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ARCHIVES, COPYRIGHT AND FILM

An analysis of copyright for film archives

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I ABSTRACT

This paper will present research and interpretation on two areas of New Zealand copyright law. Firstly, it will explain the ways that film has been protected by copyright in New Zealand. Secondly, it will illustrate the development of the rights gained by archives under copyright legislation. It will then address the issues and considerations that arise or occur when an organisation archives film. It is hoped that issues raised in this paper will be seriously considered when future legislative changes are made to the Copyright Act 1994.

This research has been undertaken with the knowledge and support of the New Zealand Film Archive (NZFA) and that archive provides a focus for much of this paper. The findings of this research will have most relevance to archives that collect film and moving image materials. However, the research is also likely to have value for any archive that focuses on archiving a specific form of works (such as film or sound recordings) as well as other archives.

Very little legal research has been conducted on this subject. Even then, such commentary usually focuses primarily on broadcasting, only mentioning archives in passing. Much can be said in social and cultural terms, about copyright law and its application to archives. However, it should be noted that the intention of this paper is to present legal issues that predominantly arise from the Copyright Act 1994.

This research has been undertaken to fulfil requirements of an LLM research paper. As stated it attempts to look at the junction where archives and film copyright meet. In that respect this paper deals with a broad range of issues that spring directly from copyright legislation. However, some attention will be placed on the problems encountered when archives seek to preserve and therefore have some control over Taonga Maori.

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The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 12,700 words.

II INTRODUCTION

This paper will outline and examine the junction between copyright in film and archives that collect, preserve and provide access to those films. The law of copyright in New Zealand is set out in the Copyright Act 1994. Copyright gives the author of a work the power to control the reproduction and dissemination of his or her creation. The fundamental goal of copyright is to prevent copying of works and to thereby allow the author to benefit from those works. To achieve this, copyright provides the author of a work an exclusive right to control the exploitation of the work. Copying, using or exploiting the work by anyone other than the author is restricted. Copyright is treated in the same way as a personal or movable property.¹ The author of a work may sell or assign copyright or grant a licence for limited use of the copyright in that work. Without such an agreement in place any use or exploitation of the work is likely to infringe the copyright.

The fundamental purpose of archives is to preserve information. Once preservation goals have been met, archives' secondary purpose is to make archival information publicly accessible. These goals are reflected in the aims of archives including New Zealand Film Archive Incorporated.² Preservation requirements and access to information sometimes create the need for copies of works to be made. In the absence of an agreement with the copyright holder, such copying would normally infringe copyright in the work. The objectives and needs of archives are therefore contrary to the rights provided by copyright legislation to authors. Assuming preservation and public access to information is

¹ Copyright Act 1962, s56.

² New Zealand Film Archive statement of purpose and practice states the goals of the Archive are to "acquire, preserve and make permanently available" the collection that it holds. The Archive maintains its role is "a guardian of national works of cultural value placed in its trust..."

a greater public good than the right of an individual author to profit from the fruits of ones labour, copyright legislation has been altered to accommodate archival requirements. Accordingly, the Copyright Act 1994 grants archives significant rights to copy and distribute works that otherwise copied or distributed would infringe copyright in that work.

A Aims and Objectives

This paper aims to examine the conflicts that arise between copyright legislation and archival needs.

In New Zealand there have been three main pieces of copyright legislation. They are the Copyright Act 1913, the Copyright Act 1962 and the Copyright Act 1994. The 1913 Act and the 1962 Act are substantially repealed. This paper will examine the extent to which, for the purposes of archival film, each Act still remains in force according to the terms of the Copyright Act 1994.

The complexity of New Zealand's copyright legislation places archives in a difficult position. Legal advice in the area of film copyright for archives can be difficult and costly to obtain. This paper will examine the difficulties which archives might encounter arising from copyright in films under the various copyright legislation. Where possible recommendations will be made on ways that archival copyright issues can be resolved.

In New Zealand, the Crown has obligations to Maori under the Treaty of Waitangi. This paper contends that these obligations are not satisfactorily addressed in the Copyright Act 1994. This contention is the basis of substantial resolution process between the Crown and Maori. This paper will present another facet to that debate.

This paper intends to focus on the New Zealand position. To adhere to international agreements, New Zealand legislation allows copyright to subsist in certain internationally produced films. A full discussion of the applicability of copyright to international films is not relevant to the subject of this paper.

B Definitions

(a) Copyright Act

There have been three enactments in New Zealand with the short title "Copyright Act". In this paper any references to a "Copyright Act" will be made specific by the year of the Act unless the context permits otherwise.

(b) Archive

"Archive" has the same meaning as given in section 50 of the Copyright Act 1994. As this paper focuses on film, significant emphasis will be placed on The New Zealand Film Archive Incorporated (NZFA), an archive defined in section 50 of the Copyright Act 1994.

(c) Film

Film has the same meaning as given in section 2 of the Copyright Act 1994. That is: "a recording on any medium from which a moving image may by any means be produced."

However, in the course of this paper the definition of film will also be discussed in the context of previous legislative definitions. The definition of "Cinematograph film" under section 2 of the Copyright Act 1962 reads:

"Cinematograph Film" means any sequence of visual images recorded on material of any description (whether translucent or not) so as to be capable, by use of that material,-

(a) of being shown as a moving picture; or

(b) of being recorded on other material (whether translucent or not), by the use of which it can be shown, and includes the sounds embodied in any soundtrack associated with a cinematograph film."

Under section 2 of the Copyright Act 1913 film falls under the definitions of "Dramatic work" or "Photograph". These are defined as follows:

"Dramatic work" includes...any cinematograph production where the arrangement or acting-form or the combination of incidents represented gives the work and original character.

"Photograph" includes photo-lithograph and any work produced by any process analogous to photography.

III COPYRIGHT AND ARCHIVES

A Introduction

This section will highlight the conflicts that arise between the needs of archives and the objectives of copyright. It will begin with brief introductions to copyright and archives. It will conclude with an examination of the origins of archival exceptions to copyright.

B A Brief Introduction to Copyright

Copyright is a property right which authors have in relation to the works which they create. It is a right to stop others copying or exploiting in various other ways authors' works without permission and subsists for a limited number of years... It is best to regard copyright as a "bundle of rights" in relation to works"³

³ Gerald Dworkin and Richard D Taylor *Blackstone's Guide to the Copyright Designs and Patents Act 1988* (Blackstone Press Limited, London, 1990) 1 ["Blackstone's Guide"].

At its essence, copyright is justified by the notion that the author of an artistic work should be entitled to own and control that work. For that reason it may be argued that copyright rewards an artist for creative endeavour. A secondary justification for copyright is that it provides an incentive to create, thereby indirectly adding to the artistic and cultural wealth of society.

Historically, copyright has developed since the invention of the printing press in the late 15th century.⁴ The crown identified the need to control publications for both political and economic reasons. Since that time, developments in copyright law have been attempts to regulate unfair competition through the use of modern technologies that can be used to undermine an author's rights. For example, the development of cinematograph film and the ability to copy such film lead to the creation of a new copyright interest in film. Accordingly, the invention of video forced the developments in film copyright that appear in the 1962 Act.⁵

Copyright gives authors significant rights to control their creations. However, these rights need to be constantly balanced with societal and cultural needs. For example, the Copyright Act 1994 creates copyright exemptions for archives. Essentially, these exemptions take away authors' rights so society at large can freely benefit from archival collections of artistic works.

⁴ *Blackstone's Guide*, above n 3, 14.

⁵ Copyright Act 1962, s2. By defining "cinematograph film" as "any sequence of visual images recorded on material of any description (whether translucent or not)" the Act includes video copies of films.

C A Brief History of Archives

Archives have probably existed in some form since the beginning of publicly recorded knowledge. Modern archives are usually highly structured organisations which exist for the specific purpose of preserving, storing and disseminating information. The Concise Oxford Dictionary defines archive as "1 a collection of especially public or corporate documents or records [and] 2 the place where these are kept"⁶

In a society that values information, archives play an important preservation role. However, archives are also open to criticism. For example, an archive may enforce restrictive control over materials in its possession to the exclusion of those to whom the material relates. Archives must balance the needs of preserving material with the public's need to access the material. Archival exceptions to copyright allow archives to provide access to copies of information while simultaneously prohibiting access for reasons of preservation.

The Archives Act 1957 established New Zealand's National Archives. It also created guidelines for the establishment of other archives by authority of the Minister of Internal Affairs.⁷ Nothing in the Archives Act derogates from the provisions of the Copyright Act 1962 and subsequently the Copyright Act 1994.⁸ Therefore, copyright legislation is essential to the function of archives.

⁶ RE Allen (ed) *The Concise Oxford Dictionary of Current English* (8 ed, Clarendon Press, Oxford, 1990) 56.

⁷ Archives Act 1957, s19(1).

⁸ Copyright Act 1994, s236(1).

The Copyright Act 1994 provides various exemptions to copyright for a group of specified archives. The named archives are: The National Archives; The National Library; The sound archive maintained by Radio New Zealand Limited; the film archive maintained by Television New Zealand Limited; and The New Zealand Film Archive Incorporated.⁹

D The Development of Exceptions to Copyright for Archives

A legislative exception to copyright that favoured archives, first appeared in the UK Copyright Act 1956 following the recommendations of the "Gregory Committee".¹⁰ Two exceptions were proposed. Firstly, there were "fair dealing" exceptions.¹¹ These exceptions allowed copyright material to be made publicly available for private study and research, criticism, review, news reporting and judicial proceedings. Secondly, the report proposed a discretionary exception in favour of the Chief Archivist to allow copying of certain works.¹²

Similar exceptions appeared in the Copyright Act 1962 following the recommendations of the Dalglish Committee¹³. As in the UK Act, exceptions were provided on two grounds. Firstly, archives authorised by the Minister of Internal Affairs under the Archives Act 1957¹⁴ could rely on "fair dealing" exceptions to copyright.¹⁵ Secondly, archives could rely on the powers granted to the Chief Archivist under section 61 of the Copyright Act 1962. This allowed

⁹ Copyright Act 1994, s50(1)(a).

¹⁰ Copyright Committee "Report of the Copyright Committee", 1952HMSO, reprint 1968, Cmnd, 8662 [*Gregory Committee Report*].

¹¹ Gregory Committee Report, above n 10, 8664.

¹² Gregory Committee Report, above n 10, 8666.

¹³ Copyright Committee "Report of the Copyright Committee" [1959] IV AJHR H46 [*The Dalglish Report*].

¹⁴ Archives Act 1957, above, n 7.

¹⁵ *The Dalglish Report*, above n 13.

the Chief Archivist the discretion to make copies of public records and archives. According to section 20(3) of the Archives Act 1957, the Chief Archivist could delegate the authority to make, at the maker's expense, copies or extracts of public records or public archives without infringing copyright. Therefore, if authorised by the Chief Archivist, an archive could copy works in its possession without breaching copyright. Public Archives and Public records are defined in section 2 of the Archives Act 1957.

"Public records" means all papers, documents or records of any kind whatsoever officially made or received by any Government office in the conduct of its affairs or by any employee of the Crown in the course of his official duties; and, without limiting the generality of the foregoing provisions of this definition, includes registers, books, maps, plans, drawings, photographs, cinematograph films, and sound recordings so made or received; and also includes copies of public records.

The definition of "Public Archives" is broadly, "all public records that have ceased to be in current use... or that have been deposited in the National Archives." Archives in possession of Public Records could approach the Chief Archivist to rely on this exception.

The Copyright Act 1994 maintained and clarified legislative exceptions to copyright in favour of archives. The Commerce Committee which reported on the Copyright Bill received submissions from archives such as the NZFA.¹⁶ Obviously, by 1994 when the Act was drafted, archives were better established and could make more practical submissions to the legislature regarding the

¹⁶ For example, The New Zealand Film Archive. Submission to the Commerce Committee on the Copyright Bill August 1994.

exceptions to copyright that they required.¹⁷ The NZFA's submission helped to secure prescribed "archive" status in section 50 of the Act.¹⁸

1 The NZFA submission to the Commerce Committee on the Copyright Bill 1994

The NZFA's response to the Copyright Bill was generally favourable. The provisions relating to archives in the Bill covered most of the NZFA's requirements. However, the NZFA indicates that it has specific requirements, due to its purpose and the materials that it collects, that may not have been in the minds of those who drafted the legislation. Accordingly, the NZFA submission sought specific extensions to the archival exceptions to copyright.

The NZFA submission was critical in asserting the need of archives to be treated in a manner similar to libraries. The NZFA recommended that archives, including itself, be "prescribed" under section 50 of the Act. In accordance with this, the NZFA submitted that "prescribed archives" should be inserted wherever necessary to give archives rights consistent with rights given to "prescribed libraries". Many of the NZFA's submissions regarding legislative consistency between libraries and archives appear to have been overlooked in the Act. Comparison between the Act and the requests in the NZFA's submission clearly show firm legislative intent insofar as the Act would apply to archives.

The NZFA submission to the Commerce Committee on the Copyright Bill is annexed to this paper as Appendix A.

E Summary

The Copyright Act 1994 provides legislative exceptions to copyright in favour of archives. In establishing these exceptions, authors' rights to control and

¹⁷ Above, n 16.

¹⁸ Above, n 16, 1st submission.

exploit the products of their labour have been reduced. The reduction of authors' rights is justified by the need for preservation and public availability of information.

These exceptions cater for the needs of archives. The Gregory Committee Report, the Dalglish Committee Report and the Commerce Committee Report on the Copyright Bill 1994 have made important recommendations in favour of archives. There are areas of the legislation, discussed later in this paper, that may not go far enough.

IV COPYRIGHT LEGISLATION AND FILM

A Introduction

The development of an independent copyright in film is relatively recent. This section will examine the development of copyright in film through the three Copyright Acts of the last century.

Copyright in film is often complicated. Film frequently involves substantial contributions of many people, raising questions of authorship. The duration of copyright in film is problematised by the considerable time, often years, that films take to make. When does copyright begin to subsist in such a work?

Film may also represent sensitive cultural material. Can or should such representations be controlled by anyone other than the copyright owner?

Copyright in film is usually secured by a wide range of contractual agreements between the person or company seeking to own copyright and all others involved in the film. The copyright owner is most commonly an individual such as a film producer or legal individual such as a film production company. These contracts will not be discussed in this paper, however they provide a complicated practical background to the subject of this research.

The final and perhaps most significant complication for copyright in film is the fact that different copyright legislation has treated copyright in film in very different ways. A clear understanding of the current effects of each Act is

difficult to obtain. Films are generally subject to the provisions of the law at the time they were made. However, a close reading of the transitional provisions and savings of each Act is essential to understand to what extent, despite being substantially repealed, the 1913 and 1962 Acts remain in force.

B Copyright Act 1913

Archives store many film works that were made under the provisions of the Copyright Act 1913.¹⁹ The following examination shows the extent to which copyright under the 1913 Act is still relevant.

All films completed before the commencement of the Copyright Act 1962 and after commencement of the 1913 Act are protected under the Copyright Act 1913. However, a film is protected by the 1913 Act, not under the definition of film, but as an original "dramatic work" or as a "photograph" in a series of photographs.²⁰

Dramatic work was defined in the 1913 Act as including "...any cinematograph production where the arrangement or acting form or the combination of incidents represented gives the work an original character." This definition would include dramatic films which used sets and actors in a manner similar to a stage production. However, it would seem to exclude copyright protection from documentary films, newsreels, home movies or other non-dramatic films. Under the 1913 Act the filming of real life situations did not qualify for copyright as it was not original. The lack of consistency identified here is the result of a strict application of the originality test – copyright does not

¹⁹ For example, the collection of the NZFA contains films from as early as 1901 and numerous films produced between the 1913 Act and the 1962 Act. Source: New Zealand Film Archive, Publicity Material.

²⁰ Copyright Act 1913, s2.

subsist in non original work. (It should be noted that originality is not a requirement for the subsistence of copyright in a film under the 1962 Act or the 1994 Act). The strictness of this test fails to consider a film makers ability to construct an original non-dramatic narrative.

Copyright can still subsist in non-dramatic films if it falls under the definition of a "photograph". "Photograph" is defined as including "...any work produced by any process analogous to photography." Film images could be thought of as analogous to photography as they are developed on nitrate/celluloid film stock by an analogous process. Therefore, documentary films, newsreels, home movies and other non-dramatic films could fall under the definition of "photograph."

However, the Act also defines "Cinematograph". The definition includes "any work produced by any process analogous to cinematography." This can be interpreted to indicate legislative intent to distinguish between the process of cinematography and photography. This interpretation has substance as the process of producing a cinematograph film is quite distinguishable from the process of taking a photograph. The author of a cinematograph film usually has a different intent than the author of a photograph. Where a photographer captures a moment, a cinematograph film maker captures movement (and after 1928, sound) over time, then edits the picture and sound together, thereby condensing or expanding time to create the illusion of a narrative through time.

Despite their differences, both cinematography and photography are based on a similar (indeed, "analogous") scientific process which aim to capture light on film. Whatever the legislative intent, a modern interpretation of the Act conveniently allows the definition of "photograph" to include non-dramatic film. This overcomes what would otherwise have been a significant

inconsistency in the Act. Copyright under the 1913 Act subsists in film under the definition of "dramatic work" or "photograph". The availability of two definitions leads to an odd inconsistency as the duration of copyright in a "photograph" is shorter than that in a "dramatic work".

1 First owner of copyright

Under the 1913 Act the author is usually the first owner of copyright.²¹ The Act does not define who is the author of a cinematograph film. This is an area of dispute which would best have been contractually resolved between the film makers. However, whether that was the practice of the time is a question that can only be answered in each situation as it arises.

According to section 27, the owner of the negative on which a photograph is taken is also the author of the photograph and therefore the owner of the first copyright in the work. This may apply to cinematograph films. The resulting owner would in many cases probably be the production company or producer.

The 1913 Act also states that if a "photograph" is ordered on commission then the person who pays for the commission is the owner of the copyright in the work. If this was applied to cinematograph films, the film production company (or person) responsible for organising and paying for the film would own copyright.

2 Duration

Copyright in a "dramatic work" under the Copyright Act 1913 has a duration of fifty years from the date of the author's death.²² Copyright in a "photograph", lasts for fifty years from the end of the year in which the

²¹ Copyright Act 1913, s8(1).

²² Copyright Act 1913, s6.

photograph was taken.²³ This means that copyright protection for photographs is not linked to the life or death of the author.

The different durations of copyright allowed for "dramatic work" and "photograph" causes an inconsistency in the Copyright Act 1913. Obviously, the author of a work on film would hope that the film can be defined as a dramatic work to qualify for a longer period in which to exploit the copyright.

It is conceivable that should a dispute now arise under the terms of the Copyright Act 1913, it would turn on whether a work was a "dramatic work" or a "photograph" (or series of photographs) for the purposes of establishing the duration of copyright in that work.

3 Published or unpublished

Whether a work is published or unpublished is a distinction of basic importance. An unpublished work may not be protected by copyright but upon publication the work may become protected. Also, the duration of the protection of copyright can be altered by publication. The definition of publication given in the 1913 Act creates an irregular result with regard to the publication of films.

Under Section 3(1)(a) of the Copyright Act 1913, copyright only subsists in works first published in New Zealand or, under section 3(1)(b), in unpublished works, providing the author was a British subject or resident in New Zealand at the date the work was made. "Publication" is defined as "the issue of copies of the work to the public".²⁴ The definition also specifically states that neither "the performance in public of a dramatic... work" or "the issue of photographs" constitutes "publication" for the purposes of the Act. This means that some films, despite being screened in public, might never be legally "published". In the case of internationally produced films (for example a film made in Hollywood), achieving copyright through being "first published" in New Zealand might be

²³ Copyright Act 1913, s27.

²⁴ Copyright Act 1913, s3 (3).

an impossibility unless copies of the film were available to the public. If such a film did not gain copyright, any copy that remains in New Zealand might be out of copyright. However, if the film was subsequently "published" by the authorised issue of reproductions of the work to the public, copyright may subsist in the film from the time of publication.

4 Summary

The Copyright Act 1913 does not give adequate protection to copyright in films. Instead, the Act creates film copyright with the inconsistencies and irregularities that are highlighted above.

The 1913 Act was a useful indicator of the legislative requirements of copyright protection of film. When the 1962 Act was drafted, video technology had developed to the point where it would soon become a powerful copying tool in the hands of the public. The 1962 Act set out to remedy the deficiencies of the 1913 Act and also to look into the future to protect copyright from the onslaught of technology.

C Copyright Act 1962

The 1962 Act repealed much of the 1913 Act. This section will examine copyright law relating to film as it became under the 1962 Act.

The most important copyright advancement for "cinematograph film" was the creation of a distinct film copyright. This gave the film's author a single copyright comprising both the film and its sound-track.²⁵

The Copyright Act 1962 defined "cinematograph film" in the following way:

²⁵ Copyright Act 1962, s2(1) "Cinematograph film" and s14(4).

“Cinematograph film” means any sequence of images recorded on material of any description (whether translucent or not) so as to be capable, by use of that material,-

a) of being shown as a moving picture; or

b) of being recorded on other material (whether translucent or not) , by the use of which it can be so shown,-

and includes the sounds embodied in any soundtrack associated with a cinematographic film:

This is an exhaustive definition of film and would include video and other moving picture materials. The main issue which arises from this definition arises from the inclusion of the film sound-track in the film makers copyright. Indeed, film sound-tracks were specifically exempt for separate copyright protection as sound recordings.²⁶ A single owner of copyright in film images and sound-track would make exploitation of the copyright significantly easier. It seems likely that this is the situation that the legislation intended to create. However, the Act created a situation that was disadvantageous to the maker of a sound-track. This was repealed (and can be retrospectively enforced) by the 1994 Act so that copyright in a soundtrack is distinct from copyright in film images. The 1994 Act creates two separate copyrights in the film images and the sound-track,²⁷ however, the owner of both is the individual who owned copyright in the images when the 1994 legislation came into force.²⁸

One further definition in the 1962 Act relates specifically to film:

“Copy” in relation to a cinematograph film, means any print, negative, tape or other article on which the film or part of it is recorded; and includes the soundtrack, whether incorporated in any print or negative or tape or other article, or issued for use in conjunction with any print or negative or other article.

²⁶ Copyright Act 1962, s2(1) “Sound recording”.

²⁷ Copyright Act 1994, 1st Sch, cl 11(2).

²⁸ Copyright Act 1994, 1st Sch, cl 11(3)(b).

This clause was probably inserted to avoid any confusion that might arise from the question of how a film might be copied. The definition is obviously very broad. Cinematograph film is excluded from the definition of "dramatic work" and "photograph." As the definition of "copy" includes "part" of a print or negative it seems likely that a single frame of film would be protected (as distinct from a photograph) under this section. This would reinforce the Court of Appeal decision reached in *Spelling Goldberg Productions Inc. v. B.P.C. Publishing Ltd.*²⁹

Overall, the changes highlighted above, particularly the creation of a distinct copyright for "cinematograph film", are a decisive change away from the 1913 legislation.

1 First owner of copyright

Unlike the 1913 Act, the 1962 Act provides a definition of the maker (author) of a film. Section 14(8) provides that "the maker of a cinematograph film is the person by whom arrangements necessary for the making of the film are undertaken." This definition, though general, was well conceived.³⁰ The question of 'who was the author of a film?' created under the 1913 Act was now substantially resolved. The Gregory Committee which first formulated this definition stated: "This may be either a company or an individual; in either case what we have in mind is the entrepreneur... under whose care the labours of the many contributors are brought to a successful issue."³¹

Section 14(4) of the 1962 Act defines the first owner of copyright as the maker of the film provided that the film is not made under a commission. In that

²⁹ [1981] R.P.C. 283, 297 per Buckley LJ. [*Spelling Goldberg*]

³⁰ Evidence that this definition was well conceived lies in the fact that the definition was not significantly changed when the 1994 Act was drafted.

³¹ Gregory Committee Report, above n 10, 8666.

case, unless there is agreement to the contrary, the person who pays for the commission is the copyright owner.

Copyright subsists in every film made by a New Zealand citizen or person who was resident or domiciled in New Zealand for the whole or substantial part of the period during which the film was made.³²

2 Duration

The duration of copyright in films made between the commencement of the 1962 Act and the commencement of the 1994 Act is fifty years from the end of the year in which the film was completed.

3 Crown copyright

Under the 1962 Act the Crown assumes copyright for all work, whether published or not, that is made under the direction or control of a Government department.³³

This is important as the National Film Unit (a Crown entity) was a major producer of films in New Zealand from the 1930s until 1991 when it was sold.

Under the 1962 Act, Crown copyright has the same duration as if the copyright was held by an ordinary author. For film, the duration of copyright under the 1962 Act is fifty years from the date the film was completed. Films made by the National Film Unit after commencement of the 1962 Act are still under Crown copyright unless the copyright has been otherwise transferred.

Crown copyright is subject to any agreement that the Crown has entered into with the actual author or maker of the work. Therefore, if the maker of a film has an agreement that gives him or her part of the copyright in the film, the situation arises where copyright might belong to both the film maker (or

³² Copyright Act 1962, s14(1).

³³ Copyright Act 1962, s52(4).

author)³⁴ and the Crown. Indeed the film maker could contract with the Crown to own the entire copyright in a film.

4 Fair dealing

Fair dealing is an exception to copyright provided under Section 19 of the Copyright Act 1962. Though the fair dealing provisions do not specify archives, the practices of archives definitely fall within the meaning of the section. Section 19(5) extends the fair dealing provisions that apply to literary, musical and artistic works to include cinematograph films.

There are four exceptions to copyright under the ambit of fair dealing. Fair use can be claimed when using a copyright work for the following purposes:

- research or private study,
- criticism or review,
- reporting current events,
- reproduction for judicial proceedings.

These exceptions to copyright would allow archives to perform some of their functions. Research and private study could be facilitated at an archive and material could also be made available for purposes of criticism or review, reporting current events and even possibly reproduction for judicial proceedings. However, the fair dealing provision would not allow an archive to copy films for preservation or replacement. This would substantially undermine an archives ability to provide works under fair dealing. An archive is unlikely to provide original works for the purpose of the acts permitted by fair dealing when doing so would defeat its purpose to preserve information.

³⁴ In industry terms the film maker, author, or first owner of copyright is often (but not exclusively) the producer of the film.

In the 1962 Act, libraries were granted limited copying rights for the purposes of research or private study.³⁵ Provision was also made for libraries to screen films for educational purposes. Though archives fall outside the definition of libraries, these provisions were no doubt an important foundation for the archival provisions in the 1994 Act.

As discussed above, another foundation for archival use of copyright material was provided in Section 61 of the 1962 Act. This section grants the Chief Archivist (as nominated under the Archives Act 1957), the ability to authorise the copying of public archives or public records for archival purposes. This is a significant discretionary power. However, this power was devolved to specified archives in the Copyright Act 1994.

5 Transitional provisions

The First Schedule of the Copyright Act 1962 details the degree to which the 1913 Act remains in force for works created under that Act. To this end, the Copyright Act 1913 is repealed. The 1962 Act then states in specific terms those provisions which remain in force.

The schedule also retrospectively applies some of the 1962 Act to works made prior to its commencement. Definitions from section 2 of the 1913 Act are encompassed in the Second Schedule of the 1962 Act. Several clauses in the First Schedule have bearing on cinematograph film, dramatic works and photographs. This section examines the effect of those clauses in the First Schedule of the Copyright Act 1962 on the provisions of the Copyright Act 1913.

³⁵ Copyright Act 1962, s21.

Clause 14 provides that section 14 of the 1962 Act does not extend to the 1913 Act. This means that the definition of film provided in the 1962 Act does not retrospectively apply to films made before commencement of the 1962 Act.

Clauses 15 and 16 preserve the integrity of the 1913 Act's definition of cinematograph films under either the definition of "dramatic work" or "photograph". Without the preservation of these definitions, the 1913 Act would be ineffective.

Clause 4 creates special provision for duration of copyright in unpublished works. The clause states:

If copyright in any unpublished work under the Copyright Act 1913 would expire at the commencement of this Act or between commencement of this Act and 31 March 1973, that copyright shall continue to subsist until the 31 March 1973, then shall expire.

This means that unpublished films which fall under the definition of "photograph" (in the 1913 Act) that were made between the commencement of the 1913 Act and 31 March 1923 are now out of copyright. (Copyright in photographs subsists for the duration of fifty years from the end of the year in which the photograph was taken.) Unpublished films which fall under the definition of "dramatic work" (in the 1913 Act) may be out of copyright depending on the date of the author's death. (Copyright subsists in dramatic works for the duration of fifty years from the death of the author.)

At first glance it seems unlikely that many such films exist. However, given the difficulty of publishing a film under the 1913 Act it is possible that certain films would fall within this definition. Unpublished films would have the two distinct features. Firstly, their makers would not have been British subjects or resident in New Zealand at the time the film was made. Secondly, the work

would not have been first published in New Zealand for the purposes of copyright protection.

6 Summary

The Copyright Act 1962 is a great deal more clear on the application of copyright in cinematograph film than the preceding Act. The 1962 Act provides a clear definition of the author and first owner of copyright in cinematograph film. The single independent definition of copyright in cinematograph film means that the duration of the copyright in such film can be more precisely defined. This is a significant improvement on the confusing situation created by the two possible cinematograph film definitions in the 1913 Act.

As will be seen, the 1994 Act includes and preserves much of the film related legislation in 1962 Act.

D Copyright Act 1994

This section will examine the application of the Copyright Act 1994 to copyright in film. The Copyright Act 1994 makes one broad change to copyright in film, separating the copyright titles in the film images and the film's soundtrack.

A film made after the commencement of the 1994 Act is protected as a "film" under the definition provided in Section 2 of the Act.

"Film" means a recording on any medium from which a moving image may by any means be reproduced.

This obviously includes theatrical motion pictures, television films, films or parts of films that exist on video and digital versatile discs (DVD) or similar technology.

In the 1994 Act, film is specifically excepted from the definition of "photograph" to resolve any historical misunderstanding.³⁶

Film was also specifically excluded from the definition of "cinematograph film" in the 1962 Act. This confirms the Court of Appeal judgement in *Spelling Goldberg Productions Inc. v. B.P.C. Publishing Ltd.*³⁷ In the first instance the lower court held that a single frame from a film was neither a film or a photograph for the purposes of copyright. Obviously, this created an inconsistency as though the film might be copyright, an individual frame would not be. The decision was later overturned by the Court of Appeal bringing the case more into line with obvious legislative intent.

The sound recording in a film has separate copyright protection. The Act defines sound recording as a recording of any literary, dramatic or musical work, from which sounds reproducing the work or part may be produced. The medium of the sound recording is not relevant.

In order to qualify for copyright protection in New Zealand a work must meet the requirements set out in Section 17 of the Copyright Act 1994. Broadly, a work can be protected by copyright through the author³⁸, the country of first publication³⁹ or the place of first transmission⁴⁰.

1 First ownership of copyright

For films completed after the commencement of the 1994 Act, the author is the first owner of copyright in both sound recording and film.⁴¹ The author of a film or sound recording is "the person by whom the arrangements necessary for

³⁶ Copyright Act 1994, s2. See definition of "Photograph".

³⁷ *Spelling Goldberg*, Above n 29.

³⁸ Copyright Act 1994, s18.

³⁹ Copyright Act 1994, s19.

⁴⁰ Copyright Act 1994, s20.

⁴¹ Copyright Act 1994, s21(1).

the making of the recording or film are undertaken".⁴² In industry terms, this is the film producer. It should not unquestionably be assumed that the producer of a film is the copyright owner. For example, in "independent" director driven projects the director is often the person who fits the author's role defined in the Act. In that case a producer may not be the person with whom copyright would (or should) lie. Alternately, a situation of joint copyright could arise. Joint copyright is discussed below.

There are two main exceptions to the author as defined above. If the maker is an employee or the work is made under commission, the copyright in the work belongs to the employer or the person who commissioned the work.⁴³ The situation where an employee creates on behalf of the employer is relatively clear from the contract between those parties. However, the exact nature of a commission is not legislatively defined. A commission might include a television advertisement in which a company commissions an advertising agency to make the advertisement in conjunction with a television production company. Whether a contract for services implies a commission is unclear. It seems unlikely that the Act intended to remove copyright ownership from any person who created a work under a contract for services. However, unless a contract to the contrary is made between the contractor and the employer, this is the likely effect of the Act.

2 Duration

Section 23(1) states copyright in a film or sound recording expires at the later date of either fifty years from the end of the calendar year in which the work was made, or fifty years from the end of the calendar year in which the work was made available to the public by an authorised act.

⁴² Copyright Act 1994, s5(2)(b).

⁴³ Copyright Act 1994, ss21 (2) (3).

For the purposes of the Act a sound recording or film is first made available to the public when it is first published, broadcast or included in a cable programme service, or specifically in the case of a film or film sound track, when the work is first shown or played in public. This section highlights the somewhat confusing difference between "publication" and "made available to the public".

3 Published or unpublished

"Publication" means "the issue of copies of the work to the public"⁴⁴ and in relation to films does not include:

- (i) the playing or showing of a work in public; or
- (ii) The broadcasting of the work or its inclusion in a cable programme service.⁴⁵

According to section 23(2) it is not publication, but making the film "available to the public" which is the moment that defines the subsistence of copyright in the film. As stated above, making "available to the public" includes "publication". However, a film is also made available to the public when "the work is first shown in public". Therefore, actual "publication" is not necessary for the subsistence of copyright in a film.

4 Crown copyright

In 1991 the Crown sold the National Film Unit (NFU). At the commencement of the Copyright Act 1994, the Crown was no longer involved in film production. Accordingly, a discussion of Crown copyright in films made under the 1994 Act is not relevant.

⁴⁴ Copyright Act 1994, s10(1)(a).

⁴⁵ Copyright Act 1994, s10(4)(d).

5 *Joint authorship*

This paper will not discuss the position of joint authors. However, it should be noted that the drafting of the meaning of "work of joint authorship" in Section 6 of the Copyright Act 1994 creates a special meaning for joint authorship that is distinct from the literal meaning of the words. Essentially, if two authors create a work and the contribution of each author is separable, then each author will have separate copyright in the work that corresponds to the degree of their authorship. If the work of two or more authors is inseparable they will become joint owners of copyright in the work.⁴⁶ The duration of jointly owned copyright is the death of the last living author.⁴⁷

6 *Moral rights*

Prior to the Copyright Act 1994, an author had no moral rights under New Zealand law. The 1994 Act introduced a series of moral rights in accordance with Article 6 bis of the Paris text of the Berne Convention.⁴⁸ Moral rights exist independently of the author's economic rights and cannot be sold (though they can be waived). Moral rights consist of "the right of attribution," or the right to be named as author of the work or as director of a film;⁴⁹ the "right of integrity" or the right to object to derogatory treatment of a work.⁵⁰ Treatment of a work is derogatory if "whether by distortion, mutilation of the work or otherwise, the treatment is prejudicial to the honour or reputation of the author or director".

The third moral right in the 1994 Act is the right to prevent false attribution of a work.⁵¹ Essentially, a person has the right not to be falsely named as the

⁴⁶ Copyright Act 1994, s6(1).

⁴⁷ Copyright Act 1994, s22(6).

⁴⁸ Berne Convention for the Protection of Literary and Artistic Works, Paris text, 1971.

⁴⁹ Copyright Act 1994, s94.

⁵⁰ Copyright Act 1994, s98.

⁵¹ Copyright Act 1994, s102.

author or director of a film. The final moral right in the 1994 Act is the right to privacy of certain photographs and films.⁵²

Moral rights may impact upon archives to the extent that they subsist in works (made after the commencement of the Copyright Act 1994) held in an archive's collection. Waiver of moral rights according to section 107 of the Copyright Act 1994, is the usual way that moral rights in a work are extinguished. The implications for archives arising from moral rights are discussed below.

7 Transmission of copyright

Under the 1994 Act, copyright is transmissible in three ways. It can be assigned, bequeathed by testamentary disposition or transferred by operation of the law.⁵³ Any bequest of an item in which copyright subsists is deemed to also pass the copyright unless intention to the contrary is indicated. Copyright does not pass upon the owner's death, in an item which is loaned or voluntarily deposited to any other person or body. Instead, the copyright remains part of the deceased's estate. For copyright to be legally transferred, the transfer must be in writing and signed by the copyright owner.⁵⁴ Any licences made by a copyright owner are binding on successive copyright owners. Future copyright can also be transferred in the same ways.⁵⁵

8 Transitional provisions

Section 235 of the Copyright Act 1994, brings into effect the transitional provisions listed in the First Schedule of the Act. Section 2 of the First Schedule maintains continuity of the law of copyright under 1962 and previous legislation. Any previous laws must however be read in association with the current

⁵² Copyright Act 1994, s105.

⁵³ Copyright Act 1994, s113. This corresponds to section 56 of the Copyright Act 1962.

⁵⁴ Copyright Act 1994, s114.

⁵⁵ Copyright Act 1994, s116.

Copyright Act. The First Schedule does make some changes to the way previous law is to be read. For example, no copyright exists under the Copyright Act 1994, in films that were made before the commencement date of the Copyright Act 1962⁵⁶. This means that for films made under the Copyright Act 1913, the copyright provisions of that Act still apply. Though it seems contradictory, the First Schedule, clause 12 retains the provisions of the 1994 Act for films made prior to the commencement of the 1962 Act providing they were an "original dramatic work" within the meaning of the 1913 Act.

(a) First ownership of copyright in existing works

The Copyright Act 1994 preserves copyright from previous legislation to the extent "that may be required for continuing its effect".⁵⁷

Accordingly, the question of who was the first owner of copyright in an existing work must be decided in accordance with the law in force at the time the work was made. The first owner of copyright in film under both the Copyright Act 1913 and the Copyright Act 1962 is discussed above. Though this seems relatively simple it does occasionally produce strange results. For example a film made in the 1920s may still be under copyright as according to the Copyright Act 1913 the film was regarded as a dramatic work which attracted copyright for the life of the author plus fifty years, instead of fifty years from the end of the year the film was completed as we now understand.

The First Schedule makes one major change to the copyright treatment of film sound-tracks. Clause 11 of the First Schedule gives "Cinematograph film" the same meaning it had in the 1962 Act. However, the meaning of "sound recording" has the meaning as that in the 1994 Act. This alters the 1962 Act to

⁵⁶ Copyright Act 1994, 1st Sch, cl 6(1)(a). The commencement date of the Copyright Act 1962 was 1 April 1963.

⁵⁷ Copyright Act 1994, 1st Sch, cl 2(1).

the extent that a new separate copyright now exists in the film's sound-track as distinct from the film images. For this new copyright to arise, copyright must have subsisted in the film prior to commencement of the 1994 Act, and if so, the new copyright will expire at the same date on which the original film (image) copyright expires. The author and first owner of copyright in the film also owns copyright in the sound recording. Importantly, any licencing or other agreement relating to copyright made prior to commencement of the 1994 Act continues to have effect notwithstanding the changes made under clause 11.

E Summary

The development of the copyright in New Zealand is a reflection of the international growth of copyright law. There is both a progressive and a circular nature to our legislation. The 1913 Act could be adequately interpreted to apply copyright to film but provided few exceptions to copyright. The 1962 Act made bold changes to both the nature of film copyright and the extent and degree of exceptions to copyright provided by legislation. The 1994 Act rewrites copyright for film based on the way the law developed under the 1913 Act. The 1962 Act provides the foundation for the definition of film in the 1994 Act (with the important exclusion of the sound track from the film copyright). The 1994 Act succinctly rewrites the exceptions to copyright for archives which were first available in the 1962 Act.

Overall, this is the positive development of legislation providing for the needs in a complicated area of law. Some reservations with the current law have been raised above and these will now be discussed in more detail with a focus on the position of the New Zealand Film Archive.

V THE NEW ZEALAND FILM ARCHIVE

A Introduction

This section will discuss the formation and development of the New Zealand Film Archive. Following the introduction, will be a discussion of issues for the NZFA arising from copyright. Finally, the section will consider the remedies that the archive has developed and implemented.

B Background and Purpose of the NZFA

The New Zealand Film Archive was established in 1981. It is represented and operated by a board of Trustees. It was formed with the aim of collecting and protecting vital film and video heritage material. It also, more recently, developed an active program of public access to the material.⁵⁸ The exceptions to copyright in the Copyright Act 1994, provide the NZFA with a strong foundation for carrying out its work.

The NZFA has international standard film storage facilities to archive films, videos and related material. Further space is allocated to the storage of film files, costumes, props, and associated film material from New Zealand production companies, the New Zealand Film Commission and other film related bodies.

As a collector of films, the NZFA accepts voluntary deposits of films from the "depositor", who may be either the owner of the print or the copyright or sometimes both. The NZFA does not assume control of copyright in deposited works. Copyright licencing negotiations are beyond the function of the NZFA. It does, however, negotiate fees for those works for which it does own the

⁵⁸ The New Zealand Film Archive. Submission to the Commerce Committee on the Copyright Bill August 1994.

copyright and, where possible, assist copyright owners by facilitating negotiations between copyright owners and potential licencees.

The task of film preservation requires the NZFA to make copies of some films. Through the exceptions to copyright for archives in the 1994 Act (and exceptions in the 1962 Act), the NZFA is able to carry out this role.

As a provider of access to its collection of New Zealand films, the NZFA relies on the Copyright Act 1994 to be able to screen certain works to the public, without infringing copyright in the work.

Prior to the Copyright Act 1994, the NZFA was granted the authority to act as a "public archive"⁵⁹ by virtue of section 19(1) of the Archives Act 1957. According to that authority, the NZFA could archive material for its collection but could not make archival copies of material without the consent of the copyright owner or the Chief Archivist. The Archive gained the ability to copy works for archival purposes, without infringing copyright, through the authority of the Chief Archivist under section 61 of the Copyright Act 1962. This meant that the NZFA did not have to undergo the difficult and costly process of tracing copyright owners to seek permission to make preservation copies of works. Particularly in the case of fragments of film, identifying copyright owners is extremely difficult. In addition, time was not on the side of the archive, as films made prior to 1950 were printed on nitrate stock that was highly volatile and often rapidly deteriorating.

The Copyright Act 1962 did not allow the NZFA to screen works in public, thereby frustrating the NZFA's goal of providing public access to its collection. Under section 20 of the Archives Act 1957, it is mandatory for the National

⁵⁹ Archives Act 1957, s2.

Archives, subject to certain conditions, to be available for public reference. However, the National Archives was exclusively defined and did not include the NZFA. Instead the NZFA was a body approved by the Minister of Internal Affairs⁶⁰ to receive public archives excess to the requirements of the National Archives. By the commencement of the 1994 Act, the NZFA had collected and preserved a great deal of historic film but were unable to effectively and efficiently provide public access to it. The archival provisions of the Copyright Act 1994 were therefore essential for the progression and fulfilment of the NZFA's goals.

The Copyright Act 1994 does not give archives the same degree of exemption from copyright infringement as it affords libraries.⁶¹ The NZFA's submission to the Commerce Committee on the Copyright Bill 1994 highlights the difference between the legislature's consideration of the needs of archives and what the NZFA felt necessary for its continued operation. See below for a discussion of the provisions relating to archives in the 1994 Act.

C Copyright and the NZFA

As previously noted, the archive provisions of the Copyright Act 1994 were based on the example set by the UK Copyright and Designs Act 1988. This part of the paper will consider the statutory powers of the NZFA and highlight potential areas where those powers may be insufficient for the NZFA's needs.

1 The Copyright Act 1994

Under the Copyright Act 1994, prescribed archives are granted various opportunities to carry out their function without infringing copyright. The

⁶⁰ Archives Act 1957, s19.

⁶¹ See: Copyright Act 1994, ss50 - 57

operative sections for the New Zealand Film Archive are sections 50, 55, 56 and 57. The NZFA also benefits from the provisions in sections 90 and 191 which provide exceptions from infringement of copyright and performance rights in broadcasts copied for archival purposes. Archives such as the NZFA benefit from section 47 insofar as they may screen films and sound recordings associated with films in educational institutions for the purpose of education.

Under section 50(1)(v) of the Copyright Act 1994, the NZFA gains the status of a prescribed archive. This status allows the NZFA by legislative authority independent of the Chief Archivist, to copy works in its collection without infringing copyright. Also, the Act allows the NZFA to hold public screenings of works from its collection significantly improving the archive's public access function.

Section 55 of the Copyright Act 1994 specifies two ways that an archivist can copy any item in the archive's collection without breaching copyright in the work, or a work included in the item. Firstly, the copy may be made for preserving or replacing the item in the archive. The copy can exist in addition to the original. Secondly, an archive may copy a work to replace in the collection of another archive an item that has been lost, destroyed or damaged.⁶² These exceptions to copyright cannot be relied upon where it is reasonably practicable to purchase a copy of the item.⁶³

Under section 56 of the Act archivists have a limited right to copy and supply unpublished works. However, this section does not apply to the New Zealand Film Archive.⁶⁴ It is submitted that this section seems logically intended

⁶² Copyright Act 1994, s55(1).

⁶³ Copyright Act 1994, s55(2).

⁶⁴ Copyright Act 1994, s56(5)

to prevent the copying of unpublished films. However, this section creates some issues for the NZFA. As previously discussed, many historical films may be unpublished as publishing requires the issue of copies of a work to the public. It is important to note that according to section 10(d) of the Copyright Act 1994, screening a film to the public does not constitute publication. The relevant sections in the 1994 Act that relate to film publication are sections 10(1)(a), 10(4)(d). Section 23(2)(b) provides screening as a way a work can be "made available" to the public.

The NZFA must therefore approach the copying of unpublished films with caution. Making an unauthorised copy of an unpublished film would breach section 56 of the 1994 Act and would therefore infringe copyright in the work.

Section 56 also creates a situation where the NZFA may not be able to copy unpublished non-film works in its collection. The NZFA collects a great deal of film related material and the inability to make copies of unpublished non-film works, would seem contrary to the purpose of the archive and the intent of the law.

Under section 57(2) of the Act, the NZFA can "show a film, and play any sound recording associated with the film, held in the archive" to members of the public without infringing copyright in the film or associated sound recording. Ordinarily, the showing of a film in public is a restricted act.⁶⁵ Screenings by archives under section 57(2) are subject to section 57(3) which states that a fee for the screening maybe charged but can be no more than a reasonable contribution towards the maintenance of the archive in which the film is held. This section appears to offer a broad exemption to screen films, but in fact, section 57(4)

⁶⁵ Copyright Act 1994, s32(2) Obviously, if copyright is owned by or licensed to the person screening the film, copyright will not be infringed.

places extensive limits on archive screenings, effectively only allowing the screening of a small number of films. Section 57(4) states:

(4) This section does not apply if or to the extent that licences authorising the playing of a sound recording, or the showing of a film and the playing of a sound recording associated with the film, by an archive to which this section applies are available and if the archive knew that fact.

Section 57(4) prevents archives from screening any film they wish to, thereby abusing the copyright exemption gained through section 57(2). Accordingly, the NZFA cannot screen a film for which the archive knows a copyright licence is available. The requirement of actual knowledge attracts a high standard of proof. In a strictly literal sense, the archive or an employee of the archive must actually know that a copyright licence is available. However, it is submitted that there are very few films for which copyright licences are not available.

The question of whether a copyright licence is available for a certain film can usually be answered in the affirmative, unless copyright in the film has expired. The copyright licence will be available from the copyright owner or a licensing body.⁶⁶ An archive could have actual knowledge of the availability of a copyright licence either by screening the film and watching the credits or by basic research of the film's source. In screening fragments or unidentifiable films, the NZFA would be able to rely on the terms of section 57.

Section 57(4) highlights the difficulty of granting limited screening rights to an archive. However, the intention of the Act is probably satisfied as the NZFA

⁶⁶ Copyright Act 1994, s2 defines "Licencing bodies" and "Licencing schemes". Copyright Act 1994, s111 deals with copyright licences. As the NZFA is not generally involved in securing copyright licences, a full discussion of them is beyond the scope of this paper.

is likely to be able to screen some old, rare films or extracts from films without having knowledge of the availability of the copyright licence. That stated, the NZFA must carefully consider all of its public screenings, so as not to infringe the rights of any copyright holder.

Section 90 of the Copyright Act 1994 provides the NZFA with the ability to make copies of broadcasts or cable programmes for archival purposes. Significantly, the copying of such works will not infringe copyright in any work included in the broadcast. Therefore, a broadcaster or cable programmer has sole responsibility for obtaining the copyrights associated with the works included in a broadcast or cable programme. If a broadcast infringes copyright in a work, a copy of the broadcast made for archival purposes would not infringe (indirectly or directly) that copyright.

Section 191 of the 1994 Act reinforces section 90 of the Act by providing that the copying of broadcasts or cable programmes for archival purposes does not infringe any performers rights granted in Part IX of the Act.

Sections 50 to 57 of the Copyright Act 1994 deal with provisions relating to archives and libraries. The exceptions to copyright for archives are not as substantial as those provided for libraries.⁶⁷ Libraries (and educational establishments) have a significant right to rent works without infringing copyright, providing that a licence for the work has been originally purchased and that the rental is not conducted for profit.⁶⁸

⁶⁷ Libraries are provided exceptions to copyright in sections 51 to 56, whereas archival exceptions only appear in sections 55 to 57 of the Copyright Act 1994.

⁶⁸ Copyright Act 1994, s79.

In the NZFA Submission to the Commerce Committee on the Copyright Bill⁶⁹ raises the argument that the NZFA would benefit from the ability to rent works in several ways. It would provide added motivation to increase public access to the NZFA collection and would allow the NZFA to charge users of the collection to cover the expenses providing such access. The right to rent works also appears complimentary to the right to screen works prescribed in section 57 (discussed above). However, the requirement of section 79(b) that the work that is the subject of the rental has been out into circulation with the licence of the copyright holder would not apply to much of the NZFA's voluntarily deposited collection.

2 Moral rights

The Copyright Act 1994 offers no exception for archives from complying with the obligations of moral rights. In dealing with films, the NZFA could infringe the director's moral rights. It is important to note that moral rights do not exist for works in which copyright subsisted prior to the commencement of the Copyright Act 1994.

The right to be identified as the director of a film is relatively simple to fulfil. In general, the NZFA should ensure that it gives credit to the director of any film that it screens (or publicises) using where possible the same means that the director uses to identify him or herself.⁷⁰ The requirement to attribute a film to its director is weakened by section 96 which requires that the right of attribution must be asserted. A director can generally or specifically assert the

⁶⁹ New Zealand Film Archive "Submission to the Commerce Committee on the Copyright Bill 1994"

⁷⁰ *Pro Sieben Media AG v Carlton United Kingdom Television Limited and Another* [1999] 1 WLR 605. The author's practise was to identify itself with a logo and screen title. The same logo and screen title, subsequently used by the defendant, was held to be sufficient to identify the author.

right of attribution. Inclusion of the director's name in the film's credits is likely to be a general assertion of the attribution right.

The director's right to object to derogatory treatment of their work is probably the right most likely infringed by certain subsequent archival uses (such as editing clips⁷¹ for the purposes of screening).⁷² The NZFA should treat works made since 1 January 1995⁷³ with appropriate caution. If part of such a work is to be included, for example, in one of the NZFA's educational programmes, it would be wise to consult the director seeking a written waiver of moral rights for that purpose.

Moral rights will also subsist in works obtained through the exceptions to copyright for NZFA. For example, the directors moral rights may subsist in a broadcast, recorded for archival purposes according to section 90 of the Copyright Act. Subsequent use of that copy of the broadcast may infringe the director's moral rights. Though broadcasters and cable programmers commonly seek full waiver of the director's moral rights in a work, this does not always occur.⁷⁴ This places the NZFA in a situation where use of a work in a way which could clearly be considered derogatory should be contractually authorised by the director.

⁷¹ *Morrison Leahy Music Ltd and Another v Lightbond Limited and Others* (21 March 1991) unreported, Ch, Judge Morritt. Music by George Michael was edited and extracts were reassembled. The question of whether the facts amounted to derogatory treatment was referred to trial.

⁷² There are extensive exceptions to the moral right of derogatory treatment to allow broadcasters and cable programmers to edit works for the insertion of advertisement breaks.

⁷³ 1 January 1995 is the commencement date of the Copyright Act 1994.

⁷⁴ This information came in confidence from a film maker who had recently retained moral rights (to the surprise of the broadcaster) in a film broadcast agreement.

If a work receives derogatory treatment the director is likely to be able to obtain a court order reversing that treatment. In providing a remedy, the court would take into account the degree to which the director's reputation has suffered.⁷⁵

The right to prevent false attribution of a work is unlikely to present a problem for the archive providing care is taken to ensure that authorship of a work is correctly stated.

The right to privacy of certain photographs and films⁷⁶ provides that a person who commissions a photograph or film for private or domestic purposes but does not own copyright in the work, essentially has a right to control the public dissemination of the work. The NZFA is not exempt from infringing this right. However, this right applies only to private or domestically commissioned films (usually home videos). As the NZFA does not generally collect this type of work the likelihood of breaching this right is minimal.

D Issues for the NZFA

The archival exceptions to copyright provided in the Copyright Act 1994 are sufficient for the NZFA to continue its work. However, the current Copyright Act is complicated by a mixture of untested areas, retrospective legislation, and partially repealed laws. There has been no judicial direction on the copyright legislation concerning archives. This creates issues for the NZFA which may hinder the archive's objectives of preservation and access.

Also, the Act makes no mention of the Treaty of Waitangi, thereby leaving open the question of how the Crown intends to fulfil its Treaty obligations to Maori.

⁷⁵ *Snow v The Eaton Centre Ltd Et Al.* 70 CPR 2d 105; 1982 CPR Lexis 750 per O'Brien J.

⁷⁶ Copyright Act 1994, s105.

1 Issues arising from copyright legislation

There are several issues for the NZFA that arise directly from copyright legislation. Firstly, issues arise from the compound effect of complex legislation. For example, there have been three different definitions of "film" in less than a century. This alone creates huge questions about which legislation applies to which films. Copyright in early films is nearing its expiration. However, when copyright in a film will expire can only be decided after a film is put through the legislative windmill.

Retrospective and partially repealed law also has an impact on the confusing nature of copyright in films. The 1994 Act preserves parts of both previous Acts while simultaneously retrospectively legislating an independent copyright in film soundtracks which had not existed since the 1962 Act. The extent of old law still in force can only really be decided case by case, with a copy of each Act and a strong coffee.

The NZFA is an archive that benefits from exceptions to copyright in the Copyright Act 1994. The archival exceptions to copyright have grown from fair dealing provisions, to the ability to make copies without infringing copyright under the authority of the chief archivist to the specified archival exceptions of the current law. Despite the development of these rules over the last century they still bear uncertainties.

For example, the NZFA must approach the copying of unpublished films with caution. Making an unauthorised copy of an unpublished film would breach section 56 of the 1994 Act and would therefore infringe copyright in the work. Unfortunately the inability to make copies of unpublished works also extends to non film works held by the archive. This is in contradiction to the

ability of other archives which gain the right to copy unpublished works through section 56 of the Copyright Act 1994 (except for the archive maintained by Radio New Zealand and the archive maintained by Television New Zealand). This issue is compounded by the apparent difficulty of actually publishing a film.

Furthermore the law allowing the NZFA to hold not-for-profit screenings of works is severely weakened by the requirement to gain a screening licence if the archive knows that one is available. This is an example of the legislative balancing between the copyright owners interests and the public interest in access to the work. As stated the law would undoubtedly allow the screening of some archival material and this may satisfy the legislative intent of the Act.

Prescribed Libraries in the Copyright Act benefit from exceptions to copyright which would seem relevant to the NZFA. For example, the right to rent video works without profit. As discussed, the right of Prescribed Libraries to rent video works is subject to the library obtaining a licenced copy from the owner. The ability to rent video works without profit may not suit the NZFA as currently, the NZFA does not usually obtain copyright licences of deposited works.

There is a real possibility for archival infringement of a director's moral rights in a film. This is most likely to occur by the derogatory treatment of a film. where treatment of a film is derogatory can only be judged on the facts of each case.

The archival exceptions to copyright have never been judicially tested. This could mean that established law is working well. It is also financially beneficial

for the NZFA that no cases have been made against it. However, there are areas, such as those highlighted above, that would benefit from judicial direction.

2 Cultural property

Most of this paper has addressed the law as currently enacted in New Zealand. It has been submitted that the current law does not adequately address the needs of Maori. Current law does not protect "cultural property".

Due to extensive use in a variety of contexts "cultural property" eludes precise definition.⁷⁷ In a broad sense, cultural property means aspects of culture that have value of any type that may be protected. Different cultures have different understandings of concepts such as property, ownership and value. Therefore, cultural property cannot accurately be defined on those concepts. Instead, items or ideas of cultural value must be protected from within the culture in which the value arises. This is consistent with recommendations to indigenous people in clause 1.1 of the Maataatua Declaration.⁷⁸

Anything of cultural value that is preserved by means external to the originating culture creates contentious issues. Therefore, issues arise for archives that seek to undertake such preservation. These issues most commonly arise between archives and indigenous people because of the different type of value that people place on things in their possession or care. For example, donating a film to an archive is like passing on the right to hold and preserve a story. However, the ways in which the story must be maintained according to the custom of its originating culture may not be passed on. A story passed from Te

⁷⁷ Brent Porter and Jenniffer Garlick "Report Commissioned by the Ministry of Maori Development" *Maori Intellectual Properties* (1997) 7-12.

⁷⁸ See: Posey, Darrell and Dutfield, Graham. *Beyond Intellectual Property - Towards Traditional Resource Rights for Indigenous Peoples and Local Communities* (International Development Research Centre, Ottawa, 1996) 205.

Ao Maori to Te Ao Pakeha is being passed into a world that may have very different understandings of the value of that story. For example, until now it has been left to the NZFA and depositors of material to negotiate an understanding of the relative rights and obligations of each party. However, this negotiation is entered voluntarily by the NZFA, more out of respect and honour than out of legislative necessity.

There is a strong argument that to date the Crown has failed to honour its obligations to Maori under article two of the Treaty of Waitangi. A discussion of Crown obligations under the Treaty of Waitangi is beyond the scope of this paper.

3 Cultural property protection for current or future films

Resolution of cultural property issues must be sought for the past, present and future. The content, extent and control of cultural property must be negotiated on multiple levels. Mechanisms for the protection of current and future cultural property are occurring more often. There is a greater understanding of the need for cultural sensitivity and cultural consents for filming to occur are given on more appropriate terms. The NZFA does not enforce cultural property rights in archival films, but it has recognised the need to treat films with significant Maori content in a culturally appropriate way.

The copyright regime provides that control of the dissemination and reproduction of a film rests in the copyright owner. In the current legal system cultural property rights do not exist in film. On the contrary, the notion of a single copyright in film is regarded as being necessary to secure commercial sales and distribution of the film. Adding questions regarding ownership of cultural property in a film would increase the complexity of the situation and make the film less commercially viable because it would be more difficult to secure the rights to sell, distribute or screen the film.

Currently, the practise of filming material that is culturally sensitive is often negotiated prior to the filming. Informed consents are given by persons involved and valuable consideration is often made. For example, Darlene Johnson used a twelve point Memorandum of Understanding while filming her documentary *Stolen Generations* in Australia. The Memorandum set out what would happen to the footage once shot, how it would be treated for the creation of the story and where and why it would eventually be stored.⁷⁹

The need to maintain this cultural sensitivity clashes with the idea of film makers as artists. Artists claim the right to make artistic statement on whatever subject they wish, in pursuit of their artistic goals. Jackie Stern recently stated: "I am an artist who happens to be Maori."⁸⁰ Stern was explaining why she did not feel restricted to writing about any particular subject matter. This need for artistic freedom is felt by many other artists including film makers. Often the desire to add to societal discourse or raise awareness of an issue can be fulfilled by critical and controversial use of artistic licence. Limiting an artists ability to create a work such as a film on any subject that the film maker feels capable would be to implement a kind of censorship that is repugnant to modern democratic society. This provides a reason for the artists, copyright owner or group represented in a film to have the choice about the ways their film may be accessed.

When an archival film contains images and associated sounds depicting a cultural practise which is valued by the originating culture, who should have control of those images?

⁷⁹ From a Conversation with the film maker, Documentary Sites Conference, Auckland, 2000.

⁸⁰ From an interview with Jackie Stern. Saturday Morning with John Campbell. National Radio, 16 September 2000.

4 The NZFA deposit agreement: taonga Maori

According to the NZFA deposit agreement for taonga Maori the archive accepts its role according to the principles of mana tuturu or spiritual guardianship which are embodied in the agreement. This agreement does not remove any rights from the copyright owner. In fact, the agreement is generally used with the copyright owner's consent.

This agreement is a practical resolution to the concerns of Maori wishing to retain some control over their (or their descendants) image as represented in a film. The agreement essentially provides layers of spiritual guardianship of the film. Spiritual guardianship first rests with those represented in the film. It subsequently passes through whanau, hapu, iwi and further to such bodies that may be named as kaitiaki, for example the Maori Language Council.

Fundamentally, the agreement creates a perpetual right of control over the deposited images to the people depicted in a film or their descendants or nominees. The limited duration of copyright has long been identified by Maori as unsuitable for their needs. The deposit agreement for films with significant Maori content provides a satisfactory way for Maori to ensure that both their preservation and access needs are met.

The Deposit Agreement: taonga Maori is annexed to this paper as Appendix B.

E Summary

The NZFA has developed from its relatively small beginnings to being a major archive of New Zealand's film history. It has been recognised and assisted by copyright legislation. Through that legislation, the NZFA has become individually responsible for balancing a delicate legal situation with its goals of collection and preservation of film. Since the commencement of the Copyright

Act 1994, the NZFA has been able to significantly develop the availability of access to its collection.

To date, there has been relatively little New Zealand court action involving copyright considering the scale and complexity of the Copyright Act 1994. This paper has highlighted a number of areas that could benefit from judicial direction. Also, there is potential for legislative reconsideration of the effects of the archival provisions of the Copyright Act 1994.

The NZFA has developed contractual methods of resolving some of the issues that have arisen from the Act. The Deposit Agreement: taonga Maori is such an agreement. It is a practical response to the absence of adequate legislation or other remedy that addresses Crown obligations to Maori. This identifies an urgent need for the Crown to seriously consider how a solution to this issue can be created.

VI CONCLUSION

A Introduction

The development of exceptions to copyright for archives and the corresponding copyright in film indicates the continual balancing of copyright owner's rights and the need of archives to preserve and make available collections of historical works.

Currently archives are growing very rapidly. In the first ten years of operation The NZFA collected more than 20,000 moving image treasures, many of which would otherwise have been forgotten.⁸¹ This achievement has been mirrored by new legislation providing exceptions to copyright for archives. Correspondingly, there is a greater awareness among copyright owners of the

⁸¹ Above n 69, 1.

need to enforce protection of their copyrights. This is not surprising in a period which titles itself "the information age."

Issues for film archiving arise from two sources. Firstly, within the stated law issues arise, complicated by the extent of untested, retrospective and partially repealed law.

Secondly, absences from the current law create new situations for consideration such as the need for protection of taonga Maori.

B Recommendations

As a result of this paper, various recommendations can be made. Firstly, the Crown must consider the Copyright Act 1994 in light of its obligations to Maori under the Treaty of Waitangi. The difficulty of this task cannot be understated. The Crown must also consider its obligations under international agreements.

The NZFA should reconsider its deposit agreements in light of the issues raised in this paper. There are certain issues such as moral rights of the director, which warrant special consideration.

Other archives both local and international, may be interested in adopting the NZFA's proactive solution to control of the image in films with significant Maori content. Indeed, the principles by which this control is achieved could be applied to other situations where those involved in the images wish to retain some control of the dissemination of those images.

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Appendix to the Journals of the House of Representatives of New Zealand
Session 1959 Vol. IV H.46
3rd Session of 32nd Parliament of New Zealand

New Copyright Submission

APPENDIX A

COPY

BACKGROUND

The New Zealand Film Archive was established in 1981 to undertake the mission of saving the country's surviving film treasures from neglect and decay. During the first decade or more of its existence the organization concentrated on the primary tasks of collecting and protecting film and video heritage material.

In the pursuit of these goals the Archive and its staff had to make do with restricted resources and facilities. Operating from a range of rented premises and on very small budgets they worked with industry contacts to help and the industry to secure and

material. In the period 1981-1992 the Archive brought in more than 20,000 films, videos, television programmes and audio recordings including many treasures from New Zealand's past which would otherwise certainly have been lost. In addition to this rising income the Archive has also received a number of donations from individuals and public bodies.

THE
NEW ZEALAND
FILM ARCHIVE

The work of collecting and preserving film and video material is a delicate and expensive process and the Archive has been working through the highest priority material, ensuring it was kept in suitable conditions for viewing. More recent film and video material have also been collected, ensuring the originals were protected from damage. As a result the Archive now holds around 2000 fully preserved items which can be viewed on request.

These extensive collections, which span the years 1935-1992, are now safely housed in environmentally controlled space in the Film Centre - the new home of the Archive, the New Zealand Film Commission and the Independent Producers & Directors Guild in central Wellington.

With the move into the Film Centre the Archive is finally able to add projection - the vital third dimension - to its activities. In order to bring the collections to life for the people of New Zealand it has begun to plan the development of the ground floor of the building as the country's only museum of the moving image.

AUGUST 1994

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

BACKGROUND

The New Zealand Film Archive was established in 1981 to undertake the urgent mission of saving the country's surviving film treasures from neglect and decay. During the first decade or more of its existence the organisation concentrated on the primary tasks of collecting and protecting vital film and video heritage material.

In the pursuit of these goals the Archive and its staff had to make do with restricted resources and facilities. Operating from a range of rented premises and on very small budgets they worked with public funders, film buffs and the industry to secure vital material. In the period 1981 - 1992 the collecting work brought in more than 20,000 films, videos, television programmes and commercials, including many treasures from New Zealand's past which would otherwise certainly have been lost. In addition to this moving image material the Archive also acquired a vast quantity of photographs, publicity material, costumes, props and supporting documentation to flesh out the story of the development of film in this country.

The work of protecting the more fragile material began at almost the same time as the collecting. All 35mm films made before 1950 were printed on cellulose nitrate stock which is rapidly decaying and in most cases will not survive beyond the year 2000. In order to safeguard nitrate images it is necessary to copy them onto modern safety film stock - a delicate and expensive process - and the Archive has been working through the highest priority nitrate material, copying it and making it available for viewing. More recent films and video material have also been copied - leaving the originals safe from damage. As a result the Archive now holds around 2000 fully preserved items which can be viewed on request.

These extensive collections, which span the period 1898-1993, are now safely housed in environmentally-controlled vaults in the Film Centre - the new home of the Archive, the New Zealand Film Commission and the Independent Producers & Directors Guild in central Wellington.

With the move into the Film Centre the Archive is finally able to add projection - the vital third dimension - to its activities. In order to bring the collections to life for the people of New Zealand it has begun to plan the development of the ground floor of the building as the country's only museum of the moving image.

PUBLIC ACCESS

When the doors open on the public areas of the Film Centre in 1995 New Zealand will have a facility unique in the world. The integration of the national moving image heritage collection with the film industry will create a focus for the whole country.

The Film Centre will be used by a wide range of people.

- Film-goers will be able to see contemporary and classic New Zealand And international films in state-of-the-art facilities.
- Tourists and other visitors will see the story of New Zealand's film and television history.
- School groups will be introduced to New Zealand's moving image heritage and given the chance to participate in the film and video making process.
- Researchers and scholars will be able to investigate previously inaccessible aspects of New Zealand's social and cultural history.
- Film makers will have a focal point and an enhanced understanding of their place in a century-long heritage.
- Visitors will see exciting new kinds of exhibitions, combining technology and the Archive's moving image collections to tell different stories from the country's heritage.
- Collectors and film enthusiasts will be able to borrow and buy previously unobtainable films on video tape.
- Museums, galleries, libraries, marae, universities and other organisations around the country will be able to mount new exhibitions and screenings and introduce thousands of people to their heritage.
- Film museums and archives in other countries will be offered programmes which make New Zealand's unique moving image heritage known internationally for the first time.

COPYRIGHT BILL
SUBMISSION TO COMMERCE COMMITTEE
AUGUST 1994

The New Zealand Film Archive's response to the Copyright Bill is in general terms favourable. There is an acknowledged need to clarify the legislation in the areas of interest to the Archive - most pressingly because of the technological changes which have radically changed the electronic media in recent years and will continue to do so for the foreseeable future.

The Film Archive has the collection, preservation and exhibition of New Zealand's moving image heritage as its mission and as a result works in a somewhat different manner and with very different materials from the kinds of archives which appear to have been in the minds of those who drafted the legislation.

As members of the Committee will see from the supporting material the Film Archive has embarked on an ambitious plan to make the country's moving image heritage much more available to the people of New Zealand. The resulting process of opening up the past will be of unquestionable public benefit, but it involves material, programmes and technologies not currently employed by traditional archives.

As a result the Film Archive wishes to ensure that aspects of the Copyright Bill before the Committee are adjusted to take these factors into account. None of the suggestions below challenge the fundamentals of the Bill, but they do make clear the areas in which the Film Archive believes definitions and permissions need to be adjusted to include the kind of activities that this institution will be pursuing in the years ahead.

These activities are being undertaken by a non-profit charitable trust set up for the purpose of public education and the guarding of the national heritage and working on behalf of the New Zealand Film Commission and the Broadcasting Commission (NZ on Air). Consequently the Film Archive does not believe that the interests of New Zealand's film makers, writers and performers are prejudiced by any of the permissions sought in its submission.

The clauses which it is suggested need amendment are:

Clause 49

The New Zealand Film Archive suggests that not only 'libraries' but also 'archives' should be prescribed by regulations made under the Copyright Act. [The Film Archive would presume to be a prescribed archive in this event].

Clauses 53, 84 and 181

The Film Archive is pleased to note that the Bill takes into account its need to copy works in its collection for the purposes of preservation or replacement and in addition permits it to record off air a broadcast or cable programme as a reference copy. This is standard practice internationally. For example, the British equivalent of the Film Archive - the National Film and Television Archive - records significant broadcast material off air for archival purposes.

Clauses 50 and 52

Many clauses in the Bill allow exemption from copyright infringement for prescribed libraries when copying or renting their collection items. It would appear that the terms 'prescribed archives' and 'film' have been overlooked in some cases. The Film Archive submits that for reasons of consistency they be inserted into clauses 50 and 52 [may copy 10% of a work for supply to another person, or colleague institution].

Clause 74

This clause seems to be the logical vehicle for allowing the Film Archive to achieve its mission to promote New Zealand's film and video heritage. The New Zealand Film Archive needs to be able to screen items for members of the public, at their request and on its own premises, for research, study, general interest or entertainment [on a not-for-profit basis]. As members will see from the supporting material, the Archive is committed to giving equal emphasis to its public access function, as it has formerly given to film collecting and preservation. The Film Archive therefore wishes to see the terms 'show' and 'play' added to 'rental' in this clause. Once again it would appear to be necessary to add the term 'prescribed archives' to 'educational establishments' and 'libraries'.

Clauses 46 and 168

Sub section 2 allows for the playing or showing of a sound recording, film, broadcast or cable programme before a student audience for the purposes of instruction. It is the Film Archive's submission that prescribed archives be identified along with educational establishments in this clause.

Clauses 76 and 176

These clauses are another suitable vehicle to allow prescribed archives, which comply with all the conditions in subsection 2, to play or show films from their collection, on their premises, to their particular public audience. The Film Archive suggests that the terms 'prescribed archives' and 'film' be included in this clause.

[In general the Film Archive contends that for every instance of copyright exemption for prescribed archives suggested above, a parallel exemption from performers' rights obligations should also be included in the appropriate part of the Bill].

THE FILM ARCHIVE

Nga Kaitiaki O Nga Taonga Whitiāhua The New Zealand Film Archive

The Film Centre, Cnr Jervois Quay & Cable Street, Box 11449 Wellington
Phone: 04 384 7647 Fax: 04 382 9595 Email: info@nzfa.org.nz

DEPOSIT AGREEMENT: TAONGA MAORI

This Agreement is for people who wish to deposit moving image materials having significant Maori content with the New Zealand Film Archive/Nga Kaitiaki O Nga Taonga Whitiāhua (hereinafter called the Film Archive) for preservation.

This Agreement is between:

The Film Archive

and

Name/Organisation: ARCHIVE Generated Material

FILMS AND VIDEOS

- 1 The Film Archive acknowledges the receipt of the moving image materials listed on Appendix A from the Depositor.
- 2 The Film Archive acknowledges that:
 - a The moving image materials will remain the property of the Depositor; and
 - b all copyright in the moving images materials belongs to the Depositor and/or those persons named and identified by the Depositor in Appendix B as copyright owners.
- 3 The Depositor warrants that no person or persons other than the Depositor and those persons named in Appendix B have any entitlement to, or claim to, the ownership of the moving image materials and/or copyright in the film materials.
- 4 The Depositor has supplied letters from the copyright holder(s) Appendix C, which show he/she/they agree the Depositor may place the moving image materials in the Film Archive under the mana tuturu principle embodied in the Agreement.
- 5 The Film Archive and the Depositor together acknowledge that these moving image materials have significant Maori content and therefore mutually agree that the moving image materials will be held by the Film Archive under the principle of mana tuturu.

- 6 **The Film Archive and the Depositor agree that, for the purposes of this Agreement, the mana tuturu principle will mean "Maori spiritual guardianship".**
- 7 The Film Archive and the Depositor agree that guardianship under the mana tuturu principle will be exercised by the kaitiaki (guardians) named in Appendix D, and by their descendants, in perpetuity.
- 8 The Film Archive and the Depositor agree that bringing the moving image materials under mana tuturu protection must not in any way prejudice the copyright owner's usual rights under New Zealand law. Nevertheless, both parties agree that in choosing to place the materials under the mana tuturu regime, they are acknowledging that spiritual rights over the destiny of the deposited materials are being given to the named kaitiaki and their descendants.
- 9 The Film Archive agrees, in the event of a conflict between the Film Archive, any of the depositors, people depicted in the material, the copyright owners, the kaitiaki, or between the successors or any two or more of them, to actively promote discussion between the parties to the dispute in order to resolve the dispute. In such discussions, the Film Archive will be mindful of its obligation to respect national copyright laws relating to personal property, and of its duty under this Agreement to accord named people and their descendants kaitiaki status over the moving image materials.
- 10 If for any reason the Film Archive should come to be unable to guarantee the continued protection of the deposited moving image materials under the principle of mana tuturu, then the moving image materials will be returned to the Depositor. Should the Depositor have died or be untraceable, then the moving image materials will be passed over to the kaitiaki named in Appendix D and their descendants, and where the moving image materials will be stored and under what conditions of access will then be at their discretion.
- 11 The Film Archive and the Depositor agree that this film material is being deposited into the care of the Film Archive for preservation purposes, and agree that the Film Archive will have the authority to make duplicates of the deposited moving image materials, if it finds it necessary, in order to continue their proper preservation, provided that the uses to which these duplicates will be put will conform to all other provisions in this Agreement and its Appendices.
- 12 It is acknowledged by the Film Archive and the Depositor that any access to the moving image materials for study, exhibition, reproduction, or re-editing for any purposes other than preservation will be subject to the conditions set out by the Depositor in Appendix E. In assisting the Depositor to draft appropriate conditions, the Film Archive will be mindful of the status of spiritual guardianship given to kaitiaki under the mana tuturu principle embodied in this Agreement.
- 13 The Depositor acknowledges that the Film Archive will not be liable for any loss or damage of any nature (whether direct or indirect) incurred or suffered by the Depositor in relation to moving image materials deposited with the Film Archive howsoever arising.
- 14 This Deposit Agreement will take effect from the date shown below, indicating the receipt of the Agreement by the Depositor.

The Depositor acknowledges that he/she has read and agreed to the conditions of this Agreement.

Date: 18/09/2000

Signed: _____
For The New Zealand Film Archive

Witnessed: _____

Signed: _____
For The Depositor

Witnessed: _____

Date:

APPENDIX A

LIST OF DEPOSITED MATERIAL:

Donor No. 1009

USE FOR: Film and video generated by the Archive as part of its preservation programme.

DO NOT USE FOR: Film and video purchased from any other source.

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