THE GLOBAL VOICE OF MUSIC PUBLISHING

FAO: Ministry of Business, Innovation & Employment

Business Law team
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
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Re: ICMP Submission to the Ministry of Business Innovation & Employment´s Issues Paper:
'*Review of the Copyright Act 1994*'

Thursday, 4 April, 2019

ICMP

ICMP (The International Confederation of Music Publishers) is the world trade association representing the interests of the music publishing community internationally.

The constituent members of ICMP are music publishers' associations from Europe, North and South America, Australasia, the Middle East, Africa and Asia-Pacific. ICMP also represents the leading multinational and international companies as well as regional and national music publishers, mainly SMEs, throughout the world. Our membership includes the world's three 'Major' music publishing companies: Sony-ATV; Universal Music Publishing; Warner-Chappell, and the world's leading Independent music publishing companies for example Peer Music; MusicSales; Concord Music Publishing; Strictly Confidential; Kobalt and BMG (Bertelsmann Music Group).

As the voice and point of reference of music publishers, composers and songwriters, ICMP seeks to ensure copyright protection internationally, encourage an appropriate commercial and legal environment for our members to invest in, safeguard the interests of the songwriters and composers represented by our companies.

Our constituent member in New Zealand is AMPAL, whose mission it is to work on behalf of its members to promote the importance and value of music and music publishing in New Zealand - both culturally and economically.

Music publishers provide a bridge between the creative process and the market. In addition to being right holders, music publishers serve as the representatives of authors and composers. Music publishers are a key player in the music industry as they enable licensing of the entire array of legal music sources - our licensing practices encompass both the on and offline worlds. Music publishers have helped to establish a hi-tech digital marketplace to the benefit of consumers, one which features more than 50 million music tracks, available instantaneously and portably, on over 200 Digital Service Providers of music (DSPs).

The music industry's primary commercial instincts are to provide and license content, to restrict and provide legal alternatives to pirated/unauthorized music sources and to continue to invest in the digital and offline marketplaces of the future. In doing so, we are able to ensure the musical works of authors and composers of all genres and prominence find a commercial outlet and that their creative output is professionally and economically rewarded.

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Introductory comments

ICMP warmly welcomes the possibility to submit its response to the New Zealand Ministry of Business Innovation & Employment´s Issues Paper: '*Review of the Copyright Act 1994*' (the Issues Paper).

This is an important and uncommon opportunity to ensure New Zealand's prospective copyright framework is balanced and futureproofed for the digitized and globalized world in which the music industry and national legislation now exist.

As a world trade association, we strongly endorse the consultation submission by ICMP´s representative member in New Zealand, AMPAL. Below we endeavor to supplement this with an international perspective.

ICMP welcomes the commitment of the New Zealand Ministry of Business, Innovation & Employment (MBIE) to modernizing New Zealand Copyright Act and to bring it in line with relevant international copyright treaties, conventions and norms[1].

We also support the aim of making amendments in its copyright legislation to incorporate new provisions in the IP Chapter of the Trans-Pacific Partnership. We urge the Ministry to keep the rights of creators and rightholders at the forefront of its eventual findings and recommendations. Only by doing so can New Zealand´s copyright legislative framework encourage innovation, investment in and reward for creators. Doing so would not only sustain New Zealand's cultural heritage, it would advance her creative industries within the global digital marketplace.

Music publishers make a critical contribution to the creation of great New Zealand music. The business of music publishing is twofold: signing and developing songwriting/compositional talent of all genres; subsequently licensing their works in a way that is commensurate with their value and the moral rights of the creators.

Music publishers invest in the songwriters they represent in order to allow them the time and resources to create. Crucially, they coordinate with other stakeholders (e.g. DSPs, Telcos, record companies; managers; collecting societies in order to bring musical works to consumers). They are responsible for the collection and distribution of songwriters´ income on a global basis and they create new income streams for songwriters by facilitating licenses within the continually evolving digital space.

Comments on the consultation paper

- *Copyright term extension not being considered in the reform*

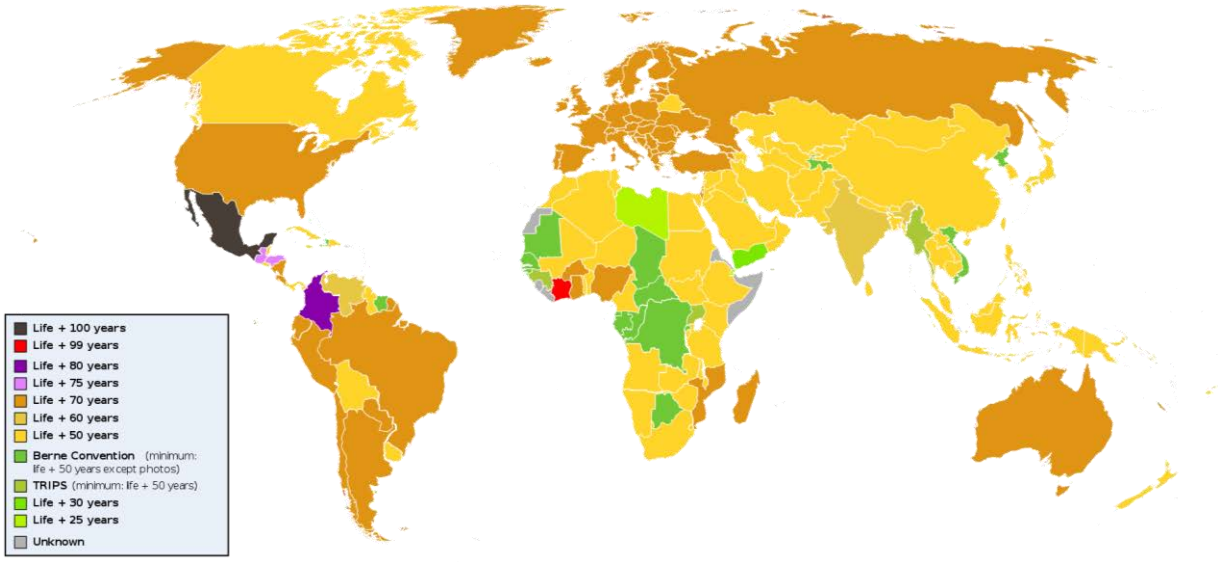
ICMP regrets that the scope of the Issues Paper does not encompass the duration of the term of copyright protection relating to copyright protected works, performances and related rights.

We note that the paper states it is "not consider necessary to look at the general term of copyright in this review" that "would not bring net benefits to New Zealand".

[1] For example: the WIPO Performers and Phonograms Treaty (WPPT), The EU Directive for a Digital Single Market; the New Zealand government's work on The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP 11).

This is particularly regrettable considering the current term of copyright protection in New Zealand of Life +50 years is, and increasingly so, an anomaly among other jurisdictions worldwide.

Table 1: Lists of copyright term durations worldwide



As long as New Zealand remains behind the majority of jurisdictions, the remuneration to musicians and rightholders will remain profoundly undervalued by default and the investment capacity of creative industries such as music will remain seriously undermined.

The evidential bases of the benefits of copyright term extension are many. For example, a comprehensive study on 'The Economics of Copyright Term Extension'[2] conducted by LECG Corporation concluded:

"*available evidence suggests an extension of the copyright term is likely to benefit consumer rather than harm them and the overall social welfare is also likely to be increased. Further, based on a review of the academic literature and the available empirical evidence on record company investment behavior (which suggests new music is, in fact, financed out of current earnings) there are strong grounds to believe that a retrospective increase in the copyright term will enhance these benefits*".

We have noted the New Zealand government's work on *The Comprehensive and Progressive Agreement for Trans-Pacific Partnership* [3](Hereafter 'TPP11') on this issue. ICMP acknowledges that work remains to be done to realize the Agreement, but we still strongly emphasize how it shows the international importance of its stated aim of term extension, specifically in Article 18.63 of the Intellectual Property Chapter of TPP11 which states:

> "*Each Party shall provide that in cases in which the term of protection of a work, performance or phonogram is to be calculated:*

[2] LECG Corporation, a global expert services company, May 2007.
https://www.ifpi.org/content/library/legc-study.pdf
[3] https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/18.-Intellectual-Property-Chapter.pdf

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(a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and

(b) *on a basis other than the life of a natural person, the term shall be:*

i. not less than70 years from the end of the calendar year of the first authorized publication of the work, performance or phonogram; or

ii. failing such authorized publication within 25 years from the creation of the work, performance or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance or phonogram."

We note that the New Zealand government's work on TPP11 and encourage the government to take the opportunity afforded by the Copyright Act Review to modernize its national copyright term duration to 'Life +70' in order to align with the majority of the world's jurisdictions. This would bring clear economic and cultural benefits to all links in the value chain of New Zealand's music sector.

Doing so via national legislation has common precedent.

We also note that this Treaty is not ratified. As such we would point to the example of Japan which – upon finding itself in identical circumstances - as recently as December 2018 introduced national legislation in order to upgrade term of protection to Life +70 for copyrighted materials, performances and master recordings.

We would strongly encourage a similar initiative by the New Zealand government as this would align with global norms, help ensure the sustainability of its creative industries and facilitate upcoming negotiations with the European Union in EU-NZ trade negotiations.

By way of further recent example, Canada, the United States and Mexico reached a new trade deal (Hereafter 'USCMA') on 30 November 2018 to replace the North America Free Trade Agreement (NAFTA). The USMCA agrees a provision extending copyright term in Canada to a minimum of life of the author plus 70 years (where previously it had been life plus 50 years).

ICMP encourages the harmonisation of copyright term internationally to ensure that the term of life plus 70 years applies as the general standard. ICMP is concerned about the copyright term of life plus 50 years currently in place in New Zealand, particularly as term in the vast majority of the world including across Europe, the United States, Australia, Japan and soon in Canada is life plus 70 years. This disparity between international trading partners places creators in New Zealand at a distinct competitive and economic disadvantage, particularly when they wish to exploit their works internationally.

ICMP submits that the current term of protection is incongruous to global patterns. We therefore urge the New Zealand government to extend the term of protection for copyright protected works and subject-matter to 70 years after death of the author for works, and in respect of sound recordings, 70 years after the date the recording is made or made available to the public. This term extensions should be subject to retrospective effect also.

Such a copyright term will lead to greater growth and increased commercial investment capacity for New Zealand and international businesses in New Zealand.

- *Question 61 of the Issues Paper: Do the **safe harbor 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.*

Safe Harbour liability exemptions, when properly observed and applied, do not in themselves bring major negative implications for copyright owners such as music publishers. On the contrary, they are a useful legal facet to facilitate the transfer of copyright protected content such as music via passive and technical service providers e.g. telcos from copyright owner to end user.

However, Safe Harbor provisions (similar to those in New Zealand) have been increasingly abused by online platforms in order to exploit copyright protected content for commercial purposes while ignoring the basic responsibilities under copyright law to take a fair license with rightholders.

The misuse of Safe Harbor provisions by online platforms lead to serious economic harm to our sector. This has led to a worldwide issue for the music sector known colloquially as 'The Value Gap'.

The Value Gap is caused by 'User Uploaded Content' websites e.g. YouTube, Vimeo and DailyMotion enabling users to upload music, but the services refusing to take a fair copyright license for the music they communicate to the public and make available. They do so by claiming an exemption from copyright liability via a 'Safe Harbour' clause (Article 14 of the e-Commerce Directive 2000[4] in Europe and under the DMCA 2000[5] in the US).

These Safe Harbour exemptions are open to electronic services which are "technical, automatic and passive". They were never intended for services such as YouTube, but rather in the early days the internet exemptions were for technical services which were truly passive e.g. telcos to transfer media content, or cloud computing storage services for personal use.

These websites are therefore making enormous profits from music on their sites, while artists see their work used freely while receiving negligible return payment for it. Google also holds a monopoly on the advertising practices on YouTube – if music does not have advertising placed next to it then it earns no money for artists.

YouTube pays the music community 20 times less, per user per year, than a fairly licenced service such as Spotify.

[4] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').
[5] Digital Millennium Copyright Act (DMCA).

This is worsened by the scale, YouTube has more than 2 billion monthly users, versus Spotify's 96 million paid subscribers. The average song is listened to on YouTube 80,000+ times every day.

The direct corollary is reduced capacity to invest in the musicians and technology of the future.

As AMPAL clearly states in its submission, these platforms are far beyond being neutral intermediaries, and can draw significant revenue from advertising, and then compete with legitimately licensed services.

Courts around the world are increasingly agreeing with the contention that they are not merely "passive".

The jurisdiction of most recent and direct relevance to *solving* the problem of online intermediaries' misuse of 'Safe Harbor' copyright liability exemptions is that of the European Union, by way of its legislative proposal for a Directive for the Digital Single Market[6] (Hereafter 'the EU Copyright Directive'), specifically Article 13.

The EU Copyright Directive was first proposed in 2016 as part of the modernization of the EU copyright framework, the objective being to make EU copyright rules fit for the digital age.

Just last week[7], an emphatic majority of Members of the European Parliament, from across the EU28, voted to approve the EU Copyright Directive.

Article 13 is one of the major advances of the Directive and it deals with Safe Harbor misuse.

Article 13 is the world's first clarification in law that User Uploaded Content platforms (in the Directive they are categorized as "Online Content Sharing Service Providers" (OCSSPs)) such as YouTube, Vimeo etc. are:

- liable under copyright due to their communicating to the public and making available[8],
- therefore ineligible for a Safe Harbor exemption[9],
- consequently must pursue licenses with rightholders or else make "best effort" to lead to the non-availability of such content on their services![10].

[6] COM(2016)593. Proposed by the European Commission on September 12, 2016, General Approach by the Council (EU28 Member States) 28 May, 2018; approval by the European Parliament of the joint text agreed in inter-institutionaltri9logue by way of plenary vote, 26 March 2019.
[7] 26 March.
[8] Article 13.1.
[9] Article 13.2
[10] Article 13.3.

The Safe Harbor exemption has been extensively misused in Europe for years. This situation not only has affected commercial relationships between online platforms and copyright owners by creating an unsustainable market for creators, but it has generated unfair competition among those specific platforms abusing ´Safe Harbor´ exemptions and those 200+ licensed services observing the existing rules.

This triggered a major campaign by right holders including:

- 2,000 musical artists
- Many Members of the European Parliament
- 112 European creative sector organisations
- A petition by 20,000 creators shows the width of support for a fair solution to the Value Gap in EU law
- 200+ creative and cultural organisations

Positively, the EU acknowledged what it is at stake and the European Parliament voted in favor of this reform. ICMP issued a press statement and social media coverage immediately after the vote.

Article 13 represents the first clarification in law that User Uploaded Content services are liable under copyright and are therefore ineligible for a Safe Harbor exemption and consequently must pursue licenses (Article 13, paragraphs 1,2 and 3).

It also includes a first legislative 'stay down' clause[11] for unauthorized content issued by large platforms upon notification of "the relevant and necessary information" by rightholders of the Communication to the Public and Making Available rights, as defined under Article 2 of the 2001 Copyright Directive.

Furthermore, on legal questions such as the extent of the obligations on OCSSPs to cooperate it should be noted that according to the Court of Justice of the EU, "knowledge" of copyright infringing content is not required in order for services to be held ineligible foe Safe Harbor and thus primarily liable for copyright infringements – See the CJEU judgement in *Stichting Brein v. Ziggo BV*[12]:

> *"…the works thus made available to the users of the online sharing platform have been placed online on that platform not by the platform operators but by its users. However, the fact remains that those operators, by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network. In this respect…in essence, in point 50 of his Opinion, without the aforementioned operators making such a platform available*

[11] See Article 13.4

[12] 14 June 2017 Case C-610/15 http://curia.europa.eu/juris/document/document.jsf?text=&docid=191707&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8067119

and managing it, the works could not be shared by the users or, at the very least, sharing them on the internet would prove to be more complex.

The view must therefore be taken that the operators of the online sharing platform TPB, by making that platform available and managing it, provide their users with access to the works concerned. They can therefore be regarded as playing an essential role in making the works in question available.

It can therefore be inferred from this case-law that, as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an 'act of communication' for the purposes of Article 3(1) of Directive 2001/29."

Also of note, the Italian Supreme Court has very recently ruled[13] that services which "optimize and promote" content uploaded by users are ineligible for Safe Harbor exemptions and are liable as intermediaries for the provision of copyright protected content such as music. The court ruled that:

1. hosting providers' are ineligible for Safe Harbours under the Italian IP legal framework. They did so by listing activities whereby UUC platforms can be defined as "active" (thereby losing Safe Harbour standing): Indexing / Filtering / Selection / Organisation / Classification / Aggregation / Evaluation / Use / Modification / Extraction / Promotion.

2. Notice and takedown notifications by rightholders do not require specific internet address citations (URLs). Rather the name of a work can suffice. This clarifies and supersedes recent judgments in lower courts saying URLs are necessary to trigger liability.

3. Such notifications by right holders of infringements do not require formal "cease and desist" notices. A standard and simple communication will trigger knowledge among the service.

4. Such notifications impose a "notice and stay down" obligation on the service.

Furthermore, in the recent *Mediaset v. Vimeo* judgment[14] the court dismissed Vimeo's claim to entitlement to the e-Commerce Directive liability exemption ('Safe Harbour') by virtue of it being a UUC service. The Court determined that service providers who play an "active role" (including

[13] *Reti Televisive Italiane SpA v Yahoo! Inc*; http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/7708_03_2019_no-index.pdf

[14] https://torrentfreak.com/vimeo-fined-e8-5m-for-failure-to-remove-copyrighted-tv-content/

"cataloging, indexing and commissioning" content) cannot benefit from the safe harbor exemptions offered by the Electronic Commerce Directive 2000/31/EC.

We strongly support this accurate and balanced interpretation of Safe Harbor provisions being taken by the EU's legislature and as in the aforementioned international caselaw. We urge New Zealand legislators to clarify their Safe Harbor legislative provisions in order to update the framework and to ensure that copyright liability is fairly respected by those platforms who *de facto* engage with copyright protected content and subject-matter.

Should the Ministry or any branch of the New Zealand government require any further information, data or input, ICMP is ready to do so at any point.

You contact us at secretariat@icmp-ciem.org or 0032 2 40- 11 49 83,

------*ENDS*