

4 April 2019

Ministry of Business, Innovation & Employment
15 Stout Street
PO Box 1473
WELLINGTON 6140

By email to: CopyrightActReview@mbie.govt.nz

Tenā koutou katoa

Submission to: Ministry of Business, Innovation & Employment
Subject: Copyright Act Review – Issues Paper
From: Arts Council of New Zealand Toi Aotearoa (Creative New Zealand)

1. Creative New Zealand welcomes the opportunity to respond to the Review of the Copyright Act 1994 (the Act) Issues Paper, published by the Ministry in November 2018. We have a strong interest in the Act and the protections and incentives it can provide for artists, authors and creators.
2. We would like to record our appreciation of the way in which the Issues Paper provided a comprehensive and understandable overview of the issues in what can be complex, daunting, and at times arcane, legislation. We believe the Ministry's approach has provided a sound basis for people to prepare submissions and express views on this important kaupapa.
3. This submission has been endorsed by a further eight organisations (see page 6). We would be grateful if you would record their support within the feedback process.
4. We'd be happy to discuss this submission with you further. The key contact person for matters relating to this submission is:

Name: David Pannett

Position: Senior Manager, Strategy & Engagement | Pou Whakahaere Matua, Rautaki me te Tūhono

Submission

5. Firstly, we note that the objectives identified for the New Zealand copyright regime in paragraph 103 (page 23) of the Issues Paper make no mention of the rights of creators.¹
6. We believe that a robust and clear copyright regime that protects and enhances the rights of creators is essential for the health and success of the copyright ecosystem, as illustrated in Figure One of the Issues Paper (page 14).
7. Objectives that do not acknowledge the need to recognise and protect the rights of creators omit a fundamental purpose of copyright. We therefore submit that the objectives of the Act need to include a specific reference to recognition and protection of creator rights.
8. The Issues Paper raised many areas where Creative New Zealand has interests and we look forward to an Options Paper that more clearly identifies the ways in which the Act may address issues raised by submitters.
9. For the purposes of this submission, we'll focus on four main areas where we believe the Review can strengthen the protections available to New Zealand creators and provide greater clarity and certainty for the authorised use of copyright material. These four areas are:
 - safeguarding the right of New Zealand creators to choose how they earn from their work
 - updating and limiting the permitted uses identified by the exemptions provisions in Part Three of the Act
 - providing clarity and certainty for the authorised use of copyright material and accessible and effective mechanisms for addressing unauthorised use
 - copyright and the Wai 262 claim.

Safeguarding the right of New Zealand creators to earn revenue from their work

10. New Zealand creators' ability to earn revenue from their work can be undermined by illegal copying and by exemptions in the Act's safe harbour provisions which enable user-uploaded copyright works to be publicly provided to users without recompense to creators (eg, via peer-to-peer sharing of work (P2P) or via online streaming services).
11. Safe harbour provisions contained in sections 92B-92E of the Act should be reviewed in order to:
 - exclude safe harbour protection from internet service providers who actively host and manage user-uploaded content
 - redraft notice and take-down provisions in section 92C to ensure that uploaded content that is subject of a notice is removed permanently
 - include in the Act a provision (equivalent to section 97A of the United Kingdom's Copyright Designs and Patents Act 1988) to confirm the High Court's jurisdiction to issue site-blocking injunctions.

¹ Throughout this submission we use the term 'creator' to refer to the creator of a work. The term includes authors, artists, composers, musicians, photographers, painters, sculptors and anyone else who create a copyright work.

12. We note that the Act's current definition of 'Internet service provider' is extremely wide and could be seen as including organisations such as libraries, who provide websites or internet services to users. We recommend that any changes made to the safe harbour provisions should ensure that protections remain for cultural heritage institutions.
13. We also anticipate that the European Union's pending Directive on Copyright in the Digital Single Market, which aims to correctly remunerate artists and journalists whose work is monetised by large on-line platforms and aggregators, will be considered for its relevance to this review.
14. In the literature space, publishers report the existence of a number of international sites where works of New Zealand literature can be downloaded for free. Current safe harbour provisions don't allow authors an effective or affordable way of getting internet service providers to deal with this. This needs strengthening.
15. For authors, improved options to retrieve rights previously assigned to publishers, but which are now out of print, should be considered, so that new value may be generated from these. This is also an access issue in the case of culturally or historically important works.

Updating and limiting the permitted uses identified by the exemptions provisions in Part Three of the Act

16. Over the last 20 years, creative works have become more and more available to consumers through an increasing variety of distribution channels. With the proliferation of ways to access creative content, it's important that there are limits to a regime that allows exemptions to avoid obtaining the creator's permission to use a copyrighted work, and that the regime does not unfairly undermine the revenue-earning potential of the creator.
17. While acknowledging the rights of the creator, we also acknowledge that it is appropriate that there are legislative mechanisms in place to enable the use of copyright works in specific circumstances, to achieve particular social, educational or cultural purposes.
18. We believe that Part Three of the Act should continue to be the legislative mechanism for dealing with permitted, but exceptional, uses of copyright works. Part Three of the Act can help provide certainty for users of content and be more effective than mechanisms such as the United States-style 'fair use' approach, or different judges making decisions about permitted uses on a case-by-case basis. While there may be some good arguments for implementing a fair use-style regime to allow innovation in a time of rapid technological change, there is justifiable widespread concern among New Zealand creators that having to go to the courts to determine what is fair use on a case-by-case basis will disproportionately benefit the large companies/corporations that can afford this.
19. Part Three of the Act needs to allow for limited access to meet specific and identified social, cultural or educational purposes (eg, for private study and research), while also ensuring that copyright owners are paid appropriately when complete works are copied and/or distributed.
20. Part Three of the Act should be revisited so that it is technologically- and format-neutral. We suggest that Part Three focus on when, why and in what circumstances an exception is permitted, rather than how the copying might be done. This may help ensure the Act is more enduring around providing for appropriate format-shifting as technology changes and develops.

21. Part Three of the Act should also be revisited so that permitted uses that are no longer fair are removed. For example, the availability of exceptions to libraries that operate in a commercial environment should be removed.
22. We also submit that the extension of the exemptions regime to recognise parody/satire and social/political commentary as permitted uses is justified and will help ensure that there is freedom in the practice of the arts. Extending the exemptions regime would also encourage the development of high-quality and innovative artworks (noting, of course, the tension this creates with an author's moral right not to have their work used in a derogatory manner, or in a culturally inappropriate way).

Providing clarity and certainty for the authorised use of copyright material and accessible and effective mechanisms for addressing unauthorised use

23. The proliferation of copying and distribution mechanisms has provided opportunities for creators as well as for those who seek to copy and distribute work that is not theirs. The Act needs to provide clarity and certainty for the authorised use of copyright material and accessible and effective mechanisms for addressing unauthorised use.
24. Resolving copyright issues and addressing unauthorised use through the court system can be both time-consuming and expensive, and is likely to be beyond the resources of many individual artists and creators. It's therefore essential that the Copyright Tribunal is an open, flexible and cost-effective forum for resolving licensing disputes of any value.
25. We note the Issues Paper's indication (paragraph 457) that concerns about the accessibility and cost-effectiveness of the Tribunal may be addressed through the Tribunal Powers and Procedures Legislation Bill currently before Parliament. However, we also believe the Review should consider the option of introducing rules for the Tribunal that are similar to the United Kingdom's Copyright Tribunal Rules of 2010.
26. As a result of action taken under the Commerce Commission under the Commerce Act 1986, licensing bodies are no longer able to obtain exclusive licenses from copyright owners. The licenses must now be non-exclusive. Provision needs to be made in the Copyright Act for non-exclusive licensees to have standing to sue for the unauthorised use of copyright material. The safeguards contained in section 124 of the Act would then apply to non-exclusive licensees.
27. We hope that any options paper developed by the Ministry following this submission process will identify where other jurisdictions have found effective ways to address the subverting of Technology Protection Measures (TPMs), the use of illegal streaming devices, and ways to widen the liability for 'authorising' an infringing act to include parties who are located outside of New Zealand (eg, the practice and experience of the United Kingdom's Copyright Designs and Patents Act 1988). We expect the options paper to identify how revisions to the Act can learn from the experience of other jurisdictions to more effectively address these issues.

Copyright and the Wai 262 claim

28. We appreciated the explanations provided in Section Two of the Issues Paper – *Copyright and the Wai 262 Inquiry*.
29. We endorse the approach proposed in paragraph 575 of the Issues Paper whereby there is recognition that consideration of Chapter 1 of the Waitangi Tribunal's finding in the Wai 262 report deserves a dedicated workstream within the Review process.

30. We recognise that engagement with Māori, as Treaty partners, and the broader community will be an integral part of the proposed workstream on taonga works. We look forward to being involved in this separate workstream that is intended to develop recommendations and specific proposals for legislative change to protect kaitiaki interest in taonga works and mātauranga Maori.

Background

31. Creative New Zealand is the arts development agency of Aotearoa, responsible for delivering government support for the arts. We're an autonomous Crown entity continued under the Arts Council of New Zealand Toi Aotearoa Act 2014. Our legislative purpose is to encourage, promote, and support the arts in New Zealand for the benefit of all New Zealanders.
32. Among the functions of the Arts Council are that it will: *uphold and promote the rights of artists and the right of persons to freedom in the practice of the arts.*
33. Creative New Zealand's Statement of Intent 2016–2021 identifies the outcomes we're seeking to achieve on behalf of all New Zealanders.
 - Stronger arts communities, artists and organisations as shown by:
 - high-quality New Zealand art is developed
 - New Zealand arts gain international success
 - Greater public engagement with the arts as shown by:
 - New Zealanders participate in the arts
 - New Zealanders experience high-quality arts.
34. We contribute to achieving these outcomes by delivering programmes in the following areas:
 - funding for artists, arts practitioners and arts organisations
 - capability building for artists, arts practitioners and arts organisations
 - advocacy for the arts.
35. Creative New Zealand receives funding through Vote: Arts, Culture and Heritage and the New Zealand Lottery Grants Board. In 2017/18, we invested \$42.466 million into the New Zealand arts sector.

Thank you again for the opportunity to comment. Please feel free to contact me if you have any questions or if you wish to meet to discuss this submission further (my contact details are at the start of the submission).

Ngā mihi rārau ki a koutou katoa

A handwritten signature in black ink, appearing to read 'D Pannett', with a stylized flourish at the end.

Nā David Pannett
Senior Manager, Strategy & Engagement

This submission has been endorsed by:

Auckland Theatre Company
Chamber Music New Zealand
Massive Company Trust (Aotearoa Young People's Theatre)
New Zealand Opera
Orchestras Central
Playmarket Inc
Royal New Zealand Ballet
The Big Idea Te Aria Nui Charitable Trust