

**IN THE SUPREME COURT OF NEW ZEALAND  
I TE KŌTI MANA NUI O AOTEAROA**

**SC 96/2023**

**UNDER THE** Copyright Act 1994

**BETWEEN** **IAN JAMES BURDEN**  
First Appellant

**AND** **PGT RECLAIMED (INTERNATIONAL) LIMITED**  
Second Appellant

**AND** **PLANTATION GROWN TIMBERS (VIETNAM) LIMITED**  
Third Appellant

**AND** **ESR GROUP (NZ) LIMITED**  
Respondent

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**WRITTEN SUBMISSIONS ON APPEAL BY APPELLANTS (“PGT”)**

**Dated 6 March 2024**

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## MAY IT PLEASE THE COURT

### (1) *Summary of argument and introduction*

1. This case concerns the proper interpretation of the provisions in the Copyright Act 1994 creating the exclusive Distribution Right for copyright owners. After the 1994 Act was enacted, an international treaty, the WIPO Copyright Treaty 1996 (**WCT**) set out in Art 6 the guaranteed conditions applying to the Distribution Right. Consistently since 2002, the New Zealand Legislature and Executive have stated that the existing Distribution Right provisions in the 1994 Act complied with Art 6. With one important exception (s 9(1)(d)), the relevant New Zealand provisions were never amended. That important amendment in 1998 – which only narrowly permitted distribution of *lawfully made copies* overseas – also demonstrated the Legislature acting consistently with Art 6 WCT.
2. In 2019, New Zealand acceded to the WCT as part of its CPTPP obligations and, subsequently, EU and UK Free Trade Agreements. Under Art 14 WCT, New Zealand is required to adopt in its domestic legislation measures necessary to secure the application of its WCT obligations. Art 14(2) requires New Zealand to ensure that enforcement procedures permit “effective action” against acts infringing the rights covered by the WCT. This, in PGT’s submission, includes this Court’s interpretative role.
3. PGT submit that the Court of Appeal’s interpretation on Issues (a) and (b) is inconsistent with the above statutory context, and specifically the enactment of s 9(1)(d) and Art 6 WCT. The interpretation adopted by the Court of Appeal denies copyright owners the full extent of the guaranteed Distribution Right in Art 6. This case accordingly requires consideration of the relevant principles of interpretation relating to Treaty obligations as well as the international trade consequences of the Court of Appeal’s decision.
4. The first principle of interpretation that is engaged by this case is that a statute ought to be given an interpretation consistent with New Zealand’s international treaty obligations. This is particularly so in this context given the multiple statements by the Legislature and Executive that the 1994 Act’s definition of the Distribution Right already complied with the WCT, and the importance of international intellectual property treaties. Secondly, as the 1994 Act was enacted before the WCT, the updating and ambulatory interpretation provided for in s 11 of the Interpretation Act 1999 is also relevant. Finally, PGT submits that the Court of Appeal’s dismissal of the very relevant 1998 amendment as being “unnecessary and misconceived” effectively disappplied that

provision, instead of properly giving it meaning, consistent with PGT's proposed reading.

5. PGT accordingly submit that the appeal should be allowed and the result in the High Court restored, namely that ESR pay to PGT the sum of \$221,134.50.

**(2) Facts relevant to the issues on appeal**

6. PGT rely on the background section in their leave submissions and the chronology. A summary of the facts given by ESR at the remedies trial is as follows. In the years 2013 and 2014 Morrow Marketing Management Ltd (MMML), a Vietnam-based supplier, sold the Roseberry and Westbury furniture items to ESR.<sup>1</sup> ESR placed orders for the Roseberry and Westbury furniture with MMML. On receiving these orders, MMML placed orders with Galaxy Home (Vietnam) Limited ("Galaxy")<sup>2</sup>. This company based in Dong Nai province in Vietnam was MMML's preferred supplier.<sup>3</sup> Galaxy was a finishing company which took furniture manufactured by other joinery companies in Vietnam and applied paint, oil or varnish finishes and handles.<sup>4</sup>
7. When Galaxy let MMML know it was ready to ship the finished furniture ordered by ESR, MMML would arrange for the furniture to be sent to the Vietnamese ports directly from Galaxy's premises.<sup>5</sup> The furniture was then shipped to ESR.<sup>6</sup> MMML would present a bill of lading to ESR and payment would usually occur after the furniture had left Vietnam and was still on the water in transit to New Zealand.<sup>7</sup> As a result, title passed to ESR from MMML before the goods reached New Zealand. MMML would pay Galaxy on receipt of an invoice from them and Galaxy usually wanted to be paid by MMML before releasing the furniture from their premises.<sup>8</sup>
8. Ms McLennan who was Managing Director of ESR at the relevant times<sup>9</sup> confirms that ESR placed its orders for the furniture with MMML.<sup>10</sup> She further confirms what was

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<sup>1</sup> Morrow at [21] [[201.000012]]; McLennan at [9]. [[201.000003]]

<sup>2</sup> Morrow at [21] [[201.000012]].

<sup>3</sup> Morrow at [15] [[201.000011]].

<sup>4</sup> Morrow at [9-11] [[201.000010]] and [16] [[201.000011]].

<sup>5</sup> Morrow at [24] [[201.000013]].

<sup>6</sup> Morrow at [24] [[201.000013]].

<sup>7</sup> Morrow at [24] [[201.000013]].

<sup>8</sup> Morrow at [25] [[201.000013]].

<sup>9</sup> McLennan at [1-2] [[201.000002]].

<sup>10</sup> McLennan at [9] and [10]. [[201.000003]].

found at trial that the furniture products in issue were imported from Vietnam by ESR and sold from the retail floor in ESR's shops.<sup>11</sup>

**(3) The WIPO Copyright Treaty 1996 (the WCT): the Distribution Right and its Enforcement**

9. The New Zealand Copyright Act 1994 came into force on 2 January 1995. In 1996, two treaties were completed by WIPO, one of the which was the WCT.<sup>12</sup> New Zealand participated in the deliberations. The WCT contained both “Berne-plus” and “TRIPS-plus” elements, and has been described as “constitut[ing] significant added value in international copyright rules”.<sup>13</sup> The WCT is an update of the Berne Convention that clarified and further extended authors’ rights.<sup>14</sup> A second chronology of relevant dates for the WCT in relation to New Zealand is also attached.

10. Article 6 reads:

**Article 6(1):** Authors of literary and artistic works shall enjoy the exclusive right of *authorizing* the making available to the public of the original and copies of their works through sale or other transfer of ownership.

**Article 6(2):** Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies *after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.*” (Emphasis added.)

11. Art 6(1) was read by the Court of Justice of the European Union (CJEU) in the *Allposters* case to mean that the Distribution Right is “exhausted” in relation to a particular copy “if it [ie the copy] has been placed onto the market with the copyright holder’s consent”.<sup>15</sup>

12. As this Court noted in *Ortmann*,<sup>16</sup> the right granted by Art 6 is commonly known as the Distribution Right, but that “first sale” or “first distribution” are other descriptions.<sup>17</sup> The authors of the leading text *WIPO Treaties on Copyright* comment that Art 6 was “the first time that a general exclusive right of distribution has explicitly been

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<sup>11</sup> McLennan at [3] and [4]. [[201.000002]]

<sup>12</sup> The second being the WIPO Performance and Phonograms Treaty (**WPPT**).

<sup>13</sup> J Reinbothe and S von Lewinski *The WIPO Treaties on Copyright* (2nd ed, Oxford University Press, London, 2015) (**Reinbothe**) at 17.0.12; the WCT is treated as a “special agreement” within the meaning of Article 20 of Berne (WCT Article 1(1)). See also S Ricketson and J C Ginsburg *International Copyright & Neighbouring Rights* (3rd ed, Oxford University Press, London, 2022) (**Ricketson and Ginsburg**) at [4.21].

<sup>14</sup> Reinbothe, above n 13, at 17.0.12; Harbottle & ors *Copinger and Skone James on Copyright (Copinger)* (18th ed, Sweet & Maxwell, London, 2021) at [2-20].

<sup>15</sup> *Art & Allposters International BV v Stichting Pictoright (C-419/13)*, [2015] ECDR 8 at [40].

<sup>16</sup> *Ortmann v USA* [2020] NZSC 120, [2020] 1 NZLR 475 at [244].

<sup>17</sup> At [244].

recognised in a multilateral treaty on the protection of copyright”.<sup>18</sup> Reinbothe notes that the definition of “making available to the public” in Art 6(1) by incorporating the word “authorizing” “has been designed to describe more precisely than by using the general term ‘distribution’ that the act of putting the work or a copy thereof on the market for sale or transfer *is supposed to be subject to the author’s control.*”<sup>19</sup>

13. Article 6(2) addresses the issue of exhaustion of the Distribution Right. With one critical restriction, Art 6(2) leaves it to the Contracting Parties (in their domestic legislation) to determine the conditions under which the Distribution Right will be treated as exhausted. Reinbothe notes that, in general, the models chosen by legislatures for dealing with exhaustion of the Distribution Right are:<sup>20</sup>

- (a) National exhaustion “where the distribution right is exhausted in a copy only if the object was distributed for the first time *with the consent of the author* within the national territory in question”;
- (b) Regional exhaustion “where the distribution right is exhausted in a copy only with the first act of distribution *with the consent of the author* within a certain region”; and
- (c) International exhaustion “where the distribution right is exhausted in a copy with the first act of distribution *with the consent of the author* anywhere in the world.”

14. At the heart of this appeal are the effect of Art 6(1) and its reading given by the CJEU<sup>21</sup> and the critical restriction on the powers of Contracting Parties contained in Art 6(2). This restriction is explained by Reinbothe:<sup>22</sup>

“However, Article 6(2) WCT does provide for a definition of the basic conditions for exhaustion. Exhaustion may only occur ‘after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author’. *It is important to note that exhaustion may under no circumstances take place in the case of putting a copy into circulation without the consent of the author.* Accordingly, it is only under these conditions that the Contracting Parties are free to choose their model of exhaustion of the distribution right. In other words the freedom of Contracting Parties is limited by the definition of the conditions for exhaustion contained in Article 6(2) WCT.”

15. A second leading international text by Professors Ricketson and Ginsburg also confirms the restrictions in Art6(2), and that rights in copies distributed without the copyright owner’s consent are not exhausted.<sup>23</sup>

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<sup>18</sup> Reinbothe, above n 13, at [17.0.12].

<sup>19</sup> Reinbothe, above n 13, at [7.6.19] (emphasis added).

<sup>20</sup> Reinbothe, above n 13, at [7.6.18] (emphasis added).

<sup>21</sup> *Art & Allposters International BV v Stichting Pictoright* (C-419/13), [2015] ECDR 8 at [40].

<sup>22</sup> Reinbothe, above n 13, at [7.6.24] (emphasis added).

<sup>23</sup> Ricketson and Ginsburg, above n 13, at [11.89] (emphasis added): “Despite the ‘Nothing in this Treaty’ language, Article 6(2) does limit national delineation of the exhaustion doctrine to some extent. Article 6(2) leaves it to

16. Article 14(2) of the WCT requires states to provide in their domestic legislation for “enforcement procedures so as to permit effective action against any act of infringement of rights covered by [the WCT]”. Art 14(1) contains an undertaking by Contracting Parties “to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty”. Reinbothe states that the requirement that domestic law must permit “effective action” necessitates that they not be “overly complicated or costly or do not take an unreasonably long time”.<sup>24</sup> This Court is in fact the critical forum in New Zealand for that enforcement as required under the WCT.
17. Two other WCT provisions require mention. First, under Art 18 each Contracting Party “shall enjoy all of the rights and assume all of the obligations under” [the WCT].<sup>25</sup> Secondly, Art 21(2) provides that, as in the case of New Zealand which joined the WCT later, the Treaty “shall bind” three months from the date on which the State has deposited its accession instruments with WIPO. At that date it is then open to citizens and nationals of contracting states whose copyright has not fallen into the public domain to rely on the WCT-compliant provisions in New Zealand’s domestic law.<sup>26</sup> The appellants fall into that category.

**(4) New Zealand’s Accession to the WCT**

18. In 2001-2002 the New Zealand Government actively considered accession to the WCT.<sup>27</sup> As this Court noted in *Ortmann*, one of the issues considered in the 2001-2002 review was “whether the existing 1994 Act was sufficient to comply with the WCT (anticipating that New Zealand may wish to become a party in the future)”.<sup>28</sup>
19. In the 2002 position paper MED noted that the WIPO Treaties provide “copyright owners ... with [inter alia] new exclusive rights of distribution ...”.<sup>29</sup> The position paper

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National law to determine the exhaustion and distribution rights in copies *to whose initial dissemination the author consented*, whether at home or abroad. Thus, the rights in copies distributed without consent are not exhausted.”

<sup>24</sup> Reinbothe, above n 13, at [7.14.23].

<sup>25</sup> Reinbothe, above n 13, at [7.18.13].

<sup>26</sup> Clause 1.4 of the WCT: All contracting states have to grant in relation to other contracting states protection for works under Art 2 Berne Convention “such protection must extend to all minimum rights laid down in the Berne Convention, **national treatment** the principle of no formalities and any other elements of protection under the relevant provisions”: Reinbothe, above n 13, at [7.1.28].

<sup>27</sup> MED (now MBIE) Discussion Paper *Digital Technology & The Copyright Act 1994* (July 2001) and subsequent Position Paper *Digital Technology and the Copyright Act 1994* (December 2002) at [12]. “Another reason for the review is consideration of New Zealand’s possible accession to two Treaties negotiated by [WIPO]– [the WCT and WPPT], together known as the WIPO Internet Treaties”.

<sup>28</sup> *Ortmann*, above n 16, at [253].

<sup>29</sup> *Digital Technology and the Copyright Act 1994* Position Paper December 2002 Part Nine WIPO Internet Treaties at [204].

stated that the Ministry's "analysis to date suggests that the provisions of [the Copyright Act 1994] substantially comply with the requirements of the WCT .... The areas where the Act appears to be compliant are ... distribution right ...".<sup>30</sup> Appendix A, *WCT and WPPT – Comparison with Copyright Act 1994*, also contained a table.

Right	WIPO Internet Treaties	Copyright Act 1994
<b>Distribution</b>	<b>WCT (Art 6)/WPPT (Art 12):</b> Authors/producers of phonograms have exclusive right to authorise making available to the public of the original and copies of their phonograms through sale or other transfer. Agreed Statement that "original and copies" refers to fixed copies that can be put into circulation as tangible objects.	<b>Complies:</b> Section 16(1)(b) provides authors (including producers of phonograms) with the exclusive right to "issue copies of the work to the public, whether by sale or otherwise". Section 9 defines "issue to the public" as putting into circulation copies not previously into circulation.

20. In 2008, Parliament enacted the Copyright (New Technologies) Amendment Act 2008.<sup>31</sup> This made amendments to the 1994 Act as discussed in the 2002 Discussion Paper to meet WCT provisions<sup>32</sup>. No amendment was made to the provisions governing the Distribution Right in ss 2, 9, 16, 29 and 31.
21. A key requirement of the subsequent Trans-Pacific Partnership (the TPP) and its successor, the CPTPP, was for signatory states to implement the WCT. On 25 January 2016 MFAT tabled a National Interest Analysis (NIA) for the WCT.<sup>33</sup> This recorded that the Copyright (New Technologies) Amendment Act 2008 had "brought New Zealand law substantially into line with the WCT".<sup>34</sup> The NIA set out each of the articles of the WCT and stated that "New Zealand already complies with the obligations in the WCT through the Copyright Act 1994".<sup>35</sup>

<sup>30</sup> At [205].

<sup>31</sup> Copyright (New Technologies and Performers' Rights) Amendment Bill (102-2) ("This bill takes account of international developments in copyright law, and incorporates many aspects of the two treaties negotiated by the members of the World Intellectual Property Organisation (WIPO)—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty")

<sup>32</sup> The Commerce Select Committee Report noted that the 2008 Bill "incorporate[d] many aspects of ...the WIPO Copyright Treaty...." Page 2 final para.

<sup>33</sup> WIPO Copyright Treaty National Interest Analysis (**WCT NIA**) 25 January 2016. This was contemporaneous with the NIA for the TPP of the same date. This was considered by the Foreign Affairs Defence and Trade Select Committee. The Comprehensive and Progressive Trans-Pacific Partnership was a reworking of the TPP following the decision of the United States to withdraw as a signatory

<sup>34</sup> WCT NIA n 32 at p 1 para 8. No changes were made to ss 9, 16, 29 or 31 in the 2008 Amendment Act.

<sup>35</sup> WCT NIA, above n 32, at 3 (penultimate paragraph). The Trans-Pacific Partnership NIA dated 25 January 2016 at 94 stated that "New Zealand already substantially complies with the WCT...."

22. After the TPP “morphed” into the CPTPP, a further and more detailed NIA for the CPTPP was tabled in Parliament in 2018.<sup>36</sup> It noted that “most of the remaining provisions in the chapter are consistent with New Zealand’s existing intellectual property regime”.<sup>37</sup> Any necessary remaining amendments to the Copyright Act were made in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Agreement Act 2018 to ensure compliance. These came into force on 30 December 2018.<sup>38</sup>
23. Significantly, no changes were made by the 2018 Amendment Act to ss 9, 16, 29 and 31 of the Act dealing with the right of issuing to the public. So consistent with the 2008 Select Committee report on the 2008 Amendment Bill, and the WCT NIA in 2016, plainly the legislature considered that New Zealand complied with Art 6 WCT. New Zealand then acceded to the WCT on 17 March 2019.<sup>39</sup> Subsequent NIA’s for the NZ-UK FTA and the NZ -EU FTA (both of which require confirmation that NZ has acceded to the WCT) regarded New Zealand as already complying with the WCT.<sup>40</sup>
24. In 2019 after accession, MBIE released a discussion paper on technical issues arising out of three intellectual property statutes (one being the Copyright Act) which contained observations on the scope of exhaustion of rights for intellectual property rights generally. During that review, MBIE considered the effect of s 9(1)(d) of the 1994 Act in combination of s 12(5A). Those sections were read by MBIE as providing that the Distribution Right is only exhausted where the copy “is placed on the market in another country by or with the permission of the copyright owner ie by acts of circulation of genuine copies”.<sup>41</sup>
25. PGT support that view. They submit that the sole express legislative indicator as to New Zealand’s position on exhaustion of the Distribution Right is found in s 9(1)(d) of the

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<sup>36</sup> With the Foreign Affairs Defence and Trade Select Committee on 8 March 2018.

<sup>37</sup> NIA CPTPP 4.17. p 60. At [4.17.2] the NIA also notes that “Many obligations in the [IP] chapter would constitute new obligations for New Zealand but would not require any changes to our law or practice...The new obligations would, however, place new limitations on the Government’s ability to modify New Zealand’s intellectual property settings to ensure they are appropriate for our domestic circumstances”.

<sup>38</sup> Comprehensive & Progressive Agreement for Trans-Tasman Partnership Agreement Act Commencement Order 2018 reg 2 in respect of amendments to the Copyright Act 1994.

<sup>39</sup> New Zealand signed in December 2018 but accession came into force three months later – per Art 21(2).

<sup>40</sup> The UK-NZ FTA contains an affirmation that each party has acceded to (inter alia) the WCT. In relation to intellectual property the NZ-UK FTA NIA comments that the chapter “builds on commitments both sides have already made” under WTO, TRIPS and “a range of international IP Agreements administered by WIPO.” Art 18.4 of the NZ-EU FTA requires each party to “comply with its commitments” under the WCT. The NZ-EU FTA NIA states (4.19) that “many of the obligations contained in the chapter are similar to those contained in existing international IP agreements and recent New Zealand FTAs or reflect existing policy settings”.

<sup>41</sup> MBIE Discussion Paper on the Intellectual Property Laws Amendment Bill – Patents Act 2013, Trade Marks Act 2002, Designs Act 1953 (May 2019) at [241].



1994 Act, which provides that distribution of lawfully made copies (ie parallel imports) is not an infringement of the Distribution Right.<sup>42</sup>

**(5) Principles of statutory interpretation**

The principle that statutes ought to be given an interpretation consistent with New Zealand’s international treaty obligations

26. This case engages a number of important principles of statutory interpretation. The first is the presumption that “... Parliament does not intend to legislate contrary to international obligations and statutes are interpreted accordingly”.<sup>43</sup> As a result, to the extent that words allow, legislation ought to be interpreted consistently with international law to which New Zealand is a signatory.
27. *Burrows & Carter* elaborate on this presumption, quoting from Sir Kenneth Keith that “[t]he basic proposition that the Executive cannot change national law by entering into Treaty obligations does not mean however those obligations may not be relevant to the interpretation of the legislation or the development of the common law”.<sup>44</sup>
28. Previous case law shows that the presumption “may apply whether or not the legislation was enacted with the purpose of implementing the relevant text”.<sup>45</sup> In many cases, domestic legislation is enacted to give effect to international treaties. PGT submit that the presumption applies equally in the case of existing legislation where (as here):
- (a) MED stated in its 2002 Position Paper Appendix A that ss 16(1)(b) and 9 “comple[d]” with Article 6 WCT.
  - (b) The 1998 Amendment Act that repealed the ban on parallel importing and amended s 9 by inserting s 9(1)(d) was consistent with Art 6 WCT.
  - (c) No changes to the Distribution Right provisions in the 1994 Act were made in the 2008 Amendment Act, being an amendment designed to bring New Zealand to a position where it otherwise met the WCT and WPPT requirements.

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<sup>42</sup> This is discussed in more detail in Section 9.

<sup>43</sup> *Ortmann*, above n 16, at [313]. Ross Carter *Burrows & Carter Statute Law in New Zealand* (6th ed, LexisNexis 2021) (*Burrows & Carter*) at 674 states that “There is a presumption, which is gaining strength, that Parliament does not intend to legislate contrary to New Zealand’s international obligations. The New Zealand Supreme Court is said to have adopted ‘a posture of profound receptivity to international law as a source of authority within the domestic legal system’”. (citing Geiringer (2006) 17 PLR 300, 318 and Dunworth [2006] NZL Rev 367, 375).

<sup>44</sup> *Burrows & Carter*, above n 43, at 674 citing at fn 167 Keith (2016) 47 VUWLR 5 at 13-15.

<sup>45</sup> *New Zealand Airline Pilots’ Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289.

- (d) The Government declared in successive NIA's from 2016 that the domestic legislation in the Copyright Act 1994 already complies with the Art 6 WCT and no amendments were made to ss 9, 16, 29 and 31 in the 2018 Amendment Act.
- (e) New Zealand acceded to the WCT (and ratified the CPTPP) and has therefore held out to other Contracting Parties that its domestic legislation meets the terms of the WCT, including Article 6.
- (f) The words of ss 9, 16, 29 and 31 allow an interpretation which complies with Article 6 of the WCT, as evidenced by the judgment of Downs J.

The “ambulatory” or “updating” approach to statutory interpretation

29. PGT also rely on s 11 of the Interpretation Act 2019 and the ambulatory or updating approach to interpretation.<sup>46</sup> *Burrows & Carter* note in general terms that very often, new developments overtake legislation and that the Courts “normally apply an ‘ambulatory’ or ‘updating’ approach and find that the Act does cover these developments provided two conditions are satisfied; *first*, that these developments are within the purpose of the Act; and *secondly*, that the words of the Act, albeit by liberal interpretation are capable of extending to them”.<sup>47</sup> The author cites *Ortmann* as an example of this principle and the Court’s interpretation of the word “object” in the Copyright Act so that ss 36 and 131 included authorised digital copies.<sup>48</sup>

A meaning that gives effect to statutory provisions is to be preferred

30. Finally, PGT note the long-held principle that the meaning of a section must be read in the light of the Act as a whole.<sup>49</sup> The meaning of a provision that is otherwise ambiguous may be clarified when understood in light of other enacted provisions.<sup>50</sup> As held by the United States Supreme Court, “the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in relation to their end in view”.<sup>51</sup> Put another way, the Court should strive to achieve a meaning that allows the provisions to “live together”.<sup>52</sup>
31. Further, where there are apparently inconsistent statutory provisions, it has long been recognised that the provisions should be reconciled to the extent possible, rather than

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<sup>46</sup> Section 11 states “Legislation applies to circumstances as they arise”.

<sup>47</sup> *Burrows & Carter*, above n 43, at 527. See also at 542 “No doubt [so far as the words of the Act supporting the interpretation] is concerned, a liberal interpretation is often necessary”.

<sup>48</sup> *Burrows & Carter*, above n 43, at 528-529. See also *IBM Corp v Computer Imports Limited* [1989] 2 NZLR 395 (HC) interpreting a “literary work” in the Copyright Act 1962 as including computer software source code.

<sup>49</sup> *Burrows & Carter*, above n 43, at 335-8.

<sup>50</sup> At 336.

<sup>51</sup> *Panama Refining Co v Ryan* 293 US 388 (1935) at 433 and 439.

<sup>52</sup> *Re Silver Brothers Ltd* [1932] AC 514 (PC) at 523.

one provision simply being preferred at the expense of another.<sup>53</sup> As noted by *Burrows & Carter*, even a strained interpretation can be “required” in order to give effect to the statutory language, the law recognising that the avoidance of internal inconsistency can justify liberality with words. As held as long ago as 1857:<sup>54</sup>

The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no further.

32. It is only in rare cases of “extreme repugnance” between two provisions that one is given no meaning at all. *Burrows & Carter* note that “[i]n such a case the court must determine which is the dominant section in the light of the scheme and purpose of the Act and hold that the other, in so far as it is repugnant to it, has no effect”.<sup>55</sup> The authors note that such an approach is “clearly most exceptional”.<sup>56</sup>
33. With respect, it should only be in extraordinary circumstances that a Court should refuse to give meaning to a section on the basis of that Court’s view that it is “misconceived” or “unnecessary”. As discussed further below, this occurred in this case with respect to s 9(1)(d).<sup>57</sup> Instead of s 9(1)(d) being effectively disapplied because of the Court of Appeal’s view on the meaning of the rest of s 9, a meaning should be found that recognises Parliament’s intent in enacting that section. PGT’s proposed meaning does that.

**(6) *Copyright owners’ exclusive right to control the first ‘circulation’ of a copy of their work to the public***

Background

34. The owner of copyright in a work has the exclusive right to do certain acts in relation to that work in New Zealand.<sup>58</sup> Those acts are described in s 16 of the 1994 Act. It is an infringement of the owner’s copyright for any other person to do one of those acts without the permission of the copyright owner.<sup>59</sup> These exclusive rights comprise a

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<sup>53</sup> *Burrows & Carter*, above n 43, at 607 to 615.

<sup>54</sup> *Grey v Pearson* (1857) 6 HL Cas 61 and 106 per Lord Wensleydale.

<sup>55</sup> *Burrows & Carter*, above n 43, at 610.

<sup>56</sup> At 610.

<sup>57</sup> *ESR Group (NZ) Ltd v Burden* [2023] NZCA 335 (**Decision**) at [95]. [[102.000425]]

<sup>58</sup> Section 16(1) “the exclusive right to do...the following acts in New Zealand.” These are described as the “restricted acts”; see also definition of “restricted act” in s 2(1).

<sup>59</sup> Section 29(1): “other than pursuant to a copyright licence”.

divisible “bundle of rights”, which includes separate rights to control the reproduction, communication, performance and distribution of copies of the work.<sup>60</sup>

35. The Act makes a distinction between primary infringement and secondary infringement. Primary infringement is defined in ss 29 to 34, being the restricted acts (**primary acts**). There is no knowledge requirement for liability. Secondary infringement is the heading preceding ss 35 to 39, the key sections being s 35 (importation) and 36 (possessing or dealing with infringing copy) (**secondary acts**). These infringements require proof that the infringer knew or had reason to believe that the object being dealt with was an infringing copy. A further essential difference is that the primary acts can arise in respect of both genuine *and* pirated (counterfeit) copies. Secondary acts are only available in respect of infringing copies.<sup>61</sup>
36. Finally, it is important to note that primary and secondary infringement are not mutually exclusive. Primary infringement in the form of issuing to the public arises where the person *at the top of the distribution chain in New Zealand* sells or distributes the infringing copies to the public.<sup>62</sup> Those who sell further down the chain in New Zealand can only be liable for secondary infringement. Importantly, those at the top of the chain in New Zealand can be liable *for both primary and secondary infringement*. That is the consequence of the creation of the distribution right in ss 9, 16, 29 and 31 of the Act and the requirement of Art 6 of the WCT.
37. This plurality of available causes of action is confirmed in leading texts. *Copinger & Skone James on Copyright* states that “*As already noted, there may be circumstances in which someone who sells or distributes infringing copies is also liable for the primary act of infringement of issuing copies to the public in respect of which guilty knowledge is not an element*”.<sup>63</sup> Another UK text *The Modern Law of Copyright*, when answering the question “why does the distribution right matter”, confirms the position.<sup>64</sup>

#### The Distribution Right

38. The first restricted act is the copyright owner’s exclusive right to make copies of their work in New Zealand.<sup>65</sup> The second is “to issue copies of the work to the public, by sale

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<sup>60</sup> *Copinger*, above n 14, at [2-19].

<sup>61</sup> As amended in 1998 (s 12(5A)), to provide that parallel imports are not “infringing copies”.

<sup>62</sup> A Speck and others *Laddie, Prescott and Vitoria: The Modern Law of Copyright* (5th ed, Butterworths Lexis Nexis, London, 2018) (**Laddie**) at [15.14].

<sup>63</sup> *Copinger*, above n 14, at [8-02].

<sup>64</sup> *Laddie*, above n 62, at [15.4].

<sup>65</sup> Sections 16(1)(a) and 30

or otherwise” in New Zealand.<sup>66</sup> The effect of this right is to grant the copyright owner the right to control the circumstances in which the original or a copy of their copyright work is “put into circulation”.<sup>67</sup> If there are multiple copies of the copyright work, the right applies to each copy.

39. Section 9 uses the neutral phrase “put into circulation”. The most common circumstances in which a copy of a work is “put into circulation” by a copyright owner is by sale. However, the wording of s 16(1)(b) makes clear that a copy can also be put into circulation “otherwise”, ie by gift. Under s 29(1) of the 1994 Act, the right is infringed by anyone who does so without the licence of the owner of the right.
40. Importantly, however, the owner of copyright is only entitled to control the *first* set of circumstances in which a particular copy of their work is put into circulation in New Zealand by or with their consent. As described by the authors of *Copinger*, “an important aspect of the distribution right is that it is *exhausted* in relation to a particular article by the first sale ... of that article in the Community by the rightholder or with his consent”.<sup>68</sup> This is the concept of “exhaustion” of the copyright owner’s right to distribution. Put another way:<sup>69</sup>

The exhaustion or first sale doctrine is the rule by which once the first sale of physical objects embodying copyright works (such as a book, DVD, or a music CD) has occurred with the authorisation of the copyright holder, they cannot dictate the fate of subsequent transfers of that object.

41. There are three recognised rationales for this limitation on the copyright owner’s right to control distribution of a copy of their work to the *first* act of circulation of *that copy*.<sup>70</sup> The first is that once the owner has put the copy on the market, they have received “a just reward” and reaped the economic benefit of that act.<sup>71</sup> The second is to foster the existence of a lawful second-hand market for goods in which copyright subsists.<sup>72</sup> The third justification is the traditional hostility of the common law towards restrictions on the alienation of lawfully acquired personal property.<sup>73</sup>

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<sup>66</sup> Sections 16(1)(b) and 31.

<sup>67</sup> Using the words of s 9(1) of the 1994 Act.

<sup>68</sup> *Copinger*, above n 14, at [7-138] (emphasis added). The type of exhaustion adopted in the CDPA is discussed in the next section.

<sup>69</sup> P Chapdelaine *Copyright User Rights: Contracts and the Erosion of Property* (Oxford University Press, Oxford, 2016) at 110. See also Laddie, Prescott and Vitoria *The Modern Law of Copyright and Designs* (4th ed, vol 2, LexisNexis, United Kingdom, 2018) at [33.21]: “the doctrine of exhaustion of rights is confined to the situation where the first marketing takes place in a Member State by or with the consent of the owner of the right”.

<sup>70</sup> At 111 to 116.

<sup>71</sup> At 111-112.

<sup>72</sup> At 113-114.

<sup>73</sup> At 114-116.

42. All three of these justifications are inconsistent with the notion that a copyright owner's right to control the first act of circulation is "exhausted" by an *unauthorised* act of circulation, by a person other than the copyright owner without consent.

**(7) *Legislative history of the right to issue copies to the public***

The position before the 1994 Act and under the CDPA(UK) 1988

43. The judgment under appeal summarises the historical development of the right to issue copies to the public prior to the passage of the CDPA(UK) from which the NZ provisions are drawn.<sup>74</sup> PGT respectfully adopt that summary in relation to the historical right to "publish" a work. Importantly, however, the publishing right was replaced in 1988. Leading UK commentary notes that infringement by issue of copies to the public was "a new concept introduced by s 18 [CDPA]...and represented a substantial departure from the previous law...".<sup>75</sup>
44. The definition contained in s 18 *as first enacted* in the United Kingdom contains the words "*in the United Kingdom or elsewhere*". This meant, on its face, that a copyright owner in the United Kingdom could not sue for infringement of the distribution right for a particular copy if that copy had been put into circulation anywhere in the world – namely, international exhaustion. Crucially, however, those words were not used in our 1994 Act.
45. For the purpose of this Court's role in interpreting the 1994 Act, it is essential to note the various amendments to s 18 of the CDPA(UK) that were made in order to comply with international law under the WCT (the content of which has been addressed above) and certain earlier EU Directives which used the same language.<sup>76</sup>
46. Section 18 stood unamended from the passage of the CDPA(UK) until *1 January 1993* when there was an amendment in relation to computer programs and films. Subsection (3) of the amended s 18 provided, in relation to computer programs only, that such copies were not put into circulation unless the act of circulation was "*by or with consent of the copyright owner*". This amendment was to meet the requirements of the EU Software Directive which gave the right holder the exclusive right "to do or authorise ...

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<sup>74</sup> Decision, above n 57, at [24]-[31] [102.000403]-[102.000405].

<sup>75</sup> Copinger, above n 14, at [7-76] Further "[d]ecisions under the earlier law are of little assistance in interpreting section 18". See also *The British Phonographic Industry Ltd v Mechanical-Copyright Protection Society Ltd (no 2)* [1993] EMLR 86 at 98 note 9: "The distribution right constitutes a statutory reversal of the decision in *Infabrics v Jaytex*..."

<sup>76</sup> These are identified in the succeeding paragraphs.

(c) any form of distribution of the original computer program or copies thereof” but provided that “first sale in the community of a copy [of the computer program] *by the right holder or with his consent* shall exhaust the distribution right within the community of that copy ...”.<sup>77</sup> This EU Directive wording was a precursor of the wording used in Art 6 of the WCT in 1996.

47. Then, as of 1 December 1996, the section was clarified again to provide that a copy of *any copyright work* (not just a computer program) was only to be regarded as having been put into circulation if that act occurred in the EEA “by or with the consent of the copyright owner”. The second amended section distinguished between copies that had and had not been put into circulation in the EEA. This amendment was driven by another EU Directive, the Rental and Related Rights Directive.<sup>78</sup> The words “by or with the consent of the copyright owner” were drawn from Art 9(2) of that Directive, which uses the same language as Art 6 of the subsequent WCT. The second formulation of the Distribution Right in s 18(2)(b) has been stringently criticised by the authors of *Laddie*.<sup>79</sup>
48. When the EU (including the UK) acceded to the WCT in the Information Society Directive,<sup>80</sup> it was not necessary to make any further amendment to s 18 in order to comply with Art 6, given the amendment made with effect from 1 December 1996.
49. The edition of *Copinger* contemporaneous with the 1996 amendments to the CDPA helpfully clarifies some of the drafting. The authors’ comments are relevant to the New Zealand provisions. *Copinger* emphasises that the words in s 18 are subject to the general words in s 16 namely that the owner of copyright has the exclusive right to do the restricted acts **in the United Kingdom**.<sup>81</sup> This is the same interpretation proposed by PGT for s 9.
50. Section 18 CDPA(UK) was amended again as of 11 October 2018. The third amended section provided that a copy had only been “put into circulation” under s 18 if it had been “put into circulation in the EEA by or with consent of the copyright owner”. The section currently in force was then updated as of 31 December 2020 consistently with Brexit, to read “putting into circulation in the United Kingdom copies not previously

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<sup>77</sup> Directive 91/250 14 May 1991 (**the Software Directive**) since codified and replaced by Directive 2009/24/EC.

<sup>78</sup> Substituted by the Copyright and Related Rights Regulations 1996/2967 designed to comply with the EU Rental and Related Rights Directive 92/100/EEC (since codified by Directive 2006/115/EEC) see *Copinger*, above n 14, at [1-55].

<sup>79</sup> *Laddie*, above n 62, at 15.20 and 15.21.

<sup>80</sup> Directive 2001/29/EC. Preamble 15 of the Directive refers to compliance with the WCT. “The Community and a majority of Member States have already signed the Treaties....”

<sup>81</sup> The equivalent provision is s 16 Copyright Act 1994 (NZ). See Garnett et al *Copinger and Skone James on Copyright* (14th ed, Sweet & Maxwell, London, 1999) at [7-107].

put into circulation *in the United Kingdom or the EEA* by or with the consent of the copyright owner”<sup>82</sup>.

51. The above legislative history demonstrates two things. First, that from 1 December 1996 s 18 provided that a copy was only put into circulation if that was by or with the consent of the copyright owner. Secondly, that the United Kingdom’s definition of “issuing copies to the public” as first enacted<sup>83</sup> expressly stated that an act of circulation “in the United Kingdom *or elsewhere*” would exhaust a copyright owner’s distribution right. Despite the fact that the 1994 Act was “largely based”<sup>84</sup> on the CDPA(UK), that wording was **not** used by the New Zealand drafters. The appellants submit below that the judgment under appeal was wrong to suggest that this indication of legislative intent was “neutral”.<sup>85</sup> Further, the United Kingdom subsequently retreated from a position of “international exhaustion” with effect from 11 October 2018 by restricting the relevant previous circulation to “in the EEA” and then in 2020 to “in the United Kingdom or EEA”. This took the United Kingdom to a position of “regional exhaustion”.<sup>86</sup>

The position in New Zealand under the 1994 Act<sup>87</sup>

52. The Distribution Right contained in ss 2, 9, 16, 29 and 31 was copied across from the CDPA. As with the UK, the creation of the Distribution Right in the 1994 Act occurred before the WCT Treaty in 1996. This Court in *Ortmann* noted that the 1994 Act was introduced in response to New Zealand’s accession to the TRIPS Agreement and “partly as a result of the time pressure to comply with the TRIPS Agreement and partly because of New Zealand’s historical reliance on UK copyright law, the 1994 Act was largely based on the [CDPA] UK 1988”.<sup>88</sup>
53. The Explanatory Note to the introductory copy of the 1994 Bill stated nothing of significance in relation to the Distribution Right. It simply recorded what is in ss 16 and 29 and stated “[c]lauses 30 and 31 provide that the copying of the work, or the issue of copies of the work to the public, is a restricted act in every description of copyright work”.

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<sup>82</sup> Intellectual Property (Exhaustion of Rights (EU Exit) Regs (SI 2019/265) reg 4(2).

<sup>83</sup> In force in the UK at the time of enactment of 1994 Act.

<sup>84</sup> Explanatory Note to Copyright Bill 1994 page 1 final para.

<sup>85</sup> Decision, above n 57, at [111]. [[102.000429]]

<sup>86</sup> The UK retreat from international exhaustion is explainable with reference to the requirements of Art 6 WCT and is powerful support for the argument that the appellant’s interpretation is the correct one. Regional exhaustion for the UK/EEA is the functional equivalent to national exhaustion for the purposes of New Zealand – given the relationship between the UK and EEA which has no equivalent in New Zealand.

<sup>87</sup> This section does not cover the important enactment of s 9(1)(d), which is addressed in Section 9 below.

<sup>88</sup> *Ortmann*, above n 16, at [313].



54. The Ministry of Justice Departmental Report for the Select Committee considering the 1994 Bill noted several submissions (of no consequence) relating to the Distribution Right.<sup>89</sup> Because the 1994 Act was passed without any precursor policy documents, and because the Explanatory Note provides no commentary on “issuing to the public”, the Court does not have the usual policy framework to assist interpretation.
55. When comparing the New Zealand provisions with those in the CDPA there are two key differences:<sup>90</sup>
- (a) First, the New Zealand provisions did not enact the “in the United Kingdom or elsewhere” formulation in s 18 CDPA as first enacted. Nor were there any subsequent amendments to reflect the changes in s 18 from international exhaustion to regional exhaustion in the EEA.
  - (b) Secondly, the New Zealand provisions were not amended to include the words “by or with the consent of the copyright owner”. However, as seen, the Executive has consistently stated since 2002 that the New Zealand provisions comply with Art 6 WCT which mandates these words.

**(8) *The proper interpretation of the Issue to the Public provisions in 1994 Act – the proper role of section 29(1)***

56. In New Zealand five separate provisions (ss 2(1), 9, 16, 29 and 31) cumulatively create the Distribution Right. Section 29(1), located at the start of the “Primary infringement of copyright” section of Part 2 of the Act, provides that copyright “is infringed by a person who, *other than pursuant to a copyright licence*, does any restricted act.”<sup>91</sup> “Restricted act” is defined in s 2 as meaning “any of the acts described in s 16 of this Act”. Section 16(1) lists the ‘acts’ and also cross refers to “sections 30 to 34”. Most relevant for this appeal are ss 16(1)(b) and 31. It is well understood that the words in s 29(1) “other than pursuant to a copyright licence” mean without *the permission of the owner*.<sup>92</sup>

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<sup>89</sup> There was one submission that s 9 containing the definition of “issuing to the public” should be proximate to s 31. However, the Report stated that this was a drafting issue for Parliamentary Counsel (page 31). No change was made.

<sup>90</sup> Another difference is that in the 1996 drafting, the UK legislature stated “copies not previously put into circulation” rather than simply “those copies”, as contained in s 9 of the 1994 Act.

<sup>91</sup> Section 2(1) defines ‘restricted act’ as meaning one of the restricted acts described in s 16, relevantly here s16(1)(b).

<sup>92</sup> C Elliott and others *Intellectual Property Law* (Lexis Nexis, online ed, 2023) at [COP29.4]. *Copinger*, above n 14, at [2-78]: “Thus the essence of copyright is the owner’s right to take action to prevent others from engaging in specific kinds of activity without the owner’s permission.”

57. In relation to issue (a), the Court of Appeal dismissed PGT’s reliance on s 29(1) saying that this subsection “neither foresaw nor anticipated” the legislative development in the UK subsequent to the introduction of the 1994 Act ie the additional words incorporated in s 18(2) in 1996.<sup>93</sup> These words were “the act of putting into circulation in the EEA copies not previously put into circulation in the EEA *by or with the consent of the copyright owner.*”
58. Contrary to the Court of Appeal’s ruling, PGT submits that the words “*other than pursuant to a copyright licence*” in s 29(1) do not just “simply recognis[e] that only an unauthorised performance of a restricted act is an infringement”.<sup>94</sup> The words apply to **all** of the restricted acts in ss 16(1) and 30 to 34. More importantly, for the words to be given their full and proper meaning, they must apply to the **definitions** of the restricted acts.
59. The obligation on New Zealand as a Contracting Party to the WCT is to give effect to Art 6 and to ensure that the Distribution Right is only exhausted where the first sale or other transfer of ownership has been by or with the “authorisation” of the copyright owner. As already submitted above, the adoption of an interpretation which permits exhaustion *without* authorisation of the copyright owner is inconsistent with the wording of Art 6. “Authorisation” means with the consent or permission of the copyright owner and is clearly encompassed in the words in s 29(1).
60. PGT therefore submits that the words in s 29(1) “*other than pursuant to a copyright licence*” should be treated as an integral part of **both** the definition in section 9 **and** the short descriptions of the restricted acts in ss 16(1)(b) and 31. To only give effect to those words in the limited sense stated by the Court of Appeal is:
- (a) to deprive the copyright owner of the full value of the Distribution Right which New Zealand has committed to; and
  - (b) to prefer an interpretation of the Act that is inconsistent with New Zealand’s obligations under Art 6 of the WCT.
61. So, the overarching words in s 29(1) require the s 9(1) definition of the term “issue to the public” to be properly read as meaning “the act of putting into circulation copies not previously put into circulation ***by or with the consent of the copyright owner.***”<sup>95</sup> As will be discussed later, this interpretation is entirely consistent with the amendments

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<sup>93</sup> Decision, above n 57, at [73]. [[102.000418]]

<sup>94</sup> Decision, above n 57, at [73]. [[102.000418]]

<sup>95</sup> The same words must also be read into the rental provisions in ss 9(2)-(3).

to the Act made in 1998. It is consistent with the purpose of the 1994 Act which was to provide for a Distribution Right and the wording of s 29(1) permits (indeed requires) this interpretation.<sup>96</sup>

**(9) Issue (a): Was the Court of Appeal correct to conclude for the purposes of s 9(1) of the 1994 Act that a copyright holder's consent is not necessary for a work to be in circulation?**

The decision

62. The Court of Appeal's conclusion was that Downs J erred in accepting PGT's contention that a copy of a copyright work will only be put into circulation if the relevant act of distribution is performed either by or with the consent of the copyright owner:<sup>97</sup>

In our view the release of a copy to the market, whether the release is unauthorised or non-infringing, causes the relevant copy to be placed 'in circulation'. The copyright owner's exclusive right to distribute that copy is spent, notwithstanding that the act of issuing was an infringement of the owner's s 16(1)(b) right.

63. Very briefly, the building blocks for this conclusion were:

- (a) PGT's reliance on s 29(1) was misplaced.<sup>98</sup>
- (b) A discussion of the so-called "implications" of PGT's argument on sequential sales of a copyright work.<sup>99</sup>
- (c) The conclusion that Sterling's interpretation of the CDPA in its original form was correct – i.e. a fact that a copy was previously circulated without the copyright owner's consent was irrelevant in determining whether a copy was to be classified as "circulated" for the purposes of the distribution right.<sup>100</sup>
- (d) The downstream developments relied on by PGT were dismissed. The 1998 inclusion of s 9(1)(d) was "unnecessary and misconceived"<sup>101</sup> and the 2019 MBIE publication relied on was "not sufficiently focussed to support a conclusion either way".

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<sup>96</sup> These being conditions for application of the principles of interpretation of Treaties and s 11 Interpretation Act discussed in section (5).

<sup>97</sup> Decision, above n 57, at [103]. [[102.000427]]

<sup>98</sup> Decision, above n 57, at [73]. [[102.000418]]

<sup>99</sup> Decision, above n 57, at [74]-[78]. [[102.000419]] - [[102.000420]]

<sup>100</sup> Decision, above n 57, at [79]-[80]. [[102.000420]] - [[102.000421]]

<sup>101</sup> Decision, above n 57, at [95]. [[102.000425]]

(e) Article 6 WCT was held to be “not informative” on this issue.<sup>102</sup>

64. PGT submit the Court’s finding on Issue (a) was wrong for the following reasons.

The Court’s interpretation was inconsistent with Article 6 WCT

65. First, as seen in Section 3 above, Art 6 itself has been interpreted to provide that exhaustion “may under no circumstances take place in the case of putting a copy into circulation without the consent of the owner”.<sup>103</sup> The CJEU, as well as the two key texts, *Reinbothe* and *Ricketson & Ginsburg* are unanimous in their interpretation to require the relevant act as being one by the copyright owner or with their consent.

66. The Australian NIA<sup>104</sup> has also interpreted Art 6 and its EU equivalent to mean that there can be no exhaustion of the right to first issue where the copies are infringing copies and there was no consent by the copyright owner to their issue.<sup>105</sup>

67. Similarly, the United States (also a WCT signatory) provides for the Art 6 right of distribution in ss 106(3) and 109 of its copyright statute.<sup>106</sup> These require (consistent with Art 6) that *authorised copies be lawfully distributed* before the distribution right is exhausted or spent.<sup>107</sup> Again the Court of Appeal’s interpretation is out of step with New Zealand’s major trading partners.

68. The Court’s finding on this issue is inconsistent with New Zealand’s obligations under Art 6 and 18 of the WCT. On the facts the infringing copies of furniture were manufactured in Vietnam and purchased there by ESR. Title passed to ESR in Vietnam or while the copies were in transit to New Zealand. At no stage was the circulation of these infringing copies in Vietnam or in New Zealand consented to by the copyright owners, PGT.

69. PGT has described the correct interpretation of ss 2(1), 9, 16, 29 and 31 in Section 8 above. That interpretation is consistent with New Zealand’s obligations under Art 6 of the WCT, and should be preferred to the Court of Appeal’s treaty-inconsistent interpretation.

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<sup>102</sup> Decision, above n 57, at [102]. [[102.000427]]

<sup>103</sup> Reinbothe above n 13, at [7.6.24].

<sup>104</sup> Australian NIA on WCT at [13].

<sup>105</sup> Art 4 Information Society Directive 2001/29. See the CJEU in *Laserdisken* Case C-479 at [20]-[21]; *Art & Allposters* Case C-419/13 at [30]-[31]. Passage cited is from *Laserdisken* at [21].

<sup>106</sup> Copyright Law of the United States 17 USC § 106-109.

<sup>107</sup> J Ginsburg *Copyright: Cases and Materials* (9th ed, Foundation Press, Washington DC) at 826.

The presumption that the Court’s interpretation should be consistent with Treaty obligations

70. Secondly, PGT relies on the presumption that domestic legislation should be read consistently with international treaty obligations – here, Art 6 WCT – and that the provisions of the 1994 Act are to be interpreted accordingly. PGT submits the case for applying the presumption is strong given:
- (a) the Art 18 undertaking by New Zealand to meet its Art 6 obligations and the obligation in Art 14(2) to provide in its domestic legislation for “effective action” against any infringement of Art 6; and also under Art 1(4) WCT New Zealand was obliged to meet all of the minimum requirements in the Berne Convention including national treatment to copyright owners who are nationals of or incorporated in Convention countries;<sup>108</sup>
  - (b) the importance of standardised intellectual property arrangements between New Zealand and its trading partners, as provided for at international law;<sup>109</sup>
  - (c) the multiple times from 2002 until actual accession in 2019 that the Government and Parliament confirmed that the Distribution Right provisions complied with the WCT.<sup>110</sup> Further, the New Zealand Government has confirmed its compliance with the WCT as a condition of entering into both the UK and the EU FTA’s; and
  - (d) the history of the development of the 1994 Act, and particularly the 1998 amendment which provided for exhaustion of the Distribution Right only in relation to parallel imports, which uses language consistent with Art 6 of the WCT.<sup>111</sup>
71. The Court of Appeal noted that the Art 6 obligation was perceived to have been satisfied in New Zealand by the existing s 16(1)(b) right, but the Court’s finding that “New Zealand’s accession to the WCT is not informative” on issue (a) is surprising and wrong.<sup>112</sup> To the contrary, as a result of New Zealand’s obligations under Arts 14(2) and 18, Art 6 WCT is highly relevant to the proper construction of the Distribution Right under the 1994 Act. If followed in other cases, an approach like that taken in the Court

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<sup>108</sup> Reinbothe, above n 13, at [7.1.28].

<sup>109</sup> Also in Art 18 of the WCT, New Zealand assumed “all the obligations” under the WCT, including the right of all citizens and nationals of Berne convention countries to avail themselves of the rights guaranteed in WCT.

<sup>110</sup> See WCT chronology and section 4 above.

<sup>111</sup> Discussed in more detail in the next section.

<sup>112</sup> Decision, above n 57, at [102]. [[102.000427]]

of Appeal would have adverse consequences on New Zealand’s standing in meeting Treaty obligations. The Court gave no consideration to the interpretative presumption in relation to Treaties – despite making other references to the *Ortmann* decision of this Court.

Incorrect rejection of s 11 of the Interpretation Act 2019

72. Thirdly the Court of Appeal wrongly rejected the “ambulatory” or “updating” principles of interpretation supported by s 11 Interpretation Act 2019 (discussed earlier), and three “related developments” relied on by PGT.
73. The Court dismissed the legislature’s insertion of s 9(1)(d) in the Copyright (Removal of Prohibition on Parallel Importing) Amendment Act 1998 as “unnecessary and misconceived”<sup>113</sup> relying on commentary from the text *Intellectual Property Law*.<sup>114</sup> PGT submits that it is unusual and surprising to dismiss an amendment in such a way and that more detailed consideration supports the application of the s 11 ambulatory interpretative approach.<sup>115</sup> Instead, Downs J in the High Court was correct to prefer PGT’s interpretation, given that “ESR’s interpretation presupposes [s 9(1)(d) to be] a mistake”.<sup>116</sup>
74. It is necessary to explain the background. As originally enacted, 12(2) provided that an object is an infringing copy if its making constituted an infringement of copyright in the work in question. As to objects that a person *imports or proposes to import into New Zealand*, under s 12(3)(a) such an object was an infringing copy if “[t]he making of the object constituted an infringement of the copyright in the work in question in the country in which the object was made”. Section 12(3)(b) contained an alternative deeming provision that covered parallel imports of genuine copies, namely that an object “... is an infringing copy if – (b) [t]he importer would have infringed the copyright in the work in question in New Zealand had the importer made the object in New Zealand”.
75. In May 1998 there was a change of legislative policy in New Zealand to allow the parallel importing and sale of genuine, i.e. not counterfeit, copies of copyright works.<sup>117</sup> This legislation was amended and passed under urgency all in one day, on 19 May 1998. The

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<sup>113</sup> Decision, above n 57, at [95]. [[102.000425]]

<sup>114</sup> *Intellectual Property Law*, above n 93, at [COP9.6].

<sup>115</sup> In this regard, PGT relies in particular on the principles of statutory interpretation described in Section 5, namely “Meaning which gives effect to statutory provisions to be preferred”.

<sup>116</sup> *Burden v ESR Group (NZ) Ltd* [2022] NZHC 1818 at [50]. [[102.000376]]

<sup>117</sup> New Zealand copyright covers both two and three dimensional copies.

only policy statements are four short paragraphs in an Explanatory Note to the Bill. This makes it clear that the amendments were to remove the prohibition on parallel importing of lawfully made or genuine goods. The importation of goods which were not lawfully made (defined as “pirated goods”) “continue to be prohibited”.<sup>118</sup> This was effected by substituting a new s 12(3) and inserting a new s 12(5A).

76. Significantly for this case, clause 4 of the Bill amended the definition of “issue to the public” in s 9(1) by adding in new subsection (d) so that issue to the public does not include:

“(d) Distribution of imported copies that are not infringing copies within the meaning of section 12 subsequent to their importation into New Zealand”.

77. Although the Explanatory Note states that “importation” of goods not lawfully made would “continue to be prohibited”, this clearly encompassed distribution because of the specific amendment to s 9(1) defining the distribution right.

78. However, by virtue of the judgment below, s 9(1)(d) has been effectively rendered meaningless, contrary to PGT’s submission on the proper reading of the Act.<sup>119</sup> PGT submits that the 1998 amendment is highly relevant to the proper interpretation of ss 2, 9, 16, 29 and 31 in accordance with Article 6 of the WCT for the following reasons:

(a) PGT submitted and the Court of Appeal agreed that the importation of objects cannot *per se* amount to ‘issuing to the public’.<sup>120</sup>

(b) The change to the definition of “infringing copy” in s 12(5A) uses language that is consistent with the language found in Art 6(2) WCT and EU directives as well as the language used in s 18 CDPA to implement Article 6 i.e. ‘copies not previously put into circulation ... by or with the consent of the copyright owner’. Similarly with the alternative formulation in s 12(5A)(b)(iv).<sup>121</sup>

(c) PGT submits that the Court wrongly dismissed s 9(1)(d). The distribution right covers both genuine and counterfeit copies of a work. The effect of the amendment was that if genuine copies of a work made overseas with the permission of the copyright owner in the country in which they were made

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<sup>118</sup> Explanatory Note to Copyright (Removal of Prohibition on Parallel Importing) Amendment Bill 1998 para 2.

<sup>119</sup> Decision, above n 57, at [95] [102.000425].

<sup>120</sup> Decision, above n 57, at [55]. [102.000413].

<sup>121</sup> Where no person owned copyright in the work in question in the country where the object was made then one of the applicable provisions was:“(iv) the object was made in that country *by or with the consent of the owner of the copyright in the work in New Zealand*”.

(parallel imports) were imported into New Zealand, then the *distribution* of those copies was not an act of primary infringement ie was not “putting into circulation copies not previously put into circulation”.

79. Ironically, the authors of *Intellectual Property Law* in the same online version that existed prior to the High Court hearing<sup>122</sup> provided this answer themselves.<sup>123</sup>

Incorrect implication of PGT’s arguments

80. Fourthly, the Court of Appeal stated that a so-called “implication” of PGT’s argument was that, although now in the market, the infringing copies had not been put “in circulation” because they had been distributed without the copyright owner’s consent.<sup>124</sup> This was said to affect sequential transactions of the copies so that they were never in circulation.

81. This implication is wrong.<sup>125</sup> When properly interpreted<sup>126</sup>, the key inquiry under s 9(1) is whether the defendant is the first person to put the copies into circulation in New Zealand without the consent of the copyright owner. There are accordingly three possible scenarios:

- (a) First, if the infringing copy was previously put into circulation in New Zealand by or with the consent of the owner, the owner’s distribution right has been “exhausted” and so no action for infringement of the distribution right lies.
- (b) Secondly, if the infringing copy was *not* previously put into circulation in New Zealand by the copyright owner, or by any other person with consent, then the defendant is the first person to put that copy into circulation. They have thereby infringed as defined under ss 9, 16(1)(b), 29(1) and 31.
- (c) Finally, if the copy was previously put into circulation in New Zealand by person X without the consent of the owner, then the person Y’s subsequent act of circulation is also not actionable, given the effect of s 9(1)(a). Only an action for secondary infringement could be brought against Y, and an action for primary infringement against X.

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<sup>122</sup> Relied on by the Court of Appeal for its ‘misconceived’ and ‘unnecessary’ statement.

<sup>123</sup> *Intellectual Property Law*, above n 93, at [COP9.6] penultimate paragraph.

<sup>124</sup> Decision, above n 57, at [76]–[78]. [[102.000419]] - [[102.000420]]

<sup>125</sup> The example from *Taylor v Pillow* referred to in the Decision, above n 57, at [76]–[78] was not put to counsel in argument.

<sup>126</sup> As per Section 8 above.



82. It does not follow that the unlawful or infringing copies have not been “put into circulation”. They clearly have been as a matter of fact. The answer to the Court’s so-called implication is found in the remaining words of s 9(1)(a) namely that issue to the public does “**not include** the acts of subsequent distribution or sale of *those copies*” (ie put into the market without the consent of the copyright owner). The copies have been put into circulation, it is just that there is no case of primary infringement. Any pursuit of those infringing copies must be done via the secondary infringement provision in s 36 where knowledge is a necessary ingredient.
83. This correct approach is illustrated by the UK case *Response Clothing Ltd v Edinburgh Woollen Mills Ltd*.<sup>127</sup> The Court found that infringing copies of the plaintiff’s copyright design fabric had been put into circulation without the consent of the plaintiff by Visage (located in the UK) when it sold those copies to the defendant EWM also located in the UK. The primary infringement occurred at that first stage. The copies were in circulation and there was no primary infringement when EWM subsequently sold the infringing fabric (made into women’s tops) to the public in the UK. PGT therefore submits that the implication by the Court of Appeal was in error.

**(10) Issue (b): Was the Court of Appeal correct to conclude for the purposes of s 9(1) Copyright Act 1994 that circulation [of infringing copies] outside of New Zealand could constitute “circulation”?**

Preliminary comment

84. PGT note that the Court will only reach this issue if it has found against PGT on Issue (a). In other words, the Court has found that the release of copies to the market, even though unauthorised, means that the relevant copies are “in circulation”, and the owner’s Distribution Right is spent.
85. If that is the case, PGT submit that an overseas act of circulation of an infringing copy (as is the case here, namely Vietnam) is not a qualifying act of circulation under the definition contained in s 9. Instead, it is submitted that the act of circulation must occur in New Zealand in order to exhaust the owner’s exclusive right to distribute here.

The Decision

86. The Court of Appeal’s conclusion was that Downs J erred in accepting PGT’s contention that circulation abroad of an infringing copy of a work cannot qualify as circulation for

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<sup>127</sup> [2020] EWHC 149, [2020] FSR 25 (IPEC) at [88].

the purposes of s 9(1).<sup>128</sup> Putting this as a positive proposition, the Court’s conclusion was that unauthorized circulation abroad of an infringing copy of a work qualified as “putting into circulation” under s 9(1). As the infringing copies of furniture sold in New Zealand by ESR had first been circulated in Vietnam, that step constituted issuing to the public and PGT could **not** rely on primary infringement of its copyright in New Zealand.<sup>129</sup>

87. Very briefly, the building blocks for this conclusion were as follows. First, the Court noted that s 18(2) of the CDPA UK *as enacted in 1989* contains the words:<sup>130</sup>

References in this Part to the issue to the public of copies of work are to the act of putting into circulation copies not previously put into circulation, *in the UK or elsewhere*.

88. As discussed above, the New Zealand provisions contained no equivalent wording. The Court of Appeal regarded the absence of any territorial qualification on circulation “as a neutral factor” and speculated as to why.<sup>131</sup> The Court then regarded the reference to “subsequent importation” in s 9(1)(c) as a more “significant interpretative pointer”.<sup>132</sup> This excludes from the definition of issue to the public “(c) subsequent importation of those copies into New Zealand.” The Court traced the statutory history of the *equivalent provision* in s 18(2)(b) CDPA which excludes from the definition of issue to the public “any subsequent importation of those copies into the United Kingdom”.
89. The Court necessarily acknowledged that importation without more could not amount to infringement of the Distribution Right.<sup>133</sup> It stated that the provision in its entirety was clear that “[b]ringing into the UK copies which had already been put into circulation elsewhere would not *in due course* culminate in infringement, whereas introducing to into the United Kingdom market (*ultimately by sale there*) copies which had never previously been circulated would do”.<sup>134</sup> This was stated by the Court to be clearly the intent of s 18(2) and “in the absence of any credible alternative” the Court did not consider that some different meaning should be placed on the near identical wording of s 9(1)(c) of the 1994 Act.<sup>135</sup>

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<sup>128</sup> Decision, above n 57, at [127] [[102.000434]]

<sup>129</sup> Decision, above n 57, at [129]. [[102.000434]]

<sup>130</sup> Decision, above n 57, at [106] and [107]. [[102.000428]]

<sup>131</sup> Decision, above n 57, at [111]. [[102.000429]]

<sup>132</sup> Decision, above n 57, at [112]. [[102.000430]]

<sup>133</sup> Decision, above n 57, at [120]. [[102.000432]]

<sup>134</sup> Decision, above n 57, at [120] (emphasis added). [[102.00432]]

<sup>135</sup> Decision, above n 52, at [121]. [[102.00432]]

90. Finally, the Court rejected a possible alternative argument as to the meaning of s 9(1)(c).<sup>136</sup> This argument was not pursued by PGT in the Court of Appeal, so can be disregarded. The Court’s finding was wrong for the following reasons.

Interpretation is in breach of New Zealand’s obligations under Article 6 WCT

91. First, the Court of Appeal’s decision involves *a blanket finding* that any circulation overseas of copies of a copyright work qualifies as an act of “putting into circulation of copies not previously put into circulation” under s 9(1)(a) so as to remove (exhaust) the right to sue for primary infringement.
92. The copies in issue in this case were never put into circulation anywhere by or with the consent of the copyright owner. The Court of Appeal, while stating that Art 6 of the WCT was not informative in respect of what is now Issue (a) before this Court, did not refer to Art 6 at all in relation to Issue (b). PGT submits that the outcome of the Court of Appeal’s interpretation is again to place New Zealand in breach of Art 6 of the WCT.

New Zealand provides for “international exhaustion” only in respect of parallel imports of genuine copies

93. Secondly, an important reminder is that s 9(1) does not contain the words “in New Zealand or elsewhere”, as were found in s 18 of the CDPA(UK) as first enacted. The paucity of legislative policy material prior to the 1994 Act means there is no ready justification for reading those words into the 1994 Act.<sup>137</sup>
94. Indeed, the relevant paragraphs in the MBIE Position Paper 2019 (which the Court of Appeal disregarded in relation to Issue (a) as not being “sufficiently focused to support a conclusion either way”<sup>138</sup>) make it clear that as a result of the 1998 Amendment, New Zealand has international exhaustion *but only in respect of parallel imports* being goods made by or with the consent of the copyright owner.
95. This is a clear articulation in May 2019, post-New Zealand’s accession to the WCT, of the limited policy position New Zealand has already adopted (or which the Government considered it had adopted in the Act) in relation to exhaustion. The discussion paper

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<sup>136</sup> Decision, above n 57, at [122]-[126]. [[102.000433]]-[[102.000434]]

<sup>137</sup> The only indication in the legislative materials found by PGT is in the Department of Justice’s “Summary of Written and Oral Submissions Copyright Bill” (11 October 1994) at 11. There, the Select Committee received a submission that clause 31 should be expanded to “mirror” s 18 of the CDPA(UK). This was never acted on.

<sup>138</sup> Decision, above n 57, at [98]. [[102.000426]]

clearly ties exhaustion of copyright to parallel imported copies “placed on the market in another country by or with the permission of the copyright ... owner”.<sup>139</sup>

96. PGT therefore submit that the Court of Appeal’s blanket approach to circulation outside New Zealand<sup>140</sup> so as to remove the right to sue for primary infringement where the copies were never put into circulation by or with the consent of the owner is wrong and in breach of Art 6 of the WCT.

Court of Appeal’s interpretation on Issue (b) contradicts s 9(1)(d)

97. The Court of Appeal’s interpretation that circulation of copies abroad qualifies as putting into circulation for the purposes of the s 9(1) definition – even where the circulation abroad was not by or with the consent of the copyright owner – results in contradicting s 9(1)(d) and making redundant the whole of the 1998 Amendments to allow parallel imports.
98. As already seen, s 9(1)(d) in combination with s 12(5A) exempts from liability for issuing to the public an object that a person imports or proposes to import into New Zealand if it is not an ‘infringing copy’ as defined. So, this exempted parallel imports of genuine copies, leaving infringing copies which were *counterfeit or pirated goods* and had been earlier distributed abroad still liable for primary infringement under s 9, 16(b), 29 and 31 if they were sold or distributed in New Zealand. This is made clear by Explanatory Note to the Copyright (Removal of Prohibition on Parallel Importing) Amendment Bill, where it was said:<sup>141</sup>

Parallel importing ... can be distinguished from the importing of goods which were not lawfully made (known as pirated goods). Importing of pirated goods occurs when goods that were made without the permission of the copyright holder in the country in which they were made are imported into New Zealand. Importing of such goods will continue to be prohibited.”

99. The Court’s finding that *any circulation of copies overseas* means that they have been put into circulation for the purposes of the s 9(1) definition and therefore not liable for primary infringement makes the amended provisions in s 12(3) and 12(5A) unnecessary. PGT submits that this demonstrates that the Court’s interpretation is wrong and should be overturned.

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<sup>139</sup> The effect of s 9(1)(d) to exempt from issuing to the public the “distribution of imported copies that are not infringing copies” justifies this statement, when read along with s 12(5A).

<sup>140</sup> By reading into s 9(1) the words “in New Zealand or elsewhere”.

<sup>141</sup> As noted earlier in para [77], the reference to “importing” continuing to be prohibited was clearly intended to cover distribution as well because of the amendment to s 9(1)(d).

100. As noted above, the Court of Appeal did not attempt to reconcile the provisions at issue and instead labelled them “unnecessary and misconceived”. That approach is contrary to the longstanding principles described above that the Court must give meaning to the provisions of an Act wherever possible. This is not a case where the Court of Appeal’s interpretation was the only available meaning, with the result that the provision simply could not be given any effect. Instead, PGT’s interpretation should be adopted as a matter of the plain meaning of the Act, its consistency with international law obligations, and to give effect to the words enacted by Parliament.

The importation argument relying on s 9(1)(c)

101. Fourthly, PGT submits that the importation provision in the exceptions to s 9(1) is not the “more significant interpretative pointer”<sup>142</sup> claimed by the Court of Appeal to justify the interpretation reached by the Court on Issue (b). Section 9(1)(c) reads “...and do not include ... (c) Subsequent importation of those copies into New Zealand”.

102. As PGT submitted and the Court of Appeal agreed:<sup>143</sup>

“Importation of a copy, whether genuine or infringing, cannot in isolation constitute the restricted act of issuing a copy to the public. Some additional step in the nature and distribution of the copy to the public would be necessary for liability to arise under s 31”.

103. In its decision the Court of Appeal provided a detailed historical account of how the equivalent provision referring to importation of copies in s 18(2) CDPA(UK) (as first enacted) had been achieved.<sup>144</sup> But the Court accepted, even despite this explanation, that “the phraseology [of s 9(1)(c)] was thus less than ideal”.<sup>145</sup> The Court concluded that the clear intention of s 18(2)(b) of the CDPA was that “bringing into the UK copies which had already been put into circulation would not *in due course* culminate in infringement of the distribution right”<sup>146</sup>. The Court therefore held that “In the absence of any credible alternative we do not consider that some different meaning should be placed on the near identical wording of s 9(1)(c) ...”.<sup>147</sup>

104. In response PGT submits:

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<sup>142</sup> Decision, above n 57, at [112]. [[102.000430]]

<sup>143</sup> Decision, above n 57, at [55]. [[102.000413]]

<sup>144</sup> At [113] to [120]. [[102.000430]] - [[102.000432]]

<sup>145</sup> At [120]. Indeed to give meaning the Court of Appeal had to add words “... in due course” and “ultimately by sale there”. [[102.000432]]

<sup>146</sup> At [120] emphasis added. [[102.000432]]

<sup>147</sup> At [121]. [[102.000432]]

- (a) First, it is clear from the statutory history that the legislature in New Zealand paid not a jot of attention to the House of Lords debate referred to by the Court of Appeal and the wording of s 9(1)(c). As this Court noted in *Ortmann*<sup>148</sup> the Copyright Act was, because of time pressure, largely a ‘copy and paste’ from the CDPA. There was no material discussion or comment on s 9 in the Explanatory Note to the Introductory Copy of the Bill nor any commentary in the Select Committee report.
- (b) In the UK the leading text *Copinger*<sup>149</sup> regards the reference to importation in s 18(2)(b) CDPA as simply being “muddled drafting”. Further and importantly the reference to “importation” in s 18 CDPA was dropped altogether in 2018, clearly indicating that it was a mistake.
- (c) The contingent comment made by the Court of Appeal was that “in the absence of any credible alternative” the meaning that it ascribed to the CDPA s 18(2)(b) should be adopted in respect of s 9(1)(c) in the 1994 Act.<sup>150</sup> PGT submits that there is indeed a credible alternative (indeed an imperative) in the form of the obligations on New Zealand in Art 6 of the WCT.

The combination of the Court of Appeal’s interpretation on issues (a) and (b) is also in breach of Art 6 of the WCT

- 105. Fifthly, the combination of the Court’s interpretation on issues (a) and (b) is also in conflict with Art 6 of the WCT and results in a complete denial of the distribution right in New Zealand for many copyright owners including PGT.
- 106. Even though PGT had no part in, and did not consent to, the creation of the infringing copies or their sale in Vietnam, the result of the Court’s interpretation (dismissing the relevance of the copyright owner’s consent) was that the infringing copies were found to have been put into circulation in Vietnam. So, ESR was not liable under s 16(1)(b) for selling the infringing copies in New Zealand. This results in a complete negation of PGT’s Art 6(1) “exclusive right of authorising the making available to the public of the original and copies of their works” in New Zealand. It also places New Zealand in breach of its obligations in Art 14.

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<sup>148</sup> *Ortmann*, above n 16, at [251].

<sup>149</sup> *Copinger*, above n 14, at [7-147] and footnote 708.

<sup>150</sup> Decision, above n 57, at [121]. [[102.000432]]

107. This interpretation has significant implications for copyright owners. For example, if counterfeit LEGO products are made without consent in Vietnam and are available in Vietnam for New Zealand retailers to purchase, the LEGO Group, as the owner of copyright in relevant works, would, on the Court’s interpretation, have no right to bring a claim for breach of s 16(1)(b) and 31 against the first seller of those counterfeits in New Zealand. On the Court’s ruling, the counterfeit goods have already been put into circulation abroad – even though the LEGO Group gave no consent to the counterfeits or their sale in Vietnam. It is no answer to say that the copyright owner can rely on secondary infringement. This is not what NZ signed up to provide upon accession to the WCT. It is positively not a requirement of Art 6 to prove knowledge against the first distributor of the copies in NZ. This was the finding of the Court of Appeal<sup>151</sup> and has not been cross appealed.
108. PGT therefore submits that the Court of Appeal was wrong on Issue (b). The reasoning contains three errors. (1) The insertion of “in New Zealand or elsewhere” into s 9(1) when there is no mandate to do so; (2) placing significance on “subsequent importation of those copies into New Zealand” in s 9(1)(c), when importation can never amount to issuing to the public; and (3) declaring s 9(1)(d) as unnecessary and misconceived when in fact it provided an explicit carve-out from exhaustion for parallel imports manufactured overseas by or with the consent of the copyright owner. Section 9(1)(d) was positively informative on the policy issue and not misconceived.
109. Counsel has made appropriate inquiries to ascertain whether these submissions contain any suppressed information. Counsel certifies that, to the best of their knowledge, the submission is suitable for publication (that is, it does not contain any suppressed information).

**DATED** at Auckland this 6th day of March 2024

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Andrew Brown QC / J Oliver-Hood / J R Wach  
Counsel for PGT

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<sup>151</sup> Decision above n 57, at [60] – [61]. [[102.000415]]

