



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

Review of the Copyright Act 1994: MBIE's approach to policy development





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Ministry of Business, Innovation and Employment (MBIE)

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1 Purpose of this paper

1. This paper sets out a framework we intend to use for developing policy advice in the review of the *Copyright Act 1994*. In preparing this paper we have taken into account submissions we received in April 2019 on objectives we proposed copyright should seek to achieve as set out on page 23 of the Copyright Act Review: Issues Paper.¹
2. What copyright law should seek to achieve ('objectives') depends on some other questions this paper proposes answers to, including:
 - a. What is the appropriate role or purpose of copyright in the first place?
 - b. How can it make people and society better off?
 - c. How is copyright law limited in its potential to deliver these outcomes?
3. We are presently at the problem identification stage of the review (analysing information from submissions to help us identify problems with current copyright law). We will therefore be using this framework, in the short-term, to evaluate the status quo. More information about how we intend to use this framework is provided in section 7 of this paper. There will be opportunities for stakeholders to comment further on objectives and how we apply them in our policy advice when we consult on options for addressing problems identified at this stage of the review.

2 The importance of good copyright policy to New Zealand

How we view the purpose of copyright

4. As policy advisors, we think about copyright law in terms of how it benefits society or promotes collective wellbeing. To explain how we think society benefits from providing copyright, a brief overview of economic theory is helpful.

The basic economics of copyright

5. The tradition in economic theory is to understand copyright works² as differing in some important ways from other goods traded in the marketplace, such as cups of coffee for example:
 - a. Once a person has consumed a coffee, no one else can consume it. Whereas, if a person buys a book, they could make copies of it for others, while still being able to read the book themselves. Copyright works tend to be easily copied and enjoyed by others without affecting their enjoyment by the buyer.³ Copyright is intended to address this by giving those who produce or sell copyright works more control over who consumes them, favouring buyers if they want payment for copies of the work.

¹ <https://www.mbie.govt.nz/dmsdocument/3441-review-of-copyright-act-1994-issues-paper-pdf>.

² By 'copyright works' we mean works that copyright subsists in, as opposed to the copyright itself, which transcends all of the works it subsists in. For example, you can legally own a Picasso drawing without owning copyright in the drawing. Here, the copyright work is the drawing.

³ This is reflected in economic theory by the concepts of copyright works being 'non-excludable' and 'non-rival' in their consumption.

- b. Coffees are inexpensive to produce and are generally made to order. Whereas, in many cases, to produce a copyright work (eg write a book) requires significant investment of time and energy without knowledge that there is any demand for it (that people will want to read the book), or enough demand to justify the investment.⁴ There are also costs involved in producing, marketing and distributing copies of works.⁵ Many of them prove to have little or no commercial value. This makes creative works risky investments, particularly in terms of the high initial costs of producing them, as opposed to the marginal cost of producing copies.
 - c. People who make coffees (eg baristas) tend to have relatively little personal attachment to them. Many copyright works, on the other hand, are the product of the intellectual labour, creativity and unique personality of their author. Creators may form a close personal bond with their work and view it as an extension of their identity.⁶ This sentimental relationship between creator and the work is easily threatened by a lack of control over the works' use by others.
6. Without the intervention of copyright law, these characteristics of copyright works may combine to make producing them for markets an unattractive proposition. This creates a risk of under-production of copyright works (a 'market failure'), which is a problem for any society that values and wants access to the culture, knowledge and other social goods that copyright works have to offer.

Copyright is an attempt to solve this access problem

- 7. Copyright is widely justified as an attempt to solve this access problem for society by temporarily giving (but also carefully limiting) creators and investors certain rights over copyright works as incentives to create new works and make them available. This is primarily how we understand the purpose of copyright – as helping to fulfil the public interest in having access to an abundance of works that it values.
- 8. In section 5 of this paper, we discuss what we think is required for copyright to do this effectively. However, it is first important to acknowledge that what we have so far described is a traditional understanding of copyright's purpose, which technological change may have made more or less applicable today. Some commentators argue that technology has already upset this traditional economic thinking to such an extent that a fundamentally different approach to copyright policy is required for it to be useful in a digital paradigm.
- 9. Whatever we might think about its merits, New Zealand is not in a position to abandon the overall approach to copyright prescribed by international copyright law. For New Zealand to withdraw from international treaties that bind its domestic copyright law, notably the World Trade Organisation's *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, (and breach free trade agreements that affirm New Zealand's commitment to these treaties) would significantly prejudice its

⁴ Though, we note creators can have aims that justify their investment other than to reach a large audience (and secure financial return).

⁵ Though once produced, the marginal costs of producing each additional copy are generally low or nil.

⁶ The link between the author's identity and their work is described in the 2005 General Comment on Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights and by Article 8 of the UNESCO Universal Declaration on Cultural Diversity.

trade and relations with other countries.⁷ These consequences would far outweigh any benefits from increased flexibility to change domestic intellectual property settings. New Zealand can, however, make the best of its domestic copyright policy within the constraints of our international obligations. We can also be guided as we do that by an understanding of its underlying purpose and of how technological changes may disrupt how well it achieves that purpose.

Examples of the way technology has changed market dynamics

10. The economic characteristics of copyright works discussed above have all been affected by recent technological developments. What follows are some examples for each of them:
 - a. Digital technologies have made it harder in some ways, and easier in others, for sellers to exclude people other than buyers from using their copyright works. It becomes harder for sellers as copying technologies and digital dissemination makes it easier for users to obtain works. The ubiquitous nature of digital copies also tends to make it harder for sellers to detect infringement and enforce copyright. On the other hand, innovations such as technological protection measures are increasingly being deployed by sellers to prevent unauthorised use of works. Some view these technologies as potentially affording sellers more control over the use of works than copyright has ever promised, by allowing them to prevent acts permitted by exceptions, segment markets and restrict use of works no longer protected by copyright.
 - b. Technological advancements have also significantly lowered the financial investment required to produce (and reuse or adapt) certain kinds of copyright works (eg photographs, films and sound recordings), provided more of us with the means of production (and reuse or adaptation), and increased the quality of output that is possible for a similar amount of investment. The costs of taking copyright works to market, widely disseminating copies and managing transactions have also generally been reduced by digital technologies.⁸ While this has generally increased the size of the potential market for works (the number of consumers capable of being reached and the ease of reaching them), lower production costs tend to result in more works competing for a share of the same market.
 - c. The reluctance displayed by many creators, including some of our submitters, to make their work available online could be seen as a symptom of technologies posing a greater threat to the personal connection between creators and their work. The often uncontrolled nature of dissemination online (eg content 'going viral'), including loss of metadata that identifies the author, can make it harder for creators to retain their sense of authorship in the work. Digital copies of works are also more readily reused and adapted by users, in ways not anticipated by the

⁷ Compliance with the TRIPS agreement is a condition of New Zealand's membership with the World Trade Organisation (WTO). Ceasing to be a member of the WTO would, for example, make all New Zealand exports subject to extra tariffs by WTO Member States.

⁸ We note, however, that the extent to which digital delivery has removed transactions costs is consistently overstated according to Furnival (2015) *The Economics of Collective Copyright*, page 13.

author. These activities begin to erode the distinction between creators and users of copyright material and between private and public copying.⁹

Copyright policy reflects western thinking, but should be responsive to Māori interests where possible

11. As the discussion so far makes clear, New Zealand has inherited concepts and traditions of copyright policy (predominantly from British common law and legislation) which are mostly derived from market-based economies and, ultimately, an industrial, western system of intellectual property. Even the idea of treating creations as private property owned by individuals may be contrary or unnatural to other cultures, including to Te Ao Māori.¹⁰ The Waitangi Tribunal, in chapter 1 of its report *Ko Aotearoa Tēnei (Wai 262)*, contrasted property and kaitiakitanga or guardianship as different ways cultures decide the rights and obligations of communities in their created works.
12. In its Wai 262 report, the Waitangi Tribunal explored the challenges involved in trying to reconcile the relationship Māori have with mātauranga Māori¹¹¹² with intellectual property law.¹³ New Zealand’s international obligations preclude us from specially providing a kind of protection within copyright law that would appropriately meet the needs of kaitiaki in respect of taonga works and mātauranga Māori.¹⁴ That is why the Waitangi Tribunal recommended that the Crown establish a new, unique regime to protect kaitiaki interests in taonga works, rather than recommending changes to copyright law. Additional protections provided in any separate, *sui generis* (‘stand alone’) legal regime would tend to be permitted by or beyond the scope of our international obligations, such as the TRIPS Agreement, and therefore avoid conflict with them.
13. The Crown has recently announced that it intends to develop a whole-of-government approach to the issues raised in the Wai 262 inquiry. Notable for the purposes of copyright policy is the option proposed in Kete 1 of “a new legal framework to protect taonga works and mātauranga Māori”. We are working closely with officials across government on this whole-of-government approach to ensure that New Zealand’s copyright law is at least consistent with the Crown’s obligations under the Treaty of Waitangi.

⁹ Guibault (2002) *Copyright Limitations and Contracts*, page 2.

¹⁰ The area of copyright that likely comes closest to bridging this distance in world views is the provision of moral rights, and particularly the author’s right to object to derogatory treatment of their work.

¹¹ This relationship is recognised by the guarantee of ‘te tino rangatiratanga o ratou taonga katoa’ in the Māori text of Article 2 of the Treaty of Waitangi.

¹² Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples, to which New Zealand is a signatory, affirms the right of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and cultural expressions (which can be understood as similar to the guarantee of tino rangatiratanga).

¹³ For example, the Tribunal talks about the need for ‘balance’ in accommodating the kaitiaki relationship within the framework of intellectual property law, and describes the ‘non-Treaty interests’ that have traditionally formed the basis for this framework.

¹⁴ For example, the TRIPS Agreement limits copyright protection to original *expressions* of ideas rather than to ideas themselves, such as traditional knowledge or mātauranga Māori that was passed on orally through generations.

How copyright can contribute to wellbeing and the Government's priorities

14. The living standards framework (LSF) and dashboard were developed by the New Zealand Treasury to improve transparency and systematic consideration of all the various outcomes that research suggests are important elements of intergenerational wellbeing.
15. 'Social capital' is central to copyright and described as "The norms, rules and institutions that influence the way in which people live and work together, and experience a sense of belonging. Includes trust, reciprocity, the rule of law, cultural and community identity, traditions and customs, common values and interests." The domains of current wellbeing from the LSF that, to us, seem the most relevant to copyright are:
 - a. Knowledge and skills
 - b. Cultural identity
 - c. Social connection
 - d. Subjective wellbeing
 - e. Income and consumption
 - f. Civic engagement.¹⁵
16. Further work is being undertaken on the role of culture in the LSF, as well as on how the framework can better express and represent a Te Ao Māori perspective. The most recent paper published on the role of culture in wellbeing and the LSF, was one commissioned by the Ministry of Culture and Heritage and the Treasury from Lincoln University.¹⁶ A whole-of-government approach to issues raised in the Wai 262 inquiry would likely navigate similar questions about the value of indigenous culture.
17. Copyright policy can also make potential contributions to a number of the priorities set out in the Government's *'Plan for a modern New Zealand we can all be proud of'* (published in September 2018), including:
 - a. *Grow and share more fairly NZ's prosperity*
 - b. Ensure everyone who is able to is *earning, learning, caring* or volunteering
 - c. Support healthier, safer, and *more connected communities*
 - d. *Build closer partnerships with Maori*
 - e. *Value who we are as a country*
 - f. *Create an international reputation we can be proud of* (MBIE's emphasis).
18. The distribution of benefits across society also matters to the Government's wellbeing approach. Hon Grant Robertson in a speech on wellbeing earlier this year said: "It is not enough to look at the economic returns of our investments without an understanding of

¹⁵ These domains are described in detail by the Treasury in this document:

<https://treasury.govt.nz/publications/tp/living-standards-framework-background-and-future-work.html#section-8>

¹⁶ This paper can be accessed here: <https://treasury.govt.nz/system/files/2019-06/dp19-02-culture-wellbeing-lsf.pdf>

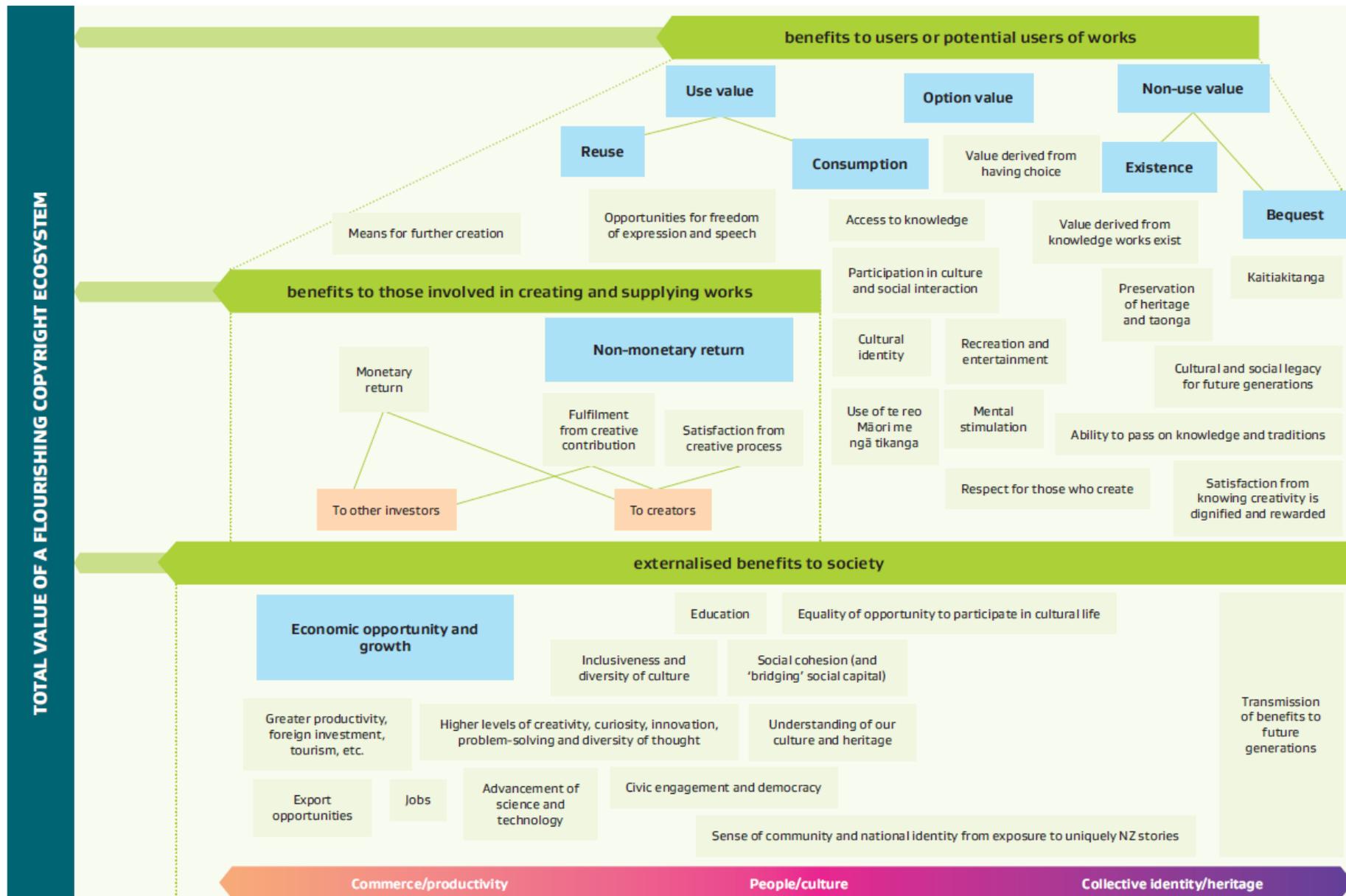
whether those returns are accruing to a select few, or are contributing to inclusive growth and prosperity.”¹⁷

19. We view copyright law as making a significant but indirect contribution to the wellbeing of New Zealanders. It sets the parameters within which people make decisions beneficial to them. When it is optimally configured, it provides the conditions for a flourishing copyright ecosystem, with flow-on benefits for the rest of society (positive externalities). **Figure 1** below illustrates the benefits potentially arising. These benefits are identified in submissions, suggested in discussion with other Government departments, and by some of the literature on the contribution of the arts to societal wellbeing.¹⁸ The question for the government, in reviewing copyright law, is what conditions or parameters will best enable people within the ecosystem, including the general public, to secure the greatest benefits at the smallest costs overall.

¹⁷ https://ipanz.org.nz/Attachment?Action=Download&Attachment_id=150280

¹⁸ For example, a 2013 paper prepared for the Ministry for Culture and Heritage: *Value and Culture: An Economic Framework and New Zealanders and the Arts* available here: https://www.creativenz.govt.nz/assets/paperclip/publication_documents/documents/607/original/new_zealanders_and_the_arts_2017_full_report.pdf?1526981303

Figure one: potential contributions of copyright ecosystem to wellbeing



3 Working within the limitations of what can be achieved through domestic copyright policy

20. The bundle of exclusive rights conferred by copyright are sometimes called ‘economic rights’¹⁹ because they are a mechanism for negotiating a share of the money users will pay for copyright works. The effective use of these economic rights accounts for a significant proportion of the revenue that sustains creative industries and makes possible the kinds of risky investments many worthwhile creative products require.²⁰ It is also economically significant to other businesses and commercial activities in New Zealand (eg copyright in software, designs and product packaging). This all makes the continued protection of economic rights important. The provision of economic rights is, however, a very indirect intervention that leaves much to market forces and does not guarantee any income in return for the creation of copyright works or ownership of copyright. It is therefore important to understand that there are limits to what changing copyright law can achieve as a means for financially supporting creators and investors or providing a financial incentive to create:
- a. There is a limit to the amount of money consumers are willing to spend on copyright works (a local play, for example). Copyright law has no influence over how they choose to spend it and can offer no guarantee that the revenue generated by a work, according to demand, will exceed the costs of producing it.
 - b. Copyright is a blunt tool, not always wielded by creators. The creators’ share may be settled in advance of knowing the work’s commercial value (eg a one-off payment for copyright in a guitar riff before it is used to make another artist an overnight success). Or the creators’ share of the revenue may be returned to them indirectly, through agreements that reflect their bargaining power in relation to others in the supply chain.
 - c. Of the copyright revenue that is returned to creators, it tends to be distributed very unevenly between them. Markets for copyright works are often characterised as ‘winner-takes-all’, with income being disproportionately enjoyed by the few who achieve significant commercial success.²¹
 - d. In markets where a small proportion of works is responsible for the majority of income, copyright tends to reward the kinds of creativity that have already proved commercially successful, to the possible detriment of less ‘popular’ forms of creativity. This may limit the diversity of works produced by creators who hope to be among the few ‘winners’. For investors operating in these markets, success depends on being able to find and do business with winners whose success will offset their losses from other investments. The riskiness of copyright works may therefore lead commercially-motivated publishers and other investors to

¹⁹ For example, WIPO (2016) *Understanding Copyright and Related Rights*.

²⁰ Sales of copies of the copyright work was the leading source of revenue reported in *Copyright and the Creative Sector* (2016)

²¹ Mitra-Khan (2011) *Copyright, Evidence and Lobbynomics*, page 81 cites a number of studies that have found this and claims “as a rough guide” that winners in song writing, for example, receive about 80% of the total song-writing income.

perpetuate established forms of creativity in their search for the next winner,²² as opposed to supporting creators whose work is more novel or challenges genres and conventions.

- e. Copyright creates access costs that may limit new entrants to creative fields or the emergence of new creative fields. For example, less established artists are likely to be disproportionately affected by transactions costs and blanket pricing of copyright works through licensing.
21. One of the most significant constraints on what we can achieve through domestic copyright policy is New Zealand's existing obligations under international copyright treaties²³ and its free trade agreements with other countries.²⁴ For example, due to national treatment²⁵, New Zealand copyright law cannot benefit local producers more, or give them greater incentives, than it benefits foreign copyright producers who export works to New Zealand. Copyright settings therefore cannot privilege local copyright owners in any way or give them a better claim on the New Zealand market than their international competitors. These same obligations similarly protect New Zealand copyright owners from being discriminated against in export markets.
22. While local creators are increasingly exporting their works to other countries, New Zealand copyright law is territorially limited. In a growing global market for copyright works, the nature of copyright law in other countries has a potentially greater impact on the interests of New Zealand copyright owners. Many local copyright owners rely on dissemination by global distributors who develop their infrastructure according to US or European law. Globalisation may also increase the challenges local copyright owners face enforcing copyright, which they may need to pursue separately in each country rather than through the New Zealand legal system.
23. New Zealand is a relatively small and isolated economy. This has several consequences for what copyright settings are prudent for New Zealand:
- a. Most of the benefits of copyright protection accrue to foreign copyright owners because we are a significant net importer/user of copyright works. This means that settings beneficial to copyright owners will disproportionately benefit foreign copyright owners at a cost to New Zealand users.
 - b. The small size of our market exposes us to some risk of foreign companies choosing not to enter or compete if they view regulatory conditions here as unfavourable. This goes especially for technology companies, who may choose not to service the New Zealand market if the law significantly increases compliance costs or requires them to adapt their infrastructure or business models. The risk of foreign producers or content owners withholding works from

²² A study by Joan Serra et al (2012) of homogeneity in music, for example, suggests high degrees of similarity or conventionalism in western popular music. Their report is entitled: *Measuring the Evolution of Contemporary Western Popular Music*.

²³ For example, the *Berne Convention for the Protection of Literary and Artistic Works*, the *WIPO Copyright Treaty*, *WIPO Performers and Phonograms Treaty* and *Universal Copyright Convention*.

²⁴ For example, the WTO's TRIPS Agreement and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*.

²⁵ This requires New Zealand to give foreign-produced works treatment that is no less favourable than the treatment given to locally-produced works.

New Zealand consumers is reduced somewhat by New Zealand’s parallel importation policy.²⁶

- c. We have a very small body of copyright cases available from New Zealand courts to clarify the application of domestic law. This arguably increases the value of having provisions consistent with jurisdictions whose case law we would like to be transferable for the interpretation of our laws, if it is desirable to have New Zealand law effectively being developed by foreign courts.
- d. Many creators are limited in the amount of commercial success they can enjoy within our small market. This increases the importance of helping them to find international audiences, which involves them making their work subject to copyright settings in other countries. Ideally, local creators would enjoy international success without leaving New Zealand or entering into contracts that offer lower financial returns to the New Zealand economy. Decisions to pursue a creative career or contracts overseas deserve further investigation, but we consider them unlikely to be explained by simple comparisons of copyright settings or a perception that New Zealand’s copyright settings disadvantage creators.²⁷

4 Related government interventions and initiatives

24. Copyright policy is one mechanism among many available to government that are capable of improving or safeguarding wellbeing in the ways identified in Figure 1. The following are some of the policies, interventions and initiatives across government that overlap with copyright policy in these ways.

Policy, intervention or initiative	Lead agency
Further work on the role of culture in the living standards framework	Treasury/Ministry of Culture & Heritage
Development of an all-of-government response to issues raised in the Wai 262 Inquiry	Te Puni Kōkiri
Work to support sustainable careers in creative and cultural sectors	Ministry of Culture & Heritage
Crown funding for arts and cultural sector	Ministry of Culture & Heritage
Enhancing the international potential of contemporary, popular New Zealand music	Ministry of Culture & Heritage
Work to consider a resale right for visual artists	Ministry of Culture & Heritage
Ten-year screen sector strategy	MBIE/ Ministry of Culture & Heritage
Grants and tax incentives for innovative businesses	Callaghan Innovation
Decision to develop an industry transformation plan for the creative industry	MBIE

²⁶ Parallel importing was discussed on page 40 of the Issues Paper.

²⁷ The points of difference in New Zealand’s copyright settings we think are most likely to matter to creators are copyright term and exceptions.

Crown broadcasting	Ministry of Culture & Heritage
Structure and funding of GLAM and heritage organisations	Department of Internal Affairs
Review of the Public Lending Right Act 2008	Department of Internal Affairs
Structure and funding of education providers	Ministry of Education
Competition policy (and the review of IP exemptions under the Commerce Act 1986)	MBIE
Māori Media Sector Shift	Te Puni Kōkiri
Initiatives relating to data stewardship (eg the Digital Nation Domain Plan), data sovereignty, and digital inclusion	Statistics, Government Digital Services and Internal Affairs
Open Government Partnership National Action Plan	State Services Commission

5 What we suggest good copyright law looks like for New Zealand

25. Good policy advice begins with a clear articulation of what the policy aims to achieve. This informs problem identification, in that problems are usefully understood as failures to fulfil policy objectives or things that undermine them. Options for addressing problems are assessed, in large part, based on how well they improve on the status quo in meeting the policy objectives. That is how we intend to use objectives throughout the review – as forming a framework for providing policy advice. At the outset of the review the objectives proposed for copyright were as follows:
- 1) Provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so.
 - 2) Permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand.
 - 3) Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law.
 - 4) Meet New Zealand’s international obligations.
 - 5) Ensure that the copyright system is consistent with the Crown’s obligations under the Treaty of Waitangi (this was added to the objectives in the Issues Paper).
26. In response to the feedback on these objectives we received through consultation on the Issues Paper, we propose to revise these objectives. To read a summary of submissions on these objectives, you can visit this MBIE webpage: <https://www.mbie.govt.nz/assets/review-of-the-copyright-act-1994-issues-paper-summary-of-submissions.pdf>.

Revised objectives for use in this review

Two objectives specific to copyright policy

27. We recommend two objectives specific to copyright policy (reflecting what we suggest copyright policy should seek to achieve):
- a. Promote the supply of copyright works that serve the cultural, economic and social interests of New Zealand by:
 - i. providing incentives for the creation and dissemination of works, where copyright is the most effective mechanism to do so
 - ii. permitting reasonable access to works for use, modification, self-expression, adaptation and consumption, where exceptions to exclusive rights are likely to have a net benefit for New Zealand.
 - b. Support creators to obtain fair recognition for their creative effort, exercise a reasonable degree of control over the integrity of their work, and obtain a fair proportion of any revenue attributable to their creative effort.

More general regulatory objectives

28. As a few submissions point out, some of the objectives we proposed were more in the nature of regulatory aims or best practice criteria for assessing legislation, rather than policy goals unique to copyright. Characterising them as such and distinguishing them from the copyright-specific objectives we think is helpful for the following reasons:
- a. The copyright-specific objectives can be viewed as ‘ends’ (describing what copyright law seeks to achieve), whereas the regulatory objectives are more related to the ‘means’ (how it should seek to achieve those ends).
 - b. This reflects a difference in how we would use these objectives in the review. In evaluating the status quo, for example, we are primarily interested in how well it measures up against the objectives for copyright. Whether the law is meeting these copyright-specific objectives in ways that are expected as a matter of good regulatory practice is for us a secondary question.
 - c. Separately identifying general regulatory objectives enables us to align them with the Government Expectations for Good Regulatory Practice (**the Government Expectations**), as best applied to copyright law.
29. We continue to think copyright law should aim to fulfil the above policy objectives in ways that are effective and efficient, and responsive to Treaty of Waitangi considerations. The Government Expectations all help to define these aims. The following table sets out the ones we think best express what this means for copyright law, as well as those that correlate with the objectives proposed in the Issues Paper:

Language from earlier proposed objectives	Relevant Government Expectation	Our observations
Provides clarity and certainty	“sets out legal obligations . . . in ways that are easy to find, easy to navigate, and clear and easy to understand”	Everyone in modern society is to some extent regulated by copyright. This increases both the importance and challenge of ensuring rights and obligations are accessible, clear and predictable over time.
	“has processes that produce predictable and consistent outcomes for regulated parties across time and place”	We note the differences in how copyright law might be expected to fulfil these aims for different regulated parties. For example, the status quo may provide far more predictability (and business confidence) for incumbent rights holders than for new entrants, secondary creativity / innovation and everyday users of copyright who have fewer resources to help interpret and apply the law to their circumstances. We also note that the Government Expectations take us away from the concept of ‘certainty’, which some submitters viewed as unrealistic for copyright.
Facilitates competitive markets and minimises transaction costs	“seeks to achieve [its] objectives in a least cost way, and with the least adverse impact on market competition, property rights, and individual autonomy and responsibility”	There is considerable overlap between this expectation and the copyright-specific objectives, which limits its usefulness as a separate consideration. Namely: <ul style="list-style-type: none"> • the degree of impact on property rights • the access benefits of competitive markets for copyright works • the costs of transactions as a barrier to the copyright-specific objectives.
None corresponding	“is flexible enough to allow . . . parties to adopt efficient or innovative approaches to meeting their regulatory obligations”	We do share a degree of the scepticism expressed in some submissions about whether copyright law can live up to these regulatory ideals. The Copyright Act is already a relatively detailed, prescriptive statute and, to the extent we can make it more resilient and flexible, this is likely to involve considerable risks of disruption, uncertainty, unintended consequences and of divorcing provisions from established case law.
	“has scope to evolve in response to changing circumstances or new information on the regulatory system’s performance”	However, we view these both as important regulatory aims for the integrity of copyright law over time. On that basis, we suggest some amount of risk should be tolerated in order to fulfil them.

Language from earlier proposed objectives	Relevant Government Expectation	Our observations
Has integrity and is respected	None corresponding	This concept does not appear in the Government Expectations, presumably because it is considered a product of effective regulation. However, there are related concepts in the Government Expectations, such as treating regulated parties in ways that are “proportionate” and “fair”. We continue to see value in this concept in its own right in the review. Copyright is an unusual area of the law in that it restricts behaviour far more widely than is capable of being enforced by private parties. This raises integrity questions that are thematic in submissions and important for us to consider.
Meets New Zealand’s international obligations	“conforms to established legal and constitutional principles and supports compliance with New Zealand’s international and Treaty of Waitangi obligations”	We have characterised New Zealand’s international obligations earlier in this paper constraints on developing copyright policy in pursuit of our objectives.
Ensures the copyright system is consistent with the Crown’s obligations under the Treaty of Waitangi		We see the review as an opportunity for the Crown to address Treaty of Waitangi issues within the limits of copyright law, in coordination with the broader process the Government is initiating to respond to these issues (as raised by the Wai 262 inquiry).

6 Explaining our revised objectives for copyright

Objective expressing the access aim of copyright

Promote the supply of copyright works that serve the cultural, economic and social interests of New Zealand by:

- *providing incentives for the creation and dissemination of works, where copyright is the most effective mechanism to do so*
- *permitting reasonable access to works for use, modification, self-expression, adaptation and consumption, where exceptions to exclusive rights are likely to have a net benefit for New Zealand.*

Retaining and combining (what were) proposed objectives 1 and 2

30. Having carefully considered the points made by submitters, we intend to retain the substance of these two objectives. We believe they appropriately express the different means by which copyright should attempt to maximise the amount and value of copyright works available to society, namely:
- a. the incentives copyright protection temporarily provides creators, investors and others involved in making works available to users
 - b. the more direct access to works able to be provided by limitations on exclusive rights, including exceptions.

31. There is a fundamental trade-off between the role of exclusive rights and limitations in fulfilling this access aim (discussed in detail in the following sections). To make it apparent the two corresponding objectives proposed in the Issues Paper are in tension, but both being pursued with a common ‘utilitarian’²⁸ aim, we recommend bringing them both within a single, new objective.

The limited role of exclusive rights in fulfilling this access aim

32. We referred to the way copyright uses exclusive rights to fulfil this access aim in the Issues Paper as a paradox at the heart of copyright because it involves incentivising people to produce and make works available to others by giving them the means to restrict the use others can make of those work. Exclusive rights, by addressing one access problem²⁹, create another access problem³⁰ because legal monopolies tend to service markets inefficiently.³¹ Peter Jaszi (1991), for example, described this as a “seemingly basic contradiction of purpose” that informs copyright doctrine.

The importance of limitations on exclusive rights

33. Copyright exceptions³² can be thought of as one important circuit-breaker in this paradox, by helping to offset the consumption inefficiencies that arise from exclusive rights.³³ It is widely accepted that the public interest in access to copyright works will not be fully satisfied purely by providing time-limited exclusive rights. There are a number of situations where this arrangement with copyright owners produces unsatisfactory results in the marketplace,³⁴ including:
- a. so-called ‘deadweight losses’ to both sellers and buyers where:
 - i. potential buyers and sellers find it hard, or impossible, to identify each other (and know they ought to), make contact and complete a legal transaction (eg works of ‘unknown authorship’)

²⁸ Utilitarian justifications for copyright tend to focus on maximising the availability of copyright works through incentives, namely incentivising the creation and dissemination of copyright works that would not otherwise be created or disseminated.

²⁹ Sometimes referred to as production inefficiency.

³⁰ Sometimes referred to as consumption inefficiency.

³¹ Monopolies provided by copyright also have the potential to create the more significant access problem of excessive market power. However, this is uncommon in practice because the scope of what copyright protects as an original work is generally narrow enough to place the work in competition with close substitutes (eg popular songs with a similar melodic structure).

³² Another example of a limitation on exclusive rights is exhaustion of the right to issue copies of a copyright work (eg to on-sell a legally purchased book).

³³ We think the most exceptions can do is *offset* this, because under-consumption of copyright works is inevitable. As Watt in (2014) *Handbook on the Economics of Copyright* page 13 discusses, works will always be under-consumed in a market served by a monopoly supplier (compared with a market that is serviced more competitively). Because the market price of the work (the amount producers think they need to charge for each copy in order to recover their costs) is higher than its marginal price (the additional cost of supplying one extra copy of the work), there are always potential users who are caught in between (willing to pay more than the marginal cost of supplying the work, which often approaches \$0, but less than what the seller demands). On the other hand, in a highly competitive market (without the monopoly provided by copyright), consumption may be even lower because works are less likely to have been produced in the first place. There is still a market failure (‘deadweight loss’ or social costs from foregone uses of works) somewhere between these outcomes that exceptions go some way to address.

³⁴ Discussed for example by Gordon in (2014) *Handbook on the Economics of Copyright*, page 80.

- ii. the combination of price and transactions costs exceeds willingness to pay (eg because the user wants to perform a restricted act for a relatively insignificant purpose like format-shifting)
- b. the potential for owners to prevent, whether actively or passively, uses:
 - i. that should generally be permitted, or at least not significantly curtailed by private parties, in a free and democratic society (eg certain educational uses)
 - ii. in which there is some other public interest (eg preservation of heritage) that outweighs the benefits of protection
- c. under-supply of works for specific markets/uses (eg print-disabled users).

Human rights most supported by this objective

34. We view this access-based objective as facilitating the exercise of several of the human rights in international law that New Zealand has commitments to (or has affirmed in domestic legislation). These include:

- *The right to participate in cultural life, enjoy the arts and share in the benefits of scientific progress* – As expressed in Article 15 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**),³⁵ this right includes access to cultural works such as literature, music and “customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence”.³⁶ The right requires both “non-interference with the exercise of cultural practices and with access to cultural goods” and “facilitation and promotion of cultural life, and access to and preservation of cultural goods”. In keeping with this reference to preservation, Article 7 of the UNESCO Universal Declaration on Cultural Diversity (**UNESCO Universal Declaration**) describes the preservation of knowledge and culture for future generations as “the wellspring of creativity”.
- *The right to freedom of expression* – The United Nations Human Rights Committee³⁷ describes this right, and freedom of opinion, as “the foundation stone for every free and democratic society”. It is significant that this right is affirmed by section 14 of the *New Zealand Bill of Rights Act 1990*, which defines it as including “the freedom to seek, receive, and impart information and opinions of any kind in any form.” This means New Zealand courts are required to read provisions in the Copyright Act in a manner consistent with this right in preference to any other meaning that can reasonably be given to those provisions. Article 6 of the UNESCO Universal Declaration describes the guarantees of cultural diversity as including (among other things) “the free flow of ideas by word and image”, “equal access to art” and “the possibility of all cultures to have access to the means of expression and dissemination”.

³⁵ This right is also defined in Article 27 of the Universal Declaration of Human Rights and reinforced by Article 5 of the UNESCO Universal Declaration on Cultural Diversity.

³⁶ 2009 General Comment by the United Nations Committee on Economic, Social and Cultural Rights.

³⁷ In its 2009 General Comment on Article 19 of International Covenant on Civil and Political Rights.

- *The right to education* – This right is closely connected with the two rights above as they concern access to information. It is required by Article 26 of the Universal Declaration of Human Rights.

Who are the people involved in ‘creating and disseminating’?

35. By creators we mean those individual authors and performers (eg artists, software developers and actors) and legal persons (eg broadcasters and record companies) actually involved in the creation of copyright works. Creators are not always those who own copyright. In some cases, it is employers and people who finance or commission works who copyright needs to incentivise in order for the creativity to occur; for example, people who provide the capital necessary for a film to be produced. The incentives copyright provides these people are typically passed on to creators through agreements that secure payment for their contribution to the work.
36. Those involved in the dissemination of works (specifically works under copyright and disseminated by licence, rather than under exceptions) are entities such as publishers, distributors and those who make the legal arrangements necessary for the work to be made available with the copyright owner’s permission (eg licensing bodies). Creators are also sometimes involved in the dissemination of the works (eg where they do this directly or retain control over the rights to communicate and issue copies to the public).

What do we mean by ‘incentives’?

37. This is a deliberately broad term. We use it to refer to anything in copyright policy that makes people more likely to create or disseminate works. We intend to be open-minded and guided by evidence available to us during the review about what features of copyright policy influence (or can influence) behaviour in that direction. We also do not assume that incentives provided by copyright are necessary in all cases for people to produce creative or cultural works of which there are examples that pre-date intellectual property law.

Copyright provides a financial incentive that we want to better understand

38. One obvious incentive we are referring to is the fact that copyright provides mechanisms for creators, employers/commissioners, publishers, distributors and licensing bodies to negotiate a financial return for their intellectual labour, investment or other involvement in providing access to works that society values. These mechanisms are the exclusive rights³⁸, which are conferred on the widespread assumption that the supply of copyright works would suffer, in the long-run, without them; namely, if those involved in the creation and dissemination of copyright works were unable to recover revenue (ie the costs of their investment) by these mechanisms.³⁹
39. There is an important question here of degree, which we have commissioned independent research to better understand. New Zealand is committed to providing economic rights. But our copyright policies (eg, our liability provisions, means of enforcement provided, and technological protection measures) do influence how effective those economic rights are in enabling revenue to be recovered by those who invest money, time and effort in copyright works. To what degree is the supply of copyright works affected by the amount of revenue able to be recovered through

³⁸ Restricted acts under section 16 of the Copyright Act.

³⁹ See, for example, Hanke (2011) *Economic effects of copyright: the empirical evidence so far*, page 5

copyright? This depends on how changes (at the margins) in the financial return enjoyed by those involved in the process of creating and making available copyright works influences their decisions. How strong, for each of those decision-makers, is the financial incentive that copyright provides?

Copyright may be capable of providing other incentives

40. We are not limiting ourselves to thinking about financial incentives. Our own study of *Copyright and the Creative Sector* (2016) and other literature suggests creators are motivated by factors more intrinsic and diverse than just by their ability to derive an income from their work. Interviews in the Study suggest creators in New Zealand are also motivated by a desire to express themselves, tell stories and build their reputation. User-generated content, such as blogs, is an example of a creative activity that can involve significant effort, with no expectation of monetary return. Copyright arguably contributes to these non-monetary desires or their fulfilment and can therefore be considered capable of increasing non-monetary incentives for creators in the following ways:
- a. Copyright affords creators a degree of control over their relationship with their work, including recognition as its author, who is able to enjoy it, and what others can do with it. Investing creative effort may be less worthwhile for creators in the absence of these protections.
 - b. Copyright can increase the opportunities creators have to engage in the creative process. Revenue from their previous work tends to reduce the amount of time they have to spend pursuing other sources of income, which gives them more time they can devote to further creativity.

Why qualify this with the words “where copyright is the most efficient mechanism to do so”?

41. We remain of the view that copyright is not always the best mechanism to incentivise the creation and dissemination of works. In the Issues Paper, we described copyright as “a very basic and egalitarian tool.” Copyright is especially limited in its ability to support the creation and dissemination of local cultural works. This is largely because it cannot give works produced locally any market advantage as they compete with works of foreign origin.⁴⁰
42. Direct investment by the Crown is a more effective incentive than copyright to facilitate certain cultural activities and the development of important local content.⁴¹ Even with the intervention of copyright, market forces alone are not conducive to the level and kind of investment in these activities that is optimal for our collective wellbeing. Reasons for this are discussed in several papers, including recently in a paper prepared for Treasury and the Ministry of Culture and Heritage.⁴²
43. Copyright exceptions are another example of a mechanism that might in certain situations prove more effective than copyright protection for incentivising the

⁴⁰ ‘National treatment’ requires New Zealand to give foreign-produced works treatment that is no less favourable than the treatment given to locally-owned works.

⁴¹ State funding of Māori media is one topical example, given its importance as a vehicle for the revitalisation of te reo Māori (among other important cultural policy objectives).

⁴² *Culture, Wellbeing, and the Living Standards Framework: A Perspective* (2019), accessible here: <https://treasury.govt.nz/system/files/2019-06/dp19-02-culture-wellbeing-lsf.pdf>

dissemination of works. Exceptions may make creative industries more active in disseminating works to certain users by putting them in competition with other entities that have an interest in servicing those users, such as universities or GLAM organisations.⁴³

44. While copyright protection is in many cases a very effective and necessary incentive for creative activity, it is important to acknowledge its limits and that to encourage socially, economically and culturally beneficial creative activity may require the use of other mechanisms available to policymakers.⁴⁴ This is why we propose to retain the words ‘where copyright is the most effective mechanism to do so’.

Is permitting reasonable access to works just about copyright exceptions?

45. Some submissions queried what relationship this objective suggests between access to works facilitated by copyright exceptions and by licensing works.
46. For the purposes of this objective, by ‘permitting reasonable access’, we are referring only to exceptions and other limitations on exclusive rights. Licensing of works, on the other hand, is a kind of dissemination referred to in objective one. We think the interaction between these two objectives should help to guide decisions about in what situations access will be adequately facilitated by licensing and in what situations limitations are desirable.

What do we mean by “a net benefit for New Zealand”?

47. We propose to retain the concept of reserving exceptions for cases where we expect they will have a net benefit for New Zealand. This concept is deliberately broad, reflecting our view that exceptions to copyright should only be applied where the cultural, economic and social benefits to society of doing so are expected to outweigh the costs of doing so. One notable cost of limiting copyright protection through exceptions is that it risks eroding incentives to create and disseminate works. In this way, the net benefits test is intended to involve trading off the two original objectives.
48. Enjoyment of the human rights identified in submissions is an example of a social good that could weigh heavily in the use of the net benefits test, ie consideration of whether exceptions better facilitate enjoyment of the relevant rights than copyright protection.

Why add the words ‘modification’ and ‘self-expression’?

49. The original wording of this objective already refers to access to works for ‘adaptation’. This concept is defined in the Copyright Act and may inadequately reflect the many secondary uses of works that technology has made possible. The words ‘modification’ and ‘self-expression’ are intended to broadly recognise the scope of secondary uses that may be seen as developing a work through the investment of further skill, judgement and labour or that involve exercise of the right to freedom of expression. The value of opportunities to make creative reuse of works is thematic in commentary on many of

⁴³ GLAM organisations include galleries, libraries, archives and museums.

⁴⁴ A similar point is made by Article 11 of the UNESCO Universal Declaration on Cultural Diversity which states that “market forces alone cannot guarantee the preservation and promotion of cultural diversity”.

the human rights relevant to copyright.⁴⁵ While those opportunities may be provided by copyright owners, exceptions may increase the amount of useful creativity overall.

50. The inclusion of these words is intended, not to place more weight on the possible role of exceptions in facilitating secondary uses, but to broaden the scope of activities described and able to be weighed up against other interests.

The new objective relating to the interests of creators

Support creators to obtain fair recognition for their creative effort, exercise a reasonable degree of control over the integrity of their work, and obtain a fair proportion of any revenue attributable to their creative effort.

Our analysis would be incomplete without this new objective

51. As noted earlier, we think copyright is supposed to benefit creators principally in order to promote the interests of others in having access to their work, including other creators, and our collective wellbeing, ie externalised benefits to society as a whole. However, this raises the question, whether we should be satisfied with copyright law that benefits creators only as much as is strictly necessary to serve those interests. In other words, do we want copyright to confer only the minimum benefits for creators as are necessary to incentivise their further creativity?
52. Reflecting on this question, as well as on submissions, relevant literature, New Zealand's obligation to recognise human rights and other government priorities, we believe a purely incentives-based approach to thinking about the role of copyright for creators would be incomplete.

Difficulty justifying moral rights on a strictly incentives-based analysis

53. Moral rights provide an example of how concerning ourselves only with incentives for creators would fail to accommodate factors that should matter to copyright policy. We are required by the Berne Convention and TRIPS Agreement to provide moral rights for authors and directors. While their availability and the ability to enforce them is potentially capable of providing some added incentive for creativity,⁴⁶ moral rights are typically understood as justified more on the basis of 'natural rights'. In consequence, the only apparent reason New Zealand continues to provide these rights is because these treaties require it.⁴⁷
54. Surely a better reason for New Zealand to continue protecting the moral interests of authors is because it is the right thing to do. Few would dispute that it is reasonable for an author or director to expect, for example, that a claim by someone else to be the author of their work is an injustice that the law should support them to correct. That is not a position we need arrive at by investigating whether authors would produce fewer

⁴⁵ For example, the 2014 report of the Special Rapporteur on cultural rights discusses secondary use of existing works (eg for commentary) as within the 'moral interests' of authors. It describes the moral interests of authors in "artistic freedom and autonomy" as useful guiding principles regarding what uses of copyright works should be preventable by other rights holders.

⁴⁶ Submissions on moral rights and research from the Creative Sector Study suggest creators do value moral rights highly, and may be less inclined to invest effort in producing copyright works without them.

⁴⁷ Frankel in (2011) *Intellectual Property in New Zealand* states there is no clear policy apparent in New Zealand on the purpose of protecting moral rights (page 300).

copyright works if the law failed to protect their reputations through moral rights. We believe moral rights are more credibly justified in New Zealand as a matter of fairness or “as the mark of a just and civilised society”.⁴⁸

Little protection of creators’ material interests purely on the basis of incentives

55. By having copyright at all we protect the material interests of authors. But there is a question of degree. We have discussed how copyright is limited in its capacity to secure income for creators. However, it does set some of the rules within which revenue is recovered in proportion to demand for their work, and there is some flexibility to configure those rules more or less to the financial advantage of creators, for example, by choosing which party to give default ownership in their work. On a purely incentives-based analysis, our goal is to configure those rules so that creators can derive no more income than is necessary to incentivise further creativity.
56. This would make copyright policy indifferent to any material hardship that creators may endure without reducing their creative efforts. It would tolerate situations where users of a work make no payment to recognise the efforts of the creator, if payment makes no difference to the creator’s choices in future (eg because the author will retire after publishing a final work). It seems clear that these situations would undermine “the inherent dignity and worth of all persons” from which authors’ rights derive.⁴⁹ They may even fail to align with the attitudes of the people who benefit from them. Payment is one effective, and sometimes the only, way to communicate one’s appreciation or respect for a copyright work. Users who derive value from a copyright work may themselves have a strong interest in the person who created it getting paid.⁵⁰
57. We may therefore say that a purely incentives-based approach to copyright policy would fail to adequately protect the material interests of creators as a matter of principle. But how vulnerable are creators in practice to material hardship if copyright policy focusses exclusively on incentives? We know as a starting point that:
 - a. the actual income of most creators is comparatively low and often below what is necessary to enjoy an adequate standard of living “by work which one freely chooses” (Article 6 of the ICESCR)⁵¹
 - b. despite the poor promise of monetary return from creative careers, there seems to be no shortage of people pursuing them in New Zealand.⁵²

⁴⁸ From the submission of the New Zealand Society of Authors, accessible [here](#).

⁴⁹ 2005 General Comment of the Committee on Economic, Social and Cultural Rights.

⁵⁰ According to research conducted for Creative New Zealand, more than half of New Zealanders agree the arts should receive public funding. See *New Zealanders and the Arts* (2017).

⁵¹ According to recent research conducted for Creative New Zealand (*A Profile of Creative Professionals 2019*):

- the median annual income for creative professionals is \$15,000
- 63% of them do not think they are fairly remunerated for their work
- 55% of them supplement their income by working outside the creative sector
- within the creative sector, those working in visual arts, crafts and dance have lower incomes on average.

⁵² Of the creative professionals who feature in the Creative New Zealand statistics regarding income, only 12% are dissatisfied with their career and 82% see themselves persisting in the creative sector for at least the next 5 years.

58. One likely explanation for this willingness to accept low incomes is that creators report getting significant non-monetary return from their creativity, eg the satisfaction they experience from expressing something meaningful to them.⁵³ This is frequently observed in literature and consistent with what we learnt from interviewing creators in the Creative Sector Study. Only two per cent of writers in 2018 Horizon Research on the income of writers in New Zealand, for example, reported that they were influenced by money to first start writing.
59. What this suggests to us is that creators tend to need, or accept, relatively little financial motivation, and enjoy far less actual monetary return than many would consider fair, or sustainable, or that ensures they can continue to make creative contributions to society with dignity and without facing material hardship. While we are mindful of the limitations of copyright policy as a means to financially support creators (discussed in section 3), we have concluded that it would not be just or in the spirit of international human rights law to view copyright as concerned with their material interests only so far as is necessary to induce creativity that would not otherwise occur.

Why make this only about the interests of creators?

60. We are aware of no shortcoming in applying a purely incentives-based analysis to the dissemination of works. Publishers, distributors and licensing bodies perform functions that are essential for the health and productivity of the copyright ecosystem, but there is no public policy reason for copyright to benefit them beyond providing them with the incentives necessary for them to perform these functions. The economic interests of right holders other than the creator do not enjoy the status of human rights. Whereas the contributions of creators, and their wellbeing as a class of society, are required by international human rights law to be recognised distinctly from the interests of “subsequent right holders” who “typically exercise more influence over law-making than individual creators, and may have opposing interests”.⁵⁴ There are at least modest ways copyright law can accommodate these expectations in respect of creators beyond minimally incentivising creativity.

What do we mean by “fair recognition” and “a reasonable degree of control over the integrity of their work”?

61. The moral interests of creators in their work are largely protected in copyright law through the provision of moral rights. Moral rights reflect a tradition of viewing creative work “as an expression of its author’s personality and as a product of uniquely personal labour” and a duty to respect the author. Differences between moral and economic interests of authors are recognised by the Berne Convention requiring moral rights to be provided independently of economic rights and exercisable by the author after any transfer of economic rights to another party.⁵⁵
62. The Copyright Act currently provides two moral rights roughly corresponding to the wording of this objective: the right to be identified as the author or director (“fair

⁵³ Creative professionals are quoted in *A profile of Creative Professionals* on the fulfilment they get from their work, with one of them saying: “I love my work and feel very privileged that I can work at something I love and believe in, even if the rewards are predominantly not monetary.”

⁵⁴ Shaheed (2014) *Report of the Special Rapporteur in the field of cultural rights*, page 9.

⁵⁵ Shaheed (2014) *Report of the Special Rapporteur in the field of cultural rights*, page 7.

recognition”⁵⁶) and the right to object to derogatory treatment of work (a “reasonable degree of control over the integrity of the work”).

What do we mean by a “fair proportion of revenue attributable to the person’s creative effort”?

63. The objective is also intended to give copyright policy a role in helping human creators to benefit materially from their contributions to a work’s commercial success, irrespective of how much material benefit is necessary to incentivise further creativity by that person. While it shares the concept of ‘material interests’ of the author with human rights instruments, this objective attempts to apply the concept to what may be achieved specifically through copyright policy. The limitations of copyright policy as a mechanism for delivering monetary benefit to creators were discussed in section 3 of this paper. These limitations inform what we mean when referring to a ‘proportion’ of the revenue from the work that is ‘fair’ in the circumstances. In expressing this objective we also take care:
- a. not to assume all copyright works a creator contributes to will generate revenue
 - b. not to suggest creators have an entitlement to any share of revenue from a work beyond what can be attributed to their creative efforts at the expense of other parties who have contributed, for example a co-author or a person who made significant creative choices when commissioning the work.
64. When copyright works are profitable, this objective will require attention to the ways a reasonable share of those profits may fail to be returned to creators. An area of potential concern discussed in the 2014 Special Rapporteur Report, and in some submissions on our Issues Paper, is the imbalance of power between creators and parties that help them to commercialise their work (eg publishers). The interests of creators and these other parties can diverge at the point of negotiating contracts concerning copyright works, where creators are able to transfer all or some of their economic rights as a source of future income from the work. The weak bargaining power creators can experience in these situations is widely observed and commented on in some of the submissions we received. The human right to authorship may therefore require copyright policies aimed at protecting authors from unfair bargains.⁵⁷

Human rights most supported by this objective

65. As well as being worthwhile for the reasons discussed above, we view this new objective relating to the interests of creators as necessary to make copyright policy consistent with a few human rights provided in international law. Principal among these rights is the author’s right to the protection of their moral and material interests in their work, which is provided in Article 27 of the Universal Declaration of Human Rights and by Article 15 of the ICESCR.
66. Commentary on this right, as provided in the ICESCR, suggests care is required not to equate it with intellectual property rights.⁵⁸ However, it clearly has a close relationship with, and relies in part for its fulfilment on, copyright law. The Committee on Economic,

⁵⁶ Though, arguably the right protecting authors against false attribution is also within the concept of fair recognition.

⁵⁷ Austin (2017) *Authors’ Human Rights and Copyright Policy*, page 420, accessible on SSRN.

⁵⁸ 2005 General Comment by the Committee on Economic, Social and Cultural Rights.

Social and Cultural Rights (**the Committee**) in its 2005 General Comment described the obligation to ‘protect’ as requiring us to “take measures that prevent third parties from interfering with the moral and material interests of authors”. Helfer (2006) describes the Committee as envisaging “a zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent intellectual lives that are essential requisites for any free society.”⁵⁹ The Committee said this right “derives from the inherent dignity and worth of all persons.” This includes the right to an adequate standard of living, but is not the same as maximising the profits that can be derived from copyright.⁶⁰

67. This authors’ right is supported and developed in ways relevant to copyright policy by a few other rights and instruments in international human rights law, including:
- the right to take part in cultural life (discussed above)
 - the right to freedom of expression (discussed above)
 - Article 8 of the UNESCO Universal Declaration, which requires that particular attention be paid to due recognition of the rights of authors and artists in the face of economic and technological change
 - the right to just and favourable conditions of work, including remuneration that provides fair wages and a decent living (Article 7 of the ICESCR)
 - the right to gain one’s living by work which one freely chooses (Article 6 of the ICESCR).

7 Practical effect of using these objectives for advice on copyright policy

68. As noted earlier, we intend to use the objectives set out in this paper as a framework for developing advice on copyright policy in this review. In the short-term this means evaluating how well copyright law is currently performing against the objectives and identifying settings or features of the law that undermine them, ie problems. Using our objectives we can define problems in the following way:
- a. A **policy problem** according to our policy objectives for copyright will be something that:
 - i. inadequately promotes the supply of copyright works that serve the cultural, economic and social interests of New Zealand through an imbalance between incentives to create and disseminate works on the one hand, and permitting reasonable access to works on the other; and/or
 - ii. inadequately supports creators to obtain fair recognition for their creative effort, exercise a reasonable degree of control over their work, and obtain a fair proportion of the revenue attributable to their creative effort.
 - b. A **regulatory problem** according to our regulatory objectives will be a way that the law, in attempting to fulfil our policy objectives, is ineffective, inefficient or

⁵⁹ In *Collective Management of Copyright and Human Rights: An Uneasy Alliance*, page 97.

⁶⁰ Austin (2017) *Authors’ Human Rights and Copyright Policy*, page 415.

inconsistent with our relevant obligations under international law or the Treaty of Waitangi.

69. An example of something that is more likely to be considered a problem with the inclusion of the new objective relating to the interests of creators is the challenges they experience, and report in submissions, asserting their moral rights and obtaining legal remedies when those rights are infringed. Without that objective, we would need to be satisfied that the presence of these challenges actually reduces the creativity we can expect to occur in the cultural, economic and social interests of New Zealand in order to identify a policy problem.
70. Objectives will be used later in the review to assess options for addressing problems with the status quo. Options would be preferred to the extent that they improve on the status quo in meeting objectives, treating the objectives essentially as criteria for assessing options. This is where the possibility of weighting objectives differently arises - an idea we sought feedback on through the Issues Paper. For instance, there may be a case for weighting the policy objectives more heavily than the regulatory objectives.
71. We will return to the question of weighting when we undertake public consultation on options. Until then, our preference would be to preserve flexibility in what weight we give to each of the objectives. One reason for this preference is that many of the human rights supported by the objectives, as identified earlier in this paper, need to be carefully balanced. The 2005 General Comment of the Committee describes the cultural rights provided in Article 15 of the ICESCR as “at the same time mutually reinforcing and reciprocally limitative”.⁶¹ Flexibility may be necessary if we are to conduct the kind of human rights impact assessments recommended by the 2014 Special Rapporteur report. These assessments could be a useful and important way to help resolve conflicts between objectives: eg between the moral interests of one creator in maintaining the integrity of their work and the artistic freedom, or right to freedom of expression, of another creator wishing to modify the work.

⁶¹ The Committee also expects countries to balance these rights with others. In doing so, it suggests the private interests of authors should not be unduly favoured over the public interest in enjoying broad access to their work.

8 MBIE responses to other points made in submissions on objectives for copyright

The submissions we received on objectives proposed in the Issues Paper are summarised on our website: <https://www.mbie.govt.nz/assets/review-of-the-copyright-act-1994-issues-paper-summary-of-submissions.pdf>. As these submissions informed the preparation of MBIE's approach to policy development in the review, the preceding sections of this paper comprise our response to them. However, there are some additional points made in these submissions we have identified as worth separately responding to.

Subject/theme	View expressed in submissions	MBIE response
National identity	New Zealanders get value from being able to enjoy local stories and seeing our culture celebrated in the arts and mainstream media. These experiences foster a strong sense of national identity, which needs to be protected.	<p>We do not doubt that seeing creative New Zealanders succeed both at home and on the international stage can contribute to these positive experiences of nationhood and shared culture within New Zealand. 75 per cent of New Zealanders feel proud when our artists do well overseas, according to a Creative New Zealand survey, and over half agree the arts help us define who we are as New Zealanders.⁶²</p> <p>However, what influence our copyright settings can have on the international success of local talent is questionable. Due to national treatment,⁶³ New Zealand copyright law cannot benefit local producers (ie to incentivise the local production of copyright works) more than it benefits foreign producers who export works to New Zealand, generally at a cost to New Zealand consumers.</p> <p>Exceptions can be used to provide access to local culture, heritage, stories and other works that educate us about and reinforce our unique culture and values. However, exceptions themselves do this equally between local and imported works. Whether local works are promoted over imported works tends to come down more to the choices made by GLAM organisations (eg which works to invest in acquiring, preserving and exhibiting).</p>
National identity	Copyright law in New Zealand should actively promote the creation and success of local content.	Our law cannot promote or protect local works in preference to works of foreign origin, which they are largely in competition with.

⁶² (2017) *New Zealanders and the Arts*

⁶³ This international commitment requires New Zealand to give foreign-produced works treatment that is no less favourable than the treatment given to locally-produced works.

Subject/theme	View expressed in submissions	MBIE response
Economic benefits	A healthy copyright system benefits the New Zealand economy in ways that need to be accounted for in the review.	There is a very clear relationship between the copyright objectives set out in this paper and benefits for the New Zealand economy. Copyright gives creative people and industries a mechanism to benefit financially from what they produce while trying to reduce barriers to beneficial uses, including ones that will prove valuable to local creators, businesses and the economy. If we identify economic impacts that fall outside the objectives set out in this paper, we would still aim to factor those impacts into our advice.
Economic benefits	Alignment of copyright settings with our key trading partners is an important aim.	We note firstly that the copyright settings of our major trading partners are not greatly aligned with each other, particularly in how they provide exceptions to copyright. Alignment of our copyright settings with those of countries we do business with is generally desirable, but we view this as desirable only insofar as it improves the effectiveness of our copyright system. Where there are benefits to New Zealand in differentiating our copyright settings from those adopted by our trading partners, those benefits may outweigh the benefits of alignment.
Kinds of creativity	The objectives should better recognise the value of software development and the creative problem-solving that involves (rather than favouring more traditional forms of creativity).	We do not intend to express any preference in our objectives towards more artistic or traditional kinds of creativity over activities such as software development that give rise to ownership of copyright in a literary work (ie data compilation).
Proposed objective of permitting reasonable access to works	It is doubtful or unclear whether the approach of providing exceptions to copyright where this is 'likely to have net benefits to New Zealand' would comply with our international obligations, namely, the three-step-test.	We are confident that the spirit of this objective is not inconsistent with the three-step-test. In any case, New Zealand would be precluded from applying this objective in a way that is inconsistent with the three-step-test when developing copyright exceptions. We intend to take care to ensure in any policy advice on exceptions that we do not overstep this boundary.

