



**Screen Producers and Directors Association of New Zealand
Box 9567
WELLINGTON**

**Tel: 939 6934
Fax: 939 6935
Email: jane@spada.co.nz
Web: www.spada.co.nz**

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SUBMISSION

**TO: Copyright (Digital Technology) Submissions
Ministry of Economic Development
Attention: Mark Simpson**

ON: Inquiry into the impact of digital technology on copyright law and the advantages and disadvantages of New Zealand implementing and Acceding to the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonograms Treaty 1996.

INTRODUCTION

1. This submission is from the Screen Producers and Directors Association of New Zealand (SPADA).
2. SPADA is the foremost industry organisation representing film and television producers in New Zealand. We have 280 members. Our mission statement is to be *the leading advocate for a robust screen production industry which strives to enhance the diversity of screen culture in New Zealand.*
3. This submission has been approved by SPADA's Executive, a Board annually elected by its members.
4. Reference to the Act and other abbreviations used throughout this submission have the corresponding meaning to that given in the Discussion Paper, "Digital Technology and the Copyright Act 1994".

BACKGROUND

4. Our interest in this inquiry derives from many of SPADA's members being involved in the production, distribution and exploitation of New Zealand films, television programmes and videos

(collectively referred to throughout as “films”) and the interest of all our members in a thriving film and television industry in this country.

5. As commissioners of productions, producers are usually the copyright owner of the film. They are the party responsible for protecting and exploiting the rights in and to the film. Their ability to earn revenue from the film is dependent on their ability to control those rights and to prevent others from exploiting them.
6. A film is made up of a large number of disparate and individual underlying works which each have their own copyright. These can include the original work upon which the film is based, the script as a literary work, various set properties that may be artistic works in their own right; pre-existing musical numbers, choreographed dance routines, the specifically composed sound track for the film etc.
7. The tying together of all these rights into one bundle, able to be dealt with as a single entity is one of the producer’s primary functions. This is in order for the producer to permit others to deal with the film, to satisfy the requirements of domestic and international investors and to maximise opportunities to gain revenue from the exploitation of the film and its various components.
8. The health of the film and television industry in New Zealand is dependent in large part on the ability of producers to secure and exploit the copyright in literary, dramatic and artistic works and sound recordings.
9. The value of creative ability and expertise is well-recognised in an industry that is highly collaborative and requires large numbers of individuals to see a production delivered to the film or television screen. One has only to take the time to look at the credits that trail on endlessly after a programme or film has come to an end to realise just how many people are involved in a single production.
10. The Copyright Act 1994 is the single most important piece of legislation for producers, directors, writers, performers and musicians. The protection granted or denied by the Act helps determine the value – or otherwise – of the creative abilities and proceeds of these individuals.
11. The advent of new technologies and digitalisation provides not only producers, but all of these rights holders, with additional and alternative means of exploiting their films and works.
12. With the opportunity for increased legitimate exploitation also comes the opportunity for the misuse of this same technology to dilute copyright owner’s rights and opportunities.
13. It is in these circumstances that SPADA wishes to support the submissions made by the Copyright Council and, in particular, to air the collective voice of its members in seeking to highlight the importance of ensuring that copyright owners’ existing rights under the Copyright Act are not diluted by technological changes, but rather, are expanded, so as to deal adequately with new technologies.

GENERAL SUMMARY

Key Issues

14. From a producer’s point of view the key issues that need to be addressed by amendments to current legislation are:
 - a) the enlarging of the definition of “copying” so as to explicitly include the conversion of works into digitised form;

- b) the provision of an exclusive right for copyright owners to authorise the communication of their works to the public by **any means**, ie, a technology-neutral right;
- c) the repeal of cable service providers' right of re-transmission under s.88 of the Act;
- d) the liability of Internet Service Providers for inclusion of infringing works on their servers;
- e) the upgrading of current provisions that provide for legal protection against the use of devices designed to circumvent copyright protection devices and the provision of appropriate legal remedies against circumvention of copyright protection devices and the removal of copyright identification;
- f) a review of the current limitation and exceptions to copyright owners rights in light of current technological developments and the development of services of copyright licensing collectives in New Zealand and overseas.

Questions 2 & 3: Advantages in implementing and acceding to WIPO Internet Treaties and current legislation

- 15. In order to maximise the benefits derivable from the additional distribution platform that the Internet provides producers for their films, there needs to be legal certainty that these films, and the underlying works contained in them, will be protected internationally, not just domestically.
- 16. *SPADA supports the harmonisation of copyright laws and the implementation of those aspects of the WIPO Internet Treaties that are not currently provided for in our legislation together with any additional or particular concerns of New Zealand copyright holders. SPADA favours copyright legislation that is "technology-neutral" so that future technological developments are covered as and when they are devised.*

Question 4: The Reproduction Right

- 16. Existing legislation does not explicitly consider the digitalisation of works and whether the unauthorised digitisation of works infringes copyright. There are also differing views on whether temporary or incidental acts of copying ("transient copying") are restricted.
- 17. Currently the definition of "copying" may not be sufficiently broad to cover the concept of conversion and/or storage of works such as sound recordings or films into a digital form and thus such digitisation would not be a restricted act.
- 18. For producers, as copyright owners, the right to control the copying of their protected material is the primary means of ensuring that they control the exploitation of their product and provides the most important weapon in taking action against piracy.
- 19. *SPADA submits that the definition of copying needs to be amended so as to ensure that the storage of both sound recordings and film is also a restricted act and that the definition of "copying" be amended to explicitly include conversion into digital form.*

Question 5: Temporary Copying

- 20. Further, the Act does not currently specifically address the question of whether temporary or incidental copies which are made as a result of technology and are not stored in a "medium", infringe the right of copying. This issue is relevant to digital copies made as a function of "browsing" and "caching" on the Internet – that is, copies in a non-material form that are made to aide in the process of viewing or transmitting of works in digital form.

21. Because videos and films and programmes will increasingly be enjoyed on-line, involving temporary copies that disappear when the use ends, SPADA supports the proposition that there is a need to restrict transient copying in order to control Internet piracy and that the definition of “copying” in the Act needs expressly to extend to such activities.
21. *SPADA supports legislative change that would allow certain acts of temporary and incidental reproduction such as browsing and caching but only where they:*
- a) *are carried out solely for the purpose of enabling efficient transmission or lawful use of a work;*
 - b) *are expressly limited to the circumstances required under Article 10 of the WCT;*
 - c) *have no economic value of their own;*
 - d) *do not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the copyright owner.*

Questions 6-8: Communication Right

22. Hitherto communication of works to the public referred to broadcast of a work or its inclusion in a cable programme service and the rebroadcast of the work. Technological advances have made it possible for works to be communicated to the public in new ways, eg the Internet allows works to be transmitted by “webcasting” or made accessible to the public in an inter-active “on-demand” manner.
23. Currently the Act does not grant copyright owners explicit rights to control the communication or making available of works in this manner. Consequently, the existing broadcast, cable programme service and distribution rights are unlikely to be sufficient to control the dissemination of copyright material on-line.
24. These problems demonstrate the desirability of a technology neutral broad-based transmission right as advocated in Australia and the US.
25. *SPADA submits that*
- a) *copyright owners should have the exclusive right to transmit works to the public via the Internet and that the Act should be amended to include an explicit right to control the communication to the public of works over the Internet.*
 - b) *webcasts and internet transmission to the public should be protected as copyright works in the same way as broadcasts and cable programmes currently are.*
 - c) *the Act should be amended so as to provide copyright owners with a separately stated exclusive right that expressly controls the making available of their works in an interactive, on-line demand system such as the Internet.*
25. Making works available in an interactive, on-demand fashion provides an additional or alternative distribution channel for producers and distributors of other types of copyright works to publish or issue copies to the public.
26. However, the digitisation of sound recordings and films – and the making available to the public through this means - might not infringe the reproduction right currently provided under the Act in respect of those works.
27. *In these circumstances SPADA submits that an amendment be made to the Act granting a separate right of making available in conjunction with, or as part of either a separate right of communication over the Internet or a technology-neutral right of communication.*

Questions 9-10: Retransmission Rights

28. The basis for the special provision for cable programme services enacted in 1994 had two objectives:
- a) to encourage greater competition and investment in the cable network and service industry by allowing cable service providers to bundle free-to-air television with telecommunication services;
 - b) to improve the quality of television reception in areas where signal quality was inadequate.
29. It is submitted that this rationale no longer has the strength of argument that it did in 1994. Television service providers should now rely on commercial arrangements to carry each other's signals, to meet their commercial needs and the needs of the viewing public.
30. Producers of films should not be required to effectively subsidise cable service providers and sections of the viewing public by being constrained from seeking additional licence fees for additional transmission rights. In an environment that seeks to increase and encourage the production of local content, legislation should protect the interests of those producing such local content by permitting them to secure additional licence fees for additional uses.
31. If broadcasters are not free to licence the re-transmission of their free-to-air broadcasts, then producers are also not in a position to negotiate a secondary use fee, which they would otherwise be entitled to but for the effect of section 88 of the Act.
32. *SPADA submits that section 88 should be abolished altogether. On no account should it be extended to allow the transmission of free-to-air broadcasts by other means such as satellite, pay television and/or webcasting in addition to inclusion in a cable programme.*
33. *SPADA also submits that the broadcaster/webcaster should have the exclusive right to authorise or prohibit retransmission of free-to-air broadcasts through contractual or licensing means.*

Question 11: Internet Service Provider Liability

34. Given the difficulty in taking action directly against infringers, it is an attractive proposition for a copyright holder to be able to seek redress from an Internet Service Provider in circumstances where it is shown that the ISP is aware of the infringement taking place on its server.
35. It is, however, recognised that the possibility for ISP infringement may
- a) affect investment in internet support services;
 - b) lead providers to impose restrictive requirements on customers;
 - c) lead providers to seek onerous legal indemnities from customers;
 - d) lead providers to act as quasi-censors.
36. *Balancing the two, SPADA takes the position that ISPs should be required to either remove infringing material once it has been brought to the provider's attention or close down access to the website carrying the infringing material.*
37. With this proviso, ISPs should be expressly exempted from liability for copyright infringement for transitory communications, system caching, storage of information on systems or networks and the use of information location tools by subscribers and where infringing copies have been made and distributed by subscribers using the ISP's services, where the provider has no knowledge of the infringement.

38. *SPADA suggests that New Zealand take a similar approach in providing for ISP liability as taken in Australia and the US.*

Question 12: Technological Protection Measures and Electronic Rights Management Information

39. Both the WCT and WPPT include provisions that oblige member countries to provide “adequate legal protection and effective legal remedies” against the circumvention of effective technological measures that are used by copyright authors and owners, in connection with their rights under those Treaties or under the Berne Convention.
40. The Treaties also include provisions that oblige member countries to provide adequate and effective legal remedies against the unauthorised removal or alteration of rights management information; or the unauthorised distribution, importation for distribution, broadcast or communication to the public of copyright works (or copies of such works), knowing that such information has been removed or altered without authority.
41. New Zealand legislation does not currently meet these levels of protection.
42. *SPADA submits that the existing copy-protection provisions in the Act should be expanded so as to include new provisions in relation to rights management information and the removal or alteration of any electronic rights management information so as to meet New Zealand’s obligations under the WCT and WPPT Treaties.*

Question 15 - 17: Limitations and Exceptions for Copyright Users – Permitted Acts

43. Because of the ease of access and delivery through digitalisation and the Internet, it is all the more important to ensure that those who create the works to be accessed and disseminated receive an equitable remuneration for the variety of uses that are made of such works by end users.
44. It is important that collective licensing arrangements be encouraged and supported in the digital environment to ensure that creators and copyright owners are fairly remunerated for the use of their works.
45. Through licensing agencies such as Screenrights, producers (and writers, composers, record companies and broadcasters) earn royalties from the subsequent use of their films by educational institutions. This additional revenue stream helps encourage the creative endeavours of the film and television industry. While not reflective of market licence fees or rates, it goes some way to recompensing producers etc for subsidising educational institutions by provision of their works for teaching purposes.
46. *SPADA submits that the existing exceptions and limitations to copyright owners’ rights in the Act should be reassessed in the light of the current and developing electronic environment so as to ensure that the rights copyright owners are not diluted or minimised in any way.*
47. *SPADA submits that a provision should be included in this part of the Act to the effect that a dealing is not fair where the copying is for direct or indirect economic or commercial advantage or where the work is available (electronically or otherwise) within a reasonable time at an ordinary commercial price.*

Question 18: Time-shifting Exemption

48. *SPADA submits that the time-shifting exception provided for in the Act should only be extended to real time simulcast webcasts that are not accessible on demand.*

CONCLUSION

49. SPADA welcomes this inquiry into the impact of digital technology on copyright law and sees it as a timely opportunity to address existing gaps in the Copyright Act that potentially detract from and threaten producers' rights in and to their creative works and the revenue streams that they may otherwise be able to protect.

**Karen Soich
President
Screen Producers and Directors Association**

[sent unsigned by email]