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**DIRECTORS & EDITORS GUILD OF NZ**

**SUBMISSION TO  
2015 DIGITAL CONVERGENCE GREEN PAPER**

## **INTRODUCTION**

This submission is made by the Directors & Editors Guild of NZ (DEGNZ) the industry association representing the interests of directors and editors in the New Zealand screen industry. This includes directors and editors of feature drama and documentary; television drama, documentary and factual programmes; short films; video art; animation; commercials and web content.

The founding body of DEGNZ, the Screen Directors Guild of New Zealand, was formed in 1995. With the welcoming of editors into the guild in 2009, the guild name changed to reflect their inclusion. DEGNZ has 250 members nationally.

DEGNZ works to ensure the creative, cultural and financial well being of its members. We:

- are dedicated to promoting excellence in the arts of directing and editing;
- foster collegiality and unity within the screen industry;
- promote members' creative and economic rights;
- work to improve industry working conditions and remuneration;
- offer professional advice and information on contracts and industry standards and practice;
- offer professional development events, networking opportunities, career advice, dispute resolution, mentoring, workshops, training, discounts and regular news bulletins for members across all levels of expertise, from novices to seasoned professionals; and
- are a voice for directors and editors in influencing policy in the interest of our members through our membership of the pan-industry group SINZ (Screen Industry New Zealand), and by making submissions to government and public officials.

Internationally, DEGNZ 's working relationships extend through IEASDO (International Affiliation of English-Speaking Directors' Organisations) to the Broadcasting, Entertainment Cinematograph and Theatre Union (BECTU), the Directors Guild of America (DGA), the Directors Guild of Canada (DGC), Directors UK, the Screen Directors Guild of Ireland (SDGI) and the Australian Screen Directors Guild(ADG).

## EXECUTIVE SUMMARY

DEGNZ welcomes the opportunity to submit to the 2015 Digital Convergence Green Paper.

The ever expanding digital world is impacting on the ability of directors in the audio-visual medium to be fairly rewarded for their work as the Authors and Creators of Content.

The diminution of the Content Creator and his or her value by digital aggregators, distributors and others in the digital world who expound that content should be free and made freely available to Users while they profit from doing so severely impacts on the Content Creator's ability to achieve a sustainable living. This, on top of current New Zealand Copyright Act legislation that denies Directors Moral Rights and Authorship—which they clearly have—worsens the situation.

In nearly all discussions regarding digital convergence, Content and Content Creators are not clearly recognized as the all important factor in the debate—without the Creators expending their efforts to create Content, there is nothing for the digital pathways, portals, aggregators, managers and manipulators to carry, shape, distribute and earn revenues from so doing.

Content and Content Creators must be explicitly acknowledged and kept at the forefront in any discussion around digital convergence for without them there is simply nothing to debate.

In the recent PWC *Employment and National GDP impacts of music, publishing and film and television in New Zealand*, the creative industries were identified as adding \$3.848 billion to the New Zealand economy, with Film & TV making up a \$2,829 million impact on GDP and providing a total of 31,416 Full Time Equivalent jobs. This \$2,829 million, which comes from the authoring of Content by Directors, highlights the importance Directors bring to the national economy—their ability to work, sustain a living, and innovate must be safeguarded so that they can contribute to business growth.

To ensure Directors' continued and important contribution in the converged world, DEGNZ advocates for:

1. Changes to the New Zealand Copyright Act to give Directors Moral Rights over and Authorship of audio-visual content so that all key creatives can share equitably in successes.
2. An effective copyright regime that facilitates the monetising of cultural output, where appropriate, to underpin income generation and enable cultural practitioners to live in dignity.
3. Ongoing support for New Zealand's audiovisual and cultural industries by way of direct and indirect subsidy for the production of New Zealand content for broadcast and online consumption.
4. Appropriation to New Zealand On Air to adequately support public broadcasting.
5. Tighter regulation and heavier penalties to protect Intellectual Property and Copyright.

An examination of the issues for policy and legislation around digital convergence provides an opportunity to acknowledge, emphasize and foster Content Creators and the cultural and commercial Content they create, while ensuring effective regulation of the distribution technologies and mechanisms by which their Content is disseminated to Users.

## SUBMISSION

### 1. Do you agree with the way this paper defines convergence? Why/why not?

DEGNZ does not support the paper's definition of convergence because it does not emphasize the importance that Content and Content Creators have in the converged world.

In the Legacy Industries of the past and the Converged IP-based world of now and the future, everything apart from Content is merely a Pathway<sup>1</sup>—a distribution technology that delivers/manipulates Content to the User. Without Content, those Pathways remain empty.

Content therefore remains King, and thus so do Content Creators.

It is far too easy to get caught up in the hype that the companies behind the Pathways create, and so minimize the paramount role Content Creators and Content play in the old and new paradigms. The owners of Pathways benefit from unrestricted access to free, illegal and unauthorized Content, from which they are able to generate revenues.

Often large national or multi-national companies, Pathways are able to control the conversation and influence policy, legislation and through marketing and communications influence Users' mindsets to diminish the role of Content and Content Creators. By so doing they greatly affect the ability of Content Creators—who are often independent contractors or Small to Medium-sized Enterprises—to generate sustainable revenues for themselves and their businesses.

Equally, there are those who believe that if Content exists in the digital world then it should be free. This philosophy destroys Content Creators' livelihoods.

A pertinent recent example is that of the feature film *Turbo Kid*, made as a coproduction between New Zealand and Canada, minority funded with New Zealand tax payer dollars via the New Zealand Film Commission (NZFC). The NZ producer reported that *Turbo Kid* was recently the No. 1 download on the illegal download KA list—Over 80,000 people illegally downloaded it in 24 hrs on this one site. He estimates that probably over 500,000 people will end up illegally downloading the film. Such action prevents the NZFC and thus the tax payer from ever recouping its investment, and the filmmakers from earning deferred fees and revenue that could be invested into other projects.

In the audio-visual medium, Directors are the Authors and Creators of Content. As independent contractors, Directors are denied recognition by New Zealand producers, the New Zealand Copyright Act and therefore the Pathways as the primary author of the Content. Due to this, they are often unable to build a sustainable career that delivers ongoing revenue for the work they create through carriage or recarriage of the Content they have authored via the old and new Pathways that exist or will come into being. Furthermore, their ability to contribute to business growth and exports is severely inhibited, because without the funds to invest in their own new content creation—often requiring personal R & D and development—Directors' ability to create and innovate is stymied, to the loss of their own income and the national economy.

DEGNZ believes a reinterpretation of how "Convergence" is expressed is required to accurately reflect the paramount role and importance Content and Content Creators have always held in the Legacy Industries and will hold in the new paradigm of the converged world.

### 2. Do New Zealand's current regulations and policies need to change to account for convergence? Why/why not?

DEGNZ agrees that current regulations and policies need to change to account for convergence. As well, they need to change to address inaccuracies in the current Copyright Act.

The New Zealand Copyright Act fails to recognize the Moral Rights and Authorship of Directors, who are the true Authors of audio-visual content. Specifically, DEGNZ requests changes to:

1. Moral Rights: that the current exceptions to the right to object to derogatory treatment of films and television be removed from the Act; and
2. Copyright: that directors be recognised as the 'Author' of audio-visual works, i.e., that copyright in an audio-visual work first resides with the director.

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<sup>1</sup> Broadcast, Radio, Apps, IP Transport, Infrastructure, etc.

## MORAL RIGHTS

New Zealand moral rights legislation as it pertains to film and television is unique internationally. The usual intention of moral rights legislation is to protect the integrity of the creative work and reputation of the author. It is quite separate and independent from the primary exploitation rights, covered by copyright, which by their nature are purely economic.

There are generally considered to be three main moral rights:

1. the right to be identified as author of the work or the 'right of attribution';
2. the right not to be identified as author, or the 'right against false attribution'; and finally
3. the right to object to any modification or other derogatory treatment of the work which would be prejudicial to the author's honour or reputation, the 'right of integrity'.

Under our legislation, the Director is specifically named as the person who has the authorial or moral rights in film, but anachronistically is not defined as the author in the copyright section of the Act. The Director's right of integrity does not threaten the interest of any producer with commitment to a film or TV programme. Since the final version of a work is achieved by agreement with all contractual parties, the director's moral rights are in effect extended to the producer, who does not have any under our legislation.

The problem that DEGNZ has with the current legislation is section 101, dealing with exceptions to the right to object to derogatory treatment.

Paraphrasing, this section states amongst other clauses that:

- moral rights NOT infringed if delivered film cut by broadcaster for reasons of timeslot (i.e./ broadcaster ad-hoc internal censorship is okay);
- moral rights NOT infringed if film cut by broadcaster to fit any specific time length (i.e./ shortened to fit a slot or for any reason a broadcaster feels like);
- moral rights NOT infringed if film is split into parts (screened on different days) or has ad breaks inserted; and moral rights NOT infringed if parts of film used as a promo.

These unique exceptions are applied AFTER a film or programme is delivered to a broadcaster, i.e., it is not about contractual parties agreeing on the Final Cut<sup>2</sup> for delivery—it is about the broadcasters actions AFTER delivery.

These clauses for the broadcaster don't exist analogously for any other creative medium in the NZ Copyright Act. i.e., there are no clauses saying that shortening, cutting, splitting into parts or inserting adverts in the middle of novels is an exception to the author's right to object to derogatory treatment. They certainly don't exist in other moral rights legislation internationally. In most of Europe the director must sign a partial waiver of moral rights in order for the broadcaster to insert adverts and promo the film.

The current legislation offers no protection whatsoever for the integrity of the television work.

## COPYRIGHT

Copyright laws were historically setup to protect the book publisher and the backers or investors. As such it protected their primary exploitation (economic) rights. Copyright, as the name suggests, protects the backers/publishers from illegal copying, sale or exploitation of the work. The author, by way of the act of creation, is the original copyright holder, who then assigns this right to the publisher/backer usually in return for a share in the primary exploitation proceeds.

NZ copyright law is anomalous because it states that the screenwriter is legally the 'Author' of the script, the composer is 'Author' of the score but the director is not the 'Author' of the film even though the same act specifically grants the director the authorial rights (Moral Rights) of the film:

Section 5. Meaning of "author" For the purposes of this Act. The author of a work is the person who creates it.  
... the person who creates the work shall be taken to be,...

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<sup>2</sup> Final cut privilege (final cut right) is a film industry term, usually used when a director has contractual authority over how a film is ultimately released for public viewing.

(b) In the case of a sound recording or film, the person by whom the arrangements necessary for the making of the recording or film are undertaken.

This person who 'undertakes the arrangements' is generally regarded by NZ lawyers as the producer, however, the person who actually undertakes the arrangements to create the work is in fact the director.

DEGNZ seeks the author of audio-visual works, "the person who creates it" to be specifically defined as the director.

### **3. Do you agree with the proposed convergence work programme?**

DEGNZ agrees in essence with the proposed convergence work programme, with caveats.

The first is that Intellectual Property and Copyright in Content by Content Creators be positioned at the pinnacle from which all other elements of convergence flow and are debated.

Content exploiters are not Content Creators and therefore tend to diminish or neglect the paramount importance that Content and Content Creators had in the legacy industries of the past and have in the converged, IP-based world we now face.

Applications, services, networks, and devices are merely expensive pathways for the delivery of Content, produced by Content Creators.

In the audio-visual medium, Directors are the Authors and creators of Content. To ensure the ongoing flow of Content, both culturally and commercially significant, the Director's position must be acknowledged and protected through Intellectual Property and Copyright legislation.

Second, DEGNZ feels that what is currently missing from the work programme is an examination of the significance of culture in a converged world.

Cultural activities, goods and services have both an economic and cultural nature because they convey identities, values and meanings, and therefore must not be treated as solely having commercial value. In the Legacy Industries of the past, our cultural expression was primarily focused in our own geographic territory. In the converged world, our ability to express ourselves internationally is now magnified. New Zealand On Air and the New Zealand Film Commission allow New Zealand Content Creators to express their unique identity on screen without a commercial imperative, whether it's on a TV, cinema screen, Smartphone, Tablet or other display. To enable New Zealand Content Creators to compete globally, appropriation to these and other institutions in a converged world must be significant to ensure we have a cultural place at the global table. This will also help to ensure we have a healthy local screen industry producing local content telling our stories for domestic and international consumption. Without well-funded institutions supporting New Zealand Content Creators to create Content, we will be overwhelmed by the flood of foreign culture and programming that the converged world provides New Zealanders pathways to.

### **4. Should the Government be doing anything else to address convergence?**

#### **REGULATION**

It is crucial that the government maintain regulatory mechanisms, including content quotas in a multi-channel environment and in the digital landscape.

DEGNZ notes with concern the new digital multi-channels that the commercial free-to-air broadcasters now operate. This has come without any additional local content regulations or increased subsidy for the local screen content industry. The result is the flooding of offshore programming on all these new channels providing a worrying precedent for the screen industries.

The introduction of transmission of screen content over the Internet in a converged environment will allow for unregulated content being delivered to New Zealand homes.

There are two ways that the government can support a healthy screen content creation industry in New Zealand – through regulation and subsidy. The regulatory environment that now exists under New Zealand Broadcasting Act and the New Zealand Film Commission Act has ensured the creation of New Zealand content on New Zealand screens. This has also been supported by finance through New Zealand On Air and NZFC.

DEGNZ believes that the new “pathways” for screen content should have the same regulation that applies to the traditional delivery systems. This will deliver to the screen content producers an opportunity to build on the success they already have with the creation of new programming across a range of platforms.

Any easing of this regulation will see a diminution of New Zealand content on New Zealand screens.

## SCREEN INDUSTRY SUPPORT

DEGNZ recommends the ongoing support for New Zealand’s audiovisual and cultural industries by way of direct and indirect subsidy for the production of New Zealand content for broadcast and online consumption.

The ongoing support for the screen industry through organisations such as New Zealand On Air and the New Zealand Film Commission are imperative to ensure the continuing creation of original New Zealand content. But there also needs to be a flexible approach to this support.

An industry with opportunities for all key creative’s to earn a reasonable living, practice their craft, develop skills and collaborate creatively, and communicate their stories and visions to the widest possible audience needs to be supported. DEGNZ supports the view that growth in enterprises and support for established production companies are a key factor to the sustainability of the industry. However, we wish to reaffirm our view that such a programme should be able to demonstrate support for the creative endeavour’s and careers of directors and other filmmakers who contribute to the success of the local industry. A beneficial flow-on effect for other key creative’s cannot be assumed, but must be built into the guidelines for NZ On Air and NZFC.

However, DEGNZ believes very strongly that this goal is not mutually exclusive with rewarding entrepreneurial directors and supporting directors’ rights. Directors play a key creative role in screen production, and historically in the New Zealand industry, have generated their own work. Indeed, it is rare that a New Zealand director has not been substantially involved in the development of a project they are attached to direct. Our leading directors have been the driving force of our most successful films.

Collaboration with talented producers has also been crucial to realising director driven projects, and a flexible, balanced framework for supporting endeavours from all talented key creative’s is essential to the growth of the industry.

Many experienced directors also use their skill and expertise to work as producers, bringing substantial skills to the producer’s role, which has a further positive effect in assisting to build the careers of the emerging directors they produce for.

The application of the new approach introduced at NZFC through its Business Development Scheme to empower a small group of companies takes no heed as to whether or not this is the best outcome for a particular project. The fact that there are only a limited number of established production companies in the industry with finite resources to take on new projects, whether as producer or executive producer, is also an issue that has not been adequately addressed.

It is DEGNZ’s view that NZFC need to demonstrate greater adaptability to specific circumstances to allow all talented key creatives to pursue their entrepreneurial and creative vision and share equitably in their successes. A more flexible approach has the added advantage of encouraging diversity and harnessing the full potential of the industry.

In a converged environment where the way we produce content will vary depending on the platforms that Content Creators use, support for these content creators needs to also vary.

DEGNZ would therefore recommend the following:

- An increase in the funds made available to NZ On Air and NZFC by the government;
- A review of the programmes and guidelines prior to any increase in funding to these organisations with direct input by industry practitioners;
- Widening of the programmes and ways that content creators, in particular directors, can access these additional funds.

## **5. What barriers are you aware of that prevent you from benefiting from, or responding to, convergence?**

The overriding barriers that prevents Directors benefitting from convergence is the legacy legislation in the Copyright Act that denies Moral Rights and Authorship to Directors, and the lax regulation and penalties for blatant copyright infringement.

### **COPYRIGHT**

Since the New Zealand film industry emerged in the mid 1970s, New Zealand film directors have become very significant cultural exports and often the driving force behind some of our best-loved and successful films. The list includes Sir Peter Jackson (Brain Dead, Heavenly Creatures) Jane Campion (Sweety, An Angel At My Table, The Piano), Geoff Murphy (Goodbye Pork Pie, Utu, The Quiet Earth), Roger Donaldson ( Sleeping Dogs, Smash Palace, The World's Fastest Indian) to name a few. There are also television directors who are closely involved in creating the distinctive flavour of some of New Zealand's most popular television shows, directors such as Peter Burger (When We Go To War, Field Punishment No. 1, Waitangi: What Really Happened), Rob Sarkies (Consent: the Louise Nicholas Story, This Is Not My Life) Chris Dudman (The Day That Changed My Life, Harry). Directors such as these are the backbone of our television drama industry.

The key creative role of the director is now not only better understood but revered. In this context it would be reasonable to say that the absence of directors as co-creators and joint copyright holders along with producers, writers, musicians and music publishers in the Copyright Act was an historical oversight. Consequently, directors are still not receiving the remuneration they are entitled to under the act.

DEGNZ believes that the digital distribution landscape offers an opportunity to redress this anomaly. In addition, a new remuneration model for all key creative's is crucial to the sustainability of the industry. Already directors are finding that that the need for content in a multi-channel and multi-platform environment is providing new opportunities for rights holders that they do not benefit from.

The Directors Guild of America negotiated with all studios and producers to agree that the directors of screen content would be entitled to share in the revenue from all digital uses of the screen content on a defined residual basis.

It is the DEGNZ's view that in the New Zealand context the government must ensure that directors are finally appropriately recognised, along with other key creative's for the very significant role they play in the creation and success of the content that is at its very foundation, and be rewarded fairly.

The failure of section 101 of the Copyright Act to adequately recognise directors and properly reward their creative work through the assignment of Authorship severely inhibits directors' ability to maintain a sustainable living in their chosen career.

Aside from our high profile feature film directors, the vast majority of working directors in New Zealand have little bargaining power when it comes to negotiations with producers. It is a buyer's market with a limited range of projects for the suppliers of creative services such as directors. Therefore it is the view of DEGNZ that the amendment to section 101 of the Copyright Act needs to be urgently addressed by government if directors are to continue to provide their unique creative contribution to the New Zealand screen sector and be properly remunerated.

Directors in New Zealand are in the unenviable economic position of benefitting from neither the European tradition of collective administration which collects remuneration for cable retransmission, rental rights, private copying and other secondary uses, nor from the support of a strong union like the Directors Guild of America or Directors Guild of Canada which have established and equitable residual arrangements with producers and studios.

The biggest hurdle for New Zealand directors is shifting industry practice to recognise and value their contribution. As there is no history of secondary income streams or residual payments flowing to directors in New Zealand, it is near impossible to achieve the contractual changes that would address this. By contrast actors, musicians, composers and writers are all recognised in statutory schemes or award-style arrangements that reward their endeavours.

## REGULATION AND PENALTIES

Much is made of the Sharing Economy, by the likes of Google, Uber, Airbnb and others. Essentially, however, the Sharing Economy allows organisations to avoid taxation, regulation and to generate revenues from the use of unauthorized or illegal content.

DEGNZ is opposed to Sharing when the Intellectual Property asset holder and Copyright holder are denied the opportunity to earn revenues from their work.

DEGNZ supports tighter regulation and heavy penalties to protect the rights of Content Creators to earn a sustainable living from their creative endeavours.

In this new converged media environment it is vital that the Director's role as Creator and Author of screen content be recognized and appropriately remunerated to support a healthy and growing pool of screen directors.