ALAI Congress 2019 Managing Copyright

National Report: New Zealand

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1. General Overview of Collective Management

New Zealand's Copyright Act 1994 is largely based on relevant provisions of the United Kingdom's Copyright, Designs and Patents Act 1988. This emulation includes Part 8 'Copyright licensing' which follows, with minor exceptions, Chapter VII of the United Kingdom legislation. The similarity of the two Acts means that United Kingdom court decisions are influential on the few cases that Part 8 and its predecessors have generated.[1]

Copyright licences in New Zealand are voluntary. The legislation contemplates different types of licensing scheme, notably, a scheme operated by a licensing body (CMO) relating to the works of more than one author.[2]

The Copyright Tribunal is a non-departmental public body, sponsored by the Ministry of Business, Innovation and Employment ('MBIE'), which has limited jurisdiction to review proposed or existing copyright licences.[3] A proposal to abolish the Copyright Tribunal because of the few decisions it makes was not taken up because of its highly specialist function and member expertise.[4]

1.1 Can CMOs be described as monopolies in New Zealand?

New Zealand has a highly liberalised economy but, being a geographically isolated country of fewer than 4.8 million people, natural monopolies are not unusual. Restrictive trade practices are closely monitored by the Commerce Commission which, in terms of the Commerce Act

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1 See, for example, *Trustpower Ltd and Public Relations Institute of New Zealand v The New Zealand Press Association* [2005] NZCopyT 1 (27 July 2005) and *Working Men's Club and Institutes Union Ltd v Performing Rights Society* [1992] RPC 227.

2 These schemes are expected to represent a diversity of interests. See *Saturn Communications Ltd v Sky Network Television Ltd* (Copyright Tribunal, Wellington, CT1/97, 4 September 1997).

3 See *The New Zealand Press Assn v Trustpower Ltd* (HC Wellington, CIV 2005-485-1695, 27 March 2006, MacKenzie J).

4 See Law Commission, *Tribunals in New Zealand* (NZLC IP 6, Wellington, 2008).

1986, has wide-ranging powers to counter monopolistic behaviour, notably practices that may substantially lessen competition in a market.[5]

The structure of Part 8 of the Copyright Act 1994 indicates a legislative expectation of a division of copyright collection between CMOs that cover different areas of copyright (literary, dramatic, musical, artistic works and typographical arrangements of published editions by or on behalf of educational establishments).[6] And so, while there is no dominant CMO across copyright in general, specialist CMOs serve particular sectors.[7]

1.2 Does the New Zealand system differentiate voluntary, extended (if any) and mandatory collective management? Which rights are managed under which regime?

Traditional licence schemes, under which a CMO represents more than one rightholder in a usual commercial context, are voluntary in New Zealand. In restricted circumstances, which approach use-through-necessity (copying by librarians for collections of other libraries,[8] use of copyright material for services of the Crown,[9] and recording by media monitors[10]) licences may be described as mandatory, inasmuch as users must pay the rightholder equitable remuneration for use.[11] Such arrangements do not necessarily involve a CMO.

1.3 *Is competition between CMOs permitted in New Zealand? How often and in which fields may competition occur?*

CMO competition is permitted in New Zealand but, in practice, a specialist CMO serves a particular segment of the market.[12] The Copyright Tribunal may review licensing agreements but does not have the power to regulate the CMO sector.

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5 Competition Act 1986, s 27.

6 Copyright Act 1994, s 148(d)(i).

7 For example, Screenrights is the trans-Tasman licensing body for general screen content but Christian Video Licensing International New Zealand licenses video to churches in New Zealand.

8 Copyright Act 1994, s 54.

9 Copyright Act 1994, s 63.

10 Copyright Act 1994, s 91.

11 Copyright Act 1994, s 168.

12 In addition to Screenrights and Christian Video Licensing International New Zealand, Copyright Licensing New Zealand ('CLNZ') provide licences for the reproduction of extracts from books, journals and periodicals; the Print Media Copyright Agency ('PMCA') provides licences to organisations that

1.4 *How is extended (if any) and mandatory collective management regulated and applied where, for the management of a given right, there are more than one CMO?*

There is no legal provision for extended or mandatory licensing schemes in New Zealand, other than the use-through-necessity noted in 1.2.

1.5 *Is the collective licensing of rights conducted by non-profit CMOs or a different type of agency or entity, or by a state agency?*

There is no state agency involvement or oversight of licensing schemes in New Zealand. (The role of the Copyright Tribunal to review on reasonableness grounds – if requested by a party to a licensing agreement – might be considered a form of regulation.[13]) CMOs are not required to be constituted in a particular way. They may, for example, be for-profit or not-for-profit companies, not-for profit joint ventures or incorporated societies. Regulators of the particular type of entity (if any) oversee compliance with the founding statute. Generally, regulation of enterprise in New Zealand is light-handed.

1.6 *Are CMOs obliged to contribute to cultural development of society? If so, in which areas and how is the cultural support implemented? Is the creation of such funds and their allocation limited by law?*

CMOs are governed by their founding statutes, internal governance rules and the general law. There is no common law or statutory requirement to operate a cultural fund. Some CMOs do operate cultural funds or sponsor awards but these initiatives appear to be in the nature of marketing exercises.

2. *CMOs and Authors*

2.1 Do authors have a legal right to be represented? To become members? If they are rejected, what kind of remedy do they have at their disposal?

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wish to use articles appearing in newspapers and magazines, including electronic publications; OneMusic, the licensing brand for a joint initiative between APRA AMCOS and Recorded Music NZ, licenses music; Playmarket licenses performance of plays; Copyright Agency collects copyright on behalf of visual artists; and Christian Copyright Licensing International ('CCLI') (New Zealand Christian music and media).

13 See *Copyright Licensing Ltd v University of Auckland* [2015] NZCA 123 at [69].

Author representation by a CMO is voluntary and governed by the law of contract, which, in New Zealand is derived from English common law.[14]

2.2 How does the CMO resolve a conflict between rightholders in the event of a "double claim"? Are the rightholders referred to court or is ADR available?

There is no specific procedure for resolving any such disputes which lie beyond the jurisdiction of the Copyright Tribunal.

2.3 How can authors participate in the activities of a CMO. Under what circumstances can they be elected to the management or controlling boards? Are there pre-conditions, such as minimal amount of remuneration from the CMO to be elected.

Any author participation in the governance of a CMO would be determined by the internal governance rules of the CMO or by contract between author and CMO. The internal governance rules of an incorporated society, such ad Playmarket, are publicly available online but it is not always possible to ascertain the full constitution.

2.4 How is remuneration distributed among members? How can authors intervene in the process of the formulation of distribution schemes? In which phases of the collecting process are the fees taxed and by whom?

No specific income tax provisions apply to royalty payments to New Zealand resident copyright rightholders. If paid to a non-resident, royalties are classed as non-resident passive income and are subject to non-resident withholding tax at a rate of 15%, unless reduced by a double taxation agreement.[15] A person, whose taxable supplies exceed NZ$60,000 a year, must charge goods and services tax (a comprehensive value-added tax).[16] A CMO would collect the tax on behalf of the rightholder, in an agency capacity.

2.5 How does the law or legal practice reflect the will of the author to grant licences individually? Can a user obtain a licence from the author? Are such direct licences null and void, or are they valid while the user still pays remuneration to the CMO?

No statutory rules govern the situation of a rightholder who enters into a licensing agreement and then seeks to license directly. The usual rules of contract would apply. Restraints of trade

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14 See English Laws Act 1858.

15 See generally Income Tax Act 2007.

16 See generally Goods and Services Tax Act 1985.

are void at common law but are enforceable if reasonable. We have no case law to guide in this regard.

3. CMOs and Users

3.1 How does New Zealand prescribe private copying remuneration? Is the general principle of freedom of contract respected in this area or is the size of the private copying levy stipulated by legislation?

Freedom of contract is the fundamental principle but, if requested by a party to proposed or existing licensing agreement, the Copyright Tribunal may review on reasonability grounds.

3.2 Has there been any attempts in New Zealand to set private copying levies collected by CMOs etc in the form of a flat fee or special tax?

CMOs may negotiate as they wish but New Zealand governments seek to maintain an uncluttered tax system, and so would avoid special taxes.

3.3 How are tariffs set? What are the statutory criteria for the tariffs? Do they require approval of a regulatory authority? How can they be contested by users – by general courts, by special ADR procedure or specialised tribunal?

No statutory criteria apply to tariffs, and no approval by a regulator is required. However, a party to a proposed or existing licensing agreement may refer it to the Copyright Tribunal to assess its reasonableness. When determining a scheme's reasonableness, the Copyright Tribunal must take into account: 'the availability of other schemes, or the granting of other licences, to other persons in similar circumstances; and … the terms of those schemes or licences'. The aim here is to ensure 'that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person.'[17]

Specific criteria apply to licences: for reprographic copying,[18] for educational establishments in respect of works included in communication works,[19] to reflect conditions imposed by

[17] Copyright Act 1994, s 161.

[18] Copyright Act 1994, s 162

[19] Copyright Act 1994, s 163

promoters of events,[20] to reflect payments in respect of underlying rights,[21] and in respect of works included in retransmissions.[22]

The Copyright Tribunal may set the rate of remuneration for use-through-necessity identified in 1.2 above. While the title to the relevant section indicates that the remuneration set should be equitable, the substantive provision requires the Copyright Tribunal to make an order that it considers reasonable in the circumstances.[23]

A general right of appeal lies to the High Court from a decision of the Copyright Tribunal.

3.4 Does New Zealand competition law recognise abuse of dominant position of a CMO? Are there any examples of a CMO being held responsible for the distortion of competition?

Section 45 of the Commerce Act 1986 provides a broad exception for intellectual property rights. While the key anti-abuse of market power provision (section 36) applies to intellectual property rights, 'a person does not take advantage of a substantial degree of power in a market by reason only that the person seeks to enforce a statutory intellectual property right'.[24] MBIE has recommended that the intellectual property exception in section 45 should be repealed.[25] There is no New Zealand case law on the provision. Nevertheless, MBIE's view is that New Zealand's competition law should be consistent with that of Australia, with which, New Zealand participates in a Single Economic Market ('SEM').[26] Australia intends to repeal its similar intellectual property exception.

3.5 Transparency of tariffs

Licences are private arrangements. No statutory transparency rules apply.

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20 Copyright Act 1994, s 164

21 Copyright Act 1994, s 165

22 Copyright Act 1994, s 166

23 Copyright Act 1994, s 168(2)

24 Commerce Act 1986, s 36(3).

25 MBIE, *Discussion Paper: Review of Section of the Commerce Act and other matters* (Wellington, January 2019).

26 SEM is an ongoing process. Australian and New Zealand copyright and neighbouring rights legislation, while having a common ancestor in the Imperial Copyright Act 1911 and reflecting shared treaty obligations, manifest notable differences.