Dear Victoria Pearson;

Thank you for once again offering me the opportunity to share my thoughts and comments on the various copyright issues raised by digital technology and media, and on the Ministry's recent position paper. I am attaching my response to the position paper as an MS Word file. If you would prefer an alternative format, just let me know and I can reformat and resend.

For the most part, I think that the Ministry's approach and positions are useful. While I still feel that a reconceptualization of copyright would be beneficial, I also recognize the political and possible economic realities that limit the ability to present more radical reforms. Thus, I have tried to make practical comments and suggestions to the specific issues raised, while occasionally also presenting a more visionary argument.

I also want to be open in my bias. I firmly believe that the role of copyright policy should be to encourage both the creation of intellectual property and its use and not merely the ability to commercially exploit such work. To that end the goal of copyright should be to balance owner and user rights, to limit the monopoly rights of owners and to permit socially valuable exceptions. I am heartened that this seems to be an underlying principle in the Ministry's position paper. I also firmly believe that digital media and technology have the potential to transform the information and communication environment in positive ways, and that the development, diffusion, and widespread utilization digital media and communication systems (in particular the Internet) should be fostered. There is a tremendous potential for social value and benefit in such systems. Copyright should not be used to hamper or restrict such development; at a minimum it should be technologically neutral, although I think that strong arguments could be made to promote diffusion and use of new media. I do recognize that such arguments may be outside of the specific mandate of this examination of policy, and do applaud the Ministry's concern that whatever copyright changes emerge be as technologically neutral as possible.

Anyway, my response is attached, and let me say, once again, that I thank you for the opportunity to talk with you and the group during my visit to New Zealand, and for the opportunity to respond to the position paper. If you should have any questions, or if you feel it might be useful for me to
clarify or expand on some of the responses, please feel free to let me know.

Sincerely,

Benjamin J. Bates
Professor,
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University of Tennessee
Response to

Digital Technology and the Copyright Act 1994 Position Paper (December 2002)

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Introduction

Digital technologies are reshaping the way in which information and creative content is created, transmitted, and consumed. Incidentally, they are posing problems and raising questions with regard to an intellectual property rights systems (copyright) that was developed to deal with very different media.

In July 2001, the Ministry of Economic Development of New Zealand started to address some of these issues and concerns by releasing a discussion paper entitled Digital Technology and the Copyright Act 1994. In October of that year, I responded to the discussion paper, stressing my concerns over several recent trends. The first was based on the rise of digital technology, which is in the process of transforming the fundamental processes of information creation, diffusion and utilization. I argued that this transformation is fundamentally at odds with a current copyright metaphor based on the concept of restricting the making of copies, and that it would be worthwhile to consider a new metaphor for intellectual property rights, perhaps focusing on a metaphor of controlling the conditions of distribution (i.e., control over communication rather than control over copying).

A related trend is the direction that copyright policy has tended to take in response to the changes engendered by digital technology. Copyright policy has tended to react to digital technology by attempting to create enforcement mechanisms that force new technology and uses to fit into older models. One troubling aspect of that trend is the increased emphasis on criminalizing the act of intellectual property piracy, but the potential for it (by seeking to place limits on technology and knowledge that might be used to make unlicensed copies). I find that this is a troubling trend, one that seems to shift from criminalizing an illegal act to potentially criminalizing intent, or even potential, a direction of policy that could have serious, perhaps even devastating, economic and social consequences.

The third major trend was the tendency of recent copyright policy changes to focus on maximizing the potential for commercial exploitation, a shifting of rights from producers and consumers to distributors, and its attendant tendency to ignore other sources of value that comes from the creation, dissemination, and utilization of information, cultural and creative activity, and knowledge. It is vital to the long term interests of society to maintain a proper balance of interests, and in particular, to promote a system of intellectual property rights that recognizes and encourages the production, distribution, and utilization of a wide range of intellectual property, especially creative works and information goods that may not have high commercial value, but make significant scientific, cultural, or social contributions.

With the release of the Digital Technology and the Copyright Act 1994 Position Paper ("position paper"), it seems that the Ministry has taken a positive step in addressing those concerns. I particularly applaud the Ministry for its copyright policy framework; in particular its key guiding principle that goal of intellectual property policy should be the enhancement of the public interest (paragraph 24) through a balancing of creator, distribution, and user interests (paragraph 27). Within that fundamental framework, I feel that the Ministry has also taken a positive approach in trying to achieve a degree of technological neutrality (paragraph 31). As digital technology continues to develop and
diffuse, it is certain that new forms of copying, communication, and content will continue to develop, and it will be important to have an intellectual property policy that can be applied to new technologies as they develop.

There is also language in the position paper suggesting that policy should seek to also be impact-neutral. I would urge the Ministry that while that may serve as a starting point, that it would serve the greater social and economic interests of New Zealand to consider whether or not, in some areas, a rebalancing may need to be achieved to correct recent trends, and whether or not particular some particular forms of content or communication may deserve preferential treatment in order to promote socially (rather than commercially) valuable creation, diffusion, and/or utilization (in particular education uses and traditional cultural expressions).

Finally, I recognize that in both my earlier comments and in the remarks that follow, I argue for a more radical reconceptualization of intellectual property rights than may be politically practical. I feel that it is important to make that argument, and I applaud the Ministry for being willing to consider them, and if not adopt them wholeheartedly, to at least to have incorporated the underlying concerns into some of their deliberations and positions. I will continue to make a case for a more radical reconceptualization in my comments on the proposed positions, but I will also attempt to comment on them from a more practical level.
The Reproduction Right

The core metaphor and manifestation of current copyright policy is the grant of an exclusive right to copy a work. This metaphor emerged at a time when the creation of physical copies was the primary means by which creative works could be commercially exploited. This mechanism allowed the creator to thus benefit from such exploitation, and arguably provided greater incentive for the creation and dissemination of such work. Over time, first with the rise of broadcast technology and now with digital technologies, the emphasis on control of physical copying has become more problematic. Policy has adapted to changing technology and emerging media largely through attempting to redefine or extend notions of “copying”, rather than a return to what is the underlying rationale of the right to benefit from commercial exploitation.

This emphasis on copying has resulting in a number of problematic issues, two of which are addressed by the position paper. The first issue is whether the existing definition of copying is sufficient to protect copyright owner rights as new technologies and media emerge. A second issue raised directly by digital media such as the Internet and World Wide Web (WWW) is whether transient and/or incidental copies made as part of a dissemination process should be covered by such an exclusive right.

There are other issues as well that may need to be addressed in this or future considerations of copyright policy. One is the ability of copyright owners to exert rights over subsequent uses of copies, once they are made and sold. Another set of issues is covered under the umbrella of “Fair dealing” or “Fair use” – principally, does or should the exclusive right to copy extend to some or all situations where there is no commercial exploitation? To an extent, this is addressed in a later section on permitted acts and exceptions (part 8).

An emerging issue that is only addressed peripherally in the position paper is digital (electronic) rights management (DRM). While still under development, there are already discussions that DRM could be used to transcend the tradition notion of copies exchanging hands and ownership (with the attendant transfer of rights), transforming a right to copy to a right to control all aspects of access and use of content while maintaining full legal ownership, in effect abrogating all user rights. The Ministry should begin considering the implications of this emerging technology and address the issue of what digital rights should be protected, and to what degree.

Storage and digitization

The current copyright language seems to cover digital copying under the terminology of “any material form”, or for specific creative works “storing the work in any medium by any means.” I see two issues that may call for clarifications in the future. The first is whether or not some transient or digital works may or not be of a “material form”. A point is made by a number of scholars that digital content can be considered immaterial. As the position paper suggests (par. 39), this could be covered by an explicit statement that “material form” includes current and future digital formats. This would be a simpler, and more technologically neutral approach than trying to enumerate specific forms.

The second issue relates to the specific and differential treatment of a series of what could be called creative work (“literary, dramatic, musical, or artistic work”). This could
raise questions regarding how such work is defined, particularly if there is considered to be any differentiation in what might be considered copying in the two statements. I would thus urge the Ministry to formulate and utilize a single, consistent definition that is applied to all copyrighted works. The position paper suggests that this could be achieved by including the creative works statement as a subset of a more general definition (par. 42), “making it clear that “material form” may include storage, but does not necessarily have to.” I find that there is still a degree of uncertainty in that approach, which could create problems in application. Is it storage of certain types of content that is covered but not others? Is it that arguments can be made that certain applications are covered but not others – and if so, under what conditions? A content and technology neutral approach would seem to favor a clear and consistent definition.

The premise of the position paper is that the definition, whatever it is, should be as inclusive as possible, certainly incorporating digital or other emerging media. While arguably technology neutral, a very broad-based definition of copying may well shift the balance of rights (expanding copyright owner rights), and tends to create other problems, such as the question over transient and incidental copying. The Ministry may thus want to consider a narrowed definition of copying, creation of explicit exceptions, or a limiting of exclusive rights.

Transient copying

The reasons for a more restrictive set of reproduction rights is evident in the consideration of how to deal with transient and incidental copying, particularly in digital media. The current definition of copying can certainly be extended to a variety of transient and incidental copies, and the WIPO Internet treaties seek to make that extension explicit. In addition, it is clear that any definition of copying that extends to nonphysical copies, or is broad enough to include future digital formats and media, will also have to cover the kinds of transient and incidental copying involved in the operations of the Internet and any other form of IP/packet-switched telecommunications system, digital display/replay systems and any analog systems using signal processing, and in the kinds of time-shifting activities traditionally covered by Fair Deal/Fair Use exceptions. Strict application and enforcement of such a broad definition would essentially criminalize most modern media use. As noted in the position paper (par.45), courts have tended to embrace rather than limit broad definitions and applications. Thus it is critical for policymakers to address the issue clearly, and in a way that will not hinder development and use of digital media.

The position paper, I believe, makes the proper judgment that too broad an assertion of reproduction rights is likely to be socially harmful, making an argument that “it is the purpose of the copying that should be considered” (par 46). Later, the paper proposes an exception only apply where “there is no independent economic significance” (par 49). This might seem to harken back to my previous argument that policy should shift from an emphasis on control of copying to an emphasis on controlling the right to extract commercial benefit. However, while perhaps embracing that concept, the Ministry seems intent on maintaining the copy metaphor, instead framing the basic question not in terms of copying vs. other rights, but in terms of whether one should deal with the issue by trying to define certain transient and incidental copies as not being “copies” in law, or by granting an exception to certain transient and incidental copies. In light of the current
international intellectual property rights environment, it may be too early to focus on a paradigm or metaphor switch, but a reliance on an outdated metaphor is likely to continue to face problems as technology and media evolve.

Still, what the position paper discusses may be reasonable short-term solutions to the problem of transient and incidental copying. I do agree that, given the limited options, it would probably be better to address the issue through the granting of an explicit exemption rather than attempting to derive a definition that will cover some nonphysical digital copies while permitting the necessary range of transient and incidental physical and nonphysical copying involved in a wide range of communication and display technologies. The position paper reported what seemed to be a consensus position that transient and incidental copying inherent in the process of making an authorized use of the work should not create liability for copyright infringement.

The problem will arise with how to properly define the exception in a way that will capture the intent of encouraging creation, distribution and (authorized) use of content and new media, while restricting inappropriate uses. It is unlikely that any specification of a specific technology or approach will be viable in the long term, as technologies evolve, and infringers seek to use the explicit exception as a loophole to evade liability. Similarly, seeking an exception for specific uses is likely to result in similar problems. Even language limiting liability for copying for “authorized uses” may be problematic in terms of whether or not that includes exceptions, and what uses are considered appropriate under “Fair Dealing/Fair Use.”

In the absence of radical reconceptualization, I would encourage the Ministry to focus on the exception approach, perhaps in connection with a limited set of compulsory licenses. Compulsory licenses (with or without compensation) can be used in those cases where there is clear public and social benefits to be gained from making content available via a specific medium or means. However, compulsory licenses may not be easily adapted to new media or technologies, and do pose a cost to copyright owners. Thus, it is also important to draft a class of exceptions that follows the intent of early intellectual property policy (protect commercial value while encouraging use), and uses language that is technologically neutral and broad enough to be extended to new technologies and media.

Language for an exception approach may be difficult to develop, but I would urge the Ministry to avoid citing specific technologies, processes, or uses, but rather identify one or more classes (types) of uses that would be exempt from liability. I would also urge the Ministry to err on the side of more exceptions rather than less. The broader social and economic impact of possibly criminalizing media or technologies, or of what are widely perceived as acceptable and appropriate uses, are likely to far outweigh any fringe economic losses (from some uses that might slip through) to copyright owners.

One class that I would urge protecting falls under the concept of “common carrier.” In the U.S. common carriers refer to transit or transmission systems that carry all comers, where the carrier has no control over the good. Traditionally, as they have no control, they are exempted from liability (the liability remains with the shipper/owner of the good). This notion of common carrier could certainly be applied to all forms of display or replay devices and technologies, and to certain aspects of the media (such as certain
aspects of ISP activities), along the lines of defining a “common carrier use” as any technology, medium, or process which transmits, stores, or displays/replays intellectual content in a content neutral fashion. Then, any transient or incidental copying made in “common carrier use” of authorized content, or of content/use protected by exceptions, would be excluded from liability. While I think the language might need to be carefully worked out and drafted, I feel that such an approach would be technologically neutral, protect authorized uses and appropriate exceptions, yet still permit actions against illicit copying. This also helps restore some of the enforcement imbalance, as returning focus to the illicit act, rather than criminalizing all copying. It could also cover part of the Internet Service Provider concerns, address more fully later.

Another class of exceptions could be the traditional fair dealing/fair use exceptions. Personally, I would argue to exempt all copying/use that had little or no negative impact on the commercial value of intellectual property, but I recognize that that is likely to be controversial, and raises questions of how to discern or measure such negative value. However, it would probably be useful to specify, either in this aspect or in a separate exceptions section, whatever specific exceptions uses the state might find beneficial to authorize (such as the making of authorized archival copies, media- or time-shifting for personal use, educational or governmental uses, etc.). One of the international trends in copyright policy and litigation seems to be aimed at reducing or restricting the traditional exceptions, and it is thus important to provide explicit exceptions where warranted (this will also be treated in more detail later).

In particular, it might be particularly useful to either specifically identify some technologies and/or media as either fitting the “common carrier use” definition, granting an explicit exemption, or a compulsory license. For example, one of my greatest concerns the potential, under a strict inclusion of transient and incidental copying, that the Internet could be shut down completely, as it is based on the notion of communication through the making of multiple copies. It could clarify and facilitate development to grant a compulsory license to copy any content placed legally on the Internet and made publicly available for unrestricted use. This could be done for important or significant cases, but would be cumbersome to try to specifically identify all desired applications.
Communication to the Public

Certain technologies and media may make intellectual property available for use without actually making copies (a common example is “broadcasting”). In order to protect the rights of copyright owners while encouraging the use of such media and technologies, it is appropriate to allow copyright owners some control over such disseminations. Current New Zealand law seeks to achieve that through media-specific policy, and some other copyright policies seek to develop a “right to communicate.”

Media-specific policy is likely to continue to create problems, as new technologies and media emerge, and as usage develops. The Ministry is correct in seeking to develop a technology-neutral right, rather than trying to enumerate and anticipate specific technologies, media, and applications. I also applaud their interest in consideration of the development of a right to communicate, in contrast to a reproduction right (par. 61-62). However, the concept of a communication right remains somewhat nebulous, and I am not sure that I agree with some of the Ministry’s specific statements and approaches.

Specifically, I am not convinced that a technology-neutral right will necessarily maintain the existing balance between copyright owners and users (par. 63). While a worthy goal, that should not be presumed in policy considerations. The Ministry also seems to propose to deal with the issues of Webcasts (par 68) and cable retransmission (par 72) by narrow, targeted policy, rather than more fully exploring the potential offered by the concept of a right to communicate. As the Ministry notes in the position paper, such narrow approaches may prove problematic over time. They may also raise potential for conflicts with traditional exceptions and other aspects of intellectual property policy.

I would like to suggest consideration of a truly technologically-neutral right to communicate, that could broadly subsume copyright, or could be more narrowly tailored to the consideration of the kinds of “broadcast” rights being addressed in this section.

One could define a right to communicate as the right to set the conditions under which the copyrighted material could be disseminated. That is, the copyright owner has control over determining what is made available, to whom it is made available (to a limited number of users, or to a wider set of the public), and, in a technologically neutral way, how it is made available (for lease/loan, single copy/use sale, or broadcast – i.e. publicly and freely available). However, once the conditions of distribution are set, the distribution may then occur via whatever technology or media is feasible. (This would additionally solve many of the other copyright issues raised by the position paper, particularly the issue of transient/incidental viewing.

Let me provide a couple of illustrative examples. Consider a novel. The copyright owner makes the decision to disseminate his novel through single unit sales for private individual use, throughout New Zealand, for a content fee of $5.00 per “copy”. That content could then be printed and disseminated in hardcover or paperback format, or in electronic form, as long as the license fee is paid to the copyright holder for each initial transaction, and the use is private and individual. A buyer making additional copies for resale or distribution would still be in violation, as would other unauthorized dissemination (say in movie format, or in translations in other countries) if they were not authorized by the copyright holder. Now such a right would shift the balance, as any
truly technologically neutral communication right would likely remove the ability of one medium or distributor to achieve monopoly profits. The copyright owner and content creator may benefit from the added sales brought by the lower competitive prices, or may be harmed to a degree by not being able to share in the monopoly profits or by not benefiting from the additional promotional activity that a monopolist may (or may not) engage in. On the other hand, consumers would likely benefit from lower prices, more rapid distribution, and a greater range of media options.

Another example might be a television network. The network decides to offer a package of programming, including advertising, for casual viewing (let’s say single use) by a particular, geographically defined, audience (say New Zealand). Under a communication right, that signal is then made available to terrestrial broadcast stations, but could arguably also be legally picked up by cable, satellite, or Internet transmitters (as long as the content is restricted to NZ) for retransmission. If a fee is charged for access, that fee should be paid by whatever transmission system is used. If the program is broadcast free to consumers, then no additional charge should be made to other retransmitters that abide by the stated conditions of communication. Such a right could also arguably extend to the right to use technology to time-shift the content for the convenience of the individual consumer. In this case, there should be no negative impact on the copyright holder, as retransmission only helps to reach the desired audience. Also, the impact on consumers will be positive, as it offers better coverage and a range of access options. However, it is possible that a transmission system may be harmed by losing monopoly control over content, and thus the ability to extract monopoly profits.

I am sure that there are other arguments that could be made where there may be additional negative impacts from such a right to communicate. Thus, it may be essential to not grant a blanket right to set conditions, but rather to enumerate specific rights (choice of compensation and audience for example). I would also be concerned that a right to communication be constrained from being extended into a right to limit use.

This approach may have strong promise and potential in the long term, but I fear that there are still many facets that need to be explored and fully considered before I could be assured that such a system would be more generally beneficial. Therefore, while I suggest that such an approach be considered and explored, I would be concerned about rushing to implement such an approach at this time.
Internet Service Provider Liability

The Internet is a wonderful distribution mechanism that is based on the use of multiple copying of content, in distribution, display, and in caching for optimizing performance. As such, it is both a great boon for copyright owners (as an efficient and inexpensive means of distribution) and potentially a great bane (as that same inexpensive, efficient technology also facilitates illicit copying and piracy). As noted before, strict enforcement of copyright could close down the Internet, which I believe would have severe and harmful social impacts, particularly for the poor and for special interests of all kinds. Thus, it is vital to develop policy that will protect and foster the development of the Internet while protecting copyright owner interests.

There would seem to be three key issues: how to deal with transient copying of authorized content (addressed earlier); to what degree should non-transient caching be allowed as a means to improve efficiency; and how to appropriately deal with the posting and use of unauthorized content on the Internet.

The position paper correctly notes that there appears to be a strong public interest in promoting and protecting cost-effective access to the Internet and the content that it offers. It is also appropriate to protect copyright owner rights to limit unauthorized use of their content, and to seek relief if such use results in economic harm. Policy, again, needs to balance these interests.

Policy should also recognize that Internet Service Providers (ISPs) often incorporate multiple functions. The central function is as a conduit, an entry to the Internet, simply passing content among users. Many ISPs also offer hosting, that is, they allow users to place content on their servers so that others may access that content through the Internet. Finally, some ISPs are themselves content providers. I believe that policy needs to address these functions separately, and with an emphasis on control and intent.

First, I would suggest that in terms of the central ISP function of “conduit” that such use falls under the general transient and incidental copying exception, as in that regard the ISP is truly operating as a common carrier. While I would argue that such activities would clearly fall within such an exception, the growing importance of the Internet as an international communications system may call for an explicit exception or compulsory license to be granted to ensure that its growth and utilization are not threatened by litigation.

In the case of caching, I would also extend the “common carrier use” exception in cases where the caching is automatic, and temporary (but allowing for renewals). Depending on the length of the caching between refreshes (that is, how long the content remains in storage before being discarded or renewed), it may be appropriate to require ISPs to remove content that is found to be illegally offered on the Internet. However, I would argue that as long as an ISP operates in good faith, that they should be held free from liability for their communication activities.

The Ministry’s proposal would seem to be in line with my “common carrier use” approach. They do enumerate several conditions, however, and while I think that most would fall under the scope of my preferred approach, I would like to comment on one. I
would suggest caution in requiring explicit compliance with conditions of access and rules of updating, particularly if those are determined by individual content providers and not by broad policy. The problem is that caching is automatic, and such rules may imply that ISPs review and monitor caches, and check each original site for terms, and possible require positive action to implement terms and conditions. This is likely to be cost-prohibitive and detrimental to the primary goals of caching. If access and currency is of serious concern, it may be more effective to encourage development of a marker that sites could use that would signal that they do not want their content to be cached.

There are two related aspects that I did not see addressed in this section, but may be relevant. First is the issue of making back-ups. ISPs and others make regular back-ups of content and caches in order to be able to restore services and materials in case of a service loss. Conceptually, these serve a similar purpose to caches, and, I would argue, should be treated in the same way as caches are treated. I would hope that the Ministry would seek to expand their definition and treatment of caches to include automatic back-ups.

I do wish to step back into my role as an academic researcher of the Internet to make a special pleading for the right to establish archives of the Internet and Internet content for historical and research purposes. Due to the immaterial nature of raw digital content and communications, and the fluid nature of the Internet, potentially valuable content may be lost if it is not transferred to more permanent media at some point. The ability to take, in effect, a snapshot of the Internet (or some portion thereof) for research or historical purposes can be extremely useful in studying the Internet’s operations, utilization, and aid in understanding its implications for society. This right should, however, be a listed exception, less it be exploited for the purposes of piracy.

The problem of what liability should exist for the posting and dissemination of unauthorized or illegal content would seem to be the most serious and important issue to copyright holders. Current law and policy already is clear in enabling action to be taken against the infringer (the actual creator of the infringing material or act). On the Internet, however, such content is often hosted by ISPs, and clearly, any dissemination may involve ISPs. Thus, there is a question of liability for what might be called secondary infringement.

The current trend of policy and litigation on secondary infringement would seem to suggest that the fundamental issue is one of knowledge and control. If the ISP has knowledge of an infringement and continues to support the infringing activity, liability may ensue. However, if the ISP has no knowledge or control, and takes positive action when it is informed of such activity to end the infringement, then it is often held to be exempt from liability. The position paper suggests that this is the manner in which secondary infringement is currently treated in New Zealand copyright policy, using a definition of “constructive knowledge” (par. 92).

I believe that this is an appropriate approach, although I am somewhat worried by the desire of the Ministry “to ensure that the scope … is not unduly broad, and to allow content owners greater scope to protect their exclusive rights.” (par. 93 a). The second part of this would seem to run counter to the Ministry’s goal of maintaining a balance of rights, placing an emphasis on content owner rights. Certainly, a content owner should
have the right to challenge possibly infringing material, and under many approaches, the ISP may only claim exemption from liability if the offending site is removed or access restricted. While a seemingly appropriate response, it does place a presumption of guilt on the offending party that is counter to judicial tradition, and the response may well be disproportional. It grants a great deal of power to copyright owners with no proportional or corresponding rights for users. A mere claim of possible infringement in one part of a site may well lead to immediate removal of an entire site by an ISP eager to remain free of liability, with no assurance that service would be restored in a timely manner in the case where the act was judged to not be an infringement, or if the allegedly infringing material was removed. A claim that an individual might have downloaded an illegally posted file may be sufficient to deny that individual service. In a recent U.S. case, an ISP was forced to provide customer information to a group that alleged only that there might have been an infringing file downloaded, based on the fact that the individual had downloaded a lot of information from the Internet. There is a strong potential for abuse in a system where ISPs fearing liability feel compelled to take extreme measures on the basis of mere allegation of possible infringement.

Thus, I would urge that the Ministry also provide for consumer rights in such cases. For example, the copyright owner should be obliged to notify both the ISP and the primary infringer, allow for the alleged infringer to either challenge or remove the alleged infringing material in a timely manner, with restoration of services by the ISP, and provide a mechanism for challenges to be heard and resolved in a timely manner. Moreover, if an unfounded claim of infringement is successfully challenged, the user should be able to seek damages from the copyright owner.
Technological Protection Measures

Current intellectual property policy places an emphasis on the control of copying. To an extent, that control is manifest in legal protections in the authorization of the act, although that control may also be sought in terms of the technology of copying. In addition, where technology facilitates copying, technology might also be used in the attempt to limit unauthorized copying (or at least make it more difficult and expensive). That is, where technology can be used for one purpose, technology can also be used to defeat that purpose. Thus, one trend in copyright policy is the increased use of legal prohibitions against the circumvention of technological protection measures.

The current trend in copyright policy is to attempt to outlaw the devices that may be used to circumvent copyright technological protection measures (TPMs). As the position paper notes, that policy is manifest in the WIPO Internet Treaties, and to an extent in section 226 of the Copyright Act 1994 (pars 97, 98). The position paper notes several issues arising from section 226 and TPMs: should the approach extend to devices circumventing the control of communication or access as well as copying, should protection provide right of action to actual use or against provision of means, the impact of TPMs on permitted acts, the standards for application of anti-TPM policy, and the need for criminal as well as civil remedies.

I think, if I am interpreting the second concern correctly, that the Ministry has it backwards. It is the act of infringing that creates a violation, and should be the foundation of TPMs policy, not the idea or means of circumvention. Certainly it is easier to seek to control the ideas or means of circumvention than to have to seek out the actual infringing acts themselves. But by shifting the emphasis, the Ministry is shifting the balance of rights, once again to the copyright owners, while creating for itself a whole class of related issues (issues 3-5 listed above). It also places a presumption of guilt (possession presumes intent). Finally, it opens up a potential for misuse and abuse that could have grave political and social consequences.

TPMs – use or means?

I would argue that the emphasis of policy restricting TPM circumvention should place its emphasis on the actual acts of circumvention, rather than on the technology or knowledge that may facilitate the act. At the very least, policy should seek to restrict use of anti-TPM technology for copyright infringement, and not merely its possession or creation. To do otherwise would have a negative impact on innovation and the diffusion of technology and media. It might also, as the position paper points out, restrict the ability of individuals to make permitted uses of protected materials.

As such, I would argue that the Ministry’s current policy to retain the focus of anti-TPM technology on the manufacture of devices or means, and the publication of information, to be seriously wrong, and will likely lead to serious consequences. Any attempt to prohibit or criminalize the publication of information (even that discussing the means of TPM circumvention) is a serious violation of freedom of speech. Already, the threat of litigation has challenged the ability of researchers to present information related to issues of encryption and the viability and impacts of TPMs within a research context.
Further, while an absurd example, it could be argued the ability to write allows individuals to circumvent the TPM of printing, and thus the teaching of writing is the publication of information allowing the circumvention of TPMs. Or substitute the manufacturing of computers – the copyright proposals acknowledge that digital copies are infringements, and since computers both create and decode TPMs in the form of encryption, they are by definitions TPM circumvention technologies.

The ministry proposes to deal with the ability to over-control by focusing only on devices or means “specifically designed or adapted” to circumvent TPMs. However, I think that this will be problematic in a digital environment. Too narrow a specification would make it easier for TPM circumvention, while too broad a specification could prohibit myriad permitted uses and stifle technological advance. An emphasis on the use of TPM circumvention techniques, rather than the manufacture, sale, and possession, would also avoid the apparent anomaly discussed in paragraph 113.

Thus, I would urge the Ministry to reconsider their approach in this case. If the concern is that a failure to address TPM circumvention may facilitate infringement, then the appropriate response is to assert greater penalties for the use of such technology and techniques. Instead of seeking to limit information and technology, the act should emphasize that use of anti-TPM techniques indicates a positive intent to infringe (addressing the “knowledge” issued discussed in paragraphs 125-127), or that such use attaches greater penalties.

TPMs and exceptions

The above section addresses the issue of the use of TPM circumvention technologies or techniques for infringing uses. TPMs can, however, also be used to prohibit authorized uses or exceptions of copyrighted material. This is not a problem if it is the use for infringement that is regulated. If the act is an infringement, it is improper. However, if the act is not an infringement, then the use of technology is not prohibited. On the other hand, placing limits on the manufacture and distribution of TPM circumvention technology would prohibit authorized as well as unauthorized uses. While not a serious problem to date, as the use of TPMs increase, so will the problems. The Ministry recommends waiting until the problem increases before reconsidering. I would argue that this potential provides further support for a general policy emphasizing the act of circumvention (for infringement) rather than a focus on trying to limit or prohibit information and technology that might circumvent.

TPMs and Knowledge Requirement

It would appear that the subjective test recommended by the Ministry is equivalent to an argument that one should presume that information or technology would be used illegally. Again, I feel that this places an inappropriate presumption of guilt that would encourage misuse and abuse.

TPMs – offence provisions

I would support the argument that penalties be primarily civil, with the possible exception of cases of gross piracy.
Electronic Rights Management Information

Digital rights management (DRM) is an emerging area of concern within copyright policy. It is also an evolving area, as the potential of DRM shifts with technological advances. Currently, two areas of potential seem to be the focus. The first covers what the position paper refers to as Electronic Rights Management Information (ERMI) – basically identifying information about authorship, ownership, and usage conditions that can be embedded in the work itself. The more recent set of emerging debate covers the developing of associated technology that can automatically track content and/or enforce those usage conditions. That second set of issues also includes some discussions over the degree to which it is appropriate for copyright owners to restrict use.

I would agree that policy should prohibit the unauthorized removal or alteration of identifying information from content. In that sense, I would support the Ministry’s proposal to protect the intentional removal and alteration of ERMI, and I share the Ministry’s concern that in such a case, that the ERMI be narrowly limited to identifying information.

As noted in paragraph 141-142, DRM information may also include information that facilitates the tracking of information, or that allows the limitations of use by associated technologies. For instance, DRM information may include a limit on the number of viewings of material, or a time frame of viewing. Such limitations would run counter to the first sale doctrine, or the fair dealing exception of time shifting. I would be concerned that this ability to control use in essence extends a right to control copying to a right to control subsequent uses of authorized copies. As such, it would grant a substantial new set of advantages and control to copyright owners without any additional benefit argued for users. It would have the potential to severely shrink user rights, and to impose significant additional costs upon them, resulting in less use of information with its concomitant loss of social value and welfare.

The position paper supports this argument, in its discussion of limiting the “tracking” function of ERMI. However, tracking is only one aspect, and one that actually tends to occur outside of the ERMI itself (that is, the technology to track only needs to read the ERMI, rather than be embedded in the ERMI itself). The broader DRM issue of access controls is one that, in a very large sense, lies outside of the ERMI itself. My concern is not so much that there is this information, but that copyright concerns might be used to mandate that tracking and usage control technologies be included in digital media. I would urge the Ministry to consider allowing such technology, but to make a stand against mandating that digital media include tracking and/or usage control information.
Non-Original Databases

There are two main concerns regarding non-original databases and copyright. The first is the degree to which a non-original database or compilation of existing work can be considered a creative work for purposes of copyright. A related issue is whether the act of compilation, through a grant of an exclusive right to copy, effectively removes the compiled information from the public domain, or can be used to extend copyright concerns (by adding new material for a new “compilation” over time).

The position paper argues that the current protection for non-original databases is broad enough that additional extension is not needed. While I would concur with that perception, I would argue that the current New Zealand copyright policy inadequately addresses the above issues. A lax definition of “originality” shifts the balance of rights, once again to the copyright holder, and permits misuse and abuse of copyright. I am particularly concerned about the potential to try to remove public and public domain information through the device of compilation.
Permitted Acts and Exceptions

Whenever monopoly rights are granted, there must also be a related set of consumer rights granted (either to individuals or through state regulatory authority) to protect the balance of power in the marketplace. As copyright is the granting of a monopoly right to the intellectual property owner, balance demands that compensatory rights be granted to users. Traditionally, these balancing rights have occurred in two ways: by making the monopoly rights transitory, and by the permitted of exceptions to the monopoly rights. The lengthening of copyright terms has already significantly shifted the balance of rights in the first case. The limiting of exceptions will shift it even further. In fact, the limiting of exceptions that have been commonly perceived by the public as their inherent rights to certain uses has the potential to not only shift the balance further, but to trigger a social revolution against the notion of those monopoly rights. On the other hand, new digital media and technology may create new uses, and problems, calling for a reexamination of permitted acts and exceptions, including both the possibility of new exceptions as well as the revocation of older exceptions which may no longer serve their balancing purpose.

Thus, it is critical that copyright policy carefully consider permitted acts and exceptions, protect those that are widely considered essential and important, and even consider the creation of new classes of permitted acts and exceptions where socially beneficial, or to redress other shifts in the balance of owner and user rights.

Fair Dealing

Fair dealing encompasses a set of exceptions and permitted uses that have long been associated with the use of copyrighted material. Conceptually, these have tended to include a set of uses that are of arguable or potential social value, while having negligible negative impact on the commercial value of the copyrighted material. There has been some tendency to seek to restate the “Fair Dealing”/”Fair Use” exceptions as a specific, narrowly defined, set of exceptions, with the effect (if not intent) of restricting the exception. The Copyright Act 1994 seems to follow this modern tendency, by enumerating exceptions rather than identifying a general conception of fair dealing or a broad class of acts.

Section 41 of the Act deals with incidental copying (which has been addressed previously). Section 42 addresses news reporting, criticism or review. Section 43 addresses research and private study. These last two are addresses as uses, and thus are likely to be technology-neutral. The position paper argues, however, that it may be worthwhile to explicitly extend the language to deal with issues arising from digital media. There seems to be some concern that the perceptions of news reporting, criticism, and review may not extend to their Internet forms, and thus language should explicitly include them. I would suggest that it may be inappropriate to explicitly include one or more forms of media, for then it could be argued that the lack of explicit inclusion means that other media are not so privileged; that fair dealing rights should not be allowed for those media. Rather, I would suggest that if there is a concern about the extension to new media, that rather than explicitly enumerating media, that the language include a reference that embraces all forms of media; a statement that what is at issue is the purpose of use, not the medium.
The position paper notes that the research exception allows for only a single copy to be made, and notes that questions may arise about transient or incidental copying. While this may be covered by new language covering transient or incidental copying, that the Ministry should consider whether a specific reference to transient copying, or any specific number or timing of copying should be included in any new policy.

I would argue that the language of exceptions should focus on the purpose of the act, rather than any specific statement of limitations (of either numbers or timing of copies). If it is perceived to be necessary to put in place an explicit limit, I would suggest that rather than including an exception for transient or incidental, that language place a limit on the number of permanent and/or archival copies.

As someone who has researched Internet sites, I would also urge the Ministry to not place a limit on the amount of content to be covered by the exception. Such a limitation may be appropriate for the use of the copyrighted content in a report, (i.e. a review or news report should only include portions of the material, to not have a material impact on commercial value), but should not be extended to the collection of the raw material/content for research or review purposes.

Educational Institutions, Libraries and Archives

Some of the traditional “fair dealing” uses cover educational uses, including libraries and archives. Here there are strong arguments for the social value gained by excepted and permitted uses, although there are also arguments that can be made that those uses can have a negative impact on commercial value. I would argue that many, if not most, of these traditional uses need to be protected, and extended to digital media and technologies. As such, I concur with the Ministry’s basic proposition that permitted acts and exceptions be extended to the digital environment (par. 165).

Archiving

As I argued earlier, it is important to have the ability within the digital environment to make archival copies of the Internet in whole or part. It is also important, as very few forms of media are truly permanent, that it be possible to make archival copies of intellectual content in multiple forms. It is also arguable that with the rise and potential predominance of digital media, that older content forms be made available in digital formats. The current law would seem to allow copying of “at risk” works by libraries, at least in those cases where alternative copies are not readily available. I would suggest that the Ministry support language that extends the right of archival copying to all works possessed by libraries or individuals, with the limitation that the individual, institution, or library not sell their originals, or make additional copies available to, third parties.

Digitisation and Making Available

The ability to digitize content and shift forms is, I believe, inherent in any archival right. It does, however, touch on two related rights/exceptions: format-shifting and making available. While format shifting will be discussed more thoroughly later, I would argue that format shifting for an individual’s private use of authorized content is a permitted use. “Making available” is the more problematic issue.

As digital forms are easily copied, and can be made available to multiple users, it can easily be argued that too open an exception can have a significant negative impact on the
ability of the copyright owner extract commercial value from the work. In other words, if a library makes a digital version of a book freely available to any user, that is likely to impact on subsequent sales for the book. There are, I believe, four alternative approaches to solving this problem. One is to allow archiving, but prohibit the use of the archive except to replace damaged or lost content. I believe that such an approach violates both the spirit and the letter of current exceptions, and should not be supported.

A second approach is to place a limit on “making available” that is tied to the original material. For example, if the library has a single volume of a book, then it can only make a single digital copy available at a time; but if the library has a collection of thirty copies, then up to thirty digital copies can be made available. Alternatively, a library may acquire a license that allows ten simultaneous uses of a database, and it would have to enforce that limit. Such an approach would, in effect, carry through into the digital environment the limitations of the analog/physical world.

A third approach would seek to address the primary concern of the copyright owner rather than once again placing an emphasis on copies. In this approach, the concern would be whether or not the “making available” of works impacts on their commercial viability. In such a consideration, it would be necessary to reject the presumption that any use is automatically harmful (as it usurps a commercial sale). Instead, I would argue the consideration of an approach that allows libraries to offer access to the degree that they can demonstrate they can limit subsequent copying or use. For example, to make materials available in forms or formats that are transient, or use TPM to restrict the ability to copy, regardless of the location. In essence, if the use is similar to using the material in a traditional way (in the library, or on loan from it), then it would fall under the exception.

The fourth approach is based on the argument that libraries serve a valuable social purpose in permitting and encouraging use of information and content, particularly for those whose access to such materials are limited (by resources or geography). This approach would argue that “making available” should be maximized. This approach, however, would likely have significant impacts on copyright owners and their ability to extract commercial value. The Ministry notes that it is not their purpose to promote general social welfare concerns, but policy should also not prohibit those concerns from being addressed elsewhere.

The stated preferred policy (par 175) is to permit only on-site access to only those materials made available in digital format by the copyright owner. This would seem to fall more in the first alternative outlined above. I would argue that this is too narrow an exception, and would in fact discourage copyright owners from making materials available in digital form. Rather, I would urge that the Ministry should support allowing libraries to digitize all content, at least for archival purposes, and to consider using one of the other approaches outlined above, one that will encourage and promote library use and libraries’ use of digital media.

I would also like to add a brief discussion of the separate educational “making use exception.” This exception does not seem to be directly addressed in the position paper. However, I find that the language in the Copyright Act 1994 that sets enumerates specific conditions and sets strict limits on the proportion of material that can be copied (Section
44 in particular) to be detrimental to education, and harsh enough to render the exception invalid except for the most minor examples. Particularly since the wording does not provide any allowance for use of works that while still under copyright might not be readily available for purchase at a reasonable cost. I feel that such narrow construction violates the spirit of fair dealing, and reduces the ability of students and teachers to utilize a range of materials for educational purposes. I would urge the Ministry to reconsider the language used in that exception.

The Ministry also raises the question of whether or not museums should be allowed to archive their collections digitally as well. I would urge the Ministry to extend the archive exception to museums, and to other institutions and individuals. If you own copies of content, particularly content copied on perishable materials, you should be able to protect that investment by making archival copies. However, I do understand that opening the right to archive entire collections to individuals could be misused. Thus it may be appropriate to limit the group that can obtain the exception. I did take a brief look at the language of 50(1)(b), but that seems to apply only to “public archives” as defined, and not to broader collections. I would argue for a broader definition of collection, to include the widest possible set of intellectual and creative works.

**Interloan**

Libraries are increasingly using digital technologies for the purpose of interlibrary loans. It reduces shipping costs, and mitigates against potential damage to the work in question. I would argue for the treatment of interlibrary loans primarily under a general “fair dealing”, technologically neutral approach. That is, if the use would be permitted in terms of a traditional interloan (say the photocopying and mailing of a journal article for research purposes), then the use would be permitted using digital technologies (for instance, by faxing). Or, just a consideration that the use in question would have negligible commercial impact. I would argue against any separate treatment of interlibrary loans, or specific technologies or media.

**Caching**

Increasingly, educational materials are made available on the Internet. Under normal uses, those materials are open for access by users throughout the world. However, there may be cases where high-volume content is available overseas, or content may be posted only for limited materials. If large amounts of content are not available locally, local caching may serve to reduce access costs and facilitate use. This may be particularly true for New Zealand. (I could relate my experience in trying to get access to a video archived in the U.S. for a class in NZ – just let me summarize that is was both problematic and expensive to get multiple access in a timely fashion). Being able to cache the material locally would be a significant benefit.

As most educational material is open-use, the best approach would be to seek permission of the copyright owner to repost locally. Finding and contacting content owners may be problematic, however, so I can see the value of an explicit exception. However, I would argue that instead of an explicit exception, that it would be better to have this kind of use covered under a broader definition of permitted use or exception (say as transient copying or “common carrier” copying, or as a valid educational exception).
Distant Learning

The key issue with distance learning is that there are a variety of “fair dealing” exceptions that have evolved that apply to the use of materials within classrooms, under the presumption that this helps to restrict access and use to legitimate faculty and students, the use is transient, and the location restriction makes it unlikely that the copying/use will be more widely available. For distance learning, however, that classroom may involve more public forums and media.

I would urge the Ministry to consider the inclusion of distance learning exceptions, but under a technology-neutral “classroom” exception. That is, to allow uses that are permitted in classrooms to also be extended via appropriate media to registered distance education students. For example, at the University of Tennessee, we have educational support software that allows us to offer access to materials to registered students, but to prohibit general access. Such uses should be considered an extension of the classroom, and permitted.

Time-Shifting

I would make an argument that the Time Shifting exception be extended in a technology and content neutral way, rather than existing specifically for broadcast or cable programming. Referring to my earlier discussion of a right to communicate, I would argue that a fair dealing exception for time shifting be granted for any content made available in a broadcast form/use (that is, made widely available for general use, and not merely through broadcast media). The point is that the choice to make content/works available through a “broadcast” use is based on the content owners choice that value comes from widespread access and use, and time-shifting actually encourages rather than harms such value. Thus, the use of time shifting for “broadcast” content enhances rather than harms value.

Format Shifting

There would seem to be two conceptual conflicts at the roots of the debate over the validity of format shifting. The first is the fundamental issue of whether, when an information good is being purchased, the good being purchased is a particular formatted copy, or the content in that form. If you accept the argument that the transfer of a copy only gives you use of that specific physical copy and format, then it follows that format shifting, as it transfers the content to another form or even another manifestation of the same format, is illegitimate. On the other hand, if what is being exchanged is the content (with or without a specific physical form), then the purchaser then should be able to utilize the content in whatever form or format they desire. In this case, format shifting for private use would be appropriate. The second fundamental issue is whether copyright controls the right to commercial benefit from copying, or extends to the ability to control use and copying beyond the “first sale.” Under the “first sale doctrine,” copyright owner rights are limited after that first sale of a copy, which gives a stronger argument in support of format shifting.

There is likely to be continuing strong debate (and litigation) over the degree to which copyright owner rights extend beyond the first sale. I would urge the Ministry to consider including a consideration and elaboration of the first sale doctrine, as well as
addressing a somewhat more limited format shifting exception for private use. Explicit language setting out rights and limits might preclude future litigation, and by clarifying the rules, foster innovation.

I would also urge the Ministry to format any language on format shifting to also be technologically and content neutral. While the debate today is predominantly in terms of music, it is likely to expand to new forms and media rapidly (already there is a rise in electronic books – does purchase of an electronic version let you make a print copy at home?), and might be subsumed in other rights (time-shifting often subsumes a format shifting as well; there are also a variety of other devices (print readers for the blind, digital video recorders) that shift format or process content in a way that could be considered a format shift). The language of a format shifting exception should not be restricted to type of content (music), nor to a particular technology or medium. Thus, I would propose using language reflecting the following:

The owner of copyrighted content may make copies of that content in other forms and formats, for personal noncommercial uses only, and only while still maintaining ownership of the original.

I am also not convinced that the right should be limited to a single copy, as that may be confounded with issues of transient and incidental copying, and may be problematic with backing up digital storage media, or when there are multiple devices at work. I do support the “use” argument, that this exception should be restricted to the personal use of the copy owner. (The use of domestic might also be problematic in terms of, say, including use in cars, in portable devices, or in players at a private office). I would suggest using noncommercial rather than domestic—it gets at the main issue of not permitting copies for sale, and personal would arguably preclude giving away copies. If language is to limit the number of copies, I would suggest again using the phrase “permanent copies” instead of copies, to avoid transient copying issues, and problems associated with temporary storage on replay media.

Levy Schemes

Copyright holders often argue that allowing format shifting, and the making of private copies, causes economic harm in terms of lost sales. They also often suggest that that harm should be compensated through the use of levies on the materials that might be used to make such copies. The argument might be somewhat more compelling if they spoke in terms of a compulsory licensing, funded through a levy, and based on more reasonable estimates of actual harm, but they seem to want the levy while maintaining that the act itself is illegal. What that amounts to is an attempt to shift the costs of enforcement from the copyright owners to the state and to the consumers of the levied media or technology. While shifting the balance, there is an additional unfairness built in, in that the levy must also be paid by those who do not engage in the illicit activity. It also could tend to increase the problematic activity, as consumers figure since they’re already paying for copying, they may as well engage in the activity. Thus, I concur with the Ministry that a levy scheme does not seem appropriate at this time.
**WIPO Internet Treaties**

The WIPO Internet treaties are a reaction to a number of issues raised by the evolution of digital technology and digital media, the Internet in particular. The treaties do not appear to be well drafted, as the language in many parts is problematic, or at least is broad enough that it can accommodate misuse and abuse of the traditional monopoly copyright. In particular, the WIPO treaties would appear to foster a significant shifting of the traditional balancing of owner and user rights in favor of copyright owners. On the other hand, the treaties do raise issues that it would be worthwhile for countries to address in their own copyright policy, and it would seem possible to adequately address those issues within the framework of the WIPO treaties while maintaining the traditional balance.

In fact, this position paper tends to seek that resolution, and the proposed policy responses would seem to comply, for the most part, with the WIPO treaties.

It would seem that, to date, there has been limited support for the WIPO treaties (as of 15 January 2003, there were only 39 signatories), and it is unclear what additional benefits may accrue from accession. Thus, I would concur with the proposed policy of focusing policy development on the various issues raised by digital technology, with an awareness of the WIPO treaties provisions and an eye towards eventual compliance and accession, rather than rushing to support the treaty itself.