



MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Review of the Copyright Act 1994: Issues Paper

Summary of submissions





**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

Ministry of Business, Innovation and Employment (MBIE)

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1 Background to this summary

We developed an Issues Paper to solicit evidence of problems with current copyright law and areas where it is working well

On 23 November 2018, we released an [issues paper](#) as the first stage of public consultation on the review of the Copyright Act 1994. This stage in the review is about identifying problems with the way current copyright law in New Zealand is operating or opportunities to improve it, as well as understanding where it is performing well.

The main purpose of consultation was to solicit information that would help us make these assessments, and inform decisions about which areas of the law there is the most value in reviewing. The paper also sought feedback on a set of objectives for copyright that we proposed to use as a basis for evaluating copyright law.

The Issues Paper is a long document that asked 97 questions. This reflects the complexity of our copyright law, the range of potential issues we wish to investigate (at this stage), and the government's desire to review this legislation thoroughly and without pre-judging the scope of the review. Part 3 of the paper sought feedback on the proposed objectives. The remaining parts explored potential issues, in roughly the order these subjects appear in the Copyright Act:

- Part 4 – Rights (including the criteria for protection and protected works; ownership, duration and infringement provisions; and related rights)
- Part 5 – Exceptions (including the purpose-based, fair dealing exceptions; exceptions for particular users (libraries, archives and educational uses); exceptions for particular kinds of works; contracting out of exceptions; and internet service provider liability)
- Part 6 – Transactions (including licensing and assignment; the role of collective management organisations; licensing disputes dealt with by the Copyright Tribunal; and orphan works)
- Part 7 – Enforcement (including groundless threats of legal action; border protection measures; issues with the infringing file sharing regime; online infringement; safe harbours for internet service liability; and criminal liability)
- Part 8 – Other issues (namely, the dual protection of industrial designs and how the government should approach recommendations on taonga works in the Wai 262 report).

We conducted over four months' public consultation

We used the Issues Paper to have conversations with anyone who works with copyright or is affected by it and wanted to contribute information to the review. The main way we facilitated these conversations was by hosting four public workshops (in Christchurch, Auckland and Wellington). These workshops were an opportunity for people interested in copyright to improve our understanding of the issues, exchange information with each other and hear different perspectives. A total of around 160 people participated. We subsequently published [notes](#) from these discussions.

There was some discussion in these workshops on the questions the paper asked about taonga works and mātauranga Māori, and the idea of establishing a separate workstream to develop policy on taonga works in partnership with Māori. To begin more direct engagement kanohi ki te kanohi (face-to-face) with Treaty partners and experts on these questions, we also held a targeted kōrero to discuss how the Crown and Māori should work together on this kaupapa. You can find out more about the feedback we received on [this page](#).

Written submissions on the paper (summarised in this document) are the predominant source of information generated by the consultation process, which formally concluded on 5 April 2019.

Who submitted

We received 148 written submissions

Some of the 148 submitters asked us not to publish their submissions. Some other submitters asked us to withhold their identity or specified parts of their submission when we publish their submissions.

Organisations that submitted (and whose submissions we can publish)

Name of organisation submitting (alphabetical)	Organisation or submission type	Abbreviation (if used in summary)
AJ Park Intellectual Property	Legal	
Alliance of Independent Authors	Industry body	
Artistic Licence	CMO (inactive)	
Asian Pacific Copyright Association	International body / forum	
Auckland Art Gallery Toi o Tāmaki	GLAM	
Auckland Libraries	GLAM	
Auckland War Memorial Museum (Tāmaki Paenga Hira)	GLAM	
Australian Digital Alliance	Coalition of public and private sector groups	
Australasian Music Publishers' Association Limited	Industry body	
Blind Foundation	Support and advocacy for blind users	
British Copyright Council	International body / forum	
Canterbury Museum	GLAM	
Christchurch Art Gallery	GLAM	
Copyright Agency	Australian organisation advocating for creators	
Copyright Licensing New Zealand	CMO	CLNZ
Council of Archives and Records Association New Zealand	GLAM	
Creative New Zealand	Crown entity	

Name of organisation submitting (alphabetical)	Organisation or submission type	Abbreviation (if used in summary)
Design and Artists Copyright Society	Industry body and CMO	
Designers Institute of New Zealand	Industry body	
Depot Artspace	Visual arts	
Directors and Editors Guild of New Zealand	Industry body	
Documentary Heritage SIG	GLAM	
Drama Magic Ltd	Company directed by writer, playwright, and teacher Susan Battye	
ESA Publications New Zealand Ltd	Publishing company	
Google	Tech company	
Hachette New Zealand Ltd	Publishing company	
Hamilton City Libraries	GLAM	
Heritage New Zealand Pouhere Taonga	Crown entity	
Huia Publishers Ltd	Māori publishing company	
Interactive Games & Entertainment Association	Industry body	IGEA
International Association of Music Libraries (NZ branch)	GLAM	IAML
International Confederation of Music Publishers	Industry body	
International Confederation of Societies of Authors and Composers	Industry body and CMO	
International Federation of the Phonographic Industry	Industry body	IFPI
International Publishers Association	Industry body	
InternetNZ	Organisation supporting the development of NZ's internet	
Library and Information Advisory Commission	GLAM	
Library and Information Association of New Zealand Aotearoa	GLAM	LIANZA
Marist Archives	GLAM	
Massey University College of Creative Arts Toi Rauwharangi	Education	
Mega Limited	Tech company	
Museums Aotearoa	GLAM	
Museum of New Zealand Te Papa Tongarewa	GLAM	Te Papa
National Digital Forum	Other (network of people and organisations that supports digital culture and heritage)	
National Library	GLAM	

Name of organisation submitting (alphabetical)	Organisation or submission type	Abbreviation (if used in summary)
New Zealand Film and TV bodies (joint submission)	Industry body	NZ Film and TV bodies
New Zealand Institute of Architects Incorporated	Industry body	
New Zealand Institute of Patent Attorneys	Legal	NZIPA
New Zealand Institute of Professional Photography	Industry body	
New Zealand Law Society	Legal	
New Zealand Media and Entertainment	Media company	NZME
NZ music industry (joint submission)	Industry bodies	NZ music industry
New Zealand Society of Authors (PEN NZ Inc) Te Puni Kaituhi o Aotearoa	Industry body	NZSA
New Zealand Telecommunications Forum Inc.	Industry body	
New Zealand Writers Guild	Industry body	
Nga Tāonga Sound & Vision (The New Zealand Archive of Film, Television & Sound)	GLAM	NTSV
Organisation for transformative works	Fan organisation	
Otago Museum	GLAM	
Patterson Associates Limited	Architecture company	
Playmarket	Industry body for NZ Playwrights	
Print Media Copyright Agency	Industry body	
Publishers Association of New Zealand	Industry body	PANZ
Radio New Zealand	Crown-owned broadcaster	
Archives New Zealand	GLAM	
Royal Society Te Apārangi	Statutory organisation promoting science, technology and the humanities in NZ	
Screenrights	Industry body	
Screen Production and Development Association	Industry body	
Screen, music and interactive media (joint submission)	Industry bodies	
Sealegs International Ltd	Marine industry body	
Sky TV	Media company	Sky
Spark	Tech company	
Stuff Limited	Media company	
Te Hunga Rōia Māori o Aotearoa, the Māori Law Society	Legal	
Te Rūnanga o Ngāi Tahu	Iwi	
Television New Zealand Limited	Crown-owned broadcaster	TVNZ

Name of organisation submitting (alphabetical)	Organisation or submission type	Abbreviation (if used in summary)
Tohatoha Aotearoa Commons	Incorporated society promoting openness, sharing and equity on the internet	Tohatoha
Trademe	Tech company	
Universities New Zealand	Education	
University of Canterbury Library	Education (GLAM)	
Victoria University of Wellington Students Association	Education	
Vocus New Zealand	Fixed line operator	
Waikato Museum	GLAM	
Walsh Memorial Library (MOTAT)	GLAM	
WeCreate	Alliance of NZ's creative industries	
Wellington City (Council) Archives	GLAM	
Xero Limited	Tech company	

Individuals who submitted

Profession/description given	Number
Writers	9
Artists	4
Academics	2
Photographers	2
Barristers	2
Patent Attorney	1
Retired librarian	1
District Court Judge and former Chair of the Copyright Tribunal	1
Titchfield Press	1
Member of the Director and Editors Guild	1
Te Runanga o Whaingaroa Beneficiary	1
Whangaroa Papa hapu Member	1
Writer, Director	1
Oral historian	1
Board member of New Zealand Society of Genealogists	1
Creator of designs	1
Artist, academic, writer, producer, curator and commissioner of works.	1
Member of public /published author/ artist/ designer and Christian feminist	1
Other interested individuals	7

2 Approach used in this summary

Purpose

The purpose of this document is to synthesise, for ease of reference, the vast amount of information received in written submissions, and give a sense of the themes emerging on each subject. It is not supposed to be a substitute for the full submissions, which you can read directly on [this](#) page on the MBIE website.

How we have organised information from submissions

We reviewed information from submissions and made best efforts to organise it all by question number or subject.

We have aggregated some answers to each question into broader subjects, but have mostly preserved the order they are dealt with in the Issues Paper.

We have aimed to summarise information in a fair, neutral and representative manner.

We have focussed on information that evaluates the status quo

In producing this summary, we have generally focussed on information that reveals something about the way copyright law and the system currently works ('problems' and 'benefits' or 'advantages' and 'disadvantages', to repeat the wording used in the questions).¹

Many submissions told us what changes or solutions we should consider in the review. The Issues Paper did ask for these views, because they will help us develop options for addressing issues in the review. We intend to summarise the changes submitters have suggested when we are consulting on options for change. For now we are focussed on evaluating the status quo and examining issues with it.

Some submissions also included views and information about policies that are outside the scope of this review (not directly related to copyright). For example, some comment on other legislation (eg the Public Lending Right for New Zealand Authors Act 2008). We have not used this information in developing these summaries, but have identified which part of government we believe is best placed to consider or address it through their work programmes and are drawing their attention to those comments as published.

¹ One notable exception to this is summarising responses to our questions about Copyright and the Wai 262 Inquiry (taonga works), which were not focused on current copyright law.

3 Overall themes from submissions

General response to the Issues Paper

The Issues Paper appears to have been well received by most submitters. Many individuals and organisations (in or when providing their submissions) expressed their thanks to the government for undertaking a comprehensive review of copyright law and their commitment to continue working with us as the review proceeds.

Submissions have commended:

- The Issues Paper as a useful and informative document. The submission from Creative NZ, for example, says they wish:
“to record our appreciation of the way in which the Issues Paper provided a comprehensive and understandable overview of the issues in what can be complex, daunting, and at times arcane, legislation. We believe the Ministry’s approach has provided a sound basis for people to prepare submissions and express views on this important kaupapa.”
- The opportunity for constructive dialogue we provided by hosting public workshops on the paper (eg TVNZ and Trademe). InternetNZ noted that “Developing fair and effective copyright law requires input from a range of perspectives...”
- The Government’s interest in the possibility of a new workstream aimed at providing better protection for taonga works and mātauranga Māori.

A few submissions were critical of the paper, certain statements it made or the process we used to consult publicly on it:

- The submission from PANZ argues that the Issues Paper approaches the question ‘what copyright seeks to achieve’ in three different and inconsistent ways, and that two of them are ‘needlessly adversarial’.
- The Royal Society Te Apārangi suggests mātauranga Māori issues should feature earlier in discussion documents produced by the Crown, if only to acknowledge that they require special and different treatment.
- Several submissions react negatively to some statements made in the paper. For example:
 - the discussion (on page 12) of the ‘copyright paradox’ causes the NZ music industry concern that we view copyright (in their words) “purely as a cost to society that should be tolerated only as far as absolutely necessary to guarantee production of more works”
 - our suggestion that it is unnecessary to review the term of copyright for works other than communication works and unpublished works described by section 117.
- The NZSA criticises some of the language used in the [Terms of Reference](#) about the potential for over-protective copyright settings to inhibit important cultural activities and say they “reject the inference that obtaining permission is just too hard and ‘stifles creativity’”.

- The submission from author Helen Lowe expresses concern about the ability of creators to participate in the review. While creators are arguably the most directly affected stakeholder group, she suggests they are disadvantaged by both the Issues Paper and the consultation process. She describes the length and technocratic nature of the paper as advantaging larger stakeholders (with budgets and specialist advisors at their disposal) over artists (who generally have limited resources) and recommends that in future we more actively facilitate the input of creators in a user-friendly and inclusive way.

Overall nature and quality of information received

In releasing the Issues Paper, and consulting on it, we emphasised our desire to gather evidence that can be used to substantiate issues with the status quo, as well as to understand its benefits. To help people do this in their written submissions, we also published [guidance](#).

Many submissions make clear efforts to answer our call for evidence and to use the guidance we provided. Tohatoha, for example, used each of the proposed objectives to structure its responses to questions.

Ultimately, very few submitters were able to provide concrete evidence of the kind that would allow us to confidently quantify problems and benefits with the status quo. Much of the data and statistics in submissions provide useful context, but are not easily applied in this exercise. For example, estimates of the economic contribution of specific activities or technologies have potential applications in the review, but do not *alone* enable us to conclude what economic impact particular copyright policies are having (and policy changes would likely have) on those activities.

The longest submission we received was a joint submission from organisations in the NZ music industry (almost 400 pages). There are some good examples of creative industries and some technology companies collaborating in producing submissions on the Issues Paper.

Examples of submitters who have produced or commissioned research that is directly applicable to the review include Sky, CLNZ, Vocus and the NZ music industry. Other evidence provided in submissions generally falls into the following categories:

- references to existing research on copyright policy (ie academic papers, overseas studies and government reports)
- local surveys of people in certain professions (eg a University of Otago survey of its staff about their understanding of copyright from 2016)
- anecdotal evidence, particularly examples from individuals and organisations from their experience.

Some submissions also contain insights and analysis that will be valuable in developing policy on copyright.

A large proportion of the content of submissions is comprised of statements of position, views and assertions on particular issues or copyright settings. In many cases, these views are not accompanied by evidence or justifications. One common approach used by submitters to criticise the status quo is comparing it with copyright law in other developed countries.

Divergence in thinking about copyright and its purpose

Submissions overall reinforce our understanding that stakeholders with different interests in copyright view its purpose and how it should operate in fundamentally different ways.

Several submissions from creators and rights holders share the sentiment that copyright exists principally or solely for the benefit of creators and creative industries. A few of them characterise copyright works as possessions requiring the same kind of protection as items of personal property, such as a house, and argue that any use of their work (eg as permitted by exceptions) is never justified or amounts to theft.²

Other submitters identifying themselves as creators have different attitudes to the use of their work, by viewing themselves as participating in a wider creative community that is best served by the open and respectful exchange of ideas or information.

These and other stakeholders often characterise copyright in their submissions as creating barriers to freedom of expression and access to culture, or suggest it risks losing relevance the more it comes into conflict with common practices and values. For example, commenting on user-generated content, Tohatoha says:

Under the current law, noncommercial creative expression is limited in ways that stifle innovation and creativity. Internet platforms like YouTube, Twitter, Facebook, and Reddit are part of most people's everyday lives and creating remixed content for these platforms is an important outlet for creativity and play. It's bad practice and discourages respect for the law when the law is so far out of step with people's lived experiences and community standards.

Judge David Harvey, in his submission, distances himself from traditional thinking about the structure and purpose of copyright law (which he calls 'obsolete'), suggesting it should instead be designed to reflect the properties of digital technologies.

Almost universal agreement that copyright law is poorly understood

For nearly all areas of the Copyright Act explored in the Issues Paper there are submissions suggesting provisions are poorly understood, too complex, confusing or difficult to apply in practice. Complaints about complexity and confusion are commonly levelled at copyright exceptions (eg for libraries and archives). Other examples of areas where this concern is raised are originality, ownership, moral rights and authorisation liability.

Several submissions express this concern more generally about the Act's inaccessibility or people's poor comprehension of it. Waikato Museum, for example, says:

The biggest issue that we have come across was a lack of cohesive understanding of the Copyright Act across each of our departments. Copyright is something that we are aware of and that affects each of our jobs individually, but we do not have a team that works solely on copyright.

Some of these submissions suggest the Government needs to take more responsibility for promoting understanding of copyright or producing guidelines. For example, commenting on exceptions, the NZ film and TV bodies says:

² The submission from Drama Magic Ltd, for example.

There are limits on legislation's ability to educate or explain concepts to the wider community. In Australia the Copyright Council publishes information sheets about specific issues in copyright law as a way of educating copyright users. This approach works well in New Zealand in areas like tax, privacy and trade practices where the IRD, Privacy Commissioner and the Commerce Commission for instance each do an excellent job in their production and dissemination of soft law material.

Subjects attracting the most comment

Submitters were generally selective in answering questions from the Issues Paper on subjects of most interest to them. Some parts of the Paper attracted far more responses from submissions than others. In descending order of number of answers to questions in each part they were:

- *Part 5 – Exceptions and limitations*, with a fairly even spread across the sections in this Part
- *Part 4 – Rights*, with the greatest number answering questions on section 1 “What does copyright protect and who gets the rights?”
- *Part 3 – Objectives*
- *Part 7 – Enforcement*, with the costs of enforcement, online infringement and the role/limited liability of internet service providers attracting the most submissions
- *Part 6 – Transactions*
- *Part 8 – Copyright and the Wai 262 Inquiry*
- *Part 8 – The relationship between copyright and registered design protection.*

4 Summary of submissions by subject

Proposed objectives for copyright

Part 3 of the Issues Paper sought feedback on five proposed objectives:

1. Provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so
2. Permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand
3. Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law
4. Meet New Zealand's international obligations
5. Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi.

Sixty-one submissions answered questions about the objectives proposed in the Issues Paper. Many more submissions made comments of indirect relevance to the proposed objectives (that we made best efforts to identify and include in this summary).

Submissions on values, frameworks or policy goals not expressed in the proposed objectives

Many submissions make general comments on factors not clearly expressed in the objectives that they believe are important to recognise when evaluating or developing copyright policy. A few of these submitters take clear issue with 'financial' or 'economic' analysis, because these models underestimate the full value of copyright works (by looking at them only as tradeable goods or commodities). The Treasury's Living Standards Framework and related concepts are cited in some submissions as providing an appropriate model.

Cultural and social contributions of copyright works to New Zealand

Submissions, predominantly from creative industries, libraries, archives and museums, identify a number of cultural and social benefits of a flourishing creative sector and enjoyment of the arts, on the basis these benefits require a supportive regulatory environment.

National Identity

A theme from these submissions is the value New Zealanders place on being able to enjoy New Zealand stories and seeing our culture celebrated in the arts and mainstream media, which is thought to foster a strong sense of national identity. Some submitters refer to local productions, such as iconic films, that have reached international audiences, showcasing local talent, indigenous voices, our unique story-telling and kiwi sense of humour. CLNZ distinguishes this from what they call 'cultural cringe' – a discomfort we used to feel towards New Zealand stories. It also expresses the sentiment that our cultural identity has been 'hard fought' and is in need of protection/preservation.

At least two submissions express the view that copyright law in New Zealand should actively promote the creation and success of local content.

Many submitters comment on how a rich fabric of New Zealand works and the organisations involved in preserving and providing access to them contributes to:

- educational opportunities, including to improve our national awareness
- our understanding of New Zealand’s unique history and heritage
- the cultural legacy we leave for future generations.

The role literature plays in delivering these benefits was emphasised by a number of submitters from the writing and publishing sector. Submitters describe books as cultural artefacts, repositories of our country’s social and political outlook, enabling us to pass on traditions to our children and helping us to contextualise our own experiences. CLNZ adds that a thriving writing and publishing sector is essential to ambitions to revitalise te reo.

A few submitters refer to the concept of ‘kaitiakitanga’. Massey University Colleague of Creative Arts does this to convey that, in the interests of our cultural wellbeing and that of future generations, all New Zealanders are responsible for the endurance and documentation of our culture (much like our physical environment) by caring for collections in a respectful manner. Submitters such as Museums Aotearoa and the National Library describe the cultural significance and national value of works held and made accessible by heritage organisations. These submitters also describe the importance of heritage services to public engagement with and understanding of our culture, as well as to research, science and creativity.

Cultural diversity and inclusiveness in the arts

A few submitters said that promoting the diversity of cultures and creative approaches should be important goals for copyright policy. The National Library quotes one of the recent European Union Copyright Directives as saying copyright protection “also contributes to the Union’s objective of respecting and promoting *cultural diversity*...” [emphasis added]. One submitter talks about the richness of cultural diversity in New Zealand and importance of valuing and hearing the voices of our Tangata Whenua and diverse communities. The Australasian Music Publishers Association Limited quotes Prime Minister Ardern as having described the importance of the arts in helping us to “express ourselves as unique individuals, brought together in diverse communities.”

Helen Lowe discusses the historical importance of copyright in moving us away from times when the arts served the will and leisure of a privileged class of society to the more egalitarian system we have now, where everyone enjoys the freedom to consume, participate in the arts and express themselves (which has led to greater diversity). The Organisation for Transformative Works comments at length on fan fiction as an example of an accessible and rewarding method of participation in the arts (rather than passive consumption), which it says has numerous benefits.

Other social/cultural benefits identified

Submitters claim that a flourishing supply and enjoyment of copyright works (from different sectors, but largely focussing on written works) can have a number of other socially-beneficial effects, including:

- *Increased social cohesion* – Submitters comment on how reading helps us connect and learn about each other by cultivating empathy, imagination and the ability to discuss complex issues.
- *A better functioning democracy* – CLNZ and one other submitter discuss how the health of our democracy depends on how well local journalism, books and quality publications

enable us to educate ourselves, reflect on our surroundings, learn from our political history and debate ideas.

- *More equality of opportunity* – At least two submitters discuss the role of access to education (eg through books) in addressing social inequalities. Another submitter discusses the importance of children engaging with local stories to positive life outcomes.
- *More creative and fulfilled citizens* – Submitters comment on how the arts inspire the freedom to explore, experiment, take creative risks and express our uniqueness, and how they stimulate fresh thinking and creative problem-solving. One children's author gives examples of reader experiences that include improving their psychological health, helping them confront long-term trauma and making them more emotionally in touch with parents.

Contributions to New Zealand's economic success

A few submissions discuss the contribution of the creative sector to the New Zealand economy. WeCreate does this in a number of places, describing itself as “the alliance of New Zealand's creative industries with the mission to grow the creative sector's contribution to New Zealand's social and economic wellbeing”. Its submission talks about how our creative sector drives economic growth, offers opportunities for regional development and generates high value, environmentally-friendly exports. At least two other submissions also comment on the role of creativity and our knowledge economy in diversifying our exports, given New Zealand's geographic isolation.

The importance of being able to compete internationally is another theme in some submissions. Two submissions suggest that healthy or strengthened copyright protection in New Zealand helps New Zealand writers and publishers to compete more effectively in a global market. A few submissions say that successful creative industries (eg big budget film productions,) also benefit the economy by attracting tourism and creating jobs. The submission from Google mentions the Government's innovation goal that New Zealand becomes a leading country in the global digital economy and characterises over-protective copyright law as a barrier to competing with other countries on technological innovation.

Human rights

Many submissions refer (directly or indirectly) to cultural rights that are provided in various human rights instruments, but not acknowledged in the proposed objectives. Most of these submissions suggest these rights should be explicitly recognised in the objectives or used as guiding principles when making policy choices and weighing interests in copyright.

The right to science and culture

Several submissions reference or allude to rights provided in article 27 of the Universal Declaration of Human Rights and article 15 of the International Covenant on Economic, Social and Cultural Rights:

- the right everyone enjoys “freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”³

³ Article 27(1) of the Universal Declaration of Human Rights, but expressed in similar terms, by article 15 of the International Covenant on Economic, Social and Cultural Rights.

- “the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.

The first of these rights is viewed by some as inadequately recognised in the proposed objectives – for example, in the second objective, which caveats ‘reasonable access’ to works with the concept of a ‘net benefits’ test.

Several submissions characterise the rights of authors in slightly different terms to these international instruments (or elaborate on their meaning), referring to the right to be *rewarded* or *fairly remunerated* for their work and the right to choose how their work is used and protect its integrity. The CLNZ submission suggests there is an equivalent right (eg to fair remuneration) for publishers, as well as authors. This link between the Article 27 right of authors and the idea that authors should enjoy an adequate standard of living and fair remuneration was the subject of a general comment by the United Nations Committee on Economic, Social and Cultural Rights, as Judge David Harvey points out.

The right to freedom of expression

About a dozen submissions identify the right to freedom of expression as being in a central consideration in copyright policy. Some submissions quote article 19 of the International Covenant of Civil and Political Rights. Judge David Harvey emphasises two features of the right as expressed in article 19:

- that it explicitly protects the media of expression
- that it includes both the imparting and the reception of information, which is now largely facilitated by the internet.

Judge David Harvey discusses how a decision by the European Court for Human Rights demonstrates (accordingly) that even the kinds of basic restrictions copyright law places on the use of information may be regarded as interfering with the right to freedom of expression. Though, he adds that such interference is often justified. Massey University College of Creative Arts makes the related claim that copyright has the potential to be used as a tool for censorship, or to prevent unflattering commentary on copyrighted works.

The right to freedom of expression is also affirmed, as submitters like InternetNZ point out, by section 14 of the New Zealand Bill of Rights Act 1990 as: “including the freedom to seek, receive, and impart information and opinions of any kind in any form.”

The right to education

In commenting on the importance of human rights to copyright, a few submissions also reference the right to education as affirmed in article 26 of the Universal Declaration of Human Rights: “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages.”

Rights of indigenous peoples

In commenting on the importance of human rights to copyright, the National Library (and Judge David Harvey by reference to a book by Graeme Austin and Laurence Helfer⁴) also allude to article 31 of the Universal Declaration on the Rights of Indigenous Peoples, which provides

⁴ Laurence R Helfer and Graeme W Austin *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, New York, 2011).

those peoples with the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and cultural expressions.

Copyright as a human right to property

At least three submissions (NZ film and TV bodies, CLNZ and the Alliance of Independent Authors) characterise copyright works as items of personal or private property and claim copyright owners should be able to assert the same rights as they would have over other kinds of private property. Comparing copyright with ownership of land, CLNZ takes issue with the fact that copyright exceptions allow uses of property without the kind compensation to which a landowner may expect when their land is acquired by the Crown (under the Public Works Act 1981).

Comments on how to apply or balance these rights

Many submissions call for balance in copyright law between the rights identified above. Some submitters view copyright and the interests of copyright owners as in opposition to the rights to culture, science and freedom of expression. Others go into more nuanced discussions about how creators themselves rely on access to existing works for participation in culture and freedom of expression.

The relationship between copyright protection and freedom of expression is a particular theme well discussed in submissions. Some submitters discuss how they see the freedom to express ourselves as fundamental to the quality and diversity of works, including the ability of creators to access, build on, transform and adapt works to their own cultural context. The Organisation for Transformative Works, for example, explains how writers improve their craft and creative output through fanwork. Auckland Museum explains that this relationship between access to and improvement of others' work (or the 'standing on the shoulders of giants' effect) is well understood in scientific and technology communities. The submission from Melissa Laing suggests using principles of respect and generosity to navigate this tension between protecting creators and facilitating creative reuse. In particular, she distinguishes between 'generative' reuse (which is beneficial and helps grow the arts) and 'extractive' or 'exploitative' reuse, which tends to diminish the field of practice (eg for commercial gain).

Submitters express various attitudes to how the internet and digital technologies affect these human rights. The internet is seen by some as a major enabler for participation in culture, access to information and freedom of expression. These submitters view regulation of the internet (eg through site blocking) as threatening the exercise of these rights. A United Nations report is twice cited to support this view.⁵

Judge David Harvey proposes a fundamental rethink of copyright principles to accommodate what he calls a new information paradigm. He suggests using a rights-based approach, citing the (earlier mentioned) book by Graeme Austin and Laurence Helfer, and says this could involve, for example, assessing the extent to which copyright policies limit the right to receive and impart information in order to make them proportionate.

Rewarding creativity for reasons beyond 'incentivising' creation

A sentiment expressed in several submissions is that copyright should principally benefit creators, by rewarding them for their efforts and creative contributions, as an end in itself. (This view is expressed over and above arguments based on the author's right to protection of

⁵ Fareeda Shaheed (UN Special Rapporteur in the Field of Cultural Rights), *Copyright policy and the right to science and culture*, [A/HRC/28/57](#)

their moral and material interests provided by article 27 of the United Nations Declaration of Human Rights.) The concept of ‘rewarding’ creativity is closely connected in these submissions with helping creators secure fair remuneration, giving them control over uses of their work, ensuring respect for their work and empowering them to maintain its integrity.

Professor Rebecca Giblin in her submission (and publications) distinguishes the desire to recognise and reward creators from the ‘utilitarian’ or ‘instrumental’ rationale for copyright. Understanding and recognising authors’ valid claims to recognition and reward, she says, is a “necessary first step towards developing a system that results in fair payment for authors, fair investment opportunities for cultural intermediaries, and fair access to culture for everyone else”. The belief that copyright should reward creators, as an object in itself, is generally held by submitters as a matter of principle (eg human dignity), morality, recognition of the emotional investment made by the author or “the mark of a just and civilised society” (the NZSA).

A few submissions (for example from Helen Lowe and Universities NZ) talk about certain disadvantages that may help to explain the low incomes of authors and artists:

- power imbalances authors face when negotiating with publishers or online distributors
- other perceived disadvantages, such as:
 - not having the means to enforce their copyright
 - not being able to participate equally in legislative reviews with large organisations with big budgets.

Melissa Laing proposes copyright be governed primarily by a principle of respect, which would recognise the relationship artists have with their work and te ao Māori values. She explains the principle of respect as upholding the mana of both artists and their works (in their own right and cultural context), acknowledging authorship, influence and whakapapa, compensation for labour and positive creative dialogue.⁶ Her submission suggests we understand the work itself as “an independent entity with mauri”, whose integrity can be harmed (in addition to that of the artist).

Other policy goals or objectives suggested

A few submissions view alignment of copyright settings with our key trading partners as a worthwhile aim in the review. The NZ film and TV bodies emphasises the importance of alignment with Australia and the United Kingdom in order to continue benefiting from their case law. The submission from Google recommends Treasury’s 2015 approach to Best Practice Regulation be used in the review. The Xero submission suggests the objectives should better recognise the value in a digital age of software development and the creative problem-solving that involves.

Resilience to technological change

Over 40 submissions commented directly on the possibility of an objective for copyright law relating to technological-neutrality or resilience to technological change (which was offered in question 2 as an example of another objective we could consider). Most (25) of these

⁶ Understanding copyright through the principle of respect, Melissa Laing says, is especially meaningful to visual artists, as the value of their work is strongly influenced by their artistic identity and relationship with their work (having little to do with economic rights).

submissions appear to support an objective along those lines, tending to agree that the pace of technological change presents a significant challenge for regulating copyright. The main reasons offered by these submissions are:

- Legislative change is not fast enough to accommodate technological change.
- Protection of copyright works should not differ depending on its format (eg digital versus physical).
- Heritage organisations, library and information service-providers need to perform their access to knowledge functions in ways that embrace technological developments (eg digital preservation technology) and changing expectations of their users. Failure of copyright law to anticipate/accommodate these technologies – through exceptions in particular – undermines these important functions.
- Inflexible copyright law stifles innovation and disadvantages users of works because new uses enabled by technology and services are presumed to be infringing until Parliament says otherwise.
- Principles-based law works well in other statutes (eg the Privacy Act 1993, the Consumer Guarantees Act 1993 and the Fair Trading Act 1986).

At least three of these submissions reject the suggestion that flexibility and certainty in copyright law would be conflicting objectives, instead viewing principles-based standards as improving clarity, certainty and respect for the law. Google points out in its submission that Treasury's Best Practice Regulation principles include both 'flexible/durable and certain/predictable' and quotes the Australian Law Reform Commission as saying: "Standards are generally less certain in scope than detailed rules. However, a clear principled standard is more certain than an unclear complex rule."

Around 15 submissions take clear issue with an objective of this kind. The most common reason for this position is doubt that it is realistic to develop copyright law in a way that appropriately anticipates technological change. Other reasons offered against adding resilience to technological change to the objectives are that:

- it would make copyright legislation more uncertain, which would negatively affect confidence to invest in bringing copyright works to market and increase reliance on costly clarification by the courts
- the objectives already lend themselves to this aim
- it may have unintended consequences (eg for how provisions are interpreted)
- it would add unnecessary detail to the objectives.

Judge David Harvey comments extensively in his submission on the challenges involved in continuing to apply 'traditional' or print paradigm principles to copyright when it now operates in a digital paradigm. The paradigmatically different qualities of digital information systems, he says, are fundamentally altering our behaviours, values and attitudes towards information and relationships with it. He argues that the law loses credibility if it does not accommodate those new values. What he suggests is required is that we stop perpetuating the obsolete model of copyright (by opting out of international treaties) and develop broad principles that accord with the new paradigm.

Support for the five proposed objectives

Twenty-three submissions expressly endorse the five proposed objectives. Another four express clear, but *qualified* support (eg because they propose adding an objective) for the five objectives and a further two appear to show *implicit* support for the objectives. Several other submissions specifically endorse at least two, but not all of the objectives.

Views on weighting of objectives

Seventeen submissions recommend equal or no weighting between the five proposed objectives. Many of these submitters are predominantly users of copyright, who acknowledge the importance of incentivising creation and dissemination of works.

Of those that recommend different weighting between the objectives:

- twenty submissions recommend that objective one, or the general aim of incentivising creation, be given the greatest weighting, many on the basis that this is the primary purpose of copyright
- another few submissions favour weighting objective one and three, or objective one and five more heavily than others
- four submitters suggest objective three be given the greatest weighting, emphasising clarity and certainty
- two submissions propose that objective five be given the most weighting, given its constitutional importance – Tohatoha, for example, saying there is no higher obligation than honouring the Tiriti O Waitangi.

Views on sub-objectives

Fourteen submitters oppose the idea of developing sub-objectives or different objectives for different parts of the Act. This view is expressed mostly on the basis that the objectives are best kept straightforward and concise. ANZA distinguishes copyright law from statutes that have distinct objectives for different parts (eg the Commerce Act 1986), on the basis that copyright law has a more established history and tradition borrowed from British law.

Six submissions suggest sub-objectives that build on the objective: ‘permit reasonable access to works for use, adaptation and consumption, where exceptions to exclusive rights are likely to have net benefits to New Zealand.’ Two submissions propose the three-step-test be re-stated here to ensure that our exceptions comply with this test. Other sub-objectives relating to exceptions that submitters suggest:

- a specific presumption that any ‘taxpayer-funded research’ be available for public access and reuse
- rules to address the problem of orphan works
- further definition of how ‘net benefits for New Zealand’ are to be determined.

Two submissions support the idea of having sub-objectives relating to moral rights and/or performers’ rights.

Another idea suggested by two submitters is that sub-objectives be used to clarify differences in how copyright law should apply within different sectors or to different categories of works.

Suggested changes to objectives, how they are worded and related criticisms

General comments on approach

A few submissions comment on the difference between the objectives and the diagram modelling three outcomes copyright seeks to balance (on page 22 of the Issues Paper). Three submissions favour the concept of balance between outcomes, one of them modifying the language in this diagram to reflect their desire that copyright law supports a 'virtuous information ecosystem'. The PANZ submission argues that the balance of outcomes approach leads to flawed policy thinking by making creation and use competing objectives.

Three submissions argue that the objectives conflate policy objectives specific to copyright and more general principles of good law making or objectives for the *review* of the Copyright Act. Two of these submissions propose a distinction between objective one (as the core objective for copyright) and the others as ancillary objectives.

Objective one

Six submissions comment specifically on the suggestion that copyright is not always the 'most efficient mechanism' for incentivising the creation and dissemination of works. Most of these submissions argue this caveat should be removed from the objective:

- The PANZ submission expresses reservations with the idea the government might incentivise the creation and dissemination of works through funding programmes where this is more efficient than copyright. It discusses how government funding accounts for very little of the revenue available for the production of New Zealand books, suggesting these activities would suffer significantly without the incentives provided by effective copyright law.
- The NZ music industry questions how the concept of assessing copyright policy against other mechanisms for incentivising behaviour would be applied and whether this would be within scope of the review.

Another of these six submissions suggests limitations and exceptions may be the best way to ensure copyright only applies where it is the most efficient incentive mechanism, given copyright cannot be applied selectively (unautomatically) to works. The submission from Auckland Museum favours couching this objective more in terms of "fair and proportionate incentives". One submission suggests this objective explicitly define incentives as including financial reward, and uses the example of photographers who may be expected to accept work purely in return for 'exposure' as a sufficient incentive.

Objective two

Several submitters take general issue with this objective on the understanding that it suggests a more permissive approach to providing exceptions to copyright than they consider appropriate as a matter of policy (eg on account of concerns this would damage incentives to create). A few of these submitters appear to dispute that there is any justification for the use of their work without their permission.

The NZ music industry submission expresses the view that exceptions should be limited to circumstances where licensing of copyright is impracticable, the user is a non-profit body acting for a social benefit or there is some other market failure relating to licensing. Screenrights likewise cautions against promoting exceptions at the expense of licencing of copyright. The International Publishers Association suggests rewording this objective so that 'access' is first taken to mean "with the authorisation of the rightsholder".

Comments specifically on the concept of developing exceptions using a 'net benefits' test

Nine submitters express the concern that the concept of 'net benefits to New Zealand' is too narrow or the view that these benefits should be clarified as including broader social, cultural and economic considerations. Creative NZ, for example, questions whether this approach adequately facilitates freedom of expression and suggests the objectives clarify that copyright is not intended to censor the exchange of ideas that a healthy democracy depends on. Tohatoha submits that this objective does not adequately emphasise the public interest in open access to information, knowledge and creative works. The Australian Digital Alliance suggests that limiting the net benefits test to New Zealand ignores the benefits to other countries of activities facilitated by our exceptions (offering the example of the cross-border rationale for the Marrakesh Treaty to Facilitate Access to Published works for Persons Who Are Blind).

Five submissions express some amount of doubt that the approach of providing exceptions to copyright where this is 'likely to have net benefits to New Zealand' would comply with our international obligations (namely, the three step test). The NZ music industry view is that a policy reason for the exception, supported by evidence, must be the starting point, before any balancing exercise is undertaken. The music industry, among a few other submitters, also questions whether it is possible to properly measure or weigh the costs and benefits using this test.

Other comments on this objective

The Australian Digital Alliance recommends that the objectives for copyright should recognise the importance of a rich and diverse public domain and its role in freeing up material in a "continuous cycle of cultural and creative growth." Three other submissions make the related suggestion that access to knowledge, education and/or the promotion of learning be specifically identified as an objective for copyright.

Three submitters criticise the wording of this objective, eg the words 'reasonable access', as being unclear or too vague. Another submitter discusses the difficulty of ensuring access remains 'reasonable' as technologies change over time.

Objectives three, four and five

While clarity and certainty are valued highly by some submitters, InternetNZ and LIANZA both suggest certainty is not a realistic aim because the market value of works is inherently uncertain and copyright regulates an environment that is constantly changing. A more appropriate aim for copyright law, InternetNZ suggests, is providing an understandable and predictable framework for people to respond to change.

The phrase 'facilitating competitive markets' was queried or criticised by some submitters as unclear. One submitter suggests that this, and 'minimising transaction costs', would be achieved as a consequence of a regime that fulfils the other objectives.

Four submitters question the approach of referencing international and treaty obligations. Three argue that these should be taken as given and highlighting them may imply a lesser commitment to other important obligations, notably human rights obligations.

The National Library suggests the language of compliance with obligations under the Treaty of Waitangi does not reflect the relationship of partnership between the Crown and Māori.

Rights – what copyright protects and who owns it

The Issues Paper sought information about problems and advantages with the way the Copyright Act currently:

- defines and categories copyright works (**question 5**)
- sets the originality test for works to qualify for copyright protection (**question 6**)
- treats of data and data compilations (**question 7**)
- sets default rules for who is the first owner of a given copyright work (**question 8**)
- applies to artificial intelligence and computer-generated works (**question 9**).

Categories of copyright works (question 5)

Thirty-seven submissions discuss the categorisation of works.

Ten submitters suggest that the current works are sufficient and no changes are needed. It is noted by several submissions that the categories of works each have very well established meanings in law, and are also attached to international requirements that New Zealand is bound to.

Eleven submissions raise concerns or doubts about the applicability of these categories to modern creative practices and technology.

Unnecessary complexity and rigidity

A range of submissions suggest the current categories sometimes lead to confusion and illogical outcomes because it operates or is perceived as a fixed list with often unclear boundaries. This may disadvantage those who produce works that do not fall neatly into the current definitions.

A few submissions suggest that traditional categories of works are out-dated or their boundaries blurred by new technologies, digital methods of distribution or convergence of traditional media forms. A common example given is the inclusion of software or computer programs in the category of a 'literary work', despite having quite different properties to traditional literature. Two submissions from the galleries, libraries, archives and museums (GLAM) sector raise concerns around digital records, noting that there is a difference between digitised surrogates of physical items, born-digital records and datasets. Five submitters suggest that in libraries there is confusion around works that appear on multiple mediums (such as a sound recording that is supposed to supplement a book).

While not aware of any particular issues with current categories of works, the IGEA notes that the complex and 'fragmented' way the copyright applies to video games (as a collection of copyright works) can cause confusion.

Multi-faceted and contemporary works may defy categories

Several submitters also suggest the current categories are very conservative and traditional and poorly describe some contemporary works.

One submitter notes that even established art forms of the 19th and 20th centuries such as musicals, opera and ballet, do not always fit neatly into the categories. While protection for the literary, dramatic and musical aspects of these works may be straightforward, it is submitted that costumes and scenery may not necessarily be protected.

Melissa Laing comments that contemporary art has evolved to include “improvised, performative, action-based, non-material and ephemeral practices”. These works are often in the realm of ‘ideas’ that are seldom scored, and can be highly experiential. They would not readily fit into the current traditional categories of works; their very purpose is often to challenge status quo ideas.

Some submitters view the current categorisation of works as failing to reflecting the creative role of directors (of films, but also other art forms such as art exhibitions, staged musical performances or dramatic performances) in applying a creative vision across a number of distinct works.

The skill, judgement and labour test (originality) (question 6)

Forty-seven submissions respond to the question about the ‘skill, judgement and labour’ test for copyright protection.

Many of these submitters do not see any issue with it. Twenty-two submitters believe the test is clear, some explaining this in terms of well-established case law.

Another 20 submissions express concerns about the test for originality. These submissions tend to argue that the threshold is either unclear or so low (and widely applied) that it prevents the legitimate use of works. Some of the reasons for and implications of this view are as follows:

- As technology advances and copying becomes more automated, the skill, judgement and labour test becomes more confusing in its application.
- Determining whether copyright exists takes a significant amount of time and resources, eg seeking legal advice.
- The low originality threshold makes it difficult to produce works that are a collection of works (eg log books and phone books), without having to talk to every copyright holder of each individual item in the collection.
- The uncertainty visual artists face about the difference between borrowing or referencing elements of an existing work and copying a ‘substantial part’ can stifle creativity.
- Galleries, libraries, archives and museums (GLAM) do not think the test provides certainty with regards to whether digitising material uses enough skill, judgement and labour to qualify for copyright protection. For instance, it is not clear whether 3-D scanning creates a new copyright work.
- It is not clear whether the originality threshold will be met in an age where artificial intelligence can create books.

Treatment of data and compilations (question 7)

Twenty-six submissions respond to the question about the application of copyright to data, databases and compilations.

Submitters supportive of the status quo

Ten submitters say they are not aware of any issues with the treatment of data and compilations in the Copyright Act. Four of them appear to base this on their understanding or view that datasets or compilations should generally meet the threshold for copyright protection. The IGEA submission comments on the importance of protecting data underlying video games without inadvertently locking up or preventing access to underlying data that are valuable for other uses.

Issues raised by submitters

A dozen submissions discuss issues with the treatment of data and compilations in the Copyright Act, including that:

- it is difficult to determine whether certain data, datasets or metadata qualify for copyright protection
- it creates potential restrictions on the ability to use databases for research, including non-commercial research and educational use
- it is thought to make data from internet users more valuable, enabling big technology companies to on-sell it
- it deters risk-averse institutions, such as schools, GLAM organisations and NGOs from making full use of data for beneficial purposes
- there is an unclear relationship between copyright protection and other laws governing underlying data such as the Privacy Act and the Official Information Act
- databases often include new original content within the data, making it difficult to separate and requiring licence stacking
- it causes doubt about the lawfulness of text and data mining, which puts New Zealand in danger of being left behind as other countries enjoy the benefits of text and data mining.

Rules of ownership (question 8)

We received 51 submissions on the default rules for copyright ownership. Most of these were comments on the commissioning rule, which makes the person who commissions and pays or agrees to pay for the creation of certain works their first owner (and can be varied by contract).

The commissioning rule

Seventeen submitters disagree with the commissioning rule, claiming it is unfair to authors, inconsistently applied to some works and not others, and confusing in application. Many of these submissions are from visual artists and photographers.

Eleven submitters suggest the commissioning rule is appropriate, as well six other submitters who say they support the current default rules in general. Most of these submitters are either from the GLAM sector, publishing industry or media companies.

Submissions on benefits of the commissioning rule

Submissions from GLAM organisations, media companies and the publishing industry explain the importance of the commissioning rule in the effective functioning of their organisations:

- GLAM institutions claim that by retaining rights in the work they commission, they are able to reuse, publish and promote works in an effective way, without having to overcome the administrative and potentially financial burden every time they wish to use a commissioned work.
- Media companies suggest the commissioning rule is fundamental to enabling them to make effective use and re-use of commissioned work. They submit that without owning rights in commissioned works, they would have little control over their use by other parties and they would be prepared to pay far less for the works themselves.
- Publishers also support the commissioning rule as it relates to literary works and published editions.

Submissions on issues with the commissioning rule

Submissions discuss a range of concerns they have with the commissioning rule, including that:

- it is inconsistent by applying to some types of works and not others (which advantages some creators over others)
- it is poorly understood, particularly by artists and smaller organisations (who may assume the artist is the first owner of their work)
- it is unfair by not properly recognising the skill, effort and identity of creators and potentially reduces the quality or level or creative investment they are willing to make if they know they will not own copyright in the commissioned work
- it weakens the negotiating position of creators and exacerbates the power imbalance between them and companies or organisations with the resources to commission work
- it disadvantages authors who are trying to compete in an international market
- the creator is often better placed to protect the work's integrity or act as the kaitiaki of ideas expressed in the work.

Works made in the course of employment

A few submissions discuss the rule that employers are default owners of certain works made in the course of their employment. Two of the main issues raised in these submissions are that:

- it can be difficult to determine when works are made in the course of employment, as opposed to in a personal capacity
- many artists (eg creative arts academics) and researchers have their reputation and identity tied up in works that they technically produce in the

course of employment, and yet the rule deprives them of creative control over that work

Submissions from some museums and Tohatoha suggest it is undesirable that employers do not also get default ownership in films, sound recordings and computer-generated works produced in the course of employment. This appears to relate to the reduced costs of producing these works. Te Papa points out that some organisations employ people specifically to create them (eg short video clips or sound recordings for a website).

Should film directors be default owners of copyright?

Several submissions from screen sector bodies and individuals comment on the fact that screen directors are not treated as authors of films or other productions. These submissions all view this as unfair and failing to recognise the importance of their role, including the skill, vision, leadership and creative decision-making required of directors in bringing aspects of a work together.

A few of these submitters (Paolo Rotondo, for example) claim this reduces the ability of screen directors to negotiate income because they do not by default have copyright they can either retain (for royalties) or that the producer would need to purchase from them. This differentiates directors from individuals who get copyright in their works (eg scripts, musical compositions and props or designs) while making arguably smaller contributions to the production overall. Further, often the industry will work with 'industry standard' contracts (that do not assign rights to directors).

It is also noted by a couple of these submitters that New Zealand departs from many other countries by not treating screen directors as the authors of their productions. The Directors and Editors Guild of NZ suggests this makes local directors more likely to take jobs overseas.

Artificial intelligence and copyright (question 9)

Twenty-six submissions discuss the application of copyright to artificial intelligence (AI) and computer-generated works.

Submissions supportive of the status quo

Seven submitters say they do not see any significant problems with the Act. The IGEA anticipates that, in future, artificial intelligence may be involved in creating more elements of games, which will raise ongoing questions of authorship for the government and industry to work through. A few submissions comment specifically on the way the Act treats the author of a computer-generated work as the person who 'made the arrangements necessary' for the creation of the work. Most of these seem to consider this approach appropriate and capable of withstanding further developments in AI.

Other views and issues raised with how the Copyright Act applies to AI

Eleven submitters raise issues with the current rules related to computer-generated works, including:

- There is potential uncertainty as to whether the person that made the arrangements necessary for the work to be undertaken will be the creator or the user of the program.

- The current rules are ambiguous, leave excessive room for interpretation, and fail to address the matter of AI created works. Those who develop and rely on new technologies consequently operate in legal grey areas.
- Businesses that licence and use AI software to create valuable content may have difficulty securing copyright in these licences.
- Machine learning technologies frequently depend on having large sets of data and information to analyse. These datasets may include copyright material. This can pose significant barriers to the development of AI in New Zealand as we have inflexible and prescriptive exceptions.
- An AI system may operate autonomously in a manner that infringes third-party copyright.

Rights – resale right for artists

Page 33 of the Issues Paper discussed whether visual artists (in particular) receive a fair share of revenue from their works, when the works are on-sold at a higher price than that of the artist’s original sale. Some jurisdictions provide for an “artist’s resale right” (ARR), which provides a right for artists to claim a portion of the sale price when a work is re-sold. The Issues Paper (**question 10**) asked whether there are problems or benefits with the current rights in the Copyright Act for visual artists. We received 26 submissions on this topic.

Twenty-three of them view the absence of an ARR in New Zealand as problematic. Many of these submitters are practitioners working in the visual arts field as artists. There are also submissions from several industry bodies; academics or writers about art; GLAM organisations; and lawyers who have worked with clients who are visual artists.

Three submitters neither support nor object to introducing the right, but submit points that would need to be considered in developing a scheme for this right.

Main issues raised by submitters in favour of establishing an ARR

A growing secondary art market

Submitters suggest the rise of social media and dissemination online means that visual works are increasingly shared and sometimes sold online. Technological advancement also means that it is very easy to replicate an original artwork. Artists also miss out on royalties if works are sold globally in other countries that do have ARR.

Visual artists do not benefit from increases in the value of their work

Submissions consider it unjust that visual artists are not compensated, and their creative merit poorly remunerated, when other people on-sell their work for profit.

The value of an artist’s work may increase overtime depending on their continued growth and development of their career. In some cases, works can be sold at a much higher price than the original sale. Submitters suggest it is often auction houses or parties that are in a privileged position who benefit from resales, or a party who is in possession of the work that ends up benefitting by trading it in a commercial setting, as opposed to the artist who spent the labour, skill and effort to create the work in the first place.

Rights – reversion of rights

Pages 33 and 34 of the Issues Paper discussed the fact that there is no mechanism in the Act for returning copyright to the author long after it has been transferred to another person. It asked whether there are problems with this (**question 11**).

Thirty-four submissions answer this question. They are predominantly from authors, publishers and collective management organisations for literary works.

Benefits of the status quo

Nearly all submitters supportive of the status quo base this on the importance of contractual freedom for well-functioning markets.

Some publishers and CLNZ mention practices of reviewing the commercial potential of back catalogues, distributing them on demand or improving libraries' access to out-of-print works.

Submitters from the screen, gaming and music industries express the view that revision of rights is not an issue in those industries and suggest reverting rights in more complex works (eg software in a video game developed by hundreds of people) would be challenging.

Issues raised in submissions

About half of submissions on a lack of rights reversion by law characterise it as a problem. The main problem they identify is that a creative work's potential value to the author and to users is effectively spent once the publisher is no longer actively distributing it or making it available to new audiences. An extreme example offered by one submitter is where the publisher retains copyright and is no longer trading, which effectively 'orphans' the work.

Some of the consequences of this situation submitters identified are:

- The author has stopped getting paid for the work and cannot take it back to market, reducing their incentives to invest in further creation.
- There may be unmet demand for the work (a loss to consumers) because the publisher's interest in disseminating it often tails off after a short life cycle of heightened commercial success.
- It can cause access issues for libraries and archives where the work may have cultural or historical importance.

A few submitters give accounts of what opportunities can arise when the author is able to reclaim copyright, including an increase in sales through a different publisher and the release of the work through a creative commons licence. In practice, whether the author can have copyright returned even by a publisher no longer exploiting the work depends on the terms of their contract (if not the 'good will' of the publisher in negotiating reversion outside the contract).

Is it too difficult to secure rights reversion by contract?

Some organisations (eg the NZSA) offer guidance to writers on including a clause for reversion of rights in contracts with publishers. CLNZ notes that contracts that transfer copyright without these clauses do not appear to be very common in New Zealand according to a recent Horizon Research [Report](#) on Writer's Earnings:

- 62% of respondents said they always retain copyright in contracts related to their writing (which would make a reversion clause unnecessary).
- Another 62% of respondents said they have included a reversion clause in their contracts with publishers, whereas 38% have not.

Nonetheless, seven submitters claim that writers face barriers to negotiating the reversion of copyright in contracts with publishers. The main barriers discussed are:

- pressure exerted by some publishers, who are motivated by uncertainty about the commercial success of the work to negotiate lasting ownership
- the poor bargaining position of writers who can be highly motivated to publish on any terms.

Submissions identify different approaches to drafting reversion clauses. Alexandra Sims points out that many 'out-of-print' clauses can be problematic because they no longer trigger reversion in the manner intended by the author. She explains that digital copies of the work may technically be 'available' indefinitely, without the publisher trying to find an audience for the work in the way they would when releasing a new print edition.

Rights – Crown copyright

Pages 34 and 35 of the Issues Paper described the current approach to Crown copyright in New Zealand and asked about problems or benefits with it (**question 12**).

Forty-two submissions answer this question, mostly from users or potential users of Crown copyright works (eg GLAM and heritage organisations, academics, writers and researchers) or from organisations that have Crown works in their collections. Two of them appear to discuss benefits of the status quo. The rest raise concerns with how Crown copyright operates.

Submissions on licensing under NZGOAL

A few submissions endorse the aims of NZGOAL (the New Zealand Government Open Access and Licensing framework) or note that the practice of releasing works under NZGOAL has reduced the costs of accessing and using those works. However:

- Three submitters suggest NZGOAL is not applied consistently across government.
- Tohatoha queries the costs incurred by government of administering NZGOAL and, along with another submitter, characterises the training, resources and effort required of civil servants to license documents under NZGOAL as substantial, which may create a reluctance to apply NZGOAL as intended.
- According to Keitha Booth, some agencies, such as Crown Research Institutes, are increasingly finding it difficult to apply NZGOAL to their publicly-funded research outputs, or to retain Crown copyright in contracts with others.

Moreover, it is clear that most submitters are concerned with the social, cultural and economic potential of Crown works created before the implementation of NZGOAL. Several suggest the Crown works most challenging to make use of are those created after 1945 but before

NZGOAL was implemented. Submissions indicate that the amount of Crown works in this category is considerable.⁷

Submissions questioning the policy rationale for Crown copyright

Several submissions question the justification for giving the Crown copyright at all (some expressly proposing it be abolished) or in a blanket manner that requires Crown entities to 'opt out' by licensing new works under NZGOAL. Submissions offer various reasons for questioning Crown copyright, including that:

- the Crown does not need copyright as an incentive to create and disseminate these works
- Crown works belong in the public domain as a matter of principle, because the public has effectively funded their production
- Crown copyright is at odds with commitments to open and transparent government (eg the Declaration on Open and Transparent Government approved by Cabinet in 2011) and the spirit of NZGOAL
- there are other mechanisms and information-management tools available to the government to protect confidential, private or sensitive material.

However, there is a recognition by some of these submitters that, in particular instances, Crown copyright over works with commercial value may be appropriate to ensure the Crown retains ownership and control of them. Examples given are works produced by Standards NZ and MetService, and architectural or planning documents used for infrastructural projects.

Submissions on difficulties caused by Crown copyright

The majority of submissions on Crown copyright discuss difficulties making effective use of Crown works and associated loss of culture, which some say are exacerbated by the 1945 amendment extending the term of Crown copyright from 50 to 100 years after the work was made. Many submitters offer examples from their experience of the lengths they had to go to, and the obstacles they faced, in seeking authority to use or provide access to Crown works.

Uncertainty as to whether works are under Crown copyright and, if so, are licensed for reuse

Submissions largely attribute this to difficulty tracing the origin and age of certain Crown works (and therefore the duration of copyright, which changed in 1945). Te Papa asks, for example, whether the Crown owns copyright in letters, poems, and stories written by soldiers deployed during World War One. A couple of submissions suggest it can also be unclear whether some older materials that appear to be intended for reuse have actually been licensed by the Crown (for example, physical teaching materials (such as videos) that need to be reformatted).

The time, resources and uncertainty involved in identifying who can authorise use of works under Crown copyright

Several submissions discuss the many structural changes to government departments over time as contributing significantly to the challenge of identifying which organisation and contact person to seek permission from. Using itself as an example, Wellington City Council Archives

⁷ NTSV, for example, claims to hold over 100,000 Radio NZ sound recordings made after 1945.

asks how anyone would know to contact the Council for permission to use works it inherited after the repeal of the Carter Observatory Act in 2010. Another example mentioned by a few submissions is the disestablishment of the Ministry of Works and transfer of its functions to the private company Opus. The Tohatoha submission describes the large collection of Crown legacy works that are unavailable to heritage organisations, schools and other publicly-funded institutions because those organisations are inadequately resourced to properly investigate ownership and persuade the owner they have authority to issue a licence for the work. Radio NZ describes the uncertain status of printed material and recordings made by a unit of Radio NZ between 1974 and 1989 whose assets were neither sold to the new owners nor transferred to Radio NZ. Canterbury Museum says that to find the correct copyright owner of images from the Trans Antarctic Expedition's Ross Sea Party took the resources of four staff members and over 18 months of research.

Difficulty persuading the Crown to authorise or license use of the work

According to a few submissions, departments are sometimes unaware they have inherited ownership of works and can be particularly risk-averse in giving permission to use works the decision-maker is unfamiliar with. The National Library also attributes reluctance to license Crown works to ambiguity about ownership.

Te Papa discusses a particular letter of condolence that required considerable staff time and effort attempting to obtain Crown authority to use in its WW100 commemorations. The submissions by Te Papa, Auckland Museum and the National Library all describe situations where:

- efforts by heritage organisations to obtain authority to use Crown works are unsuccessful or the authority given is uncertain
- this puts them in the challenging position of having to weigh up the work's cultural importance and public interest in having access to it (eg exhibited in a non-commercial commemorative project) against the legal risk of the Crown later asserting copyright.

Rights – copyright duration

Pages 35-37 of the Issues Paper set out when copyright expires for different categories of works, which largely reflect the minimum terms required by international treaties New Zealand has ratified. It explained our understanding that extending copyright term is unlikely to provide net benefits to New Zealanders. It then asked about problems or benefits with:

- the current term of 50 years for communication works (**question 13**)
- providing an indefinite copyright term for the type of works referred to in section 117 (**question 14**).

Copyright term in communication works

Sixteen submissions answer this question. Ten of these submissions argue that copyright term for communication works should be reduced. Of the submissions that offer clear reasons to support this view, the themes are that:

- copyright protection for longer than necessary undermines access to information
- communications works tend to have a short commercial lifespan in their original form

- technological developments have increased opportunities to reuse communication works, including for educational purposes, which are hindered by lengthy copyright protection
- the difficulty identifying and seeking authorisation from the copyright owner increases with the age of a communication work.

Four submissions briefly express the view they see no reason to reduce the current term of 50 years for communication works. Two of these submissions note that 50 years is consistent with some comparable countries.

Indefinite protection for certain unpublished works

Submissions on benefits of indefinite protection for these works

Six submitters discuss the benefits of indefinite protection of the unpublished works described in section 117. Some comment on the special nature of these works, as being entrusted to the institution for its cultural and research value, but conferring on the institution a lasting obligation to protect the work's integrity and honour the author's wish not to publish it. A couple of submitters suggest section 117 may be encouraging people to bequeath unpublished works. PANZ suggests that moving to a finite term of protection for these works may reduce willingness to entrust them to institutions.

Two submissions mention Wai 262 in relation to these works. Archives NZ comments that some of these works may be taonga, which could require indefinite protection according to the kaitiaki's wishes.

Submissions on issues with indefinite protection of these works

Just over a dozen submissions express concerns with indefinite term for these works or a preference for contractual arrangements that do not rely on indefinite copyright protection. The main concerns raised with indefinite protection for these works are that:

- it does not incentivise the creation and dissemination of these works
- it seems illogical to give longer protection to works that are not disseminated than to those that are
- it may result in greater protection than intended, potentially precluding fair dealing for criticism and review
- the ability to restrict publication of works indefinitely may be abused or become a tool for censorship
- it indefinitely prevents opportunities for socially-valued uses, eg by researchers, family historians, documentary filmmakers and authors
- the fact that it is worth the institution investing in the preservation and curation of these works suggests they are often of immense historical value and cultural significance, meaning there is a strong public interest in having opportunities to reuse them
- it increases likelihood of these works being orphaned and never entering the public domain.

A few submissions from GLAM and heritage organisations discuss their preference for negotiating terms with donors of unpublished works outside of the Copyright Act that suit the circumstances. Some of these submitters view the indefinite protection provided in section

117 as a radical step that reduces their flexibility in agreeing to terms that appropriately balance the private and public interests in the work.

NTSV reports confusion within the GLAM sector about what term applies to unpublished works, particularly at the time they are deposited or entrusted to the institution. They discuss difficulties ascertaining the age and author of unpublished films in their large collection. Without knowing which of these are works described by section 117 (bequeathed to them while still under copyright), they tend to rely on the contractual arrangements they have with the person who deposited the work. They suggest that this makes section 117 irrelevant.

Submissions on whether current copyright term is optimal for other works

We identified twenty submissions that volunteered views and information about the prospect of extending the general term for copyright, namely from 50 to 70 years for sound recordings and films and from 50 years after the death of the author to 70 for other works.

Criticisms of current copyright term as too short

Several submissions provide reasons for their view that copyright term is currently inadequate. The NZ music industry submission and that of the IFPI point out that New Zealand is exceptional among OECD countries in providing protection for less than 70 years or life plus 70 years. The IFPI states that 67 other countries now have a term of protection of 70 years or longer for sound recordings, and that these include 17 out of the top 20 music markets (in terms of trade revenues).

As the NZ music industry submission explains, New Zealand works and recordings receive only 50 years of protection in countries that apply the “rule of the shorter term”, which includes the EU, UK and South Korea. They, as well as the IFPI (and the International Confederation of Music Publishers to a lesser extent), discuss at length why they consider New Zealand’s comparatively short copyright term for sound recordings and musical works to be inadequate. Their main arguments are that this situation:

- is unfair on New Zealand artists, songwriters and composers, when those overseas may benefit from royalties for longer
- disadvantages New Zealand record companies competing with overseas labels, because artists may prefer to sign with the label that can offer protection for longer (or base their careers in a country with longer copyright term)
- allows online distributors to earn revenue from out of copyright New Zealand music, rather than New Zealand creators and investors
- will result in a substantial body of iconic New Zealand music from the 1970s and 1980s coming out of copyright (that is, copyright in the sound recording), which is already the case for Wayne Mason of Fourmyula, who recently stopped being entitled to royalties from the band’s recording of *Nature*.

The NZ music industry submission also explains why they believe previous policy and economic analysis of term extension is now unreliable. They say that this is largely because it assumed consumers would purchase units of music, whose price might change depending on whether or not the music was protected by copyright, whereas now consumers predominantly use streaming services to listen to music. This involves paying for access to a library of music either through a subscription or advertising, rather than a cost per unit. According to the NZ music industry, this makes it unlikely that an increase in the term of copyright protection would have an impact on consumer pricing.

CLNZ and the PANZ both reiterate a similar view on the modelling by Henry Ergas (in 2009) of the effects of copyright term extension on the New Zealand economy. They submit the modelling was 'numerically flawed' and that the effect would in fact be a net benefit to the economy. While these submissions do not cite evidence for this claim, the International Confederation of Music Publishers quotes a UK study by the LECG corporation (in 2007) as concluding that term extension is likely to benefit consumers and increase the overall social welfare (more so if term extension is applied retrospectively). The submission from the Australian Music Publishers Association argues that the commercial life of songs from the 1960s and 1970s is clearly longer than the current copyright term in New Zealand.

Five submissions briefly refer to efficiencies or savings in our licensing agreements with other countries they would expect if New Zealand was to align or 'harmonise' the term of protection we provide with that of countries we trade with.

The NZ music industry submission also raises a question about what providing shorter copyright term than other countries means for our international reputation. A shorter copyright term, they suggest, does not fit with the image of a country that is a leader in supporting and producing creative talent.

Submissions defending current copyright term (or in favour of reducing it)

We identified ten submissions that volunteered comments opposing the option of extending copyright term (or suggesting we should reduce it, despite our international commitments). Professor Rebecca Giblin submitted extensively on this subject. According to her submission:

- we grant 25 years of protection more than would suffice to incentivise the production of even the most expensive works
- a core justification for this longer protection is to encourage investors to continue making the work available, as it is thought that works out of copyright will be subject to less investment and therefore be less available
- empirical research by her team (on the relative availability of ebooks to public libraries in New Zealand, Australia, Canada and the US) demonstrates the opposite is true: that titles were less available in countries where they remained under copyright than where they were in the public domain. She has provided their full research paper (which is also [freely available online](#)).

Other themes from submissions opposing term extension include:

- general scepticism that increasing term of protection could affect decisions to create copyright works
- an expectation that it would increase the already significant underuse of works under copyright (orphan works)
- the suggestion that copyright term can adversely affect creators who rely on access to older works
- claims that the costs of investigating copyright ownership increase with the age of the work and when ownership has been transferred to descendants. Institutions trying to provide access to knowledge and culture either have to accept these costs or the legal risk in using works.

The submission from Te Papa provides a ten-page process diagram illustrating the existing complexities of determining whether works in its collection are in or out of copyright.

Rights – actions reserved for copyright owners

Section 2, Part 4 of the Issues Paper (pages 37-40) discussed the exclusive rights given to owners of copyright and the various ways those rights may be infringed. It asked about problems or benefits with the way the Act:

- expresses and gives copyright owners exclusive rights (**question 15**)
- creates secondary liability (facilitating infringement or dealing with infringing copies) (**question 16**)
- approaches liability for acts of ‘authorisation’ (**question 17**).

Exclusive rights and primary infringement

We received 29 submissions on this question.

Submissions supportive of the status quo

Fifteen of these submitters suggest the status quo is working well or that they are not aware of any issues. The main themes in these submissions are that current exclusive rights:

- provide a reliable basis for copyright owners to license their works and enforce their rights
- are expressed largely as required by international treaties and to provide compatibility with other countries, which is a reason to retain the current wording.

Submissions raising issues with exclusive rights

Five submissions that raise issues with exclusive rights are essentially about exceptions. They take issue not with the way the exclusive rights are expressed, but rather the way they are limited or may be undermined by exceptions.

Another four submissions appear to view the exclusive rights as very broad and resulting in overprotection.

Secondary and authorisation liability

Twenty eight submissions answered either or both of the questions about secondary and authorisation liability.

Secondary infringement online, pirate websites and liability of ISPs

Several submissions raise online piracy and the involvement of internet-services providers in facilitating access to infringing content as an issue with the Copyright Act’s secondary liability and authorisation provisions (those this is predominantly covered in submissions on Part 7 – Enforcement). Sky suggests this comes up because the secondary liability provisions are seen as being too focussed on physical media (eg selling pirated DVDs), as opposed to online distribution of infringing content. A few of these submissions argue that internet service providers, particularly search engines, who make it easy to access infringing copies, normalise the activity while financially benefiting from it, through advertising revenue.

Online distribution of copyright works also makes it difficult for users to distinguish between legitimate and infringing copies, according to the IAML. InternetNZ similarly mentions normal and beneficial uses of the internet it says risk being impeded if secondary or authorisation

liability is made to apply too broadly. Requiring knowledge of the infringement is an important check on these liability provisions that should be maintained, according to InternetNZ and NZME.

A point on which many submissions appear to agree is that the law (either the Copyright Act or New Zealand case law) currently fails to make it clear what online activities constitute authorisation (to do a restricted act).

Submissions on authorisation and potential liability for ‘linking’

Four submissions discuss the benefits and commonplace nature of linking to content or webpages. Judge David Harvey submits extensively on this subject:

- He argues that, because links are essential to the architecture and basic functioning of the internet, it would be unreasonable to extend liability to parties operating systems that use links in this way.
- He offers the analogy of a card index system used in a library to direct readers to a particular shelf: the card carries only that information that is necessary for the reader to find the right book.
- He also quotes a Supreme Court of Canada decision (in a case concerning hyperlinks and defamation) that describes hyperlinks as content-neutral because they communicate only “that something exists, but do not, by themselves, communicate its content.”
- He argues that copyright infringement should be a matter of what users do with material under copyright and the difficulties that may cause copyright owners in detecting and dealing with infringement do not justify ‘back-door methods’ of making other parties liable.

Universities NZ explain that universities rely extensively on links to provide content to their students, which can include cases where the copyright status of the content is uncertain. They say that potential liability arising from this practice may reduce educational opportunities provided by more risk-averse institutions. Similarly, LIANZA explains that library websites provide links to content in good faith – a practice they say should be protected, provided the library is not knowingly linking to infringing content.

InternetNZ suggests ordinary users would effectively have to do due diligence on all content (eg in an article or website) before they share it on social media if linking amounts to authorisation. Their submission claims most cases of linking pose no harm to copyright interests and can even further their interests by attracting wider audiences (which increase potential advertising and subscription revenue).

The NZ film and TV bodies submission argues that linking should constitute authorisation if, for example, links are provided on a website that indicates the content can be accessed through the link. It likens this to the law of defamation, suggesting that a website that presents more than just a content-neutral link to infringing material should be taken as having authorised use of the infringing material. The submission also puts media streaming boxes that have apps designed to help users find infringing content in this category. The submission from Sky, also describing these streaming boxes as designed to provide access to infringing content, argues that importing or selling them should constitute secondary infringement in the same way as importing or selling pirated DVDs.

Territorial limitations on liability for authorisation

Thirteen submissions comment on the point made in the Issues Paper that authorisation only infringes copyright when it is done in New Zealand. The WeCreate submission suggests this is an unintended result of the way section 16(1) is drafted. Many of these submissions point out that authorisation under UK and Australian law is not territorially-bound in this way.

These submissions generally consider this an issue in so far as it removes the option of enforcing copyright against website owners and internet service providers operating outside New Zealand. Some submissions emphasise that operators of websites with large amounts of infringing content do not use New Zealand servers. While the New Zealand Law Society and Sky describe this as an anomaly, submissions appear to view bringing legal action against foreign authorising parties as impracticable.

Exhaustion of rights and parallel importing

Page 40 of the Issues Paper discussed New Zealand's longstanding policy of allowing parallel importing, without a specific question on this policy. However, we identified thirteen submissions that discuss the impact of the parallel importing policy.

Seven submitters from the book publishing industry and authors allege that New Zealand's parallel importing policy has contributed to a decline in the publishing industry in New Zealand. They allege that the policy has also reduced the ability of New Zealand authors to earn money from international sales. IGEA says that parallel importation and the increased ease of New Zealanders to "grey import" copies of video games from overseas creates an increasingly challenging environment for many local owners of video game copyright.

Three submitters (Universities NZ, the IAML and LIANZA) support and describe benefits of parallel importing. IAML assert that it enables libraries to access all of the world's resources, not just the small segment commercially available in New Zealand.

Another submitter suggests that without a 'material difference' test for parallel imports, copyright owners have less control over the quality of goods being imported into New Zealand.

Rights – specific issues with rights

The right to communicate works to the public and 'communication works'

Pages 41-43 of the Issues Paper discussed changes made in 2008, introducing the right of communication to the public and a new category of copyright work called communication works. It then asked about problems or advantages with the way these provisions operate (**questions 18 and 19**).

Sixteen submissions comment on the right of communication to the public, while 19 submissions respond to the question about communication works. Although distinctly provided in the Copyright Act, these two concepts were frequently discussed together.

Current right of communication to the public

Most submitters support the way the Act currently provides the right or restricted act of 'communication to the public' of any work. They feel that it is broad and technologically-neutral enough to withstand technological developments. This flexibility in the way the right is expressed is considered by some submitters to be preferable to being overly prescriptive in the

face of a continuously developing environment. Some submitters also comment that the current definition is in line with the WIPO Copyright Treaty of 1996.

The category of ‘communication works’

The current definition of communication work is:

a transmission of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme.

Scope of ‘communication works’

Sky is one of a few submitters who appear to benefit from or support the way that the creation and broad definition of communication works provides equal protection for different technological methods of transmitting content to viewers.

Many submitters expressed concerns about the scope of the definition of a communication work. Some of them argue that it now goes beyond the original rationale for its creation, which was to create a technologically-neutral category of works (to replace ‘broadcast’ works) that would continue to protect signals against theft or piracy. The scope now includes any transmission over the internet.

The NZ music industry submits extensively on this category of work. They claim New Zealand is the only country that protects transmissions as a category of work in its own right. While noting the importance of protecting the transmission of valuable content, the NZ music industry and the IFPI question whether there is any value in creating a new category of copyright work in the transmission of content. The NZ music industry claims this category conflates the “protection for the transmission itself” and “the protection of the content carried by the transmission”. They suggest that the content it carried by any transmission is already sufficiently protected as other categories of work such as film, literary, dramatic, musical etc. and the exclusive right to communicate these works to the public. The IFPI suggests it is questionable whether a transmission itself would even meet the originality threshold in order for copyright to subsist.

The IGEA submission does not discuss particular issues with the category of communication works, but notes that emerging methods of both playing and viewing the playing of video games (eg via streaming) may fall within the definition of a communication work. They also point out that this comparatively broad definition may mean publishers or distributors creating streams may be given copyright uniquely in New Zealand.

Some submitters also suggest that, while communication works were always intended to apply to audio-visual material, their scope is now so broad that it could potentially apply to text-based material such as an ebook, or anything else that is transmitted over the internet.

Definition of ‘public’ to include the individual household viewer

Some submitters express doubt over whether the word ‘public’ includes an individual viewer or household in relation to streamed content. Others believe it is clear that New Zealand law protects on-demand transmissions viewed by individuals (as required by the WIPO Copyright Treaty 1996). Radio NZ and AJ Park suggest live streaming be thought of as the digital equivalent of broadcasting and on-demand streaming as comparable to traditional broadcast viewer/listener requests.

Other issues with communication works

The National Library note that they are “mandated to collect, preserve, protect and make available New Zealand’s heritage.” In order to do this effectively, they need a legislative regime that permits them to communicate “works which have been withdrawn from public access, having been previously communicated or made available”. The National Library submits that, for clarity and ease of use, terminology should be expressed as closely as possible to the wording in any relevant international treaties. This is particularly important for institutions that work collaboratively with the international community.

Treatment of digital content

Pages 43-44 of the Issues Paper explored and asked about potential ambiguities in how the Act applies to copyright works in digital or intangible formats and the potential implications of the Supreme Court’s decision in *Dixon v R* (**questions 20 and 21**).

Use of the term ‘object’

Twenty-four submitters comment on the use of the term ‘object’ within the Copyright Act. They mostly discuss whether it refers or should refer to digital or intangible material.

Preference for neutral language

Most submitters agree that references to ‘object’ may be perceived as including only physical copies and should be neutrally defined so that it extends to digital copies, such as computer files. The submission from Mega discusses the uncertainty that reliance on the undefined term ‘object’ creates for businesses trying to comply with their legal obligations in respect of digital files, particularly as the case law position (notably, the *Dotcom v USA* proceedings) is apt to change.

Potential for intended consequences

A few submitters note that the term ‘object’ is applied across a number of provisions in the Act in potentially different ways. They express that care would need to be taken that whatever definition is decided upon, this works for all circumstances and does not lead to any unintended consequences.

Implications of *Dixon v R*

Eighteen submissions comment on the implications of the Supreme Court view in *Dixon v R* that digital files can be treated as property in some cases.

Some of these submitters believe our copyright law is already consistent with the views expressed by the Supreme Court in relation to the Crimes Act 1961. The NZ film and TV bodies, for example, suggests the Copyright Act already treats digital information as property by giving copyright in data compilations. Others comment on the importance of copyright law recognising rights in digital content and the value of data (eg used in the making of films that are rendered digitally).

Other submissions (including from academics or specialists in law and technology) express concerns about the risks of trying to resolve the complex questions the Supreme Court’s reasoning would raise if applied to copyright law. It appears that some of these submitters would disagree with the Supreme Court position (as they understand it) if applied to copyright. The Australian Digital Alliance, for example, views the notion of property rights over mere

information as extremely problematic. These submitters would be opposed to integrating the approach of this ruling into copyright law without careful and specialist analysis of the potential implications. InternetNZ suggests the Copyright Act review is unlikely to be a process that can do justice to the broad scope and complex issues raised by the *Dixon v R* decision.

Renunciation of rights

Page 45 of the Issues Paper asked about possible problems with the inability to renounce copyright (situations where automatic copyright may be unhelpful to a creator who wants to make their work available for anyone to use or copy) (**question 23**).

Thirty-two submissions answer this question. The vast majority of them (23) appear to view the inability to renounce copyright as a problem.

Is the ability to renounce copyright desirable?

All but a few submissions state or imply that copyright owners who wish to renounce copyright and devote it to the public domain should have the freedom to do so. This view is expressed directly by two submitters who identify themselves as authors seeking the legal right to renounce copyright in their work. One of these authors, Siobhan Leachman, takes issue with the possibility that the intentions of the original copyright owner could be undermined by others in the future (and queries whether this could be prevented by including a clause in her will).

Two submissions discuss the risk that if copyright owners are able to relinquish their rights they may be pressured by others to do so, or may do so without meaning to. Three submissions discuss potential difficulty identifying works in which copyright has been renounced.

Can you effectively renounce copyright through a CC0 licence?

A dozen submissions discuss the use of Creative Commons CC0 licences to waive all copyright and related rights. Tohatoha, who developed this licence, explains its role in increasing the richness of information available for reuse while overcoming licensing and attribution complexities.

A few submitters note that the legal statements in a CC0 licence are unequivocal in conveying its intended effect of “permanently, irrevocably and unconditionally” waiving all copyright and related rights. However, there is a conflict between these licence statements and the understanding of some submitters that irrevocable waivers are not recognised by the common law in New Zealand, meaning even a CC0 licence could potentially be later revoked by the owners’ descendants. Several submissions comment on the legal uncertainty this creates, including Tohatoha who sought legal advice on whether CC0 licences can be revoked.

Two submissions question whether subsequent revocation of a CC0 licence would be possible to implement in practice.

Issues caused by uncertainty about works intended for the public domain

A few submissions discuss the perceived risks of making full use of content released under a CC0 licence, notably that the owner or descendants of the owner will later assert copyright (by revoking the licence). This affects some schools and GLAM organisations, according to Tohatoha, who says the fact that CC0 is not recognised in NZGOAL contributes to the impression that reusing CC0 licensed work is unlawful or risky.

Siobhan Leachman suggests GLAM organisations are also deterred from releasing their own data under CC0 licences, which she claims is best practice internationally for these organisations, on account of its omission from the NZGOAL framework. Te Papa acknowledges its own reluctance to use CC0 licences for this reason. Both these submissions then discuss the opportunities New Zealanders (and the global community) miss by not licensing these collections consistently with GLAM organisations worldwide. To illustrate the costs incurred by creators having to work out whether they can safely devote their work to the public domain (through a CC0 licence), Te Papa also uses an example of an archivist's experience seeking to upload photographs to Wikipedia.

Rights – moral rights, performers' rights and technological protection measures

Pages 46-47 of the Issues Paper discussed rights provided to people in addition to the bundle of exclusive rights we call 'copyright'. It asked about problems or benefits with:

- the way the moral rights are formulated in the Copyright Act (**question 25**)
- giving performers greater rights over the sound aspects of their performances than the visual aspects (as required by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)) (**question 26**)
- the performers' rights regime in general once CPTPP comes into force (**question 27**)
- the technological protection measures provisions (**questions 28 and 29**).

Moral rights

Thirty-seven submissions, from a variety of professions, comment on moral rights matters. In general, the majority of these submissions emphasise the importance of moral rights and the need to ensure that the Copyright Act continues to protect these rights.

Enforcing moral rights and awareness of them

The most common issue raised by submissions is the challenge of enforcing moral rights or finding a satisfactory remedy for infringement of moral rights.

One such challenge, discussed in a few submissions, is that many artists do not have a proper awareness of their moral rights (which is necessary for asserting them) or an understanding of their meaning.

Artist Shane Hansen's experience asserting his moral rights against the company Escape Rentals, as he outlines in his letter to the Minister, raises a few issues that are reflected in other submissions. His submission, and that of Josie McNaught, suggests that the litigation necessary to enforce moral rights is unlikely to be a viable option for the individual authors or artists they are intended to benefit, and who are often of limited means. There is consequently a lack of case law helping people to understand in what circumstances moral rights are infringed, particularly what amounts to derogatory treatment of a work. Shane Hansen is also one of a few submitters who describe the amount of injury that can be caused by infringement of moral rights. He talks about the damage to his reputation, identity and mana caused by what he claims was derogatory treatment of his artwork and questions whether authors or artists can obtain damages that reflect the true extent of injury they suffer. Shane Hansen's story also raises the question of whether the right against false attribution can be distinguished from claims to be paying 'homage' to the artist.

A related theme in some submissions is that because artists are frequently unable to make a living through their work, they often accept commissioning agreements or may feel the need to trade their rights for more immediate payment. A few submissions view moral rights as too passive, given that they have to be asserted and can be waived. The Asian Pacific Copyright Association and one other submitter both suggest this can make authors vulnerable to pressure to surrender even the right to be identified as the author when entering into an agreement (eg with a publisher).

Scope of the right to object to derogatory treatment

Several submitters view this right as too narrow in its application. One author, for example, suggests this right should not be limited to acts that alter the work. They argue that it is possible to use the work in ways that are prejudicial to the honour or reputation of the author (eg to promote something the author personally disagrees with) even though nothing has been done to affect the integrity of the work itself.

Five submissions discuss culturally inappropriate uses of works. These submissions suggest we should consider extending moral rights to protect against the kind of culturally inappropriate uses identified in the Wai 262 inquiry. From example, Melissa Laing suggests that for works that are taonga, it is not just the artist's honour and reputation that deserve protection, but that work itself, its mauri and the kaitiaki relationship.

Five submissions (including, for example, the Organisation for Transformational Works) comment on the risk of moral rights interfering with freedom of expression. They discuss the need to carefully balance the role of moral rights in protecting artistic integrity against the importance of enabling valuable creative reuse of the work, such as for satire or social comment.

Who should have moral rights in commissioned works?

NZME and Xero argue that those who come to be the first owner of a work by commissioning it should not be constrained in their use of the work by the moral rights of its author. They claim there is no basis for treating a commissioning party any differently to an employer and that enabling authors to assert the right to be identified and to object to derogatory treatment can unduly limit the commissioning party's ability to exercise their economic rights in respect of works they have paid for.

Performers' rights

Eighteen submitters comment on performers' rights, with eight of these being specifically about the changes made to implement CPTPP.

Performers' rights and technology

Many submissions comment on the increasing ease with which performers' rights are infringed, often without the performer's knowledge, due to the rise of smartphones and other recording technology that has democratised the ability to make audio-visual recordings. The unauthorised recording and distribution of performances that are intended to be exclusive to the live audience may undermine the performer's ability to be compensated for their labour. An example one submitter gives of this is delivering workshops on their craft that they have spent considerable time preparing for. Their inability to control the size of their audience on account of videos that may be made, they suggest, is likely to reduce their willingness to provide performances and therefore of learning opportunities for others. Hachette Publishing

suggests illicit recordings can transfer revenue from the performer to content hosts and notes the case of an artist who recently used cell phone blocking technology to stop illicit recording of her new stage show.

Creation of audiobooks

The NZSA is one of a few submitters who express concerns relating to the Marrakesh Treaty Implementation Bill and the possibility that those who produce audiobooks may be given performers' rights that interfere with the original author's ability to control the dissemination of the work.

CPTPP changes to rights in sound recordings of performances

A few submissions express concern about the changes to performers' rights made to implement CPTPP. GLAM organisations that hold audio-visual or sound recordings in their collections discuss the increased difficulty this causes them for rights clearance. The National Library, for instance, describes the costs involved in trying to identify and locate all performers in a live recording before they can release it for use by a member of the public, and claims this increases the proportion of works in their collection that becomes orphaned.

Two submitters (NTSV and Massey University College of Creative Arts) question the rationale for treating performers rights in the sound aspects and the visual aspects of recordings differently. NTSV suggests this distinction also complicates rights clearance in audio-visual material.

Technological protection measures (TPMs)

We received 36 submissions on TPMs, mostly from industry bodies.

Submitters express contrasting views on whether the scope of our TPM provisions is appropriate. Copyright owners and industries, such as the music industry, view them as too narrow (in ways discussed below), whereas some other submitters view even the existing scope of TPM protections as interfering with legitimate activities (such as fair dealing exceptions or internet-users taking measures to protect their privacy or security online). There is also a poor awareness and degree of confusion about what the TPM regime allows and what it prohibits, according to submissions from the GLAM sector and InternetNZ.

Exclusion of access control TPMs

Several submitters take issue with the exclusion of access control TPMs from New Zealand's TPMs regime or believe that access controls should have the same protections as copy control TPMs. Of those who provide reasons for thinking this is a problem, the themes are that:

- technologies such as cloud services that are used to distribute content online (eg ebooks) rely heavily on access controls (as opposed to copy controls to prevent downloading of files)
- stream ripping services are commonly used in New Zealand to circumvent access control TPMs, giving users downloadable copies of streamed content, which diverts revenue from legitimate streaming services
- services that circumvent geoblocking (eg the "Global Mode" service) undermine exclusive licences with overseas content providers such as Netflix USA and the BBC
- in the gaming industry, access control TPMs provide an important second layer of protection and security against sophisticated methods of infringement.

A prevailing message in submissions from creative industries is that they invest in both copy control and access control TPMs because both play an important role in limiting consumption of copyright works that are delivered digitally to their intended audience. Submitters imply that if access control TPMs are ineffective, this would reduce their ability to recover revenue (from advertising and subscription services) and their confidence to deliver content in these innovative ways. For example, the gaming industry claims access controls give them the confidence to deliver games in innovative ways (eg streaming) and offer different product options/versions of the game (eg releasing a trial version in the knowledge they can stop free access after the trial period ends).

Issues raised with the offence provisions relating to TPM circumvention

A few submissions note that while dealing with circumvention devices is prohibited, the actual act of circumvention is not prohibited. NZME argues that prohibiting only the supply, but not the actual use, of circumvention devices fails to deter manufacturers and distributors of circumvention devices because it provides them with a market (which NZME suggests would be undermined if end-users were also made liable for circumvention).

IFPI submits that the prohibition in section 226A(1) on dealings with TPM circumvention devices sets too high a burden of proof because it applies only if the person “knows or has reason to believe that it will, or is likely to, be used to infringe copyright in a TPM work”.

Lawful circumvention of TPMs

The NZ film and TV bodies describes the exceptions for circumvention of a TPM in the exercise of a permitted act as ‘appropriately constrained’, discussing the importance of targeting them to legitimate uses.

Some submissions couch their criticisms of the current exceptions in terms of the balance needed between enabling TPMs to prevent unauthorised copyright, but also ensuring the law supports people in overcoming technological barriers that TPMs present to otherwise lawful activities. Examples given of legitimate activities that can be impeded by TPMs include:

- fair dealing in a work (eg for research or private study)
- where computer code, data or software that needs to be fixed or investigated (eg for security purposes), but has been created in a different jurisdiction and is locked
- accessing short clips for teaching purposes from TV on-demand content that is protected by TPMs
- works lawfully acquired by parallel importation that require circumvention of a TPM in order to be used.

Many of these submissions, particularly those from GLAM organisations, suggest the balance is skewed in the Copyright Act by providing what they see as very narrow and prescriptive allowances for circumvention.

The Organisation for Transformative Works argues that if the Act can be taken as prohibiting communication of techniques for circumvention, this can have a chilling effect that reduces the amount of information available to users wishing to exercise permitted acts. They also suggest requiring citizens to judge the lawfulness of communications about TPM circumvention may be injurious to remix communities and creators wanting to differentiate their work from mass culture.

‘Qualified persons’

A few submissions, predominantly from the GLAM sector, describe the process prescribed for enlisting the help of ‘qualified persons’ in circumvention as costly, burdensome, overly complicated and impracticable. Tohatoha says it is not aware of any school, library, or heritage organisation that has attempted to use the process prescribed by the Act to circumvent TPMs.

Other issues with the prescribed process for lawful circumvention raised in these submissions include:

- It is considered unhelpful to limit the ability to circumvent TPMs to librarians when there may be other staff within an institution who specialise in digital technology and be better placed to perform the necessary technical tasks. For example, digital specialists, IT staff, collection management staff or administrative staff in places like schools and universities.
- Librarians do not always exercise a permitted act directly on behalf of a user, yet this is what the provisions suggest or require. This makes it unclear in practice what is permitted and what is not.
- The option of seeking the permission of the copyright owner or exclusive licensee to exercise a permitted act is considered impractical. Often it is difficult to determine who the rights holder may be. Even if identified, they may not be contactable.

Exceptions – our general approach to copyright exceptions (permitted acts)

At the beginning of Part 5 of the Issues Paper (pages 52 and 53), we characterised the overall approach to exceptions for copyright in New Zealand’s Copyright Act as ‘closed’ and contrasted it with ‘fair use’ modelled on US law. The paper then stated:

“we need a far better understanding of the problems with the current exceptions regime before we consider alternative options . . . Submitters should therefore focus on the problems or benefits with the current situation (our current permitted acts exceptions) rather than on the reasons why New Zealand should incorporate a fair use exception.”

We have identified a dozen submissions that accept this invitation by discussing disadvantages with the current approach to exceptions. We have also identified closer to 15 submissions that criticise the fair use model, which could be taken as describing perceived benefits of the status quo, predominantly:

- relative clarity in the law as written (reducing the need for litigation) and
- less damage to the interests of copyright owners.

Submissions are divided on whether an approach to exceptions like fair use would comply with our international obligations (particularly what’s known as the ‘three-step test’, which is described in paragraph 93 of the Issues Paper).

Issues with inflexible exceptions

Missed economic opportunities

Five submissions (including from Google, InternetNZ and Trademe) suggest our inflexible approach to exceptions, compared with countries that use an approach more akin to fair use, have negative consequences for the New Zealand economy. They cite various overseas studies and assessments (conducted eg by the Australian Law Report Commission and Productivity Commission) they believe support this view. Examples given by these submissions of economically-beneficial activities constrained by our current exceptions regime include artificial intelligence, cloud computing and scientific research. A common explanation provided, particularly by Google, for how this affects economic outcomes is that higher costs of compliance (obtaining licences for activities that are covered by fair use exceptions in other countries) put innovators at a commercial disadvantage and may deter them from domiciling businesses in New Zealand. Google gives the example of the significant contribution of artificial intelligence to New Zealand's GDP forecast in a recent report,⁸ which it suggests would be lessened by not having exceptions that accommodate machine learning.

Contrary to good regulatory practice

A few submissions discuss the difference between the rate at which technology makes new, beneficial activities possible and the rate at which our Copyright Act is amended to accommodate these changes. Google, for example, discusses changes in the ways consumers engage with works via the internet since the Copyright (New Technologies) Amendment Act 2008.

Universities NZ⁹ anticipates that amendments from this review (without a fundamental change in approach) will be out of date by the time they are in force. The Australian Digital Alliance likewise claims that if the law continues to permit new uses through use-specific exceptions, it "will always be playing catch up".

Some submissions identify specific conventions or policy aims they claim inflexible exceptions are contrary to:

- the proposed objective for copyright of permitting reasonable access to works, which in order to be achieved over time, requires an approach to exceptions that is resilient to change
- Treasury's best practice regulation principles (notably, the 'flexible, durable' principle)
- the Government's innovation policy objectives
- the common law tradition that "a person is free to do whatever has not been proscribed"
- principles-based approaches and open-ended tests used in other statutes that affect everyday activities (eg the Consumer Guarantees Act).

Flexibility and certainty are compatible aims for copyright law according to the submissions from Google and the Australian Digital Alliance, which each offer examples of reports and academic papers they suggest challenge the notion that flexible exceptions make copyright law less clear or predictable.

⁸ *Artificial Intelligence: Shaping a Future New Zealand*

⁹ In their paper *Why universities want fair use* which their submission references.

Impedes or illegitimizes non-commercial, personal and creative activities

InternetNZ discusses the increasing amount of personal and non-commercial activities that involve copying as society becomes more digital. They suggest this means copyright law applies “far beyond the activities and industries it is meant to enable and protect”. Melissa Laing similarly describes creative expression as so pervasive that it has become impossible to actively participate in many forms of social and cultural exchange without infringing copyright. She notes the sentiment that remixing an existing work is the contemporary equivalent of singing on your porch.

A theme in some of these submissions is what was described in the Australian *Hargreaves Review* (and quoted by the Australian Digital Alliance) as “a growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people.” The Alliance discusses how ordinary and socially-beneficial uses get caught in a gap between licensing and legislation, because they do not offer enough revenue or cause enough harm for copyright owners to make works available under licence.

InternetNZ characterises this gap as putting New Zealanders who want to act responsibly in a difficult position. Its submission suggests that conscientious citizens, rather than infringe copyright, may miss opportunities to participate in cultural life. Melissa Laing suggests it is common for people in artistic communities, presented with this choice, to be guided by their own sense of fairness and ethical norms rather than by what copyright law requires. The appropriation, citation, reuse and adaption of existing works is common practice in the visual arts in New Zealand, according to Melissa, because these communities prioritise the development of the creative field and their own professional ethics (notions of fair use) over compliance with copyright law. A similar observation was made in a study of creative professionals in Australia,¹⁰ according to the Australian Digital Alliance.

The complexity of and difficulty understanding our copyright exceptions is also understood by some submitters as eroding respect for the Copyright Act. Google and InternetNZ illustrate the legal complexities ordinary users need to navigate in order to determine whether exceptions enable them to back up or format shift works of a given type.

Exceptions – current fair dealing exceptions

Pages 54-57 of the Issues Paper discussed the ‘fair dealing’ exceptions in sections 42 and 43 of the Copyright Act 1994. It then asked about problems or benefits with each of the fair dealing exceptions, including specifically about examples of activities or uses that have been impeded by these exceptions and the exclusion of photographs from the exception for news reporting (questions 30-33).

Thirty-seven submissions respond to at least one of these four questions.

General comments on problems or benefits with these exceptions

We have identified 12 submissions as making fairly general comments on whether these exceptions are working well or not.

¹⁰ *Imagination foregone: a qualitative study of the reuse practices of Australian creators*

General benefits discussed by submitters

Five submissions from media companies discuss what they view as the merits of the fair dealing exceptions. The themes from their submissions are that these exceptions:

- Facilitate beneficial uses without conflicting with the economic interests of copyright owners
- Are sufficiently defined, certain and well understood, allowing media organisations to operate fairly and efficiently with little need for litigation. The Sky submission explains this view at length, and distinguishes between:
 - qualitative assessments of fair dealing (eg what it means to use a work ‘for the purposes of reporting current events’ and whether the use is qualitatively ‘fair’) which it suggests is relatively uncontested; and
 - quantitative assessments (ie how much of the work it is reasonable to use), which it submits are better made by the markets on a case by case basis than by Parliament.
- Sit well within the parameters of the ‘three-step test’.

General problems discussed by submitters

Three submissions characterise these exceptions as unhelpfully ambiguous. Tony Millet says this undermines compliance with the law. InternetNZ adds that while these exceptions provide open-ended tests, they are still very confined, meaning they create uncertainty without the kind of flexibility that accommodates digital activities, such as using cloud-based services for collaborative research or study.

Fair dealing for criticism or review

The NZSA and another submitter claim the exception for criticism or review is well-established in the literary sector. Universities NZ describes the open-ended nature of this exception as a key benefit, because it is capable of covering fair or reasonable uses not envisaged at the time it was developed.

Four submissions discuss problems caused by uncertainty about the activities covered by this exception:

- The Universities NZ submission describes the risk assessments students and institutions make in deciding whether they are operating within the criticism or review exception, with potentially inconsistent results. It (and the University of Canterbury Library) gives the example of risk-averse students removing images from their theses before making them publicly available.
- The Massey University College of Creative Arts discusses risk-aversion as stifling critiques of popular culture – particularly through contemporary reuse of visual works and meme culture – which it says can be censored either by the author or by other bodies involved.
- The Auckland War Memorial Museum reports dealing with uncertainty about this exception by obtaining licences it may not actually require for its exhibitions, public programming or research. It gives the example of a controversial cartoon it devoted significant staff time to obtaining a licence for, as part of its exhibition on gender equality, to resolve doubt that their use of the cartoon was within section 42.

Fair dealing for reporting of current events

Several submissions (from Stuff, Sky, the NZ music industry, InternetNZ and some individuals) all suggest this exception is broadly working well in enabling media organisations to effectively report on current events and in facilitating the licensing of uses that go beyond the exception. Stuff and InternetNZ attribute this, at least in part, to the flexible nature of this exception – in terms of what practices constitute fair dealing and what events the public has an interest in having reported.

A few submissions raise issues with this exception. NTSV asks whether it continues to apply to material that was used in archived news broadcasts (eg footage of an old six pm news broadcast) which comprise much of its collection. If the exception does not continue to apply, NTSV suggests it would face the significant difficulty of getting authorisation from the owner of the material that was used in the historical footage in order to make that footage available to users. It describes this as contributing to a general chilling effect it experiences in providing access to what was reported in years gone by.

NZME submits extensively on this exception, including to express a similar concern about the loss of access to archived news items that would result if they have to remove stories after each news cycle that rely on the exception (stories that include material for the reporting of “current events”). NZME expresses more general concerns that the undefined term “current events” may be understood as more narrow and time-bound than reflects modern news reporting practices. It says that, in practice, events are not always “current” (in terms of when they occurred) at the time they are reported.

Submissions on the exclusion of photographs from this exception

Six submissions (including from Sky and Stuff) discuss benefits of photographs being excluded from section 42(3). Four of them view this as providing an important source of income for photographers by enabling them to negotiate a fee for the use of their works in news reporting. Stuff and one other submitter explains that producing high quality images to illustrate news stories is costly (requiring specialised equipment, skill and sometimes travel) and claims photographers need to be able to seek compensation for the time and expense involved. Sky and another submitter claim that copying of photographs generally involves copying of complete works or finished products (rather than small proportions of works for the purpose of reporting current events).

One photographer says that if news media could use his photographs without his authorisation, he would be inclined to withdraw them from public display by taking down his website. The Auckland War Memorial Museum makes a similar claim. They say excluding photographs from this exception gives GLAM institutions more control over how their collections are used by the media. Allowing media to use these under fair dealing risks reducing willingness of creators to give permission for them to use photos and may reduce willingness of these institutions to make collections available online.

The Auckland War Memorial Museum also discusses the need to protect not only photographers but the subjects of their photographs: some images are taonga that require sensitivity and observance of Treaty of Waitangi requirements.

NZME takes issue with the exclusion of photographs from this exception. They argue that the inability to use photographs for reporting current events by print media (as opposed to by sound recording, film or communication work) is unfairly prejudicial to print media. They say that it impacts on their ability to meet modern expectations that reputable news be available in a timely fashion.

Fair dealing for research or private study

The PANZ submission comments that many books it publishes rely on use of the research or private study exception. Several other submissions raise issues with it.

Tohatoa notes that some libraries and museums feel required to police fair dealing by users of their services or facilities. This is reflected in Tony Millet's submission, which discusses challenges libraries face informing users of the limits of what copying is permissible under the exception for research or private study. Both submissions suggest these service-providers do this to reduce their perceived liability for copying of works they hold that is not permitted by this exception. Tohatoa suggests these concerns cause some institutions to deny access to information (eg high quality images).

Two submissions report confusion by libraries and their users about what is permitted under this exception, rather than under a licence from CLNZ. The NZ music industry suggests it is problematic that 'research' is not defined for the purpose of this exception, making unclear whether it is available for commercial research.

CLNZ discusses its difficulty having visibility over copying that is done within this exception or otherwise outside the licensing services it provides educational institutions, and therefore the extent to which interests of copyright owners are affected. This includes subsequent uses of copies of material made under this exception.

The Universities NZ submission argues that limiting use of this exception to the making of a single copy fails to recognise the needs of academics working in a digital environment. They often need to format-shift copied material, or make digital versions of physical material for preservation, electronic storage or use.

Exceptions – transient and incidental exceptions

Pages 57-58 of the Issues Paper discussed exceptions for inadvertent use of copyright works to ensure that copyright protection does not impede everyday activities, including common technological processes. The paper asked about the problems or benefits with the exceptions for incidental copying and transient or incidental reproduction (**questions 34-35**).

Incidental copying

Sixteen submissions comment on exceptions for incidental copying. The majority of submitters seem satisfied that such an exception is needed and no change is necessary. However, three submitters suggest there may be problems with the exception. For example, the Screen Production and Development Association comments that screen industry lawyers report difficulty advising on this, but does not elaborate further. Alexandra Sims comments on a 1934 court case related to a film of the Prince of Wales opening a new school, alleging the courts treated the scope of this exception very narrowly.

Transient or incidental reproduction

Fifteen submissions discuss the exception for transient or incidental reproduction. The majority of submitters seem satisfied that the exception is necessary and appropriate. However, five submitters discuss potential issues with the interpretation of the exception. Issues mentioned include the absence of any reference to copies needing to be "temporary" could lead to an interpretation that permanent incidental copies may be permitted. Others

considered that the interpretation of section 43A(b)(ii) may be ambiguous and as a result lead to unduly broad interpretations compared to similar provisions provided overseas.

Some submissions reveal differences in understanding as to whether the transient reproduction exception covers caching services provided by internet service providers. Five submitters consider that it either does or should cover caching services, whilst four submitters believe that it does not, and should not, cover caching as the existing safe harbour provision for caching is sufficient.

University of Canterbury Library and Universities NZ consider that a benefit of the exception is that it could be interpreted as allowing a teacher to copy a portion of a film for showing to a classroom for teaching purposes.

Exceptions – other desirable uses not covered by exceptions

Pages 59-62 of the Issues Paper discussed how we had heard concerns that there other desirable uses of works that are not clearly recognised within the exceptions regime, including:

- technological process like cloud computing
- non-expressive uses like data mining for research purposes or developing artificial intelligences
- uses that facilitate freedom of expression, like parody and satire
- use of quotations.

The paper asked about problems or benefits with not accommodating these activities within the exceptions regime (**questions 36-40**).

For the purposes of this summary, we distinguish between the non-expressive (technological processes, data mining and development of AI) and expressive uses of works (parody and satire, remixing or referencing works for social or political commentary, and use of quotations for purposes other than criticism or review).

Technological processes (eg cloud computing)

Twenty six submissions comment on this topic. Eleven submitters are of the view that an exception for cloud computing and storage is necessary, largely on the basis that no current exception exists for these activities. Most of these submitters refer to the existence of cloud computing exceptions overseas as the basis of there being an issue here. For example, IGEA say they are not aware of any practical impediments under the Copyright Act to the use and adoption of cloud technology. However, they consider the absence of such an exception creates uncertainty as to whether cloud computing services can lawfully operate in New Zealand.

Six submitters (from rights holders) consider an exception is neither required nor necessary and that concerns regarding cloud computing are overstated. They note that the issue is being addressed through licensing arrangements and on-demand platforms and channels, especially for e-books, sound recordings and films. These submitters are also concerned that a broad exception for cloud computing and storage would undermine lawful platforms and channels providing these types of works.

University of Canterbury, Universities New Zealand and LIANZA consider that without more permissive technology-based exceptions there are reduced opportunities for educational institutions and libraries to provide “makerspaces”, where people can come to try out and

experience using different technologies. LIANZA note that as new technologies develop and become popular, libraries will start using these technologies to capture and display creative works.

Data mining and artificial intelligence processes

Thirty-six submissions discuss use of copyright works for data mining or other computational purposes. Nearly half of the submitters appear to conflate the idea of accommodating these uses within the exceptions regime with adopting a general fair use or principles-based approach to exceptions.

Twenty submitters consider that a data mining exception should be provided. Many of them assert the need for a data mining exception on the basis that they are available overseas, for example in the EU, UK and Singapore. Auckland War Memorial Museum considers that data mining is more safely outsourced to countries with fair use regimes (ie Singapore, Israel, USA) and this limits New Zealand's ability to contribute to collaborative research projects.

Eight submitters (from rights holders) consider that there is no need for any exception and any copyright issues can be, and are being, addressed through licensing arrangements. LIANZA suggests data mining does not infringe copyright, but notes that rights holders vary in their willingness to grant licences for such activities.

The Alliance of Independent Authors notes that artificial intelligence systems are now using copyright works to learn and to generate new copyright protectable works, and there are unanswered questions and disputes about copyright as a consequence.

IGEA noted that AI is becoming increasingly used in the development of video games and some of its members favour a copyright framework that is broadly supportive of, and provides clarity around, the use of data by AI.

Expressive uses of works

The Issues Paper asked about problems or benefits with not having an express exception for creative reuse of works, such as parody and satire, and with the use of quotations or extracts taken from copyright works. Submissions provided in response to these two questions overlap considerably with responses to an earlier question about how the Copyright Act applies to user-generated content. We therefore summarise submissions on these three questions together.

Fifty-eight submissions answer at least one of these questions.

Issues with not having an express exception for parody and satire

At least a dozen submissions either express support for creating an exception for parody and satire and/or discuss issues with its absence.

Several submissions discuss the social and cultural importance of parody and satire. Radio NZ, for example, describes parody and satire as important tools for social commentary and for entertaining, engaging and informing audiences who may not follow hard news reporting.

A few submissions acknowledge or discuss that parody and satire without the copyright owners' authorisation is tolerated in practice (one describing this approach as unprincipled). Tohatoha and Universities NZ claim that large content producers have entered into what Tohatoha calls "gentlemen's agreements" to not take legal action over parody and satire directed at each other's works (eg satirical skits and mash-ups of popular songs on the Jono &

Ben Show). They argue this practice excludes small and emerging artists, as well as the free speech of ordinary citizens. Universities NZ suggest lower profile producers (eg student union magazines) may wrongly assume parody and satire is facilitated by copyright law, which undermines “integrity and respect for the law”. NZME likewise argues New Zealand copyright law is at odds with common practice, including the ease with which internet users can adapt and modify content.

NZME suggests it is often not practicable to gain the copyright owner’s permission to satirise their work, particularly when the author is based overseas.

Other issues raised in submissions include:

- Sky suggests the use of exceptions for parody and satire in other countries disadvantage New Zealand, in terms of access to content, and our entertainers and comedians.
- Google expresses doubt that the Current Act is consistent with the New Zealand Bill of Rights Act 1990 in the way it limits the use of works in parodic and satirical contexts, particularly on political matters.
- Kevin Glover offers the example of an overseas production that was deterred from performing in New Zealand: a burlesque show which parodies *Star Wars: The Empire Strikes Back*.

Submissions on other creative reuse of works for freedom of expression

Several submissions specifically discuss the value of what they call transformative works and ‘remix culture’. Many examples of works of this kind are provided in these submissions, including two valuable works that Te Papa holds and discusses at length.¹¹ Submissions from InternetNZ, Tohatoha and Google all discuss how the internet has provided important avenues for creativity, play, self-expression in an increasingly media-saturated world and participation in cultural life through adapting, reusing and remixing content. Judge David Harvey also submits that freedom of expression is facilitated by the internet, and emphasises the importance of recognising that ideas expressed are building blocks for new ideas.

Melissa Laing claims appropriation, citation and adaption of existing works is common practice in the visual arts. She offers examples of artists who use various techniques (eg collage and sampling) that infringe copyright but are rarely impeded in practice because the value of those activities and artistic norms may be seen as outweighing interests in copyright.

A theme in some of these submissions is what Google calls the “large disconnect between the Act and ubiquitous consumer practices that are unlikely to harm copyright owners” and suggests this either makes copyright irrelevant to millions of kiwis or brings the law into disrepute. The failure of copyright law to recognise widely accepted activities and social norms is also a concern for Tohatoha, Universities NZ and Melissa Laing. Some submissions suggest copyright law has not anticipated the pervasive nature of creative works and range of human creativity made possible by the internet.

On the other hand, some creators of adapted or remixed works and organisations involved in the production or exhibiting of these works are more risk-averse, according to some submitters.

¹¹ Te Papa describes Janet Lilo’s *Top 16, 2007-2017* as an interactive work of “national significance” from a curatorial perspective, but which likely infringes copyright in a number of other works.

Massey University College of Creative Arts also claims that the limited scope of the fair dealing exceptions stifles contemporary artistic practice. It gives an example of how concerns about copyright infringement have deterred students from showing some of their best works that incorporated footage in transformative ways. Google cites research it claims found that New Zealand's copyright framework dis-incentivises the creation of transformative works and claims this negatively affects the health of New Zealand's creative sector and digital economy. It adds that major innovations and creative breakthroughs are often made possible only through an iterative process whereby developers envisage new uses for existing information. Google sees the use of thumbnail images by the Google Image search engine as an example of this. Another example it offers is adding extra layers of data to Google maps to present information in new and useful ways.

Te Papa discusses the artist Christian Marclay's choice to not seek licences for films used in his work *the Clock*, 2010 and quotes him as saying: "If you make something good and interesting and not ridiculing someone or being offensive, the creators of the original material will like it". It says museums in New Zealand inherit this liability when displaying works like this.

Other submissions on user-generated content

A few submissions discuss the importance of user-generated content as a growing medium for New Zealanders to exercise their freedom of expression with no expectation of commercial gain. Submitters suggest user-generated works, like other copyright works, vary in their quality, significance, and the time and skill invested in their production. In response to the Issues Paper, one submitter suggests it is not so much a question of how the Copyright Act applies to them as user-generated works, but how it fails to accommodate remix culture more generally (any content generated in response to and including elements of other copyright works). Te Papa likewise views user-generated content as a subset of the wider remix culture, which is not supported by current copyright law. Issues raised in these submissions that are specific to remix works are that:

- their authors are in a poor position to license the uses they put existing works to
- copyright law hinders the collection and preservation of born-digital content.

A few submissions from creative industries suggest the current law is capable of accommodating user-generated content, including:

- the NZ music industry, who discuss the availability of licences for the use of sound recordings in user-generated content, including mash-ups, which they argue shows the markets have responded effectively to the rise of user-generated content
- the NZ film and TV bodies, who make a similar statement about the licensing of film clips, stills and music samples.

Use of quotations

Benefits of the status quo

Submissions from rights holders defend the status quo on the basis licensing solutions for uses of quotes and excerpts (where required) are generally working well in the publishing, screen and music industries. These submissions generally emphasise the benefits of copyright owners retaining control over the partial copying of their work, particularly where for a commercial purpose.

Exception for quotations required by the Berne Convention

A few submissions refer to Article 10 of the Berne Convention and appear divided on whether it compels New Zealand to permit quotation of works beyond our current fair dealing exceptions. At least a couple of submitters suggest New Zealand is required to recognise a 'right to quote', whereas Screenrights submits that New Zealand and Australia implement the requirement in Article 10 by the fair dealing exception for criticism or review.

Issues with inability to quote work outside current exceptions

Ten submissions raise issues with the current constraints on use of quotes and extracts without the copyright owners' authorisation.

The Australian Digital Alliance couches its criticism of the status quo in terms of the social importance of being able to reference and quote content in an illustrative manner, which it describes as essential for public discussion, the sharing of knowledge and free speech. Two other submissions also view restrictions on the ability to quote as restricting freedom of expression, InternetNZ noting the increased role of quoting text, images and video as a form of communication online.

Google and other submitters give numerous examples of common activities unlikely to be permitted by current exceptions (including retweeting tweets, inserting charts and tables in a presentation and using song lyrics or song titles as commentary in academic writing).

The theme again arises in these submissions of a divergence between those who are actually inhibited by the current law (which one submitter describes as only the very 'risk-averse' organisations) and the many artists, authors, academics and consumers who practice quoting either in ignorance of the law or conscious disregard for it. Two submissions suggest respect for the law is undermined by what the Australian Digital Alliance describes as a disparity between what our Copyright Act allows and the "reasonable expectations and behaviour of the general population".

Submissions suggest it is predominantly universities and the GLAM sector whose activities can be affected by limitations on the ability to quote copyright works. The National Library describes it as best practice for heritage organisations to provide short extracts from their resources (including digital extracts) for the purpose of promoting their collections to potential users. Te Papa discusses its practices in relation to attributed quotations, particularly in managing its collections database. It gives an example of how the limits of fair dealing for criticism or review:

- caused Te Papa to remove some quotations from its collections dataset, which impaired the dataset's functionality
- still exposed Te Papa to some degree of legal liability for data still containing quotations
- costed Te Papa significant staff time.

Other practical consequences discussed in these submissions include difficulties getting academic work or research published because it includes unauthorised quotes and increased transactions costs involved in obtaining permission for quotes.

Non-literary quotations

It is clear from a number of submissions discussing quotations of works that they do not limit their comments to the quoting of written, literary material. Submissions from Te Papa, Sky and one other make particular comments about practices such as ‘sampling’, ‘collaging’ and ‘scrapbooking’ of non-literary works that may be considered within the meaning of quotation.

Te Papa views some of these artistic techniques as not infringing copyright when done physically because the artists is creating something materially and artistically new with collage or scrapbook material, but claims that Te Papa risks infringing copyright when producing digital images of these works.

Submissions from the music, film and gaming sectors claim non-literary quotation or sampling of ‘clips’ (sound recordings or film-based works) is already or should be facilitated by licensing practices and may have significant commercial implications for copyright owners.

Exceptions – the activities of GLAM organisations

Pages 64-67 of the Issues Paper discussed potential issues with the exceptions to facilitate the functions of not-for-profit libraries and archives. It then asked:

- for examples of undesirable outcomes resulting from uncertainty about these exceptions (**question 41**)
- about problems or benefits with the amount of flexibility these exceptions provide libraries and archives to:
 - perform their functions in relation to digital content (**question 42**)
 - undertake mass digitisation projects and make copies of physical works available in digital format (**question 43**)
 - make copies within their collections for collection management and administration (**question 44**)
 - copy and make available content published online (**question 45**)
- about problems or benefits with excluding museums and galleries from these exceptions (**question 46**).

We received 49 submissions on these exceptions. Thirty-five of them are from organisations, including GLAM organisations, collective management organisations (CMOs), universities, and industry bodies. Fourteen of these submissions are from individuals.

Seven submissions expressly support the current exceptions for libraries and archives, suggesting they are already fit for purpose. The majority of submissions raise issues with these exceptions.

Is there enough flexibility for libraries and archives in these exceptions?

Fourteen submissions suggest these exceptions afford libraries and archives too little flexibility and that this unnecessarily limits public access to knowledge by:

- creating challenges for digitisation practices
- only allowing digital copies to be accessed at a physical location

- precluding libraries and archives from making works available on online collection portals, blogs, newsletters or social media sites.

The majority of comments on the issue of flexibility relate to digitisation practices of libraries and archives. The challenges discussed in these submissions include:

- The current exceptions do not allow libraries to convert physical content to digital form and make that content available to the public online.
- Digitisation for the open web involves uncertainty around ownership of intellectual property. A lot of cultural and scientific heritage remains undigitised because of this.
- The time, money and skills needed to locate rights holders is a significant burden for libraries. Projects that include copyright clearances are often shelved in favour of easier projects.
- Submitters argue that there is a significant public good in making heritage collections available, but this is prevented or undermined by the complexity of the regime and resourcing constraints.
- Four submissions commented on accessibility issues created by the current exceptions. For example, the current exceptions do not cover playing or showing sound recordings or films held by Archives New Zealand.

While the majority of submissions emphasise the need for more flexibility, eight submissions argue the current exceptions do provide libraries and archives with enough flexibility. In particular, they do not support copying for collection management, mass digitisation, or making the current exceptions more flexible for libraries and archives. Key points made in these submissions include:

- Libraries do not need to make copies for collection management without permission because replacement copies can be purchased.
- Expropriating works can be disrespectful and may undermine the creator's ability to build and maintain their own platform.
- Copying website content and entire URLs without the copyright owner's permission is a violation of their rights.

Uncertainty in applying these exceptions

Sixteen submissions discuss uncertainty around exceptions for libraries and archives as an issue, claiming that they are often confusing for both organisations and users to apply. Cited examples of what causes confusion include:

- undefined terms used in the Act (eg, libraries often query what constitutes a 'reasonable proportion' of a work under section 51)
- not knowing whether libraries and archives are allowed to make thumbnail images for cataloguing purposes for internal use.

For some submitters, the role of their organisation is not always clearly defined in the Act. For example, libraries that sit within museums (such as the Walsh Memorial Library within MOTAT) are not sure what kind of exceptions they are entitled to use.

A few submissions mention inconsistencies in the scope of exceptions available for libraries and archives. For example, Universities NZ notes that sections 54 and 56C seem to be

applicable only to books, whereas section 55 seems to include any kind of work, including a computer program (which is excluded from sections 52-54). This makes it difficult for librarians to interpret and apply the exceptions. The length and complexity of these provisions is also discussed as contributing to confusion within libraries and archives.

Digitisation

We received 12 submissions specifically about digitisation of works held by libraries and archives.

A number of submitters view limits on the mass digitisation or making copies available online without a licence as important because these activities threaten the ability of authors to derive income from their work. Concerns with digitisation projects of libraries and archives include:

- Mass digitisation projects are alarming to writers who receive no compensation for that lending in New Zealand.
- Data mining is used extensively in marketing and media companies like Cambridge Analytica and Facebook. These types of organisations have breached privacy and intellectual property laws by harvesting and manipulating data, and then selling it to advertisers, political parties, etc.

Nine of these submitters believe the Copyright Act should facilitate digitisation. Auckland Libraries, for example, considers that digital heritage preservation is a key issue, and would like to have the legal right to do so for new content. The issues raised in these submissions include the following:

- The IAML suggests its decisions about what to copy are often based on importance and fragility, but also very often, solely on copyright status (whether they can then share it).
- Much of the material that is truly vulnerable and fragile is in the public domain. Newer items can still be vulnerable and will be copied under the preservation exceptions. However, the preservation exception does not necessarily allow for material to be made available online, which there is increasing demand for.
- The exception does not recognise that most of the cost involved in creating a digital copy of a physical item is in the preparation before scanning.

Exceptions for galleries and museums

Twenty-eight submissions comment on the exclusion of galleries and museums from the exceptions for libraries and archives. Of these, 22 submissions believe galleries and museums should also benefit from these exceptions. They argue that all GLAM organisations, including galleries and museums, have common goals, such as acquiring, preserving and giving access to New Zealand cultural heritage. Museums and galleries (like archives and libraries) generally exist to provide and disseminate information, and it is increasingly common for the public to expect to find this information online. Submissions suggest that by not affording them the same exceptions as archives and libraries, the current law makes it harder for them to achieve the common goals of the GLAM sector (eg provide public access to their collections).

Two submissions (Te Papa and Auckland Art Gallery) note that, as museums and galleries do not have access to the preservation exceptions available to libraries and archives, the selection

of digitisation projects is often skewed towards copyright-free content, which in turn impacts online collections content.

A number of submissions from GLAM organisations also note that many museums maintain libraries and archives within their collections, and treating these organisations differently reduces their efficiency and often causes confusion as to what they are legally able to do with their collections. Two submissions (Marist Archives and Auckland War Memorial Museum) specifically note that galleries and museums can have constituent libraries or archives, which function in the same way as libraries and archives that have access to the exceptions.

Exceptions – educational uses

Pages 68-72 of the Issues Paper discussed exceptions in sections 44-49 of the Copyright Act that are intended to allow the use of copyright works to facilitate education, while having due regard to the interests of copyright owners. It then asked for information that would help us determine:

- whether these exceptions provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies (**question 47**)
- whether exceptions for education are too wide or too narrow (**questions 48 and 49**)
- how well copyright is understood in the education sector (**question 50**).

Does the Copyright Act provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies?

Provides sufficient flexibility

Ten submissions express the view that the exceptions for education do provide enough flexibility. Some of these submitters have complaints with this flexibility, such as authors not receiving adequate compensation and many schools not paying for licences. CLNZ says these exceptions function well, by providing content to schools and a return to authors.

Does not provide sufficient flexibility

Eleven submissions believe the exceptions for education are not flexible enough. The reasons they offer for this view include that:

- the licences available to schools do not allow them to provide ‘massive online open courses’
- the exceptions are too complicated and result in academics shying away from useful content because of the difficulty maintaining compliance with the law
- the exceptions do not allow students to collaborate via email, online class networks, social media or video chat
- there is a lack of clarity over the use of new technologies, such as using data-mining for research
- recording lectures is problematic (for instance, DVDs and sheet music cannot be shown in digitised lecture recordings)
- dissertations must have third party material redacted (unless they have permission) before they can be shared on institutional repositories

- the cost of licences institutions must purchase, because of the limited scope of current exceptions, is passed on to students and taxpayers.

Are the education exceptions too wide or narrow?

The exceptions are too wide

Twelve submitters believe these exceptions are too wide. CLNZ and the NZSA both claim that 30 percent of schools do not have a copyright licence. Some submitters say that it is difficult to tell whether schools are complying with the exceptions. The NZ music industry submission says they have noticed that several of their content creators are reluctant to create content for New Zealand because of the broad copying allowed for by the exceptions. Waikato Museum says that a lack of clarity around the meaning of “educational purposes” may result in these exceptions being interpreted more widely than appropriate. PANZ argues that allowing teachers to copy material undermines the market. They also suggest educators tend to use more inefficient methods of copying works (eg scanning) to avoid paying for content.

The exceptions are not too wide, or are too narrow

Sixteen submitters either disagree that the exceptions are too wide or argue that they are too narrow to effectively support educational uses. IAML believes it is reasonable, in certain situations, to supply photocopies or electronic copies, especially if an educational institution or student has gone to the trouble of securing the original item. Two submissions from universities say there is no evidence of lecturers copying entire books, and that their library acquisition policies enable the purchase of specific books by academics at their request.

Submissions from universities also suggest that the Copyright Act precludes them from making lecture slides and recordings available on the learning management system. The University of Canterbury Library say that making printed sheet music available to students is problematic, because the collective management organisations have been unable to secure the rights for universities. Another submitter says the copying of films and sound recordings for educational purposes is unreasonably restrictive. Three submitters claim that the work of GLAM organisations can complement and enhance classroom learning in ways that are inhibited by the exclusion of these organisations from the education exceptions.

Is copyright well understood in the education sector?

Twenty-two submitters say copyright is not well understood in the education sector, whereas two believe it is. Many of the organisations that comment on this topic say that copyright is not well understood because of its complexity. Some submitters suggest that many teachers choose to ignore copyright and the resources provided to help them understand it. CLNZ says that it is not reasonable to expect individual teachers, tutors and lecturers to be copyright experts, and that the institutions that employ them should instead take responsibility for ensuring compliance with the law. This submitter adds that their survey of schools found that copyright infringement happens frequently.

Several submitters agree that understanding of copyright varies in the education sector. For instance, the basic principles of copyright are often understood, but inconsistencies and the complexity of the law creates uncertainty. Universities NZ says that a survey undertaken by the University of Otago 2016, showed that about half of staff self-reported a good or comprehensive understanding of copyright. This submitter says that the patchwork of licences and exceptions is difficult to understand. The National Library thinks that uncertainty with the exceptions leads to overly cautious behaviour and unnecessary restricting of knowledge.

Tohatoha believes understanding New Zealand copyright is particularly challenging for staff coming from overseas. Christopher Cookson says that teachers who misunderstand copyright can end up passing this on to students.

Exceptions – exceptions for specific works

Pages 73-80 of the Issues Paper discussed exceptions provided in Copyright Act that permit uses of particular works in certain situations, and asked about problems or benefits with these exceptions, namely for:

- free public playing of communication works and sound recordings (**question 51**)
- format shifting of sound recordings for personal use (**question 52**)
- recording of communication works for the purpose of time-shifting (**question 53**)
- reception and retransmission of broadcast content (**question 54**)
- other uses of communication works (**question 55**)
- computer programs (**question 56**)
- artistic works on public display (**question 57**).

Free public playing

Thirteen submissions discussed the free public playing exceptions. Sky outlines the way the exceptions (in sections 87 and 87A) reduce compliance costs for certain business as they can play communications works for their patrons without incurring additional licensing fees.

Six submissions have concerns with the way these exceptions apply to communication works and sound recordings, but not to the musical works underlying any playing of a sound recording or communications works containing a sound recording. The NZ music industry submission comments extensively on the unequal treatment of sound recordings and the underlying musical works. IFPI view these exceptions as effectively requiring producers of sound recordings and performers to subsidise businesses that make commercial use of their music.

Other submitters, including from LIANZ and Universities NZ, have concerns with the way these exceptions do not apply to underlying works, characterising the exceptions as being:

- complex
- unclear as to who they are intended to apply to
- difficult to apply for the playing of orphan works
- technology-dependent by only permitting an organisation to play a film or sound recording when in the form of a communication work, but not directly from a recording of the work itself.

Format shifting of sound recordings for personal use

Twenty two submitters commented on the format shifting exception for sound recordings. Thirteen of them consider the lack of a general format shifting for works, especially for audio visual works, is an issue. In addition, six submissions from the GLAM sector discuss concerns

that they are unable to rely on this exception to make copies of any works in their collections because it does not apply to them (ie it only relates to copying of sound recordings for personal use).

Six submitters, mostly form right holders, oppose any change being made to the exception. They consider that there are broadly no issues with the current exception for copying sound recordings for personal use. They allege that the market for physical files (eg CD's) is declining and this is reducing the need for anyone to format shift, as New Zealanders have changed the way they consume content (eg to on-demand and streaming services). These submitters express concern that any changes to format shifting exception could undermine legitimate licensing markets and facilitate piracy. The IGEA says it is unaware of any problem or need for the current exception to be extended to video games.

Time-shifting for programmes included in communication works

Eight submissions discuss the time-shifting exception. Three of them consider the exception works well, with some commenting that the time-shifting exception has become redundant with the rise of on-demand services now being available from most content providers. Two submitters consider that a time-shifting exception should also apply to on-demand services, citing the need for further convenience for users and that content is often only available from on-demand services for a limited period of time.

New Zealand Writers Guild argue that screenwriters are uncompensated for the time-shifting of broadcasts and should be paid a royalty for these uses. The NZSA likewise believe free-to-air broadcasters should pay a licensing fee for any recordings made from an author's work.

Reception and retransmission of broadcast content

Five submissions discuss the exception for reception and retransmission of broadcasts. TVNZ consider the exception to be archaic and putting free-to-air broadcasters at a commercial disadvantage. They allege that it enables platforms to build scale off the back of free-to-air content that the platform neither owns nor retransmits under a licence. In contrast, there is no equivalent for free-to-air broadcasters to build their content by using unlicensed content from those same platforms. The NZIPA suggests that the exception is now superfluous as the objective of the provision has not been satisfied and is now unlikely to eventuate due to technology changes and market forces.

Sky says it is unaware of any problems caused by this exception. The NZSA expresses concern about the use of the exception by parties, like the Foundation for the Blind, to produce and monetise the distribution of audio books.

Other communication works exceptions

Five submitters commented on these exceptions. Three of them believe that the exceptions are not creating any problems. The NZSA considers that section 85 (related to incidental recordings for purposes of communication) is unclear in what uses it permits educational establishments and libraries.

Screenrights consider that the exception under section 91 (recording by media monitors) does not reflect the reality that media monitoring companies are also communicating copies of their recordings to their clients.

Exceptions relating to computer programs

Eight submitters responded to the question about these exceptions. InternetNZ suggests that their limited scope is problematic because it does not allow for the making of multiple backup copies of computer program. Restricting this to one copy to be used only for replacement, they argue, does not recognise that often programs are being accessed from multiple devices and it is good practice to make three copies across at least two different formats. Google is concerned that the exception may not enable users to back up apps, games and software. LIANZ suggests the exceptions for backing up computer programs are too limited because they do not enable libraries to make backup copies of any material in their collections.

The IGEA is not aware of any issues arising from these current exceptions, noting that digitally distributed games allow platforms and retailers to address any user's desire to back-up content.

Xero comments that the exceptions for computer programs do not reflect that its software is delivered using the "software as a service" model, meaning subscribers' needs for the copying and backing up of its software are limited. Although third parties could make programming interfaces with Xero's software, it considers that the exceptions require modification to protect its software from decompilation that may undermine its autonomy and jeopardise data protection and security of its subscribers. Xero wants to prevent unexpected or malicious interference with its software that might negatively impact on existing subscribers and their reputation.

The NZIPA and the National Library suggest the term "computer program" may be ambiguous or need defining.

Exceptions for artistic works on public display

Ten submitters responded to the question about the exceptions for artistic works on public display. Six of them express the concern that the exception has the potential to be used to make copies of works on public display for commercial purposes, unless this use of the exception is clearly ruled out. Although Universities NZ also believe the exception should not permit businesses to use these works for commercial purposes, they distinguish this from its use by universities for educational and marketing purposes. Two submitters support the position (of the High Court, as discussed on page 79 of the paper) that the exception should also apply to any underlying work(s) (of the sculpture or building).

Exceptions – contracting out of exceptions

Part 5, Section 5 of the Issues Paper (page 81) discussed how the Copyright Act is largely silent on whether copyright owners can, by contract, exclude or limit a person's ability to use exceptions. It then asked about problems or benefits with these practices, to the extent they occur (**question 58**).

Thirty-five submissions respond to this question. Fourteen of them support the status quo. The remaining submissions take issue with the possibility that copyright exceptions could be limited or defeated by contract.

How common is contracting out?

The suggestion made by a few submissions is that contracting out of exceptions is becoming more common, as users rely increasingly on subscription and licensing packages for electronic access to information (rather than on acquisition of physical works).

Licences for subscriptions to electronic resources (particularly from large academic and educational publishers) commonly require libraries to contract out of exceptions for inter-library loans and for educational purposes, according to submissions from universities, libraries and Tohatoha. The Australian Digital Alliance claims licensing practices requiring users to contract out of exceptions are so well identified by international studies that their existence is uncontroversial. DVDs often have licences that limit use in teaching environments under exceptions for educational purposes, according to the University of Canterbury. NTSV's submission suggests that its ability to make works available to third parties through exceptions can also come into question in its contractual agreements with depositors.

The International Publishers Association states that publishers do not routinely contract out of exceptions in their agreements with customers, but may do so when justified. They, along with PANZ and other copyright bodies (such as IFPI), suggest that flexible licences that afford rights holders more control over the potential use of their work are made more necessary by growing demand for digital content and the increased use of digital methods of distribution.

Legal status of contracts attempting to limit exceptions in New Zealand

Most submissions acknowledge the uncertain legal status of contracting out clauses in New Zealand. Many appear to believe copyright can be infringed by people using an exception that is prohibited by a contract or licence for the work, or at least act as if that is the case. The Australian Digital Alliance comments that, despite the general rule that legislation cannot be overridden by private agreement, contracting out is generally recognised in practice due to factors such as power imbalance and risk-aversion by users.

The IFPI suggests copyright contracts are already subject to consumer law protections (including the common law) and can be ruled invalid when the public interest requires it.

Submissions on benefits of contracting out

Submissions from the music and screen industries comment on how the status quo supports the freedom of parties to contract, which they see as integral to effective licensing practices and the copyright ecosystem. ANZA and Sky specifically discuss benefits of users being able to forgo their rights (afforded by exceptions) by contract. Sky suggests agreeing terms of use by contract can be a more practical method (for both contracting parties) than relying on statutory exceptions and offers the example of a licence authorising a news agency to use clips from a library of content on condition that they waive their fair dealing rights. The IGEA discusses how flexible end-user licence agreements contribute to the willingness of gaming companies to support innovative activities (like 'modding' and user-generated content) that benefit the gaming community.

The NZSA views contracting out as beneficial where the exception being limited by contract is one that affects the income of writers. PANZ and Screenrights also comment that the technological innovations have generally increased the availability of works under licence, which reduces the need for exceptions.

Submissions on issues with contracting out

Contracting out undermines the purpose of exceptions and the legislative process

Two submissions quote the UK Government's Modernising Copyright report as saying contracting out "effectively enables the rights holder to rewrite the limits that the law has set on the extent of the rights conferred by copyright." The Australian Digital Alliance and Tohatoha takes issue with the idea that copyright exceptions decided by Parliament can be undermined or defeated by contract. Tohatoha suggests this undermines the legislative process and respect for the law. It considers that it is good regulatory practice for laws protecting New Zealand consumers or citizens to provide basic protections that parties cannot contract out of and offers minimum protections in the Consumer Guarantees Act and Residential Tenancies Act as examples.

Several submissions appear to view the uncertainty created by the Copyright Act's silence on contracting out as an unacceptable or undesirable outcome in its own right.

The effects of contracting out on users

A few submitters reference reports from governments in other countries that discuss the costs of not precluding contracting out. Possible consequences emphasised in these submissions are that this situation erodes socially and economically important uses of works (eg the possibility of blanket licences defeating exceptions to make accessible copies for disabled users) and increases the return to creators over and above what is necessary to incentivise their creation.

InternetNZ and the Australian Digital Alliance both claim that consumers are generally in a poor position to challenge end-user licence agreements and click-wrap licences that limit their entitlements under exceptions intended to protect them (eg format and time-shifting).

Four submissions discuss how the use of works held by libraries and information-service providers under exceptions is becoming increasingly constrained as more subscription-based electronic resources (eg academic journals) form a greater proportion of works held by these institutions. These submissions claim this significantly reduces access to information available to universities and researchers. In the case of inter-library loans, libraries take the precaution of complying with the licence agreement rather than operate within the section 53 exception. According to the University of Canterbury, they limit themselves to copying works in their physical collection for inter-loan, despite having invested heavily in access to and distribution of electronic resources.

Transactions – collective management organisations (CMOs)

The Issues Paper discussed the operation of collective management organisations (which are not regulated by the New Zealand copyright legislation). It then asked:

- whether there is a sufficient number and variety of CMOs in New Zealand for different types of copyright works (**question 63**)
- about any problems members of a CMO have experienced with the way they operate in New Zealand (**question 64**)
- about any problems users have experienced trying to obtain a licence from a CMO (**question 65**)

We received 21 submissions on the operation of CMOs.

Some submitters suggest CMOs are not always effective

Seven submissions believe CMOs are not always effective. For example, one submission (from Rachel Ann Louise Ovens nee Moore) suggests that New Zealand needs to fund more lawyers and critical thinkers to lobby existing international bodies. Overall, the submitters raised the following themes:

- NZME believes that a CMO is a legal monopoly and possesses monopoly powers when dealing with customers who wish to access works licensed by that CMO.
- Universities NZ does not believe that CMOs can meet the requirements of the modern classroom. In their opinion, CMOs are often ill-equipped to offer solutions to users who want to use a range of different types of work, of varying levels of obscurity. These excluded works are all works that lecturers wish to copy and share with their students from time to time and are generally of little economic value. They argue that getting permission is time-consuming both for rights holders and for users, and is often impossible to obtain for older works.
- Finally, NZME notes that copyright licensing and music licensing, in particular, is inherently complex, and the existence of two general musical CMOs in New Zealand introduces unnecessary complexity and an additional cost for users who wish to gain access to musical works.

Submitters believe that CMOs are effective in reducing costs

Two submissions note that CMOs are efficient at acting as advocacy bodies as well as reducing transaction costs. For example, Australasian Music Publishers' Association Limited believes CMOs play a central role in reducing transaction costs in the copyright system, and operating transparently, efficiently and according to best practice. In addition, the NZ music industry submission notes that CMOs provide a particular benefit for smaller right holders who lack the bargaining power to negotiate a licence with large users of music.

A few submitters (including the NZSA) claim that CLNZ is an effective CMO; acts in the interests of rights holders; and is transparent about its distribution policies and alternative dispute resolution services. In particular, submissions suggest:

- There is no problem with CLNZ from the point of view of writers.
- Hachette publishing notes that PANZ is co-owner of CLNZ alongside the NZSA. It believes that the role of publishers and authors in ownership and governance ensures that CLNZ efficiently acts in the interests of rights holders, offering educational licences and returning most of the revenue from those licences to rights holders.
- CLNZ notes that their operational practices follow the guidance issued by WIPO on collective management practices, and that CLNZ's financial statements and procedures are externally audited each year.
- CLNZ also notes that they provide both a complaints process and alternative dispute resolution, although neither of these has been utilised by copyright owners or licensees in the past decade.

Submitters emphasise New Zealand needs more CMOs

Twelve submissions suggest there needs to be new CMOs in New Zealand to represent visual artists, AI and computer games, digital works and user-generated content, to collect royalties under lending schemes as well as for taonga and taonga-derived works. One submission provides statistics to demonstrate how few professional photographers are members of a CMO. This submission also suggests the Australian Copyright Agency may be collecting royalty income on behalf of New Zealand visual artists, but with very little of that income being distributed to artists in New Zealand.

International Confederation of Societies of Authors and Composers argues it is important to set up a CMO to safeguard the right of the audiovisual creators in New Zealand and from around the world.

Two submissions comment that taonga works and matauranga Māori lack protection and would benefit from the creation of a Māori copyright management organisation which can provide an effective mechanism for licensing these works.

Transactions – the Copyright Tribunal

Pages 90-91 of the Issues Paper discussed the Copyright Tribunal's role in dealing with disputes about licensing, acknowledged that the Tribunal is seldom used in practice, and then asked about:

- problems and advantages with the way the Copyright Tribunal operates (**question 66**)
- any alternative dispute resolution services offered by CMOs (**question 67**)

We received 13 submissions on these questions.

Submitters believe that the Copyright Tribunal could be more efficient

Five submissions believe that the Copyright Tribunal could be more efficient and the dispute resolution process could be faster. In particular, NZME argues that the lack of regulation in this area means the Tribunal is the only avenue available for addressing disputes involving licensing schemes offered by CMOs. The NZSA notes that CLNZ offers an alternative dispute resolution service.

The submission from Screenrights argues that the Copyright Tribunal is underutilised. In particular, it raises the following issues with the current system:

- The Copyright Act only requires that the chairperson of the Tribunal have 7 years' experience in legal practice. In their experience, the kinds of disputes that come before the Tribunal are high value and complex. Parties are generally represented by senior intellectual property barristers. It is therefore appropriate that the chairperson presiding over the dispute is a current judge. Ideally, the chairperson would also have experience in copyright (at least in private practice, if not on the Bench).
- Very little information is available on the Ministry of Justice's website about the Tribunal's jurisdiction. It would be helpful to stakeholders if the Tribunal's jurisdiction was made clear in the legislation. The Tribunal needs to be adequately resourced to enable it to carry out its functions. This should include the establishment of a Tribunal website.
- It is essential that the procedures of the Tribunal are clearly set out.

Submitters believe that the Copyright Tribunal's scope should change

Four submissions believe the scope of the Copyright Tribunal should be extended and/or changed. Submissions from the NZ music industry and CLNZ all note that although the Copyright Tribunal has powers to deal with issues arising under individual licences or proposed licences between a CMO and a particular user, most of the cases referred to the Tribunal during its history since 1977 have related to licensing schemes involving bodies represent a large numbers of users.

Massey University College of Creative Arts suggests the Copyright Tribunal should have a role in delineating fair dealing disputes. This would allow for artists and copyright users to be provided with more certainty without the risk of a costly court case, particularly as artists are typically less-well-resourced than large rights-holding bodies.

Another submission argues that the reason so few applications are made to the Copyright Tribunal is because it can only hear disputes regarding licensing schemes, and there are no consequences for parties that do not comply with Tribunal orders.

Finally, the NZIPA notes that the jurisdiction of the Copyright Tribunal is limited and that an expansion of its jurisdiction is likely to increase the number of applications.

Transactions – use of online platforms and other creative communication tools

Page 92 of the Issues Paper discussed the importance of our transactions regime supporting the creation of new technologies, including online platforms, that help creators and copyright owners to disseminate and monetise their works. It then asked about the advantages and disadvantages of using content hosts or other communication tools to create, modify and disseminate content, including whether creators and copyright owners have found this undermines their ability to monetise content (**questions 68 and 69**).

We received 15 submissions on these questions.

Social media platforms result in proliferation of copyright infringement

Five submissions argue that social media platforms cause proliferation of infringing activities and should not have access to safe harbour provisions. For example, Sky discusses the main disadvantages they have faced with Facebook and the way it allows the easy and wide dissemination of works. Sky also believes that if social media platforms could not claim protection from the safe harbours, they would be more incentivised to help fix these problems.

Daymond Goulder-Horobin notes that the advantage of social media is being able to freely disseminate information to viewers. He believes that the main disadvantage is that copyright owners can go after works they do not like that use their work. He argues that even if new content does not infringe copyright, in the current social media landscape it would get taken down until the dispute was solved.

The NZSA argues that take down notices are regularly issued and ignored and they and other author and publisher organisations act in concert to attempt to exert pressure. They note that sometimes the sites come down for a day but generally spring back up in a week or so with a slightly different name.

Daymond Goulder-Horobin argues that internet service providers should be blamed because there are many examples on YouTube of people wanting to review products and services who

get copyright strikes because they gave a negative review of the product. The submission claims that the filtering classification is not completely accurate, resulting in false positives, which is why it is important not to put much fault on internet service providers.

Finally, the NZ film and TV bodies suggest that social media platforms are not passive towards content and therefore should not come within any safe harbour. They are concerned about the accessibility of the safe harbour to those who “host material on websites or other electronic retrieval systems that can be accessed by a user.”

Positive aspects of social media platforms

Six submissions discuss the opportunities social media platforms present for creators, including the ability to monetise content. For example, Google argues that social media platforms or other communication tools provide an easily accessible platform that anyone can use to monetise their content; these platforms foster creativity and allow New Zealanders to have access to a new source of income.

InternetNZ notes social media platforms create both opportunities and challenges for distributing works. Online platforms can make it very easy to reach and grow an audience. On the other hand, using these platforms to share works may trigger contractual terms and conditions, as well as implied social norms related to the platform, making it harder to later assert exclusive rights. InternetNZ believes this is similar to the use of open licences, which can also have a mix of benefits and drawbacks, depending on the type of work involved and the desired business model.

Two submissions suggest there is a need to establish a tracking mechanism for creators and rights holders to be able to monetise their content.

Power Imbalance

Two submissions note that there is a power imbalance between content creators and social media platforms. According to the NZ music industry, these platforms are “unreachable”, and there is no way to talk to a person, and individual creators feel powerless to resolve any issues.

Finally, a few submissions believe social platforms fail to compensate creators, and negatively impact the news media. For example, NZME argues the rise in popularity of social media platforms, particularly Facebook, has over the years significantly affected the ability of the news media industry to earn revenue through online content and advertising. Another submission suggests social media platforms in general have a negative impact on monetising content because they provide no form of compensation to content creators, but provide means for rapid dissemination of data which can readily erode any potential for monetisation.

Transactions – new technologies for licence-management

Page 92 of the Issues Paper gave blockchain technology as an example of an emerging technology that could be used to manage ownership and licensing of works. It then asked whether the transactions provisions in the Copyright Act support the development of technologies that could provide new ways to disseminate and monetise copyright works (**question 70**).

We received eight submissions on this question. Of these, seven submissions agree that the current transaction provisions in the Copyright Act support new technologies. One individual submission suggests that the Act does not support use of blockchain technology. While the NZSA’s submission agreed that the blockchain technology may help track infringing material,

they suggest site blocking and geoblocking technologies would be much more effective in protecting the rights of authors. Other points made in these submissions include:

- that blockchain technology is a highly risky technology because it has extremely high energy requirements, and, if adopted on a large scale, could become environmentally unsustainable
- the NZ music industry's view that the transactions provisions in the Copyright Act do not hinder its exploration of blockchain and other emerging technologies.

Transactions – orphan works

Pages 92-93 of the Issue Paper discussed issues relating to 'orphan works', which is a term used to describe works whose copyright owner/s is/are not easily identifiable or contactable. It then asked:

- about experiences where the inability to identify or contact the copyright owner may have impeded the use, preservation or making available of copies of older works (**question 71**)
- about ways submitters deal with orphan works and the time and resources this costs them (**question 72**)
- whether copyright owners of an orphan work ever come forward to claim copyright after it has been used without authorisation (**question 73**)
- about problems or benefits with regimes used overseas for orphan works (**question 74**)

We received 35 submissions on orphan works.

Identification of the copyright owner/s

Eighteen submissions discuss difficulty identifying copyright owners. They claim identification of copyright owners is an expensive and time-consuming process. A few submissions also emphasise that the Act needs to clearly define what constitutes 'reasonable enquiry' when attempting to identify the author of a work.

A few submissions note that projects involving orphan works are not even considered due to the amount of work associated with the identification of copyright owners. The key themes submitters raise include:

- The process of trying to identify a copyright owner is both time consuming and expensive, and can delay the publication, sometimes, with disastrous commercial results
- It is not clear if orphan works can be supplied for private study and research and not further distributed or copied.
- Not having enough time or resources to perform due diligence on orphan works, or to even work out that something could be an orphan work in the first place.

The Library and Information Advisory Commission's submission considers that these costs and challenges identifying copyright owners would be increased should the term of copyright be extended. They argue that an extension to 70 years or longer would see tracing copyright owners being extended to great-grandchildren and distant relatives and, possibly, multiple rights holders.

Dealing with orphan works

The majority of organisations that deal with orphan works appear to have developed their own policies and strategies for doing so. The following strategies for dealing with orphan works are shared in submissions:

- Use a take-down notice policy: Some organisations indicate that they use a take-down notice policy, which means that, if requested, the organisation would remove an orphan work from the public domain.
- Risk aversion: A few organisations report that they do not risk making orphan works available in the public domain, meaning they often exclude orphan works from their projects.
- Diligent searching: This is reported as a general approach by the majority of GLAM organisations, and the process involves a search of relevant resources. Most submissions note that this is very resource intensive process, and it is particularly difficult if works have multiple rights holders.
- Determining copyright duration: The difficulty and expense involved in determining whether a work is still under copyright is illustrated by the ten-page A3 flowchart Te Papa uses for this purpose.
- Use of “Copyright information is not available” statements: Organisations using this approach normally label an orphan work with the statement and ask that anyone with further information contact the organisation.

A few submissions suggest that a safe harbour provision be implemented for the GLAM sector to use orphan works, which would enable them to provide activities for the benefit of the public without being liable for copyright infringement. In addition, the NZ film and TV bodies’s submission suggests that the orphan works problem be treated like innocent infringement. Under this approach, provided the user has done due diligence to identify the rights holder, should the copyright owner come forward, the user should only be required to account for their profit, rather than being liable for damages.

CLNZ’s submission notes that the organisation holds a considerable amount of data associated with New Zealand copyright holders. The ability to use this information is, however, regulated by the Privacy Act, not the Copyright Act. CLNZ identified a potential issue with the sharing of bibliographic data of published works, which may be considered private information under the EU’s General Data Protection Regulation.

The National Digital Forum notes that to assist GLAM organisations with developing strategies to deal with orphan works, National Digital Forum hosted a number of copyright workshops. National Digital Forum believes that high demand for these workshops for several years indicates that the process for dealing with orphan works is confusing.

Finally, 11 submitters claim that rarely, if at all, does the copyright owner of an orphan work come forward to claim copyright after the work has been used without authorisation. The submission from the Australian Digital Alliance reports a similar experience in Australia: even when orphan works are published under s200AB of Australia’s Copyright Act 1968¹², copyright owners rarely, if ever, come forward. Apparently, both the National Library of Australia and

¹² Australia introduced a flexible exception for libraries and archives (s200AB) as part of its 2006 amendments.

the Australian War Memorial are unable to identify a single incident in which a copyright owner has come forward.

Defining what constitutes a ‘reasonable inquiry’ (ie under section 67)

Submissions from the NZSA and Wellington City (Council) Archives suggest the term ‘reasonable inquiry’ is ambiguous because it is not well defined by the Act. For example, the Wellington City (Council) Archives argues that interpretation of ‘due diligence’ varies from organisation to organisation, which makes it harder for anyone to comply where their expertise in the copyright system is limited.

Transactions – licence-stacking

Page 94 of the Issues Paper described possible cases where a work cannot be used without paying licence fees to a large number of parties (sometimes called ‘licence stacking’) or without attributing the work to all parties, even when released under permissive licences. It then asked about problems faced when using open data released under an attribution only Creative Commons Licences (**question 75**).

We received 12 responses to this question. Of these, four submissions note that their organisations have had no issues with Creative Commons Licences. Xero, being one of these submitters, comments that it could become unduly onerous to attribute a data set to each of the contributors.

Five submissions agree that using licence-stacking is not always straightforward. For example, Tohatoha claims misunderstanding around the ability to waive attribution can cause issues. If a rights holder uses a CC-BY licence and chooses to waive copyright, they need to ensure that this is communicated to future users. In a digital environment where information is sometimes dissociated from its original metadata, this can be problematic. Tohatoha discusses this as something that could be addressed by a statutory mechanism to renounce all rights and release works into the public domain.

Wellington City (Council) Archives suggests it is not always possible to attribute work to its author in a reasonable or visually appealing manner when reusing content, which may take away from the integrity of the work itself. Without a public domain option in the Copyright Act the “no known copyright restrictions” licence must be used to represent this, and from the perspective of an end user – this is rather unclear – and is very similar in phrasing to “copyright unknown”.

InternetNZ argues uses that combine many works face a problem of licence-stacking, where proper attribution becomes impractical. Licence-stacking creates uncertainty and unwanted transaction costs.

Auckland Museum believes that issues can arise in relation to data, particularly scientific data, that is being shared with an aggregator (eg Virtual Herbarium) and the problems of ‘attribution stacking’ if each contributor has to be attributed.

Enforcement – general issues (not relating to online piracy and ISPs)

Part 7 of the Issues Paper (pages 95-103) discussed potential issues with the provisions under the Act for enforcing copyright and taking action against infringement. It asked about problems or benefits with:

- evidence requirements for a court to make determinations (**question 76**)
- the inability of non-exclusive licensees to take legal action (**questions 77-78**)
- costs of taking legal action (**question 79**)
- groundless threats of legal action (**question 80**)
- border protection measures (**question 81**)
- the criminal liability provisions (**question 88**).

Establishing the existence of copyright and ownership to the courts

Difficulty establishing ownership

Five submitters state that there are issues with establishing to the courts that copyright exists in the work and they are the copyright owners. The NZ music industry submission says that increasingly in litigation, infringers raise challenges to ownership to delay proceedings and cause costs to the plaintiffs. AJ Park said that locating the documentation that shows who created the work and when can be difficult, especially years after a work was created.

Not difficult to establish copyright

Seven submitters suggest that it is not difficult to establish to the courts that copyright exists in a work. Kevin Glover says that if copyright owners want the protection of the law they should keep appropriate records. A couple of other submitters note that depositing the work at the National Library can provide a source of information that can help establish copyright ownership.

Reserving legal action to copyright owners and their exclusive licensees

Benefits of the status quo

Three submitters consider that precluding non-exclusive rights holders from taking legal action in the courts is beneficial. Two of these submitters argue that copyright owners may not want legal action brought in their name, and that they may face reputational and business risks as a consequence. The NZ film and TV bodies submission says that compelling copyright owners to be involved in infringement proceedings would increase the costs for all involved.

Issues with the status quo

Six submitters believe it is an issue that non-exclusive licensees are not able to take legal action. Some of their reasons include that:

- The purpose of licensing bodies is to take action on behalf of multiple copyright owners.
- Some rights are retained by overseas licensors, which means that licence may not be considered exclusive.

- Some licences are not signed by the copyright owner because they are acquired by sublicense from a global or regional distributor.

Should collective management organisations (CMOs) be able to take legal action to enforce copyright?

It is problematic that CMOs cannot take legal action on behalf of their members

Eighteen submitters believe that CMOs should be able to take legal action to enforce copyright on behalf of their members. The issues they suggest this would address include that:

- members of CMOs seldom have the resources or time to enforce copyright
- creators have limited options available for enforcement
- CMOs cannot take collective action on behalf of multiple copyright owners, which limits the scope of infringement that can be addressed.

Several of these submitters note that if CMOs are able to enforce copyright, it should only be with the approval of the copyright owner.

CMOs should not be able to take legal action

Two submitters consider that CMOs should not be able to enforce copyright or be able to take legal action to enforce copyright. Universities NZ suggest CMOs are powerful monopolies and should not be able to use threats of litigation for breaches of copyright to pressure organisations into taking out a licence. Tohatoha says giving enforcement rights over to someone else makes assumptions about what copyright owners want and copyright owners may face business or reputational risks if CMOs enforce their rights.

The cost of enforcement

The cost is too high

Thirty-one submitters consider that the cost of enforcement negatively impacts the choice of copyright owners to enforce copyright or to tolerate infringement of their rights. Reasons for this impact include:

- the cost of going to court exceeds what most copyright owners can afford
- the relief awarded by the courts is uncertain and may not cover legal costs
- there are cheaper options, such as private negotiation and settlement
- because of the small size of the New Zealand market, the commercial benefits from a successful court case are small and potentially outweighed by the costs.

Groundless threats

Not aware of groundless threats/not an issue

Ten submitters state that they are either not aware of groundless threats or they do not believe it is an issue. Sky says there are already adequate legal protections in place, eg groundless threats would be a breach of the *Fair Trading Act 1986*. Helen Lowe believes that providing protection from groundless threats could be used by organisations to bully creators into not taking action to support their rights.

Groundless threats are an issue

Six submitters say that groundless threats are an issue. One individual suggests that it mostly happens online where groundless threats can be automated. Other submitters say that groundless threats can halt innovation and are often abused by businesses to extort settlements.

Border protection measures

Cost

Four of the five submissions on this question consider that the \$5000 bond is too much. Kendra Delugar and NZIPA say that the cost deters rights holders from enforcing their rights by using the border protection measures. The other two submitters oppose the bond because of parallel importing.

Broader border protections

Five submitters think that the broader border protections are needed. Three of these submitters suggest devices that could be used to infringe copyright should also be covered. NZ film and TV bodies and Sky say that media streaming devices and other devices that are set up to provide copyright infringing material to users are not captured because they do not contain infringing material when they are imported.

Hachette NZ believes it is inappropriate to have any border protections because parallel importing makes border protections obsolete.

Criminal offences and the size of penalties available under the Copyright Act

Sky thinks that the criminal offence provisions need to apply to both “objects” and works in digital format.

Hachette NZ and PANZ say that the primary issue is a lack of resources to pursue criminal enforcement, and insufficient penalties or remedies. They consider that limiting remedies to account of profits does not deter non-compliance.

Sky thinks that there is no need for an increase in penalties for criminal infringement and the NZ film and TV bodies say that there is nothing wrong with the maximum level of penalties. Another submitter suggests that lighter punishments could be fairer, but that there might not be a deterrence factor if this happened. Three submitters believe the penalties are not high enough. Two of these submitters say higher fines would discourage infringement.

A submitter suggests the police and courts are reluctant to enforce the penalties, which is an issue because the copyright owner cannot enforce them.

The NZ film and TV bodies submission says that the law does not have clarity as to whether knowingly communicating a work to the public is an offence.

Enforcement – ISP liability, online piracy and the infringing file sharing regime

In this section, we summarise the rest of submissions on Part 7 of the Issues Paper (**questions 82-85**).

Part 5, Section 6 of the Issues Paper (pages 82-85) discussed the way sections 92B to 92E of the Copyright Act defines and limits the liability of Internet Service Providers (ISPs) where someone infringes copyright through the use of their services. These provisions are commonly referred to as ‘safe harbours’. We have summarised submissions on this subject here (**questions 59-62**) (rather than under ‘Exceptions’) because they overlap considerably with comments submissions make on issues relating to infringement of copyright via the use of internet services.

The definition of an Internet Service Provider (ISP)

Sixteen submitters think that the definition of ISPs is too broad or unclear. Many of these submitters believe that the definition is problematic because it covers ISPs that monetise, promote or have control over their content.

Four submitters note that the definition covers organisations within the GLAM sector. One submitter thinks that the definition does not feel appropriate for them and that this exposed them to greater risk.

Six submitters have either not experienced a problem with the definition or believe it should not be narrowed.

Search engines and linking

Several submitters raise issues with search engines, including that:

- search engines play a significant role in enabling copyright infringement by acting as a gateway to infringing content
- search engines will only take steps to demote or remove search results if forced to by the government.

Judge David Harvey says that linking does not copy the websites content and is not communicating the work (it is referring to it). Therefore there is no infringement.

It is hard for website owners to identify infringing material

Several submitters note that it is difficult and potentially impossible to identify all infringing material. One submitter believes it would be incredibly expensive and that even large organisations are prone to make mistakes.

Issues around uncertainty

Eight submitters express concerns around a lack of clarity. Some of the points they raise:

- uncertainty as to whether linking and search engines are covered by the exceptions has the potential to discourage innovation and investment in New Zealand
- search engines and linking is needed for the internet to function and almost all material on the internet is copyrighted

- if linking were treated as authorisation, it would impose undue liability and transactions costs for New Zealand users.

The commercial relationship between online platforms and copyright owners

Safe harbour provisions impact commercial relationships

Eleven submitters think that the safe harbour provisions impact the commercial relationship between online platforms and copyright owners. Many of these submitters believe that it makes it harder for copyright owners to negotiate a fair licence and enforce their rights.

The NZ film and TV bodies say that some of their members have experienced online platforms refusing to negotiate a licence because of the safe harbour protection. They argue that this has a flow-on impact for the commercial relationship between copyright owners and legitimate licensees, eg prevents the promise of exclusivity when negotiating a licence.

The NZ music industry says that the unfair market conditions for licensing music are exemplified by the large gap between revenues paid to artists and record companies by two types of streaming services. They believe that audio streaming services, which negotiate licences before making content available, paid 13 times more recorded music revenues per user than video streaming services which often encourage users to upload content which is then streamed to the world. They explain this is due to the fact that video streaming services negotiate a licence after the content has already been made available; putting rights holders at a disadvantage, which results in less revenue for rights holders.

The Act provides the right balance in the commercial relationship

Three submitters believe that the Act provides the right balance in the commercial relationship between online platforms and rights holders. Google believes that it fairly compensates rights holders and provides an easy way for people to monetise their content. InternetNZ says that most commercially significant platforms operate overseas and so they cannot see how New Zealand's safe harbour provisions have any impact on the commercial relationship.

Online copyright infringement and peer-to-peer file sharing technologies

Nineteen submissions comment on the use of peer-to-peer file sharing technologies to infringe copyright. Submitters vary on the scale of infringement and several note that it is difficult to measure.

Some submitters note that new technologies, such as streaming and watching content on social media, has meant that peer-to-peer file sharing is not the only means by which infringing content is accessed. For example, consumer research commissioned by Sky found that 32 percent of New Zealanders have watched something on YouTube or Facebook that they thought may have been pirated. This report also found that 10 percent of New Zealanders say they "normally" stream pirated content from websites. Similar research produced by Vocus NZ found that 11 percent of New Zealanders "normally" stream pirated content.

The Vocus report also found that the majority of New Zealanders watch less pirated material than they used to. Their report concludes that this likely due to changes in the delivery of content, with better access to free and paid on-demand material from the likes of Netflix and OnDemand television. Sky's report found a slight decline in piracy from the previous year. The report also found that New Zealanders who infringe copyright say they are motivated by delays and inaccessibility, as well as cost and convenience.

The NZ music industry submission includes the *Music Consumer Study 2018*. The study found that almost one-in-four New Zealand internet users download infringing copies of music. Stream ripping was the method most commonly used to download infringing copies, with 20% of New Zealand internet users using stream ripping in the last three months.

Some submitters believe that peer-to-peer file sharing also has legitimate uses, such as increasing the download speed for legitimate licensed content.

Other submitters believe that peer-to-peer file sharing is still a substantial issue. Hachette NZ claims that its parent company detected 310,000 cases of peer-to-peer file sharing infringements in the month of January 2019. Judy Knighton claims that all of her books have appeared on peer-to-peer systems only a few hours after publication. The NZ film and TV bodies submission says that Pirate Bay, a Peer-to-peer file sharing site, is one of the top websites accessed by New Zealanders, demonstrating that it is still an issue. PANZ says that the UK's Intellectual Property Office's most recent report found a significant increase in peer-to-peer infringing and that 17% of e-books are consumed illegally.

NZSA believes that the Marrakesh Treaty is used to claim free files, which are then illegally disseminated.

Why is the infringing file sharing regime not being used?

Ten submitters, mostly creative industry representatives, think that the costs are too much. The costs they mention include the \$25 notice fee, administrative and legal costs, and the costs of non-compliant notices. Some submitters claim that the cost of enforcement outweighs the awards. CLNZ believes these costs are a disincentive for sending large numbers of notices, which as a consequence reduces any educational deterrence benefits.

Other reasons mentioned for not using the infringing filing sharing regime include:

- that the popularity of streaming now means that the file infringing system is less relevant
- technologies, such as VPNs, can mask the identity of online infringers and reduce the effectiveness of the regime
- delays in decisions, with a submitter saying that one of the cases took 329 days for a decision
- the Act prevents disclosure of the personal information of the alleged infringer until the Tribunal process is exhausted, meaning that rights holders cannot use it as an educational deterrent for other infringers
- only having the ability to restrict a single user's access is not particularly useful
- the absence of a prescribed form meant that many notices were inaccurate and hard to understand – some notices were also sent by email which ended up being falsely identified as spam by email providers
- notices of copyright infringement are ignored
- the sites come back up after being taken down
- many hosts and sharers are located in jurisdictions with weak copyright enforcement mechanisms
- there were teething issues when the regime was first introduced

- other tools, such as TPMs are more effective – ISPs also have better copyright take down notice schemes which are faster and cheaper
- there are reputational risks when taking enforcement against individual account holders
- rights holders may not have wanted to set a precedent by paying for a regime that they disagree with
- the awards are not sufficient – a submitter says that the average deterrent fee per track across all the Copyright Tribunal awards was just \$70.36
- the Tribunal only looks at the effect of downloading, not uploading, which limits the scope of action that can be taken by the Tribunal.

Advantages of the infringing file sharing regime

Six submitters discuss advantages of the infringing file sharing regime, including that:

- it limits negative impacts on free expression and the privacy of users and account holders
- technology and markets have adapted well to change
- it is overseen by impartial copyright experts
- it specifies the burden of proof before accused parties are publicly identified.

Relationship between copyright and industrial designs

Part 8, Section 1 of the Issues Paper (pages 104-108) discussed the relationship between the protection of industrial designs under the Copyright Act and the Designs Act 1953, and then asked about:

- any problems or benefits with having an overlap between copyright and industrial design protection (**question 89**)
- any experiences of problems when seeking protection for an industrial design, especially overseas (**question 90**)
- the use of digital 3-D printer files to distribute industrial designs (**question 91**)
- any problems or benefits with New Zealand not being a member of the Hague Agreement (**question 91**)

We received 11 submissions on this subject, most of them from lawyers.

Some submitters comment specifically on issues with the Designs Act without reference to the Copyright Act. These have not been summarised here as this summary is concerned with issues (or benefits) with the protection afforded by the Copyright Act.

Benefits of copyright protection

Four submitters identified benefits of copyright protection for industrial designs, including:

- copyright protection is free and automatic, whereas registering variants of a design can be costly

- requirements for copyright protection are less than those for registering a design, eg a design may only be registered where it appeals to the eye and is not purely functional, whereas no such restrictions apply to copyright protection.

Issues with copyright protection

Elsbeth Buchanan said that one of the drawbacks of copyright protection is the difficulty of proving ownership because there is no register to establish ownership. Elspeth also states that there is a higher cost to enforcing copyright than to enforcing registered designs because there is no register to prove ownership of copyright.

Elsbeth also says that the term 'industrially applied' design is problematic because the '50' copies requirement is an arbitrary number, ie if less than 50 articles are produced it may still be a normal commercial sale.

Kevin Glover believes it is too easy for copyright owners to take action in relation to non-novel designs, because it does not have the same rigor as registered designs. Kevin says that infringement is assessed much more in favour of the owner in the case of copyright when compared to registered designs or patents. Kevin also says that the Designs Act is neglected because people just rely on copyright.

Issues Overseas

Several submitters note issues with protection of industrial designs overseas. These include:

- New Zealand designers who have relied on domestic copyright protection find that they cannot protect their designs overseas because of novelty requirements for registration, which a publicly available unregistered design does not meet.
- Overseas businesses often have an unfair advantage because of their size and resources available to enforce design protection. Small New Zealand businesses and individuals do not have the resources to enforce their copyright and so often settle threatened infringement actions, even if they are unjustified threats, because of the cost.
- Most overseas countries do not extend their copyright for two-dimensional designs to three-dimensional reproductions. A couple of submitters say this means that the domestic rights New Zealanders have are less valuable overseas.

3-D Printing

Rachel Ovens directly addresses the question on 3-D printing by saying that she believes that file sharing 3-D copies could be beneficial.

Other

Knowledge of copyright protection

AJ Park and the NZ Law Society believe that New Zealand businesses lack of knowledge concerning how to protect industrial designs overseas is an issue.

AJ Park considers that industry could benefit from a better understanding of the differences between copyright and design registration protection. They also consider there is a wider issue with businesses generally not understanding intellectual property rights and how they can be of benefit to them.

The NZ Law Society says that often SMEs also only inquire as to what protections they have only once their design has been copied.

The Hague Agreement Concerning the International Registration of Industrial Designs

Three submitters support New Zealand joining the Hague Agreement. Reasons given include that it will make it easier and more cost effective for New Zealanders to protect their designs in multiple countries.

NZIPA say that accession to the Hague Agreement could result in the New Zealand market becoming flooded with overseas registered designs, hindering domestic creativity and commercialisation.

Copyright and the Wai 262 Inquiry ('taonga works')

Part 8, Section 2 of the Issues Paper (pages 109-117) looked at the Waitangi Tribunal's Wai 262 inquiry in relation to expressions of Māori traditional knowledge ('taonga works'). The Paper summarised the Tribunal's analysis of issues with the protection of taonga works and the recommendations it made for reform. It then asked a few questions and invited feedback on the proposal of setting up a separate work stream (alongside the Copyright Act review) dedicated to considering Chapter 1 of the Wai 262 report, with a view to developing a new system for protecting the kaitiaki interest in taonga works and mātauranga Māori.

You can read our summary of the 35 submissions responding to this section of the Issues Paper (and other feedback we received) on [this page](#). There is also information about other work to address Wai 262 issues on [this page](#), which we have set up as a repository for all information on 'mātauranga and taonga Māori, and the intellectual property system'.

