

11th March, 2005

The Secretary
House of Representatives Legal and
Constitutional Affairs Committee
House of Representatives
CANBERRA ACT 2600

Dear Sir/Madam

RE: INQUIRY INTO HARMONISATION OF LEGAL SYSTEMS

I am writing with regard to the respective copyright legislation in Australia and New Zealand.

Introduction

1. Viscopy is a copyright collecting society for the visual arts in Australia and New Zealand, owned by 5024 visual authors. Viscopy is a non profit company that represents rights for fine artists, illustrators, cartoonists, photographers, crafts workers, sculptors and architects. We represent the members of the New Zealand peak body for visual artists, Artists Alliance.
2. Viscopy is a member of the International Confederation of Societies of Authors and Composers (CISAC) and an associate member of the International Reprographic Rights Organisation (IFRRO), both global bodies for copyright collecting societies closely linked to the World Intellectual Property Organisation (WIPO).
3. Viscopy membership is free, and we represent two different sets of rights for members.
4. Primary rights are represented for 60% of Viscopy membership, which includes the direct licensing of images.
5. Statutory income from Government and Educational use is received on behalf of 96% Viscopy members. The remaining 4% are represented by other collecting societies for statutory rights only.
6. While Viscopy members can receive statutory income in Australia, this income is collected by the two collecting societies declared for these rights under the *Copyright Act 1968*, the Copyright Agency Limited and Screenrights. Viscopy members receive income from both these collecting societies through Viscopy.

7. Over 40% of Viscopy members are Aboriginal and Torres Strait Islander artists. We work closely, in addition, with Maoriarts.
8. In addition to managing the rights of our members and collecting royalty income for them, Viscopy provides services to members including educational services, information and non legal advice, infringement services where their works are infringed, and moral rights services.
9. Viscopy provides licensing services for our licensees which include auction houses, commercial galleries, public art galleries, manufacturers, publishers and other users of primary licensing artworks such as retail.
10. Viscopy operates in Australia under the accountability mechanisms provided by a voluntary Code of Conduct, carried out annually by Justice Burchett QC.
11. As Viscopy is a small organisation of 5 staff members, we have been unable to afford physical expansion into New Zealand, although we have a medium term plan, should finance be obtained, to start a one person subsidiary office in New Zealand. We have retained legal advisers in New Zealand to assist with the different copyright legislation.

Arts Law/ Copyright Council Services

12. Where legal advice is required for visual artist members in Australia, Viscopy works with Arts Law, the Australian Copyright Council and pro bono lawyers to ensure our members have representation. We also have developed relationships with the Australian Competition and Consumer Commission concerning imbalance of market power and invalid contracts (for instance our indigenous artists speak 38 languages and many in regional areas do not have written comprehension of legal English).
13. Viscopy notes the absence of free Arts Law services in New Zealand, despite a comprehensive recommendation for these services in an independent report carried out last year for the New Zealand Government by the Wellington based legal firm of Chapman Tripp. New Zealand visual artist members typically consult free community based lawyers who are ill equipped to deal with copyright and intellectual property law.
14. In addition Viscopy notes that the Copyright Council of New Zealand is an industry based association, where collecting societies, publishing and creator bodies are members. It is not a body like the Australian Copyright Council, staffed by expert lawyers, whose function is to

provide copyright information to the public, including licensees and authors of creative works.

15. The absence of Arts Law and Copyright Council services of the Australian type has created a market in New Zealand where there is no resource for the general public or creators to obtain legal copyright information. This has resulted in a market which tends to favour those licensees who are substantial enough to afford real cost legal advice, over small licensees, authors and the general public, who generally are unable to afford such legal services at market rates of cost.

Role of Copyright in International Trade

16. With the visualisation of the internet, works of visual copyright as commodities are of increasing importance to the global economy.
17. Viscopy has reciprocal licensing affiliation agreements with visual arts collecting societies in 42 countries.
18. This affords the artworks of members some measure of protection against infringement and a global collection system for royalties, when works are licensed in other countries.
19. Altogether the system, run by global body CISAC, which is affiliated with the World Intellectual Property Organisation, contains the works of over 250,000 visual artists.
20. Viscopy estimates that the combined visual artist derived component of the economies of Australia and New Zealand is in excess of \$400,000,000 per annum. This figure includes all visual artists (whether or not they are a member of Viscopy), and includes primary sales of fine art, resale, illustrations for publishing, design and reproductions for manufacturing, plans for architecture, town planning, sculpture, cartoons, drawings, photography, engravings and other miscellaneous contributions of visual artists, as defined under respective copyright legislation.
21. It is clear from the income of visual artists in New Zealand that they do not always share in the revenue their work creates. While there are additional issues such as market power involved, visual artists in New Zealand have less access to copyright protections because of key sections in the *New Zealand Copyright Act 1994*. It is the view of Viscopy that the lack of access both to copyright itself and affordable public legal services, has led to a situation where visual authors in New Zealand are not offered the same protections as their fellow artists in Australia or the United Kingdom.
22. There is a broad perception in New Zealand that visual artists are too dependent upon welfare income, through work for the dole initiatives

such as PACE. Though PACE is a worthy initiative, it is Viscopy's view that the current legislation prevents New Zealand artists from exploiting the royalty income inherent in their work, which would enable further autonomy for visual artists.

Copyright Laws

23. Australia and New Zealand are signatories to the Berne Convention. Section 9 of the Berne Convention states: "Authors of artistic works shall have the exclusive right of authorizing the reproduction of these works".
24. Section 35 of the Australian *Copyright Act 1968* is the equivalent section of this provision.
25. The *New Zealand Copyright Act 1994* differs from the Australian, and the United Kingdom copyright legislation in several important respects:
- a) The equivalent of Crown copyright is in the public domain in New Zealand, similar to the approach taken in the United States. This has significance for many public commissions of visual artworks in New Zealand.
 - b) The *New Zealand Copyright Act 1994* has not, (unlike the other Crown law based Copyright Acts), revised the section which awards the copyright of commissioned works to the commissioner.

Section 21(4) Where—

- (a) A person commissions, pays or agrees to pay for the taking of a photograph, the making of a computer program, painting, drawing, map, chart, plan, engraving, model, sculpture, film or sound recording; and
- (b) The work is made in pursuance of that commission, --

That person is the first owner of any copyright in the work.
New Zealand Copyright Act 1994

Effect of the New Zealand Copyright Legislation for Visual Authors

26. This section leaves New Zealand visual artists in a position where:

They cannot collect royalties on works created under commission;

They cannot protect the works created under commission from infringement or piracy either at law in New Zealand or internationally, when infringements occur beyond domestic borders;

They cannot effectively enforce moral rights over commissioned creative works;

They are in a position of dependence upon the commissioners of their works, including rights owners such as publishers, manufacturers, business, government (and finally the tax payer as the Crown copyright is in the public domain);

They have a weaker market position with respect to the collection of royalties on non commissioned works to which they are currently entitled;

Therefore, the capacity for Viscopy to provide the same services for our New Zealand members is compromised.

27. A recent example brought to our attention was the works of Maori visual artists, currently heavily promoted in the United States, which are unable to be protected under copyright law in the US because they are not copyrighted in their domestic territory of New Zealand, given they were produced under commission. Similar impacts have been observed concerning the sale of New Zealand commissioned visual artworks in Australia.
28. Because the New Zealand “commissioning rule” itself favours an imbalance of market power, visual artists in that country are dependent upon Intellectual Property provisions to defend their work.
29. Viscopy would argue that as Intellectual Property and trademark law was not designed to make up for a deficiency in the copyright legislation. A shorter protection is provided for works, one which has to be renewed.
30. Large commissioners in New Zealand typically have more access to the law than small licensees or creators. However many works of visual authorship are extant prior to use, so there are still a proportion of non commission situations where royalties can be derived for the visual author. Viscopy continues to follow up these matters for our members.

31. Viscopy has sought advice from all our international affiliates in Crown law countries with regard to the impact of the commissioning rule in New Zealand, the better to inform our submission to LACA and the FTA process with New Zealand.
32. Canada, like Australia, has updated the legislation over time and followed the lead of the UK.

UK – Designers and Artists Copyright Society (DACs)

Our UK affiliate, DACs's legal adviser emails as follows:

“Overall I was astounded that they have such archaic rules in New Zealand – their commissioning rule covers virtually everything. UK law was never that onerous, even in the nineteenth century.

Of course, as with Australia, the commissioner under our current section is free to negotiate an assignment under contract with the artist, but this option is not a principle of the *UK Copyright, Design and Patents Act 1988* and visual authors are free to engage lawyers to draft acceptable contracts in that event. If this is not the case, and assignment of rights is automatic, how can a visual author be paid for copyright assignment?

UK Commissioning Provisions - Historical

Under UK law the author of an original artwork has always been the first owner of copyright, subject to certain exceptions. Following the *Copyright Act 1911* the scope of these exceptions was limited to commissioned portraits, engravings and photographs, though this was subject to any agreement to the contrary. The *Copyright Act 1956* duplicated these provisions which were in operation until the passing of the *Copyright, Design and Patents Act 1988*, which now applies to works made on or after 1st August 1989.

This current provision under the latter act is that copyright in any form of commissioned artwork will remain with the author, unless the author elects to assign these rights to a commissioner by contract. Essentially it is up to the visual author to make their own arrangements. It is not possible for New Zealand to use the current UK provisions as a basis for their position.

Basis of the New Zealand Commissioning Provisions

The relevant, section of the UK *Copyright Act 1956*, section 4, duplicated the 1911 principle of commissions, and is where the New Zealand *Copyright Act 1994* appears to draw from. This section deals with the ownership of copyright in literary, dramatic, musical and artistic works. Most of it deals with employment situations and works made specifically for newspaper employers.

Specifically section 4(3) reads:

**4 (3) Subject to the preceding subsection, where a person commissions the taking of a photograph, or the painting or drawing of a portrait, or the making of an engraving, and pays for it or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, the person who so commissioned the work shall be entitled to any copyright subsisting therein".
UK Copyright Act 1956".**

33. In summary, the UK legal advisor to DACS feels that while the international Crown law focus has developed to ensure a balance between the interests of authors and copyright owners, by ensuring authors are remunerated with royalty income for their works, New Zealand appears, in contrast, to have extended the application of the commissioning rule (for instance to include the making of a computer program), rather than reducing it, over time.
34. The approach to commissioning and the public domain approach to Crown law give the New Zealand legislation two major aspects that are complex with regard to harmonising arrangements with Australia.
35. While Viscopy has an appreciation of how these components have developed in an economy the size of New Zealand, we believe it is possible for the New Zealand Government to sustain the creative industries of New Zealand without doing this at the expense of the smaller licensees and creators of New Zealand.
36. Viscopy urges the Inquiry into the Harmonisation of Legal Systems to recommend that the commissioning rule, as contained in section 21(4) of the *New Zealand Copyright Act 1994*, be urgently updated in accordance with the concepts contained in the United Kingdom *Copyright, Design and Patents Act 1988*, if the *United Kingdom Copyright Act 1911* contained the original justification of the principle.
37. This revision will enable New Zealand authors, and particularly visual authors, to obtain a higher level of protection, service and income from their domestic legislation.
38. Viscopy also believes that the provision of Arts Law services in New Zealand would benefit the entire copyright sector and greatly inform the general public, as well as licensees and creators.

I would be very pleased to answer any questions on this matter, should it prove to be of interest to LACA.

Best regards

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CEO, Viscopy