

SUBMISSION TO
THE MINISTRY OF BUSINESS, INNOVATION
AND EMPLOYMENT
ON THE COPYRIGHT ACT REVIEW

5 APRIL 2019



tvnz

To: Copyright Act Review Team
Ministry of Business, Innovation and Employment
Wellington

By email: copyrightactreview@mbie.govt.nz

This submission is made on behalf of Television New Zealand Limited, in response to the Copyright Act Review Issues Paper.

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INTRODUCTION

1. Television New Zealand Limited (**TVNZ**) is the country's leading free to air broadcaster. It reaches approximately 2.2 million New Zealanders every day, predominantly through its three broadcast channels (TVNZ 1, TVNZ 2 and DUKE) as well as its TVNZ OnDemand, 1NEWSNOW, Re: and HEIHEI online services. It operates 24 hours a day and produces, commissions and acquires thousands of hours of content per year. TVNZ is owned by the Crown and operates as a self funded, commercial entity by virtue of the Television New Zealand Act 2003¹.
2. TVNZ welcomes a comprehensive review of the Copyright Act 1994 (the **Act**), which pre-dates the digital era.
3. TVNZ thanks the Ministry of Business, Innovation and Employment (**MBIE**) for the opportunity to make a submission in respect of the Copyright Act Review Issues Paper (the **Issues Paper**). TVNZ welcomes the further opportunity to discuss this submission in more detail should MBIE desire.
4. Earlier this year TVNZ was represented at each of the workshops across the country held by MBIE to discuss the Copyright Act Review. The TVNZ participants at each found these particularly useful, and they illustrated the breadth of issues covered by the Act. Again, TVNZ thanks MBIE for the opportunity to attend and discuss these issues with stakeholders from across the creative sector.
5. At each of these sessions it was communicated that law reform in this space was likely to be 24-36 months away. TVNZ requests that if that was to be the case, and without prolonging reform any further, that an opportunity be made to reflect on current practice at that time rather than rely on submissions that were made 2-3 years previously. The fast-moving pace of technology and the way it is used to create, disseminate and protect content is changing rapidly. Also, other jurisdictions are grappling with the same complex themes as those in the Issues Paper and it would be useful to reflect international best practice in any future legislation.

EXECUTIVE SUMMARY

6. The creative industry is an important one to support New Zealand's aspiration to be a knowledge-based economy. This sector contributes an estimated \$17.5 billion contribution to GDP, and sustains 131,220 jobs or 6.6% of the local work force². A strong copyright legislation framework underpins this industry.
7. TVNZ is proud to be a friend of WeCreate and supports their Action Plan paper which has been submitted to MBIE and the Ministry for Culture & Heritage. TVNZ was also a contributor to *Kiwi Creativity Doesn't Just Happen* (the **Kiwi Creativity Submission**) – the submission prepared on behalf of New Zealand's screen, music and interactive media creators. Each of

¹ See s12 Television New Zealand Act 2003

² WeCreate Industry-Government Action Plan, 2019, p11

these documents is fully endorsed by TVNZ and this submission is intended to supplement those.

8. As a creator of content valued by New Zealanders, TVNZ supports a legislative framework that enables it to control where and how its valuable intellectual property is used.
9. As a user of other parties' content, both licensed and under fair dealing exemptions, TVNZ seeks balance to ensure that those exemptions are appropriate. It does not support an ecosystem where use of others' copyright outside of fair dealing exemptions becomes the standard, and that mere attribution of the creator or owner is considered sufficient compensation.
10. TVNZ is concerned at the rates of content piracy in New Zealand and the threat that this causes to the creation of content. We endorse the position of the music industry and others to explore site-blocking legislation to curb this, as has been the case in other jurisdictions.
11. This submission will focus on the following issues not otherwise covered by the WeCreate Action Plan and Kiwi Creativity Submission:
 - 11.1. A parody exemption; and
 - 11.2. The retransmission of broadcast in cable programme service.

PARODY EXEMPTION

12. TVNZ supports a fair dealing regime as currently provided in Part III of the Act, and as articulated in the Kiwi Creativity Submission. It does not believe that a fair use regime is required in New Zealand and submits that the current set of exemptions is sufficient save for one omission – a parody and satire exemption.
13. In 2016, TVNZ was party to litigation brought by SKY Network Television against other New Zealand media which claimed that those media were using SKY's copyright content in excess of the fair dealing regime³. The matter was subsequently settled and each media organisation has an agreement that determines the amount and frequency of SKY content that can be used in news (in this case sports content for which SKY is the rights holder in New Zealand). Separate to that there is an arrangement between NZME, Stuff and TVNZ which allows for the use of different amounts of content between those organisations. While criticised at the time, Section 42 of the Act provides a framework which allows media organisations to negotiate the finer detail of what is acceptable to be used.
14. The current Part III exemptions do not include a parody right and TVNZ submits that this should be included within fair dealing exemptions in future legislation.
15. It is TVNZ's position that the absence of a parody exemption puts New Zealand out of step with similar jurisdictions. It further submits a change would reflect current practice in New

³ SKY Network Television Limited v Fairfax Media and ors, High Court, CIV-2016-404-2693

Zealand, certainly as to between New Zealand media which have used comedy vehicles to parody each other's content for many years without resorting for litigation.

16. TVNZ's submits that such an exception should be fettered. The extent of a parody exemption should ensure that the parody or satire does not cash in on the original work, but rather creates a distinctive new work that criticises or reviews the original work rather than just displaying it. As one leading academic in this space noted: "Satire should not be a fig leaf for taking copyright-protected material that should be licensed".⁴

RETRANSMISSION OF BROADCAST IN CABLE PROGRAMME SERVICE

17. Section 88 of the Act provides for the free transmission of free-to-air broadcasts within a cable television service. Due to the age of the Act, and the plethora of delivery methods now available, "cable television service" is capable of a wider definition than that anticipated by lawmakers in the early 1990s.
18. TVNZ submits that this provision is an anachronism and commercially disadvantages those broadcasters who operate free-to-air television services. TVNZ believes this section should be repealed.
19. The curation of content (whether created, commissioned or acquired) into a linear schedule is both a skill and an art. TVNZ operates under a commercial mandate by virtue of Section 12 of the Television New Zealand Act 2003. Both it and its competitors invest a lot of money in building and holding their audience, and creating a competitive advantage.
20. Section 88 of the Act allows a platform owner to build scale off the back of these services that it does not own or license, in order to compete with the very content that it enjoys a free ride with. However there is no equivalent obligation on those service providers to make their services available, nor is there a compulsory licensing or wholesaling scheme in place.
21. The reach of a free-to-air channel is important to a broadcaster, so making its channels available to a wide range of platforms is usually welcomed. However, under the principles of copyright, the copyright owner should be able to set a fair price for its content and not have it exploited without consideration. In addition, in some cases the technical standards of the platform taking the broadcasting signal may not be of a high enough standard, and therefore degrade or diminish the content. The broadcaster in this case has no control over these aspects.
22. Section 88 is similar to provisions that were contained within the copyright legislation of other Berne Convention-signatory countries. Our nearest neighbours Australia amended its own Copyright Act in 2001 to remove a similar provision. Under the amended legislation, payment must be made by pay television networks to retransmit free-to-air television networks.

⁴ Prof Graeme Austin, *Newsroom* website, May 2018

23. Section 88 is fettered by the existence of a licensing scheme⁵, which allows a broadcaster to receive consideration. This is not a preferred solution as there are many parts to a negotiation with a “cable television service” that may vary the consideration that a broadcaster is willing to receive, for example the functionality of the platform, the depth and use of electronic programming data, and the channel positions. A licensing scheme generally does not allow for negotiated positions and applies a “one size fits all” approach.

⁵ See s88(3) of the Act