

Copyright – a tradable asset?

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Around the globe, copyright has played and continues to play a vital role in connection with numerous industry sectors that are of critical importance to the world economy. New challenges constantly have to be overcome in order to ensure the continued functioning of copyright. This is due to various factors, in particular the high growth rate experienced in different branches of industry, such as the area of software development, which has arisen as a natural consequence of the information society. This paper will examine the different measures used to cope with these challenges – from the past right up until the present day – to reveal whether copyright is a tradable asset. Starting with a historical overview, the paper will show the different legal foundations and starting points of copyright in New Zealand and author's rights in German. These starting points are still reflected today in the different focuses and conditions of protection in the two countries.

I. HISTORICAL OVERVIEW

1. Common Ground

a) The Statute of Anne

aa) From privilege to author's rights

As a former British colony, New Zealand's legal system was strongly influenced by the traditional English system. This means that the starting point of copyright law in New Zealand is the Statute of Anne 1709, which is often said to be the first copyright statute in the world.¹ The Statute focussed primarily on protecting publishers against prohibited copying,² and aimed to abolish the position of supremacy held by the Stationer's Company – a printers' and publishers' guild. While the Statute was initially thought of as instrument to protect the profession, a special Stationer's Copyright was in fact granted to the guild. Over time, the rights granted by the Statute were increasingly monopolised by publishers.³

bb) Millar v Taylor and Donaldson v Becket

After the Statute of Anne came into force, the Stationer's Company relied on common law Copyright, which is founded on *John Locke's* labour theory, to regain and maintain their position of supremacy.⁴ Accordingly, a natural law copyright was asserted alongside the protection offered by the Statute of Anne, and therefore it was said to be transferable to the publishers. In this way they attempted to circumvent the legal

¹ Haimo Schack, *Urheber- und Urhebervertragsrecht*, Mohr Siebeck, 3. Aufl., Tübingen, 2005, 49.

² Beatrice Wagner-Silva Tarouca, *Der Urheberschutz der ausübenden Künstler und der Tonträgerproduzenten in den USA*, Beck Verlag, München, 1983, 1.

³ Harald Peter Knöble, *Die „kleine Münze“ im System des Immaterialgüter- und Wettbewerbsrechts*, Dr Kovac, Hamburg, 2002, 15.

⁴ *John Lockes* labour theory will be re-visited in more detail below in paragraph III A. 1 in relation to German author's rights.

requirements of the Statute.⁵ The 1969 case of *Millar v Taylor*⁶ was the first case in which the courts affirmed the view propounded by the Stationer's Company (acting disguised behind author's interests), that a common law copyright existed.⁷ The judicial recognition of a natural law foundation to copyright turned out to be short-lived. After only five years the House of Lords overruled the decision in *Donaldson v Beckett*⁸.

2. New Zealand and Positivism

a) Positivism versus Natural Law

aa) The concept of 'Property'

Both the term 'property' and the legal foundations of the concept differ in New Zealand from those in German law. The development of the originally Anglo-Saxon concept of property, as an economic right, is closely related to the respective roles of common law and statute law in the legal system. This means that special attention needs to be paid to parliamentary supremacy: unlike judge-made law, law made by Parliament does not have to be based on precedent, custom or natural law reasoning.⁹ Thus, property law is still regarded today as an instrument that is created by the lawmaker purely to serve society's needs and economic interests (Zweckmäßigkeitsschöpfung)¹⁰

This heritage means that in Great Britain and in New Zealand it is generally not regarded as necessary for statutes to accord with natural law in order for them to be within the bounds of legality. As a consequence,

⁵ Matthias Ruete, *Copyright, „geistiges Eigentum“ und britische Verwertungsgesellschaften*, J. Schweitzer Verl., München, 1986, 20.

⁶ *Millar v Taylor* (1769) 98 ER 201.

⁷ Ian Eagles, *New Zealand Moral Rights Law: Did Something Get Lost in Translation?* [(2002) 8 NZBLQ 26, 37].

⁸ *Donaldson v Beckett* (1774) 1 ER 837.

⁹ Even today New Zealand does not have a written constitution comparable to the German Basic Law (Grundgesetz), capable of circumscribing legislative power.

¹⁰ J Ormond, *Moral rights and the Copyright Act 1994*, University of Auckland, Auckland, 1995, 2.

the same is true of property rights. It follows that property, in a legal sense, is not limited to what Locke suggested as part of his labour theory, namely that which is acquired through labour.¹¹ Instead, the concept of property is far wider, and encompasses property awarded by statute such as copyright, as a chose in action.¹² Property in a New Zealand sense is therefore not limited to movables and immovables as it is under the German system.¹³

bb) Utilitarian conception of the Statute of Anne

The Statute of Anne grants no 'natural' legal rights to authors. The exclusive right of authors and their successors to copy and distribute their works – from the moment of publication onwards – can be used to demonstrate this.¹⁴ As discussed below, it is not the author's act of creation itself, but the publication which gives rise to legal rights. In light of this, protection of the trade rather than the author is the main focus here. The lawmaker still substantiates this state of affairs by means of the public interest premise. This suggests that Jeremy Bentham's utilitarian ideas have had a decisive influence on copyright law.¹⁵ Accordingly, the applicable law has to be of the greatest use for society in order to be valid.

This Benthamian concept is one of the foundation stones of copyright. Individual property rights are bestowed upon the author, thus creating an incentive for increased production while at the same time improving public welfare.¹⁶ The potential to gain private wealth by creating and publishing works of intellectual property in turn encourages the generation and

¹¹ Pascal Oberndörfer, *Die philosophische Grundlage des Urheberrechts*, Nomos, 1. Aufl., Baden-Baden, 2005, 53.

¹² Copyright pursuant to section 14 of the New Zealand Copyright Act 1994 a property right.

¹³ Ruete, see above n. 5, 35.

¹⁴ Wagner-Silva Tarouca, see above n. 2, 1.

¹⁵ Eagles, see above n. 7, 29.

¹⁶ Wagner-Silva Tarouca, see above n. 2, 13-14.

invention of new works.¹⁷ In this sense it is more lucrative to primarily protect the investment of time, skill and capital expenditure in the process of creation instead of the individual interests of the author.¹⁸ This means that a general tendency in favour of the public interest can be said to be underlying copyright protection.¹⁹

The utilitarian conception of copyright is reflected in the Statute of Anne. In particular, the title “Encouragement of Learning” reflects its central theme. The object of the statute is not just to encourage knowledge acquisition in terms of specific information and skills, but to promote learning and acquisition of knowledge in general.²⁰ This object is taken up in section 1 of the Statute of Anne: “Encouragement of learned Men to compose and write useful Books“. The attention is directed to “useful books” to ensure that findings gained through research and science can be used for innovation and progress, thus benefiting the general public.²¹ Consequently, the granting of exclusive copyrights (although limited in time) is attributable to legal, cultural and most importantly, economic, considerations of the lawmaker. Hence the focus is on supporting the sciences and useful arts in order to increase innovation, prosperity and the standard of living in the public interest.²²

3. Germany and Natural Law

a) Natural Law versus Positivism

aa) Locke and Intellectual Property

¹⁷ Ibid.

¹⁸ Knöble, see above n. 3, 19-20.

¹⁹ Ormond, see above n. 10, 3.

²⁰ Oberndörfer, see above n. 11, 50.

²¹ Ibid.

²² Knöble, see above n. 3, 18-19.

At times of privileges in Germany, the prevailing canon protecting the printers' and publishers' profession was driven out by the intellectual property doctrine, in particular due to John Locke's labour theory.²³ His fundamental idea was that the person who applies his labour to an object should be able to reap the fruits of that labour.²⁴ Accordingly, the labour theory was extended so that protection moved away from the publisher and instead was directed at the author, thus resulting in a copyright independent of the granting of privileges. Today in Germany, the lawmaker does not grant the rights in the work to the author, as is the case in New Zealand. Instead, the author's right in his or her work arises from its very nature, namely intellectual property. This means that the statutes are only providing for formal recognition and formulation for intellectual property rights, and a legal framework in which they can operate, rather than creating the actual rights.²⁵

Nevertheless, the objection by German academics that property could only exist in tangible objects could not be overcome.²⁶ In particular, during the lawmaking process, differences between the 'property of things' (Sacheigentum) and intellectual property became apparent.²⁷ As a result, author's rights (Urheberrecht) are not rights in rem, giving rise to possession of the work. Unlike the 'property of things' they are also limited in time. They only guarantee the control over the work, protecting the material and non-material interests of the author. These factors contributed to severe criticism of the doctrine of intellectual property during the second half of the 19th Century. Moreover, author's rights were

²³ Stefan Gottwald, *Das allgemeine Persönlichkeitsrecht*, Berlin Verl. Spitz, Berlin, 1996, 21. The intellectual property, which the author left to the publisher enabled the latter to legally prevent copies of the work being made by another.

²⁴ Wagner-Silva Tarouca, see above n. 2, 13.

²⁵ Knöble, see above n. 3, 11.

²⁶ Gottwald, see above n. 23, 22.

²⁷ Note that German private law traditionally defines the property object independently of the obligations, which sustain it. The 'law of things' (Sachenrecht) is therefore separate from 'the law of obligations' (Schuldrecht) in the Civil Code. See also Eagles above n.7,33.

overwhelmingly regarded as pure economic rights rather than personal rights and this eventually lead to the rejection of the doctrine in Germany.²⁸

bb) Author's rights as rights of personality

Towards the end of the 19th Century Otto von Gierke asserted the theory of author's rights as 'personality rights' (Persönlichkeitsrechte).²⁹ According to Von Gierke, a work of intellectual property is to be understood as part of or an extension of the author's personality, over which the rights are guaranteed.³⁰ Along these lines, commercial exploitation of the works does not only serve economic ends.³¹ Instead, the focus is on the author's interest in gaining a good reputation and being held in high esteem. In this way Von Gierke's theory made a significant contribution in relation to the protection of authors' non-material interests.³²

cc) The doctrine of non-material rights

Even the doctrine of personality rights was not fully satisfactory, as protection of the author's personality alone could not do justice to the economic significance of author's rights. There was a need to recognise the fact that an intellectual creation can exist in its own right in the business world, without necessarily being connected to the author's personality.³³ This need led to the development of the theory of 'non-material rights' (Immaterialgüterrechte). This theory resembles the notion of exclusive protection of property rights, which is still valid today.³⁴

²⁸ Knöble, see above n. 3, 12-13.

²⁹ Ibid, 12.

³⁰ Oberndörfer, see above n. 11, 111.

³¹ Gerhard Schricker, *Urheberrecht: Kommentar*, Beck Verlag, München, 1987, 246.

³² Knöble, see above n. 3, 12-13.

³³ Ibid.

³⁴ Gottwald, see above n. 23, 31.

Accordingly, author's rights are neither pure economic nor pure personality rights.³⁵

As has been maintained by Josef Kohler, non-material rights have a distinctly dualistic character.³⁶ It follows that the author's economic and personality rights exist independently of one another in terms of their nature and effect. This means that the author's economic rights protect a work only as a commercially exploitable asset.³⁷ Despite this, Phillip Allfeld's monistic theory of author's rights became generally accepted in Germany during the 20th Century.³⁸ Accordingly, author's rights have to be regarded as a single right with a double function due to the strong correlation of economic and personality aspects,³⁹ simultaneously protecting the author's non-material relations with his work and its material exploitation.⁴⁰

4. COMPARISON

a) Dichotomy of both systems of copyright protection

In spite of similar starting points, a comparison of both legal systems shows that the historical development gave rise to two very distinctive systems with regard to the protection of intellectual property works – above all due to the different reception of natural law in each country. Based on the British development, copyright in New Zealand became defined as a legal right by statute, thus, relying on a positivistic conception of the law, whereas natural law theory contemplating independent rights of the individual gained the upper hand in Germany.⁴¹ Therefore, it is not surprising that New Zealand copyright takes a pragmatic policy approach

³⁵ Oberndörfer, see above n. 11, 111-112.

³⁶ Gottwald, see above n. 23, 26.

³⁷ Knöble, see above n. 3, 13.

³⁸ Gottwald, see above n. 23, 26. In 1965, the 'monistic theory' was codified in § 11 UrhG.

³⁹ Ibid, 26-27.

⁴⁰ Schack, see above n. 1, 53.

⁴¹ Knöble, see above n. 3, 19-20.

while German law works more dogmatically, concentrating on the personality of the author.

aa) Author's rights versus Copyright

The orientation of New Zealand and German law is quite different in kind, which can be demonstrated by examining the varying terminology.⁴² Initially, during the time of the Statute of Anne 1709, the term "copyright" was understood literally. Thus, to own a copy meant to have the exclusive right to print and publish a book.⁴³ Even today, copyright is still an impersonal, negative right, conferring on its owner (who does not have to be the author) the right to prevent the copying of a work by another. New Zealand copyright is, therefore, primarily to be regarded as an economic right, which protects financial investment as a matter of priority, placing special emphasis on commercial aspects.

In contrast, the German term 'Urheberrecht' has its roots in natural law theory. The name speaks for itself – the author (Urheber) is given priority here as opposed to commercial gain. Consequently, the work is protected as an expression of the author's personality. In addition, the author is able to control and exploit his creation in each and every aspect.⁴⁴ In light of this, the focus on the author's personality comes strongly to the fore. In contrast, owing to the principle of freedom of contract, the New Zealand author is faced with a weak bargaining position on his or her own.

bb) Copyright as a monopoly

In light of the above, one can say with certainty that the New Zealand copyright owner obtains a legal monopoly, limited in time, which arises by way of law – due to the owner's legal power rather than his or her market

⁴² Schack, see above n. 1, 11.

⁴³ Knöble, see above n. 3, 19-20.

⁴⁴ Ibid.

position.⁴⁵ In classifying exclusive rights in copyright works as property rights, and thus converting copyright into a tradable asset, the lawmaker awarding those rights is limiting the freedom to carry on a business. It follows that the natural state of affairs, that is to say, the work being commonly available upon its publication, is displaced.⁴⁶

German author's rights do not give rise to a monopoly seeing that they are granted as a result of the mere fact of creation and are thus regarded as the natural state of affairs as opposed to free public availability. Accordingly, the lawmaker is only competent to acknowledge and safeguard the natural right – but incapable of creating it. In view of that, one has to point out that the exclusive rights of copying, commercial exploitation and public rendition, derived from the author's right, can result in a de facto monopoly. However, this is to be regarded solely as an effect of author's rights; their natural law character has to be strictly separated.⁴⁷

II. PERSONAL ASPECTS OF COPYRIGHT LAW

1. Little protection in New Zealand

a) Copyright until 1994

The New Zealand legislative and the House of Lords amongst many others rejected the possibility of natural law foundations of British copyright. It follows that the nature of copyright law in New Zealand was shaped by a positivistic conception of law. Always regarded as a pure economic right, until the renewal of the Copyright Act in 1994, New Zealand copyright had never granted any special protection with regards to the non-material interests of the author.⁴⁸ The only available but inadequate protection of the author's personality was limited to that offered

⁴⁵ Peter Jones, *Copyright Law and Moral Rights* [(1997) 5 Waikato Law Review Online 3].

⁴⁶ Wagner-Silva Tarouca, see above n. 2, 9.

⁴⁷ Knöble, see above n. 3, 19-20.

⁴⁸ Ormond, see above n. 10, 37.

by the law of contract, defamation, passing off and later on the Fair Trading Act 1986.⁴⁹

2. Significant international influence

a) The Berne Convention for the Protection of Literary and Artistic Works 1886

The significant international legal influence can be regarded as the main impetus for a new Copyright Act and, thus, the introduction of moral rights in New Zealand. In order to bring the different legal systems into line with each other, an attempt was made to move closer to the civil law concept of non-material rights along the lines of the Berne Convention.⁵⁰ The Berne Convention 1886 is one of the oldest and most successful treaties aiming at the continued improvement of copyright protection of all contracting states by way of regular revision conferences.⁵¹

aa) Minimum rights

Moral rights are set out in article 6bis of the Paris text of the Berne Convention. Accordingly, the protection embraces the right of the author to claim authorship of the work, and to object to any distortion, mutilation or other modification, or other derogatory action in relation to the said work, which would be prejudicial to his or her honour and reputation.⁵² Yet, these minimum rights provided for in the Berne Convention exerted only indirect influence on New Zealand copyright, due to the fact that New Zealand still has not ratified the treaty.⁵³

⁴⁹ The application of the Fair Trading Act 1986 is not restricted to consumers but extends to competitors.

⁵⁰ Wagner-Silva Tarouca, see above n. 2, 1.

⁵¹ The essay refers to the Paris text of the Berne Convention from 1971, which is applicable in most contracting states today.

⁵² Article 6bis (I) of the Berne Convention.

⁵³ Ormond, see above n. 10, 1.

b) The Trade Related Aspects of Intellectual Property Rights Agreement 1993

Catalyst for the significant changes in favour of the author was a misunderstanding regarding the TRIPS Agreement. On the face of it, the TRIPS Agreement mandates compliance with the Berne Convention and its moral rights provision. As a party to the convention, New Zealand's protection of author's interests would not have been sufficient for the country to live up to its international obligations. However, article 9(1) of the TRIPS Agreement excluded the protection of article 6bis of the Berne Convention.⁵⁴ Nevertheless, New Zealand felt prompted by its international responsibilities to embrace article 6bis independently. The perhaps mistaken pursuance of the objective of complying with international law initiated the creation of a new Copyright Act, including Part IV – the new moral rights provisions.

c) The General Declaration on Human Rights 1948

The growing importance of human rights on an international and national level provided another incentive for the recognition of the author's moral rights.⁵⁵ As a matter of international law, moral rights are embodied in article 27(2) of the Universal Declaration of Human Rights, as regards the protection of the author's personal interests.⁵⁶ For these reasons, the new Copyright Act was finally passed in 1994.

⁵⁴ Eagles, see above n. 7, 27

⁵⁵ Although New Zealand has no written constitution as such, human rights also play a central role in the legal system, which is partly due to the growing influence of international treaties since the beginning of 1980. Since then, national courts have increasingly considered human rights treaties in reaching a decision, although there has been no copyright case to date. See also *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

⁵⁶ <http://www.butterworthsonline.com.ezproxy.auckland.ac.nz/lpBin20/lpext.dll/bw/L12/236/cop/1?f=templates&fn=bwalmmain-j.htm&contents=yes&szPath=/bw/L12/236/cop/1> (Brookers, 05.09.2005).

3. New Zealand Copyright Act 1994

a) Great Britain's continued influence

Especially in light of the limited time available to the lawmaker for renewal, New Zealand decided to follow the lead of the United Kingdom.⁵⁷ To be more precise, the Copyright Act 1994 is based on the UK Copyright Act 1988, as is the moral rights part of the statute.⁵⁸ Moral rights are therefore, just like copyright, part of statute law made by Parliament. The right to recognition of authorship and the right to respect of the integrity of the work are the two most important moral rights,⁵⁹ for the purposes of this essay – at the same time being minimal rights under article 6bis of the Berne Convention, which had to be upheld by Great Britain as a party to the treaty.⁶⁰

aa) Separation instead of order

Copyright and moral rights exist separately and independently of each other, due to the fact that the statute takes up the 'dualist theory' of copyright law.⁶¹ In view of that, moral rights are separated from copyright, as a purely economic right. Furthermore, New Zealand moral rights are clearly limited to the rights listed in the statute, protecting the non-material interests of the author. Despite the fact that the Copyright Act positions moral rights before copyrights, the statute centres on copyright as an economic right.⁶² The structure of the statute therefore gives no indication of the value ascribed to the non-material interests of the author.

bb) No unity of underlying thought

While German doctrine derives author's rights from the natural law property right in the author's personality, calling on significant

⁵⁷ Eagles, see above n. 7, 27.

⁵⁸ J.A.L. Sterling, *World Copyright Law*, Sweet & Maxwell, London, 1998, 442.

⁵⁹ Section 94 of the Copyright Act 1994.

⁶⁰ Bentley und Sherman, *Intellectual property law*, Oxford University Press, 2 Aufl., Oxford, 2004, 63.

⁶¹ Ormond, see above n. 10, 61.

⁶² Jones, see above n. 45, 3.

jurisprudential considerations,⁶³ New Zealand copyright and moral rights have to do without such fundamental principles, seeing that they are purely creations of statute. Moreover, the lawmaker did not stipulate any guiding principles of policy in the Copyright Act 1994.⁶⁴ This lack of a unifying central theme is partly due to the lawmakers only having limited time available to them in order to examine the foundations of copyright – that is, briefly and not thoroughly.⁶⁵

cc) British half-heartedness

Alternatively, the lack of unity also has to do with the historical development of New Zealand copyright law, including the Statute of Anne 1709 and the ‘dualist theory’. In view of that, special attention has to be paid to the half-hearted implementation of article 6bis of the Berne Convention in Great Britain.⁶⁶ During the 10-year phase of development of Great Britain’s new Copyright Act, the media and entertainment industries in particular had plenty of opportunities to limit the protection of author’s rights through continual, strong and strategic lobbying practices.⁶⁷ When the statute was passed in 1988, the lawmakers had acceded to nearly every objection put forward by various interest groups via numerous wide exceptions, optional waivers of rights and the possibility of informal consent to breach of the author’s moral rights.⁶⁸ Therefore, the protection of non-material interests is guaranteed to a very limited degree only, as regards both countries, Great Britain and New Zealand.

The paternity right serves as an illustrative example of the shortcomings of moral rights law in New Zealand.⁶⁹ The author must assert the right in

⁶³ Wagner-Silva Tarouca, see above n. 2, 6-7.

⁶⁴ Eagles, see above n. 7, 27.

⁶⁵ Ormond, see above n. 10, 66.

⁶⁶ Bentley und Sherman, see above n. 60, 234.

⁶⁷ Eagles, see above n. 7, 27, 40.

⁶⁸ Ormond, see above n. 10, 14, 66.

⁶⁹ Section 94 of the Copyright Act 1994.

order to rely on it to require a person to identify him or her as the author.⁷⁰ Assertion of the right to recognition of authorship can take place at any time after the work has been created,⁷¹ using one of the mechanisms set out in the Copyright Act. However, delays in doing so are to be taken into account by the court pursuant to section 96(5) when considering remedies in an action for infringement of the right. Again, economic efficiency is at the core of the norm. To be more precise, the process of searching for the author was seen to be too expensive and time consuming for those who legitimately exploit the work, especially regarding mundane or utilitarian works made by anonymous employees.⁷² Consequently, the automatic recognition of authorship could not be economically justified, resulting in the pre-condition of assertion, which has to be satisfied whenever the author wants to make use of the paternity right.

b) Moral Rights as an economic incentive

aa) The origin and development of the author's reputation

Along the lines of the Berne Convention, moral rights protect the honour and reputation of the author.⁷³ But even in light of that, a pragmatic economic approach is taken again, as is demonstrated above by the example of the paternity right. In relation to that, the right of integrity is of importance, too. Under section 98 of the Copyright Act 1994, the author is protected from damage to his reputation. The Act aims to maintain and develop the author's reputation, at the same time giving rise to commercial success, which in turn provides a new economic incentive to create more copyright works. In this way, the granting of individual moral rights can lead to more copyright production and, thus, innovation in the public

⁷⁰ Section 96 of the Copyright Act 1994.

⁷¹ Bentley und Sherman, see above n. 60, 238.

⁷² Eagles, see above n. 7, 50-51.

⁷³ Jones, see above n. 45, 5.

interest.⁷⁴ As follows, Bentham's utilitarian conception appears to play a decisive role in shaping moral rights in New Zealand.

c) Non-assignable moral rights

aa) An obstacle to exploitation?

Despite the fact that moral rights exist separately from copyright (as an assignable economic right), they are not assignable, following the civil law approach – mainly to ensure compliance with Great Britain's international obligations under the Berne Convention.⁷⁵ This non-assignability (Unübertragbarkeit) may give rise to potential obstacles to exploitation at first glance. However, these barriers can be removed quite simply through a waiver of rights pursuant to section 107(2) of the Copyright Act. Additionally, the Act does not stipulate any formality requirements so that the author can informally consent to a breach of his or her moral rights.⁷⁶ However, in case proceedings arise, such consent has to be manifested in a way discernible to the court. As a result, it is not an infringement of moral rights to use a work in a manner to which the author has consented.⁷⁷

For these reasons, copyright authors might be tempted to give up their moral rights in favour of monetary gain, which has become subject to intensive criticism. It has been argued, that by way of consent or waiver, inalienable moral rights are converted into economic rights, which leads to an inalienable decline in the level of protection regarding the author.⁷⁸ Besides, publishers and others exploiting copyright works, may have an increased chance of exerting their influence by continually insisting that authors waive their moral rights, in order to create a custom or a practice

⁷⁴ Ormond, see above n. 10, 64.

⁷⁵ Section 118 of the Copyright Act 1994.

⁷⁶ Section 107(1) of the Copyright Act 1994.

⁷⁷ Eagles, see above n. 7, 72.

⁷⁸ Ormond, see above n. 10, 58.

to that effect.⁷⁹ As of yet, practice in New Zealand does not reflect these concerns but maybe the commercialisation of moral rights is only a matter of time.⁸⁰

bb) Formalities of the waiver

Besides, the New Zealand Copyright Act 1994 provides for certain formalities as a precondition to protection, contrary to the legal requirements of the Berne Convention. A waiver of moral rights, for instance, has to be made by an instrument in writing, signed by the person waiving the right under section 107(2).⁸¹ Nonetheless, it is not clear what happens if the formalities are not complied with. The law in New Zealand appears to be ambiguous as regards the application of the common law rules concerning implied contractual terms⁸² and the law of estoppel⁸³, which is of particular importance, seeing that those rules could sustain, what would otherwise be formally ineffective waivers.⁸⁴

A comparison between the New Zealand Copyright Act and its UK counterpart might give an indication of whether these common law rules are applicable.⁸⁵ While the British provision expressly preserves the general law relating to estoppel and implied contractual terms, the New Zealand provision does not do so. Applying the presumption of deliberate departure, it might be assumed that an informal waiver is not permissible in New Zealand.⁸⁶ Moreover, it has to be mentioned that the author's

⁷⁹ Jones, see above n. 45, 6-7.

⁸⁰ Ibid.

⁸¹ Ormond, see above n. 10, 52.

⁸² The courts may imply additional terms into the contract in question where the intention of the parties makes it clear. This is to be objectively determined from the circumstances surrounding the contract and the conduct of the parties alongside with any law or custom to that effect. Dietl und Lorenz see above n. 48, 387-388.

⁸³ Dietl und Lorenz, *Dictionary of Legal, Commercial and Political Terms*, Beck 2000, 287.

⁸⁴ Eagles, see above n. 7, 41.

⁸⁵ Section 87(2)(b) of the Copyright, Patents and Designs Act 1988 (UK)1988

⁸⁶ Eagles, see above n. 7, 72.

waiver in this context is not based on a contractual agreement, whereas the rules in question are creatures of contract law.

cc) Rejecting the Privity Rule⁸⁷

Conversely, the absence of a contractual relationship also leads to the author being unable to rely on the privity rule, which is also very important to note, seeing that a waiver is presumed to extend to the licensees and successors in title of the owner and prospective owner of rights unless a contrary intention is expressed under section 107(3).⁸⁸ As a result, the waiver can be stretched “down the chain of future licensees and assignees to uses undreamed of and beneficiaries unheard of at the time moral rights are signed away”.⁸⁹

In view of that, the question arises whether the Act is going too far in this respect, seeing that “moral rights are designed to secure for authors an enduring and visible link with what they have created”.⁹⁰ Along these lines, the author’s bargaining position – already being more or less ineffectual – is further weakened, enabling publishers and others exploiting copyright to take full advantage of the author’s unfavourable situation.⁹¹ Although the waiver may be subject to revocation, this has to be expressly provided for, which is easier said than done in light of the author’s prejudicial position.⁹² In any case, despite the introduction of moral rights in New Zealand, the author generally comes off worst, in particular regarding the common law’s assurance of absolute freedom of contract, since Investors and Publishers have the whip hand in most cases, due to their stable position in the market. For these reasons, copyright can be regarded as a tradable asset in New Zealand.

⁸⁷ In general only parties to a contract are capable of enforcing it. In the same vein, a contract can only be enforced against its parties. Dietl und Lorenz, see above n. 83, 643.

⁸⁸ Jones, see above n. 45, 6.

⁸⁹ Eagles, see above n. 7, 75

⁹⁰ Ibid, 74.

⁹¹ Ormond, siehe oben fn. 10, 58.

⁹² Section 107(7)(c) of the Copyright Act 1994.

4. Strong protection in Germany

a) Significant national influence

aa) From theory to practice

As mentioned above, towards the end of the 19th Century Otto von Gierke's theory of author's rights as personality rights became generally accepted. In view of that, the decision *Felseneiland mit Sirenen*⁹³ of 1912 is of special importance as it provided the basis of general moral rights law in Germany (allgemeines Urheberpersönlichkeitsrecht).⁹⁴ In the course of time, several individual moral rights were derived from the case,⁹⁵ including the right to integrity,⁹⁶ the right to recognition of authorship⁹⁷ and the right to choose when a work is fit for publication or display⁹⁸. Subsequently, moral rights law, focussing on the author's non-material interests, was codified in 1965 by the Author's Rights Act (Urheberrechtsgesetz), which is still valid today. While moral rights in Germany have mainly been subject to the national influence of academics and judges, they can also be seen to have developed in response to international pressures – albeit to a lesser extent than in New Zealand. Germany as a party to the Berne Convention, for instance, is bound to comply with article 6bis, which is clearly reflected in the Author's Rights Act 1965.

b) The Author's Rights Act (Urheberrechtsgesetz) 1965

aa) Author's rights provide comprehensive and undivided protection

(1) Order not separation

The Author's Rights Act 1965 is based on the 'monistic theory'. Accordingly, copyright is a unitary body of law in which moral and other rights are seen as interconnected and mutually reinforcing, simultaneously

⁹³ RGZ 79, 397 - *Felseneiland mit Sirenen*.

⁹⁴ Gottwald, see above n. 23, 29.

⁹⁵ Jochen Dieselhorst, *Was bringt das Urheberpersönlichkeitsrecht*, Lang, Frankfurt am Main, 1995, 98.

⁹⁶ RGZ 102, 134 – *Strindberg-Übersetzung*.

⁹⁷ RGZ 110,393 – *Raumkunstwerk*.

⁹⁸ BGHZ 15,249 – *Cosima Wagner*.

protecting material and non-material interests of the author. Moreover, exercising these rights can bring to bear elements of both economic and moral rights, which is illustrated by the double nature of the right of first publication and display (§ 12 UrhG), being a fundamental right of the copyright author.⁹⁹ The right generally finds application at the time when the so-called 'exploitation rights' (Verwertungsrechte) are being made use of – suggesting an inalienable connection between economic and moral rights.¹⁰⁰

Ulmer's figurative approach comparing author's rights to a tree illustrates this connection particularly well. The author's protected material and non-material interests are represented by the roots of a tree, whose trunk symbolises uniform author's rights.¹⁰¹ The varied rights of the author are embodied in numerous branches of the tree, which are supported and strengthened, sometimes through either of the roots and sometimes through both.¹⁰² It follows that while damage to personality rights can bring about economic entitlements, the same is also true vice versa in that exploitation rights may give rise to claims regarding the personality of the author.¹⁰³

In accordance with the monistic understanding of author's rights, the lawmaker's classification of author's rights into moral rights (§§ 12-14 UrhG), exploitation rights (§§ 15-24 UrhG) and other rights of the author (§§ 25-27 UrhG) has no limiting but only organising effects.¹⁰⁴ The moral rights focus of German author's rights is reflected beside the specially listed moral rights in many other sections of the Author's Rights Act 1965, which predominantly serve to protect the non-material interests of the

⁹⁹ Schack, see above n. 1, 145.

¹⁰⁰ Schricker, see above n. 31, 246-247

¹⁰¹ Ibid.

¹⁰² Dieselhorst, see above n. 95, 98-99.

¹⁰³ Knöble, see above n. 3, 14

¹⁰⁴ Schack, see above n. 1, 145.

author.¹⁰⁵ The requirement of consent on part of the author regarding the further assignment of exploitation rights is an example, seeing that authority over the work remains in the author's hands protecting him or her from completely giving up the rights in question (§ 34(1) and (2) UrhG).¹⁰⁶

bb) Copyright as a personal right

(1) Only a natural person can be an author

Furthermore, author's rights are regarded as personal rights, which is partly due their constitutional foundations.¹⁰⁷ To be more precise, in respect of the moral rights elements of author's rights, articles 1(1) and 2(1) of Germany's Basic Law (Grundgesetz), dealing with the protection of personality, are applicable. Accordingly, moral rights serve to protect human dignity and guarantee the uninhibited development of the author's personality. In addition, the personal nature of author's rights bears a close connection to the 'author's principle' (Schöpferprinzip) founded on natural law. That is to say, the author is seen as transferring part of his or her personality onto the copyright work by way of the act of creation.¹⁰⁸ Seeing that only human beings are capable of creating intellectual works and developing their personality in doing so, only natural persons can be authors of copyright works, thus, excluding legal persons.¹⁰⁹

(2) Injury to personality by way of damage to the work

In addition, on account of the 'author's principle', authorship can only be awarded to the natural person who actually create the work as opposed to the owner of one or more exploitation rights.¹¹⁰ Hence, the creator of the work – on account of his or her intellectual performance – is entitled to rely

¹⁰⁵ Dieselhorst, see above n. 95, 98-99.

¹⁰⁶ Horst-Peter Gotting, *Persönlichkeitsrechte als Vermögensrechte*, J.C.B. Mohr, Tübingen, 1995, 163.

¹⁰⁷ Schack, see above n. 1, 39.

¹⁰⁸ Schricker, see above n. 31, 218.

¹⁰⁹ § 7 UrhG.

¹¹⁰ Schack, see above n. 1, 11.

on author's rights (as his property) as part of the natural order of things. In view of that, one has to briefly draw attention to a distinguishing feature of German author's rights, that is, the author's special connection with his or her work (Werkbezug). Moral rights offer exclusive protection of the author's non-material interest in relation to a particular work.¹¹¹ In this way, 'the intellectual bond' (das geistige Band) is maintained and reinforced, linking the author with his or her creation as an expression of his or her personality.

In this context, the right of recognition is used to exemplify the preservation of the author's intellectual personal interests in relation to the work. In contrast to New Zealand copyright law where assertion is required, the author is automatically entitled to demand that the work be recognised as his or her brainchild (§ 13 Sentence 1 UrhG).¹¹² As a result, Germany lives up to its international obligations under article 6bis of the Berne Convention, which provides for the protection of moral rights interests without requiring any formalities. In ensuring this right to automatic recognition, the intellectual bond between author and work – only in so far as the author desires – becomes visible to the public so that authorship cannot be denied.¹¹³

cc) Non-assignable author's rights

Unlike New Zealand copyright law, German author's rights, as non-material rights (§ 11 UrhG) are based on a monistic understanding of the law and, thus, encompass both, economic and moral rights as integral components.¹¹⁴ As a consequence, all of the author's rights in Germany are prima facie not assignable – with the exception of assignment after

¹¹¹ Ibid, 19.

¹¹² Ibid.

¹¹³ Schricker, see above n. 31, 270.

¹¹⁴ Ormond, see above n. 10, 9.

death.¹¹⁵ However, the content and exercise of moral rights can become the subject of legal transactions set out in § 39 of the Author's Rights Act. Accordingly, contractual agreements are permissible to a limited degree, especially with regards to paternity and integrity rights in terms of changes to the name of the work or the work itself.¹¹⁶ As a result, the author might be contractually bound to accept certain actions on behalf of the exploiting individual, which breach his or her moral rights.¹¹⁷

Contracts along these lines are valid so long as they do not encroach on the protected core of author's rights and provided that they are not illegal under § 138 of the Civil Code (Bürgerliches Gesetzbuch).¹¹⁸ Thus, author's rights may be voluntary restricted by the author but they cannot be renounced permanently. Having a closer look at the right to be named as an example will provide a better understanding of this. According to § 39(I) of the Author's Rights Act, the author is able to contractually renounce his or her right to be named by the owner of the exploitation rights. However, giving up the right to recognition in the particular case does not extend to the author's exercise of the general right to be named with respect to third parties under § 13 Sentence 1 of the Author's Rights Act.¹¹⁹

What is more, the author can leave his or her moral rights to a certain extent to be exercised by a third party.¹²⁰ Thus, the chosen third party can assert non-assignable moral rights in his or her own name.¹²¹ Especially, the right to choose when a work is fit for publication or display (Erstveröffentlichungsrecht) is often exercised in this way – certainly in part on account of the Author's Rights Act itself, which suggest this

¹¹⁵ § 29 Abs. I UrhG.

¹¹⁶ § 39 Abs. I UrhG.

¹¹⁷ Schack, see above n. 1, 148.

¹¹⁸ Ibid. Explain the concept of sittenwidrig?

¹¹⁹ Schricker, see above n. 31, 278-279.

¹²⁰ Schack, see above n. 1, 147, 259.

¹²¹ Ibid.

possibility by mentioning the requirement of consent in § 12(2) last half-sentence. In view of that, one can also think of films where the producer is permitted by the author to exercise the right of first declaration of contents for advertising purposes. The producer is simply the author's agent in bringing the work to public view.¹²² Last but not least, it is important to note the author remains a moral rights holder at all times, and may continue to assert those rights against the third party, here the producer.¹²³ In this way, the moral rights focus of German law becomes apparent once again.

III. ECONOMIC ASPECTS OF COPYRIGHT LAW

1. Copyright as an economic right

a) Assignability

Copyright and moral rights in New Zealand exist separately as the Copyright Act 1994 is based on a dualist understanding of the law.¹²⁴ Furthermore, copyright is to be regarded as an economic right, owing to its historical development and its positivistic starting points – a moral rights part to the right, as is the case for German law, is missing here.¹²⁵ Furthermore, the common law has always held the private autonomy of the property owner with respect to his property in high esteem. Consequently, he or she could deal with all legal matters in principle just as he or she liked.¹²⁶

It is, therefore, not surprising that copyright law follows this view. To be more precise, works of copyright are assignable under section 113 of the

¹²² Schricker, see above n. 31, 269.

¹²³ Schack, see above n. 1, 259.

¹²⁴ Ormond, see above n. 10, 61.

¹²⁵ Schack, see above n. 1, 53.

¹²⁶ Westco Lagan Ltd v Attorney-General [2001] 1 NZLR 40.

Copyright Act, just like any other form of property.¹²⁷ In addition, section 114 of the Act requires the consent of the assignor for the effective assignment of copyright, thus allowing copyright to be alienated without the author's approval.¹²⁸ The same is true for rights with respect to future works.¹²⁹ As a result, the author together with his or her moral rights is at the mercy of another.

b) A legal person can be author

The utilitarian conception of copyright and the absence of the natural law characteristic of a strong 'intellectual bond' between the author and their work, mean that both legal and natural persons may be entitled to copyright in a work.¹³⁰ The employment relationship is used as an example to provide some clarification in this context. In general, the author of the work is simultaneously first owner of any copyright in the work.¹³¹ However, there are exceptions to the rule where an employee, in the course of his or her employment creates a work, which is often the case with regards to industrial companies. The same is true in relation to commissioned works.¹³² Coming back to the employment example, pursuant to section 21(2) of the Copyright Act, a person's employer is the first owner of any copyright in the work and therefore able to confer copyright on a third party. The author comes away empty handed, since he is stripped of his property rights in favour of the employer. Nevertheless, this state of affairs is generally not regarded to be unsatisfactory, seeing that the employee can be rewarded in other ways, for instance by means of a pay rise or a possible promotion.¹³³

¹²⁷ Ormond, see above n. 10, 14. Note that the same questions arise in relation to a refusal to comply with the formalities of writing and signature in this context, as in relation to personality rights regarding the application of the law of estoppel and implied contractual terms discussed above in.

¹²⁸ Section 114 Copyright Act 1994.

¹²⁹ Section 116 Copyright Act 1994.

¹³⁰ Section 5(3) Copyright Act 1994.

¹³¹ Section 21(1) Copyright Act 1994.

¹³² Section 21(3) Copyright Act 1994.

¹³³ Bentley und Sherman, see above n. 60, 117.

Here again, economic efficiency is at the heart of these rules in favour of the employer. Especially as far as the exploitation of copyright is concerned, the employer is more often than not in a better position than the employee to make the best possible use of the work.¹³⁴ Although the employer is not creatively active, he is still an important part of the creative process, seeing that he puts the equipment and materials at the author's disposal in order to enable the act of creation in the first place.¹³⁵ Moreover, it has been suggested that the granting of rights of first ownership encourages the employer to invest in the business infrastructure, which in turn creates an incentive for increased production of copyright works amongst employees.¹³⁶ In this respect, copyright can be regarded as a tradable economic asset.

c) Generous protection for minimal creative effort

The commercial approach to copyright in New Zealand also has an effect on the definition of the work. Although the observation "what is worth copying... is worth protecting" is not entirely accurate, the threshold that has to be met for copyright to subsist, is significantly lower than in Germany.¹³⁷ Under section 14, works only have to be original to enjoy copyright protection. In view of that, the Act does not require that the expression must be in an original or novel form, but that the work must have been independently created, that is to say, it must not have been copied from another already existing work.¹³⁸

The subsistence of a work of copyright can be determined by applying the judge-made test of time, skill and labour. The very low threshold required for copyright to subsist becomes remarkably apparent in relation to artistic

¹³⁴ Schack, see above n. 1, 11.

¹³⁵ Bentley und Sherman, see above n. 60, 117.

¹³⁶ Ibid.

¹³⁷ University of London Press Ltd v University Tutorial Press Ltd. [1916] 2 Ch. 601, 609.

¹³⁸ Ibid.

works – especially if compared with the German law’s protection being conditional upon the existence of a creative element. As follows, artistic works can be defined as graphic works, irrespective of their artistic properties, thereby avoiding subjective assessments of quality under section 2(a)(i) of the Copyright Act 1994.

The Husqvarna¹³⁹ decision is a prime example of the minimal demands made by the New Zealand law. The decision involved two slightly different drawings of the cutters from a chainsaw-chain, made by two different authors with the aid of computers. The question whether the angle of the chainsaw teeth of the later drawing could give rise to an original artistic work, in the sense of the definition, was answered affirmatively by the New Zealand High Court.¹⁴⁰ In view of that, it has to be noted that every single angle of each of the cutters was of critical importance for the functioning of the chainsaw. Consequently, these minimal changes to the angles were held to be decisive. As a result, despite there being only slight visual changes the court was convinced, that sufficient time, labour and skill had been expended for copyright protection to arise.¹⁴¹

Overall, copyright protection in New Zealand amounts to a full-blown protection, which extends across-the-board to individual creations in the fields of literature, science and arts, as opposed to being limited to elitist creations. In this way, the copyright business is economically viable for authors and exploiters alike.¹⁴² It follows that copyright can be described as a tradable asset. Conversely, the open-ended interpretation of the threshold has also lead to more and more industrial works pushing their way forward to copyright protection, although alternatives protecting

¹³⁹ Husqvarna Forest & Garden Ltd v Bridon New Zealand Ltd [1997] 3 NZLR 215.

¹⁴⁰ *Ibid*, 223-224.

¹⁴¹ *Ibid*.

¹⁴² Gerhard Schricker Festschrift für Rheinhold Kreile zu seinem 65. Geburtstag, *Abschied von der Gestaltungshöhe im Urheberrecht*, Nomos Verl., 1. Aufl., Baden-Baden, 1994, 718.

investment would perhaps have been more suitable.¹⁴³ The resulting long-lasting copyright protection can, thus, turn into a barrier to the statutorily anticipated progress and innovation and even to the common good as a whole. For these reasons, it is worth considering whether it would be better to settle for short-term alternatives.¹⁴⁴

2. Author's rights as personal rights of economic importance

a) Non-assignability of author's rights

The non-assignability of German author's rights, anchored in a monistic understanding of the law, also extends to exploitation rights.¹⁴⁵ As a result, exploitation rights can neither be wholly nor partially effectively assigned amongst living people.¹⁴⁶ This means that an author can never fully renounce the author's rights that attach to the work and can only grant simple or exclusive user rights (Nutzungsrechte) to a limited extent.¹⁴⁷ The remaining freedom of choice that remains with the author is grounded on the property guarantee found in the German Constitution.¹⁴⁸ Exploitation rights, as an expression of the economic aspects of author's rights, are to be treated as property under article 14(1) of the Federal Republic's Basic Law.

aa) Freedom of choice

In view of that, the Constitutional Court describes the "commonly protected core of author's rights" as the freedom of the author to make a decision on his or her own terms about the economic consequences of the intellectual work.¹⁴⁹ In this respect, a German author's right is a power to do

¹⁴³ Schack, see above n. 1, 29.

¹⁴⁴ The period of protection under the Industrial Designs Act is limited to 16 years compared with 60 years of copyright protection.

¹⁴⁵ § 29 Abs. 1 S.1 UrhG.

¹⁴⁶ Except for the execution of a will as is provided for in § 29(1) UrhG.

¹⁴⁷ § 31 UrhG.

¹⁴⁸ Schack, see above n. 1, 38.

¹⁴⁹ BVerfGE 31, 229, 240f.

something of one's own free will (Willensmacht), a power conferred upon the author by the legal system.¹⁵⁰ The author has a subjective right to choose the extent to which others can make use of the work. Others can be excluded from using it altogether, by way of prohibitive rights, or alternatively the author may allow for exploitation contractually, and make this subject to conditions such as the payment of a licence fee.¹⁵¹ The exploitation rights set out in §§ 16-33 of the Author's Rights Act present the author with exclusive rights, which give rise to absolute authority over the work, analogous to the authority over things (Sachherrschaft) pursuant to § 903 of the Civil Code.¹⁵²

bb) Contracts regarding future works

In contrast to contractual moral rights agreements, the granting of exploitation rights implies that the author is free to decide what to do with his or her author's rights, generally based on a contract under the law of obligations.¹⁵³ It follows that the author has both existing and future user rights at his or her disposal.¹⁵⁴ The example of an employment contract makes this clear. An employee is bound by an employment contract to give up any user rights that may arise in relation to future works and to confer them to his or her employer.¹⁵⁵

While sweeping agreements of this kind can be legally effective, § 40 of the Author's Rights Act requires additional protection for the author by stipulating that a contract of obligations must be in writing. Even if there is no written contract, the courts still presume that a granting of user rights in favour of the employer was intended – but only so far as is necessary to

¹⁵⁰ Schack, see above n. 1, 2.

¹⁵¹ Ibid, 196.

¹⁵² Ibid, 2-3.

¹⁵³ Schricker, see above n. 31, 509.

¹⁵⁴ § 40 UrhG.

¹⁵⁵ § 43 UrhG.

realise the objective of the grant.¹⁵⁶ This corresponds to the ‘purpose transmission theory’ (Zweckübertragungstheorie), which is a rule that protects the copyright author from a wholesale surrender of rights attributable to ignorance or economic hardship.

cc) Contracts regarding future uses

In spite of this, the purpose transmission theory (codified in § 31 of the Author’s Rights Act) forms part of the rules of interpretation. This means that it can only be used in cases where there is doubt about the extent of the rights that are granted.¹⁵⁷ The theory is not applicable where the contract precisely and clearly defines the different uses. In serious cases, however, § 138 of the Civil Code might be of assistance.¹⁵⁸ In addition, § 31(4) of the Author’s Rights Act offers effective protection against the granting of user rights in relation to unknown uses, for example, those arising out of technological developments.¹⁵⁹ As a result, an employee (author) is unable to conclude any far-reaching agreements as regards future uses. This protects the author from granting user rights for which the true worth is not ascertainable at the time the contract is entered into.¹⁶⁰ In contrast, this type of buy-out contract is lawful in New Zealand. The German restrictions on freedom of contract are regarded by many as an unjustified intrusion by the lawmaker into the workings of the free market – at the expense of investors and copyright exploiters.¹⁶¹ In this respect the German author’s right is not a freely tradable economic asset.

b) The author’s right to recall

In certain circumstances the author can recall a user right that has already been granted - namely in cases of non-use of the right in question (§ 41(I))

¹⁵⁶ Hartmut Eisenmann und Ulrich Jautz, *Grundriss Gewerblicher Rechtsschutz und Urheberrecht*, C.F. Müller Verl., 5 Aufl., Heidelberg, 2004, 13.

¹⁵⁷ Schack, see above n. 1, 249.

¹⁵⁸ Schack, see above n. 1, 437. Explain if possible?

¹⁵⁹ BGHZ 76, 137 – Anneliese Rothenberger.

¹⁶⁰ Schack, see above n. 1, 145.

¹⁶¹ Bentley und Sherman, see above n. 60, 235.

UrhG), changed convictions of the author (§ 42(1) UrhG) and resale of the rights without the author's consent (§ 34(3) Sentence 2 UrhG). This recognises the author's personal interest in choosing to make the work available to the public or permitting its exploitation by just a particular user rights owner.¹⁶² After the recall has been exercised, the user right automatically reverts back to the author.¹⁶³ Once again this reflects the German law's focus on the author. Economic aspects are reflected in the fact that the recall is not always immediately effective. The author may well have to meet an additional economic requirement – in order to protect the user rights owner – as is the case with the right to recall due to changed convictions. Accordingly, the author can only regain full power of disposal over the right in question if adequate compensation is paid pursuant to § 42(3) of the Author's Rights Act.

c) Loosening of the intellectual bond

aa) Out-dated ideal of the copyright author

As discussed above, German law gives much more prominence to the personal bond between the author and the work than New Zealand copyright law does. Yet the related romantic idea of the author as an isolated creative genius draws an unrealistic picture of the day-to-day creation process, particularly in relation to modern electronic applications and works of low authorship¹⁶⁴ (Werke der kleinen Münze).¹⁶⁵ Copyright proves beneficial in many respects, including the informal, gratuitous and long-lasting protection it affords, and its open-ended interpretation with a view to protecting new and evolving cultural and economic developments. In fact, these advantages have led to an increasing number of technical and collective creations pushing their way into the realms of author's rights

¹⁶² Ibid, 256.

¹⁶³ Gotting, see above n. 106, 151.

¹⁶⁴ While works of low authorship are highly useful, they do not possess any creative or original elements.

¹⁶⁵ Bentley und Sherman, see above n. 60, 253.

protection.¹⁶⁶ Most databases and computer programs, for instance, are commercial products, created through a collaborative effort on part of anonymous employees. The author's personality finds minimal expression in these works. In extending the original sphere of protection – which used to be restricted to cultural works of 'literature, science and fine arts' (§ 1 UrhG) – the intellectual bond is increasingly loosened.¹⁶⁷

bb) Creativity required

In an attempt to oppose the 'loosening dilemma', the courts opted to raise the protection threshold. For the purposes of § 7 UrhG, the creator can only be the person who generates a "personal intellectual creation" pursuant to § 2(2) UrhG.¹⁶⁸ Accordingly, individuality of the work is the central precondition of protection. A work satisfies this condition only if it is the result of individual creation, characterised by the author's personality.¹⁶⁹ Moreover, a creative element (*Gestaltungshöhe*) is required, which serves to determine the outer limit of author's rights protection.¹⁷⁰ This additional minimum requirement of individuality was initially developed in relation to artistic works in order to strengthen the intellectual bond – separating author's rights from patent law.¹⁷¹ By and large, the continued expansion of author's rights protection was slowed by the greater demands on artistic and creative performance.¹⁷² Therefore a work 'made in Germany' had to show a much higher standard of creativity to be protected under author's rights law.

cc) Influence of the European Union

¹⁶⁶ Knöble, see above n. 3, 44.

¹⁶⁷ Schack, see above n. 1, 29.

¹⁶⁸ Schricker, see above n. 31, 218.

¹⁶⁹ Knöble, see above n. 3, 52.

¹⁷⁰ *Ibid.*, 58.

¹⁷¹ Gerhard Schricker, *Der Urheberrechtsschutz von Werbeschöpfungen, Werbeideen, Werbekonzeptionen und Werbekampagnen*, GRUR 1996, Heft 11, 815, 817.

¹⁷² Schricker, see above n. 142, 716.

In time, the stricter requirements were extended beyond artistic works. The German Federal Court applied the additional creativity requirements in an ambiguous way – to some but not all categories of works – introducing higher standards without having analogous reasons for doing so.¹⁷³ In particular, the introduction of a creative element in relation to computer programs was particularly controversial.¹⁷⁴ The Europeanisation of German law is of special importance, given the harmonisation scheme brought about law changes here. The 1991 EU guideline regarding legal protection of computer programs expressly rejected the restrictive stand of the Federal Court of Germany.¹⁷⁵ Consequently, the German courts were obliged to lower the threshold, so that today the only requirement is one of individuality – there is no quantitative dimension.¹⁷⁶ Moreover, “even a small degree of intellectual activity” may suffice in certain circumstances for works of low authorship to be afforded full protection.¹⁷⁷

The lead of the 1991 computer program guideline has been followed by numerous other European Union guidelines to the same effect, including those relating to photographs and databases.¹⁷⁸ The resultant lowering of the protection threshold marks the intention of the European Union to keep author’s rights functioning in the information society. To exclude modern electronic applications and works of low authorship would not only mean a substantial loss of substance for author’s rights, but also enormous economic consequences, given significant parts of the copyright industry would lose their foundations.¹⁷⁹ It follows that German author’s rights also prove to be a tradable asset – even if only to a limited extent.

¹⁷³ *Ibid*, 716-717.

¹⁷⁴ Knöble, see above n. 3, 63-64.

¹⁷⁵ Schricker, see above n. 142, 717.

¹⁷⁶ Schricker, see above n. 171, 818.

¹⁷⁷ BGH, GRUR 1991, 130-133 – Themenkatalog.

¹⁷⁸ Schricker, see above n. 171, 818.

¹⁷⁹ Schricker, see above n. 142, 720.

IV. COPYRIGHT LAW – A TRADABLE ASSET!

Despite initially similar starting positions, the different reception of natural law in the two legal systems resulted in a fundamental dichotomy. This can still be seen today in terms of the differing rights and the associated conditions of protection. On the one hand, we find New Zealand copyright as a tradable asset, influenced by legal and in particular, economic considerations. While this predominant economic perspective and the flexibility of New Zealand copyright law mean that it is well equipped to cope with the demands of continuing technological and economical change, the law does not adequately protect the author's personality. Numerous exceptions and possible waivers undermine moral rights protection and reveal shortcomings of copyright – even the commercialisation of author's rights appears to be possible.

Conversely, German author's rights law has a very personal focus, reflected in the characteristics of the intellectual bond and limitations on the author's freedom to exercise his right, including its non-assignability. This significantly strengthens the bargaining position of the author, unlike in New Zealand where an author is left to one's own devices and the free market economy. While German law concentrates predominantly on the non-material interests of the author, this personal focus does not deny the economic importance of author's rights. In particular, owing to the significant influence of the European Union, author's rights can also be regarded as tradable assets, as the lowering of the protection threshold demonstrates.

In times of digitalisation it is worth considering whether other rights of protection should be utilised or created as an alternative to loosening the intellectual bond. This would enable progress and innovation to continue, unimpeded by long-lasting author's rights or copyright protections. In the end, it is essential that one does not forget about the author, the creator of

the work and the driving force behind the whole process. In my opinion, Germany's system of author's rights provides a better solution in this respect, as it achieves the protective ends without losing sight of the author.