

**RESPONSE TO MINISTRY OF BUSINESS, INNOVATION AND
EMPLOYMENT'S REVIEW OF THE COPYRIGHT ACT 1994 (NZ)**



Submission by Screenrights

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Screenrights is the trading name of Audio-Visual Copyright Society Limited ABN 76 003 912 310 ADDRESS:
Level 1, 140 Myrtle Street, Chippendale NSW 2008, Australia WEBSITE: www.screenrights.org
POSTAL: PO Box 853, Broadway NSW 2007 Australia
FreePhone: 0800 44 2348

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ABOUT US

Audio-Visual Copyright Society Limited trading as Screenrights is a not for profit copyright collecting society representing rightsholders in film, television and radio programmes. Screenrights has over 4,277 members in 66 countries world-wide covering a wide spectrum of copyright owners including broadcasters, producers, writers, music copyright owners and creators of artistic works.

Since 1998, Screenrights has licensed New Zealand educational establishments under s.48 of the *Copyright Act 1994* (“Copyright Act”) to copy television and radio broadcasts and cable programmes from broadcasts or the internet.

EXECUTIVE SUMMARY

Our focus in this submission is on the educational exceptions in the Act. We will also comment on some core copyright issues that affect our members. These include the proper objectives of copyright, the definition of “communication work” and “internet service provider”, copyright exceptions and the advantages of a “license it or lose it” approach, the complementary nature of copyright and contract, authorisation liability and internet service provider liability, the role of CMOs, improvements to the jurisdiction and procedures of the Copyright Tribunal and the importance of the enforcement of copyright.

Screenrights administers licences to copy and communicate audio-visual material for educational purposes in both New Zealand and Australia. Although the licences are similar, the legislative structures are different which gives Screenrights a unique perspective on the differences between the systems. The key difference is that the New Zealand provision in s.48 is a “license it or lose it” exception whereas the Australian provision is a more proscriptive statutory licence.

The New Zealand approach has significant advantages over the Australian approach. It facilitates licensing while allowing free exceptions to operate where a licence is not commercially viable or necessary. It is also broader in scope as the material covered is defined in a technologically neutral way whereas the Australian system has an increasingly artificial distinction between traditional broadcast technology and the internet. The result is that the New Zealand educational access for use of audio-visual material is unparalleled globally in Screenrights’ experience, while maintaining fair payment to copyright owners.

One negative difference is that the definition of “educational establishment” in the Act is more restrictive in New Zealand and does not include for profit training providers. We would be interested in working with the Ministry to develop a more workable definition of educational establishment for the purposes of the s.48 licence.

INTRODUCTION

We are grateful to the Ministry of Business, Innovation and Employment (“MBIE”) for the opportunity to participate in this consultation. Our approach in this submission is not to provide a comprehensive response to all the questions posed in the Issues Paper, but to assist MBIE by providing responses based on our experience of how the Copyright Act is currently operating. We note that we have had the opportunity to read the submission of the New Zealand Film and TV Bodies and support that submission.

As MBIE’s recent study of *Copyright and the Creative Sector* indicates, the creative sector in New Zealand is diverse and copyright is important to most participants.¹ In Screenrights’ experience, the Copyright Act is functioning well. This is particularly so in the case of the exception for copyright and communication of communication works for educational purposes under s.48. As discussed in Part 5 of this submission, the flexibility of this exception means that Screenrights is able to offer New Zealand educational establishments access to a vast repertoire of content that is unparalleled in similar schemes in other jurisdictions such as the UK and Australia. In Screenrights’ view, while the Copyright Act would benefit from some amendments which we address in this submission, its underlying basis is sound and does not require overhaul.

PART 3 - OBJECTIVES

Like other countries whose copyright legislation is inherited from the United Kingdom (“UK”), for example, Australia and Canada, the Copyright Act in New Zealand does not have any stated objective. And unlike the United States (“US”) Constitution which gives Congress power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”², the New Zealand Constitution does not limit the power of Parliament to legislate with respect to copyright.

Screenrights acknowledges that modern legislative drafting favours setting out the objectives of legislation. Screenrights generally supports including objectives in the Copyright Act. We note, however, that this may have a significant impact on the way that the legislation is interpreted and operates. In our submission, it is therefore imperative that any objectives included in the Act are drafted carefully and facilitate the proper operation of the Copyright Act.

In our submission, the proposed objectives conflate policy objectives with principles of good law making and other legal requirements. In our submission, the objectives should be confined to the policy objectives of copyright law in New Zealand. We address the specific questions below.

¹ Ministry of Business, Innovation and Employment, *Copyright and the Creative Sector*, 2018, p.4.

² *United States Constitution*, Article 1, Section 8, Clause 8.

1. Are the above objectives the right ones for New Zealand's copyright regime? How well do you think the copyright system is achieving these objectives?

In our submission, the copyright system in New Zealand is generally working well. We have the following comments in relation to the proposed objectives:

1. *Provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so.*

Copyright is generally understood as fulfilling the dual purposes of providing incentives for the creation of original material, while facilitating the dissemination of information. We are concerned that proposed objective 1 conflates a number of concepts and will be difficult to interpret. We suggest that the objective should be simplified to “the creation of original works” as set out in paragraph 101 of the Issues Paper.

2. *Permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand*

In our submission, this proposed objective focuses unnecessarily on exceptions to copyright. The goal of facilitating access to information and knowledge is facilitated not only by exceptions to copyright but by limitations which underlie copyright law. For example, the requirement of originality and the fact that copyright does not protect ideas limit what copyright protects in the first place. Arguably, these limitations are more fundamental to the dissemination of information and knowledge than exceptions. Access is most commonly provided through licensing. Exceptions are not necessarily incompatible with licensing, as per the “license it or lose it” provisions such as s.48. The objective should not be phrased so as to promote exceptions at the expense of licences.

Further, we are concerned that the proposed objective will affect the way that exceptions in the Act are interpreted. As we note in Part 5, the education exception under which Screenrights operates, functions very efficiently and is a good example of where the Copyright Act facilitates access to content while ensuring that rights holders receive fair remuneration for their work.

In our view, the objective should be expressed more generally as “the dissemination and access to knowledge and information”, along the lines of paragraph 101 of the Issues Paper.

3. *Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law*

Again, we are concerned that this proposed objective conflates a number of concepts and may be difficult to interpret. We also query the extent to which the objectives are specific to copyright, but rather embody principles of good law making. We therefore query whether this objective should be included in the Act.

4. *Meet New Zealand's international obligations*

In our submission, proposed objectives 4 forms part of the legal framework of New Zealand's copyright legislation, rather than discrete objectives. We therefore query whether it is necessary or appropriate to include them in the legislation. To do so, will raise the issue of how those treaty obligations should be treated compared with other legal obligations.

4. *What weighting (if any) should be given to each objective?*

As stated above, any objectives included in the Act will become important tools for interpretation of the legislation. In our submission, the objectives should not be given any weighting and the normal rules of statutory interpretation should apply.

PART 4 - RIGHTS

SECTION 1 - WHAT DOES COPYRIGHT PROTECT AND WHO GETS THE RIGHTS?

Protected Works

We note that unlike other jurisdictions such as the UK, Canada and Australia, the Act does not distinguish between "works" and "other subject-matter". The New Zealand approach seems to work well and limits the length of the Act. We confine our comments to the definition of communication works.

5. *What are the problems (or advantages) with the way the Copyright Act categorises works?*

Communication work

The definition of "communication work" was inserted into the Act in 2008 as part of the *Copyright (New Technologies) Amendment Act 2008*. It replaced previous references to "broadcasts" and "cable programme". While the definition of "communication work" was intended to be technology neutral, it was, in our submission, still intended to apply solely to audio-visual material.

The current definition of "communication work" in s. 2 applies to "a transmission of sounds, visual images, **or other information**, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme" (emphasis added). In our submission, the current definition is so broad, that it could potentially apply to text-based material, such as an E-book. In our submission this is an unintended consequence of the 2008 amendments and we respectfully submit that the definition of communication work should be amended by deleting the words "or other information".

Originality

While the Copyright Act does not provide a positive definition of what is “original”, it does provide a negative definition. Sub-section 14(2) provides:

A work is not original if—

(a)

it is, or to the extent that it is, a copy of another work; or

(b)

it infringes the copyright in, or to the extent that it infringes the copyright in, another work.

While the Issues Paper focuses on s.14(2)(a), in our submission, s.14(2)(b) is an important provision as it prevents copyright from subsisting in infringing material. In our experience, this has important practical implications. For example, an infringing communication work does not qualify for copyright protection and cannot be licensed under s.48. We support the retention of s.14(2)(b).

6. *Is it clear what ‘skill, judgement and labour’ means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?*

There is a significant amount of common law dealing with the meaning of “skill, judgement and labour” when it comes to determining originality. Ultimately such questions are determined on a case by case basis.

We note that case law in New Zealand has, to date, stopped short of requiring human authorship as part of this test. This is in contrast to the situation in Australia which following the *Telstra v Phone Directories* decision in 2010 has required human authorship as part of originality.³ This leaves the way open for material created through artificial intelligence to be protected by copyright. In our submission, there is merit in retaining this flexibility.

13. *Are there any problems (or benefits) in providing a copyright term for communication works that is longer than the minimum required by New Zealand’s international obligations?*

Given the breadth of the definition of “communication work” in the Copyright Act, in our submission, it is appropriate that the current term of 50 years be retained. We note that this is also consistent with the approach in other countries such as the UK and Australia.

SECTION 2 – WHAT ACTIONS DOES COPYRIGHT RESERVE FOR COPYRIGHT OWNERS?

³ *Telstra Corporation v Phone Directories Company* [2010] FCAFC 149.

Secondary Infringement and Authorisation

We refer to and support the submission of the New Zealand Film and TV Bodies in response to questions 15 and 17 regarding secondary infringement and authorisation liability.

Communication to the public

18. What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?

In our submission, the technology neutral definition of “communication to the public” works very effectively in New Zealand.

For example, in the context of Screenrights educational licence provided under s.48, the definition has allowed Screenrights to license and educational establishments to employ an incredibly diverse and ever changing set of technologies to communicate copies for educational purposes. The drafting has facilitated flexible licensing which has adapted to changes of technology including downloading, emailing between institutions, sharing on internal networks, and ultimately cloud based streaming archives for educational purposes.

Communication Works

19. What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered

Because the definition of “communication work” applies to material distributed via traditional broadcasting technology as well newer technology such as video streaming, Screenrights is able to offer licensees a vast repertoire of content. This is to be contrasted, for example, to the situation in Australia, where Screenrights’ licenses are limited by the mode the content has been delivered (i.e. limited to traditional broadcasting technology).

In our submission, “on demand” content clearly falls within the definition of “communication work”. This is clearly contemplated by the definition of “communication to the public” in Article 8 of the *WIPO Copyright Treaty 1996*:

the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them (emphasis added).

Subject to our comment in response to question 5 above (that the definition of “communication work” should be expressly confined to audio-visual material, consistent with the legislative intent) we support the technology neutral approach of the current definition of communication work. In our submission, it serves the dual objectives of the Copyright Act by ensuring that New Zealanders can access

a broad range of copyright material, while at the same time ensuring that copyright owners receive fair remuneration.

SECTION 4 – MORAL RIGHTS, PERFORMERS’ RIGHTS AND TECHNOLOGICAL PROTECTION MEASURES

TPMs

28. What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?

Over recent years, digital business models have facilitated unprecedented access to copyright material by New Zealanders. Technological protection measures (“TPMs”) are vital to these business models. In a market place that has moved to streaming, the ability of rights holders to control access to their content is particularly important. In our submission, the fact that the Copyright Act does not protect access control TPMs provides insufficient support for new content delivery platforms and is out of step with the approach in New Zealand’s major trading partners. We therefore support the proposals made by the New Zealand Film and TV Bodies in response to this question.

PART 5 - EXCEPTIONS AND LIMITATIONS

Fair Use

We note that the Issues Paper includes a discussion about fair use, although it does not ask any specific questions about whether fair use should be implemented in New Zealand. For the record, we note that Screenrights does not favour the introduction of fair use into New Zealand copyright law.

Screenrights notes that multinational technology companies are major supporters of fair use in New Zealand and around the world. Screenrights respectfully submits that it is vital to examine the commercial drivers behind the technology sector’s push for fair use. We submit that the goal is not fairness for society, but rather a means of reducing licensing fees. Given the impact services such as Google and Facebook are having on local media, any proposal to give such companies even greater access to content without compensation needs to be met with considerable scepticism.

In our submission, there is no need for a fair use regime in New Zealand. In our experience, the existing exceptions already operate flexibly and effectively. Indeed, the specific provision in s.48 provides for use of audio-visual content for educational purposes that is far beyond that possible under fair use.

If, however, despite the above, MBIE becomes satisfied that there is evidence to support the introduction of fair use, we query how this would operate in practice.

In particular, we note that fair use relies on development through the common law. It is generally acknowledged and celebrated that New Zealand enjoys a low

rate of copyright litigation. However, if fair use is by definition dependent on litigation to define its scope, we question how practical it would be in New Zealand. We note that proponents of fair use suggest that reliance could be placed on US jurisprudence. However, we query how practical or desirable that is given the different constitutional settings of US law and the inconsistencies inherent in US fair use jurisprudence. As one commentator has recently stated, while the transformative use doctrine “has harmonized fair use rhetoric, it falls short of streamlining fair use practice or increasing its predictability”.⁴

In our submission, the introduction of fair use would subject New Zealand copyright law to an unjustified level of uncertainty and unpredictability, contrary to proposed objective 3. While this may appeal to free-riders, in our submission, it is likely to have a negative influence on investment in New Zealand’s copyright industries and society.

Section 1 – Exceptions that facilitate particular desirable uses

Fair Dealing

Like other countries whose copyright law have their origins in the 1911 UK Act, New Zealand has a number of fair dealing exceptions. These exceptions relate to specific public policy outcomes: news reporting, criticism or review, research or study. In our submission, these exceptions are operating well and are informed by a body of law developed by New Zealand courts and the courts of other common law jurisdictions such as the UK and Australia. As the fair dealing exceptions only apply in special cases, they readily sit within the first limb of the “three-step test” which sets the parameters for exceptions to copyright under international law.⁵

The “fairness” element of the fair dealing exceptions is important in ensuring compliance with the second and third limbs of the three-step test. Namely, that the exception does not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the rights holder. We acknowledge that there is sometimes a tendency for parties relying on a fair dealing defence to look to the purpose of their use only, without focusing on its fairness. In our submission, this approach is flawed. The fairness of a dealing should be regarded as important as its purpose.

⁴ Liu, Jiarui, ‘An Empirical Study of Transformative Use in Copyright Law’ (February 6, 2019). 22 (2019) *STAN. TECH. L. REV.* 163 at 238. Available at SSRN: <https://ssrn.com/abstract=3330236>

⁵ Article 9(2) *Berne Convention for the Protections of Literary and Artistic Works*; Article 13, *TRIPS*; Article 10 *WCT*; Article 16 *WPPT*.

31. What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?

As stated above, in our view, the fair dealing exceptions in New Zealand are operating well. This question raises the issue of how the fairness of a dealing is to be judged. A practical option may be to apply a “license it or lose it” approach to the fair dealing (and other) exceptions in the Act, similar to the approach in ss. 45 and 48 for educational purposes and also ss. 88 and 91 in relation to communication works.

For example, the exception for the copying and communication of communication works for educational purposes under s.48 does not apply to the extent that there is a licence available and the educational establishment is aware of the licence. In practice, Screenrights provides a licensing solution and educational establishments are able to rely on our licence. However, in the absence of a licensing solution, they would be able to rely on the exception in s.48.

There are a number of advantages to the “license it or lose it” approach:

- It ensures access to content;
- It incentivises copyright owners to license their content;
- It provides a mechanism for copyright owners to receive a fair return for their work;
- It improves certainty as to when an exception will apply; and
- It ensures compliance with the second and third limbs of the three-step test.

In our experience, the “license it or lose it” approach works extremely well in the educational context. We therefore offer it as a possible solution for addressing issues surrounding fairness and certainty in relation to exceptions generally.

Print Disability

We note that the *Copyright Amendment (Marrakesh Treaty Implementation) Bill* was introduced into Parliament on 1 November 2018 and is currently being considered by a Select Committee. Screenrights did not make a submission to that process, we do however, strongly support enhanced access to copyright material for people with disabilities. We will defer to our colleagues at the Publishers Association of New Zealand and Copyright Licensing Limited in relation to the drafting of the legislation.

Non-expressive use of copyright works (data mining and the creation of artificial intelligence)

38 What problems (or benefits) are there with copying of works for non-expressive uses like data-mining. What changes, if any, should be considered?

We note that the terminology “non-expressive use” derives from US fair use jurisprudence in relation to transformative use. As we note at the outset of our response to Part 5, Professor Jiarui Liu has recently cautioned against the adoption of transformative use rhetoric as a substitute for in-depth policy analysis taking into account different efficiency and equity considerations.⁶ We therefore submit that MBIE should be cautious in adopting such terminology.

As far as the introduction of a specific data mining exception is concerned, we are not aware of any pressing need for the introduction for such an exception in New Zealand. As the Issues Paper notes, this activity may already be covered under the existing fair dealing exception for research or study.

If, however, as a result of this review, MBIE is minded to consider such an exception, we would urge that data mining for commercial purposes should be excluded from any such exception.⁷

We are aware that in many instances, data mining occurs under licence. It would therefore seem appropriate to make any such exception subject to the availability of a licence as we have suggested in our comments in relation to fair dealing above.

As the Issues Paper notes, the UK adopted a text and data mining exception as part of its copyright amendments in 2014.⁸ The EU has also agreed on a new data mining exception as part of the new Copyright Directive in the Digital Single Market.⁹ Both of these exceptions are quite narrow in their application. They are limited to specified beneficiaries for specified purposes (such as non-commercial research) and only apply in relation to the right of reproduction and not subsequent use of the data. Another important qualification is that the exception only applies when the beneficiary has lawful access to the data.

In our submission this approach may provide a possible model for New Zealand. We do not support the broader formulation of an exception for data mining as proposed by the Singapore Government which would extend to commercial activities.¹⁰

Quotation

⁶ Liu, Jiarui, *ibid.*

⁷ See further, Eloise Chin, ‘Robot vs Rightsholder: Machine Learning and Copyright in the Film and Television Industries’ (March 2019) 115 *Intellectual Property Forum* 23.

⁸ *Copyright, Designs and Patents Act* 1989, s. 29A.

⁹ EU Copyright Directive in the Digital Single Market, Article 3.

¹⁰ Intellectual Property Office of Singapore, *Copyright Review Report*, 17 January 2019, 32. Available at <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Press%20Release/Singapore%20Copyright%20Review%20Report%202019/Annex%20A%20-%20Copyright%20Review%20Report%2016%20Jan%202019.pdf>

40. What problems (or benefit) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?

It should be noted that Article 10 of the Berne Convention provides a mandatory exception for quotations. It further requires that the source and the author of the quotation be identified. The position has always been that in countries like New Zealand and Australia, this obligation is implemented by the fair dealing exception for criticism and review. That remains Screenrights view.

While we note that the UK introduced a specific fair dealing exception for quotation as part of its 2014 amendments,¹¹ in our view “quotation” is not of itself, a purpose and does not sit properly as a type of fair dealing. Indeed, we are concerned that such an exception would open the way to unlicensed uses of entire works. We also query the need for introducing such an exception into New Zealand law. In this regard, we refer to the example given at paragraph 322 of the Issues Paper which suggests that such an exception could overcome copyright difficulties associated with MOOCs. In our submission, the example provided ignores the operation of s.48 and the availability of licensing solutions for the inclusion of extracts of copyright material in MOOCs.

While the fair dealing exception for quotation received much attention as part of the Hargreaves Review¹², we are unaware of any litigation involving that exception since its enactment in the UK in 2014.¹³ Against that background, we do not favour a quotation exception being introduced in New Zealand.

Section 3 - Exceptions for Education

47 Does the Copyright Act provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?

Screenrights operates exclusively in the educational sector in New Zealand. We offer licences that enable educational establishments to record or download audiovisual content for teaching or to keep as an educational resource.

¹¹ *Copyright, Designs and Patents Act 1989* (UK), s.30 (IZA).

¹² Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth*, May 2011, United Kingdom.

¹³ We note that the UK Intellectual Property Office is currently undertaking a technical review of the 2014 copyright amendments. <https://www.gov.uk/government/publications/call-for-evidence-to-review-2014-copyright-changes/2014-copyright-changes-post-implementation-reviews-call-for-evidence>

The Screenrights licence also enables educational establishments to store, access and play recordings from resource centres such as eTV. This all occurs as part of a voluntary licensing arrangement under s.48 of the Act.

In our submission s.48 is operating extremely well. The flexibility of the regime ensures that Screenrights is able to offer New Zealand educators access to an unparalleled wealth of content. This is to be contrasted with the highly prescriptive statutory licensing regime under which Screenrights operates in Australia which limits the type of content that is included in the licence and how it can be used.

As noted in the introduction to this submission, our only concern is that the definition of “educational establishment” in s. 2 excludes for-profit establishments. This has the effect that for-profit educational establishments are not covered by the exception in s.48 and Screenrights is unable to include such establishments in its s.48 licence. This leaves for-profit educational establishments with direct licensing as their only (legal) option for using communication works and in practice such licences are unavailable for commercial reasons. We would be interested in working with MBIE to develop a definition of educational establishment for s.48 that would overcome this limitation.

The flexibility of s. 48, together with the broad definition of “communication work” (which includes material distributed via the internet) is helping to ensure that the New Zealand educators have access to a huge repository of audiovisual content. Importantly, it is also helping to ensure that the people who create that content, many of whom are New Zealanders, receive fair remuneration.

As the case study below demonstrates, the access to audio visual content in New Zealand is extraordinary.

Case Study: eTV



ETV
REAL TIME, REAL LIFE
LEARNING RESOURCES

In 2008, when Parliament amended the Copyright Act to introduce the right of communication they also expanded the scope of s.48 to cover “educational resource suppliers”. This was done to align the New Zealand provisions with the Australian Act which had allowed licensing of such bodies for some time.

As a consequence, Screenrights is able to license non-profit organisations which make copies and communicate copies of audio-visual works on behalf of educational establishments. One such organisation is eTV.

eTV provides a cloud based streaming service for schools, universities and other tertiary institutions. The content is broadcast television and online audio-visual content which have been copied by eTV under a Screenrights licence. It is like Netflix for teachers.

eTV is enormous. Where Netflix typically has 5-6,000 programs available to stream to the public at any one time, eTV has over 100,000 items.

Over time, eTV has expanded to include new services for the educational institutions. Now in their fifth version, they have online quiz tools, student analysis and a range of services designed around modern teaching practice.

The service is ubiquitous in universities and increasingly so in other tertiary institutions and schools.

An example of eTV’s explanatory material is annexed.

Section 4 – Exceptions relating to the use of particular categories of works

Other communication work exceptions

55. *What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?*

We note that the media monitoring exception in s.91 is quite narrowly drawn and is another example of an exception that only operates where no licence is available. We are concerned that the exception only refers to recording communication works and making transcripts of those recordings and does not cover “communication”. In our submission, this does not reflect the reality of modern media monitoring. In order for an effective licence to be available under s.91, in our submission, consideration should be given to whether the provision should be extended to cover communications as well.

Section 5 – Contracting out of the exceptions

58. *What problems (or benefits) are there in allowing copyright owners to limit or modify a person’s ability to use the existing exceptions through contract? What changes (if any) should be considered?*

As we have stated throughout this submission, we are in favour of a “license it or lose it” approach to copyright exceptions. That is, in the absence of a licensing solution, an exception should apply. It is our view that this approach serves the objectives of copyright law. This approach relies on the operation of contract law and is an example of how copyright and contract can work side by side.

The Copyright Act currently only expressly prohibits contracting out of the exception relating to computer programs in s. 80D. The Issues Paper refers to the recommendations of the 2014 Australian Law Reform Commission (ALRC) in its report *Copyright and the Digital Economy* as a possible model for reform in New Zealand. In that report, the ALRC recommended that it should not be possible to contract out of the library and archive and fair dealing provisions in the Australian Copyright Act. Screenrights does not support this approach.

Firstly, we query whether there is a need for such an amendment. As we have stated elsewhere in this submission, New Zealanders currently enjoy unprecedented access to copyright material. Secondly, the business models that deliver that content (including our own) rely on contract. We are concerned that introducing an amendment that prevents rights holders from setting the terms of their licences will have a stifling effect on innovation. We are also concerned that such an amendment is likely to create uncertainty about how contracts operate and can be enforced.

Finally, we query what the practical effect of such an amendment would be. As the UK example has shown, such provisions can easily be avoided by strategically selecting the law of another jurisdiction (for example, Australia or the US) to govern the contract.¹⁴

For these reasons, we do not support prescribing a copyright owner’s freedom to contract in the manner canvassed in the Issues Paper.

Section 6 – Internet service provider liability

59. *What are problems (or benefits) with the ISP definition? What changes, if any should be considered?*

In our submission, it is appropriate for the New Zealand Government to refine the definition of internet service provider. We support the submission of the New

¹⁴ See, for example, E Hudson, T Aplin, R Burrell, *Submission to the Copyright Consultation: Department of Communications and the Arts*, 4 July 2018, 12. Available at https://www.communications.gov.au/sites/default/files/submissions/hudson_aplin_and_burrell.pdf

Zealand Film and TV Bodies and call for the development of a principled definition directed at capturing passive internet intermediaries only.

60. Are there any problems (or benefit) with the absence of an explicit exception for linking to copyright material and not having a safe harbour for providers of search tools (eg search engines)? What changes (if any) should be considered?

In our submission, it is appropriate that there is no explicit exception for linking. In most instances, linking to legitimate content does not present an issue, and linking to infringing content should be considered as a matter of authorisation liability. Nor do we think that it is appropriate for search engines to fall within the safe harbour. We support the submission of the New Zealand Film and TV bodies in relation to this question.

61. Do the safe harbour provisions in the Copyright Act affect the commercial relationship between online platforms and copyright owners? Please be specific about who is, and how they are, affected.

Given the breadth of New Zealand's current safe harbour provisions, we are concerned that this is having an effect on the willingness of so-called internet service providers to enter into commercial licensing arrangements for communication works distributed on their services.

PART 6 - TRANSACTIONS

Collective Management Organisations

63. Is there a sufficient number and variety of CMOs in New Zealand? If not, which type copyright works do you think would benefit from the formation of CMOs in New Zealand?

Screenrights has been operating in New Zealand since 1998. The Issues Paper states at paragraph 451 that MBIE has not heard of any issues with the way that CMOs operate in New Zealand. In our submission, that is because the system is operating well.

We note that Questions 64 and 65 of the Issues Paper are directed at members of CMOs and licensees. We therefore take the opportunity to note that Screenrights has developed procedures for handling competing claims, complaints and alternative dispute resolution mechanisms for disputes with members and licensees.¹⁵

¹⁵ See our website for our policies and guidelines <https://www.screenrights.org/about-us/corporate-governance/>

Copyright Tribunal

66. *What are the problems (or advantages) with the way the Copyright Tribunal operates? Why do you think so few applications are being made to the Copyright Tribunal? What changes (if any) to the way the Copyright Tribunal regime should be considered?*

In our submission, the Copyright Tribunal in New Zealand is underutilised. Based on our experience in Australia, the Tribunal is a mechanism for the resolution of high value disputes. While we note that the New Zealand Government has recently enacted the *Tribunal Powers and Procedures Legislation Act 2018*, we consider that further improvements could be made to the jurisdiction and procedures of the Copyright Tribunal. We have had the benefit of reading the joint submission of Recorded Music New Zealand, Copyright Licensing New Zealand and APRA|AMCOS in response to this question and support their recommendations. We make some additional observations below:

Membership of the Tribunal

At present, s.206 of the Copyright Act only requires that the chairperson of the Tribunal have 7 years' experience in legal practice. There are no requirements regarding the other members of the Tribunal.

In our experience, the kind of disputes that come before the Tribunal are high value and complex. Parties are generally represented by senior intellectual property barristers. It is therefore appropriate that the chairperson presiding over the dispute is a current judge. In our submission, s.206 of the Copyright Act should be amended accordingly. Ideally the chairperson would also have experience in copyright (at least in private practice, if not on the Bench).

Jurisdiction of the Tribunal

Section 211 of the Copyright Act leaves the jurisdiction of the Tribunal open. Very little information is available on the Ministry of Justice's website about the Tribunal's jurisdiction. It would be helpful to stakeholders if the Tribunal's jurisdiction was made clear in the legislation.

Orderly and Efficient Operation

Section 211A of the Copyright Act provides for the orderly and efficient operation of the Tribunal. In our submission, the Tribunal needs to be adequately resourced to enable it to carry out its functions. This should include the establishment of a Tribunal website.

Procedures

Section 214 of the Copyright Act enables the Tribunal to regulate its procedures as it sees fit. Following the recent amendments, the chairperson also has the power to issue practice notes for any type of proceedings dealt with by the Tribunal.

While we appreciate that there may be some advantages in procedural flexibility, in our submission, it is essential that the procedures of the Tribunal are clearly set out (either in the legislation, in regulations or in practice notes). This should

include the development of forms and standard fees. This will help to guarantee transparency, procedural fairness and facilitate the efficient conduct of proceedings before the Tribunal. A current judge chairing the Tribunal as submitted above will, in our view, also lend to this outcome.

In our submission, these changes will enhance the Tribunal's capacity to handle copyright disputes.

Alternatives to the Copyright Tribunal

67. Which CMOs offer an alternative dispute resolution service? How frequently are they used? What are the benefits (or disadvantages) with these services when compared to the Copyright Tribunal?

As noted in our response to Question 63 above, Screenrights has developed policies and mechanisms for dealing with disputes. In order to ensure transparency, these are set out on Screenrights' website.

Screenrights has a range of mechanisms to handle competing claims. This includes "Screenrights Resolution" which is an online portal for competing claims designed to assist members to self-manage competing claims wherever possible without the costs and time involved in using an external decision maker. Other mechanisms include alternative dispute resolution and the appointment of an external expert (either at the request of a member or Screenrights).

Screenrights also has a general complaint handling procedure, as well as alternative dispute resolution processes which provide for the mediation of disputes between Screenrights and its members and licensees.

Since their establishment, these mechanisms have been effective in dealing with the vast majority of disputes that arise.

Screenrights is committed to a process of continual improvement in its distribution processes and procedures including the handling of disputes. We are currently undertaking a review of the ADR procedures including consultation with members on next steps.

Social Media

69. What are the advantages of social media platforms or other communication tools to disseminate and monetise their works? What are the disadvantages? What changes to the Copyright Act (if any) should be considered?

We refer to our previous comments in relation to the role of social media platforms in response to Question 59 above. We have no comment in response to this question, save to note that material distributed via social media (providing it is non-infringing) will fall within the "communication work" definition in s.2 of the Copyright Act.

Orphan Works

We make the following generally observations about the issue of orphan works in New Zealand. As the Issues Paper notes, s. 67 of the Copyright Act already provides for an exception where the author of a work cannot be identified. In our submission no further changes to the Act or are necessary. In our experience, this is largely a question of risk management. Large collecting institutions, who are the main advocates for orphan works amendments, are able to implement risk management policies which enable to utilise orphan work in their collections.¹⁶ In those circumstances, we are not convinced that New Zealand needs to go down the path of other jurisdictions such as the UK.

PART 7 - ENFORCEMENT OF COPYRIGHT

The ability of copyright owners to enforce their rights is crucial to an effective copyright system. We refer to and support the responses of the New Zealand Film and TV Bodies in relation to this Part and, in particular, questions 82-84 regarding infringing file sharing.

78. Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?

Screenrights primary function is to collect and distribute copyright royalties on behalf of our members. Screenrights has limited power to deal with the copyright material of its members. Under our membership agreement, Screenrights' members elect the services they want Screenrights to supply. For example, educational licensing in New Zealand. As part of this arrangement, our members appoint us as their non-exclusive agent for the administration of copyright in material they have registered with us.¹⁷ We do not see it as part of our role to enforce copyright on behalf of our members.

¹⁶ See, for example, the Museum of New Zealand Te Papa Tongarewa's Image Sale Agreement <https://www.tepapa.govt.nz/about/media-sales-and-licensing/terms-and-conditions#4>.

¹⁷ See Screenrights Membership Agreement <https://my.screenrights.org/v2/member/application/join>

CONCLUSION

In conclusion, we think that the Copyright Act is working effectively. While we support some amendments in relation to the definitions of “communication work”, “educational establishment” and “internet service provider”, the jurisdiction and procedures of the Copyright Tribunal and the provisions relating to online copyright infringement, we do not support a complete overhaul of the Copyright Act.

We look forward to assisting MBIE as it progresses this review. Please contact me if I can be of further assistance.

James Dickinson
Chief Executive

info@screenrights.org

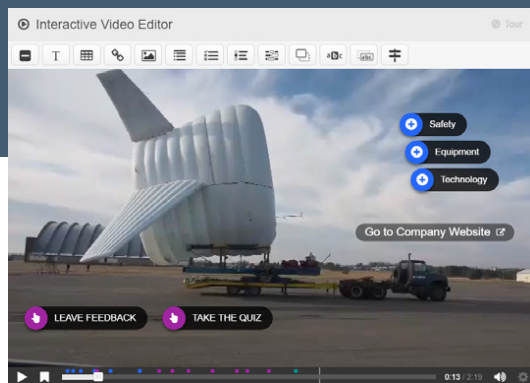
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