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SUBMISSION

**TO: Copyright (Digital Technology) Review Submissions
Ministry of Economic Development
Attention: Victoria Pearson (via email)**

ON: Position Paper – Digital Technology and the Copyright Act 1994

INTRODUCTION

1. This submission is from the Screen Production and Development Association of New Zealand (SPADA).
2. SPADA is the foremost industry organisation representing film and television producers in New Zealand. We have over 300 members. Our mission statement is to be *the leading advocate for a robust screen production industry which strives to enhance the diversity of New Zealand screen culture.*
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 MED Position Paper.

BACKGROUND

5. It is worth restating our interest in this issue as per our original submission of 11 October 2001.

6. 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.
7. 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.
8. 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.
9. 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.
10. 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.
11. 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 endlessly after a programme or film to realise just how many people are involved in a single production.
12. 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.
13. The advent of new technologies and digitalisation provides not only producers, but all such rights holders, with additional and alternative means of exploiting their films and works.
14. 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.
15. It is in these circumstances that SPADA wishes 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.
16. We note the copyright policy emphasis adopted by the Ministry, where *'balance is about the wider public interest rather than simply achieving a middle ground between the competing aims of creators, owners and users of copyright works'*. (Introduction, Part C). With respect, the 'public interest' in these terms is primarily that of users. The balance is therefore skewed. While we naturally respect the right of general access to information, we also wish the rights of creators and owners of copyright material to be similarly respected. The creation and exploitation of these works is the livelihood of producers, writers and the like and underpins the creative industries.

POSITION PAPER PROPOSED POLICY: RESPONSES

A. Reproduction Right

(i) Storage and Digitisation

17. 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. We note that the Ministry prefers to leave the definition of copying unchanged but will perhaps consider specifying that 'material form' includes digital formats.
18. Our original submission stated: 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.
19. SPADA supports the Ministry's latter approach. We suggest that the section 2 definition of copying be amended so as to read:
- "Copying" means, in relation to any description of work, reproducing or recording or storing the work in any material form whether visible or not, in any medium, and*
- Includes in relation to a literary, dramatic.... and*
Includes, in relation to an artistic work,.... and
Includes, in relation to a film, television...
- and "copy" and "copies" have corresponding meanings.*
20. This amendment is proposed on the basis that not just the original sub-paragraph (b) should be made a subset of sub-paragraph (a) (as suggested by the Ministry), but that all of the "including" provisions should be made subsets of the main or general provision relating to reproduction and recording.
21. Further, the inclusion of the reference to "whether visible or not in any medium" in the opening, general paragraph will ensure that it relates to **all** types of works and will cover the limitations that have become apparent in recent case law with respect to the equivalent Australian legislation and their definition of "material form". (See *Pacific Gaming Pty Ltd v Aristocrat Leisure Industries Pty Ltd (2001) FCA 1636*).

(ii) Transient Copying

22. SPADA's original submission stated: *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.*
23. We support the Ministry's proposal and suggest the exception is framed along the lines set out above.

B. Communication Right

(i) Technology-Neutral Right of Communication

24. SPADA's original submission was 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.*
25. SPADA supports the Ministry's proposal to create a technology-neutral right of communication. This must include rights to communication control across the internet as per below.

(ii) Webcasts as Works

26. SPADA's original submission stated:
- 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.*
27. SPADA supports the Ministry's proposal to provide protection to a new category of 'communication works' which should encompass analogue and digital broadcast, cable, satellite and web-based technologies intended for public access.

(iii) Cable Retransmission of Free-to-Air Broadcasts

28. SPADA's original submission was: *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.*
29. *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.*
30. SPADA strongly supports the Ministry's proposal to repeal s88. We do not believe the issue should be deferred until the WIPO deliberations are complete. The New Zealand environment has changed radically since the introduction of the Act and there is no compelling reason for this section of the Act to remain.

C: Internet Service Provider Liability

(i) Definition of ISP

31. SPADA agrees that a definition of 'service provider' be included in the Act. We prefer that this be defined as an '*internet* service provider' and expect that liability provisions relating to the posting of new material would be clear.

(ii) Transient Copying and Caching

32. SPADA supports the Ministry's two proposals.

(iii) Secondary Infringement Provisions

33. SPADA supports the Ministry's proposal to use a 'constructive knowledge' test in determining an ISP's liability. Defining factors in the legislation should include:
- (a) receipt of a notice from a content owner or authorised distributor;
 - (b) that on receipt of such a notice the ISP acted immediately to remove or disable access;
 - (c) a code of practice published by the ISP which sets out the ISP's obligations and undertakings to copyright material (and which acknowledges the 'constructive knowledge' principles).

D: Technological Protection Measures

(i) Scope of s226 (Copy and Access Protection)

34. SPADA's original submission noted that NZ legislation does not currently meet the levels of protection suggested by the WCT and WPPT. We submitted 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.*
35. We do not agree with the Ministry's proposed approach, to retain the current focus on the manufacture of devices or means and publication of information, and not to extend liability to the act of circumvention itself. We understand the issues relating to right of access. However we note that the basis of the Ministry's view appears to be that no action is necessary because there is no evidence of a problem in New Zealand at this time.
36. In the face of considerable evidence from overseas, this appears to be a short-sighted approach to legislative change which is presumably intended to survive for several years.
37. SPADA submits that, given the extent, use and increasing technological proficiency of TPM's, the best solution is to provide access control to address large-scale copyright infringement. A clause could focus on addressing significant economic benefit received from infringement.

(ii) TPM's – Actual Use or Provision of means of Circumvention

38. See above. SPADA is concerned that any proposed New Zealand legislation does not follow the Australian wording in relation to technological protection measures. This wording has – from a copyright owner's point of view – been found to be without teeth, as seen by the recent decision in *Kabushi Kaisha Sony Computer Entertainment Inc v Stevens [2002] FCA 906 (July 26 2002)*.
39. In that case, the Federal Court found that while Sony's boot ROM system and access codes were designed to deter or discourage persons infringing Sony's copyright in its Playstation 2 games, it did not operate in either of the specific ways identified in section 10(1) of the Copyright Act 2000 defining a technological protection measure.
40. His Honour found that Sony's protection measures did not directly prevent copying at all. They prevented access to the work, but not by means of an access code or process of the nature described in the wording of the definition.

41. On this basis there was found to be no breach of section 116A relating to the importation, manufacture etc of circumvention devices etc because the work was not protected by a technological protection measure.
42. Thus the narrow wording of this definition has meant that the Australian legislation has failed to uphold the effectiveness of one of the most common forms of protection methods for computer programs.
43. SPADA's position is that this is relevant not only to owners of copyright in computer programmes, but to all copyright owners of product that is transferred or stored by some electronic means, such as films on DVDs and Music on CDs.
44. SPADA encourages the Ministry to avoid this pitfall in its drafting of any definition of technological protection measures. We agree that a review in three years, as suggested by the Ministry, is sensible.

(iv) Subjective or Objective Knowledge Requirement

45. We do not agree with the Ministry's suggestion that a subjective test ought to be retained. SPADA submits that an objective test should be used, similar to parallel importing, that a person *ought reasonably to have known* that a device etc, would be used to make unauthorised copies of copyright works.
46. The strengthening of this test is important given the increasing sophistication, ease of access and technology available to invite infringement.

(v) TPM's - Offence Provisions

47. SPADA believes criminal offence provisions should be available for offences of a large scale and deliberate nature. Namely, these should be available as a last resort and for redress against activity which is intended to provide significant financial or other commercial gain to the infringer. We realise this is a serious step – but so is large-scale activity intended to deprive copyright owners of their rightful income.

E: Electronic Rights Management Information

48. We are pleased that the Ministry has recognised that 'digital is different'. We support the Ministry's proposal to protect against the intentional removal of ERMI and the commercial dealing in copyright material where a dealer knows that ERMI has been removed or altered.
49. We do not support excluding tracking functions from the definition of ERMI. We note the Ministry has emphasised the capability of tracking technology as a new business opportunity for content owners. However the paper is comparatively silent on its use as an infringement and legitimate use tracker. As copyright owners are increasingly disadvantaged in the digital environment, we submit that excluding tracking technology is unfair.

F: Non-Original Databases

50. We support the Ministry's comments.

G: Permitted Acts and Exceptions

(i) Application of Existing Exceptions to the Digital Environment

51. We agree with the Ministry that there is a need for limitations and safeguards in a digital environment. We would like to see more Government attention and support to collective licensing arrangements. In our original submission we noted: *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.*
52. As a general observation copyright owners have little to gain by a more relaxed legislative approach. Most institutional copyright users have been loath to accept that copyright income is livelihood income and fail to respect creative product. The longstanding legal action between the universities and Screenrights (only recently settled after substantial High Court action), where the former continually declined to enter into a licensing arrangement to compensate for use of screen material, is a case in point.

(ii) Fair Dealing

53. We agree with the Ministry that it is necessary to clarify the application of ss42 and 43 and ensure changes are technologically neutral.
54. We reiterate our original submission: *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.*

(iii) Educational Institutions, Libraries and Archives

55. Archiving and Preservation: We do not support the Ministry's proposal to allow libraries and archives to archive entire collections digitally. The criticism in the Ministry's paper of licensing schemes is not entirely accurate. A specific licence can be tailored for new uses and an extended collective license is an obvious solution. Separate submissions supporting the creation of an extended collective license are being prepared.
56. Digitisation and Making Available: We concur with the Ministry's observation that *there is a significant difference between archiving and preservation of information* (as traditionally done by libraries etc) *and the dissemination and use of it* (libraries' desire to provide new information services made simpler by digitisation). We agree with the Ministry that libraries etc can provide access to copyright material made available by the copyright owner in digital form, but that libraries etc not be permitted to make the digital copies themselves. An analogy of the latter idea is if libraries were permitted to make photocopies of small books and loan that version.
57. We have no objection to approved digitised material being made available through restricted remote access provided that the material is protected so that it is read-only and unable to be copied.
58. Interloan: It is obvious how new technology benefits the operations of libraries etc. It is not obvious how libraries etc. intend to honour copyright in this environment. We do not support any new interloan provisions.
59. Caching: We have no objection to the Ministry's proposal to amend s44.

60. Distance Learning: We agree with the Ministry that no new exceptions should be made for distance learning.

(iv) Time Shifting

61. We agree with the Ministry that, along with the creation of a technology-neutral communication right, s84 be amended to apply to communication works that are not accessible on demand.

(v) Format Shifting

62. We do not see that significant attention has been paid to the idea of a levy on blank recording media (which, like the Authors' Fund for library books, compensates copyright owners for multiple use).
63. We are strongly against the Ministry's proposal that an exception be introduced permitting the owner of a legitimately purchased sound recording to make one copy of that sound recording in each format for his / her personal domestic use.
64. One of the income streams available to a producer (and record companies, musicians and composers) from the production of a film is from the release and sale of film track sound recordings.
65. Why should an individual be entitled to the benefit of purchasing only one version or format of the film soundtrack (eg in CD format) and be allowed to reproduce that into another (eg tape cassette format)? That individual acquires the benefit of being able to play the same music in two different situations, eg, home and car without recompensing the copyright owners of that sound recording.
66. If the individual is not permitted to alter the format then there is the possibility that he or she will purchase the music in two different formats in order to obtain the benefit of listening to the music in different situations.
67. It is difficult, if not impossible to justify granting an additional benefit to the consumer without recompensing the copyright holder in some way. The fact that consumers daily breach the existing copyright laws does not justify granting permission now without some form of compensatory recognition of copyright holder's rights.
68. For these reasons SPADA does not believe that any format-shifting exception can be considered without the implementation of some form of blank tape levy.

(vi) New Exceptions

69. We do not object to the two new proposed exceptions (decompilation of software and error correction in software).

Thank you for the opportunity to comment.

Yours sincerely

Jane Wrightson
Chief Executive

[sent unsigned by email]