

# New Zealand Law Society

## Submission on Television New Zealand Amendment Bill

### Introduction

The New Zealand Law Society (Society) welcomes the opportunity to comment on this Bill. The main purpose of the Bill is to implement the Government's broadcasting policy by replacing the Charter established by the previous government with a more "general set of functions" for Television New Zealand (TVNZ). The most significant aspect of the Bill is the removal of TVNZ's Charter obligations. This submission focuses on Part 4A, the proposed provisions relating to the screening of archived works.

The Society wishes to be heard.

### General

1. Part 4A will have retrospective effect – existing rights of individuals will be removed and replaced by the compensation regime set out in the Bill. As discussed at paragraphs 32 and following below, that compensation could be substantially less than the compensation to which the rights holder might otherwise have been entitled.
2. Any legislation which proposes to remove individual rights should be scrutinised to ensure that the proposed removal is:
  - (a) consistent with New Zealand's obligations under international treaties (a concern in this case – see paragraphs 21, 25 and 33 below), and
  - (b) justified on policy grounds (not raised in any substantial way in this submission).
4. Scrutiny should also extend to the question of whether any proposed compensation for the removal of the rights is fair.
5. The difficulty of being able to find rights holders and obtain their permission to do something not otherwise permitted under the Copyright Act 1994 (Copyright Act) is not unique to the TVNZ archive, and is what copyright licensing schemes and other copyright clearing organisations are set up to do. This is particularly so with "orphan works", i.e. works whose

authors cannot be found, where someone seeking to carry out an otherwise infringing act is willing to pay a royalty to do so, but cannot after a diligent search find the author. While the Bill is a convenient vehicle to implement the scheme for compensation for broadcasting archived works, further consideration should be given to the need for, size of and broader implications of this type of scheme. A better approach might be to formulate a more general policy, that allows someone to do an act, that would otherwise be an infringement of copyright, where after diligent effort they cannot locate the owner of the copyright to obtain permission. Consideration should be given to introducing a wider scheme to provide adequate compensation, while not allowing the copyright owner to ambush the infringer if the infringing act is commercially successful.

6. Section 67 of the Copyright Act allows someone to presume they are not infringing only when they cannot ascertain who the author of a work is and it is reasonable to assume that the copyright has expired or the author must have died more than 50 years ago. For all other orphan works, anyone carrying out an infringing act remains liable to be sued for copyright infringement.
7. The Bill appears to have the effect of deeming everything in the TVNZ archive which is pre-1989 to be subject to the proposed new regime, even a film where TVNZ might know the identity of the various parties who would have rights in the event of a further broadcast. TVNZ would not even have to show that it had made reasonable inquiries to locate such parties. This effect would be inconsistent with s7 of the Copyright Act (meaning of unknown authorship, including "... unknown if it is not possible for a person who wishes to ascertain the identity of the author to do so by reasonable inquiry ..."), and s192 (power of Tribunal to give consent on behalf of a performer where, *inter alia*, the identity or whereabouts of the performer cannot be ascertained by reasonable inquiry).
8. While the Bill addresses this problem it does so only in relation to a small subset of works in one medium.

#### *Recommendation*

9. A more global approach should be taken to address the issue for all types of works. The Bill appears to be an *ad hoc* response to a particular problem in a particular industry. Consideration should be given to introducing a wider scheme to provide adequate compensation in all instances where someone wishes to deal with an orphan work.

## Scope

10. Compensation is being paid for more than a copyright interest. Clause 29C(1) provides that the interests in an archived work may be under contract as well. The recipients are persons with an interest in an archived work. Unless the contracts at the time provided for “residuals”, this is adding a bonus not originally contracted for. It might also be seen as calling into question the assertion that TVNZ is not able to show archived works in their entirety because they cannot locate some right holders.
11. To further complicate the matter, the “archived works” were all made on or before 27 May 1989 (clause 29A), a date earlier than the date the Copyright Act came into force in 1994. Under s14 of Schedule 1 of the Copyright Act, the first ownership of copyright in the archived works is to be determined in accordance with the Copyright Act 1962 (or the Copyright Act 1913 if the archived work was made before 1 April 1963).
12. If the above analysis is undertaken it may prove to be difficult to determine who had a copyright ownership or contractual interest that would be infringed by the broadcasting of archived works and so to identify who comes within the categories in clause 1 of schedule 3. There are potential risks that, by doing so, copyright or contractual interests are created that might not exist under the current legislation.
13. Clause 29D(1) addresses the question of the eligibility of those who may hold relevant copyrights but who did not enter into any contract with the Broadcasting Corporation of New Zealand (BCNZ). It only extinguishes the contractual or copyright rights of a person who comes within the definition of “person with an interest in an archived work”. However clause 29D(1) does extinguish all rights of “persons with an interest in an archived work”. Presumably this would extend to situations where a person agreed to participate in the making of a programme, but for privacy or other non-pecuniary reasons contracted for limitations on the screening that could subsequently occur. Those persons would have their contractual rights extinguished and replaced with (at best, assuming they are eligible) compensation under the compensation regime, even if the interests they were seeking to protect by contract were not pecuniary ones.
14. Clause 29(1) expressly contemplates that a person with an interest in an archived work might have a claim either under a contract or under the Copyright Act, whereas under clause 29I a claimant must show that he or she was engaged under a contract with BCNZ or its predecessor. In most or all cases a copyright owner will have entered into a contract of some sort (licence or assignment of copyright), but the interest-holder’s contract will not necessarily have been with

BCNZ. Some persons may see their rights extinguished by clause 29D(1) without being eligible for compensation under clause 29I.

15. For other persons, unless the contracts at the time provided for “residuals”, the proposed compensation regime might lead to a windfall. For example, if in the 1980s someone had provided a copyright work for inclusion in a film in exchange for a “one-off” payment, with no entitlement to further remuneration dependent upon the number of times the film might be broadcast, the proposed provisions would give that person a bonus not originally contracted for.

#### *Recommendations*

16. The Society recommends that:
- (a) right holder eligibility for compensation should not be restricted to claimants who are able to show engagement under a contract with BCNZ, but should be extended to all persons whose rights are extinguished or detrimentally affected by clause 29D(1), subject to the following subparagraph;
  - (b) the provision should be clarified to prevent claimants obtaining windfall bonuses or benefits, not originally contracted for, at the expense of other legitimate claimants; and
  - (c) those persons who are seeking to protect non-pecuniary interests should also be recognised and adequately protected.

#### **Specific Clauses**

##### ***Clause 29C – Archived works may be screened***

17. Under clause 29C(1)(a)(iv) the copyright licence that is being created applies to archived works screened on “delivery platforms” with which TVNZ enters into an agreement. In clause 5 a “delivery platform” is defined as “any technical method for screening content”. The words “technical method” are a cumbersome way to describe an entity with which TVNZ has entered into an agreement.
18. Clause 29C(2) requires an archived work to be screened “free of charge”. The clause does not specify to whom the screening is to be free of charge, but in line 1 of page 2 of the Explanatory Note, it is specified that the screening should be without charge to the public.

#### *Recommendations*

19. The wording of clause 29C(1)(a)(iv) should be changed to reflect the fact that TVNZ would be entering into an agreement with another entity in relation to, rather than with, a delivery platform.

20. Clause 29C(2) should make it clear that the screening should be without charge to the public.

***Clause 29D – Rights of persons with interest in archived work to cease***

21. Clause 29D(1) abrogates existing rights. It is doubtful whether it accords with New Zealand’s obligations under the Trade-Related Aspects of Intellectual Property Rights agreement (TRIPs). This is because TRIPs incorporates relevant parts of the Berne Convention 1971 (Berne Convention) with which clause 29D(1) arguably does not comply. However, even if the view is taken that this provision does comply with TRIPs, any amounts payable to copyright holders under the Copyright Act should be market rates. Article 13 of TRIPs provides that “members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”
22. Clause 29D(2) creates two different scenarios for persons with an interest in an archived work. These are:
- (a) If the works are screened on a pay-service such as the TVNZ Heartland Channel of Sky TV (Heartland Channel) they are not screened free of charge and therefore existing rights of such persons in archived works continue and such persons may not participate in the scheme being established by this Bill; or
  - (b) If the works are screened on a free to air service as provided in clause 29C(1) then such persons will only be allowed to participate in the scheme created by this Bill.
23. The possibility of these two scenarios calls into question the consistency of the application of the policy behind this Bill. The intention appears to be to allow for the screening of archived works without the risk that to do so would trigger claims for compensation from unidentified persons with interests in those works and, in return, creating a compensation scheme for such persons. But, at present, works are being screened on the Heartland Channel, which would be excluded from the scheme. It is unlikely that this is what is intended.
24. Clause 29D(1) will also have the effect of removing not just economic rights, but also moral rights (if any). It is not entirely clear whether any moral rights will exist in pre-1989 works. In that regard, the effect of clauses 34(1) and (2) of Schedule 1 to the Copyright Act appears to be that the right to be identified and the right to object to derogatory treatment will apply in respect of pre-1994 works, where the author was still alive when the Act came into force. So, for example, moral rights would presumably exist in respect of a musical work composed in the

1960s as long as the composer did not die before the commencement of the Copyright Act in 1994.

25. The rights to be identified and to object to derogatory treatment do not apply to films made before the commencement of the Copyright Act in 1994 (clause 34(2)(b), Schedule 1 of the Act). It may be that the provision excluding pre-1994 Act films from the operation of the moral rights regime is sufficient to obviate the need to deal with moral rights in the Bill. However, arguably if TVNZ were to use the new provisions to broadcast a pre-1989 film that contained a derogatory treatment of the lyrics or music of some copyright song, the new broadcast may itself constitute an additional derogatory treatment of the original copyright work. It is also relevant to note that Article 11 *bis* of the Berne Convention prohibits any legislative provision which would be prejudicial to the moral rights of the author. A copy of Article 11 *bis* and of Article 2 (definition of “literary and artistic works”) is attached for convenient reference.

#### *Recommendations*

26. Clause 29D should be clarified to ensure that there is no conflict with the normal exploitation of any works, and that the provision does not unreasonably prejudice the legitimate interests of right holders. To the greatest extent possible, any amounts payable to copyright owners should be at market rates.
27. This clause should also be reviewed to ensure that the provision does not conflict with New Zealand's obligations under Article 11 *bis* of the Berne Convention.

#### ***Clause 29F – Notices advising that archived work to be screened***

28. Clause 29F(2)(d) provides that a person must apply to register not later than certain dates. That date is set by TVNZ. It is implicit that the date must be after the first screening of the archived work or episode – because the date must be notified at that time – but the only other restriction is that it must not be **more** than a month after the first screening. It is important that TVNZ should not be permitted to impose a closing date for registration which is too early *vis a vis* the screening of the work. Interested parties should be given a fair opportunity to register, which includes gathering the necessary evidence of their eligibility. This is partly addressed by the requirement for public notice to be given by TVNZ 4 months in advance (and by certain limited exceptions for allowing people to apply out of time). However it is likely that certain persons will not know about the proposed screening until it actually happens. In this event, such persons should be guaranteed a proper opportunity to apply for compensation after the screening.

29. Clause 29F(4)(a) provides that the required information must accompany the first screening of the archived work, and if that notice is required to be provided, rights holders should have a reasonable opportunity to react to that particular notice. It would not be reasonable, for example, if TVNZ were to set a date under clause 29F(2)(d) which was only one day after the first screening of the archived work. There is also a workability issue with the fact that the clause appears to allow for multiple screenings of a given archived work, but ties certain deadlines (e.g. for registration, and consequently for determination of entitlements) to the first screening. If there are to be multiple screenings covered by a notice, details should be given, the period should be limited, and claims finally determined only after all screenings have occurred. Alternatively, if what is contemplated is a once and for all time notification, following which the archived work may be screened at any time free of claims extinguished under clause 29D(1), except for compensation calculated immediately after the first screening, that should be recognised and the scheme amended.

*Recommendations*

30. The wording could be improved by altering the first two lines of clause 29F(2)(d) to read: “The date by which a person must register, being the date which is no less than 1 month after the date on which –”.
31. The situation should also be clarified regarding multiple screenings.

***Clause 29G – TVNZ Archived Works Fund***

32. An arbitrary compensation rate of \$300 per half-hour (or part thereof) of broadcasting time is unlikely to be fair in all cases. An arbitrary rate in itself seems incompatible with the concept of fair compensation in every individual case.
33. It is doubtful whether the Bill as presently written complies with New Zealand’s obligations under either the Berne Convention or the TRIPs Agreement (which, at Article 9, incorporates Articles 1 through 21 of the Berne Convention, subject to member states having a discretion to decide whether or not to include the moral rights provisions of Berne). The broadcasting right is dealt with at Article 11 *bis* of the Berne Convention.
34. Under Article 11 *bis* (2) of the Berne Convention, it is a matter for the legislature of each Berne Union country to determine the conditions under which a right holder may exercise his or her exclusive rights in respect of the broadcasting of their works in its territory. The word “conditions” has generally been interpreted by most States as including compulsory licensing regimes. However any compulsory licensing regime must not be prejudicial to the copyright

owner's "right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority".

35. It is unclear whether an arbitrary rate of \$300 per half-hour, fixed in advance in the statute, would comply with the requirement of Article 11 *bis* (2) that an individual author must always be entitled to "equitable remuneration". Nor could the fixing of an arbitrary compensation rate in the legislation itself, comply with the requirement that the remuneration be fixed, absent agreement, by "competent authority". In its context in Article 11 *bis* (2), the expression "competent authority" most likely suggests some tribunal other than the national legislature itself, for example, in respect of performers' rights, the Copyright Tribunal for applications under s192 of the Copyright Act.
36. It might be contended that only the hourly rate will be fixed in the legislation, not the remuneration itself, and that there will be provision for review (the combination of TVNZ and the reviewers arguably constituting a "competent authority" for the purposes of Article 11 *bis* (2) of the Berne Convention). However, it is unlikely that the framers of Article 11 *bis* contemplated that the "equitable remuneration" could be fixed, at least in the first instance, by the prospective licensee itself (in this case, TVNZ). That would be inconsistent with the apparent intention of Article 11 *bis* (2) that there would be some attempt to reach an agreement before recourse was had to the "competent authority".
37. In terms of the mechanics of the proposed scheme, a fund providing \$300 per half-hour of broadcasting will not have much left for compensation after the costs of public notices (clause 29F) and a review committee (clause 29L) are subtracted. For example, if 10 supporting artists had an interest in an archived work, under the formula set out in clause 2 of schedule 3, the artists would be entitled to a pay out of \$5 each for a half-hour screening.

#### *Recommendation*

38. There should be a case-by-case analysis of an appropriate level of compensation for each archived work. Further, TVNZ should not be setting the level of compensation – this task should be undertaken by an independent person or organisation.

#### ***Clause 29I – Registration to participate in scheme***

39. Clause 29I(2)(b) requires evidence that the person was engaged under a contract with BCNZ or its predecessors.

*Recommendation*

40. This requirement should be broader and include, for example, subcontractors who may also be “authors” but who did not contract directly with BCNZ.

**Specific Drafting Recommendations**

*Explanatory Note*

41. The final line of the explanatory note contains a typographical error – Copyrights Act 1994 should be Copyright Act 1994.

*Clause 29N – Determination of application for review*

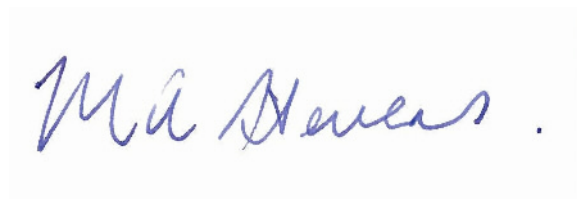
42. There does not seem to be any scope for the award of costs in relation to reviews. This might act as a deterrent for right holders. The amount of compensation is likely to be meagre in any event, and could quickly be exceeded by the cost of pursuing compensation.

*Part 2 Clause 14 – New section 57A inserted*

43. The reference in s57A to “section 4 of the Television New Zealand Act 2003” should be corrected to refer to s29A of that Act, where the term is defined.

**Conclusion**

44. The Society wishes to appear in support of this submission.

A handwritten signature in blue ink that reads "Anne Stevens". The signature is written in a cursive style and is positioned above the typed name and title.

Anne Stevens  
**Vice President**  
30 July 2010

**BERNE CONVENTION FOR THE PROTECTION OF  
LITERARY AND ARTISTIC WORKS (Paris Text 1971)**

---

**Article 11bis**

- (1) Authors of literary and artistic works shall enjoy the exclusive right of authorising:
  - (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
  - (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one;
  - (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.
- (2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.
- (3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organisation by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorised by such legislation.

**Article 2**

- (1) The expression “**literary and artistic works**” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.
- (2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.
- (3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

- (4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.
- (5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.
- (6) The works mentioned in this article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.
- (7) Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.
- (8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.