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Submissions in response to the Issues Paper: Review of the Copyright Act 1994

1. Stuff Limited (*Stuff*) is a digital first media company that is focussed on producing quality journalism for New Zealanders. Stuff considers itself privileged to tell the stories that matter to communities across New Zealand, through its print newspapers, magazines, websites and mobile apps, reaching more than three and a half million Kiwis every month.
2. To ensure Stuff can continue to sustain local journalism at scale, Stuff has diversified its portfolio to provide New Zealanders with digital products and services that enhance their daily lives. Like Neighbourly, which brings neighbourhoods together; energyclubnz, which provides electricity at cost for a small weekly club fee; Stuff Fibre, which provides fast broadband across the country with New Zealand-based customer service; or Stuff Pix, which provides a quality video on demand services so Kiwis can access movies they love.
3. While Stuff has indeed evolved into more than a media company, journalism remains at its core and this is reflected in the company's significant publication portfolio. Stuff publishes 11 major national, metropolitan and regional newspapers, 34 community publications across the country, and three magazine titles.
4. Nearly 2 million New Zealanders visit the Stuff website each month to catch up on news, watch videos, give their opinions and be inspired. (Average monthly unique audience of 1.982m in 2018, according to Nielsen Online Ratings.)
5. Stuff employs a large number of journalists and has numerous agreements with freelance and contributing journalists, opinion writers, photographers, commentators and cartoonists. In addition to text-based news content, the Stuff editorial team produces data journalism, interactive graphics, still photography, video and podcasts. Stuff employs specialists in all of these fields.
6. Stuff has invested heavily in investigative journalism including special projects, and broadcast quality video and audio content, such as from the Stuff Circuit team and National Correspondents team.
7. Stuff has 30 offices across New Zealand, with some staff working remotely from other locations. Alongside journalists and editors, it employs product developers, advertising sales teams, product sales teams, print

and distribution personnel, marketing, an events management team, as well as general business support services.

8. Every day Stuff creates a significant amount of material covered by copyright, and licenses content from other providers that is of interest to its audience. Stuff relies on the fact that the content created and licensed is valuable to both our audience and advertising clients. Stuff has a variety of business models that depend on the protection of our intellectual property rights in the content created by Stuff, and content licensed by Stuff for use on its platforms. The rights and protections in the Copyright Act 1994, and the exceptions play an important role in being able to cover the news to the standards expected by our audience.
9. The combination of Stuff's significant audience reach and its substantial investment in journalism and associated content gives Stuff an exceptionally strong interest in copyright law, and in ensuring that this is fair, reasonable and straightforward.
10. Stuff is pleased to present this submission to the Ministry of Business and Innovation in respect of the Issues Paper: Review of the Copyright Act 1994 (*Issues Paper*). Stuff has chosen to respond to certain questions raised in the Issues Paper - questions 30, 31, 32 and 33. These questions reflect the issues of most importance to our business. Our thoughts on those issues are set out in the attached Appendix.
11. In summary Stuff supports the current approach reflected in fair dealing exceptions set out in section 42(2) and (3) of the Copyright Act 1994. Although there may be some uncertainty, Stuff submits that there is no issue requiring legislative remediation, and Stuff does not support any move to define the exceptions further. For the reasons expanded on below it is not appropriate to attempt to define and limit what is current affairs and/or news. Stuff supports a closed set of exceptions in any proposed changes to the Copyright Act.
12. Stuff does not support the introduction of a fair use regime into New Zealand. To do so would be detrimental to the ability of local content creators to derive benefit from their works and would represent an erosion of content creators rights. The exceptions as currently framed place appropriate limitations and restrictions on third party use of content.

Stuff looks forward to participating in the next stages of this review.

Yours sincerely,



Mark Stevens
Editorial Director

Appendix 1

Question 30

Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use? Have you ever been threatened with, or involved in, legal action? Are there any other barriers to making use of this exception?

1. Stuff relies on the exception set out in section 42(2) and (3) of the Copyright Act as an aid to reporting on news and current affairs. For the purposes of this submission reference to a fair dealing exception will be a reference to either of these specific exceptions. Being able to fully report on the news using text, graphics, photos and video is an integral part of news coverage. The current fair dealing exceptions are an essential element in our reporting on news and current affairs.
2. To the extent that Stuff relies on the exceptions set out in the Copyright Act which allow it to fair deal, Stuff does not consider the exceptions are uncertain. It is evident that the fair dealing exceptions do not provide a "free use" or promote blatant piracy in any way. The fair dealing exceptions give Stuff, and other parties, the ability to use content responsibly and fairly, without harm to the copyright owner, while reporting current affairs.
3. The Copyright Discussion Paper outlines some of the ways that the exception has been interpreted. Stuff agrees that the length and duration of any video clips that are used under the exceptions is important. Stuff places weight on the length and duration of the clip in determining whether or not to fair deal content, this is discussed in more detail below.

Risk assessment

4. Stuff has many arrangements for the use of content from a range of services – from worldwide media licence arrangements to local content arrangements. These cover text, photographs, audio and video. Because of this, Stuff's reliance on fair dealing content is limited.
5. Stuff expects its journalists and editors to apply their best judgment when determining whether or not to rely on a fair dealing exception. We have strictly adhered to internal protocols which ensure responsible fair dealing. Each fair dealing instance must be considered on a case-by-case basis due to the indefinable and unpredictable nature of reporting the news and current affairs. The purpose must be for news and current affairs. It is not relevant whether the news is "hard news".
6. A balance must always be met between the media's need to disseminate information of public interest and benefit to their audience, and of the rights of owners and licensors of the content. The provisions of the Copyright Act give journalists and editors the ability to determine the currency and newsworthiness of any content while respecting the rights of copyright holders.
7. When using the section 42 exceptions in respect of third party audio or visual material that Stuff wishes to publish for the purpose of reporting the news or current affairs, Stuff will pick out the most relevant sections of the video that are required to directly illustrate the story, and credit the video content source. We consider the requirement for sufficient acknowledgement to be fair and reasonable. Stuff strives to ensure that the use of the copyrighted material does not challenge the owner's exploitation of copyright.

8. The Issues Paper states that the material copied need not be current, provided it is properly used to report current affairs. Editors and journalists write stories and curate content based on what is of public interest at any given moment. Because something is within the public interest it may become current even after a significant time period has lapsed. Stuff will give weight to the length of time that has elapsed since the event which is captured in the content it wishes to fair deal. It is important that there is flexibility in the term "current", and Stuff supports a continued flexible approach that does not fix the fair dealing exception to a period or point in time.
9. The Issues Paper also suggests that there is a difference in using video content for the purposes of entertainment rather than reporting current events. Simply because an event is not a traditional hard news event does not preclude an event from being newsworthy. Editors and journalists must be free to determine the newsworthiness of any event and make appropriate use of the exceptions when reporting.
10. What is news or current affairs cannot be determined in advance of an event taking place, and we submit that it would be very difficult, if not impossible, to come up with guidelines which retain the necessary flexibility, are acceptable to all interested parties and that would improve on the current position.

Other barriers

11. Stuff does not consider that there are any current barriers to fair dealing for the purposes of news reporting. The exception for reporting the news is an important right for the media to allow it to properly report news and current affairs. Decisions on when to use third party content to report the news and current affairs are not made lightly, and always include senior members of the editorial team.
12. Stuff recognises that advocating a flexible approach to interpreting the fair dealing provisions may in some cases disadvantage Stuff commercially because it may provide scope for others to exploit Stuff's copyright content. However, we consider that the overriding principle of flexibility, allowing a user to interpret the exceptions using their own best judgement is far preferable to any attempt to introduce prescriptive rules and guidelines and to define the "news and current affairs" which may limit legitimate use.

Litigation

13. Stuff has only been involved in one case involving fair dealing rights. Stuff, formerly Fairfax New Zealand Limited, was sued by Sky Network Television Limited in 2016. Sky alleged that Stuff used material that Sky was licensed with rights to broadcast and exhibit, in a manner that breached Sky's rights under the Copyright Act. Stuff argued that its use was legal under section 42 of the Copyright Act, which provides that fair dealing for the purpose of reporting news and current affairs does not breach copyright. Sky unsuccessfully applied for an injunction to limit Stuff's use of the sports clips; and it subsequently filed proceedings in the High Court against Stuff and other NZ media alleging copyright infringement. The matter did not proceed to a hearing. In our view, the lack of copyright claims and legal action in relation to the section 42 exceptions underlines the fact that the exceptions are working well in practice.
14. Clips of sporting footage garner a lot of focus when the fair dealing exception is discussed, and cannot be overlooked when discussing the fair dealing exceptions. Sport and sporting matches are of major news interest to the New Zealand public. It is right that use of clips from sports games falls within the fair dealing exceptions.

15. There is an international trend to commercialise the coverage of sporting and celebrity events. Stuff agrees that there is a need to ensure that there is a balance between those parties that have invested in being able to provide in-depth coverage of any event and media organisations covering the core and essential elements of the news from such events, which will almost invariably depend on fair dealing. Protocols are often agreed between media rights holders and other media to agree on fair use terms for reporting on important sports events.

16. Apart from the litigation briefly outlined above, Stuff has not been a party to any lawsuits regarding fair dealing of content for the purposes of news reporting. It is common for Stuff to receive legal letters, preemptively or retrospectively, from other media organisations with regards to specific news events that such media organisation has invested in, which serve as a reminder of Stuff's obligations under the Copyright Act. Stuff consider these as no more than aids in the decision-making process about the limits of fair dealing specific to the story in question. These do not serve as a barrier to Stuff's use of content that has been fair dealt.

Question 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?

Commercial Outcomes

1. The journalism and news reporting created and/or disseminated by Stuff on its platforms and in its publications supports freedom of communication and expression. It ensures that communities are aware of newsworthy events in their community, in New Zealand and elsewhere. Reporting the news is a commercial outcome. Stuff uses copyright work for the purposes of news reporting. Because there is a commercial benefit in being able to fair deal a work it is important that there are limitations and that it creates a chilling effect on the use and consumption of the copyright works. These exceptions should only be relied on where it is necessary to fair deal a copyright work without the permission of the owner.
2. Stuff believes that some stakeholders are overstating the commercial benefit derived from using snippets of pay-to-view broadcasts of live sports events, especially given that our snippets appear after the live broadcast has ended. Licensed distributors contemplate news agencies being able to use clips because news agencies are required to sign Guidelines for some sporting events to use clips and are specifically authorised to do so. For example, the Olympic Games.
3. The priority for journalists and editors to is to report the news accurately and in a manner that appeals to the audience, and which captures the essential newsworthy elements.
4. Stuff has seen increasing demand from its audience to have the news reported by text, images and video. Video is no longer a "nice-to-have," it is expected and required for reporting the news accurately. For example, Stuff served more than 128 million video views in 2018, an average of more than 10.6m per month. Stuff is a major platform for the distribution of video, as shown by NZ on Air's decisions to grant \$491,000 to Stuff's investigative unit Circuit for a documentary series and to grant \$1 million to the Kea Children's News service, for which Stuff is the platform. Both will air in 2019.

Proposed Changes – Fair Use

5. Stuff is aware that some stakeholders are advocating for a fair use provision to be introduced in New Zealand similar to the provisions in the United States of America. It is Stuff's position that fair use is too broad and too wide. As a content creator Stuff does not support the introduction of fair use.
6. Stuff has witnessed a 'wild west' mentality that already exists where third parties steal content by scraping our websites and offering this content on their own websites (often without attribution or any link back to the Stuff platform). This behaviour is not limited to New Zealand. There is concern that any broadening of the fair dealing exceptions to include fair use will increase the amount of content used by third parties for their commercial benefit with no compensation.
7. There is an argument that the current exceptions stifle innovation and creativity because parties wish to exploit others' copyright whether through new technologies or other ways are not certain of the rights available. It is Stuff's position that any use that is outside of the exceptions detailed in the Copyright Act should be negotiated with the copyright owner for that use. Protecting copyright and the opportunity to pursue on-going economic benefits from the content created is critical to the viability of media organisations.

8. There are a number of mechanisms available to third parties that wish to use content produced by Stuff. For instance, content can be licenced by the Stuff Syndication Team, from the PMCA or other third party news distributors that Stuff has given permission to license content. Currently Stuff licenses media monitoring organisations/news aggregators that use a headline and an extract of a story for their business purposes. This is an important source of income for Stuff. We consider that any expansion of the right to fair use content or further expansion to use content for any purpose would be detrimental to the benefit that Stuff is able to derive from that content.
9. Stuff does not agree that the exceptions do not respond to the changing technological environment. The exceptions apply to a purpose and those parties that operate in pursuit of that purpose. This argument is inflated by proponents of fair use.

Question 32

What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?

1. Photographs for the purposes of news reporting cannot be used under a fair dealing provision. Stuff considers that it is a benefit to the copyright owner. As the owner of a significant number of photos that are syndicated across the world for the purposes of news reporting by other media companies, we consider that it is necessary for the copyright owner to be able to realise a benefit from the work.
2. Producing high quality photographs for the purposes of news reporting is very costly. In Stuff's case, that cost includes high-quality specialist equipment, highly skilled and experienced staff and the unavoidable time and travel cost for capturing the images, frequently over significant distances. Quality images can provide the most important element of news reporting. It is essential that Stuff and/or the copyright owner is able to protect the investment and value in the images. Losing such strong protections would undermine the investment and create a barrier to producing and publishing such images.
3. Stuff contracts numerous non-staff freelance photojournalists and photographers in New Zealand and occasionally abroad. Our agreements with those individuals typically require that we act to uphold and protect their copyright in return for an ongoing licence to publish (including for an initial exclusive period). Losing or weakening the existing protections in both the photographer's copyright and our licence would risk undermining this important source of content.
4. Stuff frequently and routinely approaches non-professional photographers (ie, members of the public) where such individuals have taken a photograph which is of news interest. We seek their permission to publish in and may or may not negotiate payment for this. Similarly, members of the public submitting content for possible publication ("user-generated content") may provide photographs. Whether stated or implicit, Stuff always seeks to ensure that it has appropriate permission and to protect the copyright owner's interest around the further use of such a photo, including ensuring correct attribution is included with publication.
5. Stuff does not consider that any changes are required to the exclusions surrounding the use of photographs.

Question 33

What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?

1. Stuff submits that the exceptions set out in clause 42(3) for reporting news and current affairs should be retained in the review of the Copyright Act, and no changes should be considered to limit or further broaden these rights. News reporting is commissioned and selected for publication by experienced news editors for Stuff and our newspapers. We trust the experience of editorial staff to make decisions on whether to fair deal content based on their experience and detailed knowledge of what our audiences consider newsworthy.
2. News means different things to different people. Many newsworthy events are unpredictable. It is near impossible to set a defined set of rules about when and how much content can be used for the purposes of reporting the news. Stuff would be opposed to any regulations that seek to clarify the exceptions set out in clause 42(3), which resulted in tighter restrictions on fair dealing.
3. The exceptions allow news publishers to do what is reasonable and fair to report news and current affairs. Stuff does not consider any changes are required to the exception for reporting news and current affairs found in section 42 of the Copyright Act.

News media v Citizen Journalist

4. The Issues Paper raises the question of whether there is a distinction between the news media and a citizen journalist. The example given in the Issues Paper does not appear to create a concern in the interpretation of section 42(2) and (3) of the Copyright Act. If a person captures footage and uploads it to their personal website or social media platform, then it follows they are entitled to do so as the owner of the copyright. If Stuff or any other media organisation wished to rely on the uploaded footage, then we would either need to seek permission from the owner of the copyright work or fair deal the footage within the exceptions provided for in the Copyright Act if they applied.
5. Stuff uses video provided by citizen journalists to report a number of events. This is common across any number of national and international news agencies. Stuff will use the video in accordance with the permission of the citizen journalist or otherwise in accordance with the fair dealing exception in the Act.
6. The exceptions in the Copyright Act are not articulated to be limited to news media organisations. Clearly where a member of the public seeks to use the copyright content of a third party under the exception set out in clause 42(2) or (3) of the Copyright Act, it will be the responsibility of that person to show they were using the content for the purposes expressed in the Copyright Act.

Parody and Satire

7. Stuff is aware that some stakeholders have expressed interest in the introduction of an exception for parody and satire. Stuff supports this notion in theory, and suggests that it be introduced in a manner that reflects the current exceptions in the Copyright Act.