MARTIN JENKINS

A POLICY POSITION FOR WRITING AND PUBLISHING

Preface

This report has been prepared for Copyright Licensing Limited by Philippa Bowron from MartinJenkins (Martin, Jenkins & Associates Limited).

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- performance improvement and monitoring
- business improvement
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Basis

The position detailed in this report is based on interviews, research and analysis of the writing and publishing sectors and is a suggested approach to maximise the benefits associated with those sectors. It is not a general policy analysis accounting for all the impacts and benefits of various copyright positions and outcomes.

Why writing and publishing matters

In general

There are many reasons why the creation and publication of original written material is important and needs the protection of robust copyright legislation.

Writing and publication of original content is the creation of artefacts that describe our ideas, experiences and philosophies. It contributes to basic literacy, general education, overall communication, our ability to exercise freedom of speech and the development of inquiry and curiosity. It supports us to extend our knowledge, to undertake research, attain academic achievement and it allows us to share knowledge. It is a medium for discourse, which allows us to challenge each other's ideas, understanding and beliefs.

Research also shows that reading fiction at a young age develops a child's ability to imagine life from different perspectives, resulting in a measurable improvement in empathy and emotional intelligence[1].

In New Zealand

Content written and published in New Zealand, contributes to our collective wellbeing and our national identity. It is vital for education, our history and our legacy for future generations. We can't pick and choose. In order to have strong, vibrant writing and publishing sectors, we need a regulatory environment that supports creation and publication of every type of written work and protects the right of our writers and publishers to be fairly remunerated for their work.

For education

New Zealand has some challenging social inequalities. It also has opportunities to correct them. The ability for our challenged readers and writers to access both educational and entertainment material that they can contextualise with their own surroundings and experiences is critical to ensuring that the social inequalities do not increase, and assists in remedying them.

Having education material that works for our own education system and provides the context of our own experiences is vital to the success of our education system. It also means that the proposed context for the review of 'net importer' is irrelevant, as the continued ability to produce local content is more important than the numbers of imports vs exports.

For te reo

Increasingly we are a nation seeking to be bilingual. Many people, including our Prime Minister, are choosing to raise bilingual tamariki, speaking both English and te reo. Government and Māori, in partnership, have invested time, money and social capital in the development of the Maihi Māori and the Maihi Karauna, respectively the Māori and Crown te reo strategies. The principles of these are

[1] Psychologists David Comer Kidd and Emanuele Castano, at the New School for Social Research in New York report "Reading Literary Fiction Improves Theory of Mind".

rooted in Te Ture mō te Reo Māori 2016 (the Māori Language Act 2016) and in Article 2 of the Treaty of Waitangi which protects te reo as a taonga.

A strong, healthy regulatory system that supports the creation of original New Zealand written content, will mean adequate material will be produced to support the realisation of New Zealand's te reo ambitions.

For our national Identity

It is as recent as the early 1980's that New Zealand was a nation that suffered from 'cultural cringe'. We were not used to, or not comfortable with hearing, watching and reading our own stories. Our news readers spoke with British accents and we watched American and British programming almost exclusively.

During the 1980's, government increased efforts to ensure educational material was increasingly by New Zealanders, for New Zealand learners, with New Zealand context. What followed was a corresponding change in our radio, television and film content as we learned to tell, read, hear and watch our own stories. Sharing our own stories and knowledge is important if we want to maintain our national identity as well as our understanding and kaitiaki of our own culture and environment.

Horizon Research, in its 2018 survey for the New Zealand Book Council, reports that 75% of children under 10 years of age have read a book by a New Zealand author or poet in the last year[2]. Our children and parents are responding to New Zealand stories and we need to ensure the legislative systems are in place to support this important building block for cultural awareness and national context.

Having books written and published by New Zealanders in English, te reo and other languages, allows us to teach our children our own stories, share traditions and cultural perspectives, invent recipes and cooking methods that suit our local produce and environment, produce screen content that reflects our surroundings and experiences and connect and learn about each other. This gives context to our unique nation.

For our media and democratic health

With the rapid increase of international media availability through social media channels, the New Zealand media environment faces risk of global 'swamping' – we are losing our voice. Our democracy is not only supported by journalism, but by books and publications of in-depth analysis and historical recitation that allows New Zealand to reflect and learn from our past.

Civic journalism allows people to be informed and to react, but books are more likely to inspire people to think and plan. We need both to be a healthy, independent, democratic society.

For economic growth

Our economic wellbeing depends on our ability to inspire curiosity.

With the distance issues we face in New Zealand, , our future is in becoming a knowledge economy, reducing our reliance on primary industries and moving to a low emissions economy . Imagination and curiosity are two key elements of knowledge-economy entrepreneurial behaviour.

[2] Page 27, Horizon Research Limited Book Reading in New Zealand for the New Zealand Book Council, August 2018 https://www.bookcouncil.org.nz/advocacy/research/

We are not currently realising the full export potential of our literature. There is untapped potential and it's important that we protect the copyright of our stories so that authors and publishers, and by extension the New Zealand economy, can benefit as the sector grows.

Intellectual property is a wealth creator. Developing New Zealand stories that are attractive to consumers and can also be transformed into television or film, increase the return all the way through the value chain. While the filming of the Lord of the Rings trilogy created economic value for New Zealand, much more of that value would have been retained if it had been a book written and published here.

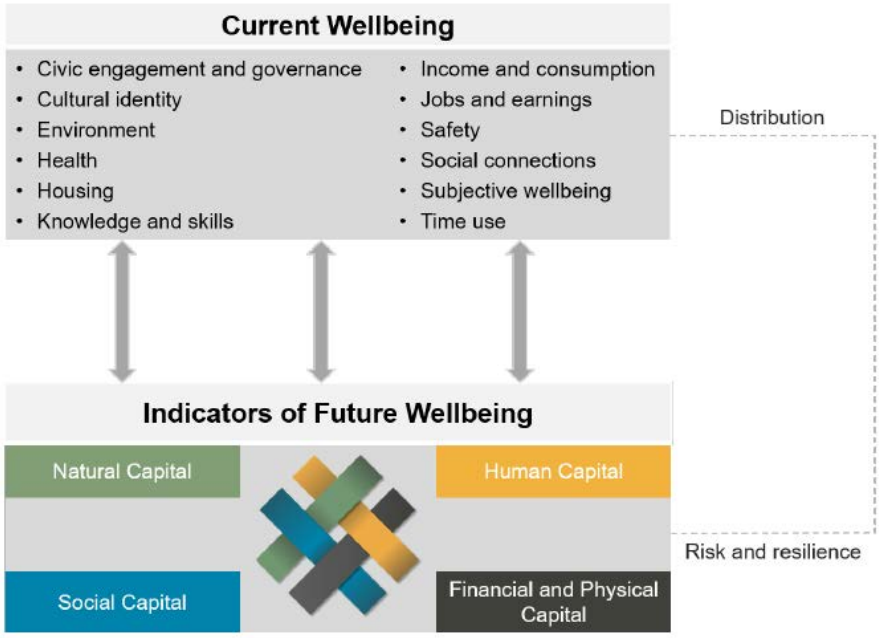
Assigning a value

The Living Standards Framework

The Living Standards Framework (LSF) developed by New Zealand's Treasury to inform advice to government on policy choices, is a reflection that New Zealanders value more than just economic benefit, and that in addition to financial and physical capital, we need to consider natural, human and social capitals.

It also details 12 current wellbeing domains, to be measured and monitored to provide evidence over time of the changes in wellbeing domains that are important to New Zealanders.

Figure 1 - Living Standards Framework



As well as the four capitals, the LSF considers inter-generational wellbeing as central to all policy choices.

Cultural wellbeing value

The current measure of impact for cultural wellbeing in the Treasury Cost Benefit Analysis model spreadsheet is “Being able to express cultural identity”[3] . This shows a 2019 impact value of $9,563 per person for every 1 point change (0- 4 scale) attributed to it.

We do not have access to sufficient data to undertake a full Cost Benefit Analysis, but it isn’t hard to imagine how a more vibrant writing and publishing sector could improve cultural identity, adding significant, measurable value to cultural wellbeing. For example, an increase of 1 point across our school population, by this measure, could produce an increase in benefit with a value of $77b [4].

What does robust NZ copyright law deliver

Economic growth

Incentivise growth of creative economy

Copyright legislation is an intellectual property law and as such is the basis for innovation. Our national ambitions to be able to innovate and exploit innovation for national wellbeing rely on having appropriate intellectual property laws to protect the right to own the creation of original creative works.

Facilitate an efficient IP market place

Locally

Facilitation mechanisms like collective licencing and accessible enforcement support lower transaction costs and increased access to material. This benefits writers, publishers and consumers, supporting a more active market for written material in New Zealand and internationally.

Internationally

Our writers and publishers compete in a global market where other countries have stronger copyright parity and protections, particularly with respect to remuneration for exemptions and territorial rights. Strengthening our legislation with respect to these two issues would allow New Zealand to compete more effectively internationally.

Prevent internet platforms from taking content

Robust legislation to support fair remuneration for content creators and reducing the current exploitation of content by global platform providers will deliver increased economic contribution by the writing and publishing sectors.

[3] Treasury CBAx spreadsheet model https://treasury.govt.nz/publications/guide/cbax-spreadsheet-model-0

[4] Based on 2018 total roll for primary, secondary and special education of 808,439 students

Legal certainty and fairness

Certainty of return on investment

Robust protection under New Zealand law for written material, provides the confidence writers and publishers need to invest in creative work. Professional writing and publishing, like any other business, requires a legislative framework that allows the investor to forecast likely return. The more certain the framework, the greater the ability to make sound investment decisions around money, time and effort.

Provide effective enforcement mechanisms

Providing a low cost enforcement mechanism in an industry where there can be quite significant imbalance of power between the right holder and the people or organisations in breach, is critical to the fair treatment of the creative sector and the certainty it needs to be successful.

Be format neutral

The ability for different platforms to allow for easier access to, and dissemination of work should never be a reason to reduce copyright protection. It's important that copyright legislation is as technology neutral as possible, and its enforcement mechanisms exist to protect against breach regardless of how that happens. The investment into writing and publishing should be protected equally for physical or digital format.

Social equity and connectivity

Incentivise creation and distribution of NZ stories

There is a certain amount of creativity in writing that will happen regardless of protection, but robust legislation supports professional creative writers and access to a professional publication industry, that is essential to ensuring every New Zealander can access New Zealand stories, factual content and education material. This writing assists us in connecting to each other as a nation and as distinct communities within that.

Enable easy access to IP

The implementation of fair and reasonable remuneration through collective licensing will have the effect of lowering transaction costs and facilitating greater, more affordable access to written works. In particular, extension of the public lending right to include digital works and private libraries and a requirement for a collective education licence will provide increased, equitable access.

Context for review

A fair basis for decision making

There are a number of factors that need to be taken into consideration in establishing a fair context for copyright legislation review:

1 Writing and publication of original New Zealand conten, cannot be assessed by financial analysis as its value lies in more than its GDP contribution. Books and e- books have value to New Zealand as cultural and societal artefacts and are not merely tradable commodities.

2 The growth of global “tech giants” that operate business models not based on creating content, but on making others’ content available, means that copyright protections need to be more effective to allow fair remuneration for creative work.

3 Copyright law in New Zealand should unashamedly incentivise creation of New Zealand content.

4 Legislation and policy on copyright needs to use the Treasury Living Standard Framework as context for decision making.

5 International treaties need to be considered, and so does international copyright law. Our writers and publishers are currently competing in a global market where our existing laws create disadvantage for our own works.

What we need from a review of Copyright legislation

No transfer of value through further exemptions

The time, talent and work needed to create and disseminate content does not reduce because of exemptions, but the return on that outlay does.

Exemptions are a government decision to transfer value from the content creator (in the case of writers, some of the most poorly remunerated people in New Zealand) to the societal group gaining the exemption. Any ***exemptions should be covered by an equivalent funding contribution*** to restore balance and ensure writers and publishers can continue to receive fair remuneration for their work.

A requirement to fund collective licensing for government use

Writers are not currently fully compensated for existing exemptions.

There is no current funding from the Ministry of Education for copyright across schools. It’s left to the individual schools to procure licences and while some do, others consistently breach copyright law. ***We would like to see a requirement for the Ministry of Education to procure a collective copyright licence for schools***, in the same way it purchases collective software licences.

There is also a need to ***increase the Public Lending Right funding*** that covers library lending to ***include digital lending, lending from private libraries and lending by educational institutes*** to allow for fair remuneration. The Public Lending Right fund has not increased since 2008, meaning that the average pay out has decreased in real terms as it has not been updated to account for inflation, or to include digital or private lending.

The provision of proper, fair collective licensing in these areas will have the effect of lowering transaction costs, allowing for more distribution of works and the innovation that goes with that, without penalising writers and publishers.

It is our view that current exemptions are not compliant with the Berne Convention. Article 9 states that countries may legislate to permit reproduction of works provided that it "does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".

An accessible enforcement mechanism

There is an imbalance of power between those whose rights copyright is meant to protect and those who seek access to those rights. This is compounded by lack of a simple, cost-effective enforcement mechanism.

The current system allows global internet organisations, contributing little to our economy and paying little or no tax, to take content and monetise it, while taking no responsibility for the copyright breaches that are supporting their revenue streams. The simple truth is that a typical New Zealand author is powerless to enforce copyright on a multi-national corporate if they choose to ignore breaches, while the work itself continues to be devalued through illegal sharing.

Companies operating social media platforms, search engines and websites need to be held to account for content, and links to content that breach copyright. Law could be changed in line with UK and allow the global organisations that aren't exercising due care for copyright to be held to account in New Zealand. This would enable accountability of companies that are operating, and importantly, selling advertising and profiting from content that breaches copyright in New Zealand.

It is our view that an obligation for hosting or linking organisations to be accountable for content that breaches copyright and links to such content would see rapid development and deployment of the capability needed to identify it.

Revision of the law itself however, will be pointless without a simple, inexpensive mechanism for enforcement.

The existing tribunal system requires technical evidence that is costly to provide and not recognised in its judgements. The cost to procure the data required to submit a complaint is far in excess of the remedies decided by the tribunal and its average time of 193 days to deliver a decision means it is not an effective mechanism for preventing loss of value to copyright material. Breach of copyright through the internet happens quickly and the damage it does escalates quickly, meaning that enforcement also needs to happen quickly to be effective.

An enforcement body that can act fast, be inexpensive to use and have the ability to compensate cost and financial loss is required.

A commitment to educate

There is no current mandate for education about copyright from government. The government organisation ***responsible for public understanding of copyright obligations needs to do more***. The Act is an important one and does require some effort in public education.

The government body with enforcement responsibility also needs to be resourced to build and promote understanding of copyright, similar to the mandate of the Privacy Commission in respect to privacy principles.

Re-introduction of territorial rights with 'use or lose' rule

In 1998 the Copyright Act was amended to end territorial copyright protection in New Zealand and allow parallel importing. This has not been the case in any other English speaking countries. Without this right, our writers and publishers are competing in a global market with their hands tied. It contributed to the rapid reduction of publishing business in New Zealand, with the New Zealand offices of multi-national publishers either closing or downsizing and it has reduced the ability of New Zealand writers to earn money from international sales.

We propose a re-introduction similar to the Australian copyright law, which allows for ***territorial rights but with a 30 day 'use it or lose it' rule*** that allows for freedom to import if a publisher has not published their edition within 30 days of international publication dates.

Simultaneous publication results in the ability to retain territorial copyright and therefore supports the investment in companies promoting those books and reading. This law in NZ has reduced the visibility of the literature sector as the larger companies no longer invest in local book marketing and promotion when the books can be sourced elsewhere.

The Counterfactual

No change to Copyright Legislation

The current legislation provides sufficient protection to support a reasonable amount of original written, published material in New Zealand, but it is not well positioned to support continued protection of, or remuneration for digital work.

As digital format becomes more standard, there is likely to be a gradual erosion of value across New Zealand's writing and publishing, meaning less available content and increased transaction costs. This is at a time where there is increasing demand for New Zealand content.

What this means economically

While it is difficult to predict exact numbers, status quo will support a gradual decline of publishing and writing in New Zealand. Our writers and publishers will reduce contribution to GDP and the associated indirect economic benefits like retail sales and New Zealand television and film production and sales will also decline.

New Zealand writing and publishing will become more expensive and less accessible.

New Zealand as a 'net importer' of copyright materials is not something to be proud of, and the level of import in comparison to export will increase in this scenario. We will become increasingly dependent on intellectual property created overseas and be impacted by the associated erosion of our culture

Because of the increasing difficulty to be remunerated for written work, we will host fewer professional writers and publishers and will rely more on those that do it as a hobby. This is likely to result in a reduction of quality, creating more economic disadvantage.

What this means culturally

New Zealanders are embracing their culture now more than ever. Without more robust protection, written copyright works will fail to meet demand.

Our current cultural identity has been hard fought and written work has been a strong contributor. Failure to strengthen our copyright protection will see a decline in New Zealand written content, with likely cultural impact where it matters most, in education. This is not an immediate impact and there is a risk that it happens slowly and imperceptibly, causing us to lose cultural value without having made any deliberate choices.

Our ambitions to revitalise te reo are also as risk without a legislative system that remains relevant to support writing and publishing of increasing amounts of te reo and English/te reo material.

What this means socially

The aspects of social value that are at risk over time with our current copyright legislation include:

- the robust nature of our democratic system and our ability to reflect, debate and learn from our progress within it
- the ability for our written education to support attempts to address social inequity through education
- the ability for our future generations to connect with other through reading about each other's philosophies and experiences as well as learning to empathise through reading relatable stories at an early age

The value erosion of these social indicators, in this scenario, is also likely to be slow and extremely difficult to reverse.

Reduction of protection

Any reduction of protection (or extension of exemption without fair remuneration) is likely to increase the pace of value erosion. This will lead to our local perspectives and experiences being lost within the globalisation of creative markets within a shorter timeframe than described above.

The economic, cultural and social impact will be quicker and more noticeable. Similar to the status quo scenario above, it would be very difficult to reverse.

In addition, the reduction of protection would put us further in breach of the intent of the Berne Convention and the TRIPS agreement. It would put us at a disadvantage to countries like the UK and France, who have recognised these risks and are strengthening their legislation to protect their copyright material.

The arguments that reducing protections will increase innovation have not shown to have any economic validity. This scenario would not produce economic gains in other areas equivalent to the loss of economic contribution in writing and publishing., In addition innovation is unlikely to contribute anything to compensate for the cultural and social value erosion.

Summary

Copyright is important in New Zealand to protect our national identity, our cultural wellbeing and our te reo revitalisation as well as supporting our democracy and our ability to leverage our intellectual property for economic benefit. Our current legislation is not robust enough to provide adequate protection in the future.

Protection of copyright in a digital environment is more difficult than in the physical. Our copyright legislation needs to be reviewed in light of today's world. It needs to provide the ability for protection in the context of the power imbalances that exist, in the context of the Berne Convention and the TRIPS agreement and in the context of our Living Standards Framework.

Our legislation needs to be improved by:

- Introducing fair remuneration for exemptions
- Establishing a basis for remuneration for any future exemptions
- Introducing an accessible enforcement mechanism
- Providing a body with resource and mandate for copyright education
- Re-introducing territorial rights

This will enable:

- Economic growth
- Legal certainty and fairness
- Social equity and connectivity

The overall value of improving our access to New Zealand written and published work could be immense, and it deserves attention. Failure to provide adequate protection will reduce value to New Zealand, economically, socially and culturally.

Submission on review of the Copyright Act 1994: Issues Paper

CopyrightActReview@mbie.govt.nz.

Your name and organisation

Name	Jenny Nagle
Organisation	New Zealand Society of Authors (PEN NZ Inc) Te Puni Kaituhi o Aotearoa

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FROM NEW ZEALAND SOCIETY OF AUTHORS (PEN NZ INC)
Te Puni Kaituhi O Aotearoa
March 2019

The New Zealand Society of Authors (PEN NZ Inc) Te Puni Kaituhi o Aotearoa submission in response to the Issues Paper for the Review of the Copyright Act prepared by the Ministry of Business, Innovation and Employment.

Background on NZSA:

The New Zealand Society of Authors (PEN NZ Inc) Te Puni Kaituhi o Aotearoa was established in 1934 and is the principal organisation representing and supporting New Zealand writers. We are a membership-based organisation, representing nearly 1,600 writers through eight regional branches and hubs. NZSA is governed by a national board made up of an elected President and regional delegates from around the country. Our branches have regional chairs and committees who oversee the local activities. Our national and branch meetings are open to non-members so the reach of events, support, professional development and workshops around the country impact a wider number of writers than our membership suggests. Our advocacy work affects and benefits all writers. Our membership in 2019 is at an all-time high.

Activities of NZSA:

We engage on a wide range of issues such as copyright review, PLR (Public Lending Right - expansion to include digital forms and private libraries), library closures, lack of funding for school libraries, falling literacy rates, promotion of New Zealand literature internationally, the creation of an ELR (Educational Lending Right) scheme, the establishment of a children's laureate post and issues of remuneration for ways writers can earn fair reward for their writing.

We are affiliated to International PEN and are active with programmes such as Writers in Prisons NZ and international campaigns to protect the right to freedom of speech for imprisoned writers and journalists around the world. We mark Courage Day (also known as the Day of the Imprisoned Writer) each year on November 15 to recognise writers around the world who defend the right to free speech and those who suffer oppression and are killed or imprisoned for their work.

We produce a fortnightly e-news, a monthly new books bulletin for our members and a quarterly *NZ Author* magazine and act as an information hub for the literary arts sector. The NZSA is effective and active and we collaborate with government and a range of organisations on behalf of writers.

We are a repository of knowledge about New Zealand literary history, as shown by our producing and hosting the NZSA Oral History podcasts featuring interviews with leading New Zealand writers.

We work closely with other literary arts organisations, government and Creative New Zealand to ensure that the professional interests of writers are strongly represented and that early, mid-career and experienced writers receive support and opportunities to develop their craft. Other primary functions are professional development through conferences, workshops, manuscript assessments and mentorship programmes and the administration of prizes and awards for writers. We have representatives on a range of boards, committees and steering groups such as PLR, CLNZ, Northtec, Whitireia, PEN International, the Burns Fellowship Trust, the Book Awards Management Trust, Writers in Prisons, NZ Book Council sector steering group, the Book Sector coalition and We Create. We work alongside CLNZ, Booksellers NZ, Library organisations, NZ Poetry Society, Storylines, The

New Zealand Book Council, Playmarket and the Writers Guild and with Festivals and the Publishers Association of NZ, so engage widely with the sector.

NZSA is a 50% co-owner of Copyright Licensing NZ Ltd, along with the Publishers Association of NZ, and NZSA is one of the founding stakeholders of The New Zealand Book Awards Trust and the proposed Book Sector Coalition.

State of the New Zealand Book Market and Writers' Incomes

The New Zealand book market suffered contraction in the past 10 years due to digital sales, a reduction in book retailing, a reduction in column inches for book coverage and reviews and less local publishing when most multinational publishers pulled back to Australia. We believe the book market and local publishing is recovering well with new independent publishers and the university presses taking a leading role, but the economics are still precarious in such a small country. First print runs are generally tiny in NZ with often only 500, 750 or 1000 copies being produced of novels and children's books.

The CLNZ-commissioned 2018 Horizon Research survey reports writers' average incomes at $15,600 p.a. We note this personal income total is below the annual value of working at the minimum wage for 40 hours a week (about $20,000) and it shows writers are not able to earn a living wage from their writing in New Zealand. The average earnings of $15,600 is achieved with a combination of royalty payments from publishers or earning from self-published books, PLR payments, editing work, mentorships/teaching creative writing and journalism/reviews.

Due to the contraction of publishing opportunities in the market, nearly 32% of our membership self-published in 2016, so the cost of printing, production, design and editing in this case is also borne by the writers and must be paid for out of that average annual earning. This survey has asked for income rather than 'profit' for a writer.

NZSA purports that there is government legislation already in place that negatively affects the ability of writers to monetise their work and derive fair income for their writing:

- An outdated PLR (Public Lending Right) scheme (no DLR - Digital Lending Right, no increase in fund for 10 years, no private libraries)
- The absence of an ELR (Educational Lending Right) scheme in New Zealand, where one is in place in Australia, the UK and Canada
- Parallel importing legislation
- MOE does not insist on copyright licensing for every school and 30% of our schools are not licensed to copy beyond the exception in the Act. This should be a cost of business compliance for every school
- Pending legislating to requisition content free of charge under Marrakesh with no compensation mechanism in place.

Our c1600 membership spans children's, adult and educational authors through to bloggers, journalists, academics and script-writers and spans the literary, education and media sectors. Writers underpin other creative sectors such as theatre, film, TV, software games, the music industry (lyrics) and the fourth estate in addition to poetry, flash fiction, children's books, novels and quality non-fiction.

We acknowledge that some of our academic writers choose to put their work into the Creative Commons as this system leads to peer review and overseas career postings. They are usually paid by their universities to do their work. We believe it is the writer's **right to choose** what happens to their work, and the choice of whether they can monetise their work should be their choice. This choice

should never be legislated away, or the power given to another entity to disseminate work free of charge and therefore negate any potential value to the content creator.

Fair Use v Fair Dealing

NZSA is aware there are powerful forces attempting to influence our debate for Fair Use v Fair Dealing. It is worth noting that Fair Use exceptions have been devastating for authors' incomes in the USA.

A 2017 court ruling in the USA has called for a "correction" to fair use applications. In an age where digitisation means it has never been so easy to copy and infringe work, NZSA and authors must defend the right to fair reward for their intellectual property and insist on their moral property rights.

The erosion of potential writing income by existing Fair Dealing exceptions negatively affects incomes. Any attempt to widen these exceptions and further reduce income would be catastrophic for writers.

The Value of NZ Writers and Writing

We cite the importance of literature to our cultural legacy, national identity and well-being, and the need for the public to be able to access our vibrant and diverse local voices. There is immense potential for New Zealand writers to be heard around the world and these opportunities will be encouraged and incentivised if the sector is underpinned with the certainty of robust and definitive copyright law and carefully considered exceptions.

New Zealand writers wish to take advantage of the export opportunities to sell their books – in physical and electronic form, overseas. New technology has created opportunity – but also requires vigilant protection of their products. An opening of exceptions will lead to the rise of e-book pirating (rampant around the world) of New Zealand books, as is happening elsewhere. Book piracy transfers the 'value' of our local publishing and cultural taonga to faceless international ISP's who take no responsibility for what appears on their sites, who return nothing to content creators, but who grow corpulent from their profits on advertising revenue from those sites.

The book industry receives minimal investment from Creative New Zealand and little interest from MFAT so we believe the export potential of our book industry remains largely untapped. The book industry in New Zealand accounts for nearly 2300 jobs and has a direct GDP of $128 million (PWC 2015 report). More economic value is derived through the literary arts sector in education, libraries, book retail, book festivals, media and reviewing and export opportunities.

The New Zealand Treasury has issued a Living Standards Framework which incorporates a measure for wellbeing. We know that experiencing and participating in the arts is a crucial part of individual wellbeing. Writers' outputs should be measured in the economic framework as outlined in Treasury's Living Standards Framework and we acknowledge the over-riding cultural importance to our society to experience high quality local arts and writing.

There is proven pedagogy (from the 1980's whole language movement) that shows the importance of children engaging with local stories that reflect their own society and landscape. Reading is the single most important indicator for positive outcomes in educational and life achievement. Our writers are a cornerstone of our cultural heritage and we see the protection of their work and their right to fair reward as the mark of a just and civilised society that wishes to stimulate local content and incentivise creativity, jobs and GDP. New Zealand writing has a distinct and vibrant view and

gives international voice to our stories. A healthy copyright law sets the stage to take our writing to the world.

New Zealand writers enrich the lives of all New Zealanders through their ideas, stories of people and place and we want to preserve their ability to continue to write, and be remunerated for their art. We look forward to the opportunity to engage with MBIE in this review process and note with appreciation the considerable work that underpins the issues paper.

NZSA supports the submissions by the Publishers Association of NZ and Copyright Licensing New Zealand.

Submitted by:
Jenny Nagle, Chief Executive Officer
New Zealand Society of Authors (Pen NZ Inc) Te Puni Kaituhi o Aotearoa P.O. Box 7701, Wellesley Street, AK 1141 ***director@nzauthors.org.nz***

REVIEW OF THE COPYRIGHT ACT 1994 TERMS OF REFERENCE

We agree that the law needs to keep pace with new technologies and that a review is relevant. We also agree that copyright seeks to incentivise the creation of original works and we support the idea that the exclusive property and moral rights of the author or content creator is paramount.

Authors hope to sell and licence their work and without adequate protection, unlawful copyright infringement will be robust on file-sharing sites, and there will be no incentive to produce their works of cultural importance. The rights and moral ownership of the author, the creator of the content, should be paramount.

A third party has no 'right' to take a work and use it without permission; anywhere else in our society, that action is called 'theft'.

We understand that some balance is needed but take issue with your statement in the terms of reference "*that over-protective copyright settings can inhibit the creation and dissemination of copyright works by inhibiting competition and 'follow-on' creation",* or that it can "*inhibit important cultural activities such as those of education, library and archival organisations".*

Publishers and writers are practiced and extensive consumers and users of copyright. To quote or reference another work, one must seek permission and acknowledge it in the new work. Often that permission comes at a cost (for example, for maps or photos held in library, museum or gallery collections). Publishers and writers have always paid for the use of copyrighted material in a new work and see no reason why other industries should claim this is unfair, or why they would be deserving of 'some over-riding right' to 'use it for free', just because they want it.

I heard an example at last year's Internet NZ copyright symposium. The film industry has always sought permissions for signage/copyright material used in the background in films. Someone from the software industry was complaining about the need to pay for an image of a tattoo that a basketballer has on their person, in the gaming version of a real-life team. A tattooist charges a client for a site license of 1 (the client's body) – but this software programmer was bemoaning the need to pay a fee to use the image on the digital version of the player. Despite the profits

they would make from selling the game, they believed they were somehow 'entitled' to that content for free, and the artist's claim was unreasonable.

We reject the inference that obtaining permission is just too hard and 'stifles creativity'. We believe this is a catch-phrase promoted by the 'free for all' lobby who do not want to pay for content, who make money off other people's content or who cannot be bothered seeking the copyright holder. We believe if you want content, you should pay for it.

We hear a lot in this debate about the need for free content for new technologies like data-mining and artificial intelligence. Data mining is used extensively by Facebook and companies like Cambridge Analytica and Amazon. This data is used for targeting advertising and influencing public opinion and sold to third party marketers, so it has a high commercial value, i.e. the data is sold by these entities, but they feel entitled to source it for free – and then monetise it, and want government sanction to do that.

Big tech is claiming data for artificial intelligence and investment in robotics, the two areas of biggest investment are currently the production of sex robots and driverless cars.

"*The 'sex tech' market is worth an estimated $30.6bn - and across the globe, firms are racing to create a radical new type of robot they say could change sex forever*". (Cecile Borkhataria, 2018).

This is a baffling and sickening indictment on 'technological advancement' and New Zealand writers ask MBIE to note that tech sector lobbying for increased exceptions for data that will take potential income from writers may be used for such purposes. It is our view that this technology will not advance our culture or our humanity. Clearly this technology will be monetised and ergo, data should likewise be monetised at the source.

Google has publicly stated its aim to upload every book title in the world to their site so they can give it away for free – and earn profits from the advertising on these sites, while citing noble intentions like 'democratisation of content'. The Google company wants free content to make more money.

The stated Terms of Reference also aim to '*balance the copyright law to benefit New Zealander's as a whole - and considers the impact on creators, users and consumers.*

We believe that a writer's content is their property and the law should protect their right to earn from their work and choose what happens to it. The government should be upholding the author's rights of property ownership in law as they do for all other property.

There are already extensive 'Fair Dealing' exceptions which undermine our authors' right to decide the fate of their work and give others 'free access' to their content. The existing exceptions already affect the rights of authors to earn from their writing, with little compensation. To extend these exceptions further is unconscionable.

Our government does not undermine other rights of property in New Zealand – for example, taking an empty house over to give to people who have nowhere to live, unremunerated to the landlord. Yet the government has legislated to remove the property rights of writers to allow others to access it for free under a raft of Fair Dealing exceptions in our current law. Authors' work is already given away by government under our extensive 'Fair Dealing' exceptions and under Section 69 of the Act relating to the Marrakesh Treaty.

In the 'Terms of Reference' you cite the Amendment Act of 2008 which introduced new exceptions and limitation of liability of ISPs.

Given that MBIE's stated purpose is "to grow the New Zealand economy to provide a better standard of living for all New Zealanders… by working with others (and) to help businesses to be more competitive, improving job opportunities for all", we would suggest that you will be aware of the chorus of outrage that is growing around the world that the tech giants operate without conscience. There is no other business or organisation that does not have to comply with law, except these businesses. Since this copyright legislation was introduced, there has been an explosion of pirated books at considerable detriment to authors' moral and legal rights and incomes around the world.

The tech companies are unresponsive to take down notices on sites that infringe authors' copyright. As Professor Graham Austin said in his seminar last year: In 2016 You Tube, Facebook and Google were collectively issued 104.2 million takedown notices and enacted 0.0002%. Writers know that once their material is pirated, the stable door is wide open and cannot be shut. These companies take no responsibility for what is peddled on their sites, and are not accountable to any entity or government, but earn income that exploits others' content.

We know from the viral footage of the Christchurch mosque shootings of 15 March 2019 that this lack of accountability is causing deep concern in our society. I am heartened by international calls from the USA (Senator Warren) and the EU Directive to curb the overreaching powers of these companies and we strongly support a move to pull back this limited liability legislation rather than expand their ability to contravene local and international laws with no consequence.

Here is a quote from one of the leaders of the tech sector about the importance of protecting IP:

"From the earliest days at Apple, I realized that we thrived when we created intellectual property. If people copied or stole our software we'd be out of business. If it weren't protected there'd be no incentive for us to make new software or product designs. If protection of intellectual property begins to dissipate, creative companies will disappear or never get started. But there's a simpler reason. It's wrong to steal. It hurts other people. And it hurts your character." Steve Jobs

Responses to Issues Paper questions

Objectives

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

Copyright must incentivise the creation of original works for cultural and national good and wellbeing. We believe that a writer's content is their property and the law should protect their right to earn from the work and choose what happens to it. The Copyright regime should uphold the property owners' rights of ownership. The current law should provide protection but competing legislation negates copyright protection for a number of exclusive rights listed in the Act. Strong IP protection is crucial to incentivise the creation of more books and writing.

We disagree that rights of the consumer or user or adapter should outweigh those of the copyright holder; IP is personal property and should be treated as such in the Act. We do not think the current legislation is able to protect New Zealand works effectively from piracy and the current extensive Fair Dealing exceptions erode both the rights and incomes of writers.

The current law is not protecting IP when it allows ISPs to operate with limited liability. It is impossible to control our intellectual property when there is no cost-effective mechanism to uphold this right. ISPs are lawless.

We believe that the extent of current Fair Dealing exceptions is not effectively compensated:

- *PLR is outdated (no increase for 10 years), does not include private libraries or digital lending*
- *ELR - does not exist in New Zealand*
- *Copyright licences – are not mandatory for all schools*
- *Parallel importing legislation has had a measurable and devastating effect on local publishing and the promotion of books and reading*
- *Marrakesh – proposed Bill increases those entitled to 'free content' from 100,000 to 400,000 or 23% of the population that identifies as having a disability.*

This lack of compensation affects authors' earnings and their ability to earn from their work. Therefore, we believe the current exceptions are in danger of contravening the Berne convention, due to ineffective compensation and the inability to get action from ISPs who infringe our writers' work.

We believe that point 69, page 16 – "that the Act provides creators with moral rights" is overridden by the extensive exceptions that the government currently allows.

We also want effective protection mechanisms:
*Your point 69 (p15) in the issues paper: says "*it 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" *– this is untrue - as any exclusive right was overridden by your parallel importing legislation.*

Ditto to your claim point 69 P 16; that the Act "enables copyright owners to prevent people from providing devices or services that help other people get around technological protection measures to prevent infringement." – we believe that the Marrakesh amendment bill that will allow 3000 schools and libraries to create copies with no regulation that will actively discourage illegal file sharing and the 2004 digital amendment that allows ISPs to escape accountability has removed or will removed the rights of the owner to uphold IP via any technological solution.

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?

	We believe that there should be compensation made available to authors for current exceptions and current IP and moral rights should be upheld. Unless the limited liability of ISPs is reversed, we cannot protect copyright from current technologies, let alone future ones.
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.
	We believe the Act should reflect the three-step test of the Berne Convention in considering exceptions. The Berne Convention says exceptions are: 1. *Certain special cases* 2. *That do not conflict with the normal exploitation of the work* 3. *Do not unreasonable prejudice the legitimate rights and interests of the author.* *We purport current exceptions, in a market the size of New Zealand, prejudice these rights. Marrakesh alone gives anyone with a disability (23% of the population in the last census) free content <u>on top of</u> exceptions to education and libraries.* *If my book was a case of wine, the government has given away 6 bottles, before I can even begin to sell the rest. For example, If I am a children's author, Marrakesh gives the file free to 3000 schools and libraries (all prescribed entities), I receive no ELR, DLR or PLR by way of compensation and I will not be able to sell many books to my target market.* *This exception alone has prejudiced our authors' legitimate rights under the Berne Convention and will not incentivise the creation of more work.* *The exceptions do not protect or compensate the 'business model or investment' of our cultural works. In fact, the exceptions are negating returns to publishers and creators.*
4	What weighting (if any) should be given to each objective?
	To incentivise the creation of original works and to uphold the IP and moral rights of the content creator is paramount. *International obligations under CPTPP, Marrakesh and the Berne Convention must be balanced and upheld so it has no economic disadvantage for content creators.* *Reasonable access to work should only be permitted if the creator is not disadvantaged. Otherwise there is no 'net benefit'. Our cultural works are taonga and cannot be treated as if they have no value to the creator. An economic model cannot be applied to measure cultural works in this way.*

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

5	What are the problems (or advantages) with the way the Copyright Act categorises works?
	The categorisation of literary works is adequate.
6	Is it clear what 'skill, effort and judgement' means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?
	The definition suffices for work created by writers and authors in New Zealand.

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?
	Data should be protected: code, databases all have some value. NZSA is aware that ISP's and Bigtech want access to this kind of information for free under data mining – which they intend to on-sell – often to marketers, political campaigners and influencers and to other tech companies. This data can be bought by those who seek to gather and monetise it and should not be freely given.
8	What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?
	This is straightforward in the publishing and writing sector. Academic work is usually owned by the institution and they are paid a salary to produce it. Authors have to monetise their work from its sale and are not paid salaries to write. *Regarding the example given in 142, that the person who commissions the work should not be the owner of the work (eg photographers, ghost writers): We believe the copyright should go to the author/creator but could be assigned to a commissioning entity by contract, if the author chooses to do that.*
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?
	Original work should be protected. Again we hear from Bigtech about 'chimp robots potentially writing War & Peace' which seems unlikely. Cultural works reflect, enhance and document the human experience. Copyright should stay with the content creator and we uphold this or in the case of AI, the company who created it, if it is a truly original work.
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?
	We support the 'artist re-sale right' Bill and believe this 2008 draft should be enacted to compensate visual artists.
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?
	NZSA advises all our members to insist on rights reversion clauses in their publishing contracts. We advise that if a book has been out of print for 12 months, with no plans for reprint then the rights should legitimately return to the author. Then the content creator would have the ability to self-publish in print or digital form and make the book available once again – or choose to put the work in the creative commons. The author should be the one to make that choice as it is their IP. Authors often have trouble trying to get these rights back from publishers who are slow to respond to requests and correspondence.
12	What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?

	The government has potentially more copyright protection for the Crown in years (100) than the Act is willing to give authors (author's life plus 50 years). Crown works should be in the public domain. I disagree that the Crown could monetise some of its work, like Standards, to provide a return to taxpayers, as taxpayers have already paid for its creation. It is also puzzling that there are no exceptions for Crown copyright, when such extensive, uncompensated exceptions have been applied to works by New Zealand writers. Crown works should be in one central repository for ease of public request.
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?
	We support the harmonisation of term with our major trading partners in the English-speaking world. This would deliver savings in international collective management agreements and payments across territories.
14	Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?
	Indefinite copyright held by institutions puts writers at a disadvantage and creates an unfair situation compared to copyright for published works.

Rights: What actions does copyright reserve for copyright owners?

15	Do you think there are any problems with (or benefits arising from) the exclusive rights or how they are expressed? What changes (if any) should be considered?
	There is no problem with exclusive rights, except that they are undermined by the extent of the exceptions in New Zealand, and these affect the ability to monetise the work.
16	Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?
	Secondary infringement is a problem due to our parallel importing law which overrides territorial copyright licence. New Zealand authors and publishers should be able to enforce this, but they can't. *ISPs collect advertising revenue off sites that give away book files and their limited liability means the authors are powerless. Take down notices are ignored by ISPs (who are literally lawless). Overseas sites are infringing the rights of New Zealand authors, in New Zealand, as they give away books by New Zealand authors, free to any global territory. We disagree with your point 190 as the infringing is happening in this territory.*
17	What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?
	There are examples of this happening in the education sector, between teachers, schools, those in resource rooms being asked to copy works to use in class. Remedy would be a mandatory copyright license for all schools and an ELR scheme that would provide some compensation. *Copyright protection and rights are not encouraged or enforced by MOE.*

Rights: Specific issues with the current rights

18	What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?
	ISPs that "communicate pdf's free to anyone and the transmission of that work" over the internet must be stopped to protect the rights of copyright owners.
19	What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?
	Why is MBIE wanting to future-proof a law for technologies which don't yet exist? Surely one would need to define parameters for new technologies and do a risk assessment for protecting the rights of copyright holders, rather than give blanket rights to something currently unknown?
20	What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?
	A website giving away free books by New Zealand writers in digital form is "communicating" this work. This needs to be acknowledged and prohibited.
21	Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.
	Sites like oceanofpdf and bookebook.bike that give away free files of books and the ISPs that host them and collect advertising from these sites should be prosecuted under the Crimes Act – this is theft, but the limited liability of ISPs in the 2004 amendment overrides our copyright law.
22	What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?
	Ditto above – we cannot enforce the law following the digital amendment and it takes away the rights of copyright owners in favour of ISPs – this transfer of value has been allowed to happen and authors do not have the funds to pursue cases under international law.
23	What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?
	Authors should be able to choose what happens to their work and be allowed to licence their material into the Creative Commons. Many academics and some writers choose to do this.
24	Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.
	Our main concerns are around the inability to counter infringement, because of the prohibitive cost of taking an action to court and the limited liability of ISPs. We would like to see the government establishment of a low-cost tribunal to hear cases of infringement: from education or websites that host infringers into this market. We want to be able to enact site blocking via ISPs into this market to protect copyright.

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

25	What are the problems (or benefits) with the way the moral rights are formulated under the Copyright Act? What changes to the rights (if any) should be considered?
	I believe that the Wai262 consideration should mirror any amendments here to restrict culturally inappropriate use of material. *Under the PEN International charter, the NZSA supports freedom of speech, but demands self-regulation regarding hate speech, terrorist manifestos and fake news. We have no mechanism to remove such sites, nor to signal "fake news".* *However, we do believe there should be limited exceptions for the use of part of a work for the purposes of parody and satire for the benefit of social comment and entertainment.*
26	What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?
	We see a problem with this regarding Marrakesh. When the Foundation for the Blind pays someone to read a book to audio, they already say they are the publisher of that new form of the work! Does this mean that they have the right to gain economic right taken under exceptions? Please note that the author currently receives nothing but the person who reads it is paid $1500 by the Foundation. We believe this would contravene copyright exceptions but demands clarity. *Does this new 'performance of the work' override authorship? Usually we find the author is seldom told if there is an audio made by the Foundation of the work. For example, NZSA member Dr Lynley Hood's book won an audio award in Australia; the publisher was listed as the Blind Foundation. She was unaware when she received the award that an audio copy had been made.* *If we record writers in workshops or events, we include rights to use the material in their letters of agreement.* *(Maybe there should have been some consultation BEFORE the CPTPP was signed.)*
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?
	See above concerns re audio recording.
28	What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?
	We need to establish controls for TPM's in New Zealand – ISPs should be legally obliged to block sites that infringe copyright. File security is a major issue for writers, especially with e-book formats that have never been so easy to copy and share. *TPM's should be part of the requirement of digital files requisitioned under Marrakesh, so authors can be assured that the prescribed entity produce this ONLY for the student or citizen with the disability – and not put the digital version into their school or classroom libraries or intranets.*
29	Is it clear what the TPMs regime allows and what it does not allow? Why/why not?
	For writers we have not experienced TPM's – but widespread infringement.

Exceptions and Limitations: Exceptions that facilitate particular desirable uses

30	Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use? Have you ever been threatened with, or involved in, legal action? Are there any other barriers?
	No – in the literary sector book reviewing and criticism has always been a part of the eco-system and widely referred to by consumers, libraries and educators to make purchasing decisions.
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?
	Libraries and school libraries in New Zealand ask individual publishers for blanket permission to reproduce book jackets with the purpose of advertising and promoting the work to their clients. *I have not heard of legal action around this type of use.*
32	What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?
	Photographs should be an exception unless the outlet gains permission.
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?
	None
34	What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?

	Authors and the book industry deal with widespread infringement both from the public and the education system. *When only 70% of our schools hold a copyright licence and MOE does not require this to be a normal cost of business, we know 30% of schools are not licensed to copy beyond the exception. This means that no income can be paid back to writers through collective management agencies that collect this data and apportion some compensation for authors whose books are used in schools.* *Teachers misunderstand the 3% rule – for example, a poem is an entire work, but it is often copied for use in class under the rule. Teachers (as we watch on teacher noticeboards) breach copyright by sharing digital files of books and resources.* *Under the proposed Marrakesh Amendment Bill, the government is proposing giving free content under exceptions to 23% of the population who identify with having a disability. MBIE said the increased number of users demanding free content will move from 100,000 to 400,000 – a huge increase in a market this size of New Zealand. At the same time, all libraries and schools will be given the right to copy. No central repository, information on the user, or central database is proposed and no regulations for file security are required under the proposed legislation. The extent of this amendment will destroy the incomes for many writers in New Zealand. We know underfunded school libraries will not buy a book if their library has a digital edition. This Amendment Bill, we believe, will severely damage the already-meagre incomes of authors, who will not be able to afford costly court cases to remedy breach. There is no compensation on offer to authors for the increase in this exception, which is a disgrace and devalues the cultural contribution of our writers. There is no other product where the government legislates that the creator must give away so many copies it destroys the potential to earn from the work – and in addition to library and education exceptions, Marrakesh is contravening the Berne Convention.*
35	What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?
	Incidental copying is something the film industry has always dealt with and causes no problems. Of course people's IP should be compensated if used, in the creation of other works.
36	What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?
	We do not believe tech companies should argue for exceptions for data mining and AI. If they want to access content for these purposes, they should pay for it. They will only be monetising the content at the other end – so they get the money and not the content creator. *Content in cloud computing and other sites is still protected by IP.*
37	Are there any other current or emerging technological processes we should be considering for the purposes of the review?
	We should have clarity around technologies and include amendments to the Act when we know what technologies we are dealing with. We should not give exceptions for untested and unknown technologies as we have no way of proving they would protect the integrity of IP for copyright holders.
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?

	We do not believe tech companies should argue for exceptions for data mining and AI. If they want to access content for these purposes, they should pay for it. They will only be monetising the content at the other end – so they get the money and not the content creator. *Data mining is used extensively in marketing, and media companies like Cambridge Analytica and Facebook have already shown they have breached privacy and IP laws by harvesting and manipulating data and then selling it – to advertisers, political parties and all. This is a very dangerous area and requires regulation and protection.* *The idea of giving tech-giants freer access to data is chilling. This should not be allowed to fall under the category of research.*
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?
	There is an argument to allow the use of a work for parody and satire and we would argue in support of this exception. This use usually creates new work for the purpose of social comment or education. There should be limitations around cultural appropriateness. We note exceptions for this purpose have been adopted into other copyright regimes in Australia, Canada and the UK and parts of the EU. Social media use of memes and mash-up technologies means this exception is already in use - widely.
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?
	Publishers and authors deal with permissions on a daily basis. They seek permissions to use comments, maps, graphs and excerpts in new works and pay for the use of that quote or piece of work. Extracts and quotes should not be an exception but permission should be sought from the original source. There are rules around appropriate accreditation, footnoting and acknowledging the source. *There could be a quotation exception for public speaking and presentation, if the source is always acknowledged.*

Exceptions and Limitations: Exceptions for libraries and archives

41	Do you have any specific examples of where the uncertainty about the exceptions for libraries and archives has resulted in undesirable outcomes? Please be specific about the situation, why this caused a problem and who it caused a problem for.
	One undesirable outcome is that it can be difficult to obtain information for research and writers don't know if they can reproduce historical photographs or newspaper articles. Librarians are often not clear what they can do to advise writers.
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?

	Marrakesh is giving all libraries increased clarity over the lending of digital formats at the expense of writers. There is NO digital lending right (DLR) compensated to writers under PLR and no ELR. The compensation for writers is what needs discussion. *The Issues paper refers to the vast amount of digital lending undertaken by libraries. It is worth noting that our PRL Public Lending Right does not include digital lending, so our authors receive no compensation for library lending in this area.* *PLR is radically out of date and has had no adjustment for new technologies.* *In addition, there are no private libraries included, so our authors receive no PLR for the 560,000 loans per year the Foundation for the Blind undertakes, with books they have been given for free.* *This is unjust and while the emphasis on this question seems to be around the rights for clarity and copying for libraries – that question is three steps ahead of the issues of zero compensation on offer to writers for any public or private lending in New Zealand of digital books.*
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?
	Mass digitisation projects are alarming to writers who receive no compensation for that lending in New Zealand.
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?
	Why do libraries need to make copies for collection management without permission? Replacement copies can be purchased. If they can't be purchased, they could be copied, but supporting the economic imperative to replace or extend the collection should come first to incentivise and support our writers. Librarians want to serve the public but should realise that libraries depend on books and authors for their existence, and if the amount of the exceptions destroy any incentive to write, it will have a narrowing and reductive effect on our wellbeing, national identity and unique New Zealand voice.
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?
	If libraries copy and make content available online, they will damage an author's market. Libraries have limited budgets, but writers more-so and deserve fair compensation for work that the public wants to read under library exceptions. Authors receive no compensation for digital lending and this must be remedied without delay.
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?
	Museums and galleries should have the same exceptions as libraries and archives to manage, promote and preserve their collections. More so, as often the objects are irreplaceable.

Notes:

- **Authors receive no compensation under PLR for digital lending as current PLR legislation does not include e-books. Given the extent of digital lending by public and private libraries**

this is an anomaly and the government has let authors down by not updating the law to include compensation for e-lending.

- **Authors receive no compensation under ELR for the same use of their work in schools and school libraries as there is no ELR scheme in NZ (unlike Canada, the UK and Australia).**
- **At the same time the library sector is pushing for increased exceptions.**

Exceptions and Limitations: Exceptions for education

47	Does the Copyright Act provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	The Copyright Act provides enormous flexibility for teachers and pupils and educational institutions. Again, there is no ELR scheme to provide compensation for authors, and the collection management for course materials through CLNZ is only paid for by 70% of schools who have a licence.
48	Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	The exceptions need a compensation mechanism. It would be less galling if NZ had an Educational Lending Right (ELR) scheme to compensate our children's, non-fiction and adult writers for books and class sets held in classroom, school and departmental libraries, and ELR that included digital lending would also capture Marrakesh exceptions and compensate for that. *There is widespread infringement in our schools – firstly with the 30% of schools with no copyright licence and secondly with teachers 'copying anyway' for use in the classroom.*
49	Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	No. Compensation mechanisms required as per above.
50	Is copyright well understood in the education sector? What problems does this create (if any)?
	CLNZ has a great tutorial on their site to educate teachers about how the education exceptions work and have produced a lot of material for schools that explain this. Many teachers understand copyright but choose to ignore it. I have been in library and resource workrooms where teachers come in and copy widely. I have seen them brush aside librarians who try to caution them about copyright. *The establishment of an ELR scheme in NZ would provide compensation.* *The MOE should make it compulsory for schools to have a copyright licence. It should be a cost of business. That they sanction copying and do not call for an ELR is letting down the writers who they want to use in their courses, but don't want to pay to support their work.* *Authors know their books are used in schools and feel let down by government who continue to widen exceptions without compensation.*

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

51	What are the problems (or advantages) with the free public playing exceptions in sections 81, 87 and 87 A of the Copyright Act? What changes (if any) should be considered?
	Use of audio books or recordings on free-to-air stations eg Radio NZ – they always seek permission and/or provide compensation to the author and publisher. This is usually considered promotion for an author.
52	What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?
	No problem from the point of view of writers
53	What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?
	We maintain that any free to air entity wanting to use a recording of an author's work should seek permission and pay a licence fee, as they do for music content.
54	What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?
	We would be alarmed if cloud-based sites offered free audiobooks or recordings. The audio book market is currently the most rapidly selling area of publishing as time-poor commuters seek solace, so any review to extend exceptions and potentially allow pirated content in this format is a concern. Authors should have the right to maximise formats in all markets and those who have produced audio books such as the Foundation for the Blind must comply with the limits of the exception and should not have licence to monetise that work in a commercial sense. (They have already done this with some audio books of prominent New Zealand writers, as the writers were unaware that audio versions existed and have never received any licence fee or income for this format from their publishers). Any income derived from this was not shared. The deal the Foundation struck was 33.3% to the platform, 33.3% to the Foundation and 33.3% for the author and publisher to share. This means that the person who wrote the book got no compensation through PLR, no fee from the Foundation and only 16.8% potentially from any commercial sale of the audio. The Foundation received funding to record, paid the narrator $1500 to read the book to tape and demands the lion's share of the income. The economic inequality from this is staggering. Our authors report they have not received any royalty from this format from their publishers.
55	What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?
	We do not think there is enough clarity around the exception "incidental recording for the purposes of communication" as may be applied through libraries and the education sector.
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?
	Software companies copyright seems to work effectively – site licences and corporate/personal rates.

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?
	Yes, because any commercial exploitation, of an artwork, should be realised by the creator.

Exceptions and Limitations: Contracting out of exceptions

58	What problems (or benefits) are there in allowing copyright owners to limit or modify a person's ability to use the existing exceptions through contract? What changes (if any) should be considered?
	NZSA would like to see the ability of an author to contract out of exceptions until there are effective compensation mechanisms in place. The increased exceptions and lack of consideration for the effect of these on the incomes of writers should include the ability of the writer to block library and education exceptions until regulations for compensation are in place. *We have explained how the exceptions are taking away half the market. Again the winebox analogy applies: 12 bottles in a case* *2 for library exceptions* *2 for education exceptions* *4 for Marrakesh* *That leaves only 4 bottles the writer can monetise for income.* *What other product is given away by government with no compensation for the creator or producer?*

Exceptions and Limitations: Internet service provider liability

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

	The problem with ISPs is that they are bound by no national or international law and turn a blind eye to infringement as sites they shelter gather advertising revenue. ISPs are unresponsive to the extent of acting on merely 0.0002% of take down notices issued to them annually. *We have already seen by Google's tacit agreement to publish the live stream of the video of the Christchurch shootings, and the reported refusal of Google executives to assist police tracking the dark web working on arms deals and trafficking of women and children, that the company appears to be either unable or unwilling to control the distribution of anti-social and inflammatory material. By way of contrast, most major book publishers will be held to account for the material they agree to publish through the application of local and international laws.* *Authors get no remedy from ISPs on sites that pirate free books. NZSA does not understand how these companies can be above the laws that govern other businesses and organisations. Senator Susan Warren in the US Senate is talking openly about the need to peg-back the 'above the law' tech giants and the EU Directive on copyright similarly is looking at making ISPs accountable for what is peddled on their sites.* *There should be no safe harbours for ISPs to hide behind and they should be subject to the same principles of law and governance as other entities.*
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?
	ISPs and search engines should not be allowed to link to sites that infringe copyright.
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.
	Yes, Safe harbours protection means that ISPs can gather revenue generated by pirating sites and consequently have an active interest in ignoring take down notices. There is no incentive or requirement by law to comply and their income is proven to be more important than their business ethics. *ISPs are making corpulent profits while the average income of a New Zealand author is $15,600. This demonstrates what is clearly unfair as ISP's exploit content rather than contribute to its generation and protection.* *As Google has stated a public intention to digitise ALL books in English to make them available, often for free, their intention and lack of care for the rights of creators – moral or economic – is clear.*
62	What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?
	ISPs have no accountability for sites they host; they break the law and profit from it. *They need to be accountable like any other business or organisation and will need to invest some of that corpulent profit in protecting copyright and content creators.* *The notion of 'Safe Harbours' has encouraged ISPs to promote the infringement of material for commercial gain.*

Transactions

63	Is there a sufficient number and variety of CMOs in New Zealand? If not, which type copyright works do you think would benefit from the formation of CMOs in New Zealand?
	Copyright Licensing NZ is an efficient, highly effective organisation that co-operates with its international counterparts and is engaged in international developments and consultations. *We need to establish an ELR to compensate authors for the education exceptions. CLNZ could easily collect schools' data and have already invested in the technology that could handle this.* *MOE needs to make copyright licences for teaching materials used in schools, compulsory for all schools and institutions.*
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.
	Authors receive money from Copyright Licensing NZ – it needs to have all schools and institutions contributing to its revenue to make it fair for writers.
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.
	Writers are big users of copyright and apply for permissions of all kinds to produce the wide variety of books in New Zealand from libraries, galleries, publishers and other writers. There is no problem with CLNZ from the point of view of writers.

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?
	The cost of protecting copyright is the single biggest factor that deters authors from seeking compensation for breaches. The Copyright Tribunal is considered difficult to access for writers and ineffective. *International sites breaching our authors' copyright are out of the jurisdiction of the Copyright Tribunal and are protected by ISPs under Safe Harbours.* *Authors' average income of $15,500 per year does not provide enough funds to seek redress.* *Authors are already feeling defeated by the large number of uncompensated exceptions that erode the value of their writing and their ability to monetise it. The message from government is that writers' work has no value, as the government provides so little recompense for the extensive exceptions.* *Despite the Prime Minister saying she wanted to establish sustainable incomes for writers, the message from MBIE is that writers do not deserve to be remunerated fairly for their work. I cite the exponential increase in the proposed new Marrakesh exceptions, without thought of compensation, as an example of the message we are receiving.* *We champion the creation of a low-cost service to breaches, similar to something like the small claims tribunal which can hear claims. Authors then might be more inclined to report breaches in schools for example.*
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?
	CLNZ offers an alternative dispute resolution service for copyright owners and for licensees. However the cost of mediation is shared equally between the parties, so this could still be a possible factor deterring authors from seeking compensation for breaches, as pointed out in Q66.
68	Has a social media platform or other communication tool that you have used to upload, modify or create content undermined your ability to monetise that content? Please provide details.
	No, content NZSA puts on social media platforms is designed to be shared and it is usually news about events in the literary sector and the arts.
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?
	Websites aforementioned in this submission: Open Library, oceans of pdf, books.come-bike and others, all around the world, peddle infringing content on line. Take down notices are regularly issued and ignored and we and other author and publisher organisations act in concert to attempt to exert pressure. Sometimes the sites come down for a day but generally spring back up in a week or so with a slightly different name. ISPs ignore take down notices and plead safe harbours.
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?

	This may help track, but it is not going to affect the outcome when sites still hide behind Safe Harbours. Authors who issue take down notices are clearly copyright holders, but websites and ISP's ignore the requests to remove infringing material. We have examples of take down notices on our sites and our members vigorously use these, to no effect. The Open Library cites Marrakesh and access as the reason it gives everything away for free, to all sites around the world. *Site blocking technologies and geoblocking would be much more effective in protecting the rights of our authors.*
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.
	This could be a concern for some writers working on research.
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?
	We do not deal with orphan works but acknowledge these are a problem for libraries.
73	Has a copyright owner of an orphan work ever come forward to claim copyright after it had been used without authorisation? If so, what was the outcome?
	No.
74	What were the problems or benefits of the system of using an overseas regime for orphan works?
	New Zealand would benefit from a clear system for dealing with orphan works. If the owner cannot be located by reasonable effort, we support an application that can grant a non-exclusive licence. We believe that a set criteria for investigation (checklist) be established to define "reasonable enquiry" to simplify the system for museums and libraries.
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?
	None

Enforcement of Copyright

76	How difficult is it for copyright owners to establish before the courts that copyright exists in a work and they are the copyright owners? What changes (if any) should be considered to help copyright owners take legal action to enforce their copyright?

	This is difficult to redress and in Point 479 – Copyright Protection under the Act by customs or otherwise has been overridden by Parallel Importing legislation which made all territorial copyright agreements, null and void. *There could be a central database for Copyright of works.* *We have already addressed international sites infringing copyright by file sharing and ISPs will not help with this, due to Safe Harbour protections. There is no incentive or legal requirement for them to do so.* *Authors rarely pursue copyright infringement; two days in court at a minimum $50k cost is beyond the reach of authors incomes.*
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?
	Reintroduce at least the 30-day rule to protect copyright territorial licence *Introduce a cost-effective tribunal for copyright cases* *Take away Safe Harbours protection so international sites that infringe copyright are in reach for authors to insist take down notices are enacted.*
78	Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?
	Yes, they need to protect the interests of the copyright owners they represent and serve.
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?
	Yes, court remedies are beyond the incomes of authors.
80	Are groundless threats of legal action for infringing copyright being made in New Zealand by copyright owners? If so, how wide spread do you think the practice is and what impact is the practice having on recipients of such threats?
	No, NZSA writes to international sites to action our members' copyright claims and point out they are infringing. We are told our authors must personally issue take down notices for their books. They do. And then those notices are ignored. *NZSA and CLNZ try to pursue the path of education about the exceptions when dealing with schools and libraries.*
81	Is the requirement to pay the $5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are the any issues with the border protection measures that should be addressed? Please describe these issues and their impact.
	Publishers and authors will refuse to pay the $5000 bond to Customs as there is no territorial protection under parallel importing legislation. The legislation has in fact negated publishers' and authors' economic rights to territorial copyright in one master stroke.

82	Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?
	Yes, websites such as Open Library, books, come-bike, oceans of pdf etc. These companies and the Open Library claim free files under Marrakesh and then issue them to anyone in the world, for free. We believe this will happen with an alarming increase once the exponential increase in those entities demanding free files under Marrakesh, begins.
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?
	We address copyright infringements, but they are ignored.
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?
	As aforementioned.
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?
	Take down notices are all we can do. These are ignored by the sites and their ISP's and are untouchable under Safe Harbours. USA sites quote Fair Use legislation which has largely been seen as "free use" see Google v the Writers Guild – as having the US courts permission to give away free books.
86	Should ISPs be required to assist copyright owners enforce their rights? Why / why not?
	Yes, by site blocking, geo-blocking and enacting take down notices.
87	Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?
	The infringing sites should pay a penalty.
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?
	Yes, we would like to see significant fines for infringement that would discourage infringement.

Other issues: Relationship between copyright and registered design protection

89	Do you think there are any problems with (or benefits from) having an overlap between copyright and industrial design protection. What changes (if any) should be considered?
	Possibly there is an overlap with the design of trademarks or logos.
90	Have you experienced any problems when seeking protection for an industrial design, especially overseas?

	n/a
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?
	n/a
92	Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?
	New Zealand should be a signatory to the Hague Agreement.

Other issues: Copyright and the Wai 262 inquiry

93	Have we accurately characterised the Waitangi Tribunal's analysis of the problems with the current protections provided for taonga works and mātauranga Māori? If not, please explain the inaccuracies.
	We believe so
94	Do you agree with the Waitangi Tribunal's use of the concepts 'taonga works' and 'taonga-derived works'? If not, why not?
	Yes
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?
	If taonga and matauranga Maori works are part of a new regime then it should override Copyright Law, such as the expiry of term. NZSA supports this. *Different arts sectors will need to consult i.e. writers and publishers will need to determine which works belong in which regime, what exceptions if any will apply, and what will happen with issues such as expiry of term, for books published by Maori writers, or in te reo Maori.*
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?
	NZSA believes the recommendations of the Waitangi Tribunal should be followed.
97	How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?

Hui, consultation, staff who are Maori and who speak Maori who could work with Maori on the terms of the new regime.

We acknowledge the rights of Maori as Tangata Whenua to have a copyright regime that fits with their cultural practices and world view. This should run equally beside the Copyright Act.