid, sell publish or expose for sale, or cause to be sold published or exposed for sale, or have in his possession for sale, any such books without such consent as aforesaid, every such person shall be liable to an action at the suit of the author or assignee, in which action double costs of suit shall be allowed, and shall also, upon a verdict being given against him in such action as aforesaid, forfeit and pay

³ The Treaty of Waitangi of 1840 was signed between Maori and the British Crown. The treaty has three articles, one of which allowed the British to make laws for New Zealand. For a discussion of the history of the treaty see Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Wellington, 1987)

⁴ See Jeremy Finn "Particularism versus uniformity: factors shaping the development of Australasian intellectual property law in the nineteenth century" (2000) 6 *Australian Journal of Legal History* 113.

⁵ See McLay, Geoff, "New Zealand and the Imperial Copyright Tradition" (June 29, 2010). *Essays on 1911 Imperial Copyright Act*, Forthcoming. Available at ssrn.com/abstract=1719679

⁶ See Victoria University, *New Zealand's Lost cases*, www.victoria.ac.nz/law/nzlostcases/5_Vict_18.pdf For a discussion of the ordinance see "New Zealand and the Imperial Copyright Tradition", *Ibid.*

the sum of fifty pounds to the use of Her Majesty, her heirs and successors, for the public uses of the Colony and the support of the Government thereof.

The main impetus for the ordinance seems to have been to protect a forthcoming dictionary of Maori grammar.⁷ The work in question had been written by the Reverend Maunsell's, who was a significant figure in the Maori church. That New Zealand should enact a copyright law for such a purpose is telling of the nature of New Zealand at the time and foreshadows what is today one of the biggest challenges of all of New Zealand intellectual property law.

Today New Zealand is a country which is poised to consider how much to protect traditional knowledge, known to Maori as *matauranga Maori*, as it relates to works akin to copyright and other intellectual property rights. Whether laws protecting *matauranga Maori* in some way will be enacted will depend on the recommendations, and government action based on those recommendations, arising from a forthcoming Waitangi Tribunal report. The Waitangi Tribunal hears claims brought by Maori pursuant to the Treaty of Waitangi.

The report relating to protection of Maori traditional knowledge and related issues arises from a claim brought by Maori against the Crown about New Zealand's flora and fauna and to the use of *Matauranga Maori*.⁸ New Zealand already has trade mark laws which take account of some Maori interests.⁹ If New Zealand law, in the future, creates greater protection of Maori interests in intellectual property or related laws, New Zealand law will be quite different from that of the United Kingdom or Australia.

COPYRIGHT LAW IN NEW ZEALAND FOR MOST OF THE 20TH CENTURY

For most of the 20th century New Zealand's copyright law was the same as English law. The Copyright Act 1913 adopted the United Kingdom Act of 1911 and the subsequent Acts in New Zealand of 1962 and 1994 were substantively based on the United Kingdom 1956 and 1988 Act respectively. Some points of difference from the

⁷ Letter Hobson to Colonial Office (29 March 1842), Alexander Turnbull Library (ATL), CO 209/14, cited in "New Zealand and the Imperial Copyright Tradition", *Ibid*.

⁸ This is known as the WAI 262 claim. The author of this is advisor to the Waitangi Tribunal on intellectual property issues relating to that claim.

⁹ Trade Marks Act 2002, s17(6)(ii). See also Susy Frankel "Third-Party Rights as a Violation of Indigenous Cultural Property – A New Statutory Safeguard" (2005), *Journal of World Intellectual Property* (8)1:83–98.

United Kingdom Acts can be found in the New Zealand Acts, but the differences are not substantive policy differences.

In some ways this is hardly surprising, after all the United Kingdom law of 1911 was framed as part of an effort to secure copyright laws as consistent as possible in all of the Empire, so as to protect British works abroad. The law reform followed the Imperial Copyright Conference in which some agreement with the colonies was reached.¹⁰ Sherman and Bentley summarise the goals of the British 1911 reform:¹¹

The law at the time, which was “incomplete and often obscure”, was governed by no fewer than twenty two Acts of Parliament, passed at different times between 1735 and 1906; and to those should be added a mass of Colonial legislation, frequently following blindly the worst precedents of English law... the new Copyright Bill ... makes a clean sweep of all of these enactments and proposes to set up in their place a homogenous code of copyright law on sound and generous lines’.

Thus, New Zealand’s law of 1913 reflected this homogenous code which spread across the Empire as far as in as much detail as the British could persuade colonial legislatures to do. New Zealand was quite obedient in this respect.

It was not until the price of cars became excessively beyond the reach of the average person in New Zealand that New Zealand changed its copyright law considerably from that of the United Kingdom and the imperial copyright tradition.

So why did the price of cars motivate a major change of direction from United Kingdom law? New Zealand’s copyright law includes, in the scope of its subject matter the protection of industrial design.¹² Drawings and models, which lie behind the design and eventual production of motor vehicles, are protected copyright works in New Zealand. There is a Designs Act, which registers some designs, but the primary form of industrial design protection is copyright.¹³ Thus, copyright law could be used to prevent the importation of cars made in or out of New Zealand.

THE PRICE OF CARS

In the 1980’s New Zealand progressively instituted a free market and deregulated economy. As a result of that economic policy New Zealand stopped manufacturing

¹⁰ See Brad Sherman and Lionel Bentley, *The Making of Intellectual Property Law* (Cambridge University Press, 1999), 136.

¹¹ *Ibid*, page 128 fn 119, citing Copyright Law Reform (1910) 216 Quarterly Review 482.

¹² Copyright Act 1994, section 14 includes artistic works, defined in section 2 to broadly include drawings and prototype models of processes of industrial design,

¹³ Design Act 1953.

goods which could be more cheaply made elsewhere. One of the sectors most radically affected in the early years of this economic policy was car assembly. Major car manufacturers, including Ford, Mitsubishi and Toyota, closed their New Zealand assembly operations. There was and is no comparative advantage in car assembly in New Zealand. But, New Zealanders do drive cars and they drive cars long distances. New Zealand may have only 4 million people on a small land mass compared to Australia, but New Zealand is a slightly larger land mass than the United Kingdom. Not assembling cars locally meant they were imported and this in turn resulted in cars being expensive.

The solution to escalating car prices was to allow the parallel importation of cars, which would eventually come primarily from Japan and Korea. But the appointed New Zealand distributors, of the car manufacturers, used copyright law to make sure that cheaper imports entered New Zealand. The price of cars then provided the political motivation to change copyright law and allow parallel importing of all copyright products including films, sound recordings and computer programs.

Since allowing parallel importing, New Zealand has tweaked the law to make parallel importing a balance between the interests of New Zealand consumers and copyright owners. For example, a copyright owner of a film for instance has a nine month exclusive window to make the film available in New Zealand before parallel imports are permitted.¹⁴ Also, when there is a dispute over whether parallel imported goods are legitimate or otherwise the burden of proof is on the importer to show there is not an infringing copy.¹⁵ Usually the burden of proof would be on the party alleging infringement.

COPYRIGHT LAWS FOR THE BENEFIT NEW ZEALAND

Since the 21st century began, when it comes to enacting intellectual property laws, New Zealand policymakers have been conscious that copyright and other intellectual property laws should be for New Zealand's benefit. All intellectual property reform, in the last decade has, at the policy and Bill stages, included statements that one of the purposes of the relevant law reform is for the benefit of New Zealanders and New Zealand's economic benefit. Whether this is, in fact, true in substance is debatable, but the policy of intellectual property laws for local benefit is a good starting point.

The most recent copyright policy debate was focused digital copyright protection and culminated in the Copyright (New Technologies) Amendment Act 2008. There are many difference of detail between New Zealand's digital copyright laws and those of

¹⁴ Copyright Act 1994, s35(3)

¹⁵ Copyright Act 1994, s 35.

the United Kingdom, European Union or United States approach. One key difference, for example, is that technological protection measures are only protected where they prevent copying rather than access to copyright works.¹⁶

New Zealand does have copyright law that is different in some respects from other common law countries. Those laws are based on a common standard, which is no longer determined by United Kingdom law, but by international agreements, including the TRIPS Agreement.¹⁷ Sometimes little differences in legislation can create bad outcomes because often there is no case law to test those little differences. The law then becomes uncertain and users of copyright works such as librarians, educators or authors themselves, don't quite know what is legitimate and what is infringing. However, major differences that can be achieved within international frameworks on the grounds of local policy interests are important. Parallel importing is one of those. New Zealand may well end up having less copyright freedom once it strikes a trade deal with the United States.¹⁸ Even though small, New Zealand it has experienced trade negotiators. Keeping parallel importing of copyright goods will be an important goal for these trade negotiations because of the obvious and proven benefit for New Zealand consumers.

¹⁶ Copyright Act 1994, s226A.

¹⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1197, 1198 (1994).

¹⁸ New Zealand is currently negotiating with the United States for the United States to join what is known as the P4 agreement. P4 is a free trade agreement between New Zealand, Singapore, Chile and Brunei. The expanded negotiations are known as the Trans-Pacific partnership and include the United States, Australia and Vietnam. For a discussion of intellectual property in these negotiations see Susy Frankel "Intellectual Property and the Trans-Pacific Partnership" in Jane Kelsey (ed) *No Ordinary Deal: Unmasking Free Trade and the Trans-Pacific Partnership Agreement* (Bridget Williams Books, 2010) forthcoming.