

5 April 2019

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By email only to: [copyrightactreview@mbie.govt.nz](mailto:copyrightactreview@mbie.govt.nz)

**Submission on review of the Copyright Act 1994: Issues Paper**

Dear Sir / Madam,

**1. Background**

- 1.1. The Print Media Copyright Agency (PMCA) welcomes the opportunity to respond to Issues Paper – Review of the Copyright Act 1994 (November 2018). We would like to express our appreciation of the balanced, consultative approach adopted by MBIE in developing the Issues Paper.
- 1.2. The PMCA is a not-for-profit organisation which represent the rights of publishers of written material (whether in print or online), including newspapers, community publications and magazines in New Zealand. The PMCA provides non-exclusive licenses, on behalf of its member publishers, to organisations such as media monitoring service organisations, charities, government departments and businesses who wish to copy and/or use that material.
- 1.3. Our members include established news media publishers such as NZME, Stuff, Allied Press and Bauer magazines as well as online only publishers including, Radio New Zealand, The Spinoff, Business Desk and Newsroom. A full list of members can be found at <https://pmca.co.nz/Licence/Publications> .
- 1.4. The PMCA is affiliated with other Collective Management Organisations (CMOs) both in New Zealand and overseas enabling the licensed use of content from overseas in New Zealand and vice-versa.
- 1.5. This submission addresses the issues raised in the Issues Paper insofar as they impact the PMCA, under Parts 3 to 7 of the paper respectively. Where relevant, we have indicated our response to the various queries raised in the paper.

## 2. Proposed objectives

- 2.1. [Question 2] The PMCA is a member of WeCreate, the alliance of the creative sector, and we broadly support the submission made by WeCreate.
- 2.2. We submit that the primary purpose of any copyright legislation is to incentivise innovation, and that this is best achieved by the content creators retaining control over the copying & distribution of their works. It is important that this primary objective continues to be met including when new means are used to create, produce, distribute and consume copyright works.

## 3. Rights

- 3.1. We are largely content with the rights conferred to rights holders under current legislation, subject to the points below.
- 3.2. [Question 17] The PMCA has encountered numerous instances of overseas domiciled organisations that distribute copyright to clients based in New Zealand relying on the fact that the Copyright Act 1994 is unclear and it is difficult for copyright owners to enforce their rights against the overseas suppliers providing links in breach of the copyright owner's rights. In most instances, copies of copyright works owned by our members are delivered to third parties in New Zealand in breach of the member's rights, but the supply originates from outside New Zealand.
- 3.3. The PMCA understands that these overseas suppliers claim there is no requirement to enter into a licence to distribute copyright works owned by our members in New Zealand as they are not domiciled in New Zealand. As a result, our members are losing the ability to commercialise their content and this causing significant financial detriment.
- 3.4. We support MBIE exploring changes to the Copyright Act 1994 that will ensure a copyright holder in New Zealand is able to seek redress against an overseas domiciled organisation that "authorises" an infringement that occurs in New Zealand similar to the outcome of the UK Court of Appeal case discussed in the Issues Paper.
- 3.5. An EU copyright survey<sup>1</sup>, conducted in 2016, which informed the development of the latest EU Copyright Directive<sup>2</sup>, found that 57% of users accessing online news did not use the publishers or copyright owner's websites or apps but accessed the content via third party apps and platforms. Accessing content from a

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<sup>1</sup> See <https://ec.europa.eu/digital-single-market/en/news/eurobarometer-internet-users-preferences-accessing-content-online>

<sup>2</sup> EU Directive on copyright in the Digital Single Market <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2019-0231+0+DOC+XML+V0//EN>

third party directly impacts the ability for the publisher to monetise their audiences.

- 3.6. In the 2017 Advertising Standards Authority media turnover report<sup>3</sup> the digital revenues derived from our members websites/apps was circa \$107m. Assuming that viewing patterns in New Zealand are similar to the EU, continued unauthorised and unlicensed use of our members' copyright material by international organisations means that our members do not receive the financial benefits.
- 3.7. The EU directive cited in 3.3 above, noted at paras 54-55 that *"A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society" ... and "The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information"*. Under Article 15 of that directive the publishers of press publications are legally recognised as a specific category of rights holder for the first time, as well as explicitly codifying the rights of the press publishers to be recompensed for the use of articles, including videos and photographs, by "information society service providers". We respectfully submit that similar protections and rights must be considered when reviewing the Copyright Act 1994.

#### 4. Exceptions & Limitations

- 4.1. We submit that a series of well thought out, platform neutral and future proofed exceptions which provide certainty when determining whether certain uses should be permitted, in acknowledgement of their wider societal benefit, are preferable to any open-ended alternatives, such as an U.S.-style "fair use" regime, which we suggest would create more confusion for both creators and users alike.
- 4.2. The PMCA supports maintaining well-thought out exceptions that provide both rights-holders and users with a clear understanding of what is permissible, and thereby facilitate competitive, well-functioning markets.
- 4.3. We suggest that any open-ended exceptions would fail the Three-Step Test under the Berne Convention and TRIPS: viz, that the exception is a "special case" and does not unreasonably prejudice the legitimate rights of a rights holder.
- 4.4. [Question 38] We submit that the government should follow UK & EU law in this respect i.e. Non-commercial TDM is permitted providing the user has lawful access to the works. We believe that commercial TDM should only be permissible under licence and that those entities engaging in TDM must be aware of who the rightsholder(s) are and that a "ready market" would already exist.

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<sup>3</sup> See <https://www.asa.co.nz/wp-content/uploads/2018/04/ASA-2017-Media-Turnover.pdf>

## **5. Enforcement**

- 5.1. [Questions 77-79] As MBIE correctly notes in the paper (paras 486-487), due to action taken by the Commerce Commission, CMOs in New Zealand must be non-exclusive licensees. Conversely, the purpose of CMOs is to represent and take action on behalf of multiple rights holders. As a general rule, the cost of a licence is modest, especially when compared to the costs of initiating court proceedings. Many members of CMOs are small enterprises and do not have the resources to initiate or follow-through litigation, hence why they engage a CMO. We submit that provision should be made, similar to s101A of the UK CPDA, which allows for non-exclusive licensees to bring enforcement action where the relevant rightsholder has provided its permission.
- 5.2. Furthermore, we suggest that any revision of the Act includes provisions for the Copyright Tribunal to adjudicate on “small claims” made by CMOs (or vice versa). Otherwise, CMOs will also be deterred from initiating proceedings given the imbalance between collection fees (costs of legal action) and amounts at risk, in all but the most flagrant, large-scale infringements.
- 5.3. We submit that the current cost and time of enforcing rights deters rights holders from exercising their rights against third parties.

We trust the above will be helpful to MBIE in development of the next stage of the review. We look forward to continued engagement with MBIE in this important area.

Yours faithfully,

**Will Gardner**  
**PMCA**