Ministry of Business, Innovation & Employment
15 Stout Street
Wellington 6011
New Zealand

By email: copyrightactreview@mbie.govt.nz

4 April 2019

Response to the New Zealand Government's Review of the Copyright Act 1994

Dear Sir or Madam

The British Copyright Council (BCC) represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade, which together represent hundreds of thousands of authors, creators, performers, publishers and producers. Our members also include collecting societies which represent right holders and which provide licensed access to works of creativity. A list of our members can be found at http://www.britishcopyright.org/bcc-members/member-list/ and is attached at Annex 1.

We welcome this opportunity to submit some general comments in response to the Ministry of Business, Innovation & Employment's review of New Zealand's Copyright Act 1994. Individual BCC members may respond separately on specific issues, and our focus here on selected topics — while we hope it will be helpful — should not be seen as exhaustive of our interest in the range of questions posed by the review. We hope it may be possible to comment further at a later stage in the process.

Exceptions and limitations

New Zealand currently operates an exceptions and limitations regime that is broadly similar to that in the UK. Whatever, if any, adjustments may be considered by New Zealand, the BCC respectfully submits two points as follows:

1. A carefully tailored system of fair dealing exceptions is always to be preferred over the broader US-style "fair use". We suggest there is no evidence establishing that the fair use system provides greater benefits than fair dealing, yet fair use is more complex and results in greater uncertainty and higher costs for all parties concerned[1]. Consequently, fair use is detrimental to all businesses in the creative value chain, from the original creator to the publisher or record company to the platform provider and ultimately to the end user.

[1] Please see a 2011 paper prepared for the BCC by the law firm Taylor Wessing LLP on the impact of costs on legal proceedings in practice on Fair Dealing and Fair Use, which we add as Annex 2.

In the US, the level of references to higher courts in fair use cases indicates that almost 180 years after the first fair use case was brought in 1841, the US still struggles with a lack of certainty in the application of fair use principles, especially in first instance courts. Recent examples include:

- Cambridge University Press, Oxford University Press and Sage Publications v Georgia State University, U.S Court of Appeals, 11th Cir., 19 Oct 2018
- Brammer v Violent Hues Productions U.S. District Court, ED Va, 11 June 2018
- Dr. Seuss Enterprises v. ComicMix U.S. District Court, SD Cal., 9 June 2017
- Disney Enterprises v VidAngel U.S. Court of Appeals, 9th Cir., 8 June 2017
- Paramount Pictures v. Axanar Productions U.S. District Court, C.D. Cal., 3 Jan 2017
- Penguin Random House v. Colting U.S. District Court, SDNY, 7 Sept 2017
- Graham v Prince U.S. District Court, SDNY, 18 July 2017
- TCA Television v. McCollum U.S. Court of Appeals, 2d Cir., 11 Oct 2016
- VMG Salsoul, LLC v. Ciccone U.S. Court of Appeals, 9th Cir., 2 June 2016

Furthermore, cases often result in split opinions within individual courts, as well as being subject to differing approaches by the most relevant courts when seeking to interpret the doctrine of fair use, e.g. Supreme Court, 2nd or 9th Circuit Courts or the United States District Court for the Southern District of New York.

For a comprehensive analysis of fair use cases, we note the updated Empirical Study of US Copyright Fair Use Cases, 1978-2014[2] by Prof. Barton Beebe NYU School of Law (www.bartonbeebe.com). This 2015 update of his original 2008 study[3] highlights the varying approaches to fair use in different courts and the high reversal and appeal rates in fair use cases.

2. Strong, objective economic evidence should be the prerequisite when considering any changes to the copyright system.

   In 2014, the UK government introduced new exceptions or amended existing exceptions in our copyright law. These were based on The Hargreaves Review[4], which suggested economic benefits to the UK of up to £7.9bn a year resulting from the review's recommended changes — but gaps in the evidence on which they were based cause us to remain doubtful that the official impact assessment, currently under way, will substantiate this at all. Uncertainty around the lack of definition of terms such as quotation and parody, caricature and pastiche, will indeed have caused the creative industries, and thus creators and performers, unquantifiable losses in terms of licensing revenue. At the time of the review, the BCC and the wider UK creative industries expressed serious concerns regarding the underlying economic evidence and

[2] http://www.bartonbeebe.com/BeebeFUPres2015.pdf

[3] http://www.bartonbeebe.com/documents/Beebe%20-%20Empirical%20Study%20of%20FU%20Opinions.pdf

[4] Hargreaves Review of Intellectual Property: https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/inquiries/hargreaves-review-of-intellectual-property/

the methodology applied. When the private copying exception was later overturned, it was because the High Court found the UK Government had based its decision to introduce that exception on defective evidence. We would therefore stress again the critical need for a sound evidence base when assessing the likely impact of copyright reforms.

Enforcement of rights

Recognition of rights must be supported by effective provisions for enforcement. Such measures should address online infringement in ways that mandate deterrent civil and criminal remedies and provide incentives for online service providers to cooperate with right holders and ensure staydown of notified pirated content. In this respect, the possibility for civil injunctive relief corresponding to the provisions of Sec. 97A of the Copyright, Designs and Patents Act 1988, is a recent development that we advocate as an example of good practice.

For streamlined and inexpensive enforcement options for low-value infringements, we commend the UK's Intellectual Property Enterprise Court and the Small Claims Track as a model for consideration.

Internet Service Provider liability

The Issues Paper discusses the liability regime for Internet Service Providers, which currently have safe harbour protections in the Copyright Act. The BCC strongly believes that commercial online platforms should take responsibility for the content they make available, and pay fair and appropriate licence fees for content uploaded to their platforms. Indeed the pending EU Directive on copyright and related rights in the Digital Single Market, as passed by the European Parliament last month following two-and-a-half years of rigorous debate, has confirmed categorically that content-sharing platforms are responsible for the copyright content from which they profit. Contrary to widespread misconceptions, these new EU provisions seek to level the playing field while imposing no new restrictions or responsibilities on internet users; they require only that commercial content-sharing companies acquire licences that pay rightholders for use of their work online, while ensuring individuals can upload content just as before but with greater legal certainty. In doing so, it sees the interests of users are expressly balanced against those of right-holders.

Artist's resale right

The BCC fully supports the implementation of the Artist's Resale Right (ARR), which has been operating successfully in the UK since 2006 for the benefit of creators whose work is resold through an auction house or art market professional. Without ARR, visual artists — unlike other creators such as writers, musicians and composers — receive no financial benefit beyond the first sale of their work, however often it is resold or however valuable the work becomes. The Artist's Resale Right, which now exists in around 80 countries, corrects this inequity and enables artists to continue in their work and to enrich cultural life[5]. This further feeds demand for art, so benefiting the market in what becomes a virtuous loop.

[5] The experience in Australia also suggests that ARR sustains indigenous art, with the government reporting that over 63% of the artists receiving royalties are Aboriginal or Torres Strait Islander artists, who have received 38% of the total royalty payments.

Since ARR was introduced in the UK, more than £75m has been distributed to artists via collective management organisations, while at the same time the UK art market has flourished, recently regaining its place as the second largest art market in the world[6]. This experience in consistent with the conclusions of research commissioned by WIPO, which found that ARR neither causes harm to the art market nor diverts sales to countries in which the right does not apply[7].

The introduction of ARR in New Zealand would not only benefit artists from the UK (and other countries that already recognise the right), but would ensure New Zealand's artists are rewarded for the secondary sale of their works in professional art markets around the world.

Voluntary copyright registration

We note the suggested potential for a voluntary register for copyright to assist with enforcement, with examples given of systems operating in Canada and the US. The BCC questions whether such a register would or even should establish authorship and/or ownership in a work (Article 5(2) Berne Convention); its utility may be limited to providing evidence for the existence of a work and a time stamp.

Secondly, a register could risk creating a two-tier regime in which right holders with greater commercial experience or knowledge about rights, or those that are better resourced, are more likely than their less well-placed counterparts to use this facility[8]. Given the extent to which the creative industries rely on self- employed creators and performers and on micro-enterprises and SMEs, a register is more likely to promote legal uncertainty rather than clarity.

Furthermore, the establishment and maintenance of a register would involve additional administrative cost that, for the reasons stated above, may outweigh the benefits.

We trust the above will be helpful in your consultation process. Please do not hesitate to contact me if the British Copyright Council can be of any further assistance.

Yours faithfully

Elisabeth Ribbans
Director of Policy & Public Affairs, British Copyright Council

[6] *The Art Market 2019*, an annual global art market analysis for Art Basel, reports that in 2018 the UK regained its position as the second largest art market in the world.

[7] *The Economic Implications of The Artist's Resale Right*: https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_7.pdf

[8] We note concerns expressed in the US following the Supreme Court's ruling last month that registration of a copyright work must be approved before a suit can be filed, adding delay and expense for litigants.

ANNEX 1

British Copyright Council members — March 2019

Artists' Collecting Society (ACS)

Association of Authors' Agents

Association of Illustrators (AOI)

Association of Learned and Professional Society Publishers (ALPSP)

Association of Photographers Ltd (AOP)

Authors' Licensing and Collecting Society (ALCS)

BECTU/Prospect

BPI (British Recorded Music Industry) Ltd

British Association of Picture Libraries and Agencies (BAPLA)

British Equity Collecting Society Ltd (BECS)

British Institute of Professional Photography (BIPP)

Chartered Institute of Journalists (CIOJ)

DACS

Directors UK

Educational Recording Agency Ltd (ERA)

Incorporated Society of Musicians (ISM)

Ivors Academy

MPA Group of Companies

Musicians' Union

National Union of Journalists (NUJ)

PPL

Professional Publishers Association (PPA)

PRS for Music (PRS)

Publishers' Licensing Services (PLS)

Royal Photographic Society (RPS)

The Society of Authors

The Writers' Guild of Great Britain

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ANNEX 2

Note on Fair Dealing and Fair Use provided by Taylor Wessing LLP to the BCC, February 2011

TaylorWessing

FAIR DEALING/FAIR USE

The purpose of this note is to summarise the information which we have been able to gather relating to:

the number of UK Fair Dealing cases and the number of US Fair Use cases since 1 January 1978; and

the cost of copyright litigation in the UK and in the US.

As will be seen, the information is far from complete. However, it does shed some light on these issues.

Number of UK Fair Dealing Cases

This was the most straightforward area to research. In our research, we have looked at decisions made on or after 1 January 1978, which is the date on which the US Copyright Act 1976 came into force and introduced for the first time in the US a statutory Fair Use regime.

On 1 January 1978, the Copyright Act 1956 ("the 1956 Act") was still in force in the UK and it remained in force until 31 July 1989. On 1 August 1989, the Copyright, Designs and Patents Act 1988 ("the 1988 Act") came into force in the UK and it is still in force, although it has been amended on several occasions since 1989.

Under both the 1956 Act and the 1988 Act there were/are a number of exceptions to copyright. In researching the cases, we have drawn a distinction between cases decided which involved the Fair Dealing provisions and those which involve other exceptions. Under the 1988 Act, there are 64 sections which set out the "act permitted in relation to copyright works". However, only two of these (Section 29 and 30) deal with Fair Dealing as such. Under these sections, Fair Dealing is permitted for the purposes of private study (which must not be directly or indirectly for a commercial purpose) or non-commercial research, criticism or review or the reporting of current events.

The remaining exceptions (Sections 28 and 31 to 76) cover a wide range of activities such as, for example, recording for purposes of time shifting, incidental recording for purposes of broadcast etc. There was a similar regime in the 1956 Act, only with fewer exceptions. The reason that we have included the other exceptions is that some of them would be covered in the US by the US Fair Use legislation.

The number of reported decisions in the UK since 1 January 1978 is as follows:

(i) Number of Fair Dealing cases decided under the 1956 Act: 4

(ii) Number of Fair Dealing cases decided under the 1988 Act: 17

(iii) Number of other exceptions cases decided under the 1956 Act: 13

(iv) Number of other exceptions cases decided under the 1988 Act: 40[78]

The total number of cases decided[9] during the period is 67 or approximately two per year. We can provide lists of these cases (together with short summaries) if this would be of use.

Number of Fair Use Cases in the US

It has proved much more difficult to obtain details of the number of reported decisions in Fair Use cases in the US.

We have been able to establish that there were not less than the following numbers of such decisions during the years ended June as set out below:

June 2010 - 8

June 2009 - 8

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[7] Five of these cases also dealt with fair dealing so are included in that total as well. To that extent, there is duplication between the two totals. Those five cases are: *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); *SAS Institute Inc v World Programming Ltd* [2010] EWHC 1829 (Ch); *HM Stationery Office v Green Amps Ltd* [2007] EWHC 2755 (Ch); *Universities U.K. Ltd v Copyright Licensing Agency Ltd* [2002] E.M.L.R. 35; *Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2001] Ch. 257

[8] Two of these cases also considered the 1956 Act so are included in that total as well. To that extent, there is duplication between the two totals. Those two cases are: *Jules Rimet Cup Ltd v Football Association Ltd* [2007] EWHC 2376; and *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328.

[9] Excluding the duplication referred to above.

June 2008 - 7

June 2007 - 8

In an article entitled “An Empirical Study of U.S. Copyright Fair Use Opinions, 1978 – 2005”, published in the University of Pensylvania Law Review – January 2008 Vol. 156 No. 3 Barton Beebe identified 306 reported opinions from 215 cases. This means that during the 28 years from 1 January 1978 to 31 December 2005 there was an average of just under 11 reported opinions per year.

Legal Costs and Expenses of UK Fair Dealing Case

It is difficult to generalise. The costs of any particular case will depend on a number of different factors, such as the amount of evidence, whether it is disputed, the complexity of the case, prospects of preliminary references to the ECJ and so on. However, the costs of bringing or defending a copyright case which goes to a full trial and a reported decision is likely to be somewhere between £250,000 and £500,000 (excluding any appeals). The newly reinvigorated Patents County Court (which has a cap on recoverable costs of £50,000 and is intended to provide a more streamlined judicial process) may mean that this figure may drop for the smaller and less complicated cases.

Legal Costs and Expenses of US Fair Use Case

A report by the American Intellectual Property Law Association estimates that the average cost to defend a copyright case is just under $1 million. [Cited at page 42 in an

article by Giuseppina D'Agostino entitled "Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use – published in Comparative Research in Law & Political Economy 2007 (Vol: 03 No. 04)].

This is clearly an average figure and some cases will be more expensive and some less. For example, in the Google Books litigation, the latest draft of the Amended Settlement Agreement provides that Google will pay $30 million towards the Plaintiffs' attorneys fees and costs. The Google Books case was a class action, involved a large number of parties and was extremely complex. Nevertheless, it was a Fair Use case and does demonstrate how difficult, complex and expensive US litigation involving Fair Use can be.

Dated: 22 February 2011