

16 February 2007

SUBMISSION on the Copyright (New Technologies and Performers' Rights) Amendment Bill

To the Commerce Committee

1. INTRODUCTION

This submission is from the **Media & Advertising Copyright Board** ('the Copyright Board'), PO Box 2778, Shortland St, Auckland.

We wish to appear before the committee to speak to our submission.

The Chair of the Copyright Board, Mr Jim Thomson, can be contacted at Television New Zealand Limited, telephone (09) 916 7893.

The Copyright Board is a non-profit body. It is an association of bodies representing those who are users or commissioners of copyright works, whether or not they are themselves creators or owners of copyright works. The main aims of the Copyright Board are:

- To raise awareness about the importance of copyright;
- To identify and research areas of copyright law and practice;
- To seek changes to law and practice to enhance the effectiveness and fairness of copyright laws; and
- To foster co-operation among bodies representing users of copyright works.

The members of the Copyright Board are as follows:

- Association of New Zealand Advertisers Inc.
- Communication Agencies Association
- Magazine Publishers' Association
- The Newspaper Publishers Association of New Zealand Inc.
- The Radio Broadcasters Association
- Television Broadcasters' Council

Through their membership of the members of the Copyright Board, this submission has the support of the majority of the major media, advertisers and advertising agencies that operate within New Zealand. Individual members of the Copyright Board may, of course, make individual submissions.

2. SUMMARY

The Copyright Board supports the intent of the Government, as embodied in the *Copyright (New Technologies and Performers' Rights) Amendment Bill* ('the Bill'), 'to maintain the careful balance of objectives and interests reflected in the [Copyright]

Act, and to clarify how the Act should apply in an increasingly digital world.’¹ However, the Copyright Board’s support of the Bill is not unqualified and the submission makes specific comment on individual provisions of the Bill. The submission also addresses issues which the Copyright Board believes have been overlooked in the current review of the Act and proposes additional clauses for consideration by the Select Committee.

The submission is not comprehensive. It does not analyse all the provisions of the Bill nor does it consider all the issues raised in the Bill. The submission is restricted for two reasons: there is only limited time and resource available to the Copyright Board; and, a number of the issues addressed in the Bill do not impact directly on the interests of the Copyright Board. For example, the submission does not address the important issue of the liability of Internet Services Providers; they are not currently members of the Copyright Board. The submission is restricted, in the main, to issues of direct interest to the members of the Copyright Board.

Particular features of this submission are:

- General, although not unqualified, support for the Bill. In a technical sense, the Copyright Board has identified a number of drafting issues.
- Support for the repeal of the exemption for cable programme services to retransmit free to air broadcasts.
- The Copyright Board submits that the exceptions provided to libraries and archives to convert material currently in analogue format to digital format should be widened to include all individuals, firms and organisations that wish to convert material for non-commercial purposes or when necessitated by digital technology.
- Support for the introduction of exceptions for transient copying.
- The Copyright Board believes that a complete review of the Copyright Act should be undertaken so that any amendments would avoid the piecemeal approach which has been adopted by the Ministry of Economic Development.² In large part, the Bill is taken up with consequential amendments which follow on from the adoption of a communication right.
- As part of a comprehensive review of the Copyright Act, the Copyright Board submits that section 21(3), the commissioning provisions, should be expanded to include all works protected by the Copyright Act.
- Comment on drafting issues associated with some of the key terms in the Bill.

3. CLAUSE 49: REPEAL OF RETRANSMISSION PROVISION

The Copyright Board strongly supports the repeal of Section 88 of the Act. In brief, section 88 provides that a broadcast made from a place in New Zealand can, by

¹ Explanatory Note to the *Copyright (New Technologies and Performers’ Rights) Amendment Bill*, Page 1.

² For example, a review of the commissioning provisions of the Copyright Act is currently underway, copyright and contracts have also been considered in a discussion paper.

reception and immediate retransmission, be included in a cable programme service, except where a licensing scheme or arrangement is in place. It provides that copyright in the broadcast, and in any work included in the broadcast, is not infringed by the retransmission. It therefore 'allows cable programme services to retransmit free-to-air television broadcasts without the permission of the broadcaster'.³ Section 88(2)(b) provides that copyright in any work included in a broadcast is not infringed 'if and to the extent that the broadcast is made for reception in the area in which the cable programme service is provided'.

The repeal of this provision is overdue for a number of reasons:

- (i) Section 88, the provision allowing retransmission of free-to-air broadcasts, is simply a carry-over from previous United Kingdom statutes. A version was also included in the Copyright Act 1962. The circumstances which led to the inclusion of the equivalent provision in the United Kingdom legislation, section 73 of the Copyright, Designs and Patents Act 1988 have never been relevant to New Zealand. In the United Kingdom, the forerunners of cable operators were diffusion services that retransmitted broadcasts to areas of poor reception.⁴ In New Zealand, no cable operator currently provides only a retransmission of free-to-air broadcasts.
- (ii) In this country, it was also thought that greater competition and investment in the cable network and service industry would be encouraged by allowing cable operators to bundle free-to-air television with telephone and other communications services. For example, InHomeTV, TelstraClear's cable service, is only available as part of selected TelstraClear packages.⁵ (It is worth noting that the service is only available in cabled areas in Wellington and Christchurch.)
As it stands and as it operates, Section 88 is an inappropriate provision in that it allows a commercial organisation, a cable operator, to benefit from the investment of the broadcaster and the owners of copyright in the content of the broadcasts without ensuring that there is a reasonable return to the broadcaster. Section 88 has become a marketing tool that enables cable operators to piggy-back on the programmes created by or licensed to free-to-air broadcasters and thereby provide a convenience for cable customers who can access those programmes without having to leave the cable portal.⁶
Despite the service provided by TelstraClear, cable television has never become well established in New Zealand and there is unlikely to be a national cable network in the foreseeable future. Section 88 is clearly redundant.

³ Explanatory Note to the *Copyright (New Technologies and Performers' Rights) Amendment Bill*, Page 2.

⁴ Laddie et al *The Modern Law of Copyright and Designs* Vol 1 para 20.91.

⁵ <http://www.telstraclear.co.nz/products-res/packages/>

⁶ For example, see the programmes available at:

<http://www.telstraclear.co.nz/products-res/television/digital-tv/channel-line-up.cfm>

- (iii) Although section 88 provides for a licensing scheme, the drafting of section 88 enables cable operators to retransmit if negotiations for a scheme are unsuccessful. The experience of broadcasters, such as Television New Zealand and TV3, is that if an agreement for equitable remuneration is not reached, the level of potential return does not justify the cost of applying to the Copyright Tribunal. Accordingly, retransmitters are able to offer to pay a negligible level royalties secure in the knowledge that the legislation gives them the upper hand in negotiations. The right of broadcasting, which is intended to be an exclusive right to control the uses made of a broadcast has been reduced to a right to receive remuneration for the secondary use of the broadcast, and such remuneration is often not equitable remuneration.
- (iv) The Bill repeals the separate rights in broadcasts and cable transmissions and replaces them with a right of communication. The formulation of the new communication right encompassing the rights of broadcasting and cable programmes has highlighted the need to examine the basis for section 88. If nothing else, the mode of drafting which has been adopted in the Bill, that is, to replace the words 'broadcasting or cable programme' with 'communication work' would make it difficult to retain section 88. It would be problematic to maintain an exception whereby one element of the communication right (a broadcast) could be copied without infringement by the exercise of another element of the communication right (a cable programme).
- (v) The suggestion was made during the First Reading of the Bill that rather than repeal section 88, 'it should be extended to permit satellite retransmission of free-to-air broadcasts'.⁷ The reasons given above in support of the repeal of section 88 apply equally to negate the suggestion that the ambit of section 88 should be extended. Currently, the major provider of satellite broadcasts, Sky Television, retransmits the main free-to-air broadcasts as part of its digital programmes.⁸ Viewers who cannot receive free-to-air broadcasts can therefore access those programmes via Sky Television, but only as a package with other Sky programmes. As with the cable operators, retransmitting free-to-air broadcast is a service provided by Sky Television for marketing reasons. It helps to ensure that satellite customers stay on that portal. The current arrangement has come about as a result of commercial agreements between the free-to-air broadcasters and Sky Television. This shows that there is no need for additional legislation and regulation of the broadcasting industry. A comparison has been drawn with Australia in support of extending section 88 to cover satellite transmissions. However, this is flawed reasoning. A clear distinction should be made between Australia, an island continent that encompasses three time zones and all the communication issues associated with a small population dispersed

⁷ Christopher Finlayson (National) <http://www.hansard.parliament.govt.nz>

⁸ TV One, TV Two, TV Three, Prime and Māori Television are available on Sky: <http://www.skytv.co.nz/index.cfm?pageid=453>

across a huge land mass, and New Zealand, a small nation with quite different issues of communication and infrastructure.

4. A PROPOSAL FOR A GENERAL PROVISION TO ALLOW THE CONVERSION OF ANALOGUE MATERIAL TO DIGITAL

The Copyright Board supports the exceptions that the Bill provides to libraries and archives that enable them to convert material currently in analogue format to digital format. However, it submits that a general provision should be included in the Bill that would allow all individuals, firms and organisations to convert material from analogue to digital format for non-commercial purposes or when the conversion is necessitated by digital technology.

It is obvious that a great deal of material (creative works, ideas and information) was created before digital technology became commonplace. Much of that material is still held in analogue format. There are three main reasons why it is important to convert this material from analogue format to digital format. First, material in analogue format, including print material, is at greater risk of damage or destruction than material held in digital format. Second, and associated with the first reason, storage costs may be reduced for material held in digital format. Third, the primary means of public access to content will increasingly be digital.

The Bill itself provides a precedent for a general exception to copyright that would allow the conversion of analogue material to digital format. Clause 34 updates section 55. That section recognises the importance to libraries and archives of being able to make copies of items in their collections without infringing copyright in any work that is included in the items where those items are at risk and subject to certain other conditions. Clause 34 updates this exception by enabling librarians to make digital copies primarily where the item is 'at risk of loss, damage, or destruction'. An important feature of both provisions is that neither section 55 nor clause 34 places any restrictions on the nature of the items which may be copied, other than that they must be in the collection of a library or archive. As a group, therefore, the items which may be copied may include all the works protected by copyright, and not just books, documents and paintings that one immediately associates with those institutions.

The Copyright Board submits that the principle of providing an exception for converting analogue materials to digital without infringing copyright where the purpose of the conversion to digital is non-commercial should be extended to all analogue materials. This would enable a commercial organisation, which is not a prescribed library or archive, to make a digital copy for its records of printed material, photographs and the like without the need to contact the authors and/or the owners of copyright in the works.

The Copyright Board further submits that such an exception should also encompass the situation where a copyright user has the right to use a work in its analogue format and now, because of changes in technology, has no option but to use the work

in digital format. For example, in order for a broadcaster to broadcast a film in digital format, it may be necessary to convert the film to digital format. It would be unfair if the broadcaster was forced to pay a further licence fee.

Therefore, the Copyright Board proposes that a new exception be included in the Bill that would enable any person to make a digital copy of any material without infringing the copyright in the works contained in that material. As a signatory of the Berne Convention, New Zealand is obliged to comply with that instrument. It is submitted that such an exception would meet the three-part requirement of Article 9(2) of the Berne Convention that exceptions should: (i) be restricted to 'special cases'; (ii) not conflict with normal exploitation of the work; (iii) not unreasonably prejudice the interests of the author of the work.

New section to be inserted:

Copying to replace copies of works

Any person may make a digital copy of any item without infringing copyright in any work included in the item if –

- (a) the original item is at risk of loss, damage, or destruction; or
- (b) the original item cannot be made available by digital communication technology.

There are two further reasons to allow the conversion of analogue material to digital: (i) There is a similar blanket exception in the Bill. Clause 44 permits copying for the purposes of format-shifting of sound recordings which are used for private and domestic use. (ii) It is in line with the thrust of the discussion paper – 'Creating Digital New Zealand: The Draft New Zealand Digital Content Strategy' – which promotes the preservation of New Zealand content and access to such content in the on-line environment.

5. CLAUSE 23: NEW EXCEPTION FOR TRANSIENT REPRODUCTION OF A WORK

The Copyright Board supports the new exception for transient reproduction of a work which is introduced by Clause 23. The right to control copying should not apply to transient copying – temporary or incidental copies that are automatically made as a result of an automatic or inevitable technical process of transmission of material or the operation of computer systems and networks. There are considerable difficulties in attempting to identify which transmission processes result in the creation of a copy of a work; where the copy was made; and, whose server and storage facilities are involved, especially where it is likely that such processes are automated. The Copyright Board therefore supports the proposal to provide an exception for transient copying 'where the resulting copies have no independent economic significance'.⁹

⁹ Explanatory Note to the *Copyright (New Technologies and Performers' Rights) Amendment Bill*, Page 3.

6. A COMPREHENSIVE REVIEW OF THE COPYRIGHT ACT 1994

The Copyright Board submits that a complete review of the Copyright Act should be undertaken which would encompass the current focus on digital technology and other issues which have arisen since 1994. Other issues include parallel importing, performers' rights, contract and copyright and the current review of the commissioning provisions. The piecemeal approach which has been adopted to reviews of the Copyright Act runs the risk of destroying the coherence of the legislation.

The problems of a piecemeal approach are easily illustrated. In large part, the Bill is taken up with consequential amendments which follow on from the adoption of a communication right, however, it is not clear whether a 'communication work', which is defined in Clause 3, is the same as a 'communication', which is not defined.

It is surprising to note, given that the public process of review of digital technology and copyright began in 2001 with the issue of a discussion paper by the Ministry of Economic Development, that the amendments are to be fully reviewed within five years of their enactment to ensure that they operate effectively and continue to be appropriate; and that the exception for format shifting of sound recordings has a two year sunset clause. The Copyright Board suggests that if it has been deemed necessary to include these limitations on the application of the new provisions then a comprehensive review of the entire copyright statute is definitely warranted.

The current copyright legislation, as enacted, was based very closely on the United Kingdom Copyright, Designs and Patents Act 1988. Since 1994, however, New Zealand has tended to look as much to other jurisdictions, notably Australia and the United States, for models for amendments to the copyright legislation. A comprehensive review would enable the Ministry of Economic Development and the Parliament to ensure that the policy and structure of the copyright regime remains intact, clearly articulated and relevant to New Zealand in the twenty-first century.

7. THE COMMISSIONING PROVISIONS: SECTION 21(3) SHOULD BE EXPANDED TO INCLUDE ALL WORKS

Irrespective of whether the Select Committee adopts the recommendation that there be a comprehensive review of the Copyright Act, the Copyright Board submits that the current Bill presents an opportunity for an overhaul of the commissioning provisions.

The application of the commissioning provisions, primarily the certainty of their application, is hampered by the scope of section 21. It covers a very restricted number of works. The current Bill adopts a technology neutral approach. The Copyright Board submits that a similarly neutral approach, although in a different context, should be adopted towards works covered by the commissioning rule.

The copyright regime recognises that ownership of the copyright in a work is, of course, a necessary adjunct to the creation of the work and it is therefore logical to provide that the person who has initiated the creation of a work should be the first owner of copyright in the work. In many cases, it is appropriate that the author of a work should be the first owner and this is the effect of section 21(1). However, section 21 also acknowledges that there are two circumstances in which the author should not be the first owner of copyright; namely, where a work is created by an employee or where it is created pursuant to a commission. The commissioning rule recognises that many works would not exist if it was not for the role of a commissioner in initiating the creation, and investing in the creation to ensure it evolved into a valuable work.

The Copyright Board repeats the submission which it made to the Ministry of Economic Development in respect of the Ministry's Discussion Paper:

The scope of the works included in the commissioning rule, section 21(3) of the Copyright Act 1994, should be expanded to include all works protected by the Copyright Act and that the commissioner of those works should be the first owner of copyright in the works. The Copyright Board notes that this is the position accorded to the Crown.¹⁰ Implementation of this submission will reward those firms, organisations and individuals who commission works of copyright by providing certainty as to the first ownership of all works. Certainty as to the ownership of copyright will act as an incentive to commission further works which, in turn, will benefit the creators of those works.

8. KEY TERMS - DRAFTING ISSUES

(1) Clause 3 Interpretation

In this clause, two key definitions are poorly drafted:

"communicate" means to transmit or to make available by means of a communication technology... -

Comment:

(i) The clause does not state 'the content of what' may be transmitted or made available in order to constitute the act of communicating. This omission can be contrasted with the Australian legislation which provides that communicate involves making available, '**a work or other subject matter**'.¹¹ Article 8 of the WIPO Copyright Treaty (WCT) is also relevant, it refers to 'the exclusive right of authorizing any communication to the public of **their works**'.

(ii) Other clauses, for example, Clause 17 and Clause 19, use the phrase 'communicating a work' or 'communicates a work', which suggests that the act of communicating involves content that is a work.

(iii) The term 'communication technology' is not defined, other than to state that it includes 'a telecommunications system or electronic retrieval system'.

¹⁰ Section 24(5) and section 26(1) of the Copyright Act 1994.

¹¹ Section 10 Copyright Act 1968 Cth.

“**communication work**” means a transmission, or the making available by a communication technology, of sounds, visual images, or other information, or a combination of any of those

Comment:

A communication work is presumably created by the act of communicating. The Explanatory Note to the Bill suggests that a communication work is analogous to ‘signals that carry programme content in broadcasts and cable programmes’.¹² This definition can be therefore be used to explain the previous definition of ‘communicate’, however, it is a clumsy means.

(2) Clause 15 New section 24 substituted - Duration of copyright in communication works

Comment:

In para (2) and (3) of this clause, the term ‘repeated communication work’ is used, but it is not defined in Clause 3 Interpretation, nor is it defined in the new section 24. A number of different interpretations could be made of the term and, for clarity’s sake, it should be defined or replaced.

(3) Clause 23 New section 43A inserted – Transient reproduction of a work

Comment:

Para (b) of the new section 43A refers to ‘making or receiving a communication’. Presumably, a communication is something that arises when one communicates. However, it has already been noted that the Bill has defined a ‘communication work’ as being ‘a transmission or the making available by a communication technology’, that is, something that arises when material is transmitted or made available. Either there is no difference between a communication and a communication work, in which case, the latter term should be used for consistency; or, there is a difference and that difference needs to be spelt out.

(4) Clause 77 New section 172 substituted

Section 172 is repealed and the following section substituted:

Section 172 Infringement by use of illicit recording

A person (A) infringes a performer’s rights if –

- (a) without the performer’s consent and by means of a recording, A shows in public, plays in public, or communicates to the public the whole or a substantial part of a performance; and
- (b) the recording is illicit; and
- (c) A knows or has reason to believe that the recording is illicit.

Comment:

The effect of Clause 77 is to amend section 172 in two ways: (i) The words ‘broadcasts or includes in a cable performance’ have been replaced by ‘communicates to the public’. This is consistent with other provisions of the Bill and implements the new technology neutral right of communication. (ii) The section

¹² Explanatory Note to the *Copyright (New Technologies and Performers’ Rights) Amendment Bill*, Page 4. ‘The Bill extends the protection currently afforded to signals that carry programme content in broadcasts and cable programmes to all “communication works”.’

makes it plain, although it was clear already, that infringement occurs only if a performance is shown in public, played in public or communicated to the public by means of a recording that is (a) illicit; and, (b) the person who does any of those acts knows or has reason to believe that the recording is illicit.

Despite the redrafting which was required to implement the right of communication and which provided the opportunity to tidy up section 172 in other ways, Clause 77 repeats the problems in the current section 172:

- (i) A infringes performers' rights if 'without the performer's consent and by means of a recording, A shows in public ... the whole or a substantial part of a performance'. On the face of it, this is acceptable; however, a closer analysis shows that the provision maintains a logical inconsistency. By virtue of section 169, a 'performance' is a 'live performance'. It is therefore impossible to show in public a performance by means of a recording for, clearly, a recorded performance is not a performance in the sense that it is not a live performance. The relevant phrase should read: 'the whole or a substantial part of a recorded performance'.
- (ii) Paragraphs (b) and (c) emphasise that the recording must be an illicit recording. The two essential elements of an illicit recording are that the recording is 'made without the performer's consent and otherwise than for private and domestic use'.¹³ However, by continuing to use the term 'illicit recording' in section 172, Clause 77 perpetuates a situation which partly defeats the purpose of the performers' rights regime, namely, to give the performer the right to control unauthorised uses of his or her performances.
If A shows in public, plays in public, or communicates to the public a recording that was originally made for private and domestic use, although made without the performer's consent (this sort of bootleg recording is not as uncommon as one might think), then there is no infringement because such a recording is not an illicit recording. Section 172 was based on section 183 of the Copyright, Designs and Patents Act 1988 (UK). That provision does not use the term 'illicit recording', it uses a wider term, namely, a recording made without the performer's consent and it is submitted that this wording should be adopted in the New Zealand statute.
- (iii) It is submitted that Clause 77 be redrafted as follows, the proposed changes have be highlighted in italics:

Clause 77 New section 172 substituted

Section 172 is repealed and the following section substituted:

Section 172 Infringement by use of *a recording made without consent*

A person (A) infringes a performer's rights if –

- (a) without the performer's consent and by means of a recording, A shows in public, plays in public, or communicates to the public the whole or a substantial part of a *recorded* performance; and
- (b) the recording *was made without the performer's consent*; and

¹³ Section 169.

- (c) A knows or has reason to believe that the recording *was made without the performer's consent*.

(5) Clause 78 Incidental copying of performance or recording

Section 175 is amended by repealing subsection (1) and substituting the following section:

- (1) The rights conferred by this Part are not infringed by -
- (a) the incidental copying of a performance or recording in a sound recording, film, or communication work; or
 - (b) the playing of a sound recording, the showing of a film, or the making of a communication work, where the performance or sound recording has been incidentally copied in that sound recording, film, or communication work; or
 - (c) the issue to the public of copies of a sound recording, film, or communication work in which a performance or recording has been incidentally copied.

Comment:

This provision has been redrafted to include the right of communication.

Unfortunately, the opportunity was not taken to tidy up section 175 in other ways, Clause 78 repeats the problems which are present in the existing section 175:

- (i) Paragraph (a) refers to 'the incidental copying of a performance'. However, in section 2(1), 'copying' is defined as: 'means, in relation to any description of work, reproducing or recording the work in any material form'. The problem is that a performance is not a work for the purposes of the copyright legislation. This is another example of the poor drafting of the original Copyright Act 1994, when the draftsman differed from the drafting in Clause 2, Schedule 2 of the Copyright, Designs and Patents Act 1988 on which the provision is closely based. That provision refers to 'incidental inclusion of a performance'. This avoids the problem which has been introduced into the New Zealand legislation.
- (ii) It is submitted that Clause 78 be redrafted as follows, the proposed changes have be highlighted in italics:

Clause 78 Incidental copying of performance or recording

Section 175 is amended by repealing subsection (1) and substituting the following section:

- (1) The rights conferred by this Part are not infringed by -
- (a) the incidental *inclusion* of a performance or recording in a sound recording, film, or communication work; or
 - (b) the playing of a sound recording, the showing of a film, or the making of a communication work, where the performance or sound recording has been incidentally *included* in that sound recording, film, or communication work; or
 - (c) the issue to the public of copies of a sound recording, film, or communication work in which a performance or recording has been incidentally *included*.

As can be seen, the suggested changes to Clauses 77 and 78 are minimal and easily accommodated.