Submission Of H. Lowe on the MBIE Issues Paper, November 2018:

Review Of The Copyright Act 1994

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A. Introduction: Overarching Comments

Thank you for the opportunity to provide a response on the Issues Paper for the Review of the Copyright Act 1994.

Having read the discussion document in full, I consider the following matters of sufficient concern that they need to be addressed upfront. In particular, I am concerned that the Issues Paper does not clearly express:

1. Recognition of the value of creativity and creative works to NZ society, particularly as an expression of our unique identity and culture, one that may be intergenerational as well as generational, rather than treating them narrowly as commodities only. The exception to this is Part 8, Section 2 on Wai 262, Taonga Maori and Matauranga Maori.

2. Recognition of and respect for the essential part creators play in producing New Zealand's cultural artefacts, media, and taonga, which collectively express, reflect, and illuminate our culture and identity, shaping our society's cultural life. And, as an extension of recognition and respect, sustaining the continuance of creative endeavour and expression, including by ensuring the law protects creators' rights to their work and to seek and receive fair reward for their work

3. Understanding of the historical importance of copyright in enabling a broader cultural expression within society, including greater egalitarianism and freedom of expression. Historically, only those with independent means and leisure were in a position to pursue

the non-performing arts, unless the artist could obtain patronage. Effectively, this meant that art and literature was the privilege of certain strata of society and catered to the values of those sectors, i.e. those who "patronise" also have greater influence over the form of the art they commission or support. Because copyright increased the ability of artists to earn a living from their work, it contributed to widening the range of those who could participate in art and therefore the diversity of social voices and ideas, increasing freedom of expression. I believe it is important that the review of NZ's copyright law not lose sight of this important societal benefit from strengthening and protecting copyright, particularly in the face of widespread technological change, which if left to run unchecked, threatens to return the arts to the domain of those with independent means and leisure, or who can secure "patronage." I believe the recent Writers' Earning Report, commissioned by Copyright Licensing New Zealand and the NZ Society of Authors, illustrates this trend.

4. In this respect, I could not find where the Issues paper explored the benefits and costs of strengthening copyright and its protection, similar to the legislation recently passed by the European Union. I believe this should form part of the consideration of Issues, in a clear and transparent way.

5. Explicit recognition of the imbalance of power between creators and the institutions that seek to benefit from creative work, particularly those that seek to limit their obligations to compensate artists, or to prevent others from circumventing creators' rights. This imbalance is inherent in the fact that artists are usually individuals or small collectives; in the great majority of cases, their incomes are low and their resources limited. It is not possible for most artists to participate as equals in a process where the other parties are institutions, most with large numbers of paid employees available to participate in processes such as legislative reviews, and with budgets that enable them to obtain external specialist and legal advice where necessary. I believe this is true of most if not all the government organisations, including education and research institutes and libraries, and also private firms such as ISPs, that are mentioned in the context of the Issues paper. It is certainly not true of most artists and this imbalance needs to be recognized and active endeavours made, within law and the institutions of government, to provide greater support for creators, particularly in the protection of rights over their own creative works.

6. With respect, I believe that the Issues paper and process does not facilitate input from creators. Its length, and the technocratic and legalistic language in which it is framed, seemed directed to those institutions, discussed immediately above, that can marshal paid employees and specialist advisors to respond in the language and format of the Issues document. While I do not believe I am a stupid person, the Issues framework and language is not one within which I feel able to readily convey my concerns about copyright and being a creator in the context of the sorts of issues being raised. I do not consider that the Issues paper and process constitutes a level playing field for creators in terms of ability to participate or the likelihood of being fairly heard. Nonetheless, I believe that creators are one of, if not *the* most significant and directly affected stakeholder group, given that our work and output is the engine room for the education, research, knowledge and content dissemination endeavours referenced in the issues document. For the reasons set above, we are also one of the most disadvantaged in terms of how ability to participate. So reaching out to us, facilitating our input, and understanding our concerns, *should* have been central to the process to date.

7. I would very much appreciate, therefore, if active consideration could be given to running a process that actively reaches out to creators in a user-friendly, inclusive, and enabling way before the issues gathering is considered complete. And for a similar approach to inform the subsequent steps of the process.

B. The Issues Paper: Specific Sections

8. I note that my comments on the following sections are informed by literature, which is the area of my own creative work as a writer. This work includes novels, short fiction, poetry, essays, and weblog content that is specific to my other writing work or arises directly from it.

Clauses 51 – 54: Why Do We Give People Copyright?

9. With respect to Clauses 52 and 53, in particular, I believe there is a tension between the two reasons for copyright articulated. The incentivisation recognized under Clause 52 is important, and the review needs to recognize the extent to which it is increasingly being eroded. But I believe it is important to recognise the artist's right to not only fairly benefit from, but also to control the dissemination of their work. As noted, creative work is

expensive—in the case of literature, particularly in terms of opportunity cost—and time-consuming. It is also the hardest work I have ever undertaken in terms of intellectual and emotional commitment and sheer hard slog. My creative work is also far more closely tied to my personal identity and sense of self than prior careers. It is *my* work and *my* voice. For these reasons, I believe it is important that my right to say when and how my work is used, both as recognition of the effort and sacrifice to bring it to the world, and to protect the integrity of my creative vision, should be protected by society and law. The "exceptions" to that premise should be truly *exceptional*, and not automatically or readily outweighed by the desire or entitlement others may feel to use or reuse it to enhance or promote their own work.

10. I believe, therefore, that any review of New Zealand's copyright law should keep these considerations front and centre, so that they from the heart of the new legislation, regardless of whether they may be considered "utilitarian", "economic", "natural", or "moral" in their origin.

Clause 60, Copyright Does Not Guarantee An Income

11. While copyright cannot guarantee an income, what it should do is guarantee the creator's right to seek and receive an income for their work, from those within society who desire to enjoy or benefit from its creation, and to ensure that erosion of that right is not facilitated by the provisions of the legislation. Similarly, as regards:

Clause 78: Some People [Creators] Are Proactively Sharing Their Copyright Worksfor Re-Use

12. Some creators have always done this. The important point, to me, as regards my work, is that it should be my choice and my decision, and that the law should not remove or erode my right to manage my own work, i.e. generosity and gifting should be a choice. And if there is no choice it is not a gift but expropriation without recompense and/or appropriate recognition.

Clauses 97-98: The Marrakesh Treaty

13. It is my understanding that the Marrakesh Treaty not only provides that a far wider provision be made for free dissemination of print works to those with a print disability,

but also allows for compensation for loss of income to be made to print creators. Yet it is also my understanding that the legislative changes proposed in New Zealand only give effect to the former provision and not the latter. Given what I understand is the substantially increased scope of Marrakesh, this actively mitigates against both incentivisation for creators of print works while expropriating their right to be fairly rewarded for their work. I am concerned that the Issues paper is pointing toward similar, further expropriation of creators rights over their own work, without compensation. I note that elsewhere in the NZ economy, a requirement that citizens work or provide services without recompense is regarded as exploitation and treated accordingly under the law.

Clauses 101 – 102: What Does Copyright Seek To Achieve? Objectives

14. For the reasons set out above, in particular Section A and B 9 – 11, I do not consider that the legislation should reflect an equal balance between Creation, Ability To Use (et al) and Access. In my view, the presumption of the legislation should be in favour of Creation, for the simple reason that without creation, there would be nothing to Use (et al) or Access. So because Creation supports the rest of the ecosystem set out in Figure 2: Model of Outcomes, protecting, enhancing, and enabling it should be the primary purpose of the legislation, with the Use (et al) and Access objectives and outcomes secondary to it.

Clauses 102 -106: Objectives – Questions 1 and 2

Questions 1 and 2:

15. I do not agree that the Objectives as proposed are the correct ones, for the reasons discussed in full in Section A and B above. I consider that:

    i. The objectives should reflect a presumption in favour of Creation and the primary objective should reflect that pre-eminence, as per my paragraph 14 immediately above:

    "In my view, the presumption of the legislation should be in favour of Creation, for the simple reason that without creation, there would be nothing to Use (et al) or Access. So because Creation supports the rest of the ecosystem set out in Figure 2, Model of Outcomes, protecting, enhancing, and enabling it should be the primary purpose of the legislation, with the Use (et al) and Access objectives and outcomes secondary to it."

ii. The objectives should also reflect the value of Creation to NZ culture, identity, and heritage, consistent with my Section A; and the importance of protecting the creator's right to seek and receive an income for their work, and to maintain the creative integrity of their work.

16. With respect to resilience to technological change, while it is not possible to anticipate every permutation of change, legislation with a clear statement of purpose, principles, and objectives will be well placed to adapt to it without overhauling the entire statue. Clarity of purpose, principle, and objectives, which add up to *intention*, will also aid certainty.

Questions 3 and 4

17. If sub-objectives are considered necessary then they must not contradict or be inconsistent with the main objectives, and must be clearly stated to be subordinate to the main objectives. However, sub-objectives may assist where there are clear differences between creative sectors, e.g. literature and performing arts, or the arts and the Industrial sections of the Act.

18. As set out under paragraph 15, I believe the protection and enhancement of Creation must be the primary objective of any future legislation, with its provisions strengthened to achieve that purpose.

Clauses 112- 118: Protected Works – Question 5; Clauses 119 – 123: Originality – Question 6

19. I believe literature should continue to be a category covered by the act and that the definition of literature should cover literary content in a broad form, i.e. what is traditionally known as "Letters", but also more contemporary formats such as blog posts. Although "personal", my blog is also primarily literary in purpose and contains material that overlaps "essays" and also "lecture"-style material in the areas of my literary endeavour, as well as interviews, chiefly with fellow authors. Having had work from my blog reproduced wholesale without any discussion, seeking permission, or recognition, and because such work does bear on my "voice" and literary identity, I believe my ability to be recognised for it and to determine how it will be reused is important. And if others wish to reuse it to support their economic endeavours then I believe the principle of fair recompense for the original creator, or creators, should be sustained.

20. I believe these considerations are relevant when addressing Question 6 and the scope of *"skill, judgment and labour."* While this may be taken as read for novels, short fiction, poetry, essays, and epistolary literature, newer forms such as blog posts also require *"skill, judgment and labour"* and their copyright protection should not be diminished.

Clauses 126 – 131: Data – Question 7

21. In terms of responding to Question 7, I make the following observations:

    i. *"129. ... Questions have been raised about the extent to which the protection of compilations/databases may be locking up and preventing access to the underlying data itself."* If the underlying data exists outside of the compilation, and the work of *"skill, judgment and labour"* has been to draw it together into a 'sum' that is greater than its individual parts, then surely the individual parts continue to exist outside of the compilation and can be accessed accordingly? However, if the individual data has been created as part of constructing the greater whole, i.e. the compilation (e.g. similar to a jigsaw puzzle and its constituent pieces), then that data would seem to be legitimately part of the whole and the copyright would correspondingly apply.

    ii. *"130…This may have the effect of limiting access to the information in the directory."* With respect, I have never had any trouble accessing the information contained in a telephone directory. However, I have never wished to do so in order to use information the directory provider has collated for one purpose (presumably at cost to themselves/their organisation, in terms of data collection and ongoing maintenance costs) for an alternative commercial purpose, which will presumably accrue private commercial benefit/gain to the secondary data user. I also note, however, that where data has been collected using public money and for public benefit, as would have been the case with the original phone directory before Telecom was privatised, then different expectations around accessibility might apply.

    iii. *"131. Data is becoming more important for identifying, and acting on, commercial opportunities."* I think data has always been important in this regard, just compiled in a different format. Questions of how it should be managed and disseminated, and its subsequent use and re-use recompensed, still relates to my

observation under 21 ii immediately above, with respect to the origin, funding, and collection of the data and the expectations around that.

Clauses 134 – 148: Ownership of Copyright – Question 8

22. With respect to literature, copyright currently grants me ownership of my work and I believe this should continue. I also believe it should be broadened and strengthened in some areas, consistent with my whole submission.

Clauses 149 – 142: Artificial Intelligence and Copyright – Question 9

23. I will make observations around some of the assumptions inherent in the Issues discussion around artificial intelligence, where these arise in subsequent sections.

Clauses 153 – 155: Artists' Resale Rights – Question 10

24. I believe there is merit in further consideration of artists' resale rights, consistent with initiatives in other jurisdictions.

Clauses 156 – 158: Reversion of Rights – Question 11

25. I believe there is merit in strengthening the legal framework around fair process and timeliness for reversion of rights, to facilitate the ability of a creator or creator's estate to continue to make the work available. Although this is covered in most publishing contracts, ebooks can make it harder to determine when a work is "in print" or "available in the market" in a real and meaningful way. That is, the rights holder may not be actively promoting or distributing the book but "technically" it is not out of print and may be difficult for those interested to acquire. The grey area in term of the question raised is between "not available" and "currently readily available", which is why greater clarity and certainty could be beneficial. However, it's also important to recognise a current rights holder's prior commitment to the work, which may have contributed a great deal to its acquiring cultural and/or heritage significance. That is why I believe consideration of the length of time that has elapsed since active commitment, and the availability of current editions, are important considerations.

Clauses 174 – 175: Copyright Term for Certain Unpublished Works – Question 14

26. Bequeathal of a work of the kind described is a gift of trust to the institution concerned. Under such circumstances, I believe that the creator will probably have chosen not to publish for good reason around the integrity of their body of published work, but understands the benefit for research and culture of understanding the evolution of the creator's "art" and "voice." I believe it is important for social and cultural integrity that the trust inherent in such gifts, and the wish of the bestower, is honoured. That consideration alone should be sufficient to retain the current provisions. However, I also note that allowing the trust to be breached also increases the likelihood that fewer such gifts will be made in future and more such unpublished works destroyed.

Section 2, Exclusive Rights and Infringement: Questions 15, 16, and 17

27. For the reasons set out in Section A and B I support the overall thrust of the current copyright provisions and exclusive rights as a means of creating an environment in which creativity, particularly independent creativity, can occur. As noted above, in paragraphs 3, 4, 15-18 and 22 (without being exclusive), I believe this review must look to strengthening copyright and its protections, particularly in the digital arena, similar to the similar legislation passed by the European Union only last week.

28. With respect to the specific issue of Authorisation and Linking to Infringing Content (Clauses 186 – 191), I concur with the view of the Federal Court of Australia *"that providing links to infringing material can constitute 'authorisation'."* I believe the onus should be on those providing the hosting service, and obtaining financial benefit from it, to ensure that they are not giving aid and comfort to those deliberately breaking the law. And not only breaking the law, but deliberately disadvantaging creators. ISPs may not actively "contrive", but turning a blind eye and absolving oneself of responsibility, may be construed as indifference at best, enablement at worst. I also believe that in the age of giant technological advance, of algorithms and bots, the tech. sector should be capable of coming up with a technological solution that identifies when links on sites they are hosting are promoting creative theft. A comparable example would be the way search engines have been developed to identify links to, and screen out, pornography, particularly in programmes used by children.

Clauses 192 – 194 Exhaustion of Rights and Parallel Importing

29. Although no question has been asked on this, I note that the discussion only addresses the impact of the policy on the NZ economy. While taking no firm standpoint, I also note that it is increasingly difficult for NZ authors to get their work, particularly works of adult fiction, published in this country. One of the reasons advanced for this is that it's simply not economic to do so. In terms of my opening observations in Section A, particularly paragraph 1, and the invaluable contribution of creation and creativity to NZ's cultural heritage and identity, I question whether parallel importing may not be having a cultural impact and what value our society wishes to place on that. I believe it would be valuable to undertake a similar study into that question, comparable to those focused on economics alone.

Clauses 195 – 199: Communication To The Public – Question 18

30. Please refer to my responses under paragraphs 16-20, which I believe are pertinent to this question.

Clauses 200- 207: Communication Works – Question 19

31. The only transmission medium with which I am familiar re this category is podcasts, which I have used to do interviews and which other authors use for readings. In such cases my concern is with the content rather than the medium for delivering the content. I believe it is important to continue to protect the content, but on current understanding I incline to the view that the law should be neutral in terms of the medium of delivery.

Clauses 208 – 212: Use Of The Term 'Object' In The Copyright Act – Question 20

32. I support the legislation being clear that *"reproducing, recordings and storing a work in any material form 'including any digital format' ...[is]... an act of copying."* As per paragraph 31, I believe the law should probably be neutral in terms of the medium of delivery.

Clauses 219 – 220: User-Generated Content – Question 22

33. With respect to fan-fiction, I believe the key is that it does not use *"skill, judgment, and labour"* to create new and/or independent/distinctive characters, worlds, or storylines. I

believe it is important to differentiate between fan-fiction and the more traditional idea of fiction in this respect. (Quite aside from the fact that a great deal of fan-fiction is focused on "shipping" established characters, as well as the proliferation of "slash.")

34. In terms of blogs, a blog devoted to fan-fiction, for example, should continue to be excluded from a copyright regime. However, a blog where the blog owner generates original content such as research into a particular genre or art form, criticism and review, analysis of popular culture, and essays on trends, mores, and tropes, should enjoy the protection of copyright in terms of self-determination and choice over how their content is used or re-used.

Clauses 221 – 223: Renunciation of Copyright – Question 23

35. The important element is that "to renounce or not renounce" should be the creator's choice, not one imposed on them by third parties. So long as the right to creative self-determination and choice is embedded in the legislation then it should encompass formal renunciation, regardless of whether the creator originally intends to gift distribution or decides to do so later in the life of the work.

Clause 226 - 235: Moral Rights – Question 25

36. I believe the notion of moral rights is an important one, arising directly from the matters discussed in Section A, paragraphs 1 and 2, and Section B, paragraphs 9 and 15ii in particular (without being exclusive.) As stated in paragraph 9, *"My creative work is also far more closely tied to my personal identity and sense of self than prior careers. It is my work and my voice."* As a result, the integrity of the work, and my personal reputation in relation to the work, are both matters of importance, which could potentially flow through into whatever place the work may assume in New Zealand's cultural life. The right of attribution and the right to object to derogatory treatment both seem relevant in that context.

37. For example, when a Taiwanese publisher acquired the rights to US author Kristen Cashore's *Bitterblue* and was preparing to release it into the Chinese market, they contacted me to ask if they could reproduce a blog interview with the author as part of their promotional material. I was—and am—proud of that interview and pleased to be able to assist a fellow author in this way. I also very much appreciated being consulted

about how the material was to be presented and how my work, as the interviewer, was to be attributed. I believe the interview comprised *"skill, judgment, and labour"* to create and believe such contribution to the world of letters should be fairly recognised and respected, both in terms of attribution but also staying true to the "sense" of the original interview.

38. I believe, therefore, that it is important for the legislation to continue to recognise and provide for moral rights. With respect to the question raised about parody, I believe the "nub" of potential conflict between moral rights and the freedom to undertake satire and parody lies in the notion of the integrity of the work. That is, there should be some relationship between the parody and/or satire and the actual substance of the work being mocked, as opposed to false attribution of elements that do not appear in the work.

Clauses 236 – 243: Performer's Rights – Questions 26 - 27

39. The chief effect I can see in terms of literary creators relates to (Clause 238) *"...performers have the right not to have their performance recorded or communicated live to the public without their consent."* (While standing to be corrected) I believe this applies in circumstances where authors are asked to deliver workshops and to give masterclasses. In most cases, a fee is negotiated for the appearance that is appropriate to delivery of the content and some recognition of the preparation time. Preparation for such events is not inconsiderable and constitutes the author's intellectual property in terms of the subject matter, e.g. character development, worldbuilding, or establishing point-of-view (et al.) Videoing or recording of the event allows the masterclass or workshop to be delivered innumerable times for the cost of one appearance fee, unless the creator has the right to negotiate a more appropriate fee for the recording being included. Bearing in mind that authors and other creators called upon to deliver such sessions are not already being paid a salary, as would be the case for researchers, academics, and other teachers.

40. Given that current NZ law gives creators choice over the full range of recordings of performance and the CPTPP is limited to voice, restricting NZ legislation to this right alone would be a retrograde step, since most performances, whether entertainment or masterclasses (et al) are videoed. One consequence of this could be that creators such as myself might choose not to give workshops or masterclasses where we have no choice

over being videoed/recorded, or would only do so for significantly higher fees. I believe the NZ creative and cultural sector would be the poorer if this was the outcome.

C. Exceptions And Limitations

Clauses 257 – 269: Part 5, Exceptions and Limitations – Framework and Introduction

41. In terms of overarching observations, I believe that the values and principles set out in my Section A, and my observations in Section B around the purpose of copyright and the objectives for the legislation, should also inform the discussion on Exceptions and Limitations throughout.

42. I also note the submission of The NZ Society of Authors (NZSA) submission which, *"does not support any extension to the current exceptions regime"* and seeks *"no extension to our current Fair Dealing exemptions."*

43. I support the overall position of the NZSA, of which I am a member. With regard to NZSA's submission on Fair Use in the USA, I have been a member of the American Authors Guild since 2008 and as such have witnessed a great deal of the discussion and effects around the issues NZSA raises in its submission. My observation bears out the conclusions in the NZSA submission, chiefly that the "fair use" changes there disadvantage and impoverish creators, while benefitting those who seek to obtain the benefit of creators' *"skill, judgment, and labour."* Obtain without recompense, that is, in order to advance their own endeavours and aspirations, many of which will have either a directly commercial reward, in terms of attracting users or subscribers, or an indirect one in terms of career or institutional advancement.

44. This observation is also pertinent to a great deal of the discussion of extension of rights, where the arguments of new technology and flexibility are essentially being used to whittle away at creators' rights and their right to fair compensation for their work. These principles, I believe, should remain constant, regardless of shifts in media and technology rather than used as a stalking horse to try and obtain far more for considerably less, and/or (better still for those that can pull it off) everything for nothing. Yet the organisations and institutions advancing these arguments are those described in my paragraphs 5, i.e. that are either funded by government or are private commercial entities, with considerable resources in terms of salaried workforces and the resources to pursue their ends.

45. I particularly note the following specific points as these seem to recur consistently in the Exceptions discussion:

i. That respecting copyright generates "limitation", "cost" (by inference "unreasonable") and "delay." Yet all aspects of life incur limitations to some degree; sometimes we even choose to limit ourselves in the interests of doing right by others. Cost is inherent to every aspect of doing business, and I have yet to meet a technology project, for example, that is not characterised by (often considerable) delay. So to seek to limit fair recompense to creators for these reasons, strikes me as questionable at best. I also note that similar arguments have often been advanced by those wishing to abrogate the rights of the owners of traditionally owned (multiple title holders) Maori land, when proposing to use or develop the land for public or commercial benefit—and are no more valid.

ii. Overall the arguments appear to hinge on convenience: i.e. that it is not *convenient* for institutions to respect and recompense creators when seeking to use, re-use, and provide access to their work. However, it's not an argument that holds water in society at large and I don't believe it should in discussion of copyright and creative content either.

iii. Another theme appears to be that copyright is somehow inhibiting institutions from transitioning into the digital age and also restricting access to creative content. Yet it is difficult to see that the principles of recognition and recompense are any different in terms of digital technology than any other medium. I think the problem, a very real one for creators, is that the new media provide greater opportunity to dispense with recognition and recompense, and the institutions would like to take advantage of that, to maximise their own objectives and minimise their costs. Ignoring creators rights, because it is *inconvenient* to do otherwise, and disregarding the considerations set out in my Sections A and B, do not accord with living in a fair and just society in which individuals and groups have rights over their labour and what they produce. It also provides considerable disincentive to continue to create at all, except as a hobby should sufficient leisure allow. Ultimately, this could adversely affect the sectors that research, teach, and curate that content.

D. Exceptions And Limitations – Limited Specific Comment

Clauses 272 – 276: Exceptions for criticism, review, news reporting and research or study – Questions 30 & 31

46. I believe the intention of "fair use" in this context should be to illustrate or illuminate the reviewer's (etc) content, and therefore be a minor part of the whole, rather than a user being able to deploy the subject work as a substitute for their own. It would be helpful for the legislation to be clear on this point.

Clauses 292 – 295: Cloud Computing – Questions 36- 37

47. I am puzzled by the discussion under this section as my understanding of the cloud is that it's something an individual or organisation signs up for in terms of their content and the material is supposed to be stored securely. (Although there are plenty of instances now to suggest that clouds are not particularly secure.)

48. In this case, if I choose to store my works-in-progress or finished works in a cloud, they "should" be secure with no implications for my copyright. If the material is copied in breach of my contract with the cloud company, either by the operator or by a security breach, then my copyrights may also be breached. So it's not currently clear where an "exception" would be needed.

Section 296 – 306: Non-expressive use of copyright works (data mining and the creation of artificial intelligence) – Question 38

49. In this area, I am most familiar with work around the creation of artificial intelligence, particularly the use of creative work to help develop that intelligence. Obviously there are huge financial rewards for such work, either from research funding for (initially) non-commercial work or direct commercial reward in the case of commercial development. If the work of creators is vital to this work, then I believe it is appropriate that it be recognised and that creators get to share in the financial benefits. And although (Clause 298) *"Once the programmes have absorbed the lessons from the input they discard the copy from the computer's short term memory"*, the point is that the development has benefitted—I understand considerably—from the input of the creators' *"skill, judgment, and labour"*.

50. If the rewards for having one's work used in this way were there, then I suspect creators would come forward willingly to participate, rather than being a source of "limitation", "cost", (by implication "unreasonable") and "delay". Even if this were not the case, I am not convinced that limitation, cost, and delay are sufficient cause for abrogating creators' rights, and note my comments in paragraph 45 i with respect to this argument.

51. For these reasons, I believe that any works used should be "lawfully acquired" and the creators compensated, in all circumstances, and that this should not be achieved simply by having the law provide an exception. As noted elsewhere, the whole point of exceptions is that they must be "exceptional", not to facilitate normal technological development processes for one group of researchers and creators at the expense of another, for reasons of expediency.

Clauses 307 – 320: Freedom Of Speech – Question 39

52. I have also addressed parody and satire under paragraph 38 in terms of the moral rights aspect.

53. Key questions include whether copyright is preventing parody and satire currently in New Zealand? Also, to what extent can the parodic effect can be achieved through more illustrative and illuminative use, i.e. quality of material as opposed to quantity – which brings me back to the first question, regarding whether there is a problem in NZ currently that needs to be solved.

Clauses 321-322: Quotations – Question 40

54. Once again, I believe this is a question of degree. I believe it is appropriate to allow quotations where these are subsidiary to the main text and their purpose is to illustrate or illuminate a point being made in that text. However, I have seen examples where almost the entirety of the original article is "quoted", at which point I believe it is being expropriated and used in lieu of the user's own content, which I do not believe most reasonable people would consider "quotation" at all.

Clauses 334 – 338: Collecting and publishing content 'born digital' – Questions 45

55. I have had personal experience of my blog being expropriated *in toto* by another literary organisation. The expropriation meant that potential readers and followers would read my

content under their platform, undermining my ability to build and maintain a distinctive platform that articulates my "voice." Or "brand" to use a more commercial term. I don't believe the fact the content is "born digital" is any reason to dispense with the principles of recognition and recompense, not to mention respect and the simple good manners of *asking*. However well-meaning the expropriation may be, i.e. in the case of the National Library, it is disrespectful at best and at worst hurts me as a creator.

Clauses 414-429: Section 6 ISP Liability – Questions 59-62

56. I believe that the review of copyright legislation should seek to strengthen and enhance creators' rights, including or even particularly in the technological sphere in line with the legislation recently passed in the European Union. I believe ISPs and all other like platforms should be held accountable for ensuring the law is upheld. My comments under paragraphs 27 and 28 also apply.

57. I support the submission of the NZSA with respect to no further extension of "safe harbours" provisions and question to what extent they should apply at all.

Section 7, Enforcement: Clauses 473 – 516; Questions 76 - 88

58. I believe that the review of copyright legislation should seek to strengthen and enhance creators' rights, including or even particularly in the technological sphere in line with the legislation recently passed in the European Union. I believe ISPs and all other like platforms should be held accountable for ensuring the law is upheld. My comments under paragraphs 27 and 28 also apply.

59. Recognizing the imbalance of power and resources between creators and institutions, I believe the law should make it easy and low cost for creators to take action to enforce their rights over their creative works. The District or High Court is unaffordable for most creators and a "Small Claims Tribunal" approach is preferred, with the presumption that costs will not be awarded against parties. The Copyright Tribunal may already provide this mechanism but perhaps its role could be extended, and also made more accessible if required.

60. The ability for CMOs to take action to enforce claims, particularly in a 'class action' way, should also be considered. NZ creators undoubtedly need a champion or champions to better defend their rights.

61. The legal aid provisions could potentially be extended to assist creators to enforce copyright if there is no institutional champion charged with doing this.

62. I am wary of the "groundless threats" provision, i.e. it could simply be used by institutions and corporates to browbeat and bully creators into not taking action in support of their rights. I believe our legal system already contains provisions to deal with vexatious actions.

63. I am not sure why there should be three goes at an infringment notice and would have thought one should be enough. $25 seems a high fee per takedown especially as ISPs will use automated processes. Again, these seem designed to disincentivise action rather than support it.

64. I believe the ISPs discharging their responsibilities in terms of preventing online infringement should be a cost of their doing business, consistent with any other business compliance matter.

65. The penalties for copyright infringement should be sufficient to send a clear message that it matters and should apply to corporations, platform providers, and institutions as well as individuals.

Signed: H Lowe

5 April 2019