Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

Name	Peter Dowling, President
Organisation	Publishers Association of New Zealand (PANZ)

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Responses to Issues Paper questions

The New Zealand Publishing Sector

From Margaret Mahy to Eleanor Catton, from primary school readers to iPad apps, the New Zealand publishing industry is a major producer of cultural and educational content for New Zealand readers and is a significant contributor to the local economy.

The Publishers Association of New Zealand (PANZ) is an incorporated society representing about 80 trade, educational, scholarly and digital publishers. Our members are local independents and large international publishers, educational and trade publishers, publishers for adults and for children, for students and professionals — combining to produce over 2000 new titles a year.

Export of New Zealand creativity is a key focus and has been propelled by New Zealand's guest of honour status at the Frankfurt and Taipei book fairs. In both education and trade publishing, digital — from ebooks to licensed platforms to ecommerce — is business as usual.

According to the latest PWC report, the book industry directly accounted for almost 3,000 FTEs and had a direct GDP impact of $167 million. The publishing industry forms a part of the wider creative economy that employs over 20,000 New Zealanders and has a direct economic contribution of over $1.7 billion.

The publishing industry makes a major contribution to many of New Zealand's wellbeing domains, as measured and monitored by Treasury's Living Standards Framework. 'Cultural identity', 'Jobs and earnings', 'Income and consumption', 'Knowledge and skills', 'Civic engagement and governance', 'Social connections' – these are all areas of priority to the New Zealand government where books, knowledge and creativity play a foundational role[1]. A robust copyright regime is absolutely vital for New Zealand's wider wellbeing into the future.

We support the submissions of Copyright Licensing New Zealand (CLNZ) and WeCreate Inc.

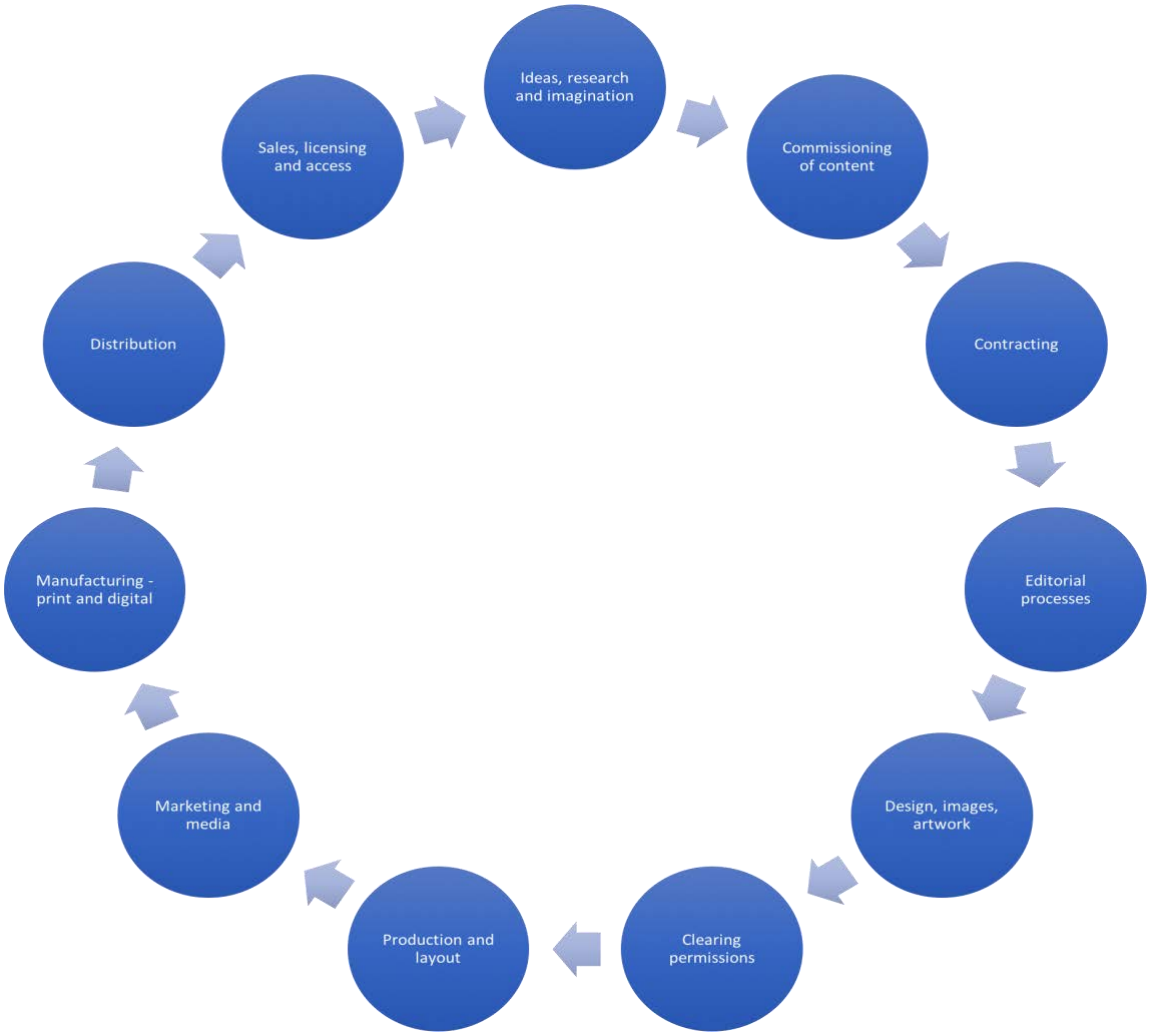
The Role of Copyright

Publishers incentivise new creations by commissioning new writing and illustrations, finding an audience for the work, paying authors royalties for print and electronic sales, and licensing that work for anything from film rights to educational licensing.

That investment in creativity by New Zealand publishers is made possible because of the Copyright Act's recognition of ownership over intellectual property. Good copyright law enables authors to make choices about how their work is made available to readers. When authors choose to contract with publishers, good copyright law enables authors and publishers to be rewarded for their efforts. And then good copyright law underpins a healthy intellectual property marketplace — where readers and authors, publishers and photographers, reviewers and educators can buy and sell that intellectual property to fuel new creations. In New Zealand, copyright is a major driver behind the creation and dissemination of new ideas.

[1] 'Our living standards framework', Treasury website, https://treasury.govt.nz/information-and-services/nz-economy/living-standards/our-living-standards-framework

A publishing value chain:[2]



The New Zealand creative sector is an innovative group of industries operating in a dynamic global environment. Ensuring that copyright law remains relevant to the current environment is critical. So we welcome the government's Review of the Copyright Act 1994. We welcome the engagement with stakeholders that resulted in the 'Copyright and the Creative Sector' report (CCS Report) and commend the Ministry of Business, Innovation & Employment (MBIE) for the work that has gone into preparing this issues paper.

New Zealand has good copyright law, but we think it could be better. We need copyright law that gives New Zealand creators control over their own taonga and their global aspirations, so that we incentivise the creation and dissemination of New Zealand's extraordinary stories. We need copyright

[2] This value chain is an approximation based upon: collective PANZ industry experience; 'Managing Intellectual Property in the Book Industry', WIPO, 2007, https://www.wipo.int/edocs/pubdocs/en/copyright/868/wipo_pub_868.pdf, p.35; Copyright and the Creative Sector, MBIE, 2016, https://www.mbie.govt.nz/assets/527e65d882/copyright-and-the-creative-sector-december-2016.pdf, p.42; and 'An economic analysis of education exceptions in copyright', PWC, 2012, https://www.pwc.co.uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf, p.9. The value chain highlights how publishers are, themselves, heavy users of copyright, everything from commissioning photographs through to clearing permissions. This means publishers have an inherent interest in an efficient and fair regime. It also highlights the interdependence of copyright relationships in broad accordance with the copyright ecosystem on p.14 of the issues paper.

law that enables easy access to creative works — through an efficient intellectual property marketplace, licenses that lower transaction costs, and exceptions limited to certain special cases. We need copyright law that gives certainty to owners and users of intellectual property, providing clear law and effective enforcement that harmonises with our key international trading partners. PANZ believes that better copyright law will enable the growth of New Zealand publishing and the wider creative economy on which much of our nation's future economic growth and social wellbeing depends.

The Issues Paper: Framing

What is copyright for and what does it do? Accurate framing of the role of copyright is critical in order to arrive at clear objectives and outcomes for New Zealand law. The issues paper frames copyright in three different and inconsistent ways:

1. *the copyright paradox*
2. *the balance of outcomes*
3. *the copyright ecosystem*

We suggest that the first two models are flawed. We encourage the government to continue to develop the copyright ecosystem framework built out of the sector engagement in the Creative Sector Study (CCS Report). Such framing reflects how copyright works in practice and will enable government to see more clearly how it might refine intellectual property settings to achieve key policy objectives.

The Copyright Paradox Framing

The issues paper suggests under 'the copyright paradox' that there is 'a tension at the heart of copyright'(paragraphs 55-56, Issues Paper). Copyright aims to incentivise the production and distribution of creative works for society's use and benefit. But by giving copyright owners a bundle of rights, it 'enables copyright owners to limit the distribution of their creative works'. This 'involves an "opportunity cost" for those who may otherwise enjoy unimpeded use of the work'. The paper suggests that, to solve that problem and 'facilitate access to creative works', copyright limits copyright term and, under exceptions, allows uses of works for social, cultural and economic purposes.

No citation is given and we can find no scholarly literature on such a 'paradox'. The idea also runs counter to how copyright actually works. By granting creators ownership of their intellectual property, copyright creates a marketplace for creative work. That incentivises copyright owners and the rest of the value chain to distribute those works, which in turn enables users the ability to access, enjoy and license those works for re-use. Why property ownership would incentivise owners (of cars or houses or intellectual property) to sit on that property and keep it out of the marketplace is unclear. Our legislation aims to increase 'access to creative works' primarily by facilitating an efficient intellectual property marketplace.

Paragraph 56 marginalises such licensing and market solutions for providing access, assuming instead that exceptions and term limits are required to achieve access. In the real world, primary access to creative works is enabled through a copyright regime that provides all participants in the intellectual property market with clarity and certainty. Such market access incentivises creative production and it is also the overwhelming source of societal benefits, not exceptions and term limits as this section claims. Reflecting international copyright frameworks, exceptions are limited to 'certain special cases' where markets and licenses won't work.

The 'copyright paradox' framing with its 'tension at the heart of copyright' is needlessly adversarial, pitting users and creators against one another, with the implication that one side – through copyright settings – must 'win out'. In reality, publishers – like other rights holders – are both heavy producers and users of copyright, operating in an ecosystem of creators, distributors and users that is deeply interdependent.

The Balance of Outcomes Framing

The issues paper (paragraph 101, Issues Paper) suggests under the 'What does copyright seek to achieve' heading that copyright might be framed in terms of balancing three competing outcomes, depicted in three circles:

- *the creation of original works;*
- *the use, improvement and adaptation of works developed by others; and*
- *access to knowledge and creative content.*

Under use, the examples are tech developments, data mining and creative re-use (sampling). Under access, the examples are education, happiness, higher productivity, greater variety.

There are a number of issues with such framing.

Like the 'copyright paradox', it is unnecessarily adversarial. It assumes that the interests of creation, use and access are fundamentally at odds, with a tiny spot in the middle where their interests might coincide. Publishers' experience is different. Publishers incentivise the creation of new works through commissioning and contracts. We re-use the works of others (photographers, other authors) frequently in our books. And we have sales and marketing teams whose aim is to provide as much access to our work as possible, from sales of print and ebooks, through licensing for translation, film, educational uses etc. Publishers, authors, and many other participants in the copyright ecosystem have a shared interest in creation, use AND access.

In the 'balance of outcomes', like the 'copyright paradox' framing, the consideration of commercial or market mechanisms is absent, when this is surely the largest opportunity for achieving outcomes in any modern copyright regime. The 'use' circle seems to assume that we are a nation of 'samplers' and 'data miners'. In the world of books, by contrast, our users are bookstore buyers, ebook readers, librarians, students in university courses, film producers who license our content, etc. Unlike the 'samplers' and 'data miners', all of these users pay for their use, either directly or through licenses. Such market-based use drives the creation of original works in the next circle. That market-based use also provides access for most users in education and everyday life, and the happiness and productivity that result from reading great books. Attention to market mechanisms provides a fundamentally different framing of copyright.

The 'balance of outcomes' approach, by assuming that creation, use and access are in fundamentally different and competing outcomes, leads to flawed policy ideas. Paragraph 59, for example, notes that copyright does not specifically target the creation or dissemination of New Zealand cultural works, and that government does that instead through the Ministry for Culture and Heritage, Creative New Zealand, New Zealand on Air, etc. The suggestion is, perhaps, that New Zealand could ease its copyright settings and support local creators instead through government funding. Such an approach ignores the ways in which commercial use and access actually drive local creation. Government funding constitutes less than 1% of New Zealand's $167m world of books. Without a 100x increase in such funding, the creation of New Zealand stories will rely in the future, as now, on an effective marketplace built around commercial use and access supported by good copyright law. Without

copyright there would be nothing like the level of cultural works and publishing that New Zealand enjoys today. Indeed, it is only with a robust copyright regime, operating in harmony with key international markets, that significant cultural publishing and creation is able to flourish. The atomised treatment of copyright in paragraph 59 reflects a lack of consideration throughout the issues paper for how copyright is essential for the cultural wellbeing of New Zealand.

The 'balance of outcomes' approach in paragraph 101 also seems to run counter to the objectives set out in paragraph 103. Both paragraphs set out to explain what copyright should 'seek to achieve' and, confusingly, offer markedly different answers. Where, for example, does the discussion or modelling of outcomes include consistency with the Treaty of Waitangi? Honouring international obligations? Or respect for the law?

The Copyright Ecosystem Framing

The Creative Sector Study spent considerable time mapping the copyright ecosystem—to understand the deep interconnections between all the many different actors in the copyright sphere: authors and other creators; producers and publishers; distributors; licensing and collective management organisations; libraries, museums and educational establishments; individual readers and users. And they began mapping out the value chains that showed how such actors were interconnected in the creative economy marketplace. A small example: The author relies on the library to access new ideas; they build from and develop those ideas into books for the publisher to create and distribute; those books go out into libraries to fuel new creation.

The issues paper frames copyright, correctly we believe, as an ecosystem in paragraph 62 Figure 1. The Copyright Ecosystem framing is a sensible way to orientate the Review. The ecosystem model is broadly consistent with the models used in the 'Copyright and the Creative Sector' paper, such as the publishing value chain (p.42, CCS Report). This means it is coherent and grounded in good evidence. The ecosystem acknowledges the complexity, diversity and interdependence we observe in the world of copyright around us, as publishers.

The copyright ecosystem figure is also, we note, inconsistent with both the 'copyright paradox' framing (the tension of the paradox, for example, is not evident in the holistic ecosystem) and the 'balance of outcomes' framing (which fails to include production, distribution and consumption, for example). This further underlines the need to dispense with the copyright paradox and the balance of outcomes model, focusing the Review instead on enhancing the operation of the copyright ecosystem to achieve the proposed objectives.

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?
	Objective 1: 'Providing incentives for the creation and dissemination of works' is obviously the core purpose of copyright law. The caveat 'where copyright is the most efficient mechanism to do so' is unclear. What other incentives are proposed? What incentives have been shown to be more efficient? Perhaps government funding is envisaged? As outlined above, that is unrealistic. The idea that the New Zealand government, unlike other countries, might incentivise the creation and dissemination of works by some means other than copyright has not been developed in workshops or the issues paper. It should be dropped from the objective. *Objective 2: This objective is flawed.*

	It runs counter to international copyright law. Our international obligations (objective 4) make it clear that the primary means for enabling use, adaption and consumption is through recognising copyright ownership and facilitating a market in copyright works, because that market will incentivise new creation. Exceptions to exclusive rights are intended for 'certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.' The proposed objective runs counter to that. It suggests that the government might ignore the regular market and the interests of the author, and instead use copyright exceptions to 'permit reasonable access to works for use, adaption and consumption' whenever there is likely to be a net benefit for New Zealand. *The objective's basis in 'net benefits' seems inappropriate. We understand that there are only two countries in the world that are net exporters of copyright: the United States and Sweden. The reasons for this are primarily historical, commercial and particular to those territories, with little to do with optimal copyright settings. New Zealand is a net importer in countless other sectors but we would never countenance using that fact as a reason to undermine the property rights of our trading partners in, for example, shoes or computers. So why should the copyright industries be treated differently? From cows to computers, New Zealand has consistently favoured a rules-based international trading framework that is free and fair to all parties. Running copyright law on different principles, changing the rules just for us to achieve some imagined net benefit to New Zealand, seems inconsistent with that approach.* *Finally, this objective is in conflict with facilitating competitive markets (Objective 3), as it would work to the detriment of creators and the government's own aims to grow the creative economy.* *The use of 'permit reasonable access' in the proposed second objective is redundant as this is covered by dissemination in the first objective. In sum, we submit that the second objective should be dropped, leaving the Review with a clearer and consistent set of four objectives.* *Objective 3: Agreed.* *Objective 4: Agreed.* *Objective 5: We welcome the inclusion of the Crown's obligations under the Treaty of Waitangi.*
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?
	While noting that enforcement could have a more explicit presence in the objectives, we think the proposed objectives (subject to the above) are sufficient. We object to the suggestion that the objectives should include regard to 'future technological change' for several reasons: ● *Attempting to legislate for uncertain futures is deeply problematic and often likely to be counterproductive. It also overlooks, again, the primary role of the market in adapting to change, working within legislated boundaries, to incentivise, create and disseminate works in new ways into the future. Publishers have transformed the ways that they reach readers over the last decade, with the rise of ebooks and audio, incentivised by a stable market to meet the evolving needs of New Zealand readers.* ● *The existing objectives are already inherently addressing questions of future adaptation and resilience, such as through facilitating competitive markets from which innovation will flow.*

	• *We also reject the implication that in some way the existing regime is not adaptable or resilient regarding future technological change. The New Zealand publishing industry is, itself, a prime example of how significant digital upheaval has been successfully negotiated under the existing law, presenting readers and consumers with more points of access than ever before. This has been achieved pro-actively by publishers operating and investing within the certainty and clarity offered by a fair dealing regime.* • *Finally, legislative amendments are naturally subject to impact reporting and renewal over time – the adaptability is already built into the law making.*
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.
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4	What weighting (if any) should be given to each objective?
	Each objective, subject to the responses above, should be given equal weighting.

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?
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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?
	All works from PANZ members are the product of skilled labour and we have no issues with this test. Following the United Kingdom precedent, as for many areas of our copyright law, seems sensible due to the origins of our legislation and the quality of that jurisdiction's regime.
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?
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8	What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?
	The default rules work and PANZ members report few issues with how they operate. We support the commissioning rule as it stands. We support the submission of the International Publishers Association on this question, especially with regard to consideration for any changes to the default rules.
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?
	Computer-generated works have little practical, real-world relevance to book publishing today – in New Zealand and abroad – and, as a result, we do not see this as a significant issue.
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?
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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?
	This issue is primarily one of a contractual relationship, not a copyright issue. PANZ supports contractual freedom for both authors and publishers. Under most publishing contracts the author transfers certain rights but not the copyright, which typically remains with the author. In some cases publishers commission work for hire and the author transfers copyright (this can be used in textbook publishing for example) but this is negotiated between the author and publisher. Most publisher contracts include reversion clauses when a work is no longer commercially available; again this is up for negotiation between author and publisher. Many PANZ members have been active in re-releasing out-of-print works as ebooks, available for libraries, and this activity – enabled by contractual freedom – will continue in the years ahead.
12	What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?
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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 note that paragraph 170 of the issues paper references a report produced by government during the Trans Pacific Partnership negotiations that addresses the term of copyright in New Zealand. This report has since been shown to be flawed and is not a sound basis from which to continue considering copyright term in New Zealand. As we stated in our submission to the Foreign Affairs and Trade Select Committee[3] in 2016: *'We assume that the slow phase-in is due to the perceived costs of term extension. As the Publishers Association and Recorded Music have shown through detailed analysis, MBIE's analysis of the costs of term extension is wrong by a factor of 200x and, with anything more than a 0.1% output increase of New Zealand originated titles due to the increased copyright term (experts suggest up to a 10% output increase), term extension will be not a cost, but a net economic benefit to New Zealand.'* *As buyers and sellers of intellectual property, publishers frequently cross borders in the rights marketplace. That marketplace is significantly more efficient if laws harmonise internationally with key trading partners (such as the United Kingdom) on issues including copyright term.*
14	Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?
	PANZ members report few issues with the current term. We note that introducing a fixed and reduced term may act as a disincentive for bequeaths and could even see works lost to New Zealand.

Other comments

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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?
	PANZ members report no issues with how these rights are expressed.

[3] Submission on the TPPA Amendment Bill, PANZ, 2016, www.parliament.nz/resource/mi-NZ/51SCFDT_EVI_00DBHOH_BILL68998_1_A524537/c2efdeb0cad68a95a0dc97fbc0f3e0df0ba5464c

16	Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?
	We support and refer you to the submission of the International Publishers Association on this question.
17	What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?
	We support and refer you to the submission of the International Publishers Association on this question.

Other comments

A key issue for publishers is that New Zealand's Copyright Act (unlike any other country in the world except Singapore) does not allow local publishers to enforce territorial copyright.

The best writing reaches readers around the world because local publishers understand their market, see an opportunity for a particular work, and take the author and the work to readers in that territory.

'The Luminaries', for example, is published by Victoria University Press in New Zealand; by Granta in the United Kingdom; by Little Brown in the United States; by Ambo Anthos in the Netherlands; and by many more local publishers all over the world. Like those overseas partners for New Zealand books, publishers based in New Zealand work to bring international books to our particular readers. They take a significant risk every time they publish an international book into our local market — buying rights, shipping over physical copies or printing locally, and investing in sales and marketing to reach new readers.

New Zealand publishers cannot operate effectively in that global world, buying and selling territorial rights to great books, because the New Zealand Copyright Act was amended in 1998 to end territorial copyright — allowing booksellers and wholesalers in this country to import books from anywhere no matter who holds rights in the territory. New Zealand is the only English-language market to adopt such rules. That makes local New Zealand publishers reluctant to sell international rights, because they often find themselves competing against overseas editions of their own book that have been co-published in some other market.

Without a secure market for international books, New Zealand publishers, both local and multinational firms, are reluctant to invest in such work. Since 1998, the New Zealand offices of some of the world's largest publishers (Macmillan, Hachette, Pearson, HarperCollins, Reed and Penguin Random House) have all either closed or significantly downsized their presence in New Zealand. Those changes have eliminated hundreds of local jobs in publishing and printing, and have undermined the publishing landscape on which New Zealand authors depend.

The end of territorial copyright has not given consumers what they were promised. Between 2008 and 2015, the average selling price for books in Australia, where territorial copyright is in place, fell by -12.4% while in New Zealand the average selling price rose by +7.6%. The range of books on sale in New Zealand in the same period fell by -34.5% and volume sold fell by -15.7%.[4] *New Zealand consumers are not getting the lower prices and increased access to books promised by the end of territorial copyright — they are getting the opposite.*[5]

We request that government reinstitute the territorial copyright that undergirds the creative activities of publishers and authors here and around the world.

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?
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19	What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?
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20	What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?
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21	Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.
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22	What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?

[4] 'Nurturing Creativity in an age of Innovation', Australian Publishers Association, https://www.publishers.asn.au/documents/item/390

[5] 'The Impact of Parallel Importing on Publishing in New Zealand', Castalia, 2009, https://www.pc.gov.au/inquiries/completed/books/submissions/subdr513-attachment1.pdf

	We see no reason why user-generated content should not abide by the same copyright rules as other works and creativity. User-generated has obviously flourished within the current copyright settings.
23	What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?
	Renouncing copyright would introduce needless uncertainty into the copyright ecosystem (through no persistent means to identify it as a 'renounced' work over time) and we do not consider any proposed benefits as outweighing this additional uncertainty.
24	Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.
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Other comments

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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?
	The existing legislative framework for moral rights is sound and important to publishers, but not always observed, especially with regard to mātauranga Māori.
26	What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?
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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?
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28	What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?
	It is often wrongly assumed that TPMs are important solely to protect copyright. In reality, TPMs also play an absolutely critical role in how digital works are distributed, especially those measures that facilitate access control. They are present in all means of commercial delivery mechanisms, spanning from Amazon's Kindle system through to licensing platforms developed by individual publishers. The book industry, including publishers, have often made substantial investment in TPMs. This means any consideration of TPMs needs to acknowledge they play a pivotal role in the copyright ecosystem and that licensing services are also dependent upon them. The Review's proposed objective of facilitating competitive markets is therefore of importance here. *Lack of legal treatment for access control measures is an issue, as addressed in submissions by PANZ and other rights-holders on the Trans Pacific Partnership Agreement (TPPA). The absence of express legal provision for access control measures provides little security for this investment and adds unnecessary uncertainty.* *Any exception, as considered by the TPPA, that enables the security of the TPM to be affected could also impact the correct delivery of the content to the consumers. This is of significant concern for publishers. Legislation should identify those exceptional circumstances where breaking a TPM might be required. A blanket exception that allows anyone who thinks they might not be infringing copyright to buy TPM circumventing devices and services from pirates will help destroy the flourishing legitimate market for publisher content in digital form. We also note, as in our response to question 58, that the benefits afforded to users through the ease of delivery and broad access to content via these systems typically obviates the need to use exceptions.* *Surveying indicates that over 80% of New Zealand publishers cooperate to enable legitimate uses of copyright works by not-for-profit entities, notably the making available of electronic files with no TPMs attached to it to the New Zealand Blind Foundation. These endeavours are over and above investments publishers already make (and will increasingly make) to produce 'born accessible' works for the visually impaired. Such voluntary sharing of digital files is enabled by – and dependent upon – the use and enforcement of TPMs to protect the wider market.*
29	Is it clear what the TPMs regime allows and what it does not allow? Why/why not?
	Please see response to Question 28 above.

Other comments

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Exceptions and Limitations: Exceptions that facilitate particular desirable uses

As noted above, the primary role of the market in enabling access to works is understated through the issues paper. Before addressing the questions on exceptions in Part Five, it is helpful to summarise the relationship of markets to exceptions, as this relationship needs to be a check on any answers throughout this section.

As acknowledged by paragraph 260 of the issues paper, the framework for New Zealand's exceptions and limitations is set by (and limited to) the three-step test, as codified by our international obligations. The Review must continue to apply this framework to any consideration of exceptions, meaning:

- *The interests of the author and the normal (often commercial) exploitation of the work must be held foremost when assessing exceptions. The three-step test recognises the primacy of market access to works in a way the issues paper often fails to – see, for example, paragraph 257 where exceptions are normalised as providing access, when in fact it is commercial exploitation of the work that achieves such access. Publishing innovation and digital investment means that exploitation of the work is becoming increasingly sophisticated and ever-broader in reach and points of access.*

- *This framework also recognises that exceptions should only operate when there is a market failure or where transaction costs of secondary licensing are so prohibitive that a licensing market will not operate voluntarily.[6] Even then, exceptions should still not be considered when they could undermine incentives for the development of market mechanisms that reduce transaction costs and make economic exchanges possible.*

- *Finally, the framework recognises that, due to the primacy of market access, exceptions – by definition – are limited to certain special cases. In other words, exceptions cannot be normalised as a means of access.*

These checks established by what, MBIE itself acknowledges, is the framework for our copyright regime must continue to be held against the Review's consideration of exceptions.

We welcome the issues paper prioritising considerations of fair dealing (and excluding fair use) for this stage of the Review. We do, however, submit that consideration of fair dealing needs to remain balanced, acknowledging that there are many existing benefits to this regime alongside any problems that could be addressed through the Review. The wording of paragraph 267 in the issues paper is leading in that it primarily associates the fair dealing regime with 'problems', with limited acknowledgement of its many benefits.

We also submit that fair use, in this framing to the issues paper, cannot be treated as a simple solution to be deployed for any identified problems in the current regime. Indeed, the evidence on the problems of a fair use regime is extensive and well-documented, including (but not limited to): uncertainty at all levels, compounded when considering its application to non-United States

[6] 'An economic analysis of education exceptions in copyright', PWC, 2012, https://www.pwc.co.uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf, p.43

jurisdictions[7]; no robust evidence to support claims that it contributes to innovation[8]; and substantial evidence that fair use increasingly operates contrary to a well-functioning market.[9]

30	Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use? Have you ever been threatened with, or involved in, legal action? Are there any other barriers?
	To answer these questions we will address the components to this exception separately: ***Responding to the Criticism or Review exception*** *Publishers regularly make commercial use of this exception, working within careful constraints and limitations, when including short excerpts within works. This exception operates on the basis of there being no market prospect for licensing such short extracts. However, material that falls outside the bounds of the exception (such as epigraphs) is licensed, in addition to material (such as songs and verse) where a viable licensing market exists internationally. The exception generally works well, primarily because publishers operate to a high standard in their dealings.* ***Reporting current events*** *No opinion as no significant use reported by publishers.* ***Research or private study*** *Publishers support the research and private study exception, because such research is the basis for many of the books we publish. Nevertheless, we should align with parallel jurisdictions (particularly the United Kingdom) on such exceptions. Our research exception should be limited to non-commercial use only, as observed in the United Kingdom. If there is a commercial application then a license should be sought. Copying of works for commercial purposes is contrary to basic principles around the rights of the author and the primacy of the market. Similarly, the research and private study exception should be limited to individuals. Organisations can readily access a licensed solution.*
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?
	Please see answer to Question 30 above.
32	What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?

[7] See, for example: '"This Is a Complex Issue": A Few More Questions about Fair Use', Graeme Austin, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327039

[8] See, for example: 'Understanding the costs and benefits of introducing a fair use exception', PWC, 2016, https://www.pc.gov.au/__data/assets/pdf_file/0010/195850/sub133-intellectual-property-attachment.pdf

[9] See, for example: 'An Empirical Study of Transformative Use in Copyright Law', Jiarui Liu, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3330236

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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?
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34	What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?
	-
35	What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?
	-
36	What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?
	New Zealand publishing, today, exists in a settled hybrid state of print and digital publishing. We have, under the current regime, successfully negotiated significant digital upheaval to offer New Zealanders a wide range of ways to access works using new technology. The CCS Report acknowledges this reality.[10] Against this background, we submit that issues regarding cloud computing are often overstated and outdated. For example, ebooks are increasingly delivered through platforms and channels that make such concerns redundant, in-so-far as the terms of the customer license will typically cover robust and secure storage and backup through the life of that license. This is the same for many other works and digital delivery channels across other sectors. We therefore submit that books should be considered outside the bounds of any issues around cloud computing. Additionally, the risks of file security and the abuse of bulk file sharing under an exception for cloud storage significantly outweigh the increasingly limited case for personal back-ups.
37	Are there any other current or emerging technological processes we should be considering for the purposes of the review?
	Please see answer to Question 36 above.
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?

[10] See: CCS Report, p44

We support and refer you to the submission of the International Publishers Association on this question.

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?

Our members report limited issues with the absence of such an exception for parody and satire. However, we fundamentally support freedom of expression for these styles and note that many stakeholders appear open to exploring the introduction of a new exception through the Review. Key issues for publishers in consideration of such an exception are consistent with those across section 42 of the legislation and include:

- *Any new exception for parody and satire should, for clarity and certainty, be attached to the same fair dealing provisions of section 42.*
- *As Professor Graeme Austin of Victoria University of Wellington has recently pointed out, it is important that any proposed parody and satire exception is constrained by the usual case law limitations of fair dealing. For regular commercial exploitation, a license should be required: 'Satire should not be a fig leaf for taking copyright-protected material that should be licensed.'*[11]
- *Credit and attribution must be maintained.*
- *Upholding moral rights is a concern, as for any exception.*

We see no reason why caricature and pastiche should not be included within this consideration ongoing.

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?

Authors often use quotations from other works in their books and so publishers are used to operating in this area. Some quotations are covered by the exception for criticism or review (please see response to question 30). For longer quotations, obtaining permission and paying a fee to the rights holder seems appropriate. If the government were to look at a broader quotation exception, such an exception would need to ensure:

- *Strict limitations to uses that are fair dealing*
- *Credit and attribution*
- *Upholding moral rights*

As with parody and satire, a quotation exception cannot become a way for commercial entities to take copyright material that they should be licensing.

[11] 'A copyright exemption for parody and satire', Graeme Austin, 2018, https://www.victoria.ac.nz/law/about/news/a-copyright-exemption-for-parody-and-satire

Other comments

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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.
	Publishers recognise and value the key role that libraries play in the books ecosystem—providing access to knowledge in ways that enhance democracy and preserving that knowledge for centuries to come. *We believe that the current library exceptions are, correctly, limited to certain special cases where regular market solutions do not work: providing copies for research and private study; allowing library access to works not obtainable commercially; copying for preservation.* *The threat to authors and publishers posed by over-broad library exceptions is clear in the United States. Recently openlibrary.org (an initiative of the Internet Archive) has digitised books, including a significant amount of New Zealand content, and made copies freely available for digital public digital lending under the claimed protection of United States Fair Use law. Such activities completely undermine the legitimate market for ebooks. And they show the threat to authors and publishers, and the uncertainty, posed by Fair Use regimes.* *One negative feature of the New Zealand situation is the lack of licensing revenue from commercial libraries. Almost all other relevant jurisdictions like the United Kingdom limit the exercise of library exceptions to non-commercial libraries. That means that commercial libraries (e.g. multinational accounting or engineering firms), need to pay for activities (e.g. interlibrary loan) that non-commercial libraries can do under the benefit of the exception. We think that making such organisations pay is reasonable, and New Zealand publishers subsidising their operations is not. Our members take issue with our legislation in this area and we ask the government to limit library exceptions to non-commercial libraries so to align us with other copyright regimes.*
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?
	The current exceptions allow the appropriate flexibility for libraries. Most publishers publish work in digital form themselves by making their content available in the ebook market and through digital licensing. It is unclear what role libraries could play in making available digital content of copyright works to the public over the internet. Such activities are already well established in the commercial market.
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?

Publishers welcome the work that libraries do in mass digitising out of copyright works. For example, PapersPast provides a critical resource for our historian authors to use for research and create new books.

The issues paper in paragraph 331 notes:

> *'We have heard that libraries and archives want to be able to copy more of their collections, including unpublished works into digital format, and to make those copies available to the public over the internet. Furthermore, they want to:*
>
> - *give the public better access to works in their collection*
> - *allow people to pin, bookmark and cache copies*
> - *allow more than one person at a time to view a work.'*

We are not aware of any problems undertaking such work with out of copyright material.

Works under copyright are a different story. The issues paper notes: "Digitisation projects can be constrained by the need to identify and trace copyright owners for permission to copy the content into a digital format and make it available over the internet." For publishers this is an obvious truth: if a work is in copyright, then creators expect to be paid for the use of that content.

Library exceptions are not the place to attempt mass digitisation of in-copyright works. Instead, digitisation of in-copyright works has been driven by publishers and the market. Publishers in New Zealand and around the world have invested heavily in digitising their content to enable commercial digital access to individuals and libraries, through retail ebooks and library licenses.

For in copyright works, this is how mass digitisation occurs. Publisher digitisation and the growth of the ebook and library digital licensing markets have made digitally available huge stores of copyright content while providing a return to the creator. It is critical that library exceptions do not undermine those efforts by providing users with a free digital alternative. Instead, libraries have access to electronic licenses from publishers that provide them with such work for a fee.

We have not seen any evidence in the world of books that 'orphan works' are impeding library digitisation projects. 'Orphan works' are works for which a user, such as a library, would like to find the copyright owner, in order to acquire certain rights, but cannot find the owner so cannot acquire the rights and pursue the desired activity.

There is no evidence yet that libraries are actually seeking to acquire such rights to written work. If they were, publishers would be receiving requests to digitise the work of all the authors who are not 'orphans'. New Zealand publishers have not seen any signs of such requests. The very low uptake of the 'orphan works' provisions established in the United Kingdom's 2014 copyright revisions would also suggest that the problem may not be large.

Publishers are frequently seeking to re-use in-copyright works for excerpts in anthologies, for extended quotations in scholarly works, etc. Our members do not have any significant problems finding the owners of copyright works and securing their permission.

The current library exceptions, by remaining limited to certain special cases, have enabled a flourishing digital market to develop for in-copyright works. It is critical that any changes to those exceptions do not undermine that market.

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?
	Our publisher members produce literary works and we have not seen any evidence of problems in this area. Library catalogue systems regularly use jacket/cover thumbnails to represent the work and there are no issues with such use.
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?
	Publishers have not observed any problems with the National Library's work archiving the internet.
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?
	This question is very broad and the issues confronting museums and galleries need to be more widely developed, discussed and understood before any expansion to the libraries and archives exception can be considered. As with other library exceptions, only public, non-profit museums and galleries (not commercial operators) should be included in this consideration.

Other comments

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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?
	Some context around the educational exceptions is critical. New Zealand educators and students, from school to tertiary levels, rely heavily on the hard work of educational and scholarly publishers to provide students and teachers access to the research, textbooks, workbooks and course packs that are the basis—alongside the teacher in the classroom—for most education. *That ecosystem is enabled by a flourishing market for educational materials, in print and digital, that ensures authors and publishers keep creating those materials.* *Publishers and providers of licenses have innovated extensively over the last decade to enable those materials to be used in the modern and more digital educational environment. That means licensing ebooks as well as print books to educational institutions; developing electronic textbooks and workbooks alongside print; enabling electronic course packs alongside print at the university level, etc.*

New Zealand publishing is essential in the educational environment. Local content is critical for young New Zealanders to understand this country's peoples, history and culture. And even in apparently universal subjects like mathematics, we know that New Zealand educators and students prefer materials written for the New Zealand curriculum and the New Zealand way of teaching. The demand for locally-grown educational content is evident in the proportion of New Zealand content used in the classroom. Under CLNZ's license, for example, New Zealand content dominates: In 2017, it represented 66% of content used in primary schools; 59% used in secondary schools; 30% used in universities; 63% in institutes of technology and polytechnics; and 76% in wananga. That content is produced by local New Zealand publishers and its creation is made possible by the educational publishing market.

Any changes to New Zealand's educational publishing exceptions need to take care not to undermine the educational publishing market and the creation of educational content that it underwrites.

Answers to particular questions
Publishers believe that for their works, the educational exception is sufficiently flexible to work alongside the flourishing market for educational content to enable teachers and students to access content and do their work.

Reprographic/Nonreprograhic copying
Publishers think that this distinction remains relevant. Paragraph 351 seems to suggest that, instead of students copying by hand, the distinction could just be eliminated and teachers could just 'copy the whole … of a work' and then distribute multiple copies of that work to their students without payment or license. 'The effect in both cases is the same: the pupils end up with copies of the extract.' The effect is not the same on the market. Such a change would obviously completely undermine the licensed, legitimate market for educational material.

Licenses Permitting Online Uses
Copyright licenses offered by publishers are generally agnostic as to whether the use is as printed excerpts or digital access to those excerpts. Of course, both uses must be limited to students enrolled in a particular course (i.e. they cannot be freely available online); otherwise such uses would undermine the market for digital books and licenses.

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

Section 44(1)
PANZ members are primarily book publishers. Copying of a whole work means for our members a whole book. It is unclear why the Act enables such copying. The book market exists so that teachers, schools, and any other individuals and institutions, can buy such content and so incentivise new creation. Allowing teacher copying undermines that market and those incentives. It does not solve a market problem or avoid inefficiencies. Instead, it encourages educators to use more inefficient methods (scanning, photocopying) to avoid paying for content. We suggest that the government eliminate this section.

Section 49
As the issues paper suggests, this exception is too broad. It would potentially enable a commercial provider (e.g. a real estate licensing organisation) to copy whole books and communicate them to candidates as part of a question. And 'examination' is not clearly defined enough to limit its use. This section should be aligned with other exceptions in the act, so:

- *Limited to non-commercial educational institutions*

- *To be enabled by a license, wherever a license is available (e.g. by CLNZ for literary works).*
- *If a license is unavailable, limited to not more than the portion of the work that is required for the purposes.*

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

We believe that the education exceptions are rightly limited to certain special cases. Alongside a flourishing market for print and digital books, and the licenses offered by CLNZ, students and educators in New Zealand have easy access to a huge range of educational content.

To address particular questions:

Certainty
Certainty is critical for publishers, so that they can invest in the creation of new educational content. The costs of uncertainty are clear. In Canada, for example, a loosely worded 'fair dealing' exception for education led educational institutions to start copying and disseminating chapters and articles to students for course use without paying a copyright license. Such free use not only directly cut all copyright licensing revenue to publishers and authors; it also led educators increasingly to use such 'free' content rather than prescribing textbooks. Reductions in revenue of both sorts has gutted the educational publishing sector in Canada and its creation of educational content.[12]

14 Days
The educational exception allows copying of no greater than 3% of a work to students. There obviously needs to be some rule to prevent an institution double or triple dipping (copying 3%; then another 3%; then another 3%) to avoid paying for a license. The 14 day rule exists to enact that intent. CLNZ suggests that an annual maximum of copying, as recently implemented in the United Kingdom, might provide more certainty and publishers would be willing to look at such an alternative. As with the United Kingdom regime, the application of the education exceptions should only apply if a licence isn't available for the required copying. Section 48 operates in this way for communication works and, we submit, section 44 should operate in the same way.

Restricting Online Materials to 'Authenticated Users'
The educational exception is intended to allow educators to use short excerpts for teaching their students. If educational institutions (of which there are thousands) began sharing such copyright material over the internet, we would quickly enable everyone access to a huge body of educational material for free. That would quickly undermine the legitimate market for such material. Educational institutions can engage with prospective students and their community in plenty of other ways.

Online Theses
Most uses of copyright material in student theses are covered by fair dealing exceptions for criticism and review. Where that is not the case, students regularly secure permission from third parties for use of material in theses if they wish to make the theses available online. They will need to do the same thing when they turn those theses into scholarly articles and books; it is standard practice in scholarly life. None of our nearest jurisdictions (the United States, United Kingdom and Australia) have an exception for this purpose. Allowing a special exception from regular copyright laws for one type of scholarly publication would put us at odds with international copyright law.

[12] 'Educational Impacts of the Canadian Educational Sector's Fair Dealing Guidelines', PWC, June 2015, https://www.accesscopyright.ca/media/1106/access_copyright_report.pdf

50	Is copyright well understood in the education sector? What problems does this create (if any)?
	CLNZ puts significant resources, including pamphlets, an e-learning module, and a knowledge base, into helping educators in schools and universities understand copyright law and what their license allows them to do. Universities and schools also do good work in the area. *Nevertheless, we believe that government has a role to play in enhancing such understanding. The work of the United Kingdom's Intellectual Property Office is exemplary here. Education about legal requirements should not fall on the publishing sector.*

Other comments

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

54	What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?
	-
55	What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?
	-
56	Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?
	-
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?
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Other comments

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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?
	The creation of a market for digital content has required publishers, retailers, aggregators and others to develop significant innovations in the platforms that will enable consumers to access content on phones and ebook readers, through online databases and educational licenses, inside apps and digital workbooks. The benefits afforded to users through the ease of delivery and broad

	access to content via these systems typically obviates the need to use exceptions.

Exceptions and Limitations: Internet service provider liability

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

International evidence indicates that ebook piracy is increasing.[13] A central reason for this increase is the growth and provision of user-generated content.[14] Notice and take downs is increasingly ineffective as a tool against piracy. The CCS Report identified widespread frustration with safe harbour regimes and take down notices. The New Zealand ISP definition, as the issues paper acknowledges, is 'extremely broad' and it is notable that countries, like Australia, already operating narrower safe harbour regimes are declining to significantly broaden their definitions. We note the recent Australian Safe Harbour Bill, as introduced, does not extend safe habour to search engines.

Against this background, the New Zealand ISP definition is plainly too broad. The key principle to a safe harbour scheme should be that protection is limited to those entities which have no control over content which third parties place on their services. Nor should the ISP receive any commercial benefit or advantage from the content. The inclusion of 'hosting' in the current ISP definition, with recent technological developments, now goes well beyond the original principle for safe harbour schemes. It amounts, in New Zealand, to a scheme that is excessively broad and undermines the commercial environment on which publishers and authors are reliant. International evidence suggests schemes such as New Zealand's can cause market distortions.[15] Any company that seeks to benefit from hosting creative content on their services should, like anyone else, license it. A narrower ISP definition will provide certainty for those ISPs providing genuine pipe services, while preventing other services acting in bad faith from hosting pirated content. Rights holders will, in turn, rightfully receive fuller returns from their creative output, while being freed-up from the costly and unfair burden of constantly policing their rights.

We object to this question wording in this section as leading towards increased exceptions and safe harbour provisions as being inherently beneficial. Especially when much of the recent international case law, notably in the European Union and United Kingdom, is preoccupied with questions of protecting creator rights from linking that infringes copyright. Any consideration of changes to the legislation regarding hyperlinking and search engines must follow this case law's principle of not allowing limitations of liability when hyperlinks direct users to infringing works and where the person providing the link has actual knowledge of this.

[13] See, for example: 'Online Copyright Infringement Tracker', Intellectual Property Office, 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628704/OCI_-tracker-7th-wave.pdf

[14] See, for example: '"I can get any novel I want in 30 seconds: can book piracy be stopped'", Katy Guest, The Guardian, 2019, https://www.theguardian.com/books/2019/mar/06/i-can-get-any-novel-i-want-in-30-seconds-can-book-piracy-be-stopped

[15] See, for example: 'Music Rights Australia's Submissions in response to Copyright Amendment (Disability Access and Other Measures) Bill 2016 Exposure Draft', 2016, http://www.musicrights.com.au/IgnitionSuite/uploads/docs/Music%20Rights%20Australia%20Submission%20to%20Copyright%20Amendment%20%28Disability%20Access%20and%20Other%20Measures%29%20Bill%202016.pdf

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?
	See response to Question 59 above.
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.
	See response to Question 59 above.
62	What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?
	See response to Question 59 above.

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?
	CLNZ works very effectively to license PANZ member content.
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.
	PANZ is co-owner of CLNZ alongside the New Zealand Society of Authors. The role of publishers and authors in ownership and governance ensures that CLNZ efficiently and effectively acts in the interests of rights holders, offering educational licenses and returning most of the revenue from those licenses to authors and publishers. CLNZ makes available on its website its distribution policy, disputes resolution procedure, and annual reports with full financial analysis. Such transparency has ensured the trust of authors and publishers. Any questions by individual publishers have been handled effectively by CLNZ. *New Zealand legislation around CMOs is out of step with other jurisdictions. The UK only allows an educational institution to take advantage of the limited copying under the educational exception of the Copyright Act if no license is available. If a license is available, then the expectation is that*

	institutions will take up those licenses to engage in copying, thereby rewarding creators. Therefore such educational institutions operating where a license is available do not require free access to an exception. *Publishers look for the government to institute that same requirement in New Zealand copyright law. Such a change would also provide more certainty for the New Zealand schools environment. Right now, some schools take up a CLNZ license and some do not, leaving teachers and school trustees in unlicensed schools with limited access to content and vulnerable to allegations of copyright infringement. A clear choice—do not copy; or if you want to copy take up a license—would provide certainty for educators and incentives to creators.*
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.
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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 Copyright Tribunal should offer an efficient way for CMOs and their customers to resolve license issues that they have been unable to resolve by direct negotiation. The Tribunal as it stands is ineffective and inefficient in performing that role.
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 license agreements also contain provisions for alternative dispute resolution services (ADR). CLNZ will soon be moving all of its rights holders into working via an online portal and ADR is also included in its terms of service with rights holders.
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.
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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?
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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?
	We welcome technology that assists with clearly identifying attribution and rights associated with a work. However, this question should instead focus, as for any prospective new technology, on whether blockchain is fundamentally of value and well established, before jumping to whether the Act inhibits its use. Our understanding is that blockchain remains very aspirational and nascent in its real world application, with limited prospective use for literary works (most proponents associate its use with images). New Zealand publishers already contribute to a global and highly-efficient market in structured industry metadata and, as such, the benefits of blockchain appear limited, at this stage.
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.
	It is relatively uncommon, compared to overseas experiences, for New Zealand publishers to not be able to identify the copyright owner of a work. As such, we do not see this as a significant issue in respect of literary works in New Zealand. When producing a work, it can more commonly be an issue for images or individual contributions (such as for compilations or anthologies) when re-issuing a previously published title. *Our industry has good expertise on exercising diligent search (as shown by our industry's long-standing commitment to retro-digitisation and release of in copyright works) and would welcome opportunities to share this with other stakeholders as the Review progresses. We are already discussing with other stakeholders, particularly in the GLAM sector, about non-legislative solutions to orphan works, such as shared best practice and guidelines for diligent search.* *Issues for publishers and other rights-holders in dealing with orphan works include: ensuring moral rights and attribution are upheld; that remuneration and the rights-holder's interests are provided for; and that clear remedies for infringement remain. We also note that New Zealand cultural works can often present additional considerations when treated as orphan works.*
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?
	See response to Question 71 above.
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?

	See response to Question 71 above.
74	What were the problems or benefits of the system of using an overseas regime for orphan works?
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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?
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Other comments

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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?
	In New Zealand, typically authors retain copyright in their work while assigning exclusive publishing rights to their publisher. Under contracts, authors typically enable publishers to enforce their copyright. This does not typically create problems for publishers enforcing copyright.
77	What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?
	See below.
78	Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?
	In educational settings, CLNZ is most likely to identify copyright infringement and, as the seller of educational licensees, has an interest in preventing such infringement. Publishers would welcome CLNZ being able to take action on their behalf, with authorisation from the publisher, when CLNZ identify such infringement.

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?
	Copyright enforcement is expensive because it requires paying for professional legal advice. Such enforcement actions are uncommon because the potential relief that will be awarded by the court is uncertain. It is unclear how to prove loss (how many copies of a book did we not sell because someone posted a free PDF on Facebook?). If it is not clear that such relief will even cover legal costs then copyright owners are unlikely to enforce their rights. *To solve the second problem, the United States provides a list of statutory damages per work. This brings certainty to the system and we would welcome it here.*
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?
	PANZ would expect to be approached regarding any such threats. We have never had such an approach so we do not believe such threats are being made.
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.
	Please see response on territoriality above (under Question 17).
82	Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?
	The international evidence is clear: peer-to-peer file sharing technologies are being used to infringe copyright and the impact of this infringement on publishers is substantial. The United Kingdom's Intellectual Property Office most recent report on copyright infringement, for example, concludes there is a significant increase in peer-to-peer infringing and that 17% of e-books are consumed illegally.[16] In New Zealand, there are significant examples of infringement such as Eleanor Catton's 'The Luminaries' made available illegally on file-sharing service.[17] Examples of high-investment educational works being pirated have also been noted in New Zealand.[18] Peer-to-peer infringement in New Zealand is particularly frustrating because publishers here have met the challenge of providing works in multiple digital formats, at reasonable prices and with easy access.

[16] 'Online Copyright Infringement Tracker', Intellectual Property Office, 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628704/OCI_-tracker-7th-wave.pdf

[17] 'Pirated Catton books removed from Mega', Aimee Gulliver, Stuff, 2013, http://www.stuff.co.nz/technology/digital-living/9324721/Pirated-Catton-books-removed-from-Mega

[18] 'Copyright Infringement in Education', CLNZ website, 2013, http://copyright.co.nz/about/news-and-event/copyright-infringement-in-education

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?
	Current measures available to publishers to address online infringement are inadequate. The infringing file sharing regime (IFSR) is a good illustrative example of the issues confronting enforcement under the current regime, with submissions from Recorded Music New Zealand providing a thorough assessment. Of particular concern for PANZ, given that many of our members are small-to-medium sized enterprises, is how the current regime largely places the policing burden on rights holders with limited resources. This is unreasonable and, we submit, redistributing this burden should be a key consideration for the Review. This constraint on policing is why identified instances of piracy (see response to question 82 above) are, we expect, only the tip of the iceberg. *Similar jurisdictions to New Zealand such as the United Kingdom and Australia now enable their citizens to get the government to block websites whose primary function is to host illegal content. The new EC Copyright Directive also embeds additional responsibility on websites to take responsibility for content they host. New Zealand's current measures available to publishers to address online infringement are inadequate and such developments in similar jurisdictions provide models for a future New Zealand approach.*
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?
	Please see response to Question 83 above.
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?
	Please see response to Question 83 above.
86	Should ISPs be required to assist copyright owners enforce their rights? Why / why not?
	The amendments of 2008 and 2011 recognised ISPs as holding a basic responsibility to assist copyright owners enforce their rights. Since then, the evolution of ISPs into hosting and storing ever-greater amounts of content (as distinct from being mere conduits) has only increased the requirement that ISPs assist rights-holders. This change is recognised by new legislation in similar legal jurisdictions such as Australia, United Kingdom and Europe. However, legislation here continues to fails to provide ISPs with sufficient incentive to assist copyright owners in preventing file sharing; nor does it provide adequate recourse for rights holders against ISPs for lack of action. The cost of taking action, under an enhanced regime, should acknowledge that (a) ISPs can benefit financially from hosting pirated content; and (b) it is reasonable to include such action within the costs of carrying out their business.
87	Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?
	Please see response to Question 86 above.
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?

	The primary issue for publishers is one of access to justice. Quite aside from types of offences or sizes of penalties, simply accessing enforcement actions of this serious nature is beyond the resourcing of most publishers. Limiting remedies to an account of profits (and no interest available for deferred payments) is nonsensical and provides little incentive for claims to progress. Instituting statutory damages is required to incentivise compliance.

Other comments

[Insert response here]

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?
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90	Have you experienced any problems when seeking protection for an industrial design, especially overseas?
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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?
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92	Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?
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Other comments

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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.

The Wai 262 report is a lengthy, complex and important document. Any summary of the Waitangi Tribunal's findings needs to be treated with care and subject to informed scrutiny and consultation. We encourage MBIE to conduct much wider consultation on its handling of Wai 262 and the Crown's obligations for copyright under the Treaty of Waitangi than has been observed to date.

We have members that view their relationship to works as kaitiaki. They feel a strong responsibility to care and protect all dealing with the work, especially when it is inherited knowledge. Some works are seen, by these members, as taonga in respect of the Treaty. Mātauranga Māori for these members is not just a question of education but about all the other values that underpin that knowledge. This usage is consistent with the Waitangi Tribunal's findings.

The concerns of these members in handling taonga works broadly aligns with the problems identified by the Waitangi Tribunal. A key concern is that authors dealing with inherited knowledge will not pursue publication if there is a substantial risk of misuse. Weak or inaccessible enforcement mechanisms in the current copyright regime often do not allow these authors and publishers to meet the kaitaki obligation to 'safeguard and protect the integrity of mātauranga Māori and taonga works'. Attribution is also vitally important, to ensure the perpetual association and relationship to the work is sustained. Anxiety about loss of attribution is a significant issue in dealing with taonga works.

A copyright regime that underpins licensing of taonga works by providing clarity, certainty and strong enforcement options is considered essential for several reasons, including:

- *Fees from licensing, such as secondary licensing for documentaries, can be modest but they are very important because they (a) demonstrate the work is valued; (b) provide clear and agreed acknowledgement; and (c) provide an ongoing relationship for the author with the licensed works.*

- *Licensing will often help inform the usage, ensuring it is secure and appropriate. For example, a production company may approach a Māori language publisher to acquire rights to dramatise a work or turn it into a documentary. These rights will often be granted on the basis that a Māori language advisor is attached to the production. In addition to the three other benefits listed above, this direct transactional relationship is often the best way to ensure taonga works are handled appropriately. When this sort of informed usage is lost (i.e. when a work is not licensed directly) the results can be offensive, derogatory or generally inaccurate and inappropriate.*

We note the concerns raised by Huia Publishers in their submission and strongly encourage MBIE to consult more fully with Māori publishers.

94	Do you agree with the Waitangi Tribunal's use of the concepts 'taonga works' and 'taonga-derived works'? If not, why not?
	Please see response to Question 93 above.
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?
	Considerations for taonga works and mātauranga Māori should be a priority for any New Zealand copyright regime and we submit that, at this stage, it should be a less a question of potential conflicts than that of designing a Review process that is inclusive of these concerns from the outset. The process thus far would appear to be deficient in its early consultation with Māori stakeholders and, as above, we encourage MBIE to conduct much wider consultation than has been observed to date.
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?
	We welcome the inclusion of the fifth proposed objective for the Review. The new work stream is also welcome but we are concerned that MBIE's communication and clarity about this work is inadequate. We have members that will want to engage with this work stream but the process and scope remains opaque and poorly understood.
97	How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?
	As above, we have members that wish to be consulted on this proposed work stream but the fundamentals for this process – scope, timing, purpose – remain unclear. Proper consultation will take time and must be a thorough, considered process. The inclusion of this work stream in the issues paper under 'Other Issues' suggests this consideration remains secondary and even devalued. We encourage MBIE to prioritise providing clarity for our members and other stakeholders on how this work stream will operate in the months ahead.

Other comments

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