



**SPADA's Submission in Response to the
Review of the Copyright Act 1994: Issues Paper**

April 2019

INTRODUCTION

Screen Production and Development Association of New Zealand response to Ministry of Business Innovation and MBIE Review of the Copyright Act 1994 Issues Paper November 2018. We welcome the opportunity to participate in this review and anticipate further involvement with interest. Our responses are confined to aspects of particular importance to the screen industry. Discussion with members as to their practical experiences continues.

We read the response to the terms of reference submitted by Recorded Music New Zealand Limited dated 27 November 2017; particularly the 4th schedule. We agree with and support those submissions.

We have also read the Australia New Zealand Screen Association and related parties collectively described as 'New Zealand Film and TV Bodies' submission in draft and endorse it. That group mainly speaks for the distributors and exhibitors and from their perspective. Their survey of the industry, its financing and the effect of digital convergence is of particular importance. We note they quote Dr George Barker who has previously researched and written for the NZFC.

SPADA

The Screen Production and Development Association of New Zealand (SPADA) is a voluntary advocacy group representing the domestic screen industry in New Zealand. We have regularly contributed to relevant reviews and inquiries. An example is 'Balancing Copyright in New Zealand' of October 2016. This was a joint submission regarding implications of the TPPA and copyright review dealing with technological protection measures, safe harbours and fair use while recommending the examples available in the United Kingdom.

SPADA members make screen works which include all forms of copyright and other intellectual property. Projects usually take many years from inception to publication let alone recovery of investment. Seven years for a feature films journey to commencement of principal photography is common. This means predictability and clarity are valuable in every sense.

SPADA shares the Government's aim to "help ensure a screen industry that is more sustainable, (and) brings greater long-term economic benefits to New Zealand. As we stated in the introduction to our paper responding to the New Zealand Screen Production Grant consultation on 4 March 2014 SPADA fully concurs with Government that this will only be achieved by "*building a strong base of local New Zealand screen companies and talented individuals developing unique IP*". Furthermore, SPADA believes it is vital that the ownership of this IP is retained in New Zealand, by New Zealand residents or domiciled companies to ensure that success is reinvested into the New Zealand economy. Retention and protection of intellectual property remains a key aspect.

SPADA members screen productions are often financed internationally with complex mixtures of sales advances appropriated to geographic territories and loans of various kinds. Tranches further denominated by medium and time are everyday negotiations. Such arrangements are secured by various transfers and licences of copyright. The financiers often require suitable insurance cover known as errors and omissions and which includes defects in copyright chain of title. International legal consistency is a key ingredient in making these kinds of arrangements in an economically efficient manner.

Screen Industry in New Zealand

The screen industry is generally accepted as valuable to New Zealand. The, 56 page, November 2017 New Zealand Institute of Economic Research report 'The economic contribution of the screen industry' reliably sets this out in detail including the following statements in the executive summary:

The screen industry makes a strong economic contribution

The screen industry added \$1.015 billion to real GDP in 2016. Others state the 2017 figure at \$3.5 billion¹. The motion picture sub-industry, a component of the screen industry, is geared towards exporting and its estimated contribution to export volumes is around \$706 million annually. The motion picture sub-industry includes the production and distribution of film, television, commercials and videos.

The screen industry has increased job stability, increased wages and well paid visual effects jobs

There were 14,000 people working in the industry in 2015.

The screen industry support New Zealand's attraction strategy

Film tourism has shown strong growth. Total spending by international visitors in the Matamata-Piako District, where Hobbiton is located, increased from \$9million in 2010 to \$45 million in 2015.

RESPONSE TO ISSUES

Question 2

The ability of the Legislature to keep up with technology is limited. Adaptability or resilience to future technology change is a desirable objective but international consistency is preferable than speculative assessments as to the future.

Statements of principle have worked reasonably well in the Privacy Act for example. The Courts have been able to apply them effectively but access is often prohibitively expensive. The mandatory considerations in s43 are useful. However lower Courts have consistently failed to accept the desirability and effectiveness of penal deterrents.

Questions 3&4

International consistency is desirable for many reasons; efficiency in contracting internationally and relevant precedent being examples. The effect of Brexit on IP legislation is not going to be clear for a while but is likely to lead to a reduction in the influence of EU law. *Media Works NZ Ltd v Sky Network Television Ltd* 2007 WL 2922917 High Court Auckland 12/9/2007, CIV 2007-404-5674 is an isolated but useful discussion as to use of footage for reporting current events and fair dealing. While an oral judgment on an injunction application it is a decision of the now Chief Justice, argued by leading counsel with relevant authorities being cited and was not appealed. There are also a number of UK decisions which are applicable such as *Newspaper Licensing Ltd v Marks and Spencer PLC* [2001] Ch 257, *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, *TCN Channel Nine Pty Ltd and*

¹ Kiwi Creativity Doesn't Just Happen March 2019

others v Network Ten Pty Ltd [2002] FCAFC 146[97] and *Hyde Park Residence Ltd v Yelland and others* [2001] Ch 143.

Much of the law of copyright is suitable and does not require much change. Our consultation with Lawyers active in advising film makers did not produce many examples of problems. The usual objectives of certainty, meeting international obligations and constitutional obligations remain paramount.

Question 6

We support the existing threshold for copyright and the reasons set forth in the 'New Zealand Film and TV Bodies' submission in response to this question.

Question 8

We support retention of the existing default rules for copyright ownership.

Ownership may provide context in which Directors views on authorial rights or moral rights might be considered. Clarity of control is important in the screen business. Writers often Direct the resultant film in New Zealand. The Producers undertake the arrangements necessary for the making of the film including negotiations with funders to secure cash flow to make the work. Most involved prioritise arrangements intended to enhance the completion so something will be brought to the screen without disabling dispute. This requires the ability to acquire and aggregate rights so as to provide security against which advances are made and to remove conflicts of interest. This is why the Producer usually contractually clarifies holding the intellectual property rights for the financiers according to their respective arrangements. There is no evidence that joint authorship issues arise despite the often informal collaborative dynamic of film making especially as between Director and Producer. The film work definition of author is effective. Most in the screen industry would want the ownership and control to be unchanged subject only to the moral rights that exist albeit perhaps clarified. They would not support a limitation on contracting out of the Act as discussed at Question 58 of the Issues Paper.

We support consideration of Commissioned Works as to the utility of the use of the word 'commissioned' without further definition as to what this comprises. See *Pacific Software Technology Ltd v Perry Group Ltd* [2004] 1 NZLR 164(CA) at 174 and *Sealegs International Ltd v Zhang and others* [2018] NZHC 1724 [229]. This is important as the default first owner is that person. Consideration might be given to aligning literary works and musical compositions with other works in terms of the default first owner.

Another aspect of commissioning that is sometimes troubling is the inclusion of "...or agrees to pay for..." in s21(3)(a) of the Act. This sometimes effectively substitutes a debt for copyright ownership. The balance between a commissioning producer having funded a production facing reversion of copyright ownership in the work compared to the creative left only with a right of action in debt is difficult. The UK and United States position does not vest ownership in the commissioner and may be more workable although any change in the definition of author would require discussion. The UK's presumed joint authorship of producer and principal director could likely be addressed contractually.

Question 11

We support retention of current arrangements.

Historically films have been bound into arrangements with entities such as sales agents when the agent either ceases to function or ceases exploitation of the work. Often, those entities have granted security over their inventory which can be impracticable or uneconomic to unravel. It seems more sophisticated contractual arrangements have reduced reports of this occurring.

Question 17

The problem arising from an offshore authorisation is evident from the case cited in your footnote 91 *Inverness Medical Innovations Inc v MDS Diagnostics Ltd* 93 IPR 14 at 250. The websites are volunteers to the activities in a way similar to banks. Regulators and enforcement bodies have seen the need to engage with banks in relation to financial transactions where the bank could argue for a passive role similar to some websites. If a legal wrong is causing damage there should be a remedy.

Question 21

We support the notion of data being property as found by the Supreme Court in *Dixon v R*. Much of what is used in the making of a film is data for much of its existence. Many films are shot in digitally rendered in a site distant from others who work on or approve it. These other rights are welcome.

Questions 25, 26 and 27

We don't support any extension of moral rights.

Performers rights might give rise to additional issues of control becoming blurred. There is thus an efficiency cost to such rights. At present, any recording or transmission of a performance requires the consent of performer. That, in practice, would also provide an opportunity to obtain rights in relation to any resultant recording. The issue is whether a performer should also be able to assert moral rights (attribution and non-derogation) and be granted the right to authorise reproduction, and distribution of their performance. It is not clear why the CPTPP rights only apply to sound recordings and not AV. The Screen Industry implications may be an extension of the required consent process to include potential waiver of moral rights (or credit clause) in return for a negotiated payment for performance?

Questions 28-29 TPM protections

The difficulties in containing the sharing and exhibition of video from the Christchurch shootings sadly confirms the observation that prevention at the earliest stage possible is more effective.

Question 31

Our consultation has not revealed sufficient particular difficulties with the statutory exceptions which facilitate research or private study, news reporting or criticism to support a move to fair use. Documentary films drawing heavily from copyright works have been made or shown in New Zealand. A relevant example of a documentary shown in New Zealand is 'Going Clear: Scientology and the Prison of Belief' by Alex Gibney in 2015. Interestingly this film was not shown in England reportedly² because Sky Atlantic, the rights holder, could not exclude Northern Ireland from its broadcast

² <https://www.theguardian.com/film/2015/apr/28/going-clear-the-film-scientologists-dont-want-you-to-see>

footprint. This was important as defamation claims in Northern Ireland did not require proof of substantial harm whereas the 2013 Defamation Act in England did.

This practical experience supports the contention that fair use defences in the style of those developed in the USA are unnecessary in addition to the uncertainty and other arguments made elsewhere. Some in the industry point to a loss of control and fair revenue distribution by virtue of the effect of fair use provisions and power imbalances between content creators and large internet providers.

Question 34

Examination of the incidental use permission found in s41 of the Act is useful. Lawyers in the screen industry report difficulty in advising on this³. Paragraph 284 of the Issues paper seems inconsistent with paragraph 6.2 of Frankel.

Exceptions for data recovery purposes, non-commercial private use and where included in professional advice have been suggested as warranting consideration.

Question 39

Parody and satire of copyright works are accepted as being difficult areas. Paragraphs 307 – 320 of the Issues Paper discuss a lot of them. We offer a cautious answer to question 39 of the Issues Paper. They are sometimes framed as freedom of speech issues but can amount to a substantial adaptation of the source work. They should not be conflated with criticism and review. Having regard to the competing interests, complexity is to be expected and accepted. There is not always a simple answer. Parody and satire are a class of copyright monopoly exceptions in some other jurisdictions as discussed in the Issues Paper. This has not proved as precise as intended. Consideration could be given to adding the word comment to s42(1) so it read "...purposes of criticism, comment or review..." with other additions to more closely align to s30 CPDA UK. This would more tightly align the new work to the freedom of speech objective whilst allowing for the possibility of caricature and pastiche.

Question 58

SPADA members would not support any restriction on contracting out from the Act.

Questions 60-62

We read the response to the terms of reference submitted by Recorded Music New Zealand Limited dated 27 November 2017; particularly the 4th schedule. The New Zealand Film and TV Bodies' submission in relation to these questions are also noted. We agree with and support those submissions. In particular we support measures that cause ISPs to assume greater responsibility and pay for use of copyright works. The decision in *Sky Network Television Ltd v My Box NZ Ltd and another* [2018] NZHC 2768 provides a more recent useful objective discussion of some new technology complexities by a judge with a strong IP background.

Interestingly on 26 March 2019⁴ the European Parliament passed two intensely debated measures. One requires websites to actively monitor uploaded copyright materials while the other obliged

³ Intellectual Property in New Zealand 2011 Susy Frankel 6.2; *New Zealand Rugby Football Union v Saint Publishing Limited* 2001 WL 1407665

⁴ https://www.theguardian.com/media/2019/mar/26/meps-approve-sweeping-changes-to-copyright-law-european-copyright-directive?CMP=Share_iOSApp_Other

those linking to copyright material, such as news aggregators, to pay. The recent Christchurch tragedy underlines the desirability of ISPs to assume and be held to acceptable levels of responsibility.

Question 77

Sky Network Television Limited v Campbell [2018] NZDC 12918 is a first instance decision which illustrates a workaround arising from the creaking enforcement issues of the current legislation. It is relevant to Issues Paper question 77. Sky was presumably a nonexclusive Licencee of multiple copyright works currently and in the future. This has led to the use of the FTA to enforce legal rights arising from misrepresentations as to the legality of accessing copyright works using set top box software. The Judge applied European, English and Canadian decisions. The defendants were New Zealand domiciled. The judges reasoning process involved a finding of breach of copyright. There has been no appeal. It is not justifiable for a copyright Licencee to be unable to enforce its valuable copyrights. Section 101A of the CPDA UK or similar would assist.

Question 78

Question 78 attracts a affirmative response. The cost of enforcement, the disclosure required to prove title coupled with elusive and often impecunious defendants makes litigation by a participant in New Zealand's screen industry to enforce copyright unlikely. It is often seemingly minor infractions of copyright that put the owner to an election as to whether to incur the costs and reputational risk of enforcement or allow the gradual erosion of their rights. A common feature of problems with the Act is the cost of enforcement.

Questions 93-97 Waitangi Tribunal and Treaty issues

Taonga works are a valuable asset which often contributes to distinctive copyright works. Our Members value the current system of attachment of Kuia and Kaumatua to projects. The process proposed is of interest and we will participate to the extent our resources allow.

END.