

Submission to Ministry of Business, Innovation and Employment

Copyright Act Issues Paper

April 2018

Background

WeCreate is the alliance of New Zealand's creative industries with the mission to grow the creative sector's contribution to New Zealand's social and economic wellbeing. WeCreate's member organisations represent content creators and owners across the spectrum of the creative industries from screen, to video games and books, visual arts, advertising, music, performing arts, mixed reality, design, photography and architecture. In addition to our members, large businesses and government agencies in the New Zealand creative sector are Friends of WeCreate. Together our Members and Friends represent over 25,000 individual creators and creative businesses.

In 2016, WeCreate commissioned NZIER to prepare *The Evolution of Kiwi Innovation*. This report demonstrated that kiwi creativity drives jobs and economic growth, not only in the creative industries, but increasingly as a key enabler of other sectors.

The New Zealand creative sector:

- **Enriches the lives of all New Zealanders** through our ideas, and our stories of people and place
- Brings fresh thinking and new solutions to **help Kiwis thrive**
- Is at the forefront of **technological innovation**
- Drives **growth** in the digital age through **innovation and productivity, diversifying** our output and exports beyond traditional industries
- Generates **high value jobs and outputs** – not just in the creative industries, but **in every sector**
- Fosters the skills and talent we will need to confidently face the **Future of Work**
- Offers new opportunities for **small business and regional development**
- Is sustainable and **kind to the environment, helping to meet emissions targets**
- **Exports globally**, growing trade weightlessly and with few barriers

In the past 2 years, WeCreate has consulted widely in the development of an Action Plan to grow our creative sector for the good of all New Zealanders. The comments made here are informed by that process, which has involved over 200 creative industry leaders and government officials and included the establishment of six Working Groups comprising industry experts, one of which is dedicated to Regulation. Copyright is the means by which creators of content manage and monetise their work and is the regulation that is most critical to the success of the Creative Sector.

We support the submissions of our Members and Friends and record that WeCreate is currently seeking a concerted industry-led partnership with government to grow our sector's contribution to Aotearoa New Zealand's wellbeing. Following two years of consultation, WeCreate has proposed an Action Plan to accelerate growth, which includes recommendations to:

- Better connect our creative industries for growth - with each other, with government, with Māori, with other industries, and with the world.
- Enhance the profile and potential of our creative sector; and creativity as an enabler of social and economic wellbeing.
- More accurately measure, and track, the value and potential of our creative sector.
- Enable accelerated growth in the capability, capacity, and export potential of our creative people and businesses.
- Support our creators' ability to derive value from their work.

The government response, led by MBIE and MCH, to the WeCreate Action Plan is currently being prepared.

We welcome the continuation of the engagement we have with the Ministry to increase the understanding of the potential of and challenges for NZ creative businesses, as they relate to copyright policy. Policy that has clarity and is efficient for business is welcomed by the Creative Sector.

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Submission

1. WeCreate congratulates MBIE for undertaking a review of this legislation. Copyright legislation that provides clarity and certainty is useful for both the creators of copyright works and those who wish to access and use others' creative works.
2. We refer to our earlier submission (attached) – *Copyright Drives New Zealand's Creative & Digital Wellbeing* – and emphasise that the principles-based approach to copyright as adopted by the World Economic Forum¹, should underpin the review of New Zealand's Copyright Act.
3. Regulation that is fit-for-purpose underpins every sector in the economy. If we are going to maximise the opportunity presented by New Zealand's creative sector, including the digital opportunity, the regulatory framework for creative business needs to be informed by the experience of the sector and be evidence-based.
4. Our IP framework should support and reward New Zealanders and New Zealand businesses that create value in IP. Robust, clear and certain copyright law underpins the health and sustainability of Aotearoa New Zealand's creators and creative industries.
5. We draw MBIE's attention to the *UK Intellectual Property Office's Five Year Strategy – Making life better by supporting UK creativity and innovation*.² The 6 goals of this strategy are recommended for their emphasis on understanding the value of IP for productivity, employment and exports.
6. We do not support all of the Proposed Objectives as outlined in the Issues Paper. Objective 2 includes the use of the words "net benefits for New Zealand". WeCreate, and many of our members, have experience with and are alert to the issues involved in measuring areas of the economy, including the creative industries. One of the goals of WeCreate Action Plan (as noted earlier in this submission) is on Measurement and Research and the need for greater accuracy in how occupational and business value is captured. This is especially true for the digital areas of the economy – where much of the potential and growth of the creative sector will take place. We are concerned that making policy decisions based on a net benefits test will result in the use of data that is not accurate.
7. The Issues Paper does not clarify whether the social and cultural wellbeing value of the creative sector to Aotearoa New Zealand will be factors in calculating "net benefits". With Budget 2019

¹ http://www3.weforum.org/docs/WEF_GAC_CopyrightPrinciples.pdf

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/528791/Corporate_5_Year_Strategy.pdf

expected to focus on wellbeing, we would anticipate that policy decisions across government would also take into account wellbeing benefits.

8. There are currently no mechanisms available to copyright owners for effective enforcement when IP rights are breached.
9. Information and resources about IP need to be accessible and the next generation, whose income will more heavily rely on knowledge assets, need to know how to manage and monetise IP.
10. When business value is not held in physical assets, but in digital assets, digital protections need to be strong. As New Zealand's economy becomes more reliant on digital business, cyber-security and increased understanding of the opportunities and risk of cloud-services is critical.

Let's make NZ creativity count

Copyright drives New Zealand's creative & digital wellbeing

NZ Creative Sector Submission

New Zealand Intellectual Property fortifies our culture and generates high value, environmentally-friendly, often digital, products and services that are at the forefront of innovation, spearhead new technology, and will underpin many future occupations, enhancing the prosperity of all New Zealanders.

The ability of New Zealand creators to contribute to that prosperity is at risk if copyright legislation does not keep pace with changing business models and technologies that enable black markets and unauthorised transactions.

Future-proofing New Zealand's well-being will rely on prioritising a thriving creative environment fit for the digital age, and growing the contribution and competitiveness of our creative industries, as other highly developed creative economies are doing.

A thriving creative economy will benefit all of Aotearoa New Zealand.

Copyright is at the heart of a successful creative economy. WeCreate urges Government to take a fresh approach to the proposed review of the Copyright Act and recognise that a thriving creative economy benefits all of New Zealand by:

- › Enabling Kiwi creators to be sustainably employed in producing work that delivers social, cultural and economic benefits to all New Zealanders;
- › Ensuring all New Zealanders have comprehensive access to plentiful content;
- › Increasing the creative sector's current and potential contribution to economic growth, productivity, and the future of work;
- › Growing export earnings (some creative industries are, or soon will be, net exporters of IP);
- › Maximising the Government's investment in digital infrastructure;
- › Enriching life-long education;
- › Telling New Zealand stories and enhancing our identity, locally and internationally.

WeCreate seeks to partner with Government to deliver a strategic and sustainable Action Plan to grow a more thriving NZ creative sector.



Core policy principles

WeCreate supports the digital copyright principles of the World Economic Forum¹ and recommends that a future-focussed review of the Copyright Act be based on:

- › Safeguarding the right of NZ creators to choose how they earn from their work - as producers in other sectors of the economy do;
- › Continuing to ensure that our digital world provides consumers with greater access to more abundant content than ever before;
- › Providing clarity and certainty for the authorised use of copyright works, and accessible and effective mechanisms for addressing unauthorised use;
- › Embracing and anticipating technological and market developments to ensure that New Zealand creators can continue to compete effectively in a global digital marketplace;

WeCreate

WeCreate is the alliance of Aotearoa New Zealand's creative sector organisations and industries (incorporating over 25,000 members). Our mission is to catalyse the growth of the sector, advance its collaborations with other sectors and be the interaction point for Government to maximise the opportunities our creativity offers.

In May 2017, WeCreate hosted 100 creative sector leaders and government officials at the 'Creative Economy Conversation' in Wellington. The overarching recommendation of this forum was to develop and implement, via an industry-led, Government-supported partnership, a strategic and sustainable Action Plan to grow our creative sector.

WeCreate's members and friends are:

Advertising and Illustrative Photographers Assn

APRA/AMCOS NZ

Artists Alliance

ATEED – Auckland Tourism, Events, & Economic Development

Christian Copyright Licensing

Commercial Communications Council NZ (formerly CAANZ)

Copyright Licensing Limited

Creative New Zealand

The Creative Thinking Project

Directors and Editors Guild NZ

Designco

Home Entertainment Assn NZ

Independent Music NZ

Interactive Games and Entertainment Assn

Les Mills International

Motion Pictures Distributors Assn of NZ

NZ Film Commission

NZ Game Developers Assn

NZ Institute of Architects

NZ Institute of Professional Photography

NZ Music Commission

NZ On Air

NZ Screen Assn

NZ Society of Authors

NZ Writers Guild

Playmarket

Print Media Copyright Agency

Publishers Assn of NZ

Radio NZ

Recorded Music NZ

SAE Institute

Screen Composers Guild of NZ

Screen Production and Development Assn

Screenrights

Script to Screen NZ

Sky Network Television

TVNZ

The Weta Group of Companies

Universal Music NZ

Viscopy

¹http://www3.weforum.org/docs/WEF_GAC_CopyrightPrinciples.pdf

Issues to be addressed in NZ copyright review aligned to core policy principles

Principle One:

Safeguarding the right of NZ Creators to choose how they earn from their work, as producers in other sectors of the economy do.

NZ authors, musicians, film makers and other creators are experiencing substantial erosion in the value of their work due to illegal copying (via P2P or streaming sites) and exemptions in the Safe Harbour regime which enable user-uploaded copyright works to be publicly provided to users without any proper recompense to creators. To achieve balance in NZ's copyright regime, WeCreate seeks:

(1) Safe Harbour Exemptions

A review of the safe harbour exemptions for internet service providers contained in ss 92B-E to achieve the following:

- (a) A review of the definition of 'internet service provider' in s 2 so as to exclude from safe harbour protection those entities that actively host and manage user uploaded content; and
- (b) Redrafting of the notice and take down provisions in s 92C so as to ensure that uploaded content that is the subject of a notice is removed permanently.

(2) Site Blocking Remedies

Inclusion in the New Zealand Act of a provision (equivalent to s 97A of the UK CDPA 1988) to unequivocally confirm the High Court's jurisdiction to issue site blocking injunctions.

Principle Two:

Continuing to ensure that our digital world provides consumers with greater access to more abundant content than ever before.

It is impossible to quantify the amount of content that New Zealanders now have access to. New creative work is made available to consumers via multiple channels every minute of the day. In a world of such abundance, exceptions to copyright must be limited to cases where the market fails and must provide clarity and certainty to both creators and consumers of creative works. WeCreate seeks:

(1) Part 3 Copyright Act 1994

There should be continued use of Part 3 as a legislative mechanism for dealing with permitted uses of copyright works in whole or in part. Part 3 exceptions provide more certainty for users of content than other mechanisms like the US-style fair use approach.

Explanation:

WeCreate strongly supports the continued use of Part 3 of the Copyright Act when determining permitted uses (ie exceptions) to copyright. These legislative exceptions provide certainty and involve legislative solutions which are far more effective (to address the respective interests of users and copyright owners) than individual judicial decisions. Judges deciding individual cases are ill-equipped to make policy across a range of uses and inconsistent decisions result in more uncertainty for users.

A number of Part 3 permitted uses should be revisited and deleted or amended. These are uses which are technologically no longer relevant or where the permitted use terms are no longer fair. These include ss 81, 87, 87A and 88. The availability of library exceptions to libraries that operate in a commercial environment should also be removed.

(2) Parody & Satire – Permitted Use

A new parody and satire permitted use should be enacted in line with the Australian provision.

Principle Three:

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

Our online and digital world provides opportunities for creators to distribute their work to a wide audience, and also provides those who seek to distribute work that is not theirs with an almost equal opportunity to do so. Digital distribution models are often based on licensing of content, rather than sales. Licensing mechanisms and support systems that are fit for the digital age are needed to safeguard the investment of content creators. Clarity and certainty are required in the following areas:

(1) TPMs and Streaming Devices

Introducing effective provisions to address the subverting of TPMs as well as the use of illegal streaming devices.

(2) Standing Rules

Change s 123 to allow licensees that are not exclusive licensees to sue for infringement – particularly where the licensee is a licensing body.

Explanation:

As a result of action taken by the Commerce Commission under the Commerce Act 1986 licensing bodies are no longer able to obtain exclusive licences from copyright owners (as part of their mandates). These must be non-exclusive. Yet the whole purpose of licensing bodies is to take action on behalf of multiple copyright owners. Provision needs to be made for non-exclusive licensees to have standing to sue. The same safeguards as contained in s 124 would apply equally to non-exclusive licensees.

(3) Authorising Copyright Infringement

Reviewing the restrictive act of "authorising" an infringing act so as to provide for liability on parties who authorise an infringing act within New Zealand but are located outside New Zealand. (Liability for "authorising" in such circumstances is provided for under the UK CDPA 1988. The restriction in New Zealand is likely an unintended function of the drafting);

(4) Copyright Tribunal

Re-examination of the jurisdiction of the Copyright Tribunal

- (a) Whether it should be retained or its jurisdiction transferred to the High Court.
- (b) If it is to be retained, the need for rules similar to the UK Copyright Tribunal Rules 2010.

(5) Border Enforcement

Implement new border enforcement provisions as per s 10 of the Trans Pacific Partnership Agreement Act 2016.

(6) Infringing File Sharing

A review of ss 122A – U and the Copyright (Infringing File Sharing) Regulations.

Principle Four:

Embracing and anticipating technological and market developments to ensure that New Zealand creators can continue to compete effectively in a global digital marketplace.

Online streaming services dominate the film, television and music markets where the marketplace is global, New Zealand creators should be afforded the same rights and opportunities as creators everywhere. The issues requiring consideration under this principle are:

(1) Term harmonisation

New Zealand copyright term provisions should be harmonised with major overseas trading partners for literary, dramatic, musical, artistic works, sound recordings, films and communication works. There should be no phase-in period.

(2) Performer's rights

Performer's rights should be provided for as contained in the Trans-Pacific Partnership Agreement Amendment Act 2016.

With thanks to Andrew Brown QC, for preparation of the legislation-specific aspects of this document.