



**National Council of
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**Submission to the Ministry of Economic Development on the Position Paper:
Digital Technology and the Copyright Act 1994**

The National Council of Women of New Zealand Te Kaunihera Wahine O Aotearoa (NCWNZ) is an umbrella organisation representing 42 nationally organised societies. NCWNZ has 34 branches spread throughout the country to which some 150 organisations are affiliated. NCWNZ also represents a number of individual women.

NCWNZ has a strong interest in maintaining natural justice, access to information and providing support and protection for innovation and new economic development. Consequently, NCWNZ supports the view that review of the Copyright Act is necessary to ensure that current digital technology and future development in the technological field receive the same copyright protection as print and similar communication works. In addition and in particular, NCWNZ supports the need to strike a just balance between protecting and encouraging creators of digital technology and allowing public access to information and technology.

The Position Paper sets out the Ministry of Economic Development's preferred policy on the eight issues relating to Copyright and seeks feedback on several points. Unfortunately, the size of the Position Paper, the specialised nature of the issue and the deadline allowed for submissions have prevented wide canvassing of membership views. Bearing this in mind, the following points are made on each of these issues.

PART 2: the adequacy of existing reproduction rights (Paragraphs in the Position Paper are bracketed)

NCWNZ agrees that the definition of copying, "reproducing or recording a work in any material form", is technologically-neutral but has no objection to the addition of the words "including digital formats" for greater clarity of the phrase "in any material form". NCWNZ does not believe that greater specificity as in the Australian example is desirable at this time (38-39).

NCWNZ agrees with the following proposed MED policies:

- that material form may include storage (40-43),
- that transient copying continue to be included in the broad definition of copying, but with a specific purpose-based exception for transient copying that has no independent economic significance (49),
- that transient copying as reproductions as part of the technical process and copies that are technically required ... by a member of the public to whom a copy of the work is lawfully made available be included as exceptions (50),
- that technical processes be applied generally so that people can store temporarily in RAM for computer programmes or games (51),
- that transient copying should not be excluded altogether from the definition of copying because not all transient copying is automatic or for technical purposes (52).





PART 3: the adequacy of existing communication rights

The Act allows copyright owners the technology-specific communication right of broadcasting or including a work in a cable programme (54). NCWNZ agrees with the following proposed policies;

- that a technology-neutral right of communication including the internet and covering both transmission and the making available of works is in the public interest (61-64). NCWNZ supports making the Act inclusive of new technologies especially those which enhance communication.

Webcasts as works

- that there should be no differentiation between traditional technologies e.g. broadcasting, and new technologies such as the internet (67),
- that webcasts as transmissions should be protected as copyright owners' property,
- that there should be a new technology-neutral category of "communication works" which would encompass broadcasting, cable and other transmissions technologies including webcasting (68).

Cable retransmission of free-to-air broadcasts

- No Comment

PART 4: Internet service provider (ISP) liability

When material being copied is subject to copyright protection, any ISP could be liable for either primary or secondary infringement (74). NCWNZ agrees to the following policies;

- that ISPs be excluded from some liability but that copyright owners may seek injunctive relief in respect of information stored by ISPs (80),
- that ISPs should be defined in the Act and should be defined by the activities they provide rather than on the nature or status of the organisation itself (81-82),
- that MED should define what constitutes ISP infringements and set out exceptions (86)
- that a "constructive knowledge test" i.e. "should have known" should apply. This could include receipt of a notice from the content owner or expert knowledge which a person considered an expert could be expected to have.

PART 5: The need for legal protection for Technological Protection Measures (TPMS)

TPMs are devices for protecting against unauthorised copying or use (95). Section 226 of the Act deals with TPMS (97). Issues include extending the scope of Section 226 to include access control as well as copy control; copyright owners right of action against use of circumvention devices or, as at present, against provision of means of circumvention, exceptions, standard of knowledge required for liability, and categorised as criminal offence v civil offence (100).

NCWNZ supports the following;

- that 226 retain its focus on copy control and not extend to protection against circumvention of TPMS that only control access (106-107) since copyright owners have access to protection through the law e.g. of contract (108),



- that TPM and circumvention devices be defined in the Act in broad terms to encompass new forms of circumvention as yet undetected or invented (111),
- that exceptions be allowed for error correction, interoperability, and encryption research and that liability not exist for permitted acts and when copyright has ended (118-119),
- subjective knowledge tests be retained, rather than objective tests (125-126),
- that civil proceedings only apply because criminal proceedings would not serve the public interest (130).

PART 6: Electronic Rights Management Information (EMRI)

EMRI identifies content protected by copyright and the terms and conditions of use. It can assist copyright owners in tracking copyright infringement and legitimate use of their work (132-138).

MED's preferred policy response is to make provision in the Act to protect against the intentional removal and alteration of EMRI, and the commercial dealing in copyright material where the dealer knows that EMRI has been removed or altered. But MED does not intend to include the tracking functions of EMRI.

While expressing grave concern about a perceived widespread use of infringement NCWNZ agrees;

- that civil remedies apply rather than criminal,
- that subjective knowledge standards apply (146).

PART 7: Non-original databases

The Act provides protection for databases that qualify as sufficiently original "compilations within the definition of a literary work (147).

MED recommends retaining the status quo, on the basis that the low threshold test for originality in NZ provides sufficient protection. NCWNZ supports this policy.

PART 8: Permitted acts and exceptions

This is certainly the most controversial part of copyright law reform since it focuses on the balance between the interests of copyright owners and users (152).

NCWNZ agrees that the existing exceptions should apply to the digital environment (153-156).

Re: Fair Dealing

NCWNZ agrees

- that the application of sections 42 and 43 should be clarified for relevance in the digital environment without compromising the concept of technological neutrality,
- that there is no need to differentiate between existing technologies and the internet (webcasting and new technologies) as regards news reporting,
- that the transient copy of a digital technology need not count as the one copy allowed to students and researchers etc. since this would be administratively cumbersome.

Re: Educational Institutions, Libraries and Archives

Archiving and preservation (169-171).

- that libraries and archives should be able to digitise entire collections for preservation purposes on condition that the digital copies not be made available to the public unless the original work is lost, damaged or at risk.



Digitisation and making available (172-174).

- that educational institutions, libraries and archives be able to make available and communicate copyright material in digital format through onsite terminals to material that is made available by the copyright owner in digital form, but not to allow the digitisation of hard-copy for this purpose,
- that this digital material also be made available through restricted remote access,
- that the relevant sections should also refer to museums.

Interloan

- that libraries and archives should be able to interloan by digital means (177-179)
Many libraries already do this and billing systems should be set up to protect copyright owners.

Caching of websites for educational purposes (180-181)

- that educational institutions should be able to cache web pages for teaching purposes for limited periods.

Distance learning

- that distance learners should be able to access libraries and archives through their teaching institutions with appropriate billing arrangements to protect copyright owners.

Time Shifting i.e. recording for later viewing (184-185).

- that time shifting is included with communication to the public,
- that section 84 is amended so that it applies to all communication works except for communication works available on demand (187).

Format shifting i.e. copying a work from one format to another e.g. taping a sound recording for personal use from a CD one has purchased (189-196).

- that there should be an exception that would allow the owner of a legitimately purchased sound recording to make one copy in each format for his or her own personal use.

New exceptions

- that the two exceptions suggested by MED be included i.e. (1) decompilation of software so that a user can obtain information necessary to create an independent and different programme on condition that the information is not available anywhere else and is not used for any other purpose.
(2) error correction in software where the activity is necessary for lawful use and is not prohibited by a contractual term (200).

PART 9: WIPO Internet Treaties

The WIPO Internet treaties provide owners and producers of phonograms with exclusive rights of distribution, communication, rental, making available, as well as provisions for enforcement and protection (201-204).

MED suggests that the 1994 Copyright Act substantially complies with the WIPO Treaties in the areas on reproduction right, treatment of computer programmes and compilations of data as literary works, distribution right, rental right, term of protection, protection of TPMs, the principle of national treatment and the provisions on enforcement of rights in the areas where rights are currently provided (205). Gaps in compliance may exist in communication and making available, remuneration right for phonogram producers in respect of secondary uses of phonograms and ERMI (206).



MED recommend making any changes to the Act in a way that benefits NZ, whilst enabling our compliance with relevant aspects of the WIPO Internet Treaties. NCWNZ supports careful investigation of costs and benefits with a positive view towards accession to the international treaties.

Conclusion

In conclusion, NCWNZ is most concerned to promote access to information and ease of communication using new technologies because this is in tune with NCWNZ's targeted focus on social cohesion and sustainable development. At the same time NCWNZ is supportive of human creativity and technological expertise which needs to be sustained by the viable economic enterprise of its creators and owners. It is hoped that the review of the Copyright Act 1994 will promote greater public acceptance of intellectual property rights and a greater willingness by users to pay for the use of other's property.

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