

**Ground (a): Was the Court of Appeal correct to conclude, for the purpose of s 9(1) of the 1994 Act that a copyright holder’s consent is not necessary for a work to be ‘in circulation’?**

**No.** The correct interpretation of “issue to the public” in s 9(1) is “the *unauthorised* act of putting into circulation *in NZ* copies not previously put into circulation *in NZ* by or with the consent of the copyright owner.” The distribution right is not spent where those copies have been put on the market in NZ without the copyright owner’s licence. This interpretation has applied since enactment. This is the correct interpretation because:

	<b>Proposition</b>	<b>Reference</b>
<b>1</b>	Section 29(1) and 9(1) properly read together require this interpretation. The Court of Appeal’s “silo” approach to issues A and B results in exhaustion of the exclusive distribution right in NZ without any licence or consent by the copyright owner.	PGT submissions [52]-[62]; Court of Appeal decision [73] [103] [129].
<b>2</b>	That s 29(1) requires this interpretation is supported by <i>Nelson v Rye</i> .	BOA 63; wording of ss 18 and 16(2) CDPA: BOA 11 and BOA 59.
<b>3</b>	The Court of Appeal’s interpretation is inconsistent with Article 6 of the WCT.  Art 6(1) by incorporating word ‘authorizing’ “has been designed to describe more precisely...that the act of putting the work or a copy on the market for sale or transfer is supposed to be subject to the author’s control”. Under Art 6(2) “exhaustion may under no circumstances take place in the case of putting a copy into circulation without the consent of the author” Inconsistent with decision of CJEU; position in US.	PGT submissions at [9]-[17]; [65]-[69].  Reinbothe BOA 46 [7.6.19] [7.6.24]; Ricketson & Ginsburg BOA 52 [11.89]  PGT submissions [65]-[67]; <i>Allposters</i> BOA1 [31].
<b>4</b>	It is a problem that the Court of Appeal’s interpretation is inconsistent with Article 6 because of the presumption that statutes ought to be given an interpretation that is consistent with NZ’s treaty obligations.	PGT submission [26]-[28]; [70]-[71].
<b>5</b>	The narrative of NZ’s involvement in the WCT and subsequent developments demonstrates that the appellant’s interpretation is the correct one, and applied as from enactment of the Copyright Act 1994	Amended Chronology of WCT dates.
(a)	As seen in Issue (1) PGT relies on an interpretation as at enactment.	
(b)	WIPO 1993 definitions of distribution right for WCT negotiations required authorisation by copyright owner. Consistent meaning given to distribution right in WCT negotiations from 1993-6; NZ actively involved in WCT from June 1993 ie before introduction of 1994 Act. Widespread consensus on Art 6(1) in 1996. NZ voted in favour of WCT wording at plenary session Final Act of Diplomatic Conference.  The need for the copyright owner’s authorisation or licence before the owner’s right to distribute was “exhausted” was well understood as being a requirement and informed the New Zealand provisions in 1994.	Amended Chronology of WCT dates. The entries from 1992 to 1996 and documents footnoted there.  Reinbothe BOA 67 [7.6.1]-[7.6.15].
<b>6</b>	Even if the interpretation argued for did not apply from enactment (which is not accepted), the ambulatory/updating interpretative	PGT submissions at [29] (ambulatory approach)

	approach in s 11 of the Interpretation Act means that it should now apply by reason of:	
(a)	1998 Amendment was consistent with Art 6. Explanatory Note to 1998 Amendment significant	PGT submissions [73]-[79]; Explanatory Note BOA 20
(b)	there has been a consistent interpretation and representation of the existing distribution right provisions as compliant with Art 6 by NZ Govt and Parliament from 1998 until accession to WCT in 2019.	PGT submissions at [19]-[24]; [70(c)]
<b>7</b>	The fact that s18 UK CDPA was amended on 1 Dec 1996 to state “by or with the consent of the copyright owner” is not determinative	PGT submissions at [47]
(a)	The history of s 18	PGT submissions at [43] – [51]
(b)	The UK amendment to CDPA in 1996 is not the only way in which the requirement of authorisation can be expressed. <i>Nelson v Rye</i> shows that s 29(1) NZ (s 16(2) CDPA UK) provides this perfectly well.	BOA [63] p 208j
(c)	The 1989 Sterling interpretation relied on by CA is inconsistent with <i>Nelson v Rye</i> and with WIPO 1993 definitions and subsequently Art 6. Sterling’s 1989 interpretation not advanced in his 1998 textbook <i>World Copyright</i> .	CA judgment [37] [79] [103] BOA 63; WIPO <i>Copyright</i> publication June 1993 BOA 61 [4]- [6]; <i>World Copyright</i> Sterling BOA 69 [9.05-6].
<b>8</b>	Problems with ESR’s arguments	
(a)	<p>ESR submission that innocent distributors cannot be sued for primary infringement is incorrect. PGT objects to this. Court of Appeal held it was not possible to read into s 31 a knowledge requirement. No leave to cross appeal sought by ESR.</p> <p>The 1980 <i>Infabrics</i> decision relied on by ESR does not represent the law in UK CDPA 1988 nor under New Zealand 1994 Act. UK text and caselaw is consistent that <i>Infabrics</i> was reversed by statute.</p> <p>Only the person at top of distribution chain in New Zealand is liable for primary infringement. ESR overstates reference to “innocent distributors”.</p> <p>Importantly, section 121 (not mentioned by CA but by Downs J) provides an ameliorating innocent defence provision limiting relief to an account of profits. ESR seeks a windfall so it can keep profits made from the sale of infringing copies.</p> <p>Person at top of distribution chain can be liable for both primary and secondary infringement. This follows from Court of Appeal decision.</p>	<p>ESR submissions [20] [58]-[59]; Court of Appeal decision at [56]-[61].</p> <p>Copinger 13<sup>th</sup> ed 1991 [8-95] BOA 42; Copinger 14<sup>th</sup> ed 1999 [7-105] BOA 44; <i>British Phonographic Industry v Mechanical</i><sup>1</sup> BOA 9; <i>Modern Law of Copyright</i> 2<sup>nd</sup> ed 1995 [2.123] BOA 60 and 5<sup>th</sup> ed 2018 [15.5] final sentence BOA 40.</p> <p>PGT submissions [36-7] and texts cited. Court of Appeal decision [56]-[61].</p>
(b)	ESR submission that Art 6 is permissive; can be met through imposition of secondary infringement is incorrect. (ESR “no need to shoehorn...a strict liability into s 9”)	ESR submissions at [63A] [63D] [44] [48].

<sup>1</sup> [1993] EMLR 86 AT 98 Note 9.

	Court of Appeal squarely dealt with this. No leave obtained by ESR. Art 6(1) is plainly directive. The distribution right applies to both genuine and infringing copies. Section 36 only applies to infringing copies so does not meet the Art 6 requirements.	Court of Appeal decision [60]
(c)	The relevance of s 9(1)(c)  Importing <i>per se</i> does not constitute distribution under s 9. Successive editions of Copinger clearly stated the CDPA equivalent of s 9(1)(c) was “muddled thinking”. Even the 13 <sup>th</sup> ed in 1991 (the first edition after 1988 CDPA) attacks its inclusion (despite ESR’s claim). Provision was quietly dropped in the UK in 2018.	PGT’s submissions [101]-[104] ; Court of Appeal decision [55]  Copinger 13 <sup>th</sup> ed [8.97] BOA 42

**Ground (b): Was the Court of Appeal correct to conclude, for the purposes of s 9(1) of the 1994 Act that circulation outside of New Zealand could constitute ‘circulation’?**

**No.** PGT submits the act of circulation must take place in NZ for the NZ distribution right to be exhausted. That is the correct interpretation because:

	<b>Proposition</b>	<b>Reference</b>
<b>1</b>	The Copyright Act spells out when account is to be taken of events/circumstances that have occurred overseas. The Act should be read only to take account of international occurrences when it says so.	Copyright Act 1994, ss 18, 75, 127, 135.  Particular reliance on ss 9(1)(d) and 12(5A).  PGT’s submissions [34]–[42].
<b>2</b>	The wording of s 16 Copyright Act makes it clear that the copyright holder has exclusive rights to “for the following acts in <i>New Zealand</i> ”.	Copyright Act 1994, s 16.  PGT’s submissions [97]–[100].
<b>3</b>	ESR’s argued for interpretation would render s 9(1)(d) meaningless and so should not be adopted when there is an alternative available.	PGT’s submissions [97]–[100].  Ref to the Explanatory Note to 1998 Amendment.
<b>4</b>	The New Zealand Act did not include the specific wording “ <i>in the UK or elsewhere</i> ” found in the CDPA 1988. This supports a different meaning from UK Act.	PGT’s submissions [93].
<b>5</b>	Contemporaneous legislative material support PGT’s interpretation.	MBIE 2019 Position Paper.  PGT’s submissions [96]–[100].
<b>6</b>	ESR’s proposed interpretation results in copyright holders losing their statutory right to first distribution in NZ due to overseas, unlawful conduct.  Contrary to Art 14 WCT requirement for states to provide “enforcement procedures so as to permit effective action against any act of infringement of rights covered by [the WCT]”.	PGT submissions [16] [107].

Counsel has made appropriate inquiries to ascertain whether this roadmap contains any suppressed information. Counsel certifies that, to the best of their knowledge, the roadmap is suitable for publication.

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