Copyright Licensing NZ
Submission to Review of the Copyright Act
December 2017

Copyright Licensing Limited (CLNZ) is a not-for-profit company owned by New Zealand authors and publishers through representative organisations, New Zealand Society of Authors (PEN) Inc (NZSA) and Publishers Association of New Zealand (PANZ).

CLNZ is part of a global network of collective management organisations (also known as collecting societies) that provide centralised licensing services for the copying of extracts from books, magazines, newspapers, journals and other written content. Centralised licensing makes it significantly more efficient for users of copyright works to legally reproduce material from published works, while providing a service for content creators that generates a valuable revenue stream.

CLNZ took an active role in the development of the WIPO TAG Compendium – a guide to international best practice in collective management – and has aligned its own operations accordingly. The company is the New Zealand member of IFRRO (International Federation of Reproduction Rights Organisations), and has non-exclusive mandates to represent authors and publishers from throughout the world in offering licensing services in New Zealand. CLNZ has copyright licenses with all of the universities and polytechnic institutions and wānanga in New Zealand as well as schools, private training establishments, not-for-profit organisations, businesses and government agencies. In the New Zealand schools sector, the New Zealand School Trustees Association administers licenses for text, music and video content on behalf of CLNZ, APRA/RMNZ and Screenrights.

In 2016, CLNZ's licensing activity returned $5.3m to content creators whose work was copied in New Zealand. In addition to this CLNZ invests (though a cultural fund) in supporting the New Zealand writing and publishing industry via grants, awards and scholarships.

CLNZ supports the submissions made by the following organisations:

- Publishers Association of New Zealand
- NZ Society of Authors (PEN) Inc
- WeCreate Inc
- Recorded Music NZ (with particular reference to licensing and Copyright Tribunal issues)

Submitted By:
Paula Browning
Chief Executive

FRAMING

The Terms of Reference for this review identify the following objectives of New Zealand's copyright regime:

1. provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so;
2. permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand;
3. ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law; and
4. meet New Zealand's international obligations

We submit that, when considering the objectives, all need to be viewed through each of an economic, legal and social/cultural lens, in addition to the opportunities and risks presented by technological developments. Account should also be taken of the fact that New Zealand is a very small market and the investment made by local creators can be, particularly for education materials, for a very small audience.

The majority of the current Act was drafted in 1994, before the internet changed the landscape for New Zealand businesses to engage in online trade seamlessly, and access for New Zealanders to the world's content became a reality. The online world has revolutionised access to creative works and technology changes much in the process of content creation, use and distribution. New Zealand authors and publishers are already taking advantage of this opportunity and should be supported to continue to do so by government policy, legislation and regulation that underpin their right to earn from their efforts just as policy, legislation and regulation does in other areas of the economy.

A REVIEW OF THE FRAMING

1. Are Current Incentives to Creation and Dissemination Working in NZ?

In 2016, CLNZ contracted Horizon Research to produce a report on NZ Writers' Earnings. The report[1] identified that NZ writers, on average, earn $13,500 per annum from their writing. It also identified that the motivations for writing vary amongst writers. We submit that, regardless of the motivation to write – economic, social/cultural, educational or academic advancement – **the choice as to how a work is able to be copied or disseminated should rest with the author and/or publisher of the work**. This is what strong copyright law does.

2. Is there reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand?

[1] http://www.copyright.co.nz/Downloads/Assets/3279/Horizon%20Research%20Writers%20Earnings%20Survey%202016.pdf

We submit that a framing of "net benefits" is wrong. Article 9 of the Berne Convention limits copyright exceptions to ones that do not conflict with the normal exploitation of a work by its creator and with the legitimate interests of the author. The broadening of exceptions shifts value away from authors and publishers which reduces not only their potential economic return, but also their ability to invest in the creation of more content. There are already multiple exceptions in New Zealand's Act that directly impact exclusive rights of creators in the writing and publishing industry – exceptions for research and private study, education, libraries (many of which are also in the education sector) and the print disabled[2]. All of these directly reduce the market for New Zealand written works.

The licensing schemes operated by CLNZ provide broad access to works at a fair price to licensees and a deliver a valuable revenue stream for authors and publishers. New Zealand libraries are able to provide broad access to published works that are free to the reader; however the Public Lending Right (PLR) scheme that is meant to compensate authors for the lending of their works from libraries is narrow in its reach and does not cover lending from special libraries[3], education libraries or the lending of digital or audio works. New Zealand authors should have access to an appropriate level of remuneration for their reduced royalties where there is a readily quantifiable public benefit provided by an exception.

3. Is the copyright system effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law?

We submit that some parts of the current system in New Zealand, with active licensing mechanisms available from CLNZ and from individual publishers and authors, are effective and efficient and minimize transaction costs. CLNZ licensing schemes provide copying permission in advance for a vast repertoire of content from New Zealand and the rest of the world which makes legal copying easy for universities, ITP's, Wānanga, PTE's and schools that are licensed. **With a proven market-offering for licensing we submit that, as in the UK, an education exception should only apply if a licence for the required use is not available.**

There is an omission in the current law that enables commercial organisations to take advantage of exceptions, eg. a library operating in a law firm. We submit that **all exceptions should only be available for non-commercial uses.**

The current system is not effective or efficient for licensing scheme disputes, or when copyright is infringed. For licensing scheme disputes, the **Copyright Tribunal process is time-consuming and extremely costly** [4]. The Tribunal operates without the certainty that **a set of transparent rules** (such as those employed by the UK Copyright Tribunal) would provide. There is also no incentive for parties to

[2] We note that the government's implementation of the Marrakesh Treaty into NZ law sits outside the Terms of Reference for this review. We also record CLNZ's collaboration with the Blind Foundation and other organisations, through the Accessible Formats NZ Forum, to find solutions to the issues of access to published works for those with a print disability in New Zealand.

[3] The Blind Foundation reports that its members were provided with access to 560,000 books and magazines in 2017 https://blindfoundation.org.nz/about-us/what-we-do/plans-and-reports/

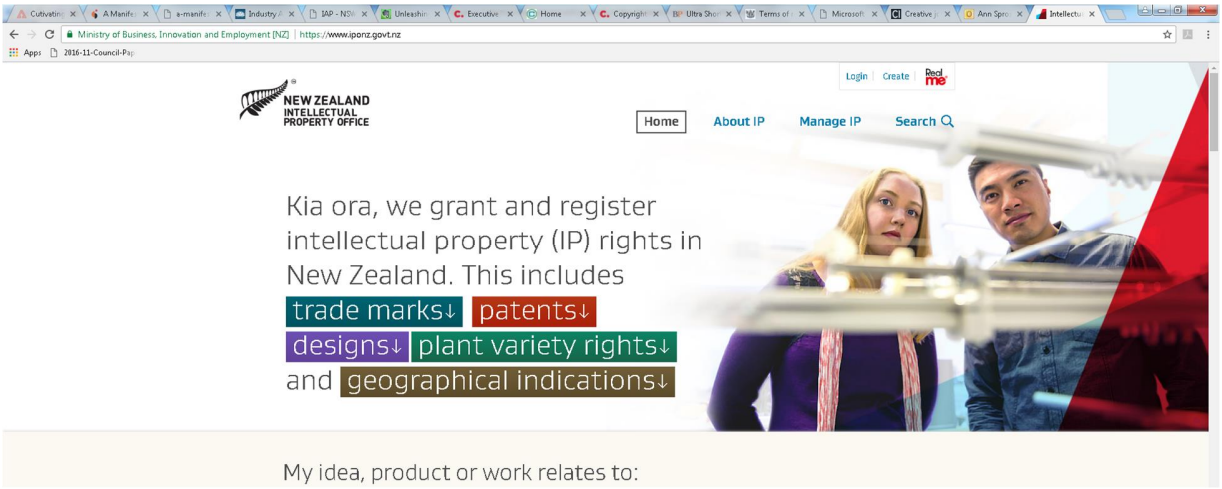
[4] We estimate that the combined legal costs of the Universities NZ vs CLNZ licensing scheme dispute in 2013/14 equalled over 50% of the annual value of the licence fee

progress cases given that awards are limited to an account of profits and no interest is able to be awarded on deferred/delayed payments. CLNZ took a reference to the Copyright Tribunal in February 2013. The reference was allowed to meander through the Tribunal process and after 22 months had still not delivered a decision on appropriate discovery, let alone a decision on the reference. The parties eventually settled but not before aspects of the reference were required to be put before both the High Court and the Court of Appeal. Proposed changes in the Tribunals Powers & Procedures Bill (put before Parliament in August 2017) will not address the delays experienced by CLNZ and other licensing bodies as they still enable the Tribunal to "regulate its procedures as it sees fit".

The cost of taking an infringement action is in the tens of thousands of dollars and requires content creators to have the knowledge and resilience to engage with the New Zealand court system. A solution to the lack of meaningful access to justice for copyright infringement can be achieved via a **small claims process** so that individual authors and publishers can take effective action when the law is broken. Improvement could also be achieved with a change to s 123 of the Act to **allow licensees that are not exclusive licensees, such as licensing agencies, to take actions on behalf of the copyright owners that they represent**. These changes would be enhanced by the involvement of judges with current and active knowledge of copyright in law and in practice. This is often absent in the New Zealand judiciary, as evidenced by the fact that in 2 of the last 3 licensing disputes to be heard by the High Court, Court of Appeal cases were required to revisit decisions. Compliance with the law would also be incentivized by inclusion of **statutory damages for copyright infringement** and

Respect for many laws, including copyright, is very different in the online world. There is no effective remedy for authors' and publishers' in circumstances where their content is copied or uploaded online. In order to restore some balance to copyright in the online world, **the benefit of the safe harbour regime should be limited to only those companies that truly provide "pipe" services**.

Where clarity and certainty falls down is mostly through lack of knowledge of the law, rather than the law itself. The government could do much more to assist with access to knowledge on copyright for the general public.



**screenshot of www.iponz.govt.nz taken 24/10/17*

Recent updates to the material on copyright provided by IPONZ are a step in the right direction. However, as shown above, copyright is not prioritised in the information provided to the public. CLNZ staff often take phone calls and respond to emails regarding copyright that have nothing to do with CLNZ's licensing business. Recently this has also included callers directed to us from IPONZ. CLNZ provides general information on copyright and more specific information on our licensing schemes but this is not a substitute for **clear guidance on the law that the government should provide.**

Does our Copyright Act meet New Zealand's international obligations?

Existing New Zealand exceptions when combined with an ineffective justice system, have a negative impact on authors and publishers. The Three Step Test is quite clear:

Limit exceptions to certain special cases, in circumstances where the exception does not conflict with the normal exploitation of the work; and does not unreasonably prejudice the legitimate interests of the author.

The issue of copyright term had extensive airing during the TPPA negotiations. The critical point that was lost in the melee was the confusion for content creators and consumers caused by different terms in different territories. **Harmonisation of © term, as with harmonisation in other sectors captured in trade agreements, provides clarity and certainty for content creators and consumers.** The proposal under the TPPA to phase the term extension in over an 8 year period would have caused 8 years of uncertainty for content users and 8 years of business complication for collective management organisations like CLNZ.

COLLECTIVE MANAGEMENT & LICENSING IN NEW ZEALAND

CLNZ's experience of licensing, drawn from nearly 30 years of licensing in New Zealand and with particular emphasis in the education sector, provides a highly informed view of issues in collective management and in licensing.

Issues that need to be addressed:

1. **Unlicensed copying in schools**

   Not all schools in New Zealand take out the licenses that enable legal copying of copyright works. With efficient licensing available (via NZ School Trustees Assn for text, music and broadcast materials) education exceptions should only apply to uses not covered by licensing schemes (as in the UK Act). CLNZ and the publishers and authors we represent, should not be in a position of having to police school copying. All schools should have equal access while publishers and authors receive fair remuneration.

2. **Legislative support for copying of entire works undermines the market for that work.**

The s 44 provision that enables the copying of a whole work undermines the market for education resources, particularly in the New Zealand schools sector where the market is very small. When conducting surveys of school copying (to enable the distribution of licence fees) CLNZ staff frequently observe copying being done from copies of materials rather than from originals.

3. **The "14 Day Rule" in s 44(6) is difficult for users and licensees to implement**

In addition to being defined in the Act, the rule is reiterated in CLNZ licence agreements. How it is meant to work in teaching practice is raised at CLNZ workshops with tertiary institutions and not easily understood by academic staff. An annual maximum of copying, as recently implemented in the UK, provides more certainty and can be easily coded into copyright management software such as the tools now being used in New Zealand universities.

4. **"Examination" is not defined in the Act**

Use of the word "examination" in s 49 dates from 1994 when the external examinations known as School Certificate, University Entrance and Bursary were in place. CLNZ receives enquiries from educators wanting clarification as to whether the exception applies to internal assessments they are preparing.

5. **Public Lending Right is not fit for purpose for either analog or digital lending**.

As a legitimate and widely-used mechanism for remunerating authors for the making available of their works in libraries, PLR needs to be expanded to cover where author's works are being used in the digital world. It should cover (at an appropriately increased funding level and with an inflation-proofing component) lending by special libraries and education libraries and include audio and digital lending.

6. **Commercial organisations should not have access to exceptions**

The Act does not currently limit exceptions to only non-commercial organisations. This enables organisations that are using copyright materials for commercial purposes to rely on exceptions when they should be licensing and remunerating the content creator for that use.

7. **Dysfunction of the Copyright Tribunal**.

CLNZ's experience of making a reference to the Copyright Tribunal is outlined earlier in this document. We fully support submission of Recorded Music NZ as it relates to the operations of the Copyright Tribunal. In its current form, the Tribunal is not an efficient or effective mechanism for resolving licensing disputes.

8. **The Copyright Tribunal cannot impose interest and penalty payments**

Penalty payments would incentivize parties to progress cases in a timely manner. The ability to award interest on settlements is standard practice and would simply bring the Tribunal in line with other courts processes.

9. **Licensing agencies cannot take infringement actions**

In 2016 a matter of copyright infringement by a New Zealand school teacher was brought to CLNZ's attention. While attempts were made to resolve the matter without using the courts, this was not possible. Although CLNZ was both funding and informing the court action, the case was required to be filed in the name of one of the copyright owners whose works had been infringed. This had significant time and cost implications that delayed the case being filed.

10. **Statutory damages are not available for copyright infringement**

Limiting remedies to an account of profits when the price of individual creative works is often low acts as an incentive for infringers when laws are meant to act as a deterrent.

11. **Safe harbour regime is too broad**

Refer above. Safe Harbour protections should be limited to only those companies that provide "pipe" services

12. **Government does not do enough to educate the public about copyright law**

The burden of educating consumers and creators about copyright should not rest solely on the creative community.

13. **NZ's term of copyright creates complexity in cross-border licensing**.

New Zealand's term of © should be harmonised with those of our trading partners to simplify licensing and access for consumers and content creators. This should be implemented without the planned phase-in in the TPPA legislation that would create 8 years of confusion for all stakeholders.

14. **Collective Management Organisations can't licence orphan works**

Individuals and organisations wanting to licence the use of a work for which they can't locate the copyright owner are prevented from doing so.

15. There is no **formalised legal backing for licensing of published works beyond direct mandates**.

Not having an ECL – Extended Collective Licensing – mechanism in our law means that CMO's cannot offer blanket licenses to (for example) GLAM institutions wanting to undertake mass digitization projects.