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

To the Commerce Select Committee

Introduction

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I request the opportunity to appear before the Committee to speak in support of my submission.

I support the broad intent of the drafters of the Copyright (New Technologies and Performers Rights) Amendment Bill 2006 ("the Bill") in their attempt to balance the public interest in cultural and educational works that have been created using new technologies (in particular in a digital format) with the economic interests of the creators and distributors of these works.

I note, however, that although the Bill purports to update the archiving provisions of the Copyright Act (“the Copyright Act”), it does not acknowledge certain technicalities of either the digital archiving process or of research into that process. I have a particular interest in the archiving provisions of the Bill and confine my comments to the clauses which will have an impact upon the ability to archive digital cultural works.

Key points

- The exception in the Bill for transient reproductions is much needed, but it is not clear that this provision, in its present form, would apply to the digital archiving process (which as explained below, involves making multiple copies of a work).
- The Bill does not expand the definition of “museum” in the Copyright Act. An expansion of the definition is desirable, and would allow other non-profit institutions to archive digital cultural material.
- The proposed provisions relating to TPM spoiling devices are unduly restrictive.
- The Bill makes no provision for the archiving of “orphan” works that were created digitally in the 1970s and 1980s, whose copyright owners cannot be located. These works are fragile and already deteriorating.

Context

The 2003 UNESCO “Charter on the Preservation of the Digital Heritage” recommends the preservation of national digital culture and suggests that priority should be given to

the earliest digital works which, without appropriate changes to the legal environment, are likely to become obsolete before they can be preserved.

There are strong historical links between copyright law and traditional published cultural heritage. The earliest copyright legislation required the legal deposit of copies of a published work in prescribed libraries as a condition for a grant of copyright in that work. In the same way as modern copyright law has been extended to cover many other kinds of works, there are calls for the compulsory deposit legislation to be extended to other kinds of creative works.

In addition, many commentators believe that the digital environment offers an opportunity for the democratisation of culture. Digital cultural works differ from traditional cultural works (many of which are currently retained in private collections and unavailable for public viewing). Digital works can be retained in a private collection at the same time as identical versions are made available in a public archive.

This suggests the environment for digital heritage should not follow the typical institutional framework for traditional culture preservation in which official “gatekeepers” of a nation’s cultural values are delegated the task of selecting and preserving “culture” according to their own particular perspectives. Instead a more inclusive legal framework should be developed for digital heritage that facilitates the involvement of a broader section of the community.

There are two ways of establishing an archive of cultural works:

1. Reliance upon a legal obligation for publishers to deposit one or more copies of a published work in a prescribed library or archive. In New Zealand, the National Library is the prescribed library and archive, and is supported by legal deposit provisions and an exception from infringement of copyright in the National Library of New Zealand (*Te Puna Mātauranga o Aotearoa*) Act 2003 (the National Library Act).
2. Reliance upon purchase and donation of selected works. This is the method relied upon by other libraries and archives in New Zealand. These libraries and archives rely upon the exceptions for archiving purposes contained in the Copyright Act.

The legal deposit provisions in the National Library Act were extended to electronic documents by the National Library Requirement (Electronic Documents) Notice 2006 which came into force on 12 October 2006.

While I support this development, I contend that it is not sufficient to ensure that a complete archive of New Zealand's digital cultural works can be created and available for all historical and cultural research purposes.

My submission on the Bill addresses the following fundamental issues:

- Digital works created in New Zealand prior to 12 October 2006 are not subject to the new legal deposit provisions. Early digital works may be acquired by the National Library for its collections by means such as donation or purchase, but

they will not be “deposited documents” for the purposes of the National Library Act and the exceptions to copyright infringement in the National Library Act will not apply. The National Library must therefore either obtain the consents of the copyright owners or must rely upon appropriate exceptions to copyright infringement in the Copyright Act for archiving purposes.

- The opportunity for democratisation of culture that is offered by the digital environment suggests that not-for-profit institutions should be encouraged to archive digital cultural works in publicly available archival collections. Such institutions will obtain their collections by donation or purchase since they are not party to the legal deposit legislation. They must obtain the consents of the copyright owners to archiving or must rely upon appropriate exceptions to copyright infringement in the Copyright Act for archiving purposes.

I wish to make the following specific comments:

Clauses 22 and 23

I agree with the general intent of these clauses. In their present form however it is not clear whether they are intended to embrace the technical requirements of research involving digital archiving (i.e. fair dealing for research purposes under s 43 of the Copyright Act), or the digital archiving process itself (i.e. copying by librarians or archivists to replace copies of works under s 55 of the Copyright Act).

Digital preservation (and related research) for cultural heritage purposes is a complex technical process, which involves an ongoing process of copying, adaptation and accessibility. Multiple copies are required for emulation, migration and regular testing

of the archived copy. In addition digital archiving guidelines emphasise as critical the need to make back-up copies of digital material and store these copies at different locations.

The multiple copies made during the archiving process are not necessarily “transient”, nor are they necessarily of “no independent economic significance” (although they could conceivably be described as “incidental” to the archiving process).

It is not clear whether the exception contained in Clauses 22 and 23 for making transient or incidental reproductions is intended to apply to these processes. The Explanatory Note to the Bill describes the purpose of the exemption as being “for example, when browsing websites on the Internet”. This is very different from archiving and indeed the exemption is not further referred to within the archiving provisions of the Bill.

I also note the term “lawful dealing in” in new s 43A seems to be incorrect. Neither the Copyright Act nor the Bill contains provisions that would permit unauthorised but “lawful dealing in” any copyright work.

I therefore support the alternative version of new s 43A provided in the submission of InternetNZ. However, I suggest that the term “lawful dealing in” be replaced with the term “lawful communication of”.

Clause 29

The definition of “museum” in the Copyright Act should be extended to allow other non-profit institutions to archive digital material. The 2003 Cabinet Paper setting out the Ministerial recommendations for the Bill recommended that the Bill extend the Copyright Act’s application to “museums to the extent they carry out archiving functions”. This recommendation has not been adopted, possibly on the assumption that museums are already included in the definition of “Archive” in section 50(1)(b) of the Copyright Act.

Section 50(1)(b) of the Copyright Act provides that an archive includes an “approved repository within the meaning of section 4 of the Public Records Act 2005”. In effect such a repository is a body that is authorised to archive public official records.

I consider that this narrow definition of “museum” is not satisfactory. In contrast, for example, the dictionary definition of “museum” is much broader, *viz*: “a building used for storing and exhibiting objects of historical, scientific and cultural interest”. I suggest that Clause 29 should insert a specific extension to extend the application of the archiving provisions to museums and further that the term should include all not-for-profit repositories of digital cultural works.

Clause 34

Clause 34, which amends s 55, does not adequately address the complex technical requirements of digitally archiving items that were “born digital”. In particular, there is no recognition of the fact that the digital archiving process involves making multiple copies of the original work (see above).

I suggest a specific reference confirming the applicability of new s 43A to the archiving process be inserted in new s 55.

Clause 36

Clause 36 allows archiving institutions to provide onsite and remote access to material they receive in digital form (that is there is no right to digitise print works for this purpose), through on-site terminals. Remote access will be permitted to authenticated users, but only to materials in “read-only” form that cannot be copied.

It is not clear whether Cl 36 will allow, for instance, a video game that is part of the collection of a prescribed library or an archive to be accessed and played in its original format (since this would require emulation for many games whose original platforms have become obsolete).

Clause 89

This clause seeks to provide assurance to producers of digital works that they may use physical measures in the form of technological protection measures (TPM) to prevent certain uses of the work. As such, it has the potential to shift the balance between the public interest in creative works and the economic interests of producers and creators which the Ministry has declared it is endeavouring to uphold. This is made very clear in the somewhat contradictory statement contained in the definition of a TPM in new s 226, viz: “.... to prevent or inhibit the **unauthorised exercise** of any of the **rights** conferred by this Act”.

For this reason, any such assurance made to the producers of digital works, who choose to use TPMs should be strictly limited.

Ideally, clause 89 should be deleted and current s 226 of the Copyright Act repealed, as suggested by Internet NZ in its submission to this Bill.

If, however, a TPM regime is to be implemented, then I make the following comments and suggestions:

- The term “TPM spoiling device” is poorly chosen and should be replaced with a less semantically-charged term, such as “TPM circumvention device”.
- I support InternetNZ’s submission that a subjective element of intention or guilty knowledge should be present if criminal liability may result from an activity such as that prescribed in new s 226A(1) and s 226A(2)(b).
- The prohibition against publication of information contained in s 2269A(2) is contrary to s 14 of the New Zealand Bill of Rights Act 1990. It cannot be considered to be a justifiable limitation upon that provision and should, therefore, be deleted.
- New s 226D(1) declares that permitted acts may not be restricted or prevented by the issuer of a TPM. There is no definition of “permitted acts” but it is assumed that this term includes all activities described in Part III of the Copyright Act (“Acts Permitted in Relation to Copyright Works”). New s 226D(2) defines the

categories of “qualified person” and in effect restricts the sale of TPM spoiling devices to such persons. This is unsatisfactory and elitist.

- New s 226E sets out to assist a person who is not “a qualified person” and who wishes to exercise a permitted act. However such a person must first apply to the copyright owner or his licensee for “assistance” (undefined). If such assistance is not forthcoming (but apparently not if it is forthcoming but, for example, an exorbitant charge for such assistance is made, or undue delay is experienced) the person may engage a qualified person to assist with the circumvention of the TPM.
- There is no limitation placed upon the sum that might be charged by either the qualified person or the copyright owner or licensee who has been requested, for instance, to assist researchers and students under the fair dealing provision in s 43. These provisions place an extraordinary amount of power in the hands of copyright owners and their licensees, as well as, one assumes, the issuers of TPM works, at the expense of the public good side of the traditional copyright balance. They have the potential to increase markedly the costs of research and study in New Zealand and they will also create an elite body of persons who are able to make use of the permitted acts provisions of the Copyright Act.
- The copyright owners and the issuers of TPM works are adequately protected by new s 226A(amended as suggested above) and new s 226B.
- I suggest new s 226D be amended by removing all reference to “qualified person” and that new s 226C and s 226E be deleted.

“Orphan Works”

These are early digital works from the 1970s or 1980s which are in danger of deterioration and which should ideally be archived for cultural purposes.

They are likely to remain copyright for many years, but the owners of the copyright are often very difficult to trace. Sometimes this will be because a corporate copyright owner has been struck off the Companies Register for various reasons and there is no clear record of an assignment of the corporate copyrights. Sometimes it will be because individuals have moved location or changed their names.

I suggest, there are the following possibilities for the Bill to address the problem of orphan works:

1. A prescribed form of notice that would be addressed to the copyright owners of specific digital works who have not been traced. The notice could be drafted along similar lines to the “prescribed notice” for the publication of old unpublished works (although not sound recordings or cinematographic films) in the Copyright Regulations 1969 (Cth) reg 5. Provided a notice addressed to the copyright owners of each digital work was published for a certain prescribed number of times in national newspapers and no response was received from a copyright owner, this would be sufficient to prevent the archiving of the digital work from being an infringement of copyright.
2. A body such as the Copyright Tribunal could be authorised to grant a statutory licence to reproduce copyright works for not-for profit archival purposes,

provided a potential licensee satisfies the Tribunal that efforts to locate copyright owners have proved futile. The Canadian Copyright Act s 77 allows an applicant to apply to its Copyright Board "to obtain a licence to use a published work, a fixation of a performance performance, a published sound recording, or a fixation of a communication signal.... [if] the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located." In return for the licence, the Act allows the copyright owner to collect royalties as a civil right.