

Screen Production and Development Association of New Zealand Incorporated

Submission to the Ministry of Economic Development



The Commissioning Rule, Contracts and the Copyright Act 1994

Discussion Paper

Summary of Submission

The Screen Production and Development Association of New Zealand Incorporated (**SPADA**) is a membership-based organisation that represents the collective interests of independent producers and production companies on all issues that affect the business and creative aspects of independent screen production in New Zealand.

SPADA members include producers, directors, production companies and allied craft professionals working in film, television, TVC, video, post-production, animation and interactive media; lawyers and accountants, completion guarantors, industry suppliers, as well as other individuals who support SPADA's strategic objectives.

This submission is in response to the Discussion Paper released by the Ministry of Economic Development (the **MED**). That paper considers two copyright issues: namely, the adequacy of section 21(3) of the Copyright Act 1994 (the **Copyright Act**) relating to the ownership of copyright in commissioned works (the **commissioning rule**) and a more general question regarding the relationship between copyright law and contract law. This submission focuses on the first issue relating to the commissioning rule, particularly on the various forms of copyright arising in screen production.

Screen production is a collaborative industry, in that producers organise the collaborative effort of actors, crew and other creative talent to develop and produce a screen production. SPADA believes that particular attention should be paid to the requirements of collaborative industries when considering whether to retain the commissioning rule or alter its scope.

SPADA considers that:

- the commissioning rule should be retained, with the scope of works potentially expanded to include scripts (dramatic work), artistic works generally, and musical works, where the work was made in the pursuance of a commission; or
- preferably, an alternative approach be introduced that relates particularly to the requirements of the collaborative industries, such as screen production. SPADA suggests the introduction of a scheme similar to that in the US Copyright Act 1963 relating to works “made for hire”. Such a scheme would provide that the commissioner is the first owner of any copyright in a work specifically ordered or commissioned for use as a contribution to a collective work.

1. **General comments**

1.1 *Aspects of commissioning*

SPADA considers that it is reasonable to expect that ownership in a commissioned work by the commissioner will include the right to fully exploit the commissioned work. The creation of an ownership interest in the work for the benefit of a person other than the commissioner (such as the ownership of copyright for the benefit of the author) would be inconsistent with this understanding, as it would interfere with the right of a commissioner to fully exploit the commissioned work.

The work is created on the request of, pursuant to the instructions of, and for the benefit of the commissioner for consideration. The commissioner must

therefore have sufficient rights to entitle it to reap the benefits of its commission – that is, the ability to fully exploit the work as they see fit.

The law must not by default provide the person to whom the commissioner has given consideration, the ability to interfere with the commissioner's enjoyment of those rights.

The alternative would be to limit the rights of a commissioner to that of a copyright licensee. This is likely to be inconsistent with the expectation of commissioners, and further inconsistent with the payment by commissioners to authors. Such a limitation should only be made possible with the express understanding and consent of both parties by way of contract.

If the identity of the clients as either commercial or private is relevant, it should only be in determining the price that the author charges for their services in the commissioning relationship, not in determining the owner of copyright.

1.2 *Features of screen production*

In the organising, financing and distribution of a screen production, it is critical that all rights of copyright reside in one person, the producer. The producer is rarely the author of the copyright work and is more typically the person who takes overall responsibility for the development, production and distribution of the screen production.

Where a copyright work is already in existence, the producer will acquire either ownership of that copyright work or a licence to use that copyright work in the screen production. In the case of work that is commissioned by the producer for a particular production, industry practice is that the producer typically acquires ownership of the copyright work.

Experienced producers will normally ensure that their rights to a copyright work are secured through the use of contracts, and will often take legal advice to ensure that they have acquired all the necessary rights.

However, due to the pressures and complexities of film production, it is not uncommon for experienced producers (and indeed it is reasonably common for inexperienced producers) to neglect to take legal advice and fail to obtain all the necessary contractual rights to commissioned copyright works.

This can lead to significant problems in the financing of these productions and their distribution. This is because the producer risks not having a clean "chain of title" to the commissioned copyright works used in the production. The result is likely to be that despite the efforts and the moneys expended by the producer, the production will not be made or the producer will be in a weak position to subsequently negotiate the acquisition of these rights.

SPADA submits that the law should support general industry practice, rather than run against it, by providing that the onus is on the author of a commissioned work to negotiate ownership of copyright.

1.3 *The commissioning rule*

SPADA believes that the commissioning rule should be retained, as it goes some way to reflecting industry practice in industries such as screen production.

However, SPADA also considers that the list of commissioned works is eclectic and should be updated to reflect the categories of works used in commissioning

works today. At the moment, the list of commissioned works is incomplete when viewed from the perspective of screen production.

This means that the commissioning rule is potentially problematic unless ownership of copyright has been the subject of express negotiation. This is because, although the legal relationship between various authors and a commissioning producer may be the same, the commissioning rule has the effect that the copyright will be owned by different people depending on the particular category of work in question.

SPADA considers that the law should not provide such an unworkable result by default, and that commissioners of collaborative works should be entitled to the ownership of copyright in all works that they have commissioned.

SPADA therefore submits that copyright legislation should provide expressly for collaborative works (discussed below), or that the categories of works in the commissioning rule should be expanded to cover the categories of works that commonly arise in screen production. SPADA considers these further categories of works to include scripts (dramatic work), artistic works generally and musical works.

1.4 *Works “made for hire”*

However, we believe the best solution applicable to the collaborative industries is to adopt a scheme similar to that in the US Copyright Act 1963 relating to works "made for hire".¹ We see merit in having a rule that is particular to, and suitable to, the requirements of the collaborative industries.

1.5 *Scope of commissioning rule should not be narrowed*

SPADA considers that there are significant reasons to suggest that the commissioning rule should not be narrowed or repealed. The purpose of copyright protection is to achieve outcomes that are in the overall public interest. SPADA believes that there are strong economic, legal and social advantages in providing that the commissioner is the first copyright owner of works.

Particularly, SPADA believes that:

- it is likely to be a reasonable expectation of commissioners that they will own the copyright in a work that they have commissioned, particularly where those commissioners are in the collaborative industries;
- the creation of works by commission are dependent on the economic investment of commissioners, and commissioners should be entitled to a return on that investment;
- it would be unfair to allow another person to exploit the commissioner's investment by creating a default ownership right in a person other than a commissioner, particularly since it is unlikely that the work would have been created but for the commission; and

¹ Referred to in paragraph 47 of the Discussion Paper.

- particularly in relation to smaller companies and individuals, there is likely to be an imbalance of knowledge in relation to copyright in favour of authors such that there should be an onus on the author to negotiate ownership in copyright.

1.6 *Photographs*

In this submission, we do not address issues relating to photographers specifically, although we do consider that, in the context of the screen production industry, photographs are just another commissioned work that is used in screen production (e.g., in creating publicity stills).

2. **Response to specific questions**

In this section, we address particular questions raised in the Discussion Paper.

2.1 *Question 6*

Question 6

What are the advantages and disadvantages of the commissioning rule as it applies to works other than photographs?

We discuss the advantages and disadvantages of the commissioning rule above, as it applies to screen production.

2.2 *Question 7*

Question 7

Does the commissioning rule reflect industry practice or does industry practice depart from the default position, and if so, in what way?

The commissioning rule generally reflects industry practice, although we discuss above that the scope of commissioned works contained in the commissioning rule is eclectic and incomplete in the context of screen production.

2.3 *Question 8*

Question 8

How do industry/individuals deal with situations where several works are commissioned, but different default ownership rules apply?

Typically, screen producers will have contracts that provide for ownership in a commissioned work used in screen production resides with the producer. However, as noted above, this is not always the case, not through negotiation but rather through proper contracting processes not being followed. This leads to significant difficulties in the financing and distribution of screen productions.

2.4 *Question 9*

Question 9

Does the commissioning rule cause uncertainty as to how to define ownership of works covered by the rule?

Yes, uncertainty arises from the eclectic and incomplete list of copyright works referred to in the commissioning rule.

2.5 *Question 12*

Question 12

Are there any reasons to extend section 21(3) of the Act to other categories of works?

Yes, see our comments above in this regard.

2.6 *Question 14*

Question 14

What are your views on the options presented and why? Which of the above options do you support and why? Do you suggest any other options?

SPADA's preference is for option 3, to expand the commissioning rule, either by creating a "work for hire" regime as in the United States for collective works, or through expanding the list of commissioned works in the commissioning rule.

Our next preference is option 1, for maintaining the status quo. Options 2 and 4 would be counterproductive and damaging from the perspective of the screen production industry.

3. **Contact details**

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