



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

Issues Paper

Review of the Copyright Act 1994

November 2018





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

Ministry of Business, Innovation and Employment (MBIE)

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Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by 5pm on **Friday 5 April 2019**.

Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please use the online portal for submissions provided at: <http://www.mbie.govt.nz/consultation-on-copyright-act-issues-paper>. This will help us to collate submissions and ensure that your views are fully considered.

Alternatively, you can make your submission by sending your submission as a Microsoft Word document using the template provided on the webpage above. Please include your contact details in any correspondence accompanying your submission.

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

Use of information

The information provided in submissions will be used in MBIE's policy development process, and will inform advice to Ministers on whether the Copyright Act 1994 should be reformed. We may contact submitters directly if we require clarification of any matters in submissions.

Release of information

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The online portal for submissions enables you to identify any information in your submission that is confidential or you otherwise wish us not to publish. If you are making a submission by any other means and it contains information that should not be published, please:

- indicate this on the front of the submission, with any confidential information clearly marked within the text
- provide a separate version excluding the relevant information for publication on our website.

Submissions remain subject to request under the *Official Information Act 1982*. Please set out clearly in any correspondence accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the *Official Information Act*.

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Glossary and Acronyms

| | |
|------------------|--|
| Berne Convention | The Berne Convention for the Protection of Literary and Artistic Works http://www.wipo.int/treaties/en/text.jsp?file_id=283698 |
| CMO | Collective Management Organisation |
| CPTPP | Comprehensive and Progressive Agreement for Trans-Pacific Partnership https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/ |
| GLAM | Galleries, Libraries, Archives and Museums |
| Hague Agreement | Hague Agreement Concerning the International Registration of Industrial Designs http://www.wipo.int/treaties/en/registration/hague/ |
| IPONZ | Intellectual Property Office of New Zealand |
| ISP | Internet Service Provider |
| MBIE | Ministry of Business, Innovation and Employment |
| MCH | Ministry of Culture and Heritage |
| TPM | Technological Protection Measure |
| TPP Act | Trans-Pacific Partnership Amendment Act 2016 |
| TRIPS Agreement | World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm Error! Hyperlink reference not valid. |
| UGC | User Generated Content |
| WIPO | World Intellectual Property Organization http://www.wipo.int/portal/en/ |

Foreword



Copyright affects all of us. When you write a personal email, take a photograph of friends, doodle on a piece of paper or record a video on your smartphone, you are producing a copyright work. When you read a book, listen to music, watch a play, use computer software, watch a sports broadcast or stream a movie, you are using copyright works. Copyright gives creators of copyright works the right to prevent others copying or distributing their works without their permission.

The vast reach of copyright – and the rapid pace of technological change today – makes it critical to ensure that our copyright regime is working the way it should: to enhance our collective social, cultural and economic well-being.

It has been more than a decade since the last significant review of the Act was completed. A lot has changed in that time. We have seen developments in artificial intelligence, data collection, virtual reality, 3-D printing and more. Kiwis are increasingly consuming digital content over the internet, sharing platforms and streaming services. We need to ensure our copyright regime is robust enough – and flexible enough – to deal with these challenges.

We also need to ensure that our copyright regime interfaces well with other regulatory regimes. The Issues Paper seeks your views on two such issues. The first is whether industrial designs should be able to be protected under both the Copyright Act and the Designs Act. The second is how the Government should coordinate the Copyright Act review with policy development on the protection of mātauranga Māori and taonga works in response to the recommendations of the Waitangi Tribunal's report entitled *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (the Wai 262 report).

It is critical that we hear your views on the issues included in this Issues Paper. The information and evidence you provide will help the Government better understand what is important to you and the key issues you face. Once we have a good understanding of this, we will consider what appropriate changes to the Copyright Act need to be made.

I am pleased to release this Issues Paper for public consultation and look forward to wide engagement with the review.

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs

Part 1 – Purpose and context

1. In this Part we outline the purpose and context for reviewing the Copyright Act 1994 including:
 - why and how the Act is being reviewed
 - how your submission will help inform the development of options for reforming the Act
 - what this Issue Paper covers.

Introduction

2. The Ministry of Business, Innovation and Employment (**MBIE**) is reviewing the Copyright Act 1994. The Copyright Act provides a set of intellectual property rights called ‘copyright’ to authors and producers of creative works (eg books, recorded music, fine art, digital art, movies, educational literature, software code) to encourage the creation and dissemination of creative works.
3. As significant technological and market changes are impacting the way we create, distribute, communicate and use content, it is important to ensure our copyright regime is achieving its objectives in a rapidly changing digital world.
4. A decision was made to launch a review in mid-2017, with the release of the terms of reference for the review.¹
5. This issues paper is the first stage of public consultation in the review of the Copyright Act. This stage involves identifying problems with the way the Copyright Act is operating or opportunities to improve its operation. It is also important to identify where the Act works well.
6. The best way to provide your views in response to this Issues Paper is to write a submission on it. You can find out how to do this in the ‘How to have your say’ section above and on page 6.
7. There will also be opportunities to participate in public engagements. You can find out about the public meetings we are holding while this Issues Paper is out for consultation on MBIE’s [website](#).
8. The length of this Issues Paper reflects the complexity of the copyright regime and variety of potential issues we need to test and gather evidence about. Some of you will not want to submit on everything this Issues Paper covers and will instead submit only on the questions most relevant to you (see the recap of questions on page 118). Some of you will want to respond to all of the questions. Either way, if you have something to say, we would like to hear from you.

¹ See www.mbie.govt.nz/info-services/business/intellectual-property/copyright/review-copyright-act-1994 for the terms of reference.

9. Submissions are due by **5pm on Friday 5 April 2019**. Queries on the Copyright Act review can be sent to CopyrightActReview@mbie.govt.nz.

Context for the review

Legislative context

10. The Copyright Act was passed in 1994. The content of the Copyright Act, and the drafting of its provisions, drew heavily on United Kingdom's *Copyright, Designs and Patents Act 1988*.
11. There have been a number of reviews and changes to the Copyright Act since 1994. These are summarised in **Annex 1**. The most significant review of the Act took place from 2001 to 2004 in response to new technologies, in particular the emergence of the internet. The review resulted in the Copyright (New Technologies) Amendment Act 2008.
12. The changes that were introduced were intended to be reviewed in 2013. This review was put on hold because of the Trans-Pacific Partnership (**TPP**) negotiations. The TPP negotiations concluded in October 2015 and the TPP Agreement was signed in February 2016. Copyright changes required under the TPP² were enacted (but not implemented) in December 2016.
13. In March 2018, New Zealand signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**), a new treaty between 11 of the 12 members of the original TPP (excluding the United States). The CPTPP suspended many of the original TPP copyright obligations.³

The Creative Sector Study

14. In December 2016 MBIE released the *Copyright and the Creative Sector* report (the **Creative Sector Study**).⁴ The Creative Sector Study provides valuable information about how works are created, distributed, communicated and consumed in New Zealand in the context of a rapidly changing digital environment and an increasingly online and borderless world.
15. MBIE led the study, in consultation with the Ministry for Culture and Heritage (**MCH**). The aim was to deepen government's understanding of the role of copyright in the creative sector in New Zealand, helping to build a solid evidence base before launching a formal legislative review.

² These include extending copyright term to life plus 70 years and introducing more comprehensive protections for technological protection measures, copyright management information and encrypted satellite signals, and new rights for performers.

³ The suspended provisions include a requirement to extend the copyright term and requirements to provide more comprehensive protection for technological protection measures, rights management information and encrypted satellite signals.

⁴ See *Copyright and the Creative Sector: Study of the Role of Copyright and Registered Designs in the Creator Sector in New Zealand* at <http://www.mbie.govt.nz/info-services/business/intellectual-property/copyright/copyright-and-the-creative-sector/study-of-the-role-of-copyright-and-designs-in-the-creative-sector>.

16. The study focussed on the life cycle of a creative work – from creation, to production, to distribution, to consumption, capturing views from a range of creative sector participants through face-to-face interviews, workshops, an online survey of the sector and an online consumer focus group.

The international context

17. New Zealand is party to a number of international agreements that relate to copyright. These agreements set the framework for countries' copyright settings and set minimum requirements in some areas.⁵ Our copyright regime is therefore broadly similar to most overseas jurisdictions.⁶ In areas that are not governed by international obligations, or where flexibility within the international framework exists, different jurisdictions take different approaches.⁷ Some of these areas are hotly debated.
18. Many dealings with copyright works occur across borders, so copyright rules should not be considered in isolation from our key trading partners. Foreign companies also play a significant role in the creation and distribution of a large amount of content that is available in New Zealand. Available data suggests that we import far more copyright works than we export. This is a factor we take in account when assessing the net effect of any changes to our settings.
19. There have been recent significant copyright reform processes in comparable jurisdictions like Canada, the United Kingdom, Singapore, Australia and the European Union. We will consider the approaches that other jurisdictions take as part of the review.

The Treaty of Waitangi and the Wai 262 report

20. Article 2 of the Treaty of Waitangi refers to the Crown guaranteeing Māori (including iwi, hapū and whānau) “the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they collectively or individually possess” (English version) and “te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa” (Māori version).
21. The Waitangi Tribunal's report entitled *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (the **Wai 262 report**) examined, among other things, how the intellectual property system protects mātauranga Māori, taonga works and taonga-derived works.

⁵ See paragraphs 82 to 98, which discuss New Zealand's international obligations.

⁶ For example, the minimum terms of copyright protection are set by United Nations-level international agreements (generally 50 years, or life plus 50 years).

⁷ Examples include the nature and scope of safe harbour schemes to facilitate the operation of content platforms and ISPs, the framing of exceptions and limitations, and the development of new types of remedies and enforcement procedures, like website blocking, to deal with on-line infringement and copyright piracy.

22. In the report, the Waitangi Tribunal recommended that mechanisms be put in place to provide greater protection for the kaitiaki interest in mātauranga Māori, taonga works and taonga-derived works. The Wai 262 report is available on the Waitangi Tribunal website.⁸
23. The Wai 262 claim raised a number of complex issues about the nature of intellectual property, the nature of the kaitiaki relationship with taonga works, taonga-derived works and mātauranga Māori, and how the interface between the two systems should operate.
24. Given the overlap between copyright and the Wai 262 recommendations, it will be important to consider how and when the Government's policy on the protection of taonga works, taonga-derived works and mātauranga Māori should be developed. We discuss the Wai 262 recommendations in more detail in Section 2 of Part 8 of this paper.

Why are we reviewing the Copyright regime?

25. Copyright issues are complex, pervasive and rarely tested in the New Zealand courts. We need to monitor and update our copyright law to ensure it is meeting its objectives (discussed in Part 3), its meaning is clear and it is no more complex than necessary.
26. People have been informing the Government for a number of years of a multitude of problems with our copyright regime. The problems we have heard with the Copyright Act include that it:
 - is unclear, overly complex, inflexible and difficult to understand
 - over-protects creative works
 - under-protects creative works
 - has not kept up with technological development and change
 - does not adequately protect Māori taonga works and cultural expressions.
27. Copyright is a form of regulation. It prohibits people from doing things that they would otherwise be free to do. We have heard that people are being prevented from using copyright works in socially-beneficial ways (for example, using satire to make a political statement). It is therefore important to ensure that copyright's default rule (do not copy or distribute without the copyright owner's permission) does not apply where there is little or no public policy rationale for prohibiting the relevant behaviour, like copying that is necessary to facilitate basic functionality of digital technologies.
28. It is also important to review the Copyright Act in the context of new and emerging technologies like streaming or artificial intelligence, and new ways of creating and distributing content like user-generated content. Outdated laws can create uncertainty and a lack of respect for the rule of law, which can result in costs to creators, copyright owners, licensees, users and New Zealand as a whole.

⁸ The WAI 262 report is available at the Waitangi Tribunal website at *Volume 1*: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356416/KoAotearoaTeneiTT2Vol1W.pdf; *Volume 2*: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356606/KoAotearoaTeneiTT2Vol2W.pdf.

29. This review will enable the Government to assess these problems from a range of perspectives and determine what, if any, action should be taken to address them.
30. We will seek to consider copyright problems from all perspectives, whether these be the perspectives of creators, distributors, users, consumers or anybody else affected by copyright. We will need your help to do this properly – so please take the opportunity to participate in the review and make your views heard.

How we intend to review the copyright regime

31. In the review of the Copyright Act, we intend to:
 - consider what the copyright regime is intended to achieve
 - assess the performance of the Copyright Act against these objectives
 - identify barriers to achieving the objectives, and the level of impact that these barriers have.
32. The first stage of the review is the release of this Issues Paper, in which we seek your views on the proposed objectives for the copyright regime and on the nature of problems we should consider addressing.
33. Many of the issues raised in this paper are exploratory. Our focus has been on highlighting key issues rather than a close examination of every provision or detailed analysis of the issue.
34. We are interested in your views on the potential issues we discuss and any evidence you have to support your position. We are also interested in hearing about any other issues with the copyright regime not covered in this paper.

Your submissions will help inform the development of policy options

35. We seek your views to improve our understanding of how the copyright regime operates in practice and the key issues and opportunities for change. Your responses will inform our preparation of a second consultation document that will set out the policy options being considered for reform.
36. Some things to think about in your submissions are:
 - Your experiences can be used as evidence of a problem and can be a valuable source of information. This type of evidence will be more compelling if you describe the practical impacts of the current regime and the nuts and bolts of how it works, eg as a result of *x*, I need to do *y*, which costs me *z* amount of time and/or \$.
 - Any economic analyses provided should aim to get at causation (ie that which can be attributed to copyright), should be independently peer reviewed and clearly state any assumptions and sensitivities in the analysis.
 - The primary purpose of this Issues Paper is to seek information about, and evidence of, problems with the Copyright Act. Although the paper does not consider nor discuss

preferred options for addressing problems with the Act, we welcome ideas and suggestions on how the problems you have identified might be addressed.

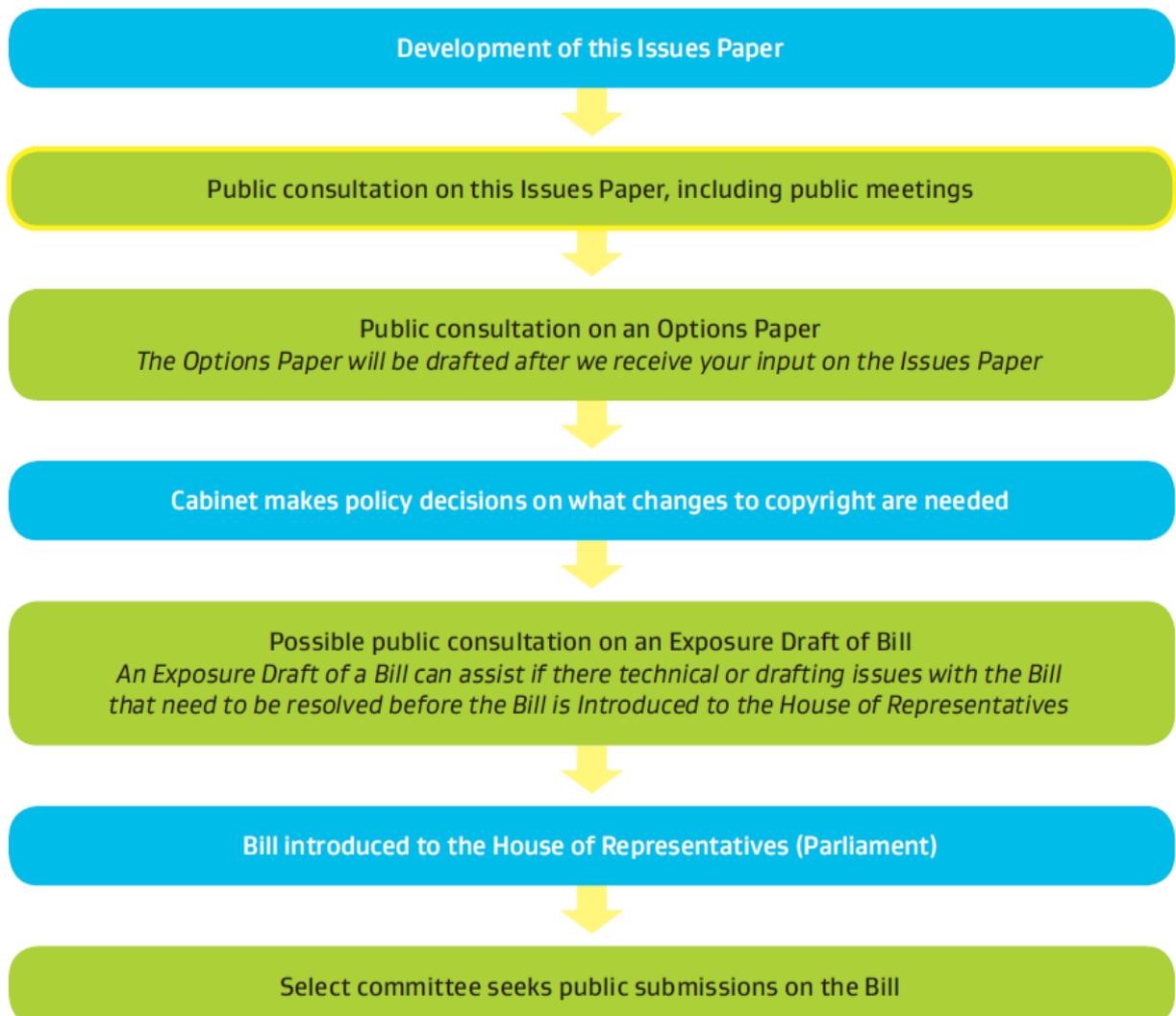
37. Submissions on the issues paper are due by 5pm Friday 5 April 2019.

The review process

38. After consultation on this document, we will analyse feedback, submissions and any other evidence before making recommendations to Ministers on:

- what the objectives of our copyright regime should be
- the issues within our copyright regime that should be addressed or prioritised in this review.

39. If Cabinet agrees that there are issues in the regime that should be addressed, the next stage will involve formulating a preferred approach to addressing those issues. An outline of the intended review process is below. The stages in green represent opportunities for you to provide your input into the process.



40. Each stage in the above process (other than the Select Committee process) is subject to a decision by Cabinet. Cabinet will decide whether consulting on an Exposure Draft of a bill is necessary after we have consulted on the Options Paper.

What does this Issues Paper cover?

41. In Part 2, we cover the basic concepts of copyright and provide information on our copyright regime that is essential to understanding the issues explored in the rest of this paper.
42. In Part 3, we set out proposed objectives for the copyright regime and seek your views on these objectives and our high level understanding of the current situation.
43. In Parts 4-8, we seek your views on whether there are problems with the way the copyright regime is working. These parts focus on potential issues that have been raised – through the Creative Sector Study process and directly with us by stakeholders.
44. We seek your views on:

Part 4 – Rights

- the criteria for protection and protected works
- allocation of rights, Crown copyright and term of protection
- the exclusive rights and infringement provisions
- moral rights
- performers' rights
- technological protection measures and geographic market segmentation.

Part 5 – Exceptions and limitations

- fair dealing
- libraries and archives
- educational institutions
- other uses of works
- contracting out of exceptions
- internet service provider liability.

Part 6 – Transactions (assignment and licensing)

- the role of Collective Management Organisations
- resolving licensing disputes and the role of the Copyright Tribunal
- use of social media platforms
- other licensing mechanisms
- orphan works
- licensing stacking.

Part 7 – Enforcement

- barriers to taking legal action
- groundless threats of legal action
- border protection measures
- infringing file sharing regime
- additional measures to address online infringement
- who should bears the cost of enforcing copyright in the digital environment.

Part 8 – Other issues

- relationship between copyright and registered design protection
- Hague Agreement Concerning the International Registration of Industrial Designs (Hague Agreement).
- copyright and taonga works.

45. In Part 9 we provide a recap of the questions asked in this Issues Paper.

Part 2 – What is copyright?

46. Copyright is a form of intellectual property right that gives authors and producers of creative works the right to determine who can reproduce, distribute and communicate those works.
47. Copyright arises automatically when original⁹ works are created (regardless of the work's quality, creative merit or cultural value) without any need for formal mechanisms like registration. Many ordinary everyday activities give rise to works that copyright protects, eg emails, writing a report, using a smart phone to take a photograph or recording a video.
48. Copyright gives copyright owners the exclusive right to:
 - **Copy the work** (eg recording, reproducing or downloading a copy or creating a new work that copies a substantial part of the original).
 - **Issue copies of the work to the public** (eg making copies of works that are not already in circulation available for purchase or rent).
 - **Perform, play or show the work in public** (eg a band performing live music at a bar, actors performing a play at a theatre, a retail store playing background music or a cinema showing a movie).
 - **Communicate the work to the public** (eg a TV station broadcasting a sports match, a radio station broadcasting or live streaming an interview via radio or webcast and a person posting a video, photograph or story on social media).
 - **Adapt the work** (eg translating a novel from one language to another or adapting a novel into a movie script).
 - **Authorise** others to do any of the above things.
49. These rights form the core bundle of rights that we call 'copyright'.

The duration of copyright

50. Copyright is provided for a limited period of time. Once copyright expires in a work, people are free to use it as they like. The term of copyright differs depending on the kind of creative work.

⁹ The test for originality is discussed in Part 4 – Rights, paragraph 119

Table 1: Duration of copyright for kinds of works

| Kind of work | When copyright expires |
|--|--|
| Literary works, including novels, song lyrics, emails, blogs and computer programs | 50 years from the end of the calendar year in which the author dies |
| Dramatic works, including dance, mime and scenario or script for a film | OR |
| Musical works, including sheet music and other musical compositions | for computer generated works, 50 years from the end of the calendar year in which the work was made |
| Graphic works, including drawings, paintings and maps | |
| Artistic works, including graphic works (described above), photographs, sculptures, models and works of architecture | |
| Sound recordings, including recorded music and podcasts | 50 years from the end of the calendar year in which the work was made or was made available to the public (whichever is later) |
| Films, including the visual aspects of movies, TV shows, webseries and home videos | |
| Communication works, including the broadcast of TV programmes | 50 years from the end of the calendar year in which the communication work was first communicated to the public |
| Typographical arrangements of published editions, including the style, composition, layout and general appearance of a page of a published work such as magazine design styling, layout of a newspaper or book cover | 25 years from the end of the calendar year in which the edition is first published |

Why do we give people copyright in their works?

51. Copyright is intended to incentivise the creation and dissemination of creative works. Creative works are often expensive and time-intensive to create but easy to copy or use. For example, a novel can take years for a person to write but can be copied and sold by others in minutes. Without the ability to protect works from unauthorised copying or distribution, there would be fewer incentives to spend the time, energy and resources required to create and disseminate works.
52. In other words, in New Zealand we take a 'utilitarian' or 'economic' approach when developing our copyright law. Under this approach (which countries like the United Kingdom, Australia, Canada and the United States also take) copyright is primarily intended to incentivise the creation and dissemination of works that would not otherwise be created or disseminated.
53. This differs to the approach that some other jurisdictions take, particularly in Europe, which have followed a 'natural rights' approach. This approach is based on the idea that the creators of creative works have a 'natural' right to profit from the fruits of their artistic endeavours.
54. Some aspects of the natural rights approach have filtered in to New Zealand law through international obligations, like the introduction of moral rights for authors.

The copyright paradox

55. There is a tension at the heart of copyright. Its primary aim is to incentivise people to produce and distribute creative works for society's use and benefit. But the main tool it uses to achieve this – providing copyright owners with the bundle of rights listed in paragraph 48 above – effectively enables copyright owners to limit the distribution of their creative works. In economic terms, giving copyright to the creator generally involves an 'opportunity cost' for those who may otherwise enjoy unimpeded use of the work (including other creators).
56. This is why, in addition to giving rights to incentivise people to create and distribute creative works, copyright regimes also try to facilitate access to creative works for the benefit of society. This is primarily done through:
- carefully considering what should be protected by copyright, when the rights should arise and what rights should be given
 - limiting the term of copyright so that copyright works become available for anybody to reproduce and use at the end of their copyright term
 - establishing exceptions to permit uses of works for social, cultural or economic purposes (eg educational and cultural activities performed by schools, archives and libraries).¹⁰

How does copyright compare to other forms of intellectual property protection?

57. Copyright is a form of intellectual property. The table below sets out the main types of intellectual property, their maximum term of protection and whether they are protected automatically or only by registration.

Table 2: Comparison between copyright and other forms of intellectual property protection

| Type of intellectual property | What's protected? | Term | Registration required? |
|---------------------------------|---|--|------------------------|
| Copyright | Original works, including written content, artworks, music, films etc. Protects expression of ideas | Up to the life of the author plus 50 years | No |
| Registered designs | New features of shape, configuration, pattern or ornament as applied to an object | Up to 15 years | Yes, with IPONZ |
| Trade marks | Branding (eg logos/words) – protects use in trade | Renewable indefinitely | Yes, with IPONZ |
| Patents | New inventions – protects products and how they are manufactured | Up to 20 years | Yes, with IPONZ |
| Plant variety rights | New cultivated varieties of plants | Up to 23 years | Yes, with IPONZ |
| Geographical indications | Origin labelling for wine and spirits | Renewable indefinitely | Yes, with IPONZ |

¹⁰ See Part 5 (Copyright Exceptions) for examples of the types of uses the Copyright Act facilitates for the benefit of society.

What does copyright not do?

Copyright does not protect ideas

58. Copyright protects the expression of an idea but not the idea itself.¹¹ Article 9.2 of the TRIPS Agreement requires member states to take this approach. To illustrate the difference between ideas and expression, consider the following example: a common literary genre is the 'whodunit' concept where a detective solves a serious crime, usually a murder. This concept can be considered the 'idea' behind such works. There have been many expressions of this idea, for example the 'Inspector Morse', 'Midsomer Murders', and 'Death in Paradise' TV series. The idea of the 'whodunit' is not protected by copyright, but the many expressions of it are.

Copyright does not specifically target the creation or dissemination of New Zealand cultural works

59. Copyright is a very basic and egalitarian tool. It applies to all works, regardless of their quality, level of investment, or cultural value. It is not a tool that is generally used to provide targeted support for the development of New Zealand cultural works. The Government does this through other means like funding from the MCH, Creative New Zealand, NZ On Air, and the New Zealand Film Commission etc.¹²

Copyright does not guarantee an income

60. Copyright does not guarantee that creators will make money from the economic and moral rights they have in their creative works. It only provides them with the opportunity to negotiate payment in return for their authorising others (by licensing or transferring copyright) to use their work (eg make copies available to the public). Their ability to derive an income from these arrangements largely depends on the public's demand for the work. While some creative works may make large profits for their creators, many others will deliver little or even no return.

¹¹ See *Martin v Polyplas Manufacturers Ltd* [1969] NZLR 1046 at 1050. Some other countries have incorporated this into their legislation – see for example s102(b) of the *US Copyright Act*.

¹² See for example <https://mch.govt.nz/funding-nz-culture>

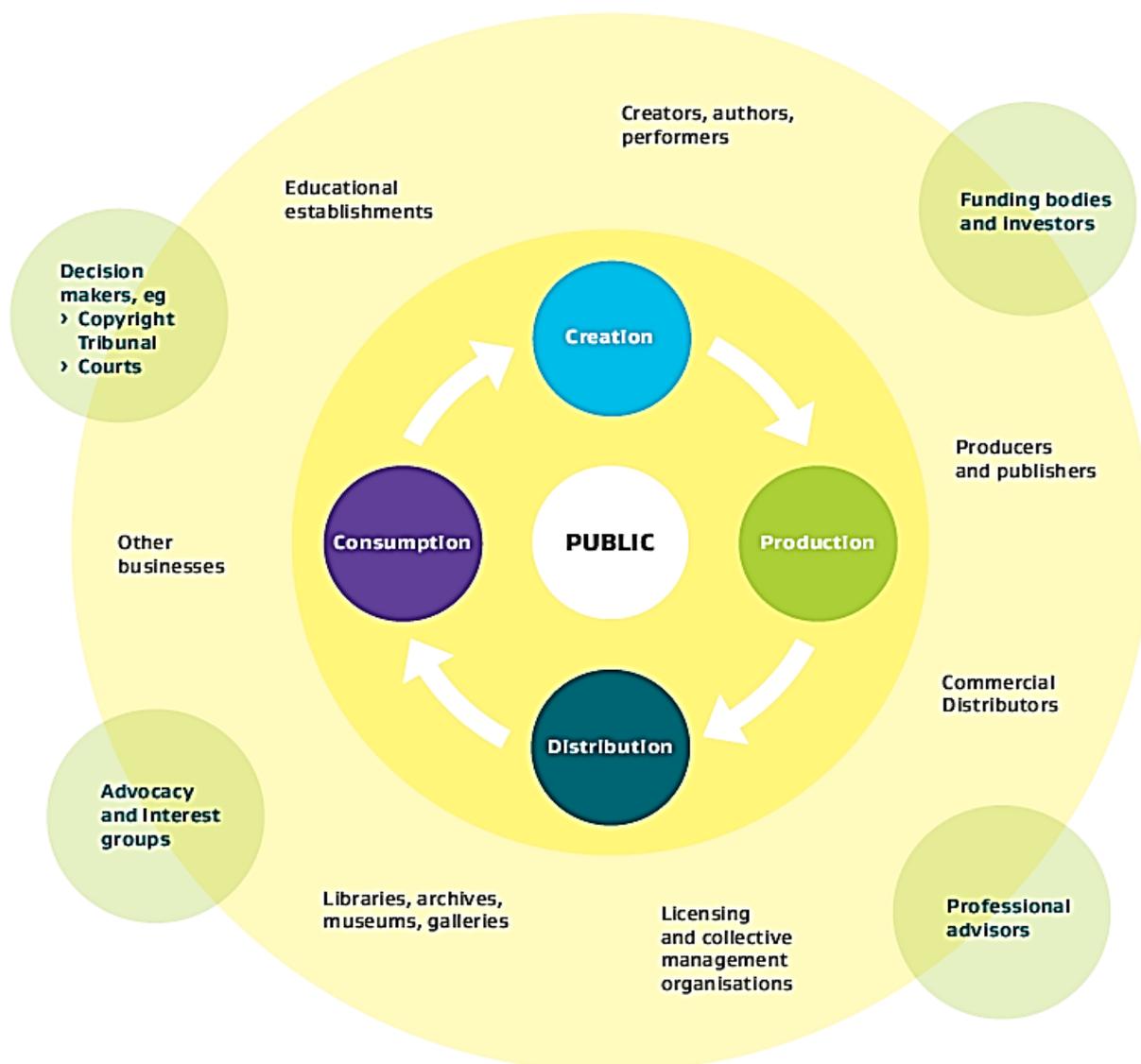
The copyright ecosystem

- 61. Copyright impacts everyone. The news articles you read, the photos you take, the music you listen to, the pictures you hang on your walls, and the television programmes and online videos you watch, are all protected by copyright. Copyright affects what we can do with the creative works we come across, whether it's for work or pleasure, used for profit or non-profit, or made by an amateur or professional person.
- 62. The map below sets out how we see the copyright ecosystem.

Figure 1: Copyright ecosystem

COPYRIGHT ECOSYSTEM

This is an indicative map of key copyright stakeholders and their *primary* role in the life cycle of a creative work (recognising that most stakeholders operate across the life cycle)



Overview of the current copyright regime

63. This section introduces the basic concepts of New Zealand’s copyright law. Further information on aspects of the regime is included in the relevant part of the Issues Paper.

The regime provides a number of exclusive rights

64. Copyright is a set of exclusive rights given automatically to creators of original works that apply for a limited period of time.¹³ These exclusive rights effectively give the copyright owner control over:
- whether copies or adaptations of the work can be made
 - whether and how copies or adaptations of the work are made public for the first time, whether this be issuing copies to the public, performing, playing or showing the work in public, broadcasting it or making it available online.
65. On creation of a copyright work, the exclusive rights are generally owned by the author (typically the person who created the work). For sound recordings, films and communication works¹⁴ the producer is the author.¹⁵
66. Sometimes copyright is not given to the author but rather to the person who commissioned the work or employed the author:
- If photographs, computer programs, paintings, sculptures, films or sound recordings are commissioned, copyright is given to the commissioner. This is called the ‘commissioning rule’. For example, if you commission a photographer to take photos of your family, you own the copyright in the photos.
 - For literary, dramatic, musical or artistic works that are created in the course of employment, copyright is given to the author’s employer. For example, if you write text for your employer’s publication in the course of your employment, your employer owns the copyright in the text.
67. These are the default rules for determining the first owner of copyright and they can be changed by contract or assigned/transferred at a later date.
68. Copyright can also be jointly owned, for example if there is more than one author or commissioner or if it is transferred to more than one person.

The copyright regime grants rights additional to the exclusive rights

69. In addition to the exclusive rights mentioned above, the Copyright Act also:
- enables copyright owners to prevent people from doing other things in certain circumstances (like importing their works into New Zealand, possessing or dealing with an infringing copy of a copyright work or enabling other people to do one of the

¹³ See paragraphs 48 and 177 for more detail on the exclusive rights.

¹⁴ A radio or television broadcast is an example of a communication work.

¹⁵ The producer is the person who makes the arrangements necessary for the recording of a sound recording like a recorded song, the making of a film (eg the film producer) or the communication of a work (eg the broadcaster).

exclusive rights listed above)¹⁶

- provides authors of literary, dramatic, musical or artistic copyright works, and directors of films, with '**moral rights**' (like the right to identified as the author and the right to object to derogatory treatment of their copyright works)¹⁷
- grants **performers' rights** that enable performers to consent to (or prevent) the recording or live broadcasting of their performances¹⁸
- enables copyright owners to prevent people from providing devices, services or information that help other people get around **technological protection measures** they have used to prevent people infringing copyright in their works¹⁹
- prohibits the interference with copyright management information attached to, or embodied in, copies of works.²⁰

A number of copyright works can sit within a creative work

70. Sometimes a creative work may comprise a number of copyright works within it, each with a different copyright owner. For example, a song that is broadcast by a radio station could involve up to four different copyright owners:

- the songwriter who wrote the lyrics for the song would have copyright in those lyrics as a literary work
- the composer who composed the music for the song would have copyright in that musical work
- the producer who recorded the song would have copyright in that sound recording
- the radio station who broadcast the song would have copyright in that broadcast as a communication work.

71. Paragraphs 115 to 118 explain this in more detail.

Copyright is subject to exceptions and limitations

72. The Copyright Act sets out various **exceptions** to copyright owners' exclusive rights. For example, there are:

- exceptions for certain **uses**: for example, the fair dealing exceptions for the purposes of criticism, review, news reporting or private study
- exceptions for certain **users**: for example, exceptions for educational establishments, libraries and archives
- exceptions relating to certain **works**: for example, exceptions for industrially applied artistic works or exceptions for communication works like time-shifting.

¹⁶ See paragraphs 180 to 181 for a discussion of secondary infringement of copyright.

¹⁷ See paragraphs 226 to 235 for a discussion of moral rights.

¹⁸ See paragraphs 236 to 243 for a discussion of performers' rights.

¹⁹ See from paragraph 244 for a discussion of technological protection measures.

²⁰ Copyright management information is sometimes referred to as 'rights management information'. It identifies the work, its author or copyright owner and can identify any terms and conditions that use of the work may be subject to.

73. The Copyright Act also includes a number of **limitations** on the liability of persons for infringing copyright under certain circumstances. For example, there are limitations providing that:
- internet service providers are not liable for copyright infringements that occur over their networks or platforms by their subscribers under certain circumstances²¹
 - employees of the Crown who infringe copyright with the authority of the Crown are not personally liable – liability lies instead with the Crown.

The exclusive rights can be transferred or licensed

74. Copyright owners can sell or transfer one or more of their exclusive rights to another person.²² They can also retain the rights but authorise another person to do one of the things covered by the exclusive rights (for example, to copy or distribute the work). The authorisation, along with any conditions of use, is a copyright licence.
75. Arranging licences to use a copyright work can be complex. When a work is made up of multiple underlying copyright works (like the radio station broadcast example above) it can involve multiple copyright owners. A copyright owner can license different rights to different licensees. For example, the copyright owner of a manuscript could:
- license the rights to make copies and distribute them (in the form of a book) to a publishing company
 - license the right to make an adaptation (a film from the manuscript) to a movie producer.

Collective management organisations play an important role licensing copyright works

76. Collective management organisations (copyright collecting societies) are bodies whose members are copyright owners. They help copyright owners to license their works and users to navigate the complexities of licensing copyright works by providing copyright licensing schemes. The licensing income collected by these bodies is distributed amongst their members.

The Copyright Tribunal can address certain disputes

77. The Copyright Tribunal can hear and decide disputes about copyright licensing schemes provided by collective management organisations. It also can hear claims and award damages arising from the use of peer-to-peer file sharing technologies over the internet to infringe copyright.

²¹ See from paragraph 414 for further details.

²² See paragraphs 48 and 177 for more detail on the exclusive rights.

Some people are proactively sharing their copyright works for re-use

78. Some copyright owners are choosing to make their works freely available to others to copy and use through, for example, *Creative Commons* and *Free and Open Source Software* licensing schemes.

Copyright can be enforced by taking legal action

79. Copyright is a property right. It is up to the owners to decide (subject to the exceptions) how and when others may use their works, being their property. Unauthorised use is an infringement of copyright and the owner may take legal action to stop the use and seek compensation for any damage suffered as a result of the unauthorised use.
80. There are also criminal offences and penalties for knowingly infringing copyright, especially when undertaken in the course of business, meaning a prosecution may be brought by the Crown.

Industrial designs can qualify for dual protection under the Copyright Act and the Designs Act

81. Original artistic works that are industrially applied (industrial designs) are given 16 years protection under the Copyright Act. Industrial designs can also be registered under the Designs Act 1953. Registered designs receive up to 15 years copyright protection.

Our international obligations

82. New Zealand is a party to several international agreements related to copyright. These agreements emerged to guarantee a minimum level of copyright protection in the member countries as works move across national boundaries. They include:
- the Berne Convention for the Protection of Literary and Artistic Works (**Berne Convention**)²³
 - Universal Copyright Convention²⁴
 - the TRIPS Agreement (which incorporates obligations under the 1971 Act of the Berne Convention).²⁵
83. Some of New Zealand's free trade agreements also contain obligations on how copyright must be protected. See for example the Intellectual Property Chapter of the CPTPP.²⁶ CPTPP in turn creates obligations to join other intellectual property agreements, including the WIPO Copyright Treaty and WIPO Performers and Phonograms Treaty.

²³ New Zealand is a Party to the Rome Act (1928) of the Berne Convention.

²⁴ The text of the Universal Copyright Convention can be found here:

http://portal.unesco.org/en/ev.php-URL_ID=15241&URL_DO=DO_TOPIC&URL_SECTION=201.html

²⁵ The TRIPS Agreement requires New Zealand to comply with Articles 1 – 21 of the Paris (1971) Act of the Berne Convention.

²⁶ <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/18.-Intellectual-Property-Chapter.pdf>

84. These international obligations collectively form the boundaries our copyright laws must fit within. Any changes we make must be consistent with these obligations.
85. The most important obligations under these agreements include:
- not requiring copyright owners to register their works to benefit from copyright protection
 - ensuring certain copyright laws are applied on a national treatment basis
 - a requirement to protect copyright for specified minimum periods of time
 - a requirement to protect certain types of works by copyright
 - ensuring that any exceptions to, or limitations on, copyright protection comply with a framework (the three-step test).
86. We explain each of these in more detail below.

No requirement for registration

87. The Berne Convention requires that copyright be granted automatically without a requirement for formalities like registration.²⁷

National treatment

88. Broadly, this obligation means that a work originating in another country that is party to the agreement must be given the same protection as if the work originated in New Zealand (and vice versa).²⁸ We cannot discriminate against persons from other countries or give preferential treatment to New Zealanders. This encourages overseas copyright owners to make copies of their works available in New Zealand, knowing the works will be protected. Similarly, all other parties to the TRIPS Agreement or the Berne Convention must provide the same protection to New Zealanders as they provide to their own citizens. The effect of this provision – together with the requirement for automatic protection described above – is that copyright works created by New Zealanders are protected by copyright in all other countries party to the TRIPS Agreement or the Berne Convention.²⁹

Copyright term

89. The Berne Convention requires a minimum copyright term of the life of the author plus 50 years for most works except films and sound recordings. For films, the minimum term of protection is 50 years from the date the film was made available to the public.³⁰

²⁷ See article 5(2) Berne Convention. Formalities other than registration could include a requirement to display a copyright notice (©) on a work or to deposit a copy of a work with a government agency.

²⁸ Article 5(1) Berne Convention, Article 3 TRIPS Agreement.

²⁹ National treatment is also required by some of New Zealand's Free Trade Agreements, either explicitly, or by reference to the TRIPS Agreement. It is also required by the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

³⁰ Articles (7)(1) and (2), Berne Convention.

90. The TRIPS Agreement additionally requires that the minimum term of protection for performances and sound recordings is 50 years from the date the recording was made or the performance took place.³¹

Works that must be protected

91. The Berne Convention sets out the types of works that must be protected³². These include:
- literary works books, pamphlets or other written works
 - artistic works including photographic works, and architectural works
 - dramatic works like a script for a film or a play
 - musical works, such as a musical score
 - films.
92. The TRIPS Agreement requires additional works to be protected, including:³³
- computer programs
 - compilations of data
 - sound recordings
 - performances
 - broadcasts.

Exceptions and limitations – the Berne ‘three-step test’

93. The Berne Convention sets out a ‘three-step’ test for providing exceptions to the author’s exclusive right to reproduce or copy a work. It requires that exceptions and limitations can only be permitted:
- in certain special cases
 - that do not conflict with a normal exploitation of the work
 - and that do not unreasonably prejudice the legitimate interests of the author.³⁴
94. The TRIPS Agreement extends the Berne Convention three-step test to all of the author’s exclusive rights provided for in the Berne Convention and the TRIPS Agreement.³⁵

Recent developments

95. More recent developments have occurred through multilateral trade agreements, including CPTPP.
96. CPTPP requires New Zealand to make a number of changes to the Copyright Act including providing new property and moral rights to performers in relation to their live performance

³¹ Article 14(5) TRIPS Agreement.

³² Article 2 Berne Convention.

³³ Article 14 TRIPS Agreement.

³⁴ Article 9(2) Berne Convention.

³⁵ Article 13 TRIPS Agreement.

and sound recordings made from their performances. CPTPP also requires New Zealand to join the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.³⁶ These treaties, sometimes called the WIPO Internet Treaties, were developed in the 1990s as a response to technological developments like the internet and the widespread availability of computers.

The Marrakesh Treaty

97. In June 2017, the government agreed to accede to the Marrakesh Treaty to Facilitate Access to Published works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled (**the Marrakesh Treaty**)³⁷. The Marrakesh Treaty requires member states to provide a copyright exception that allows ‘authorised entities’ to make and distribute copies of copyright works that are accessible to persons with a print disability.
98. A Bill amending the Copyright Act to allow New Zealand to accede to the Marrakesh Treaty was introduced to Parliament and read a first time in November this year (following public consultation on an exposure draft).³⁸

³⁶ Information about the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty can be found at <http://www.wipo.int/treaties/en/>

³⁷ Information about the Marrakesh Treaty can be found at <http://www.wipo.int/treaties/en/ip/marrakesh/>

³⁸ Information about the Copyright (Marrakesh Treaty Implementation) Amendment Bill can be found at https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_80988/copyright-marrakesh-treaty-implementation-amendment-bill

Part 3 – Objectives

Introduction

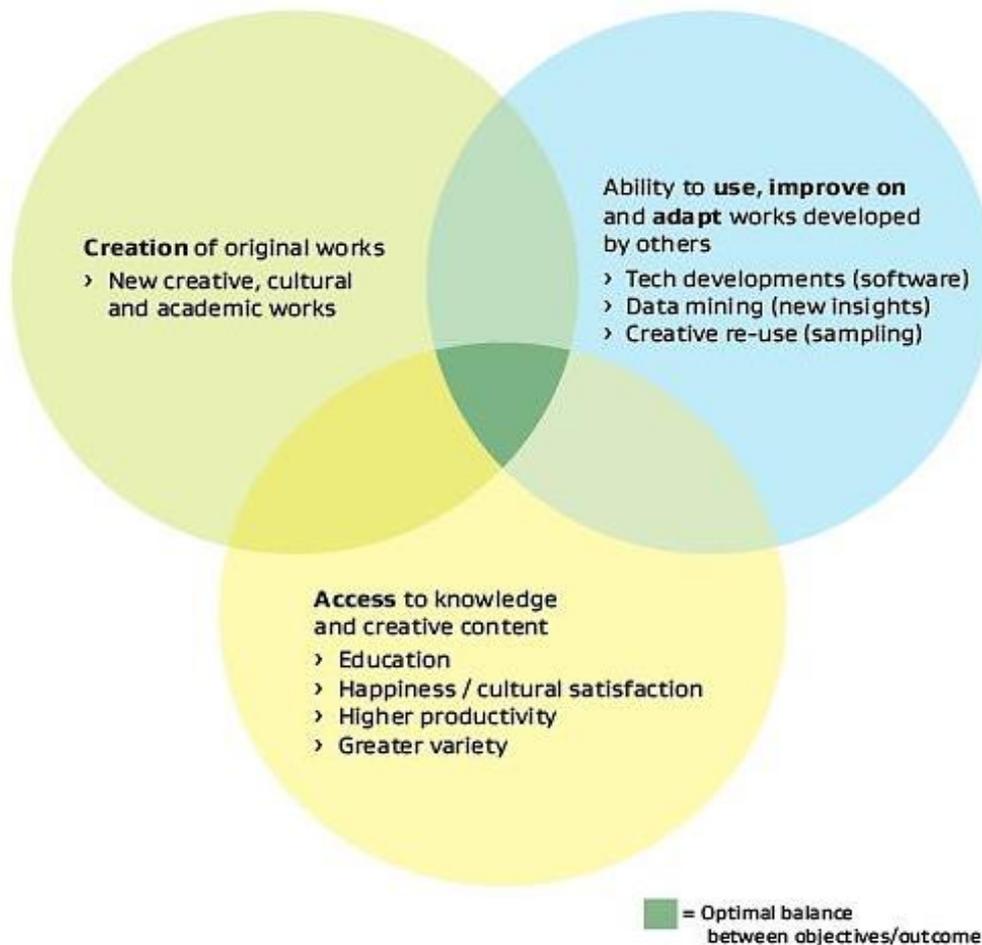
99. Having clear and agreed objectives for our copyright regime is important. They provide a clear framework and shared understanding of the purpose of the regime. They also provide a basis for monitoring and assessing the performance of the regime.
100. Unlike many modern statutes, the Copyright Act does not have a meaningful purpose statement nor any stated objectives. However, there are well understood principles underpinning copyright, developed through the common law, international law and domestic policy development.

What does copyright seek to achieve?

101. In our view the copyright regime should seek to balance the following outcomes:

- creation of original works
- use, improvement and adaptation of works created by others
- dissemination and access to knowledge and creative works.

Figure 2: Model of outcomes



102. In our view optimal settings for each would result in a more effective and efficient system and increase the quality and quantity of copyright works overall.

Proposed objectives

103. The proposed objectives describe what we think copyright should seek to achieve in the New Zealand context:

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

104. These objectives are the same as those that appeared in the review's terms of reference, with the addition of the objective on the Treaty of Waitangi.
105. We propose to use these objectives in the review to help us assess whether changes are required. We want to hear your views on whether these objectives are the right ones for New Zealand's copyright regime. Some copyright owners, for example, have told us they disagree with the above objectives. They consider that the purpose of copyright is to protect creation and creators *per se*, as well as their business models and investment.
106. We would also be interested in whether there are other objectives the regime should seek to achieve and why. Adaptability or resilience of the Copyright Act in the face of technological developments (eg through more technologically-neutral provisions) is an example of something we have heard is important to people and potentially deserves more emphasis in the objectives. Some may question whether the Copyright Act can be made more flexible without decreasing certainty for people who create and interact with copyright works, particularly given that we get very little guidance from the courts on how to interpret copyright law (compared with other countries).

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?

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?

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.

4

What weighting (if any) should be given to each objective?

Part 4 – Rights

Introduction

107. The Copyright Act provides a series of rights to creators to encourage people to invest time, effort and resources to create and disseminate creative works. The rights give creators control over the copying and distribution of their works to increase their ability to earn revenue from the works.
108. This Part discusses the requirements that need to be met for a work to be protected by copyright and the rights given to copyright owners. It also discusses some other rights the Copyright Act provides.
109. The Copyright Act provides five main types of rights:
- copyright (eg the right to prevent others from copying or distributing works)
 - moral rights (eg the right to object to derogatory treatment of works)
 - performers' rights (eg the right to prevent others from recording or distributing a performance)
 - rights relating to the maintenance of technological protection measures (eg the right to restrict others from circumventing digital 'locks' like copy-control measures)
 - rights relating to the protection of copyright management information.
110. This Part discusses:
- Section 1 – What does copyright protect and who gets the rights?
 - Protected works
 - Ownership
 - Section 2 – What actions does copyright reserve for copyright owners?
 - Exclusive rights and primary infringement
 - Secondary infringement
 - Authorisation as infringement
 - Exhaustion of rights and parallel importation
 - Section 3 – Specific issues with the current rights
 - Communication to the public and communication works
 - How should digital content be treated?
 - Section 4 – Moral rights, performers' rights and technological protection measures
 - Moral rights
 - performers' rights
 - rights relating to technological protection measures.
111. The exceptions to these rights are discussed in Part 5.

Section 1 – What does copyright protect and who gets the rights?

Protected works

112. Copyright is a property right that exists in original ‘works’ of the following types:³⁹

Table 3: Works that are eligible for protection

| Work | Includes | Examples ⁴⁰ |
|----------------------------|--|--|
| Literary | Any written, spoken or sung work (that is not a dramatic or musical work). Compilations of data and computer programs explicitly included. | Novel, blog, lyrics, computer code. |
| Dramatic | Work of dance or mime and scenario or script for a film. | Film script. |
| Musical | Any work of music excluding any words or actions. | Musical score. |
| Artistic | Any work of artistic craftsmanship. | Photographs, buildings, sculptures, paintings, plans. |
| Sound recording | Any reproducible recording of sounds or the sound recording of the whole or part of any literary, dramatic or musical work. | Recorded song, audio sound in a movie. |
| Film | Any recording from which a moving image can be produced. | Images in a movie, video recording on a smartphone. |
| Communication work | Any transmission of sounds, visual images or other information to the public. | Radio broadcast, internet television programme delivered over broadband. |
| Typographical arrangements | Of published editions | The layout of a novel. |

113. Literary, dramatic and musical works are eligible for copyright protection if they are recorded, in writing or otherwise. An improvised song or speech will not be protected by copyright unless it is written down or an audio recording is made of it.

114. Copyright arises automatically when an original work⁴¹ is created regardless of whether the work’s creator is interested in copyright protection. There is no requirement to register copyright, or pay a fee, or take any other action to obtain copyright protection. This means that a huge array of everyday creations, including an email sent to a colleague, a blog, a child’s painting, or a snapshot of a friend can all qualify for copyright protection.

115. As shown in Table 3, copyright protects different types of ‘works’. Copyright works are often a compilation of different parts. Under the Copyright Act, copyright in creative works attaches to different ‘works’ that make up the whole work. Each copyright work may have a different author.⁴² For example, recorded music generally involves:

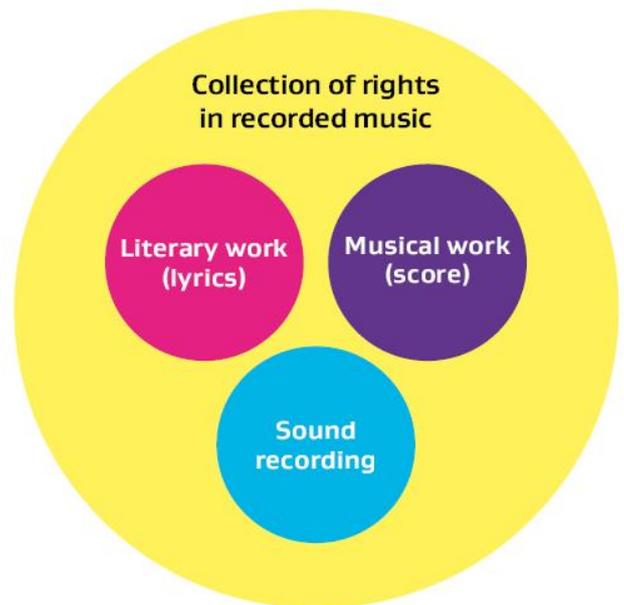
³⁹ Section 14 sets out the categories of original works, each of which is defined in section 2.

⁴⁰ Further examples of the categories of works and what they include are provided in the Creative Sector Study

⁴¹ See the discussion on ‘Originality’ below.

⁴² See the discussion under “Ownership” below.

- a 'literary work' (the lyrics written by the songwriter)
- a 'musical work' (the musical score written by the composer)⁴³
- a 'sound recording' (the recording of the song by a recording studio).



116. Similarly, audio-visual works (movies, documentaries or series etc.) are made up of different copyright works that can include, for example, literary works (the lyrics of the sound track), musical works (the musical score of the sound track), dramatic work (the script), artistic works (designs, photographs, etc.), a sound recording (the accompanying audio sound track) and a film (the series of visual images).



117. We have heard that the name of the category of work can sometimes cause confusion. For example, a 'film' in the Copyright Act encompasses any recording from which a moving image can be produced, like a smartphone video. It is therefore wider than the kinds of movies which might traditionally be referred to as a 'film'. The concept is also narrower than the ordinary meaning because the sound elements of an audio/visual work are protected separately as a 'sound recording'.

⁴³ For purpose of this discussion document we distinguish songwriters from composers to reflect the different copyright works even though they may be the same person.

118. The types of works protected largely reflect requirements in international treaties. There are however some flexibilities (eg Australia protects the moving image *and* associated sounds together as a ‘cinematograph film’).

5

What are the problems (or advantages) with the way the Copyright Act categorises works?

Originality

119. As noted above, if a work fits into one of the protected categories, it must be ‘original’ to receive copyright protection. In New Zealand there is no quality or novelty threshold for copyright protection. To be ‘original’ a work must not be a copy of another work and must not infringe copyright in any other work. The relevant international treaty, the *Berne Convention*, does not define ‘original’ or set a standard for works to qualify for protection.
120. All works are required to be ‘original’ to receive copyright protection in New Zealand. In many other countries (including the United Kingdom, Australia and Canada) there is no originality requirement for sound recordings, films or typographical arrangements.
121. New Zealand courts have tended to follow United Kingdom precedent⁴⁴ when interpreting the threshold for originality. They have asked whether creating the work involved sufficient skill, judgement and labour.⁴⁵ In some countries, judges have interpreted ‘original’ to require something extra — for example, in the United States, there must be a level of ‘creative spark’ in order to receive copyright protection.
122. In New Zealand, a telephone directory has been found to qualify as an original work and receive copyright protection.⁴⁶ Similar cases relating to telephone directories in the United States⁴⁷ and Australia⁴⁸ have come to the opposite conclusion on the basis that the directories did not satisfy a ‘minimal level of creativity’ or exhibit ‘independent intellectual effort’ on the part of the author. This may mean that some works which might not receive copyright protection in other countries could be protected by copyright in New Zealand.
123. Some people argue that the standard of originality applied in New Zealand is too low, and that some works qualify for copyright where protection is not justified. It may surprise many of us to think of the seemingly banal things, such as work-related emails, that the Copyright Act theoretically protects, especially when we find ourselves routinely infringing those protections (eg by forwarding the email). In theory at least, protection comes at a cost to the rest of society (an ‘opportunity cost’). So if our copyright regime gives people rights there is no public interest in them having (or even rights the person does not actually want or realise they have), we should try to understand the consequences of this and consider what, if anything, can be done to address it within the constraints of the Berne Convention.

⁴⁴ *Ladbroke (Football) v William Hill (Football) Ltd* [1964] 1 WLR 273(HL)

⁴⁵ Cases in New Zealand that have applied this test include *NZ Supreme Court in Henkel KGAA v Holdfast New Zealand Ltd* [2006] 1 NZLR 577 (SC) and *Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 216, (1994) 6 TCLR 23.

⁴⁶ *YPG IP Ltd v Yellowbook.com.au Pty Ltd* CIV-2007-404-002839 May 31, 2010, Cooper J.

⁴⁷ *Feist Publications Inc v Rural Telephone Services Co Inc* 499 US 340 (1991).

⁴⁸ *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149.

Is it clear what ‘skill, judgement and labour’ 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?

Idea vs expression

124. As described in paragraph 58 above, copyright protection extends to the expression of an idea but does not protect the idea itself.⁴⁹
125. In some cases, the distinction between the expression of the idea and the idea itself may not be clear-cut. An example of this is TV show formats, particularly game shows or quiz shows. Such shows are usually performed on an ‘ad lib’ basis, with any script only setting out the framework or idea behind the show. While each individual episode might be protected by copyright, the idea behind it is not necessarily protectable.⁵⁰

Data

126. The concept of ‘data’ raises similar issues. The role of copyright in the protection of data, databases and compilations is not straightforward.
127. The word ‘data’ can be used to refer to many different kinds of information. In some cases, ‘data’ can refer to short pieces of factual information (eg customer/category names, numeric figures etc) (**basic data**). In other cases, ‘data’ can refer to large pieces of copyright protected work (eg written content, film etc).
128. In New Zealand, ‘compilations’ are protected as literary works under the Copyright Act.⁵¹ The definition of a compilation includes ‘a compilation of data’. As with all works, the compilation must be ‘original’ and pass the ‘skill, effort and judgement’ test.
129. We understand that data contained in databases will often be basic data, so the individual items of data would not typically be protected by copyright.⁵² Questions have been raised about the extent to which the protection of compilations/databases may be locking up and preventing access to the underlying data itself.
130. The ‘skill, effort and judgement, test applied in New Zealand could mean that some basic data is protected by copyright. For example, the New Zealand courts have ruled that a telephone directory⁵³ involved sufficient skill, effort and judgement to be protected by copyright. This may have the effect of limiting access to the information in the directory.
131. Data is becoming more important for identifying, and acting on, commercial opportunities.

⁴⁹ See *Martin v Polyplax Manufacturers Ltd* [1969] NZLR 1046 at 1050. Some other countries have incorporated this into their legislation – see for example s102(b) of the *US Copyright Act*.

⁵⁰ The New Zealand courts have held that such TV show formats are not dramatic works for the purposes of the Copyright Act – see *Green v Broadcasting Corporation of New Zealand* [1988] NZLR 490.

⁵¹ This gives effect to our obligations under Article 2(5) of the Berne Convention, which provides that collections of literary and artistic works are protected as a compilation (eg an encyclopaedia) if the selection and arrangement of their contents constitute ‘intellectual creations’. TRIPS, Article 10.2 clarifies that this protection extends to databases and other compilations of data.

⁵² Factual information in short form like customer names, numeric figures and category names is unlikely to receive copyright protection.

⁵³ See paragraph 122 above.

Data mining

132. Data can be collected and used on a large scale with the assistance of algorithms and the web (commonly referred to as ‘data mining’). Depending on the kind of data mining, a lot of the ‘data’ collected can be copyright-protected content. We understand that mining copyright-protected data (ie copyright data) is heavily relied on for the development of emerging technologies like artificial intelligence.
133. In this issues paper, we discuss the issue of data mining in paragraphs 296 to 306, where we consider artificial intelligence and exceptions that might apply respectively.

Ownership of copyright

134. There are different default ownership rules for different types of works. The rules are not always well understood. Reviewing the Copyright Act gives us an opportunity to consider whether these rules are appropriate.

Who is the first owner of copyright?

135. The ‘default’ rule is that the exclusive rights provided by copyright, like the right to copy a work or play it in public, are provided to authors⁵⁴. If there is more than one author of a work,⁵⁵ the copyright is held jointly. In that case somebody wanting to do any of the acts restricted by copyright⁵⁶ will need the permission of all of the authors.
136. There are, however, exceptions to this rule. Sometimes the first owner of copyright is the person who commissioned the work or the author’s employer.

Table 4: Default rules relating to authorship and ownership

| Rules relating to authorship and ownership (which can be varied by contract) | | | | | | | | |
|--|--|---------------|--------------|---|---|------|--|---------------------------|
| | Literary work | Dramatic work | Musical work | Artistic work | Sound recording | Film | Communication work | Typographical arrangement |
| Author | The person who created the work (in the case of computer-generated works, the creator is the person who made the arrangements for the creation of the work) | | | | The person who made the arrangements for the making of the sound recording or film (usually the producer) | | The person responsible for the contents of the communication work who transmits it or makes it available ⁵⁷ | The publisher |
| First owner of copyright | The author, ⁵⁸ unless the work was made in the course of employment | | | The author, unless the work was commissioned/made in the course of employment | The author, unless the work was commissioned | | The author | |

⁵⁴ “Author” in relation to a copyright work is defined in section 5 of the Act.

⁵⁵ This is when two or more people have contributed to the creation of a work and their contribution is not distinct from the contribution of the other authors.

⁵⁶ The acts restricted by copyright are set out in paragraph 177.

⁵⁷ The person providing the underlying content may also be a joint author of a communication work (see section 3(1)(b)) of the Copyright Act.

⁵⁸ Except for computer programs, which are a kind of literary work to which the commissioning rule applies.

The 'commissioning rule'

137. For certain kinds of works, the person who commissions and pays for the creation of that work is deemed to be the first owner. This is often referred to as the 'commissioning rule'.
138. The commissioning rule provides that the person who commissions and pays for (or agrees to pay for) a work is the first owner (subject to any agreement to the contrary) in respect of the following kinds of works: photographs, computer programs, paintings, drawings, diagrams, maps, charts, plans, engravings, models, sculptures, films or sound recordings.
139. Literary, dramatic and musical works (except for computer programs) are not subject to the commissioning rule. Certain artistic works are also excluded from the commissioning rule, including a collage, a work of architecture, an etching and a print.
140. During the Creative Sector Study,⁵⁹ we heard strong and divergent views about the commissioning rule – particularly from photographers and, in contrast, those that commission the services of photographers. Photographers have told us that the default rules unfair and negatively impact their ability to have a viable business.
141. Photographers claim that the commissioning rule places them at a disadvantage in negotiations with clients. They say that clients tell them that they will not be hired unless they agree to assign their copyright to the client and use the commissioning rule to justify this. Some photographers noted that their work was often integral to the final creative work and felt that they were not compensated fairly for commercial works.
142. The UK, Canada, Australia⁶⁰ and the US have all introduced changes so that a person who commissions a work is no longer the first owner of copyright.⁶¹

Works made in the course of employment

143. Section 2 of the Act defines 'employment' as relating to a person employed under a contract of service or a contract of apprenticeship. This means that if an employee creates a copyright work (such as this Issues Paper) in the course of their normal duties, copyright in the work is owned by the employer, not the employee. This default position can be varied by agreement between the employee and the employer.

Some creators do not own copyright in their works

144. Some categories of people who play a major role in creation are not explicitly identified as authors. For example, because the author of a film is the person who makes the arrangements necessary for the making of the film (typically the film producer), film directors do not generally hold copyright in the film and sound recordings they make when they make a movie. Film directors do, however, receive moral rights, which we discuss further from paragraph 226.

⁵⁹ The Creative Sector Study is mentioned in more detail in paragraphs 14 to 16.

⁶⁰ However, section 35(5) of the Australian *Copyright Act 1968* provides that a person who commissions the taking of a photograph for a private or domestic purpose will be the first owner of copyright in the photograph.

⁶¹ However, they all treat the author of a film or sound recording as the person who made the arrangements. In some cases, that person may effectively be the commissioner.

145. As outlined above, the author of a film is the person who makes the arrangements necessary for the making of the film. This is commonly the film producer. The Act does not explicitly include film directors in the definition of author.
146. Some other countries have different default ownership rules for films. For example, in Australia, unless a film is commissioned, the first owner includes the director. In the EU, the principal director of a film is treated as the author, or one of the authors (alongside the producer), of a film. Some EU countries also allocate authorship of films to others involved in the process of filming.⁶²
147. Some film directors have told us that not being recognised as an author (and therefore not qualifying for copyright in films) lowers their bargaining power with producers. We have heard that this reduces their income and therefore the quality and quantity of films made in New Zealand.
148. If a film directed by a New Zealand director is shown overseas, the director is entitled to a share of the royalties from those showings. However, overseas collective management organisations will not collect these royalties on behalf of New Zealand directors. This is because New Zealand collective management organisations cannot collect royalties on behalf of overseas film directors for showings of their films in New Zealand, as we do not recognise directors as authors.

8

What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?

Artificial intelligence and copyright

149. Artificial intelligence and algorithms can write news and novels, generate artworks and computer programs, and write and perform music. Artificial intelligence can also drive innovation processes on its own initiative. This can challenge traditional copyright notions, such as ‘copying’, ‘originality’, ‘creator’ and ‘author’.
150. The definition of ‘author’ in the Act requires the author of a work to be a natural person (ie a human) or a body corporate (such as a company). In the case of computer-generated works the author is the person who made the arrangements necessary for the creation of the work. This is likely to be a computer programmer or the programmer’s employer.
151. However, that might not always be the case, particularly with the proliferation of content created and used by artificial intelligence. In some cases the creative contribution made by the computer programmer to a work created by artificial intelligence may be minimal.
152. We are interested in whether any problems are created by the current rules relating to computer-generated works, including in light of new technological developments such as artificial intelligence.

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?

⁶² By allocating author’s rights to the director, the EU also ties the term of protection to the life of the director rather than from the point at which the film was first made available to the public.

Do artists receive a fair share of the revenue generated from their works?

153. Creators of copyright works are often able to receive an ongoing financial return from further common means of distributing their works. For example, a musician may benefit from ongoing royalty payments based on sales of copies, performances, radio-play and streaming of their music.
154. Although copyright owners all receive similar exclusive rights over their works, the rights impact creators in different ways. For example, we have heard that visual artists like painters and sculptors do not earn as much income from licensing people to copy or communicate⁶³ their works as other creators like novelists and musicians. This is likely because copies of works such as paintings are often produced in much smaller numbers than is the case for books or sound recordings. In some cases only one copy of a painting or sculpture may ever be made.
155. One area where artists can feel that they are not receiving a fair return is where their works are re-sold by the person who first purchased the work from the artist. In some cases the price received by the first or subsequent purchasers is much higher than the price paid by the first purchaser to the artist. Some artists feel that, in such cases, they should receive a share of the profit made by the purchaser. Some jurisdictions have dealt with this issue by enacting an 'artist's resale right'. This gives artists the right to claim a portion of the sale price when their works are re-sold. These jurisdictions include Australia, the European Union and some Nordic countries, although details of these regimes differ. A Bill to introduce an artist resale right in New Zealand was introduced into Parliament in 2008⁶⁴ but it was never enacted.

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?

Reversion of rights

156. The purpose of copyright is to incentivise the creation and dissemination of creative works. However, we have heard that copyright can impede dissemination of older published or recorded copyright works.
157. Digital technologies have opened up new ways for authors to make copies of their works available to the public. However, authors who have transferred their copyright to another party – like a publishing company – cannot always take advantage of these opportunities, particularly if the copyright owner is unable or unwilling to assist.

⁶³ For example, by broadcasting the work or making it available online.

⁶⁴ See <http://www.legislation.govt.nz/bill/government/2008/0184/latest/whole.html#DLM1319118> for more information.

158. Older published or recorded works are often no longer available to the public (for example, out-of-print books). This might be because it is not commercially viable for the publisher to republish the work as a new edition – especially if there is low demand for it – or for other reasons (eg the reputation a publisher is seeking to create in the market). When this happens, the demand for the work (even if low) goes unsatisfied. We have heard that this can be particularly problematic for works of historical or cultural significance. The public cannot easily access such works, for example, other than by borrowing a copy from a library.

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?

Crown copyright

159. The Crown receives copyright in copyright works produced by people employed (eg this Issues Paper) or contracted by the Crown⁶⁵ (eg an economic report or computer program⁶⁶ a government department has commissioned). Copyright in these works is known as ‘Crown copyright’. The term of protection is 100 years from the year in which the work was made (or 25 years for typographical arrangements), even if the copyright is no longer owned by the Crown.
160. Crown copyright does not apply (nor does any other copyright) to works produced by the Crown like governmental and parliamentary materials like bills, legislation, court judgments and parliamentary debates.⁶⁷
161. New Zealand’s copyright term for Crown copyright was extended from 50 years to 100 years in 1994. The extended term of protection means that no Crown copyright works will come into the public domain between 1994 and 2044. It also means that the Issues Paper you are reading, together with a vast number of other documents produced by the Crown in 2018, will be protected by copyright for the next 100 years.⁶⁸
162. There are differing approaches to the protection of government-produced works internationally:
- Australia and Canada provide 50 years protection for Crown copyright works⁶⁹
 - the UK provides 50 years for published works but 125 years for unpublished works
 - The US excludes works made by Federal employees as part of their official duties from receiving copyright protection altogether.⁷⁰

⁶⁵ ‘Crown’ in this context includes Government Ministers, government departments and offices of Parliament. It does not include Crown entities or State owned enterprises.

⁶⁶ Computer programs are included in the definition of ‘literary work’ under section 2 of the Copyright Act.

⁶⁷ Section 27 of the Copyright Act.

⁶⁸ This Issues Paper has been licensed under the Creative Commons Attribution 4.0 International License (see the second page of this document). Please feel free to copy it, redistribute it or adapt it for use as a flip book: see the terms of the license at <http://creativecommons.org/licenses/by/4.0/>.

⁶⁹ For Australia, this means Crown copyright works have a shorter period of protection than for other copyright works (because Australia extended its copyright term to 70 years (calculated as described above) in 2008).

⁷⁰ Section 105 of the *US Copyright Act 1976*. However, works created by contractors or freelancers working for the Federal government are protected by copyright.

163. Since the New Zealand Copyright Act was last reviewed, the government has become increasingly aware of the potential public value of copyright works produced by the Crown. The New Zealand Government Open Access and Licensing framework (NZGOAL)⁷¹ now tells government agencies that, unless a restriction applies,⁷² they should make their copyright works available for anyone to freely copy, distribute and adapt, as long as the work is attributed to the Crown (or to the government agency releasing the work).⁷³ This suggests more of an 'opt-in' model of protection for Crown works, in contrast to the provisions giving the Crown copyright in these works by default.
164. The justification for providing Crown copyright seems more limited than for other works. The main justification behind providing copyright protection is to provide an incentive to create and disseminate works which might otherwise not have been created or disseminated. This does not tend to apply to Crown copyright works. Although there are clearly costs to the Crown in producing works, including this Issues Paper, we expect that most Crown copyright works would be produced even if they were not protected by copyright.
165. We are aware of some Crown works that may have commercial value (for example, Standards produced by Standards New Zealand). Crown copyright in those cases may provide opportunities to generate a return to taxpayers on the costs of creating the work (even if commercial exploitation was not the primary purpose of creating the work).
166. One other advantage of Crown copyright is that where the Crown has commissioned the creation of a work, the Crown's ownership of copyright means employees and contractors cannot restrict the Crown's use of that work. However, it is hard to see how a lack of Crown copyright would make this a problem if those works had no copyright at all (similar to legislation and court judgments, for example).
167. The current approach automatically grants Crown copyright and relies on Crown agencies to opt-out by releasing them for re-use under a Creative Commons licence. Given the potential value to others of Crown copyright works (and the fact they are effectively paid for by the public), it is possible that the current approach leads to overprotection of Crown works. Moreover, people may find it difficult to distinguish those Crown works they are entitled to use (through a licence under the NZGOAL framework) and those still protected by copyright.

Copyright term

168. Copyright terms differ for different types of creative works. These are set out in Table 5 below.

⁷¹ The NZGOAL is guidance for government agencies to follow on the release of copyright works they produce. It can be found at: <https://www.ict.govt.nz/guidance-and-resources/open-government/new-zealand-government-open-access-and-licensing-nzgoal-framework/>.

⁷² Examples of restrictions include where release of the material would threaten the control over and/or integrity of Māori or other traditional knowledge or other culturally sensitive material; or there is a good reason under sections 6, 7 or 9 of the Official Information Act for withholding release of the work.

⁷³ Creative Commons Attribution licence. Licensing and the creative commons framework is discussed further in Part 5 of this paper.

Table 5: Copyright term

| Term of Copyright | | | | | | | | |
|---|---------------|--------------|---------------|--|------|---|--|---|
| Literary work | Dramatic work | Musical work | Artistic work | Sound recording | Film | Communication work | Typographical arrangement | Any work under Crown copyright |
| The copyright term expires at the end of the calendar year that is 50 years after the year on which the author dies. | | | | 50 years from the end of the calendar year in which the work was made; or 50 years from the date the work was first made available to the public by, or with the permission of, the copyright owner, whichever is the later. | | 50 years from the end of the calendar year in which the communication work was first made communicated to the public. | 25 years from the end of the year on which the edition containing the typographical arrangement was first published. | 100 years from the year in which the work was made (or 25 years for typographical arrangements) |

Duration of copyright

169. We consider that the current terms of protection for copyright are more than adequate to incentivise creation and dissemination of copyright works.⁷⁴ Minimum terms of protection are set by international agreements (generally 50 years from the date of making available to the public, or life of the author plus 50 years). The TRIPS Agreement sets a minimum term for broadcasts of 20 years from the date that the broadcast was made and a minimum term of 10 years for industrial designs.
170. We do not consider it necessary to look at the general term of copyright in this review given the extensive public debate that has already occurred and the body of evidence and economic analysis we have studied on the subject. For the reasons given to the Foreign Affairs, Defence and Trade Select Committee on the *Trans-Pacific Partnership Agreement Amendment Bill*,⁷⁵ we do not consider that extending the copyright term would bring net benefits to New Zealand. We would need to become aware of compelling evidence to the contrary to have us reconsider this position.
171. We are aware that many people consider that reducing the copyright term would bring benefits to New Zealand. However, this could not be done without breaching New Zealand's international obligations under the TRIPS Agreement and the Berne Convention.⁷⁶
172. We do, however, want your views on the copyright term for Crown copyright,⁷⁷ broadcasts and certain unpublished works.

Copyright term for broadcasts

173. The copyright term for broadcasts (referred to as 'communication works' in the Copyright Act) is 50 years from the date that the communication work was first communicated to the

⁷⁴ The term of copyright is explained in paragraph 50.

⁷⁵ See paragraphs 32-70 of the Departmental Report for the Foreign Affairs, Defence and Trade Committee on the Trans-Pacific Partnership Agreement Amendment Bill at www.parliament.nz/en/pb/sc/submissions-and-advice/document/51SCFDT_ADV_00DBHOH_BILL68998_1_A531537/departamental-report.

⁷⁶ The Berne Convention requires a term of life of the author plus 50 years, or, for cinematographic works, fifty years after the work was made available to the public with the author's consent. The TRIPS Agreement requires the same terms, and also requires the copyright term for sound recordings to be fifty years from the date the recording was made.

⁷⁷ Crown copyright is discussed above in paragraph 159.

public. This is longer than the minimum requirement in the TRIPS Agreement, which is 20 years.

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?

Copyright term for certain unpublished works

174. Section 117 of the Copyright Act applies to an unpublished literary, dramatic or musical work, or an artistic work other than a photograph and the copyright owner transfers or bequeaths the work to an institution⁷⁸ subject to a condition restricting or regulating the publication of the work for an indefinite period.

175. In these circumstances, publication of the work in breach of the condition by the institution owning or possessing the work, or by any other person is treated as if it were copyright infringement even if copyright in the work had expired. This effectively gives unpublished works of the type referred to in section 117 an indefinite copyright term.

14

Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?

Section 2 – What actions does copyright reserve for copyright owners?

176. This Section examines the exclusive rights given to owners of copyright works and the various ways those rights may be infringed. Enforcement of these rights through the civil or criminal law is discussed in Part 7.

Exclusive rights and primary infringement

177. The Copyright Act gives copyright owners exclusive rights over their copyright works. These enable the copyright owner to prevent other people from doing the following acts:⁷⁹

- copying⁸⁰ the work
- issuing copies of the work to the public, whether by sale or otherwise⁸¹
- performing the work in public
- playing the work in public

⁷⁸ In this context, institution means the Crown, a local body, a prescribed library or archive, an educational institution or any other institution prescribed in the regulations (s117(4)).

⁷⁹ See section 16 of the Copyright Act which sets out the acts restricted by copyright.

⁸⁰ See section 2 of the Act for a definition of "copying".

⁸¹ See section 9 of the Copyright Act for a definition of "issue to the public"

- showing the work in public
- communicating the work to the public⁸²
- making an adaptation of the work⁸³
- doing any of the acts referred to above in relation to an adaptation of the work
- authorising another person to do any of the acts referred to above.

178. If a person does any of these things (referred to as ‘**restricted acts**’) the person will infringe copyright unless they have the copyright owner’s permission or one of the exceptions of the Copyright Act set out in Part 3 apply⁸⁴. This is called ‘**primary infringement**’.

179. The doing of a restricted act is infringement even if done indirectly. For example, making copies of a product may infringe copyright in the drawings used in the manufacture of the product, even if the infringer had not seen those drawings.⁸⁵

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?

Secondary infringement

180. In contrast with primary infringement, a person can infringe copyright even if they do not do one of the restricted acts. This is called ‘**secondary infringement**’ and seeks to prevent people from facilitating primary infringement or dealing with infringing copies or infringing performances.⁸⁶ Acts that constitute secondary infringement include:⁸⁷

- importing an infringing copy other than for private and domestic use (eg importing and selling pirated DVDs)
- possessing, selling, hiring or distributing an infringing copy in the course of business (eg making infringing copies of a DVD and selling them)
- making, importing or dealing with in the course of business an object specifically designed or adapted to make infringing copies
- permitting a place of public entertainment to be used for an infringing performance
- supplying or permitting an apparatus to be used to perform, play or show a work in public in a way that infringes copyright, or supplying a copy of the sound recording or film played or shown using the apparatus.

181. Secondary copyright infringement generally requires that the person knows, or has reason to believe, that the copies or performances involved are infringing copies or performances.

16

Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?

⁸² See section 2 of the Copyright Act for a definition of “communicate”.

⁸³ See section 2 of the Copyright Act for a definition of “adaptation”.

⁸⁴ See Part 5 of this paper for a discussion of the exceptions.

⁸⁵ See, for example, *Wham-O MFG Co v Lincoln Industries* [1984] 1 NZLR 641.

⁸⁶ A object is an infringing copy if its making constituted copyright infringement.

⁸⁷ See section 35 to 39 of the Copyright Act.

Authorisation as infringement

182. One of the exclusive rights of copyright owners is the right to authorise other people to do one of the restricted acts.⁸⁸ If a person A authorises another person B to do one of the restricted acts, and A does not have the copyright owner's permission, A is infringing copyright (and B will be too if B actually does the restricted act).
183. The Copyright Act does not define what constitutes authorisation – the issue has largely been left to the courts. The few relevant court decisions have mostly dealt with situations where businesses provide their customers with the means⁸⁹ to make copies of copyright works in circumstances where the businesses would have known that some of their customers would use the means to make infringing copies. In these cases copyright owners argued that the defendants had 'authorised' the making of infringing copies.
184. While there have been some New Zealand court decisions relating to authorisation in the copyright context, they have involved the making of physical copies of works protected by copyright. There have been no cases on what might constitute authorisation in the digital environment. This may lead to uncertainty as to which activities constitute 'authorisation' and therefore require the copyright owner's permission.
185. An example where this has become an issue is with the providing of links to infringing content on the internet.

Linking to infringing content

186. One example of linking to infringing content is where a website (W) provides links to infringing content on other websites but website W does not host the infringing content itself. When people who visit website W are directed to the other websites they can then download the infringing content there. When they download the content they will be making infringing copies on their devices and so will be infringing copyright.
187. Website W does not host any content itself so does not make or distribute infringing copies. In this case it is unclear whether website W is 'authorising' others to do a restricted act by providing the links.
188. Internet search engines can also provide links to infringing content. The algorithms that search engines use often do not distinguish between infringing and non-infringing content hosted on websites.
189. There appear to be no New Zealand cases on linking, but the Federal Court of Australia has held that providing links to infringing material can constitute 'authorisation'.⁹⁰

⁸⁸ See section 16(1)(f) of the Copyright Act.

⁸⁹ One case involved the supply of photocopiers (*University of New South Wales v Moorhouse* (1974-1975) 133 CLR 1); the other involved cassette tape decks that allowed cassettes to be copied (*CBS Songs v Amstrad Consumer Electronics Plc* [1988] 1 AC 103 (HL)). In both of these cases, it was found that there was no authorisation, as the alleged authorisers did not have any direct control over how the copying means would be used. Merely making available the means for making copies (or performing any of the other restricted acts) without more, is not 'authorisation'.

⁹⁰ See *Universal Music Australia Pty Ltd v Cooper* [2005] FCS 972.

190. One problem in relation to websites that link to infringing material may be that often the websites are hosted outside of New Zealand. Infringing copyright in New Zealand requires infringing acts like authorisation to take place in New Zealand.⁹¹ Overseas-hosted websites that link to infringing content do not therefore infringe the copyright owner's authorisation right in New Zealand. This contrasts with the UK, where the 'authorisation' does not have to happen in the UK. The UK Court of Appeal has ruled that their authorisation right covers overseas authorisation, as long as the subsequent infringing act happened in the UK.
191. Websites linking to infringing material can be hosted by ISPs and other online platform providers. This raises a question as to what extent they might be considered to be authorising others to do a restricted act by hosting such websites.⁹²

17

What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?

Exhaustion of rights and parallel importing

192. One of the exclusive rights that copyright owners have is the right to issue their works to the public. However, once copies of a work have been issued to the public in New Zealand by or with the permission of the copyright owner, this right is 'exhausted'. This means, for example, if a person buys a book, or a CD, or DVD, that person does not need the copyright owner's permission to on-sell it.
193. This 'exhaustion' of the right to issue copies of a work to the public also applies where the copies are placed on the market in another country with the explicit or implicit permission of the copyright owner.⁹³ These copies can be imported into New Zealand and issued to the public without infringing copyright.⁹⁴ These imported copies are commonly referred to as 'parallel imports'.
194. New Zealand has a longstanding policy of allowing parallel imports. The Government has commissioned a number of studies on the impact of the parallel importing policy on the economy. In 2012, the former Ministry of Economic Development commissioned Deloitte Access Economics to analyse the costs and benefits of allowing parallel imports of copyright works in New Zealand. The report updated previous studies commissioned by the Ministry on parallel importing and concluded that allowing parallel importing continued to be beneficial to the New Zealand economy.⁹⁵

⁹¹ See *Inverness Medical Innovations, Inc v MDS diagnostics Ltd* 93 IPR 14 at 250.

⁹² The issue of ISP liability is discussed in more detail from paragraph 414.

⁹³ A person may not, of course, import pirated copies of copyright works for resale in New Zealand. When someone parallel imports sound recordings, films or software for resale, section 35 requires the importer to be able to prove that the copies are not infringing copies.

⁹⁴ See section 12(5A) of the Copyright Act

⁹⁵ The report can be found at <http://www.mbie.govt.nz/info-services/business/intellectual-property/parallel-importing-in-new-zealand/documents-and-images/costs-benefits-preventing-parallel-imports-into-NZ.pdf>

Section 3 – Specific issues with the current rights

Communication to the public and communication works

The right of communication to the public

195. A number of changes were made to the Copyright Act in 2008 to ensure that the Act reflected new technological developments. One of the amendments was the introduction of a right of communication to the public.⁹⁶ ‘Communicate’ is defined as:⁹⁷

transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system, and communication has a corresponding meaning.

196. The communication right replaced references to transmission by traditional broadcasting methods. The new term ‘communication to the public’ was intended to:

- clarify that broadcasting over the internet and making content like television programs, podcasts, movies and sound recordings available on the internet were captured
- be technologically neutral in the sense that it would encompass how content might be distributed in the future.

197. The intention behind making the definition of the communication right technologically neutral was to ensure that the definition would cover future technological developments. By doing this the law would not need to be frequently updated as new ways of distributing content were developed.

198. One problem with this approach is that it is not possible to foresee the future, particularly in relation to disruptive technologies such as the internet. Even if laws are designed to be technologically neutral, therefore, they should still be reviewed regularly.

199. Laws that are technology neutral may not necessarily be ‘fair’, and may end up discriminating between technologies based only on technological differences. This is because they may not take account of fundamental differences between technologies. For example, the communication right is intended to cover both traditional broadcasting and technologies like streaming video on demand. But these are very different technologies, and a technologically neutral definition may not be the best approach.

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?

⁹⁶ See section 16(1)(f) of the Copyright Act. Introducing the right was also intended to enable New Zealand to accede to the WCT. New Zealand is obliged to accede to the WCT as part of its CPTPP commitments.

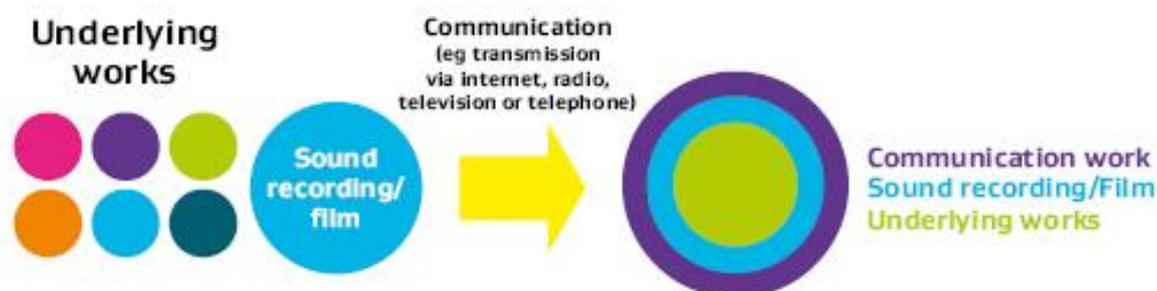
⁹⁷ See section 2 of the Copyright Act.

Communication works

200. The 2008 amendments to the Copyright Act also created a new type of copyright work: a communication work. It is defined as:

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.

Figure 3: Composition of a communication work



201. References in the Act to 'broadcasting' and 'cable programmes' were replaced with references to 'communication works'. Similar to the new communication right, the new terminology was intended to incorporate transmission of copyright works online⁹⁸ and be technologically neutral to take account of future technological advances.
202. New Zealand is the only country that protects transmissions in general as a category of work in their own right. Many other countries⁹⁹ treat over-the-air broadcasts as copyright works but this does not usually extend to broadcasting over the Internet.
203. A communication work is a transmission of content. It gives the transmitter (eg broadcaster) rights in the transmitted content. Often the transmitted content is protected by copyright, like a movie. Sometimes it is not (eg a live rugby game).
204. The concept of 'communication work' is different to the 'right to communicate a work to the public'.¹⁰⁰ The concept of communication work effectively gives the person transmitting the communication work rights over the communication itself, even though they may not own the copyright in all of the underlying works incorporated in the communication work.

Potential Issues with the definition of communication work

Definition of 'the public'

205. In order for a transmission to qualify as a communication work, it must be for reception by members of the public. 'On-demand' content is streamed on request to an individual viewer or household. We have heard that there is uncertainty over whether the viewer or

⁹⁸ The original use of "broadcasts" and "cable programmes" created a distinction between wired or wireless methods of transmission. This fitted uncomfortably with changes (consider viewing a programme online: it may come by wire to a router, but then be delivered to your device by Wi-Fi).

⁹⁹ Particularly countries that are members of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention). New Zealand is not a member of the Rome Convention.

¹⁰⁰ See previous section.

household constitutes the 'public'. If it does not, then the stream of content may not qualify as a communication work, and not be eligible for copyright protection (although the content will still be protected by copyright).

Re-transmission

206. Many entities provide Wi-Fi services to their employees or customers. If a Wi-Fi user receives a communication work, then the work is taken from the Internet and re-transmitted by the Wi-Fi service. This re-transmission will usually be made without the explicit permission of the copyright owner, so does it infringe copyright in the communication work?
207. A Wi-Fi service may be intended to serve only a particular group of people, for example guests in a hotel. However, the Wi-Fi signals may be receivable by persons outside the hotel. This may mean that those persons may receive transmissions that are not intended for them. For example, a hotel may subscribe to a streaming video on demand service intended for its guests. If the hotel's Wi-Fi transmissions can be received by people who are not guests, does this infringe the copyright in the communication work?

19

What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?

How should digital content be treated?

Use of the term 'object' in the Copyright Act

208. One of the central concepts used in the Copyright Act is 'infringing copy'. The term 'infringing copy' is defined in section 12 of the Copyright Act. This definition refers to 'an object that is an infringing copy'. That is, an infringing copy is defined as a copy that is, or is embodied in, an object. The term 'object' in this context is not defined in the Copyright Act.
209. When the Act was amended in 2008, steps were taken to ensure that 'copying' (and therefore copies) was defined in broad and technologically neutral terms. It was made clear that reproducing, recordings and storing a work in any material form 'including any digital format' was an act of copying.¹⁰¹ The Act defines 'copy' and 'copies' as having corresponding meanings to 'copying'.
210. At the same time provisions were inserted into the Act to clarify when ISPs, whose services are used to distribute and store with copies in digital format, would be liable for copyright infringement.
211. The Act, especially in relation to defining infringement of copyright (eg sections 12 and 35), refers to an 'object' without explicitly defining the term. For example, section 12 provides that an 'object' is an infringing copy if its making constitutes an infringement of copyright in the work in question. Section 35 provides that a person infringes copyright in a work by, for example, importing an 'object that is an infringing copy'. When the term 'object' is read in isolation, the use of the term 'object' may create an impression that the Copyright Act only

¹⁰¹ Section 2 of the Copyright Act and the definition of 'copying', 'copy' and 'copies'.

protects copies in a some tangible form or physical objects embodying a copy, such as a book or CD.

212. To avoid the risk of confusion, it may be time to consider whether the term ‘object’ should be replaced by language that removes any suggestion that some copies do not infringe copyright merely because of the format or medium in which they exist or the way they are accessed.

20

What are the problems (or benefits) with using ‘object’ in the Copyright Act? What changes (if any) should be considered?

Implications of Dixon v R in the copyright context

213. A Supreme Court Decision¹⁰² has raised questions about the interface between the *Crimes Act 1961* and the Copyright Act 1994. The decision concerned an incident where a person gained unauthorised access to a computer system and copied digital files on that system onto a USB memory stick. The person then deleted the files from the computer system.
214. Dixon was charged and convicted under s249(1)(a) of the *Crimes Act 1961*. Section 249(1)(a) provides that a person commits an offence if he or she “*directly or indirectly, accesses any computer system and thereby, dishonestly or by deception, and without claim of right ... obtains any property, privilege, service, pecuniary advantage, benefit, or valuable consideration*”.
215. Dixon appealed his conviction on the basis that digital data is not ‘property’ as defined in s2 of the *Crimes Act*. The Court of Appeal agreed but substituted the conviction with one for dishonestly obtaining a ‘benefit’ under the same subsection.
216. Dixon then further appealed to the Supreme Court, which overturned the Court of Appeal’s decision and reinstated the original conviction. The Court held that the *Crimes Act* definition of ‘property’ does indeed extend to digital data.

Why might this be an issue?

217. The effect of the Supreme Court’s decision is that digital files can be treated as property for the purposes of section 249(1)(a) of the *Crimes Act 1961*. This may have the effect of providing property rights over the information contained in digital files in some circumstances. The Supreme Court was, however, careful to emphasise that its ruling that digital data could be property applies only for the specific provision in the *Crimes Act* under which the case was decided, and that context was critical to the decision.
218. This raises some questions. For example, providing a property right over information itself may run counter to the approach taken in the Copyright Act (and in most other jurisdictions) that copyright only gives rights to the way in which information is expressed rather than the information itself.¹⁰³ This is particularly important today given that much information is now only readily available in digital files.

¹⁰² Dixon v R [2015] NZSC 147

¹⁰³ See discussion on idea vs expression in paragraph 124.

21

Do you have any concerns about the implications of the Supreme Court's decision in *Dixon v R*? Please explain.

User-generated content

219. There has been a proliferation of user-generated content in recent years. User-generated content is content often created by non-professionals with low levels of investment with the intent to share it on social media platforms for the enjoyment of others. The content will usually be made available for free, and the creators will usually not expect to make any money from it.
220. User-generated content can be heavily inspired by existing content. Examples include memes, fan fiction, blogs and mash-ups. User-generated content can qualify for copyright protection.

22

What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?

Renunciation of rights

221. Copyright arises automatically when an original work is created. But there are some works where the creator wants to renounce their rights in the work. In these cases the creator did not create the work in the expectation of commercial gain, and wants anyone to be able to use or copy the work. Often these creators will indicate in their work that it is free for anyone to use, for example by including a statement in the work that the creator 'dedicates' it to the public domain.
222. There is currently no mechanism in the Copyright Act that allows creators or copyright owners to renounce all of their rights in a work. Section 107 of the Act allows authors to waive their moral rights but none of the other rights conferred by the Act can be waived.
223. Creators or copyright owners wishing to renounce all of their rights could use the Creative Commons (CC0) 'No Rights Reserved' license.¹⁰⁴ However, such licences can be revoked. For example if an author has made her works available on a CC0 license, the descendants of the author could revoke the licence after the author had died.

23

What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?

Other issues

224. We would like to hear if there are any other concerns related to the scope of the exclusive rights and their infringement.

¹⁰⁴ See <https://creativecommons.org/share-your-work/public-domain/cc0/>

Section 4 – Moral rights, performers’ rights and technological protection measures

225. The Copyright Act provides rights to people in addition to the core copyright protections described in Sections 1 and 2. This Section focuses on some of these additional rights: moral rights, performers’ rights and technological protection measures.

Moral rights

226. Moral rights are a set of rights given to creators that are independent of the rights given to authors under copyright. They were originally granted on the basis that creative works were an extension of their creator’s personality. Their main focus has traditionally been to protect the personal reputation of creators.

Current situation

227. The Copyright Act gives authors and movie directors¹⁰⁵ the following moral rights:
- the right to be identified as the author or director of their work (right of attribution)
 - the right to object to derogatory treatment of their work
 - the right not to have a work falsely attributed to them.
228. The Act also gives people who commission a film or photograph the right not to have it shared or communicated to the public.
229. Moral rights generally expire when copyright in the relevant work expires¹⁰⁶ and are not transferrable other than to the author’s estate upon their death (for example by will).

The right of attribution and the right to object to derogatory treatment

230. The Copyright Act gives to authors of literary, dramatic, musical or artistic copyright works the right to be identified as the author or director of films. It also gives them the right to object to any addition to, deletion from, alteration to, or adaptation of their work if it would be prejudicial to their honour or reputation. There is a relationship between the right to object to derogatory treatment and freedom of expression that would need to be carefully

¹⁰⁵ Moral rights are given to authors of all works other than films (as defined by section 5 of the Act). For films, moral rights are given to the film’s director rather than its author.

¹⁰⁶ An exception is the right not to have work falsely attributed, which is not tied to a single work. It expires 20 years after the person who holds the right dies.

considered. When, for example, would adaption of a work for the purpose of parody amount to derogatory treatment?¹⁰⁷

231. The rights apply in specified circumstances, essentially when the work is put into circulation or dealt with commercially.¹⁰⁸ The right of attribution must be asserted in writing by the author or director before it is effective.

The right not to have a work falsely attributed or represented

232. The Copyright Act gives people the right not to have a literary, dramatic, musical or artistic work falsely attributed to them as the author of it or as the author of a work it was adapted from. It also gives people the right not to have a film falsely attributed to them as the director.

The right not to have a film or photograph you have commissioned shared or communicated to the public

233. The Copyright Act gives a person who commissions a photograph or a film for private and domestic purposes the right not to have copies of the work issued to the public, exhibited or shown in public or communicated to the public.

Possible issues with moral rights

234. We have heard that moral rights are complex to understand and difficult to rely on in practice. As far as we are aware, moral rights have not been enforced in the courts.
235. We have also heard that moral rights are too limited. The derogatory treatment right is restricted to addition, deletion, alteration or adaptation of a work. Some people have suggested that the right should go further and, for example, cover culturally inappropriate uses.

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?

Performers' rights

236. Performers' rights are a set of rights given to performers including singers, actors and dancers. The rights usually apply when a recording of a performance is made, when a performance is communicated to the public (for example, when broadcast live) or when a recording of a performance is copied or used in specified ways.
237. There are three general categories of performers' rights:
- **The right to consent to recording or live communication:** This right enables performers to control whether their performances are recorded or communicated live to the public. The right is not considered a property right and cannot be transferred.
 - **Property rights in recorded performances:** These give performers the exclusive right

¹⁰⁷ Exceptions for uses that facilitate freedom of expression (eg parody and satire) are discussed in the next Part, from paragraph 307.

¹⁰⁸ Sections 94 and 99 of the Copyright Act.

to authorise specific acts in relation to recordings made from their performances.¹⁰⁹

- **Moral rights in performances:** These give performers moral rights in their performances, like the right to be identified as the performer and to object to derogatory treatment of their performance. Moral rights in performances can apply both to the performance itself and recordings made from a performance.¹¹⁰

Current situation

238. The Copyright Act currently provides a performer with the first category of performers' right: performers have the right not to have their performance recorded or communicated live to the public without their consent.
239. If a performer has not consented to the recording of their performance, the recording is an 'illicit recording'. A person infringes a performer's rights if they copy or otherwise deal with any illicit recording – for example, playing or showing it in public, communicating it to the public, importing it or commercially dealing with it.¹¹¹
240. The Copyright Act does not currently give performers property rights in recorded performances or moral rights in their performances.

Changes under CPTPP

241. CPTPP requires New Zealand to join the WIPO Performers and Phonograms Treaty (**WPPT**). The WPPT requires that performers be given certain moral and economic rights over recordings made from, and the broadcasting of, their live performances. The new economic rights apply only to sound recordings made from their performances – they are not given any economic rights in relation to the visual aspects of their performance (eg a recording of their performance on film).
242. CPTPP also requires that performers be able to transfer their economic rights by contract.
243. The *Trans-Pacific Partnership Agreement Act 2016 (TPP Act)*¹¹² already contains the changes required to join the WPPT and CPTPP. These changes will come into force on 30 December 2018, the date CPTPP enters into force for New Zealand.

26

What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?

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?

¹⁰⁹ These exclusive rights in performances recorded in sound recordings and films typically sit alongside the exclusive rights copyright owners have in those sound recordings and films.

¹¹⁰ See paragraphs 226 to 235 for more information on moral rights.

¹¹¹ See sections 172-174 of the Act.

¹¹² Note that the title of this Act was amended to the 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership Amendment Act 2018' by the Trans-Pacific Partnership Agreement (CPTPP) Amendment Act 2018, which was enacted on 25 October 2018 .

Technological protection measures

244. Technological Protection Measures (**TPMs**) are ‘digital locks’ that copyright holders use to stop their works being copied or accessed without their permission. There are two main types of TPMs:
- **TPMs that protect against copyright infringement (copy controls):** these prevent a person from infringing copyright in a work (for example by preventing a person from making a copy of it) but do not prevent a person from accessing the work to read, listen or watch it.
 - **TPMs that control access to copyright works (access controls):** these prevent unauthorised people from being able to access content to read, listen or watch it.
245. Examples of copy control TPMs include encryption measures that prevent you copying a movie or song, software locks that prevent you from making a copy of a computer programme, and functions that ‘lock’ documents to prevent them from being printed or ‘copy and pasted’.
246. Examples of access control TPMs include the technological measures an online news provider puts in place to enforce paywalls to access certain articles, regional locks that limit the availability of content to a specific geographic region (‘geo-segmentation’) and functions that ‘lock’ products or services to particular providers (eg technical measures that prevent people fixing cars unless they are authorised to access the software in a car).
247. TPMs can facilitate the development of online business models for the delivery of copyright works to consumers. They can also impede the reasonable use of copyright works by consumers and businesses.

Current situation

248. The definition of ‘TPM’ in the Copyright Act means that only copy control TPMs are protected.¹¹³ Access control TPMs are expressly excluded from the TPMs regime.
249. Section 226A of the Act prohibits a person from:¹¹⁴
- dealing in a TPM circumvention device¹¹⁵
 - providing a service intended to enable or assist a person to circumvent a TPM
 - publishing information that enables or assists another person to circumvent a TPM, if the person knows or has reason to believe that the device or service will be used to circumvent a TPM.¹¹⁶
250. The actual act of circumventing a TPM is not prohibited.

¹¹³ Section 226 of the Copyright Act defines a TPM to be “any process, treatment, mechanism, device, or system that in the normal course of its operation prevents or inhibits *the infringement of copyright* in a TPM work”.

¹¹⁴ MBIE is not aware of any prosecutions for contravening section 226A.

¹¹⁵ A TPM circumvention device is a device or means that is primarily designed or adapted to enable the circumvention of a TPM and has limited other commercial applications.

¹¹⁶ Section 226A of the Copyright Act prohibits making, importing, selling, distributing, letting for hire, offering or exposing for sale or hire, or advertising for sale or hire, a TPM circumvention device.

TPMs exceptions and limitations

251. There are certain exceptions to the TPMs prohibitions. For example, people may provide a TPM circumvention device to a 'qualified person'. Qualified persons are certain librarians,¹¹⁷ archivists or an educational establishment.¹¹⁸ A user of a copyright work who wishes to make use of a copyright exception may also ask a qualified person to assist them to circumvent a TPM but only if the copyright owner or exclusive licensee has refused to assist the user to circumvent the TPM, or failed to respond to a request for assistance within a reasonable time.¹¹⁹
252. Any person may use a TPM circumvention device to circumvent a TPM to make use of one of the exceptions in Part 3 of the Act. If a person circumvents a TPM for other purposes, for example to make a copy of a TPM protected work for distribution to others without the copyright owner's permission, this would infringe copyright in the work.

Other protection for TPMs

253. TPMs are also protected under sections 248 to 252 of the *Crimes Act 1961* but the nature and scope of that protection is outside the scope of this review.¹²⁰

TPP changes to TPMs regime not to come into effect

254. TPP obligations on TPMs included extending the regime to access control TPMs and giving stronger rights to copyright owners. The changes were included in the TPP Act but, as these obligations were suspended under CPTPP, they will not be brought into force.

Testing the TPMs regime

255. Some people have told us that the regime does not provide enough protection for distributing copyright works in the digital environment. Others have told us that digital markets appear to be developing adequately with the current TPMs regime so no change is required.
256. We have also heard that the TPMs regime is overly restrictive for users of copyright works and that the qualified person regime is impractical and underutilised.

28

What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?

29

Is it clear what the TPMs regime allows and what it does not allow? Why/why not?

¹¹⁷ Librarians of the National Library, the Parliamentary library, law libraries and libraries maintained by educational establishments, government departments and local authorities, libraries that are members of the interloan scheme and libraries of Crown entities.

¹¹⁸ Section 226D of the Copyright Act.

¹¹⁹ Section 226E of the Copyright Act.

¹²⁰ For example, it is an offence to access a computer system for a dishonest purpose or without authorisation (which could include circumventing a TPM). It is also an offence to distribute software (for example, a TPM circumvention device) or aid another person to commit such an offence.

Part 5 – Exceptions and Limitations

Introduction

257. Copyright law provides a number of ‘exceptions’ to copyright infringement to allow desirable and appropriate use and access to creative works. These are acts that the Copyright Act expressly permits someone to perform in certain circumstances, which would otherwise require authorisation from the copyright owner. These permitted acts are sometimes referred to as ‘fair dealing’.
258. The Copyright Act has three main types of exceptions:
- Exceptions for particular **uses** – anyone can rely on these exceptions for the described purpose (eg a ‘fair dealing’ with a copyright work for the purpose of criticism, review or news reporting).
 - Exceptions for particular **users** – these exceptions can be used only by a particular class or group of people or organisations (eg educational institutions and teachers can use the education exceptions for certain educational purposes).
 - Exceptions for particular **works** – these exceptions allow particular activities in relation to certain copyright works (eg exceptions to allow format shifting of sound recordings in certain circumstances).
259. The copyright regime also has a number of ‘limitations’. These provisions limit liability for copyright infringement under certain circumstances. For example:
- Internet service providers are not liable for copyright infringements that occur over their networks or platforms by their subscribers if certain conditions are met.
 - Employees of the Crown who infringe copyright with the authority of the Crown are not personally liable (liability lies with the Crown).

International obligations and the framework for exceptions and limitations

260. New Zealand has flexibility to decide if a particular exception or limitation is to be applied and can determine how to implement it, so long as it falls within a framework known as the ‘three step test’.¹²¹ This test requires that exceptions and limitations 1) be confined to certain special cases, 2) do not conflict with a normal exploitation of the work and 3) do not unreasonably prejudice the legitimate interests of the rightsholder. This can be achieved in a number of ways, including restrictions on:
- the purpose of the copying (eg only for personal use, or non-commercial use)
 - the amount that may be copied or the number of copies that can be made
 - who may carry out the copying (eg only a librarian employed in a prescribed library).

¹²¹ Article 13 of the TRIPS Agreement.

Fair use and permitted acts

261. The Copyright Act, like the copyright regimes of comparable jurisdictions such as Australia and the UK, take a closed approach to providing copyright exceptions (sometimes referred to as ‘fair dealing’). The Act seeks to exhaustively describe specific scenarios in which people can do things normally reserved for the copyright owner. Any action not specifically identified by our exceptions regime as a permitted act infringes copyright (if undertaken without the authority of the copyright owner).
262. In contrast, a small number of countries have introduced a ‘fair use’ doctrine, modelled on US copyright law.¹²² Fair use involves the courts applying four general principles that look at:
- the purpose and character of the use
 - the nature of the work
 - the amount and substantiality of the portion copied
 - effect of the use on the potential market or value of the work.
263. The main difference between the two approaches is that fair use is not limited to a particular use or purpose.
264. We have heard that incorporating a fair use exceptions regime into New Zealand law would:
- provide a more flexible exceptions regime that would better respond to a rapidly changing technological environment
 - reduce the need for a long list of specific, technologically-bound exceptions that can be hard to navigate and impede innovation and creativity
 - be consistent with the intent of the copyright system to encourage creativity that adds to the range of works available to the public
 - allow people to use copyright material in ways that do not harm the interests of copyright owners without fear of litigation.
265. Critics of fair use tend to say that:
- it does not lead to the development of clear, bright line rules because the courts must determine whether a use is fair on a case-by-case basis, and the outcome of any given case depends on a fact-specific inquiry
 - the requirement to go to court to determine whether fair use applies may mean the doctrine only gets used by large corporations
 - users frequently misunderstand the fair use doctrine as meaning ‘free use’, adding costs to the system to educate users about when the fair use exception might apply to a particular use
 - there is no evidence that fair use on its own stimulates innovation and creativity
 - fair use may make it harder for copyright owners to prove infringement as they must establish that the alleged infringing use was not fair use.
266. Although the main focus of this Issues Paper is to identify problems with the Copyright Act as it currently is, we have included a discussion on adopting a fair use exception because there

¹²² See section 107 of the US Copyright Act.

has been a lot of debate about whether New Zealand should incorporate a fair use exception in our copyright law.

267. However, we need a much better understanding of the problems with the current exceptions regime before we consider alternative options. Understanding these problems properly will enable us to determine whether adopting a fair use exception – or some alternative course – would be the best way of addressing them. 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.
268. There will be an opportunity to provide your views on specific changes to the Copyright Act in later stages of the review.

How we have arranged the rest of this Part

269. The issues in this part are grouped under the following topics:
- Section 1 – Exceptions that facilitate particular desirable uses
 - Section 2 – Libraries and archives exceptions
 - Section 3 – Education exceptions
 - Section 4 – Exceptions relating to particular works
 - Section 5 – Contracting out of the exceptions
 - Section 6 – Limitations on ISP liability.

Section 1 – Exceptions that facilitate particular desirable uses

Introduction

270. It is important to ensure that the default rule (do not copy or distribute without permission of the copyright owner) does not apply in situations where there may be little, if any, policy rationale for requiring permission. Currently the Copyright Act includes a range of exceptions to facilitate particular desirable uses:
- Use of a work for the purpose of criticism, review and news reporting (which support freedom of communication and expression), or research and private study (which supports the pursuit of knowledge). What is ‘fair’ in these circumstances will depend on the particular facts of the case.
 - Transient and incidental copying exceptions allow copying to facilitate the basic functionality of new technology and ensure copyright is not a barrier to common technological processes or everyday activities.
271. In this section we look at these exceptions, test whether there are possible issues and consider whether there are other desirable uses that may not be covered by these exceptions.

Exceptions for criticism, review, news reporting and research or study

Current situation

272. Sections 42 and 43 of the Copyright Act permit ‘fair dealing’ with a copyright work for the purposes of criticism, review, news reporting, research or private study does not infringe copyright in the work.
273. There is a lack of binding precedent available to guide courts as to what amounts to ‘fair dealing’ in these circumstances, as there have been very few court cases in New Zealand.¹²³ Only one of the fair dealing exceptions sets out the factors a court must consider when determining whether there has been fair dealing.¹²⁴ Whether a particular use of a work falls within one of the exceptions is always a matter of fact, degree and interpretation.
274. The table below provides a summary of the current situation with examples of activities that may be considered to fall within the scope of these exceptions, the legislative guidance and the main precedents.

¹²³ The main (non-interlocutory) case for which we do have a New Zealand court judgment on fair dealing is *Copyright Licensing Ltd v University of Auckland* [2002] 3 NZLR 76 (HC), concerning the copying of copyright works by universities for distribution to students. Courts may have regard to international cases on this point, but they do not provide binding precedent.

¹²⁴ Section 43(3) of the Copyright Act.

Table.6: Fair dealing provisions

| Purpose | Example | Legislative guidance as to what is a fair dealing | How has it been interpreted? |
|---|---|--|--|
| Research or private study (s43) | Academic research; research by a company; study of a subject by a student. | Yes, a court must have regard to the: <ul style="list-style-type: none"> ○ purpose of the copying ○ nature of the work copied ○ commercial availability ○ effect of the copying on the work's potential market, or value ○ if part of a work is copied, the amount and substantiality of that part in relation to the whole work. | <ul style="list-style-type: none"> ○ Research is the searching into a matter or close study of it and can have a commercial purpose. Private study is a form of study which is personal to the person undertaking it.¹²⁵ ○ Has been held not to apply to a lecturer making copies for students because the purpose must be that of the person 'doing the copying'. In this case, the lecturer's purpose for copying was providing source materials to students rather than research or private study.¹²⁶ |
| Criticism or review (s42(1)) | A movie blog that rates films and, to do so, quotes lines from a film's script or includes screenshots of a film's characters. | No guidance but to qualify as a fair dealing the use must be accompanied by a sufficient acknowledgement. | <ul style="list-style-type: none"> ○ 'Criticism' and 'review' should be given their ordinary meaning.¹²⁷ ○ Has been held not to apply to a lecturer making copies for students because the purpose must be that of the person 'doing the copying'. In this case, the lecturer's purpose for copying was providing source materials to students rather than criticism or review.¹²⁸ |
| Reporting current events (s 42(2) and (3)) | A TV news programme showing a brief clip from another channel's broadcast of a sports event. A newspaper including quotes from a TV channel's interview with a politician. | No guidance where reporting is done 'by means of a sound recording, film, or communication work'. No guidance where reporting is effected by any other means (e.g a literary work) but the use must be accompanied by a sufficient acknowledgement. Photographs are expressly excluded from the exception. | <ul style="list-style-type: none"> ○ The material copied need not be current provided it is properly used to report current events.¹²⁹ ○ Both the length and level of repetition of clips appears to be relevant.¹³⁰ ○ Use in sports magazine programmes is likely to be entertainment, rather than reporting current events.¹³¹ |

¹²⁵ The meaning of "research or private study" was considered in relation to the equivalent of section 43 in the Copyright Act 1962 (section 19(1)) in *TVNZ v Newsmonitor Services* [1994] 2 NZLR 91 (HC) at 105 et seq. This interpretation was confirmed in *Copyright Licensing Ltd v University of Auckland* [2002] 3 NZLR 76 (HC)

¹²⁶ *Copyright Licensing Ltd v University of Auckland* [2002] 3 NZLR 76 (HC)

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Ibid., at para 39

¹³⁰ *Mediaworks v Sky* CIV 2007-404-5674, in an interlocutory judgment dated 18 September 2007, at para 74 the judge noted that while the length of the clips used was not excessive, weight should also be placed on the repetition of the clips during the day.

¹³¹ Ibid at para 140. Using the standard of proof required in interlocutory proceedings, the judge held that TV3 had a 'very strong case' that the use of World Cup clips in 'sports magazine' programmes like *The Crowd Goes Wild* was not a use of a work "for the purpose of reporting current events". Rather, this equated to the use of a work for the purpose of entertainment.

Potential issues with these exceptions

Is it clear when an exception can be relied upon?

275. We have heard that for some stakeholders the lack of certainty resulting from these exceptions creates a chilling effect on the use, adaptation and consumption of copyright works.
276. We have also heard complaints about people using these exceptions principally in pursuit of a commercial outcome, rather than in pursuit of knowledge for which they are intended. Examples of this are:
- copying works for research with a commercial end in mind
 - recording and making available online snippets of pay-to-view broadcasts of live sports events from licensed distributors primarily for purpose of attracting viewers and, therefore, increasing advertising income.

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 to making use of this exception?

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?

Should photographs be excluded from fair dealing for the purpose of reporting current events?

277. Section 42(3) of the Copyright Act provides an exception for news reporting with any work, except photographs. We have heard concerns about the different treatment of photographs compared to video clips of events. It has been suggested that the distinction no longer makes sense with the way news is reported now.

32

What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?

Is it clear what qualifies as a 'current event' and who can report on them?

278. While reporting of current events may be something that is done in the 'news media', the definition of 'news media' (and its contributors) may vary over time. The notion of what is, and who are, the 'news media' and the distinction between news and entertainment may be changing with events increasingly being announced, noted and critiqued in online social media (such as Twitter and Facebook). In the English case of *Tixdaq*,¹³² for example, the defendants operated a website and app with which users (ordinary cricket fans) could upload short clips of cricket matches they had captured from television broadcasts. The judge concluded that the relevant provisions are not restricted to traditional media and that

¹³² *England & Wales Cricket Board v Tixdaq* [2016] EWHC 575. Sections 42(2) and (3) of our Copyright Act relating to reporting current events use similar wording to section 30(2) of the UK's Copyright, Designs and Patents Act, making English court cases relevant to their interpretation.

‘citizen journalism’ can qualify as reporting current events. This means that if a member of the public captures images and/or sound of a newsworthy event using their mobile phone and uploads it to a social media site like Twitter, they may qualify as reporting current events even if it is accompanied by relatively little in the way of commentary.¹³³

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?

Exception for making copies for persons with a print disability

279. Section 69 of the Act provides an exception to copyright which allows bodies prescribed in the regulations to make or communicate copies of literary or dramatic works that are modified to be accessible to persons with a print disability.
280. A Bill amending section 69 will shortly be introduced to Parliament. The amendments will allow New Zealand to accede to the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*.¹³⁴

Transient and incidental exceptions

Current situation

281. The copyright regime provides exceptions for the inadvertent use of copyright works, ensuring that copyright protection does not impede everyday activities, including common technological processes. The exceptions include:
- ‘incidental copying’, eg coverage of an event that inadvertently captures the sound of a popular song being played in the background
 - ‘transient or incidental reproduction’, eg the copying of film by a DVD player makes during the process of playing the film.

Incidental copying

282. Section 41 provides that artistic works, sound recordings, films and communication works can contain incidental copies of works protected by copyright, and such copies do not infringe copyright.
283. The exception does not apply to copies of copyright work in literary, dramatic or musical work. This appears to be because copying effected by these types of works is likely to involve deliberate copying.
284. The term ‘incidental’ is not defined and its meaning has not been considered by the courts in New Zealand. Specifying the categories of works that can incorporate incidentally copied

¹³³ Ibid., at para 140

¹³⁴ See the section on “International Obligations” in Part 4 of this Issues Paper.

works, together with the ordinary meaning of incidental, suggests that incidental must be unintentional.

285. Although section 41 has equivalents in most comparable jurisdictions, including Canada (section 30.7 of the *Copyright Act 1985*), Australia (section 67 of the *Copyright Act 1968*), and the UK (section 31 of the *Copyright, Designs and Patents Act 1988*), their scope is not of the same breadth as section 41. For example, Australia only provides an exception for artistic works incidentally copied in films and television broadcasts. None of these provisions appear to have had significant judicial consideration.

34

What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?

Transient or incidental reproduction

286. Section 43A provides that:

A reproduction of a work does not infringe copyright in the work if the reproduction –

- (a) is transient or incidental; and
- (b) is an integral and essential part of a technological process for –
 - (i) making or receiving a communication that does not infringe copyright; or
 - (ii) enabling the lawful use of, or lawful dealing in, the work; and
- (c) has no independent economic significance

287. The exception was intended to be limited to the reproduction right for ‘transient’ copying of works in digital format made by devices or communication networks, like the internet, as a result of automatic or inevitable technical processes. These processes are generally designed to increase efficiency.¹³⁵ For example, transient copies of a film made by a device in order to play it.
288. Neither ‘transient’ nor ‘incidental’ is defined in the Act. Nor is ‘reproduction’, but it appears to be analogous to ‘copying’ since the definition of copying includes ‘reproduction’.
289. There has been little discussion of the precise meaning of section 43A. Commentators have described the provision as ‘limited’ because they do not capture technologies (like internet caching)¹³⁶ which may not be considered an integral and essential part of a technological process.¹³⁷

35

What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?

¹³⁵ See the Cabinet Paper which approved the provision for introduction to Parliament: “Paper considered by the Cabinet Economic Development Committee, ‘Digital Technology and the Copyright Act 1994: Policy Recommendations’, October 2002, published on former MED website June 2003, at para 18

¹³⁶ Internet caching is where frequently-accessed online content is stored to speed up the delivery of web content to end users.

¹³⁷ Frankel, S., ‘Intellectual Property Law in New Zealand’, 2nd edition, 2011, at para 5.11.2(a)

Are there other desirable uses that are not covered by these exceptions?

290. We have heard that there may be other desirable uses that are not specifically reflected in our exceptions regime. These include:
- uses to enable technological processes, like cloud computing
 - non-expressive uses, like data mining for the purposes of research or developing artificial intelligence
 - uses that facilitate freedom of expression, like parody and satire, social and political commentary or use of quotations in wider contexts than review and criticism.

Technological processes (cloud computing)

What is the cloud and how is it used

291. The ‘cloud’ refers to services that work via remote servers hosted on the internet, rather than a local server or personal computer. Both individuals and business can benefit from using cloud based services. These services include:
- cloud storage – this enables users to store copies of works on a remote server such that the works can be retrieved using different devices and locations, eg Dropbox
 - cloud backup – this enables users to back up to the cloud to protect against data loss arising from loss or damage to devices or by ransomware, eg iCloud
 - cloud compute – this enables users to access on-demand processing power and online services, eg Google Cloud and Xero cloud accounting.
292. These services allow users to do these activities online and without needing to use their own physical storage device (eg hard drive). However, they still run on physical computers and they rely on copying of information from a user’s computer or device to the remote server and back again.

Current situation

293. There are no current exceptions that specifically address the reasonable use of cloud services. When the copyright regime was last reviewed, the types of cloud services currently available did not exist.
294. The current exception for transient reproduction¹³⁸ is unlikely to cover cloud services, which involve making permanent copies that can be accessed by a user (and therefore have economic value).
295. The copyright regime also currently provides specific exceptions allowing copying on behalf of a user for backing-up computer programs (section 80) and format-shifting of sound recordings (section 81A).¹³⁹ The format-shifting exception, however, only applies to sound recordings and allows a shift in format (eg from a CD to storage on an MP3 player), rather than making further a copies of the recording for playing on the same device.

¹³⁸ See paras 285-288 on transient reproduction.

¹³⁹ A discussion on format shifting is at paragraphs 382 to 386.

36

What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?

37

Are there any other current or emerging technological processes we should be considering for the purposes of the review?

Non-expressive use of copyright works (data mining and the creation of artificial intelligence)

What is data mining and how is it used

296. Data mining involves using a computer programme to extract patterns from large datasets. Its use in commercial and non-commercial research is becoming increasingly common and the insights it can produce are valuable. Examples of such ‘copy-reliant technology’ include computer translation services like Google Translate (that copy millions of online translations) and plagiarism detection software (that copy millions of academic texts).
297. It has been suggested that the purpose of copying in data mining is ‘not to convey the work’s expressive qualities to the public, but rather to enable banks of microprocessors to index the context of those works and to generate metadata about the works’.¹⁴⁰ This means that the final product will not have any of the features of the original work.
298. One advanced application of data mining is artificial intelligence. Artificial intelligence can be created by mining thousands of data inputs (eg text, photos, musical compositions) in order to teach a programme to draw out patterns and insights. In doing so, the programme develops its own intuition which can then be applied to producing an output (this could include the creation of new copyright works). We understand that some programmes do this by utilising inputs they need to make temporary copies of them in the computer’s short term memory. Once the programmes have absorbed the lessons from the input they discard the copy from the computer’s short term memory.

Current situation

299. The Act does not include any specific exceptions to allow or facilitate data mining and the creation of artificial intelligence. However, the inputs, or works, that are mined for data (eg literary works, photos, and sound recordings) are often protected by copyright.¹⁴¹

Potential issues with data mining

300. We have heard that entities currently utilising data mining can either:
- get permission for the use of every input from every copyright owner (this is likely to result in limitations on the inputs that can be used, as well as being costly and time-consuming to obtain the necessary licences), or
 - rely on the exceptions for research and private study and transient reproduction.

¹⁴⁰ Sag, M., ‘Copyright and copy-reliant technology’, March 2008, p.19

¹⁴¹ Issues around the extent to which copyright protection applies to data and works generated (as opposed to mined) by artificial intelligence are discussed from paragraph 149 above.

301. 'Research' has been interpreted as meaning 'the searching into a matter or subject, or the investigation or close study of it'.¹⁴² Data mining could be described as a highly efficient, computerised research, for example to support a computer translation service and potentially falls within the research exception.
302. The use of 'research' in section 43 (unlike 'study') is not qualified by the word 'private' and opens the possibility that the exception extends to 'something done with a commercial end in view'.¹⁴³ This could mean businesses copying works in the course of a data-mining process could be protected to the same extent as persons undertaking non-commercial research.
303. Whether the transient or incidental reproduction exception in section 43A might apply depends in particular on how transient or incidental is interpreted and whether the copying is considered to be an integral and essential part of a technological process for enabling the lawful use or dealing in the work. This appears to turn on the question of whether copying for the purpose of data-mining is a lawful use or dealing in the work.

What do other jurisdictions do?

304. The United Kingdom introduced a specific data mining exception in 2014 that allows researchers to "make copies of any copyright material for the purpose of computational analysis if they already have the right to read the work (ie, they have 'lawful access' to the work). This exception only permits the making of copies for the purpose of text and data mining for non-commercial research."¹⁴⁴ A similarly limited exception is likely to be introduced soon in the European Union¹⁴⁵.
305. In Singapore, the Government has proposed introducing a general data mining exception that would allow data mining for both commercial and non-commercial purposes.¹⁴⁶ As with the UK and the EU, the person undertaking the data mining would need to have lawful access to the copyright-protected works.
306. In the United States' 'fair use' context,¹⁴⁷ the issue does not appear to be fully settled yet. However, it has been argued that "because the rights of the copyright owner are generally limited to a monopoly over the expressive aspects of their works, extending the rights of copyright owners to encompass non-expressive uses of their works by copy-reliant technologies would constitute a significant departure from existing copyright principle".¹⁴⁸

¹⁴² See *TVNZ v Newsmonitor Services* [1994] 2 NZLR 91 (HC) at 105 et seq, confirmed in *Copyright Licensing Ltd v University of Auckland* [2002] 3 NZLR 76 (HC)

¹⁴³ Blanchard J in *TVNZ Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91 (HC) at 105

¹⁴⁴ See UK Intellectual Property Office, 'Exceptions to Copyright: Research', October 2014, at p.6

¹⁴⁵ See Article 3 of the EU proposed Directive on Copyright in the Digital Single Market

¹⁴⁶ See 'Public Consultation on Changes to Singapore's Copyright Regime', August 2016, at para 3.64

¹⁴⁷ For a discussion of fair use exceptions used in some other countries see from paragraph 261.

¹⁴⁸ Sag, M., 'Copyright and copy-reliant technology', March 2008, p.52. See also the decision in *Authors Guild v HaithiTrust* 755 F.3d 87 (2d Cir. 2014)

Uses that facilitate freedom of expression (such as parody & satire)

Context – what does parody and satire involve?

307. Parody is generally understood as an imitation of the style of a particular writer, artist or genre with deliberate exaggeration for comic effect. Satire concerns the use of humour, irony, exaggeration or wit to expose, for example, corruption, stupidity or human vices. These forms of expression are generally acknowledged as a “culturally appropriate way to criticise the worth of a particular work, as well as criticising the philosophy behind a particular work and society in general”.¹⁴⁹ However, some parodies and satire may not be culturally appropriate and could cause offense to sections of the community, including Māori.

Current situation

308. Section 42(1) of the Copyright Act provides for ‘fair dealing with a work for the purposes of criticism or review’ which facilitates freedom of expression. The Act does not include any express exception for ‘freedom of expression’- type uses of copyright works, like parody and satire.

309. Currently, a person or entity wanting to use a copyright work to create a parody or satire for political comment would need to:

- gain permission for the use from the copyright owner, or
- rely on current exceptions for criticism, review or news reporting.

310. It may be costly or difficult to gain permission from the copyright owner, particularly if the purpose of the use is to poke fun at the copyright work itself or its author.

311. It is possible that certain instances of parody and satire could fall within the fair dealing exception for criticism and review. There is no New Zealand case law on this point. However in a Canadian case (prior to amendment in 2012 that introduced a parody exception), the Judge refused to read the word ‘criticism’ so widely as to include parody.¹⁵⁰

312. In addition, moral rights attached to the original work may also limit certain freedom of expression uses such as parody or satire, as it may amount to ‘derogatory’ treatment of the work.

How do comparable jurisdictions deal with freedom of expression uses?

313. A number of jurisdictions including Australia (since 2006),¹⁵¹ Canada (since 2012),¹⁵² UK (since 2014)¹⁵³, the US and several continental European countries have introduced or developed exceptions that allow for parody and satire.

314. Internationally there is no settled law or accepted definitions for parody and satire in relation to the use of copyright works.

¹⁴⁹ Frankel, S., ‘Intellectual Property Law in New Zealand’, 2nd edition, 2011, at para 6.7.3 (c).

¹⁵⁰ *Ce G nrale des Etablissements Michelin -Michelin & C" v. CAW Canada* (1996) 71 CPR (3d) 348 (FCTD)

¹⁵¹ See section 41A of Australia’s Copyright Act 1968.

¹⁵² See section 29 of Canada’s Copyright Act 1985. The *Copyright Modernization Act 2012* (Bill C -11) added an express provision allowing for parody and satire exceptions. However, it does not contain definitions for these exceptions.

¹⁵³ See section 30 A of United Kingdom’s Copyright, Designs and Patents Act 1988.

315. In Australia, there is no definition of parody or satire, nor a framework for testing whether a potentially infringing work qualifies and there has not been any judicial consideration of the exception.¹⁵⁴
316. The US fair use exception is generally interpreted to allow parody, satire and remix, including for commercial use.¹⁵⁵ The US Supreme Court has explained that fair use requires courts to avoid rigid application of the copyright statute when it would stifle the very creativity which that law is designed to foster. Parody, the court found, has a definite claim to transformative value and thus may advance the purposes of copyright law.
317. The Supreme Court drew a distinction between parody and satire by saying imitation is essential for parody, while satire is less dependent on the original. Parody therefore concentrates on aiming its critical point at the original, while the scope for satire is much wider, aiming to criticise or comment on contemporary customs or values.

Testing whether there are issues with facilitating freedom of expression

318. It is arguable that the ambiguity in this area is becoming more problematic as the ability to create and communicate parodies and satires grows exponentially. Meme-generators, and mash-up and remix apps, are readily available to New Zealanders through their home computers and mobile devices, and social media platforms allow just about anyone to post or re-tweet the resulting works.
319. Even if parody and satire are possible under current law, there are likely to be a number of considerations. For instance, fair dealing may be less likely to be found if the parody or satire was created for a commercial purpose rather than to critique the original work or some aspect of society. In this regard, one area of debate is 'adbusting', where the copyright holder is a business, the copyright work is an advertisement broadcast by the business, and the parody or satire of the advertisement is being used to criticise that business or point out errors or misrepresentations in its advertisement. Whether adbusting qualifies as 'fair dealing' would be a matter for the courts to determine on a case-by-case basis.

What about other social and political commentary?

320. We have heard that a related issue for some artists is the lack of any exception in the Copyright Act which would allow them a limited right to include someone else's copyright protected work if they are making a new work, and the inclusion of the copyright protected work is necessary as a social or political reference point (rather than being necessary for the purposes of parody or satire).

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?

¹⁵⁴ The original explanatory memorandum to the amendment further explains that this format benefits users by providing a flexible exception that allows the Act to respond better to rapidly changing technology through judicial consideration and application.

¹⁵⁵ In 1994, the United States Supreme Court held in *Campbell v Acuff-Rose Music, Inc.* that parody may be considered a fair use under section 107 of the 1976 Copyright Act, and that the commercial character of song parody alone does not create a presumption against a finding of fair use.

Use of quotations

321. Section 42 permits the use of quotations or extracts for the purpose of criticism and review, without requiring permission from copyright owners if it is accompanied by a sufficient acknowledgement. However, its use is restricted to a critical context, such as in a short quotation in an academic work.
322. The use of quotations is permitted under US and UK copyright law.¹⁵⁶ We have heard that presentations given in the US or the UK relying on fair use or the quotation exception cannot be subsequently shared with a New Zealand audience without editing out third party content to the detriment of the lecture.

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?

Section 2 – Exceptions for libraries and archives

Current situation

323. The Copyright Act provides a number of exceptions to facilitate the functions of not-for-profit libraries and archives. The purposes of these exceptions are to allow these libraries and archives to:
- supply copies of works to users for the purposes of research and private study
 - obtain copies of works from other libraries that they cannot otherwise obtain
 - copy works within their collections for preservation and replacement purposes
 - communicate works in digital form to authenticated users.¹⁵⁷
324. Libraries and archives use content themselves and facilitate its use by others. They collect, preserve and make available works for the public good, providing an important resource for creators.

The context for considering exceptions for libraries and archives

325. A number of trends are affecting the way libraries and archives are expected to operate. These include:
- the rapid shift to digital technology for storing and imparting information and knowledge
 - a growing demand for physical content in the collections of libraries and archives to

¹⁵⁶ Section 30 (1) (A) of *UK Copyrights, Designs and Patents 1988* and section 107 of the *US Copyright Act of 1976*.

¹⁵⁷ An authenticated user is a person who:

- has a legitimate right to use the services of the library or archive
- can access the work in digital form through a verification process that identifies the person as someone who entitled to access the work in digital form.

be digitised and made publicly accessible online

- a growing quantity of content that is being produced and published exclusively in digital format.

Possible issues with the exceptions for libraries and archives

326. We have heard that the exceptions for libraries and archives:

- are unclear and confusing to apply
- hinder, or do not facilitate, mass digitalisation projects
- do not allow copying for collection management purposes
- do not facilitate collecting and making available content ‘born’ digital
- cannot be used by museums and galleries.

Testing whether the exceptions are unclear and confusing to apply

327. Librarians have told us that the current library and archives exceptions are unclear and confusing to apply because of the uncertainty around their scope and use. This could potentially lead to:

- users being unable to be supplied copies of works for research and private study
- libraries and archives being prevented from supplying copies of works to other libraries or from copying for the purposes of preserving or replacing items within their collections.

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.

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?

Mass digitisation projects

328. Libraries and archives have told us that the current exceptions inhibit their ability to meet the growing demand to convert physical content to digital form and make it publically available over the internet.

329. Libraries and archives hold a wide range of content within their collections, including many unpublished works. We have heard that orphan works are particularly problematic for the sector.¹⁵⁸ Digitisation projects can be constrained by the need to identify and trace copyright owners for permission to copy the content into a digital format and make it available over the internet.

¹⁵⁸ Orphan works and the problems they create are discussed from paragraph 465 in the transactions section.

330. A further concern is that current exceptions may also be unnecessarily limiting people's access to knowledge because the exceptions focus on providing digital copies at a physical location.
331. We have heard that libraries and archives want to be able to copy more of their collections, including unpublished works into digital format, and to make those copies available to the public over the internet. Furthermore, they want to:
- give the public better access to works in their collection
 - allow people to pin, bookmark and cache copies
 - allow more than one person at a time to view a work.
332. We have also heard that current exceptions are too restrictive and that libraries and archives need greater flexibility to be able to copy works into digital form, including for preservation purposes, without being unduly limited to the condition that the work is at risk of loss, damage or destruction.¹⁵⁹

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?

Copying for collection management purposes

333. Making thumbnail images, especially of artistic works, for cataloguing purposes is an example of copying for collection management and administration. Although we have heard that these catalogues are typically only accessible internally by staff, the Copyright Act requires libraries and archives to seek permission from the copyright owner before they can create them for collection management and administration purposes. It is not clear that this sort of copying and cataloguing collections for internal use by libraries and archives is harmful to copyright owners.

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?

Collecting and publishing content 'born digital'

334. We have heard that the exceptions only target the digitisation of physical content already held by the libraries and archives and do not take proper account of the vast amount of content that was created exclusively in digital form and only published online ('born digital').
335. Collecting and archiving content born digital is likely to be just as important for the documentary heritage of New Zealand as collecting and archiving content that was published in physical form (eg in books and newspapers). We have heard that libraries and archives

¹⁵⁹ See section 5 (3)(a) of the Copyright Act.

want to be able to collect, preserve and make available to the public digital content published online to ensure New Zealand’s documentary heritage is preserved.

336. We have also heard how the National Library copies websites on a regular basis as part of the legal deposit process¹⁶⁰ by:

- selectively copying websites identified by library staff as being of ‘high value’
- copying whole domains, which is largely an automated process that captures an entire domain, such as the .nz url, in its entirety.

337. The National Library makes the copied websites available to the public to access online. These acts are permitted under section 66 of the Copyright Act, which exempt acts done under a statutory authority.

338. We understand that most of the copying and publishing of websites by the National Library occurs without the knowledge or permission of the website owners. The act of making the material copied from websites as part of the legal deposit process available to the public could be having a detrimental impact on copyright owners and undermining their exclusive rights to authorise when their material may be copied and made available to the public.

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?

Should the exceptions also apply across the GLAM sector (to museums and galleries also)?

339. Museums and galleries have a similar purpose and role to libraries and archives in collecting, preserving and making content available for the benefit of the public. Like libraries and galleries, many are also not-for-profit institutions. However, the current exceptions do not apply to them.

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?

¹⁶⁰ The copying of websites is authorised under *National Library Requirement (Electronic Documents) Notice 2006* issued under the *National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003*.

Section 3 – Exceptions for education

Introduction

340. The Copyright Act includes specific exceptions that allow certain uses for the purpose of education.¹⁶¹ The exceptions are intended to allow the use of copyright works to facilitate teaching, learning and the creation of new knowledge, while having due regard to the rights of copyright owners.
341. Some examples of how educational institutions can use copyright works without permission from the rights holder include:
- a whole copy of a literary work can be made by a teacher and used during a lesson
 - a sound recording can be played to students in class
 - copies of a literary work can be made and distributed to students as long as the extract copied does not exceed more than 3% or 3 pages (whichever is greater)
 - copies of websites (and the copyright works contained within them) can be stored and used for educational purposes.
342. The exceptions enable the use of copyright works only to the extent that the exceptions permit. If educational establishments or others want greater use they must seek a licence (and pay the licence fee).¹⁶² The exceptions allow for a certain amount of copying to be done at no cost, but some of the exceptions are intended to encourage copyright owners to make licensing schemes available to educational establishments. For example, section 45 only permits copying of films and sound recordings if no licensing schemes are available for such copying. In New Zealand, collective licences for educational establishments are issued by three main Collective Management Organisations.¹⁶³
343. It is up to individual educational institutions or users to decide whether to get a licence for uses broader than the exceptions allow, like copying of a larger proportion of works or sharing works with students online. The practice of educational institutions and users differs widely across the country.

Possible issues

344. We have heard that the education exceptions:
- are framed for a traditional classroom environment and do not take into account current teaching practices and modern technology
 - create unnecessary distinctions based on the technology used

¹⁶¹ Sections 44-49 of the Copyright Act.

¹⁶² Apart from section 48 on copying of communication works, which does not apply if licences are available.

¹⁶³ Copyright Licensing New Zealand (CLNZ) (authors and publishers), OneMusic (songwriters, record companies and artists), Screenrights (television, radio and online content). For a more detailed discussion of the role and operation of CMOs in New Zealand's 'copyright system' see paragraphs 445 to 453.

- do not cover copyright works being communicated by teachers to students over the internet
- may be too broad in some cases
- may be too narrow in some cases
- are not well understood by those in the teaching profession.

Taking into account current teaching practices and technology

345. The use of multimedia resources that incorporate different types of copyright works is playing an increasing role in teaching. Students are encouraged to use apps as part of their learning, enabling them to create their own works, re-use and adapt other people's works and share them with classmates and teachers. We hear that students are often expected to work collaboratively as part of their homework, for example on a project to create a film, or design a 3-D virtual reality game. This often involves using online resources.
346. Teachers are using a wide variety of tools to teach. They can encourage interaction and engagement through use of technologies like interactive whiteboards, projectors and computer screens. Teachers can use communication technologies like video conferencing, Skype, and Google Hangouts to interact with other schools, or experts in a field. This can be done, for example, to learn languages or to stream school assemblies.
347. Educational establishments increasingly offer teaching and resources online, using Learning Management Systems (LMS). This allows access to course readings, slide presentations, past exam papers, interactive content and other resources to registered students. Many tertiary institutions facilitate remote learning by the recording of lectures. This makes distance learning easier, enables students to catch up on missed lectures or review lectures if English is not their first language, and helps students with disabilities.

Potential issues with reprographic and non-reprographic copying

348. Section 44(1) allows a teacher to make a single copy of a whole work or part of a work by reprographic means if it is for use in a lesson at an educational establishment¹⁶⁴ or in preparing for a lesson. 'Reprographic' refers to a process for making facsimile copies, or which uses an appliance to make copies and includes copying by electronic means (but excludes making of a film or sound recording of a work). Only one copy can be made on one occasion.
349. Section 44(2) allows a teacher or student to copy the whole or part of a work (but not by reprographic process).¹⁶⁵ More than one copy can be made at any one time.¹⁶⁶
350. Both sections apply to literary, dramatic, musical or artistic works and the typographical arrangement of a published edition.
351. It is not clear that distinguishing between reprographic and non-reprographic copying is still justified. For example, a teacher may copy an extract of a work from an online resource into a slide show. This would be permitted by section 44(1). If the pupils being taught then made

¹⁶⁴ 'Educational establishments' are defined in section 2 of the Act. They include schools to which the *Education Act 1989* or the *Private Schools Conditional Integration Act 1975* apply as well as other institutions established through the *Education Act 1964* or *Education Act 1989*.

¹⁶⁵ Either before, during, or after a lesson (eg copying onto a blackboard, writing out as part of homework)

¹⁶⁶ This exception is not restricted to educational establishments.

non-reprographic copies, this is permitted by section 44(2). It is not clear how this differs from distributing copies of the slide show directly to the pupils. The effect in both cases is the same: the pupils end up with copies of the extract.

Communicating works in digital form

352. Section 47 allows students or staff to perform a literary, dramatic or musical work in front of other students and staff in the course of activities at an educational establishment. Playing or showing a sound recording, film or communication work (communicating it in a digital format) at an educational establishment for the purpose of instruction is also permitted.¹⁶⁷
353. Licences are available that permit copying and communication of a greater proportion of the copyright work.¹⁶⁸ However, we have heard that on occasions a lesson or lecture can include material not covered by licence agreements (eg printed sheet music). Obtaining permission of the rights holder for the use can be administratively burdensome for an educational establishment.
354. The exception does not apply to a teacher communicating the works to students over the internet. Licences are currently available that permit the communication of some sound recordings, films and communication works online. However, we have heard that not all works are available through licences so can only be used in the classroom setting. For example, where a DVD is not covered by a licence, it cannot be featured in a lecture that students access online though it can be played in the lecture itself. We have heard that content may have to be deleted from the version made available to students online because some institutions find it problematic to get the necessary permissions. Universities have noted that watching the full lecture online is particularly important for those with disabilities, who are less familiar with English, or who work alongside their studies.
355. When students work on collaborative assignments, we have heard that the software provided by educational establishments (which is often covered by licences permitting copying of works) is not always students' preferred method. Establishments are concerned that students may infringe copyright through the uploading and sharing of non-licensed content or that students may share licensed content externally (to non-authenticated users) as part of a project.
356. Tertiary establishments have said they would like to take advantage of opportunities for the use of new research methods such as data mining that copy and use third-party material in non-consumptive, transformative ways. Traditionally, this work is done by researchers by hand but the use of computers to analyse material can involve the creation of multiple copies of a work as part of the process. People have told us there is uncertainty about whether this is permitted under the Copyright Act at present.¹⁶⁹

¹⁶⁷ The performance, playing or showing of works to parents and guardians is not included in this exception.

¹⁶⁸ For example, the CLNZ licence allows a school to copy up to 10% of a book or one chapter of a book and share those copies via CD/DVD, email and intranet.

¹⁶⁹ For a fuller discussion of text and data mining see paragraphs [x to y].

Are the exceptions too broad?

357. Some stakeholders have expressed concern that section 44(1) is too broad. As outlined in paragraph 341, this section allows a teacher to make a single copy of a whole published edition for the purpose of educational instruction. We have heard that making a whole copy of a published edition can undermine the market of educational publishers.¹⁷⁰
358. Section 49 provides that anything done for the purposes of examination (whether setting the questions, communicating the questions to candidates, or answering the questions) does not infringe copyright. This is not restricted to educational establishments and applies to all works.
359. This exception is seen by some to be too broadly defined. It places no restriction on the action taken with a work or on the types of work¹⁷¹ covered by the exception. We have also heard that, in contrast to the other exceptions, it does not limit the quantity of copies, or the amount being copied. Nor does it clarify whether it applies to internal or external examinations.

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Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?

Are the exceptions too narrow?

360. We have heard that the detailed nature of the education exceptions works well for rights holders because it provides certainty about what can and cannot be copied under the Copyright Act.
361. However, it is possible that in some instances the level of detail in the education exceptions is difficult or restrictive to follow in practice. For example, section 44(6) states that an educational establishment cannot copy the same work again within 14 days of making the copy.¹⁷² We have heard from copyright owners and educational institutions that this rule is hard to implement and not easily understood.
362. Section 44A allows an educational establishment to store a copy of a work for educational purposes, and provide registered students the ability to access that work subject to some restrictions:
- The work must be in a separate frame/identifier.
 - The author (if known) and source must be identified.
 - The name of the educational establishment and the date the work was stored should be included.
 - If the material becomes no longer relevant to the course, the material should be

¹⁷⁰ New Zealand has 30 educational publishers, these publishers generate the majority of their revenue from within New Zealand (<http://www.publishers.org.nz/educational-publishing/>).

¹⁷¹ These are: Literary, dramatic, musical, or artistic works, sound recordings, films, communication works and typographical arrangements.

¹⁷² Under licence, repeat copies can be made within 14 days, provided that such copying is not made by or on behalf of the same staff member for the same paper, unit or module of a course of study. This restriction on repeat copying does not limit repeat access to material copied electronically and supplied to students under the licence.

deleted.

This applies to works made available online (either on a website or through another electronic retrieval system).

363. We have heard from tertiary institutions that restricting online materials to ‘authenticated users’ restricts their ability to promote their establishment to potential students or engagement with the local community.
364. We have also heard that universities would like theses submitted by their students to be made available online. However, some theses may include content whose copyright is owned by third parties. In many cases the authors of the theses will have relied on the section 49 exception rather than seeking permission from the copyright owner. Making copies of these theses available online may therefore risk copyright infringement. Another issue is whether section 49 allows universities to make their students’ theses available online without the students’ permission.

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Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?

Education sector’s understanding of copyright

365. The Ministry of Education, licensing agencies and the NZ School Trustees’ Association work to help schools understand their copyright obligations and responsibilities. However, we have heard that what can or cannot be done with copyright works is not always well understood amongst educational establishments due to the complexity of the copyright system.
366. A teacher in a school may have access to a wide range of material from a number of sources, all with their own copyright obligations. For example, they may use Ministry of Education resources¹⁷³, resources they have created, or third party resources. Some schools have their own internal policies for sharing resources developed by teachers with students and sometimes with other schools. Depending on licensing arrangements and which exceptions apply, there could be a risk of infringement if third party material is used.
367. Universities have told us that as both consumers of copyright works and creators of copyright works they must invest significant time and resources into ensuring copyright compliance.

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Is copyright well understood in the education sector? What problems does this create (if any)?

¹⁷³ Ministry of Education resources may be protected by Crown copyright, or are available under Creative Commons licenses, or the rights may be owned by third parties.

Section 4 – Exceptions relating to the use of particular categories of works

Context

368. The Copyright Act provides for a number of exceptions for which the use of a particular work does not infringe copyright. In this section we explore the issues raised by some of the exceptions,¹⁷⁴ including:

- the free playing or showing of some works
- format shifting of sound recordings
- recording for the purposes of time-shifting
- retransmission of broadcast content exceptions relating to computer programmes.

Free public playing exceptions

369. Sections 81, 87 and 87A of the Copyright Act provide exceptions that allow for the free public playing of sound recordings and communication works protected by copyright.¹⁷⁵ These exceptions affect:

- clubs, societies and other organisations that play sound recordings
- businesses such as cafes, bars, gyms and hair dressing salons (that do not charge for admission), when they play the radio, television, or stream music or video to the public.

Exception for clubs societies and other organisations to play sound recordings (section 81)

370. Section 81 of the Copyright Act provides that not-for-profit clubs, societies or organisations with charitable, religious, educational or social welfare purposes can play sound recordings without infringing copyright, as long as the proceeds of any charge for admission to the place (where the recording is to be heard) are applied solely to the purposes of the organisation.¹⁷⁶

371. This exception only applies to sound recordings, and not any other works contained in the recording like the lyrics (ie the literary work) and the musical score (ie the musical work) of a song. This means that a club or society still needs additional permissions (ie licences) to play a sound recording in reliance of this exception because the exception does not extend to these underlying works.

¹⁷⁴ There are other exceptions provided for in the Act that are not fully discussed in this document. See paragraph 396 under 'Other communication work exceptions'.

¹⁷⁵ Sections 186, 188 and 188A of the Copyright Act provide exceptions to performers' rights under the same circumstances.

Exceptions for the free public playing or showing of communication works (sections 87 and 87A)

372. Sections 87 and 87A provide general exceptions for playing and showing communication works. Under sections 87 and 87A the free public playing or showing of a communication work does not infringe copyright in the communication work or any accompanying sound recording or film in the communication work. The exceptions are designed so that recipients of communication works are not required to get authorisation to freely play or show the works in public if the copyright owners have already made their works freely available to the public or have already charged a fee to receive the works. For example:

- Copyright owners receive royalties from radio stations when their sound recordings are played. The exceptions provide that a business such as a store that plays the radio is not required to pay licence fees in respect of the radio broadcaster or any sound recording that is played in public by reception of the broadcast.
- A bar with a Sky TV subscription already pays for a Sky TV commercial licence to play music video clips. The bar is not required to obtain a separate licence from the copyright owners to play and show the sound recordings and films shown on TV.

373. Sections 87 and 87A apply to communications works freely played or shown in the following ways:

| | Free-to-air communications works (eg TVNZ programmes or NZ radio stations) | Subscription or pay-per-view communications works |
|---------------------------|--|---|
| Live transmissions | Section 87A | Section 87 |
| Recorded | Section 87 | Section 87 |

374. A communication work is played or shown ‘freely’ for the purpose of both these sections if the audience does not pay for admission and the venue does not sell goods and services at prices that are attributable to the works. However, section 87 does not apply to venues providing temporary accommodation such as hotels, motels and camping grounds (because it treats these venues as places people have paid to gain admission to). Those venues can therefore only rely on the section 87A exception (or fully license the playing of communication works described in section 87).

Potential issues with the free public playing exception

Sound recordings and films vs underlying works

375. The exceptions prevent entities from having to pay licence fees for sound recordings, films and communication works, but do not prevent infringement of any copyright in the underlying works (eg lyrics and musical work for a sound recording). This generally means that, in order for the public playing to be lawful:

- not-for-profit organisations playing a sound recording (via CD, DVD or MP3) according to the exception in section 81 still need to pay licence fees for those underlying works
- entities freely playing communication works (via TV, radio or internet) according to the exceptions in sections 87 and 87A, while also exempted from paying licence fees for the accompany sound recordings or films, still need to pay fees for the underlying

works.

376. The policy rationale for not extending these exceptions to copyright in the underlying works is unclear.

Technology platforms

377. The free public playing exceptions are structured so that whether entities are required to pay licence fees for the sound recordings and films depends on the type of technology platform used (notably, whether or not the works are communication works).
378. Sections 87 and 87A only apply to communication works (preventing infringement of copyright in both the communication work and the accompanying sound recordings or films). Entities that freely play or show, for example, internet music services or TV in public are not required to pay licence fees to sound recording and film copyright owners. However, if the same entities instead freely play or show CDs, DVDs or MP3s in public, they are required to pay fees to sound recording and film copyright owners.
379. Almost the reverse is the case for not-for-profit entities, because section 81 applies only to sound recordings. Regardless of whether they charge admission, not-for-profit entities are not required to pay licence fees to sound recording copyright owners in order to play, for example, CDs or MP3s. However, if they instead play internet music services (which are considered communication works, not sound recordings) and charge admission, they are required to pay licence fees to sound recording copyright owners.
380. These differences are inconsistent with the principle of technology neutrality. There is no clear policy rationale for distinguishing in these exceptions between technology platforms.

Not-for-profit entities and films

381. Because section 81 does not apply to films, to show films to the public not-for-profit entities need to pay licence fees to all the copyright owners. For example, a charity which held a fundraiser screening of a movie would need to obtain a licence.

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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?

Format-shifting of sound recordings

382. Section 81A enables people who own legitimately acquired copies of sound recordings (and any underlying literary or musical works contained in them) to make copies of them (ie format-shift) for their personal or household use.¹⁷⁷ The exception enables, for example, the

¹⁷⁷ The exception only applies if:

- the sound recording is not a communication work
- the sound recording is not borrowed or hired
- the copy is made by the owner, for personal or household use
- the sound recording is not made from an infringing copy
- no more than a copy is made
- the owner retains ownership of the sound recording and copies.

owner of a music CD to copy the music on to their portable MP3 player or smartphone for personal or household consumption without infringing copyright.

383. The rationale for this exception is that once a person has purchased recorded music, they should be free to ‘format-shift’ that recording, rather than having to pay for the same music again.

Potential issues with the format-shifting exception

384. The exception was created before portable devices with video playing capabilities, like smartphones, became common. It only applies to sound recordings. Format shifting of video files for personal use continues to be an infringement of copyright.¹⁷⁸
385. The combination of technological changes since 2008, the speed and reliability of broadband connections, and the development of cloud services suggest that the format-shifting exception needs to be reviewed in light of current consumer practices.
386. The format-shifting exception is tied closely to the use of physical devices, like MP3 players or smartphones, to play the format-shifted copies of sound recordings. Currently, a number of services allow users to upload their sound recordings to the cloud, and then provide access to those recordings from any device through the internet. Users are also able to save sound recordings to the cloud. Neither of these examples is permissible under the current format-shifting exception.

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What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?

Recording for the purposes of time-shifting

387. Section 84 of the Act allows people to ‘time-shift’ programmes included in a communication work (or any underlying work included in it) for the purposes of personal consumption at a more convenient time if:
- it is for personal use
 - the only purpose is to view or listen at a more convenient time
 - the recording is not made from an on-demand service
 - the person has lawful access to the communication work at the time of making the recording.
388. The effect of the exception is that the widespread practice of consumers recording TV programmes on VCRs or a personal video recorder (PVR) was no longer copyright infringement.

¹⁷⁸ When reporting on the *Copyright (New Technologies and Performers’ Rights) Amendment Bill* in 2007, the Commerce Committee noted that some submitters believed that the provision should not be limited to sound recordings only. The Committee disagreed, saying that while format shifting of sound recordings was widespread, format-shifting of other works was not.

389. The term ‘programme’ is not defined in the Copyright Act but the example provided in the Act mentions a movie screened on TV, and a streamed internet audio service. The exception does not allow people to retain the recording ‘for any longer than is reasonably necessary’.

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What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?

Reception and retransmission of broadcast content

390. Section 88 of the Copyright Act permits the reception and immediate retransmission of a broadcast by a cable programme service in certain circumstances, without infringing either the copyright in the broadcast or the copyright in any underlying work contained in it. The broadcast must be made for reception in the area where the cable programme services is provided, and must not be a satellite transmission or an encrypted transmission.
391. The exception allows a cable operator primarily offering pay television to include free-to-air channels in its offerings, without requiring a licence from the free-to-air channel operators.
392. The exception does not apply if licences authorising the retransmission are available to the cable service provider under a licensing scheme, and the provider is aware of this.

Potential issues with the reception and retransmission exception

393. The objective of section 88 was to encourage greater competition and investment in cable networks and their associated service industry and thereby encourage new investment in competitive telecommunications infrastructure. A secondary objective was to improve the quality of television reception in areas where reception was poor.¹⁷⁹
394. We understand that cable networks in New Zealand have not expanded in coverage for many years. It does not appear likely they will expand in the future. In addition, media convergence has meant that consumers are increasingly streaming media over the internet on demand. Traditional broadcasting is being blended with content from the internet, enabling products such as Freeview Plus and internet-enabled Sky boxes.
395. A similar provision in the UK’s *Copyright, Design and Patents Act 1988* was recently repealed.

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What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?

¹⁷⁹ The former Ministry of Economic Development’s digital copyright review which commenced in 2001 considered whether section 88 should be retained. The review concluded that overall, no evidence was presented to suggest the incentives provided by the exception continue to be required to encourage investment in the cable industry. When the *Copyright (New Technologies and Performers’ Rights) Amendment Bill* was introduced to Parliament it included repeal of this section, but the section was subsequently reintroduced at the Select Committee stage.

Other communication work exceptions

396. The Copyright Act allows for a number of other exceptions relating to particular types of works, including:
- recording for the purposes of maintaining standards in programmes (section 82)
 - recording for the purposes of complaining (section 83)
 - incidental recording for the purposes of communication (section 85)
 - provision of subtitled copies of communication works (section 89)
 - recording for archival purposes (section 90)
 - recording by media monitors (section 91).
397. For the sake of brevity we have not detailed these exceptions here but we would be interested to understand any issues you have identified in relation to them.

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What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?

Exceptions relating to computer programs

398. The Copyright Act contains a number of exceptions relating to computer programs. With the exception of section 80 (relating to back-up copies of a computer programme), these exceptions were inserted by the changes made to the Copyright Act in 2008.
399. The exceptions enable common activities in relation to computer programs undertaken by consumers and programmers to be lawful, including:
- *Backing up computer programs.* This allows lawfully obtained programs to be copied for the purposes of back-up in the event the program is lost, destroyed or rendered unusable.
 - *Decompiling computer programs.*¹⁸⁰ This allows a lawful user of a computer program to decompile it for the purposes of creating an independent, interoperable program that can be operated with the program or another program.
 - *Copying or adapting for lawful use.* This allows a lawful user of a computer program to copy and adapt it insofar as it is necessary for continued use (eg to correct an error).
 - *Observing, studying or testing of a computer program.* This allows users to observe, study or test programs in order to determine the ideas and principles that underlie the program.

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Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?

¹⁸⁰ The Act defines 'decompile' to mean "convert a computer program expressed in a low level language into a version expressed in a higher level language". Computer programs are created at a high level with source code, which is then 'compiled' into a low level executable file a user can run. Decompilation attempts to reverse engineer this process, so an executable file can be transformed into source code.

Exception for artistic works on public display (Section 73)

400. Section 73 of the Copyright Act provides an exception to copyright infringement which applies to the artistic works on permanent public display like buildings, sculptures, models for buildings and works of artistic craftsmanship. It states that copyright in these works is not infringed by making two-dimensional copies of the works by:
- making a drawing or painting of the works
 - taking a photograph, or a film or video of the works
 - communicating a visual image of the works to the public.¹⁸¹
401. For example, if a sculpture is on permanent display in a public space, you do not need permission from the copyright owner before taking a photograph of it. You can also distribute or sell copies of the photograph to the public without permission.

Is there a problem with section 73?

402. We have heard that section 73 might be problematic in three ways:
- the wording is unclear as it does not explicitly include underlying works
 - the exception, as currently worded, is unfair to copyright owners
 - it is unclear what is meant by 'premises open to the public', for example, whether it includes places that members of the public have to pay to enter.

Lack of clarity of wording

403. Section 73 applies to the making of two-dimensional copies of three-dimensional artistic works. This sort of copying usually involves indirect copying of any underlying works, like design drawings, that were used to make the three-dimensional artistic work.
404. Although section 73 does not mention any underlying works, this issue was considered in a 2007 High Court decision.¹⁸² The case involved a clothing company which had arranged for the manufacture and sale of tee-shirts carrying on the front a photograph of a sculpture on display in a public park in Auckland. The copyright owner argued that this breached his copyright in the sculpture by indirectly copying the underlying works used to make the sculpture. He also claimed that because section 73 made no mention of 'commercial copying' that it should only apply to copying for personal use and not copying for commercial gain.
405. The High Court held that section 73 must apply to the works underlying the works specifically mentioned in section 73. If it did not, this would be contrary to the clear policy expressed in the words of section 73:

¹⁸¹ Section 20 of the predecessor of the Copyright Act 1994, the Copyright Act 1962, contained a similar exception. Section 62 of the United Kingdom's *Copyright, Designs and Patents Act* and sections 65 and 68 of the *Australian Copyright Act* have exceptions similar to section 73.

¹⁸² *Radfords v Hallensteins Bros Ltd*, [2007] NZHC 1654, 22 February 2007.

“[section 73] sets out to allow members of the public, including players in the market, to copy in two-dimensions sculptures permanently in the public domain and even for profit; and it does so by setting aside any copyright in the work that the author might otherwise enjoy. However s 73 is interpreted, that clear policy is not for compromise.”¹⁸³

406. It may be useful to clarify that section 73 applies to works underlying works on permanent public display. This would avoid any doubt about the scope of the exception.

Is section 73 unfair to copyright owners?

407. In the court case referred to above, the copyright owner argued against the broad interpretation of section 73 that was eventually adopted by the Court. He had made a limited number of one-tenth scale bronze castings of the sculpture and argued that sale of the defendant’s tee-shirts had reduced the value of those castings which he had not yet sold.
408. This raises the question of whether the section 73 exception is fair to the owners of copyright in the artistic works covered by section 73. Some might argue that it is only fair and reasonable for copyright owners to make a return on sales of two-dimensional copies of their works. Others should not be able to make a profit from these copies without the permission of the copyright owner.
409. On the other hand, copyright owners who allow their works to be placed on permanent public display do so in the knowledge of the section 73 exception. If they do not wish others to profit from the sale of two-dimensional copies of their works without their permission, copyright owners can refuse to allow their work to be placed on permanent public display in the first place.

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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?

¹⁸³ *Supra* at [35].

Section 5 – Contracting out of the exceptions

410. The exceptions discussed in the preceding sections enable people to use a copyright work for the specified purposes without permission from the copyright owner. However, the Copyright Act is largely silent on whether copyright owners can exclude or modify a person's ability to use these exceptions through contract. It is not expressly prohibited by the Copyright Act, other than in relation to the exceptions relating to copying of computer programs under certain circumstances.¹⁸⁴
411. The Copyright Act appears to acknowledge the ability of copyright owners to use contract law to prevent users taking advantage of the exceptions. For example, the format-shifting exception in section 81A expressly provides that the exception does not apply if a contract specifies the circumstances in which the sound recording may be copied.
412. Website terms and conditions commonly take the form of a 'browse-wrap' agreement, stating that the terms and conditions are deemed to be accepted when the user accesses and uses the website. Similarly, terms and conditions on the downloading and use of computer programs can be imposed on users under 'click-wrap' agreements (for example, where users are required to tick a box stating that they agree to the terms and conditions before they download and use software). The enforceability of browse-wrap agreements (and click-wrap agreements) has not been considered by courts in either New Zealand or Australia. However, click-wrap agreements have been upheld in the US and the EU.
413. The Australian Law Reform Commission in its report on Copyright and the Digital Economy discussed imposing limits on contracting out of the copyright exceptions in Australia.¹⁸⁵ The Commission recommended that:
- the Copyright Act be amended to provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect
 - these limitations on contracting out apply to:
 - the exceptions for libraries and archives
 - fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

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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?

¹⁸⁴ Section 80D of the Copyright Act.

¹⁸⁵ <https://www.alrc.gov.au/publications/17-contracting-out/limitations-contracting-out>

Section 6 – Internet service provider liability

Current situation

414. Sections 92B to 92E¹⁸⁶ (introduced by the *Copyright (New Technologies) Amendment Act 2008*) concern the liability of Internet Service Providers (ISPs). ISPs are defined as a person who does either or both of the following:
- offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing
 - hosts material on websites or other electronic retrieval systems that can be accessed by a user.
415. The definition of an ISP captures many different types of organisations providing various internet related services. These include providers of connectivity services such as broadband, ADSL, VDSL fibre, mobile data and Wi-Fi, social media platforms, operators of email systems and providers of electronic data storage and retrieval systems. Businesses, schools, universities and libraries providing online services for their staff, customers, students or users are captured by the definition. Some businesses who fall within the broad definition of an ISP have themselves become content creators and distributors.
416. Sections 92B to 92E limit ISP liability (ie provide 'safe harbours') where:
- users of the ISP's internet services infringe copyright
 - the ISP stores infringing material uploaded by one of its users
 - the ISP stores a temporary copy of infringing material ('caching').
417. Without these provisions ISPs could face liability for primary and secondary copyright infringement (eg authorising the copying without the copyright owner's permission, possessing or dealing with infringing copies and providing the means for making infringing copies).
418. Limiting ISPs' liability is intended to facilitate the provision of internet-related services at reasonable cost for consumers.
419. The protections provided by sections 92B to 92E of the Copyright Act are not absolute. For example, 92B only protects ISPs from liability if someone merely uses their internet services for the purposes of infringement 'without more'. This means that if, for example, an ISP takes action to encourage its users or customers to infringe copyright this protection would no longer apply. The safe harbours do not prevent copyright owners from seeking injunctive relief against the ISP for any infringement of copyright by the ISP or a user of their services.

¹⁸⁶ There are also linkages between the provisions examined here and the 'three strikes' copyright infringement regime established in 2011. See from paragraph 502 of the issues paper.

Potential issues with ISP liability

420. There have been significant technological and market developments since the Copyright Act was last reviewed. The rise of streaming has impacted how consumers interact with material protected by copyright. Many consumers no longer purchase physical or digital versions of media but instead stream all the television, movies and music they consume through on-demand platforms through the internet. These consumption patterns are predicted to increase.
421. This section looks at the following issues:
- whether the definition of 'ISP' is appropriate
 - types of content hosts
 - whether the safe harbours adequately apply to modern content delivery mechanisms and discovery tools
 - protection for, and value of, copyright works
 - other possible issues.

Is the definition of ISP appropriate?

422. The definition of ISP in the Copyright Act is extremely broad and wider than other countries. For example, Australia's safe harbour regime protects only commercial connectivity providers, not other entities providing internet-related services such as content hosting providers. The Australian Government is currently considering whether to introduce a broader safe harbour regime to increase certainty for content hosts.

Types of content hosts

423. There are a large number of user-generated content (UGC) platforms like YouTube, Instagram and Facebook (sometimes known as Web 2.0) that rely on users uploading material before the platforms distribute it to their users (as opposed to traditional publishing or broadcasting process where companies push content out to consumers). These platforms also involve:
- giving users a higher degree of choice than traditional publishing or broadcasting – users can choose who to 'follow' rather than necessarily being presented with a curated or edited list of content
 - presenting users with content that they think will appeal to them based on analytics of their previous choices
 - steering users towards more profitable content.
424. When the ISP safe harbour provisions were introduced in the Copyright Act, these large online UGC platforms had not fully emerged. The ISP liability provisions may need to be reviewed in light of the developing role of online platforms as content distributors.
425. We have also heard that the ISP liability provisions reduce the incentive on ISPs to help right holders stop piracy.

What are problems (or benefits) with the ISP definition? What changes, if any should be considered?

Should safe harbours apply to the providers of search tools?

426. A number of other countries explicitly protect providers of search tools (or search engines) from copyright liability. It is unclear whether providing a link to infringing content is an infringement of copyright. See the discussion above on linking to infringing content in paragraphs 186 to 191.

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?

Protection for, and value of, copyright works, including the licensing market

427. There has been considerable discussion, particularly overseas, regarding the interaction between safe harbours for content hosts and remuneration for copyright owners. Some copyright owners say that our safe harbour regime makes it harder for copyright owners to protect their works.

428. We have also heard that it distorts the commercial relationship between online platforms and copyright owners, allowing platforms to pay low rates of remuneration for content because they can rely on the backstop of the safe harbour. It is not clear the extent to which the safe harbour regime under the Copyright Act impacts this issue, given the small size of the New Zealand market.

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.

Other possible issues

429. The *Digital Millennium Copyright Act* ('DMCA') safe harbour regime in the US, on which our notice and takedown system under section 92C is based, is currently undergoing a review. Some of the issues under consideration in that review may be relevant to the safe harbours regime in the Copyright Act. Issues under consideration include:

- General effectiveness of the safe harbour regime and how this has impacted on the growth and development of online services.
- Overcoming the 'whack-a-mole' phenomenon – does the notice and takedown regime sufficiently address the reappearance of infringing material on hosting websites?
- Should ISPs be obliged to detect and delete all infringing copies of a work, not merely the copy identified in a 'takedown' notice?
- The adequacy of the notice and takedown regime to protect against fraudulent, abusive or unfounded notices.

- The effectiveness of the counter notifications for addressing false or misleading assertions of infringement (the Copyright Act does not explicitly provide a counter notification procedure).

62

What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?

Part 6 – Transactions

Introduction

430. As discussed in Part 4 – Rights, the rights granted under the Copyright Act are intended to give creators greater control over the copying and distribution of their works to increase their ability to earn revenue from their works.
431. This Part discusses potential issues with how the Copyright Act enables copyright owners to earn a return from their works by entering into transactions that involve giving their rights to others to use and/or exploit their works.

The current situation

432. There are two types of transactions that copyright owners can enter into:
- those that involve a **transfer** of their rights – ie a transfer of *ownership* of one or more of the copyright owner’s exclusive rights (for example, to copy or publish a work) to another person
 - those transactions that involve giving a **licence** to use or exploit their rights– ie giving someone *permission* to do one of the things only copyright owners have the right to do (for example, to copy or publish a work).
433. Enabling creators, copyright owners and others to transfer and license rights in copyright works efficiently and effectively supports the development of markets and facilitates the dissemination and use of creative works.

How is copyright transferred?

434. Copyright can be transferred by assignment, by will or by operation of law.¹⁸⁷ To be effective, transfers by assignment must be in writing and signed.¹⁸⁸
435. A copyright owner can transfer any or all of their exclusive rights to one person, or may transfer different rights to different persons. That transfer can also be for part, but not the whole, period for which copyright can exist. For example a copyright owner could transfer the right to:
- publish¹⁸⁹ a novel to one person (for example, a publisher) and the right to adapt it into a movie to another (for example, a film studio)
 - communicate a film in a television broadcast to one person (for example, a broadcaster) and the right to communicate it by making it available on the internet to another (for

¹⁸⁷ Sections 113-119 of the Copyright Act. Examples of copyright passing by operation of law include a copyright owner whose property becomes vested in the Official Assignee on bankruptcy or the property of a copyright owner who dies without a will passing to his or her heirs.

¹⁸⁸ Part 4 of the *Contract and Commercial Law Act 2017* and the definition of ‘writing’ in the Copyright Act enable the requirements for an assignment to be in writing and signed to be met electronically.

¹⁸⁹ Or, in the language of the Copyright Act, issue copies of the novel to the public.

example, an internet start-up)

- show a film in public for only a six-month period.

436. A copyright owner may also transfer future copyright as if it were then in existence. For example, an author may transfer their rights that they would get over a novel that they have not yet written to a publisher.

437. A condition of the transfer of copyright is normally that the person receiving the right pays a fee to the copyright owner.

Copyright licensing

438. Copyright owners can license another person to do any of the exclusive rights granted under the Copyright Act. Similar to transfer of copyright discussed above, copyright owners can grant licences over any of their rights and for part, but not the whole, period for which copyright can exist.

439. For example, a copyright owner could license the right to:

- publish a novel to one person (for example, a publisher) and the right to adapt it into a movie to another (for example, a film studio)
- communicate a film to a television broadcaster and license the right to communicate the film on the internet to another person (like an internet streaming service provider)
- show a film in public for a only six-month period.

440. A condition of copyright licences is normally that the person using the work pays a fee to the copyright owner. The fee could, for example, be a one-off amount for using the work over a period of time (eg an annual licensing fee) or a fee based upon the number of times the work is copied or played in public.

How can copyright owners license their works?

441. There are three common ways copyright owners license their works:

- by negotiating directly with the users themselves
- by using an intermediary, such as copyright management organisation
- by using open licensing schemes such as Creative Commons¹⁹⁰ and Free and Open-Source Software.¹⁹¹

The importance of keeping a record of permissions ('chain of title')

442. Keeping a good record of all the relevant assignments and licences for use of other people's copyright material in another work is essential to avoid being liable for copyright

¹⁹⁰ *Creative Commons* licences allow creators to easily communicate which of the rights they reserve, and which rights they waive for the benefit of recipients or other creators.

¹⁹¹ *Free and Open-Source Software* (FOSS) refers to software designated by the creator as both free software and open-source that anyone is freely licensed to use, copy, study, and change the software in any way. The source code is openly shared so that people are encouraged to voluntarily improve the design of the software.

infringement. This documentation, often referred to as the ‘chain of title’, is usually necessary for:

- producers to get finance and distribution deals for films and television
- authors getting a publisher to publish a non-fiction book
- libraries and archives undertaking digital preservation projects.

Possible issues with the transfer and licensing of copyright works

443. In the rest of this Part we discuss:

- licensing through collective management organisations
- issues with the Copyright Tribunal
- alternatives to the Copyright Tribunal for resolving licensing disputes
- the use of social media platforms and other creative communication tools
- other licensing mechanisms that copyright owners might use
- orphan works
- licence stacking.

Licensing through collective management organisations

444. Copyright licensing can be very complex. As mentioned in paragraphs 434 to 437, copyright owners can split up their exclusive rights and transfer some of them, license others and retain the rest for themselves. There can also be different copyright works, all with different copyright owners, embedded in something most people would think of as only one creative work – like a book, album or movie.¹⁹²

445. Collective management organisations (**CMOs**) (sometimes referred to as ‘copyright collecting societies’) play an important role in helping both copyright owners and users to navigate these complexities.

446. CMOs make it easier for copyright owners to monetise their works. They also make it easier for users to obtain permission to use those works. CMOs are formed by copyright owners coming together to create a single body to manage their individual copyright works. They are often formed on a national basis and usually do three main things on behalf of their members (copyright owners). They:

- license users to use copyright works on behalf of their members
- collect the royalty income from these users and distribute it to their members
- monitor the use of the works of their members and take copyright infringement action on behalf of their members.

447. There are at least eight CMOs active in New Zealand:

¹⁹² See paragraph 115 in Part 4 that discusses multiple owners in movies, sound recordings etc.

| CMO | Licensing schemes |
|--|--|
| Copyright Licensing New Zealand (CLNZ) | Printed works |
| Print Media Copyright Agency (PMCA) | Newspapers and magazines articles |
| Christian Copyright Licensing International (CCLI) New Zealand | Christian music and media |
| Christian Video Licensing International New Zealand | Video licensing to churches |
| Recorded Music | Radio and television broadcasting of recorded music |
| APRA AMCOS New Zealand | Playing, performing, copying, recording and making available music |
| Screenrights | Television and radio broadcast copying by educational establishments |
| Copyright Agency ¹⁹³ | Visual artistic works |

448. The number and variety of CMOs differs from country to country. For example, Canada has 29 and the United Kingdom has around 18.

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?

Testing how CMOs operate from a member perspective

449. CMOs are not directly regulated under the Copyright Act. The Act does not set out how CMOs must be formed, managed or dissolved. Nor does it require them to operate under the principles of transparency, accountability and good governance. Some countries have introduced rules intended to ensure CMOs operate under these principles. Other countries require their CMOs to seek government approval to make licensing schemes available to users and for the fees charged.

450. Most New Zealand CMOs are members of, or otherwise affiliated with, a corresponding international body. For example, CLNZ is a member of the *International Federation of Reproduction Right Organisations*. These international bodies facilitate cooperation among member CMOs by having agreed standards for how its members should operate and how royalties collected by its members are distributed.

451. We have not heard of any issues with the way CMOs operate in New Zealand.

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.

¹⁹³ As a result of the merger in Australia of Copyright Agency and Viscopy in November 2017.

Testing how CMOs operate from a user perspective

452. CMOs provide a significant benefit to copyright markets by connecting copyright owners with users, simplifying the complexity and providing an efficient way for users to access copyright works. As a single entity representing a large number of copyright owners, CMOs have significant bargaining power when users seek to license copyright works.
453. This position can be further strengthened when a CMO has the exclusive right to negotiate licences on behalf of their members. However, New Zealand CMOs no longer obtain exclusive licences from their members. This was a condition of a negotiated settlement between the Commerce Commission and one of the CMOs following an inquiry into competition issues under the *Commerce Act 1986*.

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.

Issues with the Copyright Tribunal

454. Anybody who thinks a licence scheme operated by a CMO is unreasonable can apply to the Copyright Tribunal¹⁹⁴ (the Tribunal) for the scheme to be reviewed. The Tribunal can hear disputes about the reasonableness of a licence fee or the licence terms and has the power to rewrite the licence terms (including changing the licensing fees).¹⁹⁵ The Tribunal is intended to be an open, flexible and cost-effective forum for resolving licensing disputes of any value.
455. There have been few applications to the Tribunal in recent years to resolve licensing scheme disputes. The last applications (three of them) were made in 2015. All three were subsequently withdrawn.¹⁹⁶ Previous applications to the Tribunal appeared to have only involved large organisations (eg Universities of New Zealand and MediaWorks Radio) who pay significant licensing fees to use copyright works.
456. The issues we have heard over the past few years about the Tribunal include that:
- there are no consequences for parties that do not comply with Tribunal orders, leading to further delays as there is no incentive for parties to comply with its orders
 - the cost of using the Tribunal is too high
 - the lack of prescribed procedural rules has given rise to procedural disputes, leading to further delays.
457. Some of these issues are being addressed through the *Tribunal Powers and Procedures Legislation Bill*, introduced into Parliament in 2017. The Bill will provide the Copyright Tribunal with a standard set of powers and procedures that are intended to improve its productivity and administrative efficiency.
458. We have heard that the Copyright Act should prescribe detailed rules and procedures for the Tribunal and parties to disputes to follow. However, while requiring the Tribunal and parties to dispute to follow detailed rules and procedures may assist with resolving high value

¹⁹⁴ The Copyright Tribunal consist of a Chairperson and from two to five other persons.

¹⁹⁵ See sections 147 to 168 of the Copyright Act.

¹⁹⁶ Information supplied by the Ministry of Justice.

disputes in a timely manner, such rules and procedures also create additional and at times unnecessary compliance costs for all, especially for low value disputes. As stated above, the Tribunal is intended to be an open, flexible and cost-effective forum for resolving licensing disputes of any value. One of the ways of doing this is to enable the Tribunal to determine its own procedures and to adjust them depending on the nature, value and parties to the dispute.¹⁹⁷

Cost of the Copyright Tribunal

459. We have heard that the Tribunal is an expensive forum for resolving licensing dispute and only large organisations can afford to use it to resolve disputes. This may be a contributing factor as to why so few applications have been made to the Tribunal. It is not clear, however, why the Tribunal is viewed as an expensive forum to use. Features intended to ensure it is an open, flexible and cost-effective forum for resolving licensing disputes of any value, include:

- there is no fee payable, nor any prescribed form, for making an application to the Tribunal¹⁹⁸
- there is no minimum value for a licensing dispute, nor minimum amount for a licensing fee payable under a scheme, before the Tribunal will hear a dispute
- there is no requirement for a party to be represented by a barrister, solicitor or agent
- Tribunal members' remuneration and travelling expenses are paid out of money appropriated by Parliament for that purpose (ie the Tribunal's costs to hear and determine a dispute are not recovered from those who use the Tribunal)
- there are minimal rules and procedure prescribed under the Copyright Act giving the Tribunal flexibility to determine its own procedures and to adjust those procedures to suit the dispute it is determining.

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?

Alternatives to using the Copyright Tribunal for resolving licensing scheme disputes

460. The Tribunal is not the only means for resolving licensing disputes with CMOs. CMOs and licensees (or potential licensees) can use alternative dispute resolution or mediation services to resolve their dispute. At least one CMO (APRA AMCOS) offers its own alternative dispute resolution facility¹⁹⁹ that it claims to be faster and less expensive for resolving certain disputes compared to using the Copyright Tribunal.

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?

¹⁹⁷ See section 214 of the Copyright Act.

¹⁹⁸ The previous Government approved the introduction of a \$600 filing fee in 2013. The *Tribunals Powers and Procedure Legislation Bill* is making the legislative changes necessary to enable this fee to be introduced.

¹⁹⁹ See <http://apraamcos.co.nz/feedback-centre/alternative-dispute-resolution/>

Use of social media platforms and other creative communication tools

461. The transactions regime of the Copyright Act should provide incentives for, and support, the creation of new technologies, including social media platforms, hosting platforms and other creative tools that assist creators and copyright owners to disseminate and monetise their works. Use of social media platforms, hosting platforms and other creative tools for communicating are now of a scale that they are replacing traditional forms of marketing in terms of their audience reach, effectiveness and market dominance.
462. We have also heard that these platforms and other creative tools for communicating are increasingly requiring their users to give open licences to the platforms to use for all content that is uploaded, modified or created using their platforms. These open licences allow the owners of these platforms and other communication tools to, for example, use such content in any manner they like, including licensing others to use it, and without either asking permission or paying any licensing fee to the user.
463. These licences may be undermining the ability of the creators to monetise the works that are uploaded, modified or created using these platforms. The impact of these open licences on the ability of creators to monetise their creations is unclear.

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.

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?

Are there any other mechanisms copyright owners could use to license their works?

464. One emerging technology that copyright owner could use to transfer ownership or license their works is blockchain technology. Blockchain technology can provide a secure method of proving when a work was created and who owns copyright in the work. Through blockchain technology, each transaction (such as an assignment or licence) involving the work is traceable. The traceability feature can also provide an alert when there is any unauthorised use of the work.

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?

Orphan works

465. Copyright works for which their copyright owners (appropriate licensors of the work) are not easily identifiable or contactable are generally referred to as 'orphan works'. The older a

work, the more likely it will be an orphan work. Orphan works can also include Crown copyright works.²⁰⁰

Why are orphan works an issue?

466. As discussed above in paragraph 442 it is important for anyone wanting to use a copyright work to have a clear chain of title for that use. We have heard that obtaining permission to use an orphan work can often be extremely difficult and time consuming, providing a significant barrier to their use. Potential users can be deterred from using an orphan work from a fear that the copyright owner may appear at some later stage to assert copyright in the work and demand the user to pay a licence fee or that further use of the work be stopped.
467. We have heard that orphan works are a significant problem for the GLAM sector, especially in relation to preservation projects and increasing demand by their users that their collections be available to access online.²⁰¹ This sector often deals with large volumes of non-commercial, historical material that has been written or created without any expectation that anyone in the future would be interested in it or its authorship. As copyright often extends beyond the life of the author, successive copyright owners must be tracked through wills, many of which may no provision for the transfer of copyright.
468. Issues associated with the use of orphan works are not limited to their preservation or making collections available to users to access. They can also potentially stifle creativity and economic development. Not knowing or being able to contact the copyright owner can have a significant impact on, for example:
- a creator using some or all of the orphan work to create a new work
 - a business developing new commercial uses for old works.
469. Section 67 of the Copyright Act provides a narrow exception from infringement of copyright when the identity of the author cannot be ascertained by reasonable inquiry. Knowing the author is critical to identify whether a work is protected by copyright (ie when copyright expired or will expire) and may be of assistance for tracing the current copyright owner (assuming a chain of title exists). However, the exception only applies where it is reasonable to assume copyright in the work has expired. As an exception, it appears unsuitable for copying orphan works that are not clearly out of copyright.

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.

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?

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?

²⁰⁰ This can happen when works protected by Crown copyright are transferred by the Crown to other people or when Crown agencies themselves (often following one or more restructures) do not know who has responsibility for a particular work.

²⁰¹ See from page 66 for a discussion of the GLAM sector.

Approaches taken overseas to address orphan works

470. A number of countries have grappled with the challenge of facilitating beneficial uses of orphan works. Some have enacted laws to address this issue on a case-by-case basis, others have enacted laws that empower an organisation to licence works or allow orphan works to be used through extended collective licensing systems operated by CMOs. Examples include:
- *UK* – The Secretary of State can grant non-exclusive licences to use an orphan work if the prospective user has conducted a diligent search and not been able to identify or contact the copyright owner. Licences granted are recorded on a public register and licencing fees paid are held on trust by the Intellectual Property Office. The copyright owner has seven years to come forward to claim the fees paid.
 - *Canada* – Users can file an application with the Copyright Board of Canada for a non-exclusive licence to use certain orphan works on a case-by-case basis. Applicants must demonstrate they have made a reasonable effort to locate the copyright owner. Licensee fees can be required to be paid to an appropriate collective management organisation.
 - *Norway* – Collective management organisations are permitted to license certain uses of orphan works.
 - *Japan* – Applications can be made to the Commissioner of the Agency of Cultural Affairs for a licence to use certain types of orphan works. Applicants are required to demonstrate that they have conducted a diligent search and have been unable to identify or contact the copyright owner.

74

What were the problems or benefits of the system of using an overseas regime for orphan works?

Licence stacking

471. Licence stacking is where you need permission from many people before developing and commercialising a product. It can also be known as ‘royalty stacking’ when licensing fees must be paid to various parties to commercialise a product.
472. Open data in New Zealand is commonly released for use under an attribution only Creative Commons licence. We have heard that when information is combined from many different sources, even the most permissive licences for accessing that information can become unwieldy to manage. Datasets can pass through many different people, each making changes, and each having to name all of the previous contributors. We have heard that the requirement to attribute all the people who have made changes to a dataset can become a substantial burden, particularly for smaller or non-commercial projects.

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?

Part 7 – Enforcement of Copyright

Introduction

473. The Copyright Act provides a number of enforcement mechanisms, including civil and criminal procedures to address infringement of copyright. Supporting exclusive rights with an efficient and effective enforcement regime is an important part of providing creators and copyright owners an incentive to create and disseminate new works.
474. This Part covers potential issues with copyright enforcement. It does not cover whether any particular action should constitute an infringement of copyright or a related right. That is the subject of Parts 4 (Rights) and 5 (Exceptions).

The current situation

Legal action to enforce copyright

475. Copyright owners²⁰² can take legal action against anyone found to be infringing their exclusive rights without their permission.²⁰³ Legal action is usually taken in the High Court but may also be taken in the District Court. Cases are heard and decided by a judge alone, rather than by a jury.
476. The remedies the courts may order for copyright infringement include:
- injunctions (typically an order for a person to stop a course of action – like selling infringing copies)
 - an award of either damages to compensate for the injury to the copyright owner, including additional damages in some circumstances²⁰⁴, or account of the profits the infringer made from their infringing activity
 - disposal of infringing works and objects for making infringing copies of copyright works.²⁰⁵
477. If the person who has infringed copyright can show that when the infringement occurred they did not know, and had no reason to believe, that copyright existed in the work, the copyright owner will not be entitled to an award of damages. However, the court can instead order the infringer to pay the copyright owner the profits attributable to the infringement.

²⁰² For the purpose of this section, references to ‘copyright owners’ includes references to any exclusive licensees.

²⁰³ Section 120 of the Copyright Act.

²⁰⁴ The courts take into account the wilfulness of the infringement and any benefit that accrued to the infringer from the infringement. They may order the infringer to pay such additional damages as the justice of the case may require. See section 121(2) of the Copyright Act.

²⁰⁵ See sections 120-122 of the Copyright Act.

478. Authors and film directors are entitled to relief from infringement of their moral rights by way of injunctions and an award of damages.²⁰⁶

Other ways of enforcing copyright

479. The Copyright Act also provides copyright owners two other ways of enforcing copyright:

- border protection measures, where New Zealand Customs Service (Customs) will assist copyright owners to prevent infringing works from being imported
- the infringing file sharing regime.

Possible issues with the enforcement of copyright

480. In the rest of this Part we discuss issues related to:

- barriers to taking legal action
- groundless threats of legal action
- border protection measures
- infringing file sharing regime
- additional measures to address online infringements
- who should bear the cost of enforcing copyright in the digital environment
- criminal liability.

Barriers to taking legal action

Proving copyright exists in a work and who owns that copyright

481. The Copyright Act provides certain presumptions to facilitate copyright owners taking legal action (ie making an initial application to the courts) to enforce their copyright.²⁰⁷ For example, there is a presumption that published literary, dramatic or musical works qualify for copyright and that the person whose name appears on a copy of the work is the author of it.

482. However, in order for the court to make a determination on infringement, the copyright owner must establish the following four factors:²⁰⁸

- there is a work in which right can subsist
- copyright does subsist in the work
- they own copyright in the work
- copyright has been infringed.

²⁰⁶ See paragraph 226 onwards for a discussion of moral rights.

²⁰⁷ Sections 126-129 of the Copyright Act.

²⁰⁸ *P S Johnson & Assocs Ltd v Bucko Enterprises Ltd* [1975] 1 NZLR 311, at page 315.

483. We have heard that court action to enforce copyright often fails because the copyright owner is unable to prove copyright exists in the work or, if it does, that they own the copyright.
484. This task can be difficult for copyright owners because, unlike other forms of intellectual property rights like designs, patents and trade marks, there is no official register of copyright works to provide *prima facie* evidence that the work is protected by copyright and who owns it.
485. As discussed in paragraphs 82 to 98, New Zealand’s international obligations prohibit us from requiring people to register their copyright in works before they benefit from copyright protection. However, this does not mean that a voluntary registration regime could not be implemented to assist copyright owners to enforce their copyright. For example, the Canadian Copyright Office maintains a copyright register, where registration provides evidence that copyright exists and the person registered is the owner of copyright. The US Copyright Office also maintains a copyright register, where registration entitles the copyright owner to seek statutory damages and attorney fees in the federal court for copyright infringement.

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?

Non-exclusive licensees and CMOs cannot take legal action for infringement

486. Only copyright owners and their exclusive licensees²⁰⁹ may take legal action to enforce copyright.²¹⁰ Although a licence gives non-exclusive licensees a right to do one or more of the acts reserved for copyright owners, they cannot take legal action themselves to stop somebody else from doing one of the reserved acts.
487. There may be circumstances, however, where it is reasonable for a non-exclusive licensee to be able to take legal action to enforce against people who infringe copyright. We have heard, for example, that CMOs²¹¹ should be able to enforce copyright on behalf of their members, even if they only have a non-exclusive licence.

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?

78

Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?

²⁰⁹ An exclusive licensee is someone the copyright owner has authorised, to the exclusion of everyone else (including the copyright owner themselves), to exercise a right that would otherwise be exercisable exclusively by the copyright owner.

²¹⁰ Section 123 of the Copyright Act.

²¹¹ Following action taken in 2010 by the Commerce Commission under the *Commerce Act 1986*, CMOs can no longer obtain exclusive licences from copyright owners. Licences given to CMOs must now be non-exclusive. CMOs are therefore unable to take legal action for infringement, despite their members (ie copyright owners) wanting them to do so.

Cost of taking legal action

488. The most significant barrier for copyright owners taking legal action is the cost. Legal action in the courts is expensive and copyright owners often limit their enforcement actions to large-scale or commercial infringements. The cost can also provide a strong incentive for a copyright owner and an alleged infringer to settle infringement claims without resorting to the courts. This can mean fewer cases are available to provide guidance on how to interpret the law.
489. Although small-scale or occasional infringements may not have a significant damaging impact on the copyright owner, the collective impact of multiple infringements of this nature can be significant.

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?

Groundless threats of legal action

490. The Copyright Act provides that where the copyright owner takes legal action alleging infringement, the defendant in those proceedings (ie the alleged infringer) may apply to court for a declaration that the proceedings were unjustified and for an order that the plaintiff pay damages for any loss suffered by the defendant.²¹²
491. Nothing in the Copyright Act, however, addresses the situation where the copyright owner makes groundless threats of commencing legal proceedings for infringing copyright. These sorts of threats can result in damage to the people threatened, including emotional stress and disruption to businesses. Groundless threats can also be made with the aim of stifling freedom of speech or preventing criticism of a person or an organisation and their products or services.
492. Some countries, including Australia, enable a person who has received groundless threats of legal action to apply to the courts for:
- a declaration that the threats were unjustified
 - an injunction against the continuance of the threats
 - an order for recovery of any damages that the aggrieved person has sustained.²¹³

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?

²¹² Section 130 of the Copyright Act.

²¹³ Section 202 of the Australian *Copyright Act 1968*.

Border protection measures

493. Border protection measures are at-the-border measures provided under the Copyright Act, and administered by Customs Service, to assist copyright owners to take legal action against the importers of physical copies of works that infringe copyright. (These measures are also provided under the *Trademarks Act 2002* to assist trade mark owners to take action against the importers of trade mark infringing goods.)
494. Under the Copyright Act (and the Trademarks Act) rights holders can give a notice to Customs requesting the detention of shipments of works suspected of infringing copyright. Customs are currently enforcing 335 notices from rights owners.²¹⁴ If Customs suspects that a shipment contains infringing copies of works, it can detain the shipment and give notice to the importer and the copyright owner that the shipment has been detained.
495. The copyright owner then has 10 working days to take legal action against the importer for infringing their copyright. If legal action is not taken within this period, Customs must release the goods to the importer. Importers also have the option of voluntarily forfeiting the shipment to the Crown, in which case Customs arranges for the destruction of the shipment.

The changes required by CPTPP

496. CPTPP requires New Zealand to give Customs the power to initiate border protection measures *ex officio*²¹⁵ in respect of goods under their control that are imported, destined for export, or in transit through New Zealand to another destination.
497. Changes to implement CPTPP obligations have already been introduced into the Copyright Act (and the Trademarks Act) by the *Trans-Pacific Partnership Amendment Act 2016* but are not yet in force. These changes will enter into force on 30 December 2018, when CPTPP enters into force.

Potential issues with the border protection measures: payment of \$5,000 bond

498. Right holders must give Customs a letter of indemnity for any costs incurred by Customs in applying the border protection measures, and lodge a \$5,000 bond as security for non-payment of any invoices from Customs related to enforcement of copyright. The bond is to cover the risk that the rights holder fails to honour their letter of indemnity. The bond, less any unpaid invoices and plus any interest that has accrued on the bond, is returned to the copyright owner (or trade mark owner) at the end of the notice period.²¹⁶
499. We understand that Customs does not rely on the bond to recover its costs under the border process related to copyright or trade mark enforcement. However, Customs incurs a cost for administering the bond regime. This cost is not recovered from copyright and trade mark owners.

²¹⁴ As at 5 October 2018.

²¹⁵ *Ex officio* powers enable Customs to act on their own accord and without the need to have received a notice from a right holder.

²¹⁶ Each notice from a copyright or trade mark owner must specify the period that Customs is to enforce the notice. The maximum period is five years.

500. We have heard that the requirement to pay the \$5,000 bond can be a barrier to small businesses taking advantage of the border protection measures to prevent the importation of copyright infringing works (and trade mark infringing goods).
501. Customs is considering the design of these arrangements and submissions received through this Issues Paper on the border protection measures will be provided to Customs.

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 there any issues with the border protection measures that should be addressed? Please describe these issues and their impact.

Issues with the infringing file sharing regime

502. The Copyright (Infringing File Sharing) Amendment Act 2011 introduced a three notice regime for infringement of copyright by individuals using peer-to-peer (P2P) file sharing technologies (infringing file sharing regime). Its aim was to provide an efficient, effective and low cost enforcement regime to:
- deter individuals from infringing copyright through the use of P2P file sharing technologies
 - educate the public about copyright
 - provide compensation for copyright owners for the injury they have suffered because of this activity.
503. Under the regime, copyright owners can request an Internet Service Provider (ISP) to send up to three infringement notices to an account holder who is alleged to have infringed copyright using P2P file sharing technologies. An ISP can require the copyright owner to pay a fee of up to \$25 to send each notice.²¹⁷ After the third notice has been sent, the copyright owner may take a claim of up to \$15,000 to the Tribunal against the account holder. A fee of \$200 must be paid for each claim made to the Tribunal.²¹⁸
504. The infringing file sharing regime was implemented in response to complaints that court action was too expensive and copyright owners need a more cost effective method of combating online infringements. The infringing file sharing regime was intended to provide an alternative to using the courts to address the use of P2P file sharing technologies to infringe copyright.

82

Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?

²¹⁷ Regulation 7 of the Copyright (Infringing File Sharing) Regulations 2011. The fee is set at a level intended to enable ISPs to recover their costs, including the cost of setting up a procedure for receiving and sending notices.

²¹⁸ Regulation 8 of the Copyright (Infringing File Sharing) Regulations 2011.

505. Although a number of infringement cases using the infringing file sharing provisions were brought shortly after the regime came into effect in 2012,²¹⁹ we understand that the regime is no longer being used by copyright owners.²²⁰
506. We have heard a range of explanations as to why copyright owners are not using the infringing file sharing regime. These include:
- The \$25 fee copyright owners must pay an ISP to send a notice to an account holder is too high. Even if successful in the Tribunal, the copyright owner can recover only a contribution towards the total cost of the notices sent to the account holder.
 - Mistakes in notices by ISPs and delays and failures by ISPs in sending notices have resulted in notices being invalid. The costs associated with notices being invalid (because of ISPs) are borne by copyright owners with no recompense or ability to recover the costs of these notices.
 - General dissatisfaction by copyright owners with the outcome of Tribunal decisions, particularly with the amounts it has awarded in individual cases.
 - Delays in decisions by the Tribunal preventing copyright owners from giving timely publicity to them as a deterrent to future acts of infringement.

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?

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?

Are additional enforcement measures needed for addressing online infringements?

507. A number of websites have been created for primarily assisting individuals to infringe copyright (pirate websites). In addition, a range of technologies have been developed (eg peer-to-peer filing sharing, TV set-top boxes, such as Kodi boxes for streaming internet content, and virtual private networks). Although some of these technologies can be used for legitimate purposes, they can also facilitate large-scale online copyright infringement.
508. The use of pirate websites, which are usually hosted overseas and, therefore, beyond the jurisdiction of New Zealand's laws, and the development of new technologies for online infringement create new challenges for copyright owners in addressing online infringements. Traditional enforcement measures are becoming largely ineffective for addressing online infringements.
509. Some other countries have provided new enforcement measures to address online infringement. For example, some countries permit copyright owners to get a website-

²¹⁹ The first decision of the Copyright Tribunal under the infringing file sharing regime was made in January 2013.

²²⁰ Since late 2015 ISPs do not appear to have been requested by copyright owners to send any notices to their account holders. The last claim to be taken to the Copyright Tribunal was also in 2015.

blocking injunction to stop people from accessing overseas pirate websites.²²¹ These injunctions typically require local ISPs to block people's access to specified websites.

510. Whether copyright owners and their licensees are able to obtain website blocking injunctions in New Zealand is uncertain. Copyright owners may be able to apply for a website blocking injunction by relying on section 92B of the Copyright Act, Rules 2.1 and 1.6 of the High Court Rules and the High Court's inherent jurisdiction, but this is yet to be tested in the courts.
511. We have heard that website blocking injunctions can give rise to concerns around freedom of expression, which is protected under the New Zealand Bill of Rights Act 1990.

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?

Should ISPs bear some of the cost of enforcing copyright in the digital environment?

512. The current policy with respect to the cost of enforcing copyright is that:
- copyright owners bear the cost of enforcing their property rights, as the principal beneficiaries of those rights
 - infringers should pay compensation for the injury to the copyright owner caused by their infringing actions and the copyright owner's expenses arising from taking legal action.
513. New measures to address online infringements that require cooperation of intermediaries like ISPs to implement are challenging this policy. The implementation of the infringing file sharing regime brought this issue into the spotlight. Website-blocking injunctions have also sparked debate overseas on who should pay ISPs' costs to implement the injunctions. Countries imposing website blocking injunctions have adopted a variety of rules regarding who pays to implement these injunctions.

86

Should ISPs be required to assist copyright owners enforce their rights? Why / why not?

87

Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?

²²¹ Jurisdictions that have introduced website blocking injunctions include Australia, the EU and Singapore. The sale of television set-top boxes containing software for illicitly accessing paid subscription services is also an offence in the EU.

Criminal liability

514. Copyright infringement that is considered particularly serious – for example because it is done as part of a person’s business or because it has a significant negative impact on the copyright owner – can constitute a criminal offence.²²² In these circumstances, enforcement action by the Crown can be in the wider public interest. Criminal liability can arise for a range of actions involving infringing objects or illicit recordings. These include:
- making or importing for sale or hire
 - possessing in the course of business with a view to committing any copyright-infringing act
 - offering or exposing for sale or hire, or selling or letting for hire
 - exhibiting in public
 - distributing otherwise in the course of business to such an extent as to prejudicially affect the copyright owner.
515. Criminal liability can also arise when a person, for example:
- makes an object specifically designed or adapted for making infringing copies of copyright works
 - causes a literary, dramatic or musical work to be performed in public
 - causes a film or sound recording to be played in public.
516. The penalty on conviction of a person who commits any offence is a fine of up to \$150,000 or imprisonment for a term not exceeding five years.

²²² See sections 131 (infringing objects) and 198 (illicit recordings) of the Copyright Act.

Part 8 – Other issues

Introduction

517. This section focuses on specific issues not covered elsewhere in this Issues Paper. In particular, it covers:
- Section 1 – The relationship between copyright and registered design protection
 - Section 2 – Copyright and the Wai 262 inquiry.

Section 1 – Relationship between copyright and registered design protection

Introduction

518. Industrial designs in New Zealand are protected under the Copyright Act as artistic works. They can also be protected by registering them under the Designs Act 1953, as designs. This dual protection is unusual internationally and may be creating issues for New Zealand businesses.
519. This section covers:
- the definition of ‘industrial design’
 - industrial design protection under the Copyright Act
 - industrial design protection under the Designs Act
 - the differences between copyright protection and registering a design
 - industrial design protection internationally
 - potential consequences of providing both copyright and registered design protection for industrial designs.

What is an ‘industrial design’?

520. The World Intellectual Property Organization defines ‘industrial design’ as:

*... the ornamental or aesthetic aspects of an article. An industrial design may consist of three dimensional features, such as the shape or surface of an article, or two dimensional features, such as patterns, lines or colour.*²²³

521. An industrial design generally relates to the appearance of something manufactured by an

²²³ See <http://www.wipo.int/designs/en/>

'industrial process or means'²²⁴ (as opposed to a method of construction), the material it is manufactured from or how it functions. Industrial designs can be applied to a large range of articles,²²⁵ including furniture, home appliances, utensils, product packaging, containers, patterns applied to cloth or wallpaper, and car parts such as tyre treads.

Industrial design protection under the Copyright Act

522. The creation of an industrial design will usually involve the development of drawings or models, which are automatically protected as artistic works under the Copyright Act.²²⁶
523. The term of protection for industrial designs varies under the Copyright Act. Section 75 of the Copyright Act provides that an artistic work that is applied industrially²²⁷ receives a term of protection of:
- 16 years from the date it was created if it is not a work of artistic craftsmanship²²⁸
 - 25 years if it is a work of artistic craftsmanship.
524. If the design is not applied industrially,²²⁹ the term of protection will be the standard term for an artistic work – the life of the author plus 50 years.

Industrial design protection under the Designs Act

525. Industrial designs can also be protected in New Zealand by registering them under the Designs Act. This involves making an application to the Intellectual Property Office of New Zealand (IPONZ) and paying the prescribed fee.
526. Registration of a design only provides protection for the external appearance of a manufactured article. Designs that involve a shape or configuration that is determined by the function carried out by the article do not qualify for registration under the Designs Act. However, these designs may be eligible for patent protection under the Patents Act 2013.

Rights given by design registration

527. The Designs Act gives the owner of the registered design the exclusive right to make, import, sell or license the registered design.²³⁰ Initial registration is for a five year term and registration can be renewed every 5 years up to a maximum term of 15 years.

²²⁴ The definition of 'design' in the Designs Act is for an industrial design. The inclusion of 'industrial process or means' in the 'design' definition (which is not in the WIPO definition) is not defined in the Designs Act.

²²⁵ 'Article' is defined as "any article of manufacture; and includes any part of an article if that part is made and sold separately".

²²⁶ See section 2 of the Copyright Act, which discusses the categories of artistic works protected under the Copyright Act.

²²⁷ Section 75 of the Copyright Act states that a design is applied industrially if more than 50 three-dimensional copies of a work are made for sale or hire or one or more three-dimensional copies of a work are created in lengths for sale or hire.

²²⁸ See section 75(4) of the Copyright Act. The term 'artistic craftsmanship' is not defined in the Copyright Act. However, it seems clear from court decisions that a work of 'artistic craftsmanship' must possess some 'artistic quality'.

²²⁹ For example, if fewer than 50 copies of the design are made.

Differences between copyright and registered design protection

528. The key differences between copyright protection and design registration are summarised in the table below.

Table 7: Comparison of Copyright and Design Registration

| | Copyright protection | Registered design protection |
|--|---|--|
| Obtaining protection | Automatic on creation of the work embodying the design. No fee is payable for protection. | An application to register the design must be made to IPONZ and a fee is payable for registration. |
| Exclusive rights | To copy, import for sale, and sell copies of the work. | To make, import for sale, sell or hire any article to which the registered design has been applied. |
| Criteria for protection | The design must be 'original'. | The design must be 'new or original'. A design is not new if it has been previously registered or published in New Zealand. The threshold for this protection is higher than copyright protection. |
| Terms of protection | 16 years if applied industrially, 25 years if it is also a work of artistic craftsmanship. 50 years after death of owner if it is not industrially applied. | Up to 15 years if renewed by the owner at five yearly intervals. |
| Protection against independent creation | Another person who develops the same design without knowledge of the original does not infringe copyright in the original design. | The owner of a registered design is the only person who can make or sell the design. Anybody else who makes or sells the design infringes the registration, even if they developed it independently without knowledge of the earlier design. |
| Proof of ownership for the purpose of enforcing rights | The copyright owner may be required to establish that the work is protected by copyright and they are the owners of that copyright. ²³¹ | Registration provides <i>prima facie</i> evidence that the design is protected and of who owns the rights to the design. |
| Renewal fees required? | No. | Yes, after every five years, up to a maximum term of 15 years. |

Industrial design protection internationally

529. Industrial designs do not receive the same protection overseas. In some countries they do not receive any copyright protection, rather protection can only be obtained by registering the design.

530. All countries provide a registration regime to protect industrial designs. This protection is only provided for designs that are 'new' – that is, the design has not been disclosed to the public before the design application is filed. Countries apply different standards when

²³⁰ See section 11(1) of the Designs Act.

²³¹ See Part 6 of the Issues Paper for a discussion on enforcing copyright.

determining whether a design is new. Although New Zealand provides that the design must not have been previously published or registered in New Zealand, many countries require that the design must not have been used, registered or published anywhere in the world prior to the date of filing of the application.

531. Some countries, including EU members, provide for an 'unregistered design right' for industrial designs that provides rights similar to copyright. This right is granted automatically when the design is disclosed to the public. The term of the right is short (three years in the EU) and only provides protection against copying.

Possible issues with New Zealand's current protection for industrial designs

532. We have heard that providing dual protection for industrial designs may be creating issues for local designers. Potential issues include:

- relying on copyright protection in New Zealand could be making it difficult to obtain protection in other countries
- New Zealand provides greater protection to foreign designers compared to the protection that other countries provide to New Zealand designers
- innovations, like 3-D printing, may make it difficult to determine whether a design has been applied industrially.

Copyright protection could be making it difficult to obtain protection in other countries

533. An advantage of providing copyright protection is that it is free and creators do not have to do anything to protect their designs. However, this may also create an over-reliance on copyright protection, which may not always be in the design owner's interests.

534. If a New Zealand designer relies only on copyright to protect their industrial designs in New Zealand, they may not be able to protect their designs overseas. This is because:

- Their designs will probably not qualify for copyright protection outside of New Zealand because most countries exclude industrial designs from qualifying for copyright protection.²³²
- If they have already offered for sale articles incorporating the design in New Zealand before applying to register their design overseas, they will not be able to register their design overseas. Their design will not be considered 'new'.

New Zealand provides greater protection for foreign designers

535. Industrial designs created in other countries are automatically protected by copyright in New Zealand, even though designs created in New Zealand will not receive reciprocal copyright protection in those other countries.

Innovations may make it difficult to determine whether a design has been applied industrially

536. The term of copyright for an industrial design depends on whether or not it has been applied industrially. This is clear when a design is distributed by selling or hiring physical copies but less clear when digital files for making a copy are distributed. For example, it is not clear if

²³² However, they may be eligible for unregistered design rights, for example in the EU.

this would be determined on the basis of the number of files distributed through sale or licensing arrangements or the number of copies actually made. If the latter, it is unclear how the number of copies made would be determined.

537. The development of 3-D printing has given design owners the option of distributing their designs as digital files, rather than as physical articles. The digital files used to control 3-D printers can be produced by scanning a three-dimensional object. If the 3-D object incorporates an industrial design that is protected by copyright, it is not clear whether the scanning of the object should constitute the making of an unauthorised copy of the object. While the unauthorised printing of a copy of the object using a 3-D printer may infringe copyright in the object,²³³ it is less clear whether creating the digital file by scanning the object would be infringement.

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?

90

Have you experienced any problems when seeking protection for an industrial design, especially overseas?

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?

The Hague Agreement

538. The Hague Agreement Concerning the International Registration of Industrial Designs (the Hague Agreement) effectively establishes an international system (the Hague system) that allows industrial designs to be protected in multiple countries with minimal formalities.²³⁴ Sixty seven countries have joined the Hague Agreement, including some of New Zealand's key trade partners, such as the EU, Japan, Singapore and the US. Australia is currently considering whether to join the Hague Agreement and Canada is in the process of implementing legislative changes to enable it to join.
539. We have heard that New Zealand not being a member of the Hague Agreement makes it more expensive and complicated for New Zealand designers to protect their designs overseas.

92

Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?

²³³ 3-D printing a copy of a copyright work without the copyright owner's permission is likely to be an infringement under section 29 of the Copyright Act, as the making of copies is a restricted act under section 16.

²³⁴ More information about the Hague Agreement and the Hague system is available at <http://www.wipo.int/treaties/en/registration/hague/>

Section 2 – Copyright and the Wai 262 inquiry

540. This section looks at the findings of the Waitangi Tribunal’s Wai 262 inquiry in relation to expressions of Māori traditional knowledge (which the Waitangi Tribunal referred to as ‘taonga works’), and what the Wai 262 inquiry means for the *Copyright Act* review.
541. In its report on the Wai 262 inquiry, the Waitangi Tribunal made several recommendations to ensure recognition and protection of Māori rights and interests under the Treaty of Waitangi in the different regimes that make up New Zealand’s intellectual property system. It found the copyright regime (along with the related designs and trade marks regimes) did not provide adequate protection for Māori rights and interests in taonga works and mātauranga Māori.²³⁵ Rather than recommending changes to copyright law, it recommended that the Crown establish a new, unique regime to provide new protections.
542. In this section, we seek your views on the Waitangi Tribunal’s discussion of taonga works and mātauranga Māori, and how the Government should progress work to provide better protections for them.
543. The section covers:
- a brief summary of the Wai 262 inquiry
 - a detailed discussion of the the key concepts in te ao Māori (the Māori world) and the Waitangi Tribunal’s high-level findings on taonga works and mātauranga Māori
 - the Waitangi Tribunal’s particular analysis of how the copyright regime protects Māori rights and interests in taonga works and mātauranga Māori
 - our view of the implications of the Waitangi Tribunal’s analysis and recommendations for the *Copyright Act* review, and our proposed next steps for progressing work to protect taonga works and mātauranga Māori.

²³⁵ ‘Mātauranga Māori’ encompasses the body of knowledge originating from Māori tūpuna (ancestors). It includes the Māori worldview and perspectives, as well as Māori creativity and cultural practices, including te reo Māori. This is discussed further below from paragraph 552.

The inquiry in brief

544. In the Wai 262 inquiry, the Waitangi Tribunal examined the claims of six iwi (Ngāti Wai, Ngāti Kuri, Te Rarawa, Ngāti Porou, Ngāti Kahungunu and Ngāti Koata), who sought to establish “who owns or controls three things”:²³⁶
- **mātauranga Māori**
 - the “tangible products of mātauranga Māori” – traditional artistic and cultural expressions that the Waitangi Tribunal referred to as ‘**taonga works**’²³⁷
 - the things that are “important contributors to mātauranga Māori” – including the unique characteristics of indigenous flora and fauna, which the Waitangi Tribunal referred to as ‘**taonga species**’ and New Zealand’s natural environment more generally.²³⁸
545. The Wai 262 inquiry was the Waitangi Tribunal’s first whole-of-government inquiry, spanning almost 20 years – reflecting the significant breadth and complexity of the claims. It has been said that the inquiry was about the place of Māori culture, identity and traditional knowledge in New Zealand’s laws, government policies and practices.²³⁹ Part of the inquiry examined the interface between te ao Māori and New Zealand’s intellectual property regimes, including the copyright regime.
546. In 2011, the Waitangi Tribunal released its report, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*. Chapter 1 of the Wai 262 report deals with the relationship between taonga works and intellectual property rights.

Key concepts in Chapter 1 of the Wai 262 report

547. In Chapter 1, the Waitangi Tribunal focuses on three different concepts: taonga works, taonga-derived works and mātauranga Māori.

Taonga works

548. ‘Taonga work’ is a term coined by the Waitangi Tribunal to describe “the unique artistic and intellectual expressions of te ao Māori”.²⁴⁰ It suggested the following definition:²⁴¹

A taonga work is a work, whether or not it has been fixed, that is in its entirety an expression of mātauranga Māori; it will relate to or invoke ancestral connections

²³⁶ Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi* (Wai 262, 2011) at 17.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ <https://waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>

²⁴⁰ Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi* (Wai 262, 2011) at 19.

²⁴¹ Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuarua* (Wai 262, 2011) vol 1 at 96.

(whakapapa), and contain or reflect traditional narratives or stories. A taonga work will possess mauri²⁴² and have living kaitiaki²⁴³ in accordance with tikanga Māori.

549. We discuss the concepts of ‘mauri’ and ‘kaitiaki’ below.
550. Examples of taonga works include haka, karakia, waiata, weavings, carvings, tā moko, designs, and other Māori cultural expressions. The haka *Ka Mate* is an example of a well-known taonga work.²⁴⁴

Taonga-derived works

551. The Waitangi Tribunal also coined the term ‘taonga-derived work’. It defined a taonga-derived work as:²⁴⁵

...a work that derives its inspiration from mātauranga Māori or a taonga work but does not relate to or invoke ancestral connections, nor contain or reflect traditional narratives or stories in a direct way. A taonga-derived work is identifiably Māori but does not have living kaitiaki in accordance with tikanga Māori.

552. Taonga-derived works can also be haka, karakia, waiata, weavings, carvings and tā moko designs and other Māori cultural expressions. They are distinguished from taonga works because they do not invoke ancestors, or have living kaitiaki or mauri. Examples include the stylised koru on Air New Zealand planes, contemporary jewellery, textile, ceramic and graphic design works by Māori and non-Māori artists and craftspeople.

Mātauranga Māori

553. The Waitangi Tribunal discussed this in the following terms:²⁴⁶

*‘Mātauranga’ derives from ‘mātau’, the verb ‘to know’. ‘Mātauranga’ can be literally translated as ‘knowing’ or ‘knowledge’. But ‘mātauranga’ encompasses not only **what** is known but also **how** it is known – that is, the way of perceiving and understanding the world, and the values or systems of thought that underpin those perceptions ‘Mātauranga Māori’ therefore refers not only to Māori knowledge, but also to the Māori way of knowing.*

... mātauranga Māori was a product of the interaction between the culture of settlers from Hawaiki and the environment of Aotearoa. Mātauranga Māori incorporates language, whakapapa, technology, systems of law and social control, systems of property and value exchange, forms of expression, and much more.

554. The Waitangi Tribunal described mātauranga Māori relating to taonga works as “the intangible intellectual basis for taonga works and at least some aspects of taonga-derived works”.²⁴⁷

²⁴² The Waitangi Tribunal defined ‘mauri’ as: the life principle or living essence contained in all things, animate and inanimate.

²⁴³ The Waitangi Tribunal defined ‘kaitiaki’ as: guardian, protector.

²⁴⁴ *Ka Mate* receives *sui generis* protection under the *Haka Ka Mate Attribution Act 2014*.

²⁴⁵ Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuarua* (Wai 262, 2011) vol 1 at 96.

²⁴⁶ *Ibid*, at 16.

Kaitiakitanga and the kaitiaki relationship

555. An underlying principle behind the Waitangi Tribunal's recommendations is the kaitiaki relationship held by Māori with taonga works and mātauranga Māori. This is the relationship between taonga works and mātauranga Māori, and "those who are responsible for safeguarding them, whether or not they are the original creators".²⁴⁸ This relationship is informed by kaitiakitanga, a foundational concept in te ao Māori.
556. Kaitiakitanga relates to several other key concepts in te ao Māori – in particular, whanaungatanga, mauri and whakapapa. The Waitangi Tribunal explained how they interconnect in this way:²⁴⁹

*...the defining principle is **whanaungatanga**, or kinship. In te ao Māori, all of the myriad elements of creation – the living and the dead, the animate and inanimate – are seen as alive and inter-related. All are infused with **mauri** (that is, a living essence or spirit) and all are related through **whakapapa**.*

The people of a place are related to its mountains, rivers and species of plant and animal, and regard them in personal terms. Every species, every place, every type of rock and stone, every person (living or dead), every god, and every other element of creation is united through this web of common descent, which has its origins in the primordial parents, Ranginui (the sky) and Papa-tu-ā-nuku (the earth) .

This system of thought provides intricate descriptions of the many parts of the environment and how they relate to each other. It asserts hierarchies of right and obligation among them...

557. The rights and obligations of whanaungatanga are encompassed in the ethic of kaitiakitanga:²⁵⁰

Kaitiakitanga is the obligation, arising from the kin relationship, to nurture or care for a person or thing. It has a spiritual aspect, encompassing not only an obligation to care for and nurture not only physical well-being but also mauri.

It is a way of thinking and acting that seeks to express and enhance whanaungatanga with taonga in the natural environment.

558. Kaitiakitanga is also related to the concepts of **mana** and **rangatiratanga**.²⁵¹

...those who have mana (or, to use Treaty terminology, rangatiratanga) must exercise it in accordance with the values of kaitiakitanga – to act unselfishly, with right mind and heart, and with proper procedure. Mana and kaitiakitanga go together as right and responsibility, and that kaitiakitanga responsibility can be understood not only as a cultural principle but as a system of law.

²⁴⁷ Ibid, at 85.

²⁴⁸ Ibid, at 31.

²⁴⁹ Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuarua (Wai 262, 2011) vol 1 at 17.

²⁵⁰ Ibid.

²⁵¹ Ibid.

The Waitangi Tribunal's high-level findings on taonga works

The principle of tino rangatiratanga

559. The Waitangi Tribunal considered that Māori are guaranteed 'te tino rangatiratanga', as expressed in the Māori text of the Treaty of Waitangi, over their taonga works and mātauranga Māori. The Waitangi Tribunal described the concept of te tino rangatiratanga as follows:²⁵²

In substance, this conveys the idea that the rights of authority and control then exercised by the tribal leaders will be protected. Those rights are said to apply to 'o ratou taonga katoa' – all the treasured things of Māori tribes ('nga hapu') and all Māori people ('nga tangata katoa').

560. The Waitangi Tribunal considered that the emphasis of 'authority and control' inherent in the concept of tino rangatiratanga is to be preferred over the absolute concept of 'exclusive possession' as expressed in the English text of the Treaty.

561. The Waitangi Tribunal went on to give further background on the meaning of 'rangatiratanga' as follows:²⁵³

Its root word is rangatira, meaning tribal leader – literally, one who weaves together (ranga) a group of people (tira). So rangatiratanga carries expectations about right behaviour, appropriate priorities and ethical decision-making that are deeply embedded in Māori culture.

For example, rangatira would be expected to value kinship, respect the tapu and mauri of the natural elements surrounding the community, and above all be the embodiment of kaitiakitanga. Rangatira who behave in this way are said to have great mana.

Recognising tino rangatiratanga in the modern IP system

562. A key aspect of the Waitangi Tribunal's analysis was to consider how the legal intellectual property framework should deliver to Māori a reasonable measure of control over the use of taonga works and mātauranga Māori.

563. The Waitangi Tribunal considered that the nature and extent of kaitiaki rangatiratanga in taonga works and mātauranga Māori could be properly resolved "only on a case-by-case basis",²⁵⁴ and could be resolved through the following three-stage assessment:²⁵⁵

An initial step is to understand the relationship between the kaitiaki and the particular taonga work or mātauranga Māori in question. Once that relationship is properly understood in its cultural context, the next step is to identify any other valid interests in the taonga work or mātauranga Māori, and then to balance them against those of the kaitiaki.

²⁵² Ibid, at 79.

²⁵³ Ibid, at 80.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

564. At the first step, the Waitangi Tribunal reached four conclusions, which we have paraphrased as follows:²⁵⁶
- Whether the work in question is a taonga work or a taonga-derived work, Māori are entitled to prevent derogatory and offensive public uses of it.
 - If it is a taonga work, then the kaitiakitanga relationship that comes with it justifies more extensive rights in Treaty terms. These would include rights to consultation and, where necessary, to give consent to the commercial use of such works.
 - Mātauranga Māori is also entitled to protection against derogatory and offensive public use.
 - Where kaitiaki can be identified for closely held mātauranga Māori, they too will be entitled to be involved in decisions over the use of that mātauranga Māori.
565. At the second step, the Waitangi Tribunal identified the interests of private rights holders and the public interest in general access to the public domain as valid additional interests. In balancing their interests with those of kaitiaki (the third step), it considered that the level of protection that is reasonable in all circumstances was as follows:²⁵⁷
- Taonga works, taonga-derived works and mātauranga Māori are entitled to protection from derogatory and offensive public use.
 - While it is inappropriate to interfere in pre-existing vested rights, any future use of taonga works for commercial purposes should occur only after consulting and, in appropriate cases, gaining the consent of the kaitiaki.
566. The Waitangi Tribunal considered that a new legal framework should be introduced to give effect to these two principles.

Copyright and the protection of taonga works

567. Taonga works and taonga derived works can be protected as copyright works (and may also be protectable as trade marks or registered designs). However, the Waitangi Tribunal found that there was a wide gap between the protection the claimants sought in respect of taonga works and mātauranga Māori and those that are offered by existing intellectual property rights, in particular copyright and trade mark law.
568. The Waitangi Tribunal noted that there are a number of aspects of the copyright regime that do not address the concerns of the claimants. These include:²⁵⁸
- *The requirement for works to be original to qualify for copyright* – Many important taonga works have been passed down from generation to generation. This means that they might not be considered ‘original’ works and therefore not eligible for copyright protection.
 - *The requirement for works to be fixed in a material form* – Oral traditions, including whakapapa (genealogy), traditional korero (formal speechmaking), or mōteatea (traditional Māori chant or lament) will not qualify for copyright protection unless they are written down.

²⁵⁶ Ibid, at 86.

²⁵⁷ Ibid, at 91.

²⁵⁸ Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi (Wai 262, 2011) at 39.

- *Limited duration of copyright* – Kaitiaki have perpetual relationships with taonga works, while copyright has a limited term.
- *Lack of protection against offensive or derogatory use* – The copyright regime does not provide kaitiaki with the means to prevent uses of taonga works that are culturally offensive.
- *Copyright does not protect ideas, only their expression* – Kaitiaki are as concerned about the integrity of the mātauranga Māori underlying a work as they are about the work itself. They want to control the use of both the taonga work and the underlying mātauranga Māori.

569. The Waitangi Tribunal summed up its analysis of how the intellectual property system protects the kaitiaki interest as follows:²⁵⁹

IP law protects the kaitiaki interest in mātauranga Māori or taonga works but only to a very limited extent.... There is no recognition of the perpetual kaitiaki relationship with mātauranga Māori or taonga works. Nor does IP law reflect the guardianship role that is essential to kaitiakitanga. This means that IP law is not focused on the kaitiaki obligation to safeguard and protect the integrity of mātauranga Māori and taonga works. In addition, the law does not prevent derogatory or offensive use of mātauranga Māori. Rather, the focus of IP law is on facilitating commercial exploitation.

570. We consider that these comments can be applied to the copyright regime.

The Waitangi Tribunal's recommendations for reform

571. The Waitangi Tribunal did not recommend that any changes be made to the Copyright Act (or any of the relevant IP regimes) to deal with taonga works and mātauranga Māori. The Waitangi Tribunal's view was that the claimants' concerns should be addressed through a new legal regime for taonga works and mātauranga Māori.

572. The new regime would:²⁶⁰

- provide two new objection mechanisms:
 - a general objection mechanism to prohibit the derogatory or offensive use of taonga works, taonga-derived works and mātauranga Māori
 - a mechanism by which kaitiaki could prevent any commercial exploitation of taonga works or mātauranga Māori unless there has been consultation with the relevant kaitiaki and, if found appropriate, kaitiaki consent
- establish an expert commission on taonga works, taonga-derived works and mātauranga Māori to:
 - administer these new objection processes
 - maintain a register of kaitiaki and their mātauranga Māori or taonga works
 - publish best-practice guidelines for the use, care, protection, and custody of mātauranga Māori, taonga works and taonga-derived works
- facilitate the development of principles on which to base decisions about the nature of

²⁵⁹ Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuarua (Wai 262, 2011) vol 1 at 65.

²⁶⁰ Ibid, at 99-100.

kaitiaki involvement in the commercial use of taonga works.

Wai 262 recommendations on taonga works and mātauranga Māori

| New commission | New mechanisms | New principles |
|---|---|--|
| <ul style="list-style-type: none">• administer new objection processes• maintain register of taonga works• publish guidelines for use, care and protection of taonga works and mātauranga Māori | <ul style="list-style-type: none">• to prohibit the offensive or derogatory public use• to prevent commercial use without consultation | <ul style="list-style-type: none">• development of principles to assist decisions about the nature of kaitiaki involvement in commercial use of taonga works |

573. The standalone regime recommended by the Waitangi Tribunal would be separate from, and independent of, the current intellectual property laws. However, the Waitangi Tribunal also acknowledged that such a regime would need to interface with the current intellectual property system. It could affect, for example, how copyright arises, and whether trade marks or registered designs can be granted and enforced.

Progressing work to protect taonga works and mātauranga Māori

574. As the Waitangi Tribunal noted in its report, the introduction of a legal framework to protect of kaitiaki interests in taonga works and mātauranga Māori is important.²⁶¹

It would create, for the first time in New Zealand's history, a legal environment conducive to the long-term survival of mātauranga Māori and the kaitiaki relationship.

575. Consideration of the Waitangi Tribunal's findings in Chapter 1 of the Wai 262 report deserves a dedicated work stream. Our proposed process for progressing this work is to initiate a separate work stream at the options stage of the *Copyright Act* review. In this work stream, we would seek the views of the Crown's Treaty partners and the public on the Waitangi Tribunal's findings and recommendations with a view to developing specific proposals for legislative change to protect the kaitiaki interest in taonga works and mātauranga Māori.

576. It is essential that any new regime to protect the kaitiaki interest in taonga works and mātauranga Māori is compatible with the IP system – the copyright regime in particular, but also the trade marks, designs and geographical indications regimes. As the Waitangi Tribunal recognised, any new regime must effectively interface with the intellectual property system so that no irresolvable conflict arises between them. It is also important that we are cognisant of whether there are other Treaty of Waitangi considerations that require specific attention in the copyright regime itself. For this reason, we propose that the *Copyright Act* review and the new work stream on taonga works take place in parallel, at the same time.

²⁶¹ Ibid, at 91.

577. Engagement with Māori, as Treaty partners, and the broader community will be an integral part of the proposed work stream on taonga works. We seek your views on how we should engage on these issues.

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| 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. |
| 94 | Do you agree with the Waitangi Tribunal’s use of the concepts ‘taonga works’ and ‘taonga-derived works’? If not, why not? |
| 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? |
| 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? |
| 97 | How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works? |

Part 9 – Recap of questions

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| 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? |
| 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? |
| 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. |
| 4 | What weighting (if any) should be given to each objective? |
| 5 | What are the problems (or advantages) with the way the Copyright Act categorises works? |
| 6 | Is it clear what ‘skill, judgement and labour’ 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? |
| 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? |
| 8 | What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider? |
| 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? |
| 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? |
| 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? |
| 12 | What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered? |
| 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? |
| 14 | Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117? |
| 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? |
| 16 | Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered? |
| 17 | What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered? |
| 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? |

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| 19 | What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered? |
| 20 | What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered? |
| 21 | Do you have any concerns about the implications of the Supreme Court's decision in <i>Dixon v R</i> ? Please explain. |
| 22 | What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered? |
| 23 | What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered? |
| 24 | Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe. |
| 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? |
| 26 | What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects? |
| 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? |
| 28 | What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered? |
| 29 | Is it clear what the TPMs regime allows and what it does not allow? Why/why not? |
| 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? |
| 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? |
| 32 | What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered? |
| 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? |
| 34 | What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered? |
| 35 | What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered? |
| 36 | What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered? |
| 37 | Are there any other current or emerging technological processes we should be considering for the purposes of the review? |

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| 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? |
| 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? |
| 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? |
| 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. |
| 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? |
| 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? |
| 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? |
| 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? |
| 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? |
| 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? |
| 48 | Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered? |
| 49 | Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered? |
| 50 | Is copyright well understood in the education sector? What problems does this create (if any)? |
| 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? |
| 52 | What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered? |
| 53 | What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered? |
| 54 | What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered? |
| 55 | What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered? |
| 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? |

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| 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? |
| 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? |
| 59 | What are problems (or benefits) with the ISP definition? What changes, if any should be considered? |
| 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? |
| 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. |
| 62 | What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered? |
| 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? |
| 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. |
| 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. |
| 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? |
| 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? |
| 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. |
| 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? |
| 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? |
| 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. |
| 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? |
| 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? |

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| 74 | What were the problems or benefits of the system of using an overseas regime for orphan works? |
| 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? |
| 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? |
| 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? |
| 78 | Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances? |
| 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? |
| 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? |
| 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 there any issues with the border protection measures that should be addressed? Please describe these issues and their impact. |
| 82 | Are peer-to-peer file sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement? |
| 83 | Why do you think the infringing file sharing regime is not being used to address copyright infringements that occur over peer-to-peer file sharing technologies? |
| 84 | What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing file sharing regime (if any) should be considered? |
| 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? |
| 86 | Should ISPs be required to assist copyright owners enforce their rights? Why / why not? |
| 87 | Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements? |
| 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? |
| 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? |
| 90 | Have you experienced any problems when seeking protection for an industrial design, especially overseas? |
| 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? |
| 92 | Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement? |

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| 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. |
| 94 | Do you agree with the Waitangi Tribunal’s use of the concepts ‘taonga works’ and ‘taonga-derived works’? If not, why not? |
| 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? |
| 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? |
| 97 | How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works? |

Annex 1: Reviews and changes to the Copyright Act 1994

| Review and timeframe | Description | Notes and outcome |
|---|---|--|
| Removal of the ban on parallel importing 1998-2016 | Enabled the import of legitimate copyright works (eg books, CDs) without the rights holder's permission | Following the initial removal of the ban, a series of reviews led to a reintroduction of a temporary ban on parallel imports for films (and some other refinements). The ban eventually lapsed in 2016. |
| Review of Copyright Act (new technologies) 2001 to 2008 | The Act was reviewed in response to changing technologies and the WIPO internet treaties (the <i>Copyright Treaty</i> and the <i>Performances and Phonograms Treaty (WPPT)</i> which were agreed in 1996 and came into effect in 2002). | Incorporated new concepts and international norms relating to communicating copyright works and making them available to the public over the internet. Also looked at ISP liability and 'safe harbour' provisions. The most contentious was s92A which provided for the termination of internet accounts for repeat infringement. This provision was suspended and did not come into force with the rest of the Act (the review of this provision is discussed below.) |
| Review of performers' rights 2001 to 2003 | In response to the WPPT, considered whether to extend the performers' rights regime. | Performers' rights in New Zealand have been quite narrow – only the right not to consent to their performance being recorded. The WPPT provided a framework for performers in relation to the distribution and playing of recordings of their performance and provided performers with moral rights. Work discontinued in the absence of significant impetus for change. However, once the CPTPP comes into force on 30 December 2018, it will give performers greater rights over the sound aspects of their performances in accordance with WPPT. |
| Review of commissioning rule 2006 to 2008 | A bill was developed that would give creators default ownership of commissioned works (rather than the person who commissioned the work). | The default rule is that when a third party commissions and pays for the creation of a work, that person owns the copyright for photographs, computer programs, most artistic works, films and sound recordings. Parties can contract out of the commissioning rule. The <i>Copyright (Commissioning Rule) Amendment Bill</i> was not enacted following change of government. |

| Review and timeframe | Description | Notes and outcome |
|---|---|--|
| Copyright Resale Royalties 2006 to 2008 | A statutory regime was developed within the Copyright Act whereby a portion of sales of art works – after the first sale – would go to the artist or their descendants. | Work discontinued and the <i>Copyright (Artists' Resale Right) Amendment Bill 2008</i> was not enacted following change of government. |
| Review of Section 92A / Introduction of 'three notice file sharing regime' 2009 to 2011 | Section 92A included a provision for the termination of internet accounts for repeat infringement (not brought into force). The review considered how best to address the issue of file sharing which resulted in replacing 92A with a three notice regime to notify users that behaviours are infringing. | Section 92A aimed to deter file-sharing and was highly contentious. Government instead introduced a file sharing regime to respond to concern from music and film industry that piracy through file sharing was widespread. There were heated discussions around who should bear the costs of the regime (implementation and ongoing fees for sending a notice). The film industry has not used the provision. Used by the music industry initially, but no requests for ISPs to issue notices since 2014. |
| Review of the enforcement of offences for copyright piracy 2007 to 2011 | There was criticism that police were not investigating copyright piracy. New powers were given to MBIE and the police to investigate copyright piracy and importation of pirated copyright works. | The review also looked at the enforcement of trade mark infringement. The powers have not been used, with very few copyright and trade mark owners requesting State intervention. |
| Trans-Pacific Partnership (TPP) Implementation 2016 | The <i>TPP Agreement Amendment Act 2016 (TPPAA)</i> was enacted, but will not come into force until TPP comes into force. | Would extend copyright term by 20 years (in most cases to the life of the author plus 70 years). Introduced a more comprehensive regime for TPMs (technological protection measures) and a more comprehensive performers' rights regime. |
| Comprehensive and Progressive Agreement for the Trans-Pacific Partnership | CPTPP suspended certain intellectual property provisions in the TPP. | Amendments to extend the copyright term and to introduce a more comprehensive regime for TPMs enacted through TPPAA will not enter into force. |

