Submission for Ngā Taonga Sound & Vision 5 April 2019

Review of the Copyright Act 1994: Issues Paper

Instructions

This is the template for those wanting to submit by Word document a response to the review of the Copyright Act 1994: Issues Paper.

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the potential issues explored in the Issues Paper by 5pm on Friday 5 April 2019. Please make your submission as follows:

1. Fill out your name and organisation in the table, "Your name and organisation".
2. Fill out your responses to the Issues Paper questions in the table, "Responses to Issues Paper questions". Your submission may respond to any or all of the questions in the Issues Paper. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.
3. We also encourage your input on any other relevant issues not mentioned in the Issues Paper in the "Other comments" sections.
4. When sending your submission:
    a. Delete this first page of instructions.
    b. Include your e-mail address and telephone number in the e-mail accompanying your submission – we may contact submitters directly if we require clarification of any matters in submissions.
    c. If your submission contains any confidential information:
        i. Please state this in the e-mail accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 that you believe apply. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act.
        ii. Indicate this on the front of your submission (eg the first page header may state "In Confidence"). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).

    Note that submissions are subject to the Official Information Act and may, therefore, be released in part or full. The Privacy Act 1993 also applies.

5. Send your submission as a Microsoft Word document to ***CopyrightActReview@mbie.govt.nz***

Please direct any questions that you have in relation to the submissions process to *CopyrightActReview@mbie.govt.nz*.

Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

Name	James Taylor / Gareth Seymour
Organisation	Ngā Taonga Sound & Vision- The New Zealand Archive of Film, Television & Sound

☐ The Privacy Act 1993 applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

☐ MBIE intends to upload submissions received to MBIE's website at *www.mbie.govt.nz*. If you do not want your submission to be placed on our website, please check the box and type an explanation below.

I do not want my submission placed on MBIE's website because… [Insert text]

Please check if your submission contains confidential information:

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

Responses to Issues Paper questions

Objectives

1	Are the above objectives the right ones for New Zealand's copyright regime? How well do you think the copyright system is achieving these objectives?

	Ngā Taonga Sound & Vision is mandated to collect, digitally preserve and make accessible Aotearoa New Zealand's audio-visual heritage. With a dual role of ensuring rights-holders intellectual and creative properties are protected, as well as seeking to make collection material publicly accessible and re-usable, we find ourselves placed squarely in the middle of the copyright ecosystem between makers and users, which seeks to provide incentives for the creation of work as well as permitting reasonable access to works in our collection. In this regard, and recognising that a wholesale re-thinking of copyright is not pragmatic politically, we agree that these objectives are sufficient. We also want to note that we are pleased that the Treaty of Waitangi and kaitiakitanga has been brought into the review; it is crucial that Government addresses WAI262 and wider questions around interface between copyright, crown collections and Taonga works. *However, drawing on these stated objectives, we believe the current copyright regime is inefficient and imposes significant transactions costs for our organisation in attempting to comply with the law as it stands: we are publicly funded to protect and make accessible collection material, not administer copyright which requires significant resource. Furthermore, copyright reform is urgently required for our organisation and the wider GLAM (galleries, archives, libraries, museums) sector as current archiving exceptions are not fit for purpose because:* *1) Best practice archival preservation workflows and procedure requires multiple copying in contradiction to s55 of the 1994 Copyright Act.* *2) Prior authorisation is required for the copying of collection materials which are in copyright, resulting in significant administrative and resourcing costs to institutions, or the disregard of this part of the law.* *3) GLAMs operate in a context where users have expectations to access collection material online rather than at physical sites. Current provisions for making digitised content accessible in s56A are archaic and have not kept pace with technological developments.* *These issues are not unique to Ngā Taonga, and have been discussed in multiple academic studies about the interface between GLAM practices and copyright law in the wider Australian (Hudson & Kenyon, 2007) and New Zealand sectors (Corbett, 2011; Corbett & Boddington, 2011, Coad 2018). Because of a lack of in-house legal expertise, and limited funding/resourcing to ensure all digitisation projects are lawfully authorised, the end result of current law is a distortion whereby if institutions follow the law as intended digitisation and access would be generally limited to out of copyright works. This leads to either (1) a significant market failure in which copyright law, rather than archival best practice and policy, is an overly determining factor in the preservation of heritage materials (Coad, 2018, p.12); or (2) the alternative, which is "a tacit acceptance that State funded institutions are required to operate outside the law to achieve their official objectives." (Corbett, 2011, p.7).* *Our submission will primarily address the main operational issues that we face at Ngā Taonga, but we also want to note our support for the submissions of collegial GLAM institutions, particularly around bringing museums under archiving exceptions, making educational use provision easier to facilitate, reform of orphan work clearance, and simplification of the Crown Copyright regime.*
2	Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?

	1) We believe this is an opportunity to look beyond exceptions as a mechanism for balancing the interests of copyright holders and public access, particularly for the work undertaken by us and other GLAM institutions, which is generally non-commercial and undertaken in the public good. Ngā Taonga strongly support looking at alternative methods, including usage based principles and provision of a fit-for-purpose safe harbour for GLAM institutions, which is discussed in further detail below. *2) In terms of any archival exceptions, we would like to see wording to the effect that archives may make copies of collection material in accordance with exception Sections "in any format", which would go some way to covering off later developments in digital preservation technology.*
3	Should sub-objectives or different objectives for any parts of the Act be considered (eg for moral rights or performers' rights)? Please be specific in your answer.
	No comment.
4	What weighting (if any) should be given to each objective?
	The work Ngā Taonga does within the copyright ecosystem is covered by across all 5 objectives, and we believe they should be treated evenly to ensure an optimal reform outcome.

Rights: What does copyright protect and who gets the rights?

5	What are the problems (or advantages) with the way the Copyright Act categorises works?
	As an audio-visual archive our collection covers primarily sound recordings, film and communication works. However as media is increasingly created using digital technologies and delivered across digital platforms, traditional media forms are converging and it is questionable to what extent these defined works make sense in the present and going forward; especially as "communication works" has the potential to cover an ever expanding range of transmedia forms. *This of course is further complicated in the examples shown in the Issues Paper (p.27), which clearly shows the multiplicities of rights in audio-visual material and recorded music. As noted in the Issues Paper, the naming of the types of work leads to general confusion, with "film" a prime example of a protected work which covers both a more widely and narrowly defined range of work then it's usual (and changing) English language meaning. The term "moving image" may be more suitable, but the extent to which this would then be confused with communication works renders this problematic. We would be in favour of more simply defined types of work, with the categories better matching, in plain English, what material is being protected.* *At an operational level for us the combination of "works" within copyright objects can cause some confusion around what rights needs to be authorised. As there is no registration of copyright, nor a single source of rights information, the cost in terms of staff time and resourcing required to clear copyright audio-visual material and recorded music, either for our own use, or licensing to third parties for commercial re-use, is compounded by the multiplicity of rights contained within each.*
6	Is it clear what 'skill, effort and judgement' means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?
	No comment.

7	Are there any problems with (or benefits arising from) the treatment of data and compilations in the Copyright Act? What changes (if any) should be considered?
	No comment.
8	What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?
	The issue that we face around default rules is because we have a large collection of historic audio-visual material in our collection it can be difficult to ascertain who the "first author" is, and if work has been made in the course of employment or commissioned, due to a lack of contractual paperwork. *While we understand the necessity of making assigning copyright in a straight-forward fashion, the lack of registration in the New Zealand system means there is no "source of truth" for us to examine when undertaking rights clearances, or when disputes over rights occur.*
9	What problems (or benefits) are there with the current rules related to computer-generated works, particularly in light of the development and application of new technologies like artificial intelligence to general works? What changes, if any, should be considered?
	No comment.
10	What are the problems (or benefits) with the rights the Copyright Act gives visual artists (including painting, drawings, prints, sculptures etc)? What changes (if any) should be considered?
	No comment.
11	What are the problems creators and authors, who have previously transferred their copyright in a work to another person, experience in seeking to have the copyright in that work reassigned back to them? What changes (if any) should be considered?
	No comment.
12	What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?

	A large proportion of Ngā Taonga's collection is made up of material held on behalf of the Crown—in particular the Sound Collection, the basis of which is the former Radio New Zealand Sound Archives, and the Television Collection, the basis of which is the former Television New Zealand Archives. The RNZ Sound Archives was deposited, while the TVNZ Archive is managed on behalf of the Ministry for Culture and Heritage. At a day to day level, we administer licensing of the RNZ Collection on behalf of RNZ for requests up to $1000, while Getty Images administers commercial re-use of the TVNZ Collection, acting as TVNZ agents. *We would like to see greater clarity around what material is and isn't in Crown Copyright. While State Owned Enterprises aren't bound by Crown Copyright, is the material produced by the BCNZ up to 1989 included? For example in the Sound Collection there are 105,605 Radio NZ sound recordings; of these only 3,600 were made before the 1945 Crown Copyright date. This is a vast amount of material made by New Zealand's public broadcaster potentially locked away under a 100 year term.* *In general terms there needs to be greater clarity around where responsibility for Crown Copyright lies, who can administer it, and guidance for agencies, or institutions such as ours which inherit Crown works. There should also be stronger guidance from legislation as to what works are or aren't licensable under NZGOAL. In an ideal situation Crown Copyright would be opt-in for the sole purpose of commercialising Crown works, with a default position that otherwise works are NZGOAL licensable.*
13	Are there any problems (or benefits) in providing a copyright term for communication works that is longer than the minimum required by New Zealand's international obligations?
	There would be a strong public access benefit in shortening the terms of communication works to 30 years. Works older than 30 years old are generally no longer commercially exploitable, and reducing the time frame would allow us to eventually make significantly more audio-visual material available for public access and re-use.
14	Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?
	There is some confusion about what the copyright terms for non-published materials are in the GLAM sector. One perspective is that because there is no copyright it becomes a question of what terms and conditions were agreed with the depositor of such material, and hence a contractual agreement. Another is that because there is effectively "no copyright" in these works they are easier to release for re-use and access. The flip side of this is, as identified in the issues paper (p.37) is that the copyright term is in fact indefinite. *We hold a large collection which problematises the usual definition of "unpublished" works, as they are also films. These are 16mm & 8mm amateur films, or home movies, shot by private individuals, and there is nearly 16500 of these in the collection. The Copyright Act s23(1) & (2) specify that copyright expires in film 50 years after the work was made, or made available by being shown or played in public. In the case of these films, which often show private, domestic scenes, it can be difficult to ascertain when the film was recorded, and by their very nature they were usually not shown or played in public. It is also almost impossible to determine in many cases who the director or 'first author' is. The result is that we treat these under the contractual conditions of our deposit agreement, and go back to depositors for permissions. To an extent this renders questions around copyright null, in effect granting these items indefinite copyright. Further guidance would be useful.*

Other comments

No further comment.

Rights: What actions does copyright reserve for copyright owners?

15	Do you think there are any problems with (or benefits arising from) the exclusive rights or how they are expressed? What changes (if any) should be considered?
	The major issue is that there is no distinction based on the type of copying, i.e. for commercial or non-commercial gain. While this is likely beyond the scope of the review, looking at alternative models of framing exclusive rights would be beneficial. *The other issue is around the passive registration of copyright. While this may make the system operate with little friction at initial point, for an organisation such as ours which is dealing with historic copyright we are left with little to work with; there is no source of truth, particularly when contracts are long discarded/lost. If creators want to claim exclusivity perhaps there should be some registration, as this would ease later administrative burden and would balance reasonable access against protecting rights.* *We would be willing to support a system of registration of audio-visual material.*
16	Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?
	No comment.
17	What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?
	No comment.

Other comments

No further comment.

Rights: Specific issues with the current rights

18	What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?
	No comment.
19	What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?

	At a basic level it further complicates the rights issues for us as an audio-visual archive, adding yet another layer or clearances on top of an already complex situation. *In terms of new definitions, see answer to question 5 above. It is crucial that any copyright reform takes heed of the convergence of media forms and platforms that is currently occurring and aims to describe the materials it covers in as simple to understand language as possible.*
20	What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?
	No comment.
21	Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.
	No comment.
22	What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?
	No comment.
23	What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?
	No comment.
24	Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.
	No comment.

Other comments

[Insert response here]

Rights: Moral rights, performers' rights and technological protection measures

25	What are the problems (or benefits) with the way the moral rights are formulated under the Copyright Act? What changes to the rights (if any) should be considered?
	No comment.
26	What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?

	The difference in rights for sound performers versus visual performers means that in a collection of audio-visual material we have performers rights being treated differently based on the media type or format, which increases the complexity of rights clearances. *For instance, in general terms we will not seek to clear performers rights in television or film material—to do so would have a chilling effect on access in terms of the resource and time required to do so. On the other hand we hold many Radio New Zealand productions of dramas and book readings, which involve multiple rights: the author of the work, as well as performers. When access to these works is sought (usually by schools wanting to play the work to their pupils) it is difficult to clear performers rights, even if authors can be located and give permission. This is time-consuming and also has the effect of restricting access to these works.*
27	Will there be other problems (or benefits) with the performers' rights regime once the CPTPP changes come into effect? What changes to the performers' rights regime (if any) should be considered after those changes come into effect?
	No comment.
28	What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?
	It is imperative that TPM circumvention exceptions remain for librarians and archivists.
29	Is it clear what the TPMs regime allows and what it does not allow? Why/why not?
	No comment.

Other comments

[Insert response here]

Exceptions and Limitations: Exceptions that facilitate particular desirable uses

30	Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use? Have you ever been threatened with, or involved in, legal action? Are there any other barriers?

	A large proportion of our collection is made up of historic and contemporary radio and television news and current affairs. We would seek clarification around whether archives news reporting also retains exceptions. If not then we would be required to clear off all parts of a 6pm News broadcast to make it accessible, which is a significantly resource heavy task. The end result would likely be a chilling effect to access which closes off the potential of making archive news available online. *An example of a legal threat that Ngā Taonga faced recently was an individual who searched our online catalogue for their name and found a Morning Report item discussing his court appearance for sexual assault. There was no uploaded audio, just a text description based on unedited cue sheets from RNZ. His lawyer contacted us demanding that we take the catalogue entry down as he had been cleared of the charges. If we did not proceed he threatened us with defamation proceedings. After assessing the risk involved we eventually did take the catalogue entry down. This was a rare occurrence, but considering the content of much news and current affairs threats of legal action for simply describing what was reported in the day's news sets a disturbing precedent for making this material searchable online.*
31	What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?
	We use the exceptions to provide copies of RNZ copyright sound recordings to members of the public "for their own personal research." However, increasingly many people also want to upload the recordings to share on social media or on another digital platform e.g. embed in a blog. A broader, non-commercial use exception would permit these types of uses.
32	What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?
	No comment.
33	What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?
	See answer to question 30 above.
34	What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?
	No comment.
35	What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?
	No comment.
36	What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?
	No comment.
37	Are there any other current or emerging technological processes we should be considering for the purposes of the review?
	No comment.
38	What problems (or benefits) are there with copying of works for non-expressive uses like data-mining. What changes, if any, should be considered?

	No comment.
39	What do problems (or benefits) arising from the Copyright Act not having an express exception for parody and satire? What about the absence of an exception for caricature and pastiche?
	No comment.
40	What problems (or benefit) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?
	No comment.

Other comments

[Insert response here]

Exceptions and Limitations: Exceptions for libraries and archives

41	Do you have any specific examples of where the uncertainty about the exceptions for libraries and archives has resulted in undesirable outcomes? Please be specific about the situation, why this caused a problem and who it caused a problem for.

As indicated in the response to question 1 above, multiple academic studies examining digitisation practices and copyright law in both the Australian and New Zealand GLAM sector convincingly argue that there are a number of undesirable outcomes resulting from not just uncertainty about library and archive exceptions, but the nature of the exceptions themselves. Amongst these studies there is general agreement that the case for the reform of library and archive exceptions is strong. (Hudson & Kenyon, 2007; Corbett, 2011; Corbett & Boddington, 2011, Coad 2018).

Corbett examined practices and interviewed the staff of seven GLAM institutions and found that there was little understanding of the complexities of the copyright act, problems following the law regarding authorisation for copying and hence complying with the law, and that overall the permitted exceptions are "unsuitable in a digital environment" (Corbett, 2011, p.5). Coad argues in his more recent analysis that "[r]elying on prior authorisation generates significant primary and secondary costs and harmfully distorts the culture to which society is exposed… copyright ossifies digitisation efforts within the GLAM sector" and that "New Zealand's copyright law does not align with the legitimate activities of galleries, libraries, archives and museums." (2018, p.5).

*In general terms we face **administrative burden and resourcing cost**s. Few GLAM institutions have dedicated legal staff, and this is the case for us as well; when copyright issues arise requiring legal opinion we have to seek outside advice at significant cost. During day to day operations our copyright clearance and licensing is undertaken by a team of 8 FTE who deal with approximately 4000 collection access requests per year. Of these 36% are for re-use, with the rest split between general viewing, access, personal copies etc. At a rough estimate 1-2 hours is used per request checking off copyright requirements, and at a staff/overhead cost of $62.50 we spend between $250,000-$500,000 per year administering copyright. This is between 5-10% of our annual budget and money that is diverted from our core, publicly funded, role of preserving and making accessible New Zealand's audio-visual heritage. One reason for these significant costs is that the vast majority of our collection remains in copyright- of the 760,732 titles searchable on our online catalogue only 43,510 are out of copyright, just 5.7%.*

*There are also **secondary costs** involved in protecting copyright, including ensuring all files that are supplied for access or re-use are watermarked. There is also an growing demand from depositors and rights-holders that we make material available online through a secure DRM protected streaming platform, which is beyond the capacity of our current streaming platform and involves significant potential investment.*

*More fundamentally**, copying** is undertaken here not just for replacing files in danger of loss, but also **for preservation and access**. This is discussed below in q42 in further detail.*

*In terms of specific examples, there is uncertainty around whether **contracts** can over-ride copyright. For example, our depositor agreement allows us to copy deposited material for preservation and access purposes. But this can be on occasion challenged, and to what extent can these public good principles be over-ridden by contractual ability to close off access longer than the 50-year copyright term?*

*There remains uncertainty around the extent to which **moral rights** need to be cleared. In general terms when seeking copyright clearance, we go back to production companies, or producers of films and television programmes. What requirement is there to gain permission from moral rights-holders? And if performers rights are enhanced would we need to seek permission from all cast members? Both requirements would compound an already complex situation regarding clearances for audio-visual material.*

*Finally, s57(1-3) of the Act **Playing or showing sound recordings or film** is an extremely useful exception which allows the Radio New Zealand Sound Archive, Television New Zealand Archive and New Zealand Film Archive, the constituent archives which make up Ngā Taonga, the right to play sound recordings and films for non-profit purposes. However, this is conditional on s57(4) which states that licenses must be sought. We have differing legal opinions about to what level we need to undertake searches for extant licenses. We also have differing opinions as to whether "playing or showing a film" includes online streaming, rather than traditional on-site exhibition. As we move forward in a digital era the ability to reach mass audiences far exceeds that of on-site screenings, with over 200,000+ plays on our online catalogue last year (2017-18), and would like this updated or clarified.*

42	Does the Copyright Act provide enough flexibility for libraries and archives to copy, archive and make available to the public digital content published over the internet? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	Currently libraries and archives are required to ensure that copyright is cleared before making content available online. As noted above, the majority of Ngā Taonga's collection is in copyright. Because there is no centralised rights-database, and many contracts are no longer available or long lost, each item needs to be individually assessed before it is uploaded. We undertake a permission processes generally from producers, depositors and/or kaitiaki, as well as a takedown policy as protection from potential legal risk. All of this contributes to the costs outlined in the response above. It also means that in effect we contract out of copyright, instead relying on permissions from who we have determined are the rights-holders. *However this does mean that out of copyright material is "easier" to make available, and skews the content that is publicly accessible digitally to that sub-set which falls outside of copyright, rather than presenting a balanced representation of our collection, most of which was made after 1969.In effect copyright law, or an organisations appetite for risk, rather than archive access policy and preservation work determines what material is most likely to be made available (Corbett and Boddington, 2011).* *What compounds this is material that this still in copyright, but no longer being commercially exploited, and falls under the orphan work category. Commercial sound recordings are particularly problematic. We cannot make these available without lengthy searches for rights holders, which we have neither the time or resources to do - hence the works remain largely inaccessible to the public.* *Section 56A(1)(d) which states that only one users may access a single digital copy of a collection item at a time is particularly archaic and should be repealed. Online access is an expectation of users, and publicly funded organisations shouldn't be required to limit access to collection material once it has gone through a rigorous clearance process. As Corbett argues, "[t]here is no logical reason to limit the numbers of users who can access a lawfully made digital copy of a work in a [GLAM] collection at any one time" (2011, p.41).* *One potential solution to this, and other problems put forward in this is the fit-for-purpose Safe Harbour for GLAM institutions which will be discussed in more detail below.*
43	Does the Copyright Act provide enough flexibility for libraries and archives to facilitate mass digitisation projects and make copies of physical works in digital format more widely available to the public? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?

	No, the Copyright Act as it stands does not provide flexibility for GLAM institutions to undertake mass digitisation projects. At a basic level archival best practice is to copy collection items because of a hierarchy of reasons: this may be because an object is at risk of deterioration (granted under the current regime), or because it has been requested for re-use or access purposes. *In general terms an archive may copy for both or either reasons, but our operational workflow, and best practice, means we are constantly infringing as we create multiple digital copies of copyright works as part of the process for preserving works or supplying them to the public, either for access or re-use. Every item that is digitally preserved has at least 3 copies made: a uncompressed master file, mezzanine edit-ready file, and lower speced access file for online or onsite viewing/listening. There will also be further copies of these made, so that they are available on servers on-site or copied to redundant LTO tape backup off-site, spreading the risk in the event of catastrophic data loss.* *As Corbett and Boddington (2011) argue, current archival best practice means it is "it is nonsensical to permit the making of a single copy of the original item… digitisation process[es] includes an ongoing requirement to make backups of digital copies and to migrate them to new platforms."* *Our depositor agreement allows us to make multiple copies of deposited material, again in effect contracting out of copyright provision; however in many cases the depositor of collection material isn't the copyright holder, and the resource required to seek permission for each act of copying is untenable, and clashes with our mandated publicly funded goal of preserving collection material to make it accessible for future generations. As suggested earlier, under the current regime GLAM institutions, including ours, work under "a tacit acceptance that State funded institutions are required to operate outside the law to achieve their official objectives." (Corbett, 2011, p.7).*
44	Does the Copyright Act provide enough flexibility for libraries and archives to make copies of copyright works within their collections for collection management and administration without the copyright holder's permission? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	No, see above. A blanket exception for 'public good, non-commercial' online access, or a fit-for-purpose GLAM safe harbour, would be extremely useful.
45	What are the problems with (or benefits arising from) the flexibility given to libraries and archives to copy and make available content published online? What changes (if any) should be considered?
	As argued in the responses above, whether content is "born digital" a film or sound recording obtaining the required permissions is onerous - and in some cases, impossible. A blanket exception for 'public good, non-commercial' online access, or a fit-for-purpose GLAM safe harbour, would be extremely useful.
46	What are the problems with (or benefits arising from) excluding museums and galleries from the libraries and archives exceptions? What changes (if any) should be considered?
	There is currently a convergence of media forms which problematises much of the current works defined in the Act. At the same time there is a convergence of the operational preservation and access work undertaken by museums, libraries and archives. Any exceptions, or alternative mechanisms, granted to library and archival institutions should also be granted to museums.

Other comments

1) Mentioned above is an exception that has worked extremely well for us in the past—the ability to show films and sound recordings at non-profit events. This has enabled the New Zealand Film Archive to avoid many of the issues around orphan works in particular and facilitated 1000s of screenings of archival material. This is the sort of exception that allows GLAM institutions to undertake meaningful non-commercial outreach and engagement work.

2) Ngā Taonga Sound & Vision was formed by the merger of three archives: the New Zealand Film Archive, Radio New Zealand Sound Archives and the Television New Zealand Archive. All three of these are named archives under the Act, with the ability to make use of archival exceptions. We would like the legislation updated to reflect that Ngā Taonga Sound & Vision is now the institution that covers all three collections.

3) As discussed above, one alternative to the Library and Archive Exceptions is to examine whether a fit-for-purpose GLAM Safe Harbour could be legislated for, which would solve a number of the issues the GLAM sector faces in administering copyright and undertaking mass digitisation and online access. Samuel Coad's recent research paper (2018) puts forward a strong argument for this, as well as sketches out how this would work in practice. He proposes "[c]reating a zone of permitted GLAM digitisation would overcome legal barriers to digitisation and the practical consequences that flow from copyright law." (p.22). This would allow GLAM institutions to: (1) make and store copies of works; (2) reproduce work in publications and educational materials, including social media; (3) reproduced copied material on online databases to facilitate access; (4) make adaptations to work as necessary for reproduction purposes.

Recognising that these are significantly broader rights then the current exceptions allow the potential breach of commercial interests would be counter-balanced by limiting these functions only to non-commercial purposes: commercial exploitation falls out of scope. Works that would be covered by safe harbours would also need to be "out of commerce" and no longer being commercially exploited. There are a number of factors that he proposes which test whether items are in or out of commerce, and rights-holders would also be able to "op-out" of the Safe Harbour.

Ultimately this sort of proposal is one that Ngā Taonga would support, as it addresses many of the concerns outlined above, and would solve a number of the problems created by the current Copyright legislation which are faced daily by GLAM institutions

4) Here's two examples of recent requests to give some indication of some 'typical' requests our team deal with:

(a) A significant Taonga Māori documentary film made in the 1980s requires permission from four parties- 2x producers, the family of the directors (kaitiaki) and subject of the film (kaitiaki). This permission is a condition of access and re-use, and screening the film requires at least one kaitiaki representative to attend and present.

(b) We received a request to use 3x television commercials from 1990 advertising a long defunct computer brand for an online (YouTube) documentary about the brand, which was popular during the 1980s & 1990s. The company is now defunct and ownership of IP has passed through several organisations and companies. Hours were spent researching this and corresponding with companies who were potential holders of IP. This could not be determined with certainty, so a letter of indemnity was requested from the client as a condition of supply, indemnifying Ngā Taonga from potential legal action. The total time spent on this request was 5 hours, at a rough cost of $312.50.

REFERENCES:

Samuel Coad, "Digitisation, Copyright and the GLAM Sector: Constructing A Fit-For-Purpose Safe Harbour Regime", unpublished paper submitted for the LLB (Hons) degree at Victoria University of Wellington, 2018

Susan Corbett, "Archiving our Culture in a Digital Environment: Copyright Law and Digitisation Practices in Cultural Heritage Institutions", New Zealand Law Foundation Report, 2011

Susan Corbett & Mark Boddington, "Copyright Law and the Digitisation of Cultural Heritage", Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, Working Paper No.77, 2011

Emily Hudson & Andrew T. Kenyon, "Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives", Melbourne Law School Legal Studies Research Paper no.300, 2007

Exceptions and Limitations: Exceptions for education

47	Does the Copyright Act provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	Education exceptions are complicated and most teachers do not understand them. The exceptions don't recognise changes in teaching practice - digital classrooms, use of intranets etc. Teachers approach us wanting to obtain digital copies of copyright works for use in ways which are not covered by the current exceptions - we either have to say "No" or spend a long time tracking down rights holders and obtaining their permission for the use of their work in this way - which we are not resourced to do. A blanket 'non-commercial educational use' exception would be helpful, and would allow us to use our limited resources to make audio-visual collection material accessible for education, rather than using it to comply with copyright legislation.
48	Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	No comment.
49	Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	See above.
50	Is copyright well understood in the education sector? What problems does this create (if any)?
	No, see above q47 above.

Other comments

No further comment.

Exceptions and Limitations: Exceptions relating to the use of particular categories of works

51	What are the problems (or advantages) with the free public playing exceptions in sections 81, 87 and 87 A of the Copyright Act? What changes (if any) should be considered?
	No comment.
52	What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?
	No comment.
53	What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?
	No comment.
54	What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?
	No comment.
55	What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?
	No comment.
56	Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?
	No comment.
57	Do you think that section 73 should be amended to make it clear that the exception applies to the works underlying the works specified in section 73(1)? And should the exception be limited to copies made for personal and private use, with copies made for commercial gain being excluded? Why?
	No comment.

Other comments

[Insert response here]

Exceptions and Limitations: Contracting out of exceptions

58	What problems (or benefits) are there in allowing copyright owners to limit or modify a person's ability to use the existing exceptions through contract? What changes (if any) should be considered?

	Earlier comments above have described how we contract out of copyright in many cases: through our depositor agreement, which allows us to make multiple copies of material, and through seeking rights-holders permissions to enable access via our online catalogue and re-use for third parties. In cases, particularly around orphan works we also request for a letter of indemnity to be signed by people requesting to re-use material. However there are some cases when depositors and rights-holder seek to extend the length of time in which material cannot be accessed, so there are benefits and negatives to this approach. There needs to be more clarity around (a) whether contract trumps copyright and (b) to what extent this can occur.

Exceptions and Limitations: Internet service provider liability

59	What are problems (or benefits) with the ISP definition? What changes, if any should be considered?
	No comment.
60	Are there any problems (or benefit) with the absence of an explicit exception for linking to copyright material and not having a safe harbour for providers of search tools (eg search engines)? What changes (if any) should be considered?
	No comment.
61	Do the safe harbour provisions in the Copyright Act affect the commercial relationship between online platforms and copyright owners? Please be specific about who is, and how they are, affected.
	No comment.
62	What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?
	No comment.

Transactions

63	Is there a sufficient number and variety of CMOs in New Zealand? If not, which type copyright works do you think would benefit from the formation of CMOs in New Zealand?
	No comment.
64	If you are a member of a CMO, have you experienced problems with the way they operate in New Zealand? Please give examples of any problems experienced.
	No comment.

65	If you are a user of copyright works, have you experienced problems trying to obtain a licence from a CMO? Please give examples of any problems experienced.
	No comment.
66	What are the problems (or advantages) with the way the Copyright Tribunal operates? Why do you think so few applications are being made to the Copyright Tribunal? What changes (if any) to the way the Copyright Tribunal regime should be considered?
	No comment.
67	Which CMOs offer an alternative dispute resolution service? How frequently are they used? What are the benefits (or disadvantages) with these services when compared to the Copyright Tribunal?
	No comment.
68	Has a social media platform or other communication tool that you have used to upload, modify or create content undermined your ability to monetise that content? Please provide details.
	No comment.
69	What are the advantages of social media platforms or other communication tools to disseminate and monetise their works? What are the disadvantages? What changes to the Copyright Act (if any) should be considered?
	No comment.
70	Do the transactions provisions of the Copyright Act support the development of new technologies like blockchain technology and other technologies that could provide new ways to disseminate and monetise copyright works? If not, in what way do the provisions hinder the development and use of new technologies?
	No comment.
71	Have you ever been impeded using, preserving or making available copies of old works because you could not identify or contact the copyright? Please provide as much detail as you can about what the problem was and its impact.
	As discussed in the archival exceptions section we routinely copy old works for preservation or access purposes and seek to make them accessible via our online catalogue or to facilitate requests from third parties wanting to re-use them. *The issue of copying is discussed in detail above, q43.*
72	How do you or your organisation deal with orphan works (general approaches, specific policies etc.)? And can you describe the time and resources you routinely spend on identifying and contacting the copyright owners of orphan works?

	This has been discussed in q41 & 42 above. In general terms we have a rights clearance process, but in cases where we cannot identify the copyright holder we require requestors to sign letters of indemnity as a condition of supply. *One example is from our sound collection. We hold many older, commercially-released New Zealand sound recordings (e.g.45rpm discs). There are usually multiple rights holders, mostly untraceable. If a member of the public contacts us, wanting a copy of a recording which is not being commercially-exploited anywhere i.e. not available for purchase online, we still need to try and locate rights holders, which is often impossible for recordings made in the 1950s. As long as the use is non-commercial (e.g. personal) sometimes we will go ahead and supply a copy anyway, infringing the Act.*
73	Has a copyright owner of an orphan work ever come forward to claim copyright after it had been used without authorisation? If so, what was the outcome?
	No comment.
74	What were the problems or benefits of the system of using an overseas regime for orphan works?
	No comment.
75	What problems do you or your organisation face when using open data released under an attribution only Creative Commons Licences? What changes to the Copyright Act should be considered?
	No comment.

Other comments

[Insert response here]

Enforcement of Copyright

76	How difficult is it for copyright owners to establish before the courts that copyright exists in a work and they are the copyright owners? What changes (if any) should be considered to help copyright owners take legal action to enforce their copyright?
	No comment.
77	What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?
	No comment.
78	Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?
	No comment.

79	Does the cost of enforcement have an impact on copyright owners' enforcement decisions? Please be specific about how decisions are affected and the impact of those decisions. What changes (if any) should be considered?
	We are forced to act as a de-facto CMO for our Sound and Film & Video collections. The Sound Collection is largely copyright to Radio New Zealand, but the Film and Video collection is made up of many hundreds of depositors and copyright holders, from private individuals to production companies and large corporates. Infringement is generally not a major problem, but we have neither the time nor resourcing to enforce infringements in any sustained fashion.
80	Are groundless threats of legal action for infringing copyright being made in New Zealand by copyright owners? If so, how wide spread do you think the practice is and what impact is the practice having on recipients of such threats?
	No comment.
81	Is the requirement to pay the $5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are the any issues with the border protection measures that should be addressed? Please describe these issues and their impact.
	No comment.
82	Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?
	No comment.
83	Why do you think the infringing filing sharing regime is not being used to address copyright infringements that occur over peer-to peer file sharing technologies?
	No comment.
84	What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing filing share regime (if any) should be considered?
	No comment.
85	What are the problems (or advantages) with the existing measures copyright owners have to address online infringements? What changes (if any) should be considered?
	No comment.
86	Should ISPs be required to assist copyright owners enforce their rights? Why / why not?
	No comment.
87	Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?
	No comment.

88	Are there any problems with the types of criminal offences or the size of the penalties under the Copyright Act? What changes (if any) should be considered?
	No comment.

Other comments

No further comment.

Other issues: Relationship between copyright and registered design protection

89	Do you think there are any problems with (or benefits from) having an overlap between copyright and industrial design protection. What changes (if any) should be considered?
	No comment.
90	Have you experienced any problems when seeking protection for an industrial design, especially overseas?
	No comment.
91	We are interested in further information on the use of digital 3-D printer files to distribute industrial designs. For those that produce such files, how do you protect your designs? Have you faced any issues with the current provisions of the Copyright Act?
	No comment.
92	Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?
	No comment.

Other comments

No further comment.

Other issues: Copyright and the Wai 262 inquiry

93	Have we accurately characterised the Waitangi Tribunal's analysis of the problems with the current protections provided for taonga works and mātauranga Māori? If not, please explain the inaccuracies.
	No comment.

94	Do you agree with the Waitangi Tribunal's use of the concepts 'taonga works' and 'taonga-derived works'? If not, why not?
	The definitions are a good starting place, however more discussion is required to ensure all types of taonga are captured in the definitions.
95	The Waitangi Tribunal did not recommend any changes to the copyright regime, and instead recommended a new legal regime for taonga works and mātauranga Māori. Are there ways in which the copyright regime might conflict with any new protection of taonga works and mātauranga Māori?
	The current Taonga Maori Collection policy at Ngā Taonga deals with depositor and copyright holders, and addresses kaitiaki rights and relationships. Our policy is based on the notion that whereas legal and contractual protections diminish over time, the responsibilities of kaitiaki grow stronger. We encourage MBIE to address the way in which the current western and colonial legislative copyright framework, based on property law and commercial imperatives, intersects with kaupapa Māori and indigenous forms of knowledge, kaitiakitanga and Māori aspirations. *Ngā Taonga supports a new legal regime for taonga works and mātauranga Māori, however any system should uphold the rights of kaitiaki guaranteed under Te Tiriti o Waitangi.*
96	Do you agree with our proposed process to launch a new work stream on taonga works alongside the Copyright Act review? Are there any other Treaty of Waitangi considerations we should be aware of in the Copyright Act review?
	Yes, it is imperative that the reform of the Copyright Act is undertaken with a grounding in mātauranga Maori and acknowledgement of the importance of protecting taonga works and kaitiakitanga. The conclusions drawn by the Waitangi Tribunal in WAI262 have not yet been substantially addressed since the release of the Wai262 report. Ngā Taonga would like to have representatives involved in this engagement, and it is appropriate to deal with the complex issues using a kaupapa Māori framework.
97	How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?
	By talking to and engaging with kaitiaki in forums such as hui and workshops which best suit them. If MBIE, and the Government, is serious about addressing these issues then it will be a full consultation process which is appropriately resourced to deal seriously with the many issues that will arise.

Other comments

No further comment.