#26

COMPLETE

Collector: Web Link 1 (Web Link)

Page 2: A bit about you and your submission

Q1 Your name

Siobhan Leachman

Q2 Your email address

Q3 Please briefly tell us why copyright law interests you

I am a member of the pubic who creates copyrighted works and I also frequently reuse content which has either been licensed by the copyright holder for reuse or alternatively falls outside the copyright act or has ascended to the public domain.

Q4 For the purpose of MBIE publishing the information you provide in this submission, do you wish to remain anonymous?	**No**
Q5 Do you object to your submission being published (anonymously if you have requested that) in whole or in part by MBIE on its website?Note: if you answer Yes to this question, when you reach the end of this survey, you will be asked to specify which parts of your submission (or all of it) you do not wish MBIE to publish and help us understand your concerns so that we can consider them in the event of a request under the Official Information Act.	**No**

Page 3: Question navigation

Q6 Which of the following subjects in the Issues Paper do you wish to answer questions on?

Part 3 (Objectives),

Part 4 (Rights) Section 1 - what does copyright protect and who gets the rights?

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Part 4, (Rights) Section 2 - what actions does copyright reserve for copyright owners?

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Part 4, (Rights) Section 3 - specific issues with the current rights

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Part 4, (Rights) Section 4 - moral rights, performers' rights and technological protection measures

,

Part 5 (Exceptions and Limitations) Section 1 - exceptions that facilitate particular desirable uses

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Part 5, (Exceptions and Limitations) Section 2 - exceptions for libraries and archives

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Part 5, (Exceptions and Limitations) Section 3 - exceptions for education

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Part 5, (Exceptions and Limitations) Section 4 - exceptions relating to the use of particular categories of works

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Part 5, (Exceptions and Limitations) Section 5 - contracting out of the exceptions

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Part 5, (Exceptions and Limitations) Section 6 - internet service provider liability

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Part 6 (Transactions),

Part 7 (Enforcement of Copyright) **,**

Part 8 (Other issues) Section 1 - relationship between copyright and registered design protection

,

Part 8, (Other issues) Section 2 - copyright and the Wai 262 inquiry

Page 4: Objectives

Q7 Q1 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?

As an initial comment regarding this Review submission process, I would like to point out that because of the current Copyright Act as well as my being unaffiliated with any particular institution, my access to peer reviewed academic papers is more limited than many with institutional access to paywalled publications. However I will attempt to reuse and bring to light those papers and presentations that are free and open for access and reuse under appropriate copyright licenses.

Question 1.

I believe in general the objectives that are outlined in the Issues paper encapsulate what the law should be aiming to achieve. However I am concerned about the wording or language used to express the objectives. I would like the objectives to be expressed in more permissive and positive language. In my view the Copyright Act should include the objective "allowing the creativity of New Zealand Aotearoa to flourish".

I am also concerned about the objective "Permit reasonable access to works for use, adaptation and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand." In my opinion the language of "net benefits" needs to be clarified so it is understood that it encapsulates benefits to New Zealand that are wider than financial benefits.

I am also unsure about the wording of the third objective when it includes "Facilitating competitive markets, minimising transaction costs". These objectives will automatically be met by a copyright regime that is effective and efficient at providing incentives for the creation and dissemination of works and that provides clarity and certainty around the law. I do not believe these financially based objectives need to be specifically stated in the objectives of the Act.

Q8 Q2Are 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?

It is my view that when drafting the language of the Act that adaptability and resilience of the law to future technological change should be born in mind. However this may be impossible to achieve.

Q9 Q3Should 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.

Respondent skipped this question

Q10 Q4What weighting (if any) should be given to each objective?

Respondent skipped this question

Page 5: Rights: What does copyright protect and who gets the rights?

Q11 Q5What are the problems (or advantages) with the way the Copyright Act categorises works?

Respondent skipped this question

Q12 Q6Is it clear what 'skill, judgement and labour' means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?

In my view it is not clear what 'skill, judgement and labour' means as a test for whether a work is protected by copyright. This test leads

to uncertainty about whether the Copyright Act applies. Numerous institutions are now providing access to original works held by them through providing a digital copy on the web. Where the original work is protected by copyright the digital copy is also protected by copyright law. However where a digital surrogate is provided of an out of copyright work there is uncertainty over whether the digital surrogate is protected under copyright law or whether it too is in the public domain. Uncertainty with regard to the copyright status of digital surrogates of out of copyright works results in inconsistent practice across the Gallery Library Archive and Museum (GLAM) sector as well as other providers of access to content. It also leads to confusion and uncertainty amongst reusers of that content.

The uncertainty of the test leads to some institutions to claim copyright over the digital surrogates of out of copyright two dimensional works. Some institutions wish to retain control over their digital surrogates and, in order to ensure they retain control, claim copyright in exact copies of out of copyright works. This in my view infringes the public domain. I agree with the Wikimedia Foundation's position given in this statement made by Eric Moller:

"Wikimedia Foundation's position has always been that faithful reproductions of two-dimensional public domain works of art are public domain, and that claims to the contrary represent an assault on the very concept of a public domain. If museums and galleries not only claim copyright on reproductions, but also control the access to the ability to reproduce pictures (by prohibiting photos, etc.), important historical works that are legally in the public domain can be made inaccessible to the public except through gatekeepers." http://commons.wikimedia.org/wiki/Commons:When_to_use_the_PD-Art_tag

Institutions already control the type of reuse members of the public can put images the public have taken of out of copyright works by limiting access to their institution and the works they hold. For example see Te Papa's terms of entry https://www.tepapa.govt.nz/visit/plan-your-visit/photography-and-conduct which applies whether or not the member of the public is taking a photographic copy of an out of copyright work. Institutions also inhibit reuse by restricting access to their high resolution digital surrogates in order to facilitate revenue gathering.

Although clarifying the test will not stop this behaviour, it will ensure that the legitimate reuse of digital surrogates of out of copyright content placed on the web is no longer dampened by confusion about the legality of reuse.

I personally have spent significant amounts of my time emailing New Zealand GLAM institutions seeking clarification and justification from them about their using rights statement such as "All rights reserved" or alternatively restrictive creative commons licenses (eg CC BY NC) on digital surrogates of out of copyright works. A search through aggregator websites such as eHive https://ehive.com/ and DigitalNZ https://digitalnz.org/ for images will show examples of digital surrogates of public domain works that have their reuse restrictively licensed without any apparent justification.

Take for example this digital surrogate of a portrait sketch by the artist Charles Heaphy (1820-1881) in the Digital New Zealand website. https://digitalnz.org/records/23201833/heaphy-charles-1820-1881-cl-churton-mrs-heaphy-1851 This work is listed as having an "unknown" copyright status. It is my understanding that the original image is out of copyright in New Zealand as the creator has been dead for more than 50 years. As the digital surrogate is a copy of the work it is also my understanding that the copy can not be regarded as an original work under the Copyright Act and therefore the digital surrogate is itself in the public domain.

Currently there is uncertainty about this as there is an argument that the 'skill, judgement and labour' of the person who digitised or photographed the original public domain work is enough to create copyright in the copy of the work. However I am of the view that if this was the case copyright would in practical terms exist in perpetuity and that as such this argument is not valid. I would like this uncertainty to be resolved in any review of the Copyright Act.

It appears to be current practice amongst most GLAMs to assume that digital copies or photographs taken of public domain works are themselves in the public domain. In the example mentioned above DigitalNZ states that the copyright status of this digital surrogate is unknown and that the user should check with the holder of the work the Alexander Turnbull Library for its terms of use and encourages the user "to undertake research to find the creator and publisher of each object to determine this." DigitalNZ helpfully provides a link in that section to the appropriate Alexander Turnbull Library page. https://natlib.govt.nz/records/23201833

Here the Alexander Turnbull Library states that copyright of the image is unknown and gives the following statement:

“You can copy this item for personal use, share it, and post it on a blog or website. It cannot be used commercially without permission, please ask us for advice. If reproducing this item, please maintain the integrity of the image (i.e. don't crop, recolour or overprint it), and ensure the following credit accompanies it:
Heaphy, Charles, 1820-1881. Heaphy, Charles 1820-1881 :C.L. Churton ; Mrs Heaphy. 1851. Ref: A-144-001. Alexander Turnbull Library, Wellington, New Zealand. /records/23201833
More information can be found in our terms of use.”
https://natlib.govt.nz/records/23201833

In my opinion this practice of attempting to control the method and manner of reuse of a digital surrogate of a public domain image infringes the public domain. I believe this practice is brought about partly as a result of GLAMs being under resourced and therefore are lacking the ability to research whether works and their digital surrogates are in the public domain. It is also brought about as there is confusion and misunderstanding of what constitutes an original work under the Copyright Act. This confusion dampens the reuse of out of copyright public domain content. It also reduces respect for copyright law to when potential reusers of public domain content see rights being claimed under the Copyright Act when those rights having lapsed.

As another practical example of issues regarding reuse see these digital surrogates of public domain paintings by John Gull (1819-1888). See https://ehive.com/objects?query=%22John+Gully%22 and https://www.nzmuseums.co.nz/objects?query=primary_creator_maker%3A%22John+GULLY%22&sort=name

In both of these examples the Suter Art Gallery appears to be claiming copyright in the digital surrogate of public domain works by stating “All Rights Reserved”. This is despite the creator John Gully being dead for over 100 years and his paintings therefore have ascended to the Public Domain. It appears the Suter Art Gallery is claiming copyright in these digital surrogates of public domain works to the detriment of potential reuses from New Zealand and the world.

I believe that because of the confusion about whether copyright exists in digital surrogates of out of copyright works, it is common for cultural institutions and others to have a dampening effect on the reuse of public domain works.

As another practical example I have been working on a Charles Heaphy (1820-1881) art project. Charles Heaphy is an extremely important historical figure for New Zealand. He was an explorer, soldier, cartographer and artist. I am attempting to collate and reuse all digital surrogates of artworks made by him and placed on the internet by various New Zealand GLAM (Gallery, Library, Archive and Museum) institutions. I am aiming to upload the digital surrogates into Wikimedia Commons, collate the metadata about the paintings, sketches and lithographs, link the metadata to the images in Wikimedia Commons and also to reuse those uploaded images in appropriate Wikipedia articles for the benefit of all New Zealanders. This is purely a volunteer effort on my part.

I have been in email contact with at least 5 New Zealand GLAM institutions regarding my ability to reuse the digital surrogates of public domain works by Charles Heaphy. I have frequently met with hurdles in reusing what I believe is public domain content. These hurdles include institutions claiming copyright in digital surrogates of out of copyright works, institutions restricting reuse of digital surrogates through the terms of use on their websites, institutions incorrectly using Creative Commons licenses on digital surrogates of public domain works, institutions restricting access to the original public domain work entirely or through their terms of entry to their institution restricting my ability to reuse any digital surrogate I myself might create of an original public domain work.

These email exchanges have been time consuming and discouraging. I am unable to put an exact financial sum on the time spent emailing institutions as I am doing this as a volunteer. If I were to estimate the time I have spent composing emails, reading replies, considering my response to the same and then responding to institutions concerning reuse of digital surrogates of public domain works for this project alone I would estimate it to be at least 10 hours. Given that all the works I am interested in are in the public domain I believe ANY time spent on this is a waste of my volunteer effort.

The numerous practical difficulties I have come across attempting to reuse of digital surrogates of public domain works held by various cultural institutions across New Zealand has often resulted in me becoming discouraged. I have stopped working on this project numerous times only to continue my work at a later date once this feeling wore off. After becoming discouraged, I do admit to progressing to feeling frustrated and then angry, and often find myself feeling much less respectful of copyright law in general as a

progressing to feeling frustrated and then angry, and often find myself feeling much less respectful of copyright law in general as a result of the difficulty I have in reusing digital surrogates of public domain works. To me it seems appalling that it is this difficult for the public to reuse the digital surrogates of public domain artworks by one of New Zealand's most important historical figures.

I would hope that if the Copyright Act was simplified and clarified, problems such as these would reduce, resulting in a Copyright Act that was more respected and therefore less likely to be infringed.

Petri, G. (2014) The public domain vs. the museum: the limits of copyright and reproductions of two-dimensional works of art. Journal of Conservation and Museum Studies, 12 (1). p. 8. ISSN 2049-4572
http://eprints.gla.ac.uk/96570/1/96570.pdf

National Digital Forum Conference 2017 Keynote: Andrea Wallace - Access and the Digital Surrogate: Openness as a philosophy. National Digital Forum. Published on 27 Nov 2017 CC BY 4.0
https://www.youtube.com/watch?v=crKUIxIX3sY

Issues become more complex for the reuser when it comes to two dimensional copies, for example photographs, of three dimensional objects, for example sculptures. What is the copyright status of a photograph of an out of copyright sculpture? Currently GLAMs take the view that a photograph of a three dimensional object is covered by the copyright act as the photograph is an original work. Institutions regard these photographs as being original enough for copyright to apply. See
http://www.aucklandmuseum.com/discover/stories/blog/2016/enriching-our-online-collections-rights-management

But what about a three dimensional scan of a three dimensional object that has previously ascended to the public domain?

The 'skill, judgement and labour' test could possibly be relied upon to argue that copyright exists in the three dimensional scan of a public domain three dimensional object. However as technology advances and techniques for copying such as three dimensional scanning continue to become more automated this test of 'skill, judgement and labour' becomes harder and harder to meet. I would also argue that if original work is out of copyright, the three dimensional scan of the work is also not protected by copyright. The fact that this is open to debate and argument indicates to me that the 'skill, judgement and labour' test for originality is unclear and confusing. This leads to uncertainty that in turn reduces the effectiveness and efficiency of current copyright law.

Thomas Margoni. The digitisation of cultural heritage: originality, derivative works and (non) original photographs.
http://outofcopyright.eu/wp-content/uploads/2015/03/digitisation_cultural_heritage-thomas-margoni.pdf

Michael Weinberg. (May 2016) 3D Scanning: A World Without Copyright.
https://www.shapeways.com/blog/wp-content/uploads/2016/05/white-paper-3d-scanning-world-without-copyright.pdf

Q13 Q7Are 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?

As I understand in the current Copyright Act the compilation of data qualifies for copyright protection while the individual data element (basic data) does not. However when reusing data I am often uncertain whether this is actually the case. It is not clear to me what 'skill, judgement and labour' means as a test for whether a single basic data element is protected by copyright.

Another issue rests with the New Zealand Government Open Access and Licensing Framework (NZGOAL) recommendations for releasing government and state agency data and datasets. I frequently work with and reuse data on and in Wikidata. Wikidata is a collaboratively edited knowledgebase. See https://en.wikipedia.org/wiki/Wikidata

In order to reuse data in Wikidata that data is required to be CC0 licensed. However Government Departments and institutions funded with taxpayer funds are current discouraged from releasing collections of metadata using the CC0 public domain dedication / license. NZGOAL states that CC0 is not supported. This copyright issue has a dampening effect on my reuse of data and compilations.

There is also an issue where the original analogue work is out of copyright and GLAM institutions would like to indicate that any copyright that may be argued to exist in the digital surrogate due to the sweat of the brow uncertainty is waived. Another permutation of this is that the original work is out of copyright in New Zealand but that copyright may still apply in other jurisdictions. GLAM institutions may wish to use the CC0 license to waive any possible copyright that may exist internationally, especially if they are placing a digital surrogate of the out of copyright in New Zealand work on their website for reuse by anyone, anywhere.

One solution to these issues is to use the CC0 mark / license to state that if sweat of the brow were considered to create new copyright then that copyright is explicitly waived. The use of this mark / license is intended to provide ultimate certainty for the user that there is no copyright risk to reusing / rediting / remixing the work. As a frequent reuser of content I certainly feel much more confident in reusing content that is licensed under the CC0 license than that content that has a "no known copyright restrictions" statement.

Unfortunately I find that GLAMs are reluctant to use the CC0 license as NZGOAL states that CC0 is not supported. I believe the Copyright Act should be drafted to ensure certainty for users of GLAM produced works. Especially when the GLAM in question is pursuing its public good mandate by releasing that work for the fullest reuse possible.

There is a growing international movement to standardise metadata associated with GLAM collections worldwide. CC0 is the emerging preferred waiver / licence. Ensuring CC0 is supported by NZGOAL will ensure that it is available for all state agencies and other GLAM institutions administered by local government can join the emerging international standard for releasing metadata associated with heritage collections.

For a comparison of waivers and licensing by institutions releasing metadata see this survey of open GLAM institutions by Andrea Wallace and Douglas McCarthy.
https://docs.google.com/spreadsheets/d/1WPS-KJptUJ-o8SXtg00llcxq0IKJu8eO6Ege_GrLaNc/edit

Q14 Q8What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?

In Section 21 (2) of the Copyright Act films and sound recordings and computer generated works are excluded from the list of works where the employer is the first owner of copyright when the work is created by an employee in the course of their employment. With the democratisation and ease of creating film and sound recordings and computer generated works increasing and staff being hired by a variety of industries to specifically create these types of works, it would aid clarity and certainty if these types of works were added to the list of works were the first owner of copyright was the employer or alternatively eliminating the list of types of works associated with this rule and ensuring the employer is the first owner of copyright in all works created by employees in the course of their employment.

A practical example would be photographs and films created on a smart phone by an employee of the Department of Conservation. Currently, unless the employee has negotiated with DOC about copyright ownership of their creations through their employment contract, the copyright in the photos would be owned by the Department of Conservation and under Crown Copyright the work would not ascend to the public domain for 100 years from the date of creation of the work. DOC in recent years has adopted NZGOAL and has licensed these Crown Copyrighted works for reuse under the Creative Commons CC BY 4.0 license. However when it comes to the film or sound recording taken by the employee on the smartphone, copyright would be owned by the employee and would last for 50 years after the death of the employee with no requirement to license the reuse of these works. This is despite the taxpayer funding the employment of the creator and thereby facilitating the creation of these works. This seems to me to be confusing and inconsistent given current technology.

Institutions and departments can resolve the inconsistency in the first owner of copyright in works by employees by ensuring that their employment contracts and contracts for services are clear as to who will own the copyright in all works produced under a contract for service or employment. Other institutions may not have the in depth knowledge of the Copyright Act to be aware that the sound recordings and films created by the employee producing these works may have a different first owner of copyright than the employer. I believe there is value in making the first owner of copyright rules more consistent.

Q15 Q9What 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?

Respondent skipped this question

Q16 Q10What 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?

Respondent skipped this question

Q17 Q11What 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?

Respondent skipped this question

Q18 Q12What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?

I don’t believe Crown Copyright should exist and I would argue that Crown copyright should be abolished.

Works published prior to 31 December 1945 are clearly in the public domain, but for works created after this the copyright duration is 100 years from the date of creation. Not only is this duration far too long, the fact it exists at all causes confusion and dampens reuse by

100 years from the date of creation. Not only is this duration far too long, the fact it exists at all causes confusion and dampens reuse by New Zealanders of content that they have already paid for by funding the New Zealand Government through taxes.

I believe the added layer of Crown Copyright leads to confusion amongst the general public such as myself. As a practical example I recently attempted to reuse an artwork published in Flickr by Archives New Zealand and released under a Creative Commons license CC BY 2.0. https://www.flickr.com/photos/archivesnz/45269182004. I was unsure why Archives New Zealand was using a Creative Commons license when initially I believed this artwork to be in the public domain. I had checked that the author had been dead for 50 years and as a result I initially believed the work had ascended to the public domain and was free for reuse without restriction.

After reading the Copyright Act I was then unsure whether the work fell within Crown Copyright as it had been created while the author was a soldier in 1917 during the first world war. He appeared to be employed as an official artist. It seemed possible, although I wasn't certain, that Crown copyright applied. After investigation and research I realised Crown copyright did not apply as this artwork was created prior to 1945 and even if Crown copyright did apply it would have lapsed as the artwork had been created over 100 years ago. So why was the Chief Archivist was still controlling the terms of reuse of this work?

I emailed Archives New Zealand to ask why. See https://research.archivesnz.info/reft205.aspx?pmi=G3q02FHDFI I received a reply explaining to me that the Chief Archivist was releasing this work under a Creative Commons CC BY 2.0 license as he was empowered to do so under section 48 of the Public Records Act 2005. This states:

"The Chief Archivist may give written authority, on any conditions that the Chief Archivist thinks appropriate, for the publication or copying of a public archive that is an open access record."
http://www.legislation.govt.nz/act/public/2005/0040/latest/DLM345778.html

The practical effect of this is that artworks that are out of copyright but are created by workers of the government and are under the control of the Chief Archivist never quite ascend to the public domain. Reuse is always limited to only those allowed by the Chief Archivist. I believe this has a dampening effect on reuse. For example if I wanted to use this artwork on a conference slide I would have to put an ugly crediation on the bottom of that slide. This license would also hinder me licensing the whole of the slide deck under a CC0 license. If I wanted to copy this image by creating a new work such as a quilt I've have to somehow incorporate an attribution on or with that quilt. It seems to me if other artists wanted to reuse the work in a collage or other such reuse the attribution requirement would be a barrier to reuse.

I have also had issues attempting to reuse digital surrogates of public domain content held by government controlled cultural institutions, for example content held by the National Library of New Zealand. I wanted to reuse digital surrogates of artworks that are in the public domain as the artist has been dead for over 50 years. The National Library has made these public domain images available for free download. I wanted to reuse these by downloading them and then uploading the same to Wikimedia Commons for reuse in Wikipedia. I was planning on using the images to illustrate relevant Wikipedia articles as well as relevant Wikidata items relating to each of these works as I have been curating the metadata about those works of art in Wikidata. My intention was to create an original work through a data visualisation of the metadata about these public domain artworks .

Unfortunately I have been advised by the National Librarian that they do not license the public domain works for this reuse. In an email dated the 26th October 2018 by Mark Crookston, the Associate Chief Librarian, Alexander Turnbull Library, I was advised the following:

"As mentioned previously, we've restarted our work to agree the rights statements and all of the changes to our metadata fields, online messaging and legal text that is required to support that. While we move from our current approach to that future implementation, we can only continue to provide permission on a use by use basis, rather than assessing and reclassifying whole collections for the copyright status and making the required metadata changes.

This means that only free downloads are pre-licenced in the way that is needed for Wikimedia Commons (https://www.flickr.com/photos/nationallibrarynz_commons/). All other digitised items that could be deemed out of copyright and free of any other use restrictions (contractual, cultural) we are unable to, at this stage, give individual permissions for loading to Wikimedia as that would then be the equivalent to licencing the material openly for any use following its upload to Wikimedia, as other users will not need to come back to the institution to ask permission for a different use."

need to come back to the institution to ask permission for a different use.

I remain in the dark concerning what Act the National Librarian relies upon to limit my reuse of digital surrogates of public domain images the library has already made available for free download. I have checked the terms and conditions of the National Library website see https://natlib.govt.nz/about-this-site/copyright-and-privacy and https://natlib.govt.nz/about-this-site/copyright-and-privacy/reusing-objects-from-this-site. I have also read the National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003 as well as the Public Records Act 2005. I remain confused whether I am legally entitled to reuse in any manner I see fit the digital surrogates of public domain content made freely downloadable by the National Library of New Zealand.

I would should point out that Mr Crookston hit upon my very motivation for reusing out of copyright content in Wikimedia Commons. I wish to ensure that digital surrogates of public domain works are placed in a repository where the public of New Zealand can reuse that content freely, easily and unhindered by Government controlled institutions seeking to continue to control reuse after the property rights awarded by the Copyright Act have extinguished.

I give these examples to show the confusion that can result from the application of the current Copyright Act to content controlled by institutions of the Crown. I also wanted to show that this confusion is exacerbated by the application of other Acts affecting the public's ability to reuse digital surrogates of public domain content that is either Government owned or controlled.

I believe that Crown Copyright should be abolished. If content is generated or commissioned by the Government that content should be in the public domain unless there is a good reason for an exception to be made. Examples of reasons that could apply to limit reuse might include reuses that infringe privacy or if there are cultural concerns about reuse of the content.

I also believe that those parts of the government that are custodians of cultural heritage such as Archives New Zealand and the National Library of New Zealand should be required to ensure that they do not restrict the reuse of digital surrogates of public domain works unless there is a very good reason to do so (for example for cultural concerns).

Crown copyright also has a dampening effect on the reuse of content generated by public funded initiatives such as Te Ara, the Encyclopedia of New Zealand. There have been times when I would very much have liked to reuse portions or even whole articles written and published in this Encyclopedia in Wikipedia. This would have saved much effort on my part and would also have ensuring a wider audience for those articles, the generation of which I have already paid for with my tax dollars. However the articles contained in Te Ara are under Crown Copyright and their reuse is restricted by a Creative Commons Attribution Non Commerical reuse license. As a result I am unable to copy and reuse content contained there. See the bottom of Te Ara's landing page which states:

"All text licensed under the Creative Commons Attribution-NonCommercial 3.0 New Zealand Licence unless otherwise stated. Commercial re-use may be allowed on request. All non-text content is subject to specific conditions. © Crown Copyright."
https://teara.govt.nz/en

Another practical problem with Crown Copyright is that it is often very unclear which government department has the responsibility for the Crown copyrighted works created after 1945. This lack of clarity results in it being very difficult to get permission to reuse those Crown copyrighted works and their digital surrogates. If Crown Copyright is to continue, then a centralised government administration arm should be established to manage Crown copyright works. If Crown Copyright is to be waived it should be retrospectively waived to cover all those Crown Copyright works created in the past 100 years.

If Crown Copyright in all works created in the past 100 years was waived, it would not impact on the burden of the research required to ascertain whether a work is a Crown work. But it would add to the incentive for others to research the details surrounding the creation of an historic Crown work as determining that the work was definitely a Crown work would remove copyright barriers. There will always be content where records no longer exist to provide definitive proof whether a work was Crown copyright or copyright retained by others.

Q19 Q13Are there any problems (or benefits) in providing a copyright term for communication works that is longer than the minimum required by New Zealand's international obligations?

Copyright term extension for communication works. Do you support a extension of copyright terms?

I agree with the issues paper that the current terms of protection for copyright are more than adequate to incentivise creation and dissemination of copyright works. I would argue that the length of copyright protection in New Zealand is excessive. I recognise that as a result of New Zealand being a party to certain international agreements it is unlikely that the duration of copyright will be decreased. However in my view the length of copyright protection has a severe dampening effect on the sharing of knowledge and as a result I believe it should definitely not be extended. The general rule of 50 years after the death of the creator is more than sufficient.

The main issue with having a copyright term for communication works that is longer than the minimum required by New Zealand's international obligations is that it hinders the reuse of those communication works for the benefit of all New Zealanders. Technology has moved on and it is now much easier for the public to share and reuse communication works, including creating new works using those in the public domain. The existence of copyright lasting for 50 years from the date that the communication work was first communicated to the public rather than the minimum requirement of 20 years ensures that the freedom to reuse this content is restricted and dampened for at least another generation of users.

Q20 Q14Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?

I don't believe that just because a work is unpublished and has been donated to an institution with a donator agreement that there should be in practice be an unlimited copyright duration. At some point copyright should end, whether or not the work is unpublished and whether or not there is a donation agreement. Institutions are digitising content both for preservation purposes and for ease of access and reuse. If the content is worth collecting and is worth institutions spending money including tax payer money on its curation and preservation then that unpublished content is worth giving access to and allowing for the reuse of the same.

I can image a situation where an unpublished diary is donated to an GLAM institution with a donor agreement that it not be published for a certain length of time. I don't believe that the Copyright Act is the appropriate place to ensure the enforcement of that donor agreement.

I believe it is more appropriate for bequests to be discussed between the institution and the bequestor prior to the bequest being given. There may be occasions where this situation exists as this arrangement occurred in the past and the item is of such significance that the collecting institution retains it. In those instances providing a legal exception to the institution giving it permission to infringe the historic agreement as long as ethical best practice is met would be of benefit.

Q21 Any other comments on Rights: what does copyright protect and who gets the rights? **Respondent skipped this question**

Page 6: Rights: What actions does copyright reserve for copyright owners?

Q22 Q15Do 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? **Respondent skipped this question**

Q23 Q16Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?	**Respondent skipped this question**
Q24 Q17What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?	**Respondent skipped this question**
Q25 Any other comments on Rights: what actions does copyright reserve for copyright owners?	**Respondent skipped this question**

Page 7: Rights: Specific issues with the current rights

Q26 Q18What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?	**Respondent skipped this question**
Q27 Q19What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?	**Respondent skipped this question**
Q28 Q20What are the problems (or benefits) with using ‘object’ in the Copyright Act? What changes (if any) should be considered?	**Respondent skipped this question**
Q29 Q21Do you have any concerns about the implications of the Supreme Court’s decision in Dixon v R? Please explain.	**Respondent skipped this question**

Q30 Q22What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?

The terminology used in the issues paper appears to me to be dismissive and arguably even prejudiced against this type of social engagement. Using the terms “non-professionals” and “low levels of investment” in association with user-generated content is a generalisation. With the ever-advancing democratisation of professional tools, user-generated development of content, like any other type of content creation, results in works that vary in quality, quantity, significance, time commitment and application of professional skills.

The problems and benefits with how the Copyright Act applies to user generated content are the same as those that apply to other types of content generation involving remix. The issue lies in the level of copyright clearance knowledge and resources available to the creators. Professionals and commercial businesses often have representatives to take responsibility for rights clearance and copyright licensing. A member of the public is likely to have a lesser understanding of copyright constraints.

The “User-generated content” discussed in issue 22 should be considered a subset of Remix culture where a new work is created in response to and including elements of other copyright works. https://en.wikipedia.org/wiki/Remix_culture

Whereas the fair use defence may well be applicable when displaying remix work in the United States of America, such works in New Zealand are likely an infringement of copyright. This is because New Zealand law is restricted to specific fair dealing exceptions only.

At present New Zealand copyright law does not accommodate this remix culture. It is not just the community that are affected by the law, it is also those institutions that reflect and collect to reflect the communities to which the institutions belong. This born digital content is an important part of current day culture but current New Zealand copyright law is hindering the collection and preservation of this content.

Consideration should be given to ensuring that this type of creative activity and art practice can be legalised within the copyright regime. If future proofing the Copyright Act is regarded as an aim then ensuring it contains some method for allowing digital remixing should be a priority. This is not something that will disappear. One method of ensuring this remix culture is legal is the creation of an exception such as the fair use defence used in the United States of America.

https://techcrunch.com/2015/03/22/from-artistic-to-technological-mash-up/
https://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity

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Q31 Q23What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?

I find there are disadvantages in not being able to renounce my own copyright. Although I create content over which I am automatically legally awarded property rights, I often want to donate the same to the public domain. I want to renounce all the rights automatically awarded to me under the current Copyright Act. The only method I have at present to do this is to license my work under the Creative Commons CC0 licence.

Unfortunately I understand that there is some debate as to whether using this CC0 license ensures the content I create will always be donated to the public domain. I am uncertain whether this Creative Commons license is able to be revoked at some future date by myself or by my heirs or estate. I would also like to have a clause in my will automatically donating all my creative works in which I hold copyright to the public domain upon my death. However I understand the legality of this sort of clause may be difficult to enforce.

I believe that should I wish to do so, I should be allowed to renounce any rights automatically given to me under the Copyright Act. I believe this renouncement should also be a legal right and able to be carried out by an irrevocable licence at any time during my lifetime as well as through a clause in my will. The Act should set out a mechanism for donating content to the public domain irrevocable at a later date by the creator or the heirs of the creator.

The Issues paper states “Creators or copyright owners wishing to renounce all of their rights could use the Creative Commons (CC0) No Rights Reserved licence. However, such licenses can be revoked.” Section 223 This seems to be in direct conflict with the legal code wording of the CC0 waiver / licence which states (with my emphasis):

2. Waiver. To the greatest extent permitted by, but not in contravention of, applicable law, Affirmer hereby overtly, fully, permanently, irrevocably and unconditionally waives, abandons, and surrenders all of Affirmer's Copyright and Related Rights and associated claims and causes of action, whether now known or unknown (including existing as well as future claims and causes of action), in the Work (i) in all territories worldwide, (ii) for the maximum duration provided by applicable law or treaty (including future time extensions), (iii) in any current or future medium and for any number of copies, and (iv) for any purpose whatsoever, including without limitation commercial, advertising or promotional purposes (the "Waiver"). Affirmer makes the Waiver for the benefit of each member of the public at large and to the detriment of Affirmer's heirs and successors, fully intending that such Waiver shall not be subject to revocation, rescission, cancellation, termination, or any other legal or equitable action to disrupt the quiet enjoyment of the Work by the public as contemplated by Affirmer's express Statement of Purpose.
3. Public License Fallback. Should any part of the Waiver for any reason be judged legally invalid or ineffective under applicable law, then the Waiver shall be preserved to the maximum extent permitted taking into account Affirmer's express Statement of Purpose. In addition, to the extent the Waiver is so judged Affirmer hereby grants to each affected person a royalty-free, non transferable, non sublicensable, non exclusive, irrevocable and unconditional license to exercise Affirmer's Copyright and Related Rights in the Work (i) in all territories worldwide, (ii) for the maximum duration provided by applicable law or treaty (including future time extensions), (iii) in any current or future medium and for any number of copies, and (iv) for any purpose whatsoever, including without limitation commercial, advertising or promotional purposes (the "License"). The License shall be deemed effective as of the date CC0 was applied by Affirmer to the Work. Should any part of the License for any reason be judged legally invalid or ineffective under applicable law, such partial invalidity or ineffectiveness shall not invalidate the remainder of the License, and in such case Affirmer hereby affirms that he or she will not (i) exercise any of his or her remaining Copyright and Related Rights in the Work or (ii) assert any associated claims and causes of action with respect to the Work, in either case contrary to Affirmer's express Statement of Purpose.
https://creativecommons.org/publicdomain/zero/1.0/legalcode Accessed 8.3.2019

Having legal certainty in this renunciation of copyright and its irrevocability would ensure that everyone can continue to abide by the wishes of the creator / copyright owner.

Because of the lack of support by the NZ Government Open Access Licensing Framework, I am aware that many GLAM institutions are using the Creative Commons Attribution (CC BY) license for their datasets instead of the CC0 licence. This licence choice is not consistent with international best practice when licensing collections data. If CC0 was supported under the law it is likely New Zealand GLAMs would adopt this licence to create consistency with other GLAM institutions internationally and aid in clarity of terms of use for the public. Currently there are 489 institutions worldwide that release collections data for open reuse. The majority use the CC0 licence. The licensing is recorded here in this survey of GLAM open access policy and practice: https://docs.google.com/spreadsheets/d/1WPS-KJptUJ-o8SXtg00llcxq0lKJu8eO6Ege_GrLaNc/edit#gid=1216556120

This international consistency would assist content aggregators such as DigitalNZ, Trove, Europeana, and Digital Public Library of America and would ensure that the general public not only of New Zealand but the entire world have clarity with regard to digital access to and reuse possibilities of GLAM data.

In addition I am aware that some government departments and state agencies have expressed an interest in using CC0 licensing when making works publicly available and reusable by the public. If NZGOAL continues not to support using CC0, state agencies will remain reluctant to use the CC0 mark. With datasets, the lack of a CC0 licence exposes users to the inconvenience of license stacking and confusion. Clarifying this point in the law will likely have a roll on effect to NZGOAL documentation, then applied by state agencies, then experienced by members of the public and, as more examples of CC0 licensed works are seen, will lead to the democratisation and education about Creative Commons copyright licensing and copyright in general.

In conclusion, as copyright is a property right it seems illogical that there is no mechanism in place for creators or copyright owners to renounce the rights provided to them automatically under the legislation. The Act exists to encourage creators to be rewarded for their creativity and thus be encouraged to create more works. If a creator or copyright holder believes she would be better served by

creativity and thus be encouraged to create more works. If a creator or copyright holder believes she would be better served by ensuring her works ascend to the public domain earlier than the legislated copyright duration expiry date, then that should be her right under the law. This should be able to be actioned legally by the copyright owner and without the ability for others to revoke the decision in the future.

Q32 Q24Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.

Respondent skipped this question

Q33 Any other comments on Rights: specific issues with the current rights

Currently the law does not adequately protect the public domain. The reuse of works that are have ascended to the public domain is important for free knowledge, creativity, and innovation. The public domain is indispensable but unlike the exclusive rights on intellectual property with their robust enforcement regimes, the public domain is not adequately protected.
https://wikimediafoundation.org/2019/02/07/problems-remain-with-the-eus-copyright-reform/

As David Lange argues, the public domain is not

“whatever is left over after intellectual property has finished satisfying its appetite”.

It is an

“affirmative entity, conferring its own protection … upon individual creators”.

He points out that

“intellectual property was not necessarily an incentive or an inducement or an encouragement to create, but rather always a potential impediment to creativity, and on occasion a real and powerful disincentive to the very activity intellectual property was meant to bring about.”

Lange, David. “Reimagining the Public Domain.” Law and Contemporary Problems, vol. 66, no. 1/2, 2003, pp. 463–483.
https://scholarship.law.duke.edu/cgi/viewcontent.cgi?
referer=https://scholar.google.co.nz/&httpsredir=1&article=1728&context=faculty_scholarship

As has been explained previously I frequently come across examples where institutions or individuals are infringing the public domain, claiming rights under the Copyright Act that have never been or are no longer awarded to them. Just as the Copyright Act is frequently infringed, so too is the Public Domain frequently diminished by those who incorrectly claim intellectual property rights in material not covered or no longer covered by the Copyright Act.

I would like to see some mechanism within the Copyright Act that assists in alleviating this problem. The solution may be as simple explicitly stating that when copyright ends the content ascends to the public domain. Whatever mechanism is chosen I would like to encourage those reviewing the Copyright Act to consider this issue.

There is also the issue of the interplay between the Copyright Act and other pieces of New Zealand legislation that also negatively impact the Public Domain.

For a practical example photographs or artwork that are held by the New Zealand Archives are covered by the Copyright Act but also by the Public Records Act 2005. Even after those creations fall out of copyright and ascend to the Public Domain they are still covered by section 48 of the Public Records Act 2005. So this artwork https://www.flickr.com/photos/archivesnz/45269182004/in/photolist-2bYhoE1 is in the Public Domain in New Zealand as its author artist, Cecil Trevithick, died in 1967. However Archives New Zealand only licenses the reuse of this artwork under a CC BY 2.0 license under section 48 of the Public Records Act. Many creations generated by paid employees of the Government will therefore never truly ascend to the Public Domain. This is especially frustrating given that the public has already paid for the generation of these original works through taxation. At some point the public should be free to reuse this content without restriction.

Page 8: Rights: Moral rights, performers' rights and technological protection measures

Q34 Q25What 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?

Respondent skipped this question

Q35 Q26What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?

Respondent skipped this question

Q36 Q27Will 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?

Respondent skipped this question

Q37 Q28What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?

Respondent skipped this question

Q38 Q29Is it clear what the TPMs regime allows and what it does not allow? Why/why not?

Respondent skipped this question

Q39 Any other comments on Rights: moral rights, performers' rights and technological protection measures

Respondent skipped this question

Page 9: Exceptions and Limitations: Exceptions that facilitate particular desirable uses

Q40 Q30Do 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?

Respondent skipped this question

Q41 Q31What 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?

Respondent skipped this question

Q42 Q32What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?

Respondent skipped this question

Q43 Q33What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?

Respondent skipped this question

Q44 Q34What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?

Respondent skipped this question

Q45 Q35What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?

Respondent skipped this question

Q46 Q36What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?

Respondent skipped this question

Q47 Q37Are there any other current or emerging technological processes we should be considering for the purposes of the review?

Respondent skipped this question

Q48 Q38What problems (or benefits) are there with copying of works for non-expressive uses like data-mining. What changes, if any, should be considered?

Respondent skipped this question

Q49 Q39What 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?

Respondent skipped this question

Q50 Q40What problems (or benefit) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?

Respondent skipped this question

Q51 Any other comments on Exceptions and Limitations: exceptions that facilitate particular desirable uses

Respondent skipped this question

Page 10: Exceptions and limitations: Exceptions for libraries and archives

Q52 Q41 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.

Respondent skipped this question

Q53 Q42 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?

Respondent skipped this question

Q54 Q43Does 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?

Respondent skipped this question

Q55 Q44Does 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?

Respondent skipped this question

Q56 Q45What 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?

Respondent skipped this question

Q57 Q46What 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?

Respondent skipped this question

Q58 Any other comments on Exceptions and Limitations: exceptions for libraries and archives

Respondent skipped this question

Page 11: Exceptions and limitations: Exceptions for education

Q59 Q47Does 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?

Respondent skipped this question

Q60 Q48Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?

Respondent skipped this question

Q61 Q49Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?

Respondent skipped this question

Q62 Q50Is copyright well understood in the education sector? What problems does this create (if any)?

Respondent skipped this question

Q63 Any other comments on Exceptions and Limitations: exceptions for education

Respondent skipped this question

Page 12: Exceptions and limitations: Exceptions relating to the use of particular categories of works

Q64 Q51What 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?

Respondent skipped this question

Q65 Q52What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?

Respondent skipped this question

Q66 Q53What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?

Respondent skipped this question

Q67 Q54What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?

Respondent skipped this question

Q68 Q55What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?

Respondent skipped this question

Q69 Q56Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?

Respondent skipped this question

Q70 Q57Do 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?

Respondent skipped this question

Q71 Any other comments on Exceptions and limitations: exceptions relating to the use of particular categories of works

Respondent skipped this question

Page 13: Exceptions and limitations: Contracting out of the exceptions

Q72 Q58What 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?

I often come across website terms and conditions regarding the reuse of the public domain content obtained from website or alternatively terms and conditions restricting the use to which I can put the digital surrogate of a public domain work when I am downloading the same. These terms and conditions attempt to restrict the manner in which I may reuse public domain content.

In my opinion it would aid the confidence of the public in the Copyright Right Act if these types of terms and conditions attempting to limit the reuse of public domain content were unenforceable. At present their existence along with the uncertainty of their enforceability has a dampening effect on the reuse of public domain content.

Take for example the terms and conditions of the Hocken Library website for the Hocken Collections and Special Collections. See http://otago.ourheritage.ac.nz/ and http://otago.ourheritage.ac.nz/. On the terms of use page there is a section concerning copyright which states:
"The use of these items must be consistent with the provisions of the New Zealand Copyright Act 1994 and any amendments to that act, except where otherwise indicated. By accessing the items here you are agreeing to the terms of use. More information about copyright can be found within the
New Zealand Copyright Act 1994
Requests to use images for online publications, public display or commercial products should be made by contacting us. In these instances you will need to obtain written permission and we will supply high resolution digital images.
Where an original item is still under copyright the responsibility for obtaining permission to reproduce that item lies with the applicant."
These terms of use appear to require that any reuser of any work, whether that work is protected by the Copyright Act or whether it has ascended to the Public Domain, to contact the Hocken Library directly if they wish to reuse content obtained from that website in online publications, for public display or in commercial products.

In practice, the existence of such terms of use have resulted in me being dissuaded from reusing public domain content obtained from these sites. Often I feel it is too time consuming to write in to request permission to reuse public domain content and have gone on to search other more permissive websites for alternative content.

This appears to me that in putting these terms of use onto a website and applying the same to public domain works results in a defacto extension of copyright. These terms of use hinder creation of new works by limiting the reuse of those works now out of copyright. This stifles creativity and economic development. As the Review of the Copyright Act 1994 - Issues Paper states in paragraph 50 "Once copyright expires in a work, people are free to use it as they like." This however will not be the case if these 'browse-wrap' or 'click-wrap' agreements are judged to be enforceable.

Page 14: Exceptions and limitations: Internet service provider liability

Q73 Q59What are problems (or benefits) with the ISP definition? What changes, if any should be considered?

Respondent skipped this question

Q74 Q60Are 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?

Respondent skipped this question

Q75 Q61Do 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.

Respondent skipped this question

Q76 Q62What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?

Respondent skipped this question

Page 15: Transactions

Q77 Q63Is 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?

Respondent skipped this question

Q78 Q64If 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.

Respondent skipped this question

Q79 Q65If 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.

Respondent skipped this question

Q80 Q66What 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?

Respondent skipped this question

Q81 Q67Which 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?

Respondent skipped this question

Q82 Q68Has 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.

Respondent skipped this question

Q83 Q69What 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?

Respondent skipped this question

Q84 Q70Do 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?

Respondent skipped this question

Q85 Q71Have 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.

Yes I have. Numerous times. I have frequently wanted to reuse digital surrogates of artworks where the copyright owner has been impossible to track down or alternatively where I may have discovered the name of the copyright holder but because I was unable to confirm the date of death I was unable to establish whether copyright had expired. As a result of this uncertainty I was not prepared to reuse content that in all likelihood was in the public domain.

It doesn’t have to be “old works” either. I have had difficulty establishing whether copyright of works produced in the 1960’s were out of copyright. Despite believing the author had died over 50 years ago I was unable to find proof of this and was therefore unable to reuse the work in the manner in which I wanted - that is by uploading it into Wikimedia Commons and reusing the same in English Wikipedia for the benefit of all New Zealanders.

By not being able to know who the creator of the work is or what the creator’s death date is, I have been unable to prove that these orphaned works are out of copyright. As a result I have been unable to reuse these types of images by uploading them into Wikimedia Commons. This in turn results in me not being able to reuse to the same to illustrate English or Maori Wikipedia articles, or reuse these public domain images to illustrate Wikidata for the benefit of all New Zealanders.

Q86 Q72 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?

I first have to attempt to establish whether a work is an orphaned work. This requires considering the copyright of that work. For some content covered by the Copyright Act, whether a work is in or out of copyright doesn’t depend on the death date of the creator and therefore it isn’t necessary to attempt to trace the author.

My first step is to use this extremely useful flowchart that I have access it. See
https://drive.google.com/file/d/1C1CC3jnIYWfDBn5vNfrolLKHw1gJnw9Z/view?usp=sharing
This flowchart brings home to me every time I use it the complexity of the copyright regime in New Zealand and I feel sympathy for those members of the public who, like me, are by no means experts in this area and yet are expected to navigate through these issues in order to make sure they don't infringe creators property rights by sharing and reusing content on the internet.

My normal aim when I reuse content is to upload images or data into Wikicommons, Wikidata or Wikipedia. These three projects are based in the US and are maintained by the Wikimedia Foundation. Because the Wikimedia Foundation has servers in American, American copyright law also applies to any content I want to reuse on those projects. So in order to reuse content I not only have to navigate New Zealand copyright law, I also have to ensure the content I want to reuse is either appropriately licensed for reuse or out of copyright under American law.

Wikicommons editors have produced guidance such as this for reuse of images on Wikicommons.
https://commons.wikimedia.org/wiki/Commons:Copyright_rules However as can be seen from the disclaimer this isn't policy, nor legal advice.

Here are a list of the copyright tags used in Wikicommons. https://commons.wikimedia.org/wiki/Commons:Copyright_tags I have had occassion to use the {{PD-old-assumed}} tag where a photograph I wanted to reuse was over 120 years old but the creator of the work was unknown. Given the time elapsed I was willing to take the risk that the work was out of copyright and that I was not committing an illegal act.

Another factor which sometimes makes working out copyright even more complex is if I want to reuse content that was created in a different country that New Zealand and the United States. I then have to attempt to be aware of not just New Zealand copyright law for the reuse act in New Zealand, American copyright law as the reuse will be taking place on American servers, but also whether the work is out of copyright in the source country.

This multi jurisdictional reuse throws up many issues but the most frequent issue I come across is where the content is out of copyright in New Zealand but in copyright in another countries such as America. Institutions and creators of works in New Zealand, if they think of copyright at all, tend only to consider copyright and the public domain in the New Zealand context. Once content has ascended to the public domain in New Zealand the previous owners of the copyright in that content will assume reuse can happen freely anywhere.

Often institutions and creators are ignorant that other copyright regimes in other countries continue to apply. I have come across situations where the institution owning the copyright of a work are prepared to openly license the reuse of that content. But where the content is no longer covered by copyright and the work has ascended to the Public Domain in New Zealand the institution has just added a statement to the digital surrogate stating that fact or alternatively used the "No known copyright restrictions" statement. As this statement really means "no known copyright restrictions in New Zealand" I can end up with a situation where I can freely reuse content of that institution that falls within the jurisdiction of the Copyright Act via a Creative Commons license to do so, but I will be unable to reuse content that is in the Public Domain in New Zealand as the copyright law in other jurisdictions has yet to lapse.
For a practical example of how I want to reuse content consider this blog which contains an image of a Kea by L.A. Daff.
https://www.zsl.org/blogs/artefact-of-the-month/art-of-the-lost-and-rare-art-works-of-extinct-and-endangered-animals
I would want to reuse this digital surrogate image and upload the same into Wikicommons. Here we are lucky in that we know the name of the author although we don't yet know her death date. The steps I have to go through to work out whether I can reuse this image is as follows. Can I reuse it in New Zealand? Is it out of copyright in New Zealand? When did the creator die? In this particular case I have managed to track down the death date of the artist. See https://tiaki.natlib.govt.nz/#details=ethesaurus.96048 As she died in 1945 I believe her works are out of copyright in New Zealand.

But I now have to check whether I can use her works in Wikimedia Commons. Are her works out of copyright in the US? Here I tend to use this resource as guidance https://copyright.cornell.edu/publicdomain as well as any copyright statements given by the content providing institution. It appears from the blog post that this image of a Kea was published in Avicultural Magazine between 1933 - 37. If it was published without formalities then according to the guidance of Cornell it is in the public domain in America. If it has been published with formalities, American copyright lasts for 95 years and I therefore can't reuse it. According to guidance given by Cornell

published with formalities, American copyright lasts for 95 years and I therefore can't reuse it." According to guidance given by Cornell University the "US formalities include the requirement that a formal notice of copyright be included in the work; registration, renewal, and deposit of copies in the Copyright Office; and the manufacture of the work in the US." I have no idea whether this took place or even how to work this out.

What I do know how to do is track down the Avicultural Magazine. This magazine is in the digital library the Biodiversity Heritage Library (BHL). This image is from the 1934 volume see https://biodiversitylibrary.org/page/56219556 and according to BHL this volume is out of copyright. They have this statement attached to this particular volume at the journal page:

"Copyright Status: Not in copyright. The BHL knows of no copyright restrictions on this item.
Rights Holder: Avicultural Society "

So I assume that that this journal has been published without formalities and is therefore in the public domain in America. Relying on the guidance and expertise of this digital library I am assuming I am entitled to reuse the digital surrogate of this work in the United States.

As an added issue, the original work I want to use was created in the UK. As I understand copyright law in the United Kingdom (as again I emphasise I'm by no means an expert) as the creator of the artwork used in the publication has been dead for over 70 years this work is in the public domain.

However if the digital surrogate has also been created in the UK it could possibly be argued that UK law relates to that surrogate. UK law on digital surrogates adds an extra layer of complexity to the issue of reuse.

This issue was discussed and analysed in depth in the work "Display at your own risk: An experimental exhibition of digital cultural heritage" by Andrea Wallace and Ronan Deazley. See
https://issuu.com/displayatyourownrisk/docs/display_at_your_own_risk_publicatio

This page on Wikicommons discusses the reuse of public domain art photographs and whether the reuse of the same might somehow infringe copyright. https://commons.wikimedia.org/wiki/Commons:Reuse_of_PD-Art_photographs In my reuse I take the view that since I am reusing a public domain image in New Zealand and America it is those two jurisdictions that apply. The original artwork is in the public domain in both New Zealand and the United States and therefore so are any photographic copies of the artwork and as a result I believe I am free to reuse a digital surrogate of a work created in the UK by a UK institution in New Zealand and America without infringing copyright of the various jurisdictions.

Obviously there are legal arguments against the above belief in that it can be argued that the photographer creating the digital surrogate has used enough sweat of the brow to entitle her or him to copyright in the digital image.

I want to emphasise we are discussing the reusing a digital surrogate of an artwork that is at least 85 years old, the author has been dead for 74 years and copyright is supposed to be property right intended to compensate the creator of works and encourage the dissemination of the same.

The above process would be all but impossible if I am unable to work out the name of the creator of the work or the death date of the creator of the work.

I freely admit that because of the complexities of this situation mistakes are likely to made and it is possible that I have unintentionally infringed copyright in the mistaken belief that a work had ascended to the public domain in the jurisdictions I am dealing with. It is also possible that I have not reused the digital surrogate of a public domain artwork in the mistaken belief that the work falls within a jurisdiction that does not apply.

Also when I want to reuse those works reliant on the death date of the creator to ascend to the public domain I have to establish who the creator is and if possible the death date of that creator. For me orphaned works describes not only those works where the creator is unknown, it also describes those works where the creator is known but the death date can not be discovered.

If I can't easily establish the creator of the work or death date of that creator I tend to give up and won't reuse that work, even though the

artwork and its digital surrogate are likely in the public domain.

The steps I go through to attempt to discover the creator or the death date of the creator include a Wikidata search, a Google search, a Google scholar search, as well as a search for the digital surrogate in Museum, Library, Gallery and Archive websites. But if I am unable to locate the creator or the needed death date and am therefore unable to work out whether the creation is out of copyright, then I do not reuse that work in the manner I wish. As you can image, this can be extremely frustrating.

I believe there should be a mechanism whereby orphaned works can be regarded as being in the public domain if the author can not be reasonably tracked down or found. I also believe the test of what is reasonable should differ for members of the public in comparison to those institutions who might reasonably be expected to be experts in this area. Without such a mechanism works in practical terms remain in limbo unable to ascend to the Public Domain and unused for the benefit of all.

Q87 Q73Has 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?

Respondent skipped this question

Q88 Q74What were the problems or benefits of the system of using an overseas regime for orphan works?

Respondent skipped this question

Q89 Q75What 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?

I reuse open data in Wikidata, the collaboratively edited knowledge base hosted by the Wikimedia Foundation. It is Wikidata's policy that all structured data in Wikidata is available under a Creative Commons CC0 license. See https://www.wikidata.org/wiki/Wikidata:Licensing

Besides public domain data and CC0 data no other data license or designation is compatible with the copyright requirements of Wikidata. As a result of this I am unable to reuse using any open data released under a Creative Commons Attribution (CC BY) Licence in Wikidata.

Wikidata is regarded as one of the largest and most prominent collections of open data on the web. It is the central collection point for data from all different language Wikipedias as well as multiple external sources. It is also a global identifier hub, cross-linking multiple other identifiers from multiple institutions. Wikidata is also an authoritative reference for numerous data curation activities and a widely used information provider.

As a result of its CC0 license applications the world over use Wikidata. Examples of applications that use Wikidata include Apple's Siri and Google's search engine. When you "google it" one of the datasets that Google's algorithm obtains information from is Wikidata.

Government Departments and institutions funded with taxpayer funds are current discouraged from releasing collections of metadata using the CC0 public domain dedication / license. NZGOAL states that CC0 is not supported. Using this CC BY license has a dampening effect on my and other Wikidata editors reuse of data and compilations in Wikidata. As a result of data in New Zealand being released under a Creative Commons Attribution license, New Zealand is effectively missing out on linking and connecting to its data through Wikidata.

I believe the Copyright Act should be drafted in a way so as to encourage the use of CC0 as the default license for the sharing of data. This is likely to result in the CC0 licence then being supported by NZGOAL. This in turn will ensure that this license is available for use by all state agencies and other institutions administered by local government. They can then more widely disseminate their data by improving its ease of reuse. If CC0 was supported under the law it is likely more institutions would adopt this licence widening the reuse of their data to the benefit of all New Zealand.

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Pellissier Tanon, T., Vrandečić, D., Schaffert, S., Steiner, T. and Pintscher, L., 2016, April. From freebase to wikidata: The great migration. In Proceedings of the 25th international conference on world wide web (pp. 1419-1428). International World Wide Web Conferences Steering Committee. https://static.googleusercontent.com/media/research.google.com/en//pubs/archive/44818.pdf

Q90 Any other comments on Transactions **Respondent skipped this question**

Page 16: Enforcement of Copyright

Q91 Q76How 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?

Respondent skipped this question

Q92 Q77What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?

Respondent skipped this question

Q93 Q78Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?

Respondent skipped this question

Q94 Q79Does 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?

Respondent skipped this question

Q95 Q80Are 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?

Respondent skipped this question

Q96 Q81Is the requirement to pay the $5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are there any issues with the border protection measures that should be addressed? Please describe these issues and their impact.

Respondent skipped this question

Q97 Q82Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?

Respondent skipped this question

Q98 Q83Why 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?

Respondent skipped this question

Q99 Q84What 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?

Respondent skipped this question

Q100 Q85What are the problems (or advantages) with the existing measures copyright owners have to address online infringements? What changes (if any) should be considered?

Respondent skipped this question

Q101 Q86Should ISPs be required to assist copyright owners enforce their rights? Why / why not?

Respondent skipped this question

Q102 Q87Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?

Respondent skipped this question

Q103 Q88Are there any problems with the types of criminal offences or the size of the penalties available under the Copyright Act? What changes (if any) should be considered?

Respondent skipped this question

Q104 Any other comments on Enforcement of copyright

Respondent skipped this question

Page 17: Other Issues: Relationship between copyright and registered design protection

Q105 Q89Do 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?

Respondent skipped this question

Q106 Q90Have you experienced any problems when seeking protection for an industrial design, especially overseas?

Respondent skipped this question

Q107 Q91We 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?

Respondent skipped this question

Q108 Q92Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?

Respondent skipped this question

Q109 Any other comments on Other Issues: Relationship between copyright and registered design protection

Respondent skipped this question

Page 18: Other issues: Copyright and the Wai 262 inquiry

Q110 Q93Have 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.

Respondent skipped this question

Q111 Q94Do you agree with the Waitangi Tribunal's use of the concepts 'taonga works' and 'taonga-derived works'? If not, why not?

Respondent skipped this question

Q112 Q95The 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?

Respondent skipped this question

Q113 Q96Do 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?

Respondent skipped this question

Q114 Q97How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?

Respondent skipped this question

Q115 Any other comments on Other Issues: copyright and the Wai 262 inquiry

Respondent skipped this question

Page 20: Information you've provided that should not be publicly available

Q116 Please specify (by question number) which of your answers you object to being published by MBIE

Respondent skipped this question

Q117 Please specify (by question number) which of your answers contain information that MBIE should consider withholding if requested under the Official Information Act. For each question number, please tell us which information in your answer you believe would need to be withheld and why (preferably by referring to the relevant ground in the Official Information Act).

Respondent skipped this question