Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

Name	Sarah Powell (Acting Chair, LIANZA Standing Committee on Copyright)
Organisation	Library and Information Association of New Zealand Aotearoa (LIANZA)

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Responses to Issues Paper questions

Objectives

1	**Are the above objectives the right ones for New Zealand's copyright regime? How well do you think the copyright system is achieving these objectives?**
	LIANZA supports most of the proposed objectives as useful in helping New Zealand to update its copyright legislative regime. However, as noted in our response to question 2, we feel that the objectives fail to adequately address the human rights aspect of copyright. This is captured in articles 19, 26 and 27 of the *Universal Declaration of Human Rights*.[i] LIANZA supports objective 1 and the recognition it makes that copyright will not always be the most efficient mechanism to provide incentives for the creation and dissemination of works. LIANZA supports the aim of reasonable access to works in objective 2 but is concerned that the term "net benefits" seems to imply a focus exclusively on economic benefits. We do not feel it is right that reasonable access to works should be based solely on a test of economic benefit. We recommend that this objective be reworded to include the social and cultural benefits of access. LIANZA also questions the use of the term "consumption" and suggests the term "enjoyment" as consumption can be interpreted to mean "as the end of something". Creative works do not have an end when reused, rather they are built upon and adapted to create a new work.

	LIANZA supports the aims in objective 3 of having a copyright system that is effective and efficient. We question how realistic aiming for "certainty" is in the face of ongoing technological and business change and think it would be worth considering how the objectives could incorporate a goal of adaptability. LIANZA does not think that meeting New Zealand's international obligations should be included as an objective as it is a requirement not a goal. Including an objective to honour our commitments under the Treaty of Waitangi is supported by LIANZA, and we encourage MBIE to facilitate the consultation and engagement with Māori signalled in the Issues Paper. How well the current copyright system is achieving these objectives varies by objective. For example, anecdotal evidence from libraries about the number of in-copyright works no longer commercially available suggests that the length of copyright term is not supporting the efficient dissemination of works.
2	**Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?**
	Paragraph 2 of Article 27 of the *Declaration* talks about the protection of the "material interests" of authors, and we feel that these are well represented in in the proposed objectives. Articles 19, 26 and 27 talk about the right to receive and impart information, the right to education, and the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. We do not feel that these are represented in the proposed objectives. LIANZA recommends that objective 2 either be reworked or a new objective added that reflects the value to society of public-good institutions such as libraries being able to support the dissemination of works for access and reuse. LIANZA favours a copyright framework that is technology neutral but does not feel that this needs to be specifically included in the objectives. As noted in our response to question 1, we do recommend that consideration be given to thinking how the objectives could incorporate adaptability and resilience.
3	**Should sub-objectives or different objectives for any parts of the Act be considered (eg for moral rights or performers' rights)? Please be specific in your answer.**
	LIANZA does not think it necessary to create sub-objectives or different objectives for other parts of the Act. We think the objectives will work best when considered together.
4	**What weighting (if any) should be given to each objective?**
	LIANZA's view is that the revised objectives should be given equal weighting as this will support the necessary balancing of interests.

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

5	**What are the problems (or advantages) with the way the Copyright Act categorises works?**
	The boundaries between categories of works are becoming increasingly blurred as the Internet and other forms of digital media become the primary delivery mechanism for many works, and digital technologies allow the easy conversion from one type of work to another. For example, the current definition of "sound recording" includes "a recording of the whole or any part of a literary, dramatic, or musical work, from which sounds reproducing the work or part may be produced". It is unclear whether this would apply to any digital text which text-to-speech software could read aloud.
6	**Is it clear what 'skill, effort and judgement' means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?**
	It is unclear what "skill, effort and judgement" mean as a test to determine whether a work is protected by copyright. In creating digital copies of works in their collections library staff often need to apply specialist skills and professional judgement. This can apply both when creating a copy which is as close as possible to the original, and when 'remastering', which involves interpretation of the original. GLAM institutions have differing practices when dealing with these works; some institutions assert copyright over digital surrogates of out-of-copyright works. Libraries collect, preserve and provide access to information. As the professional organisation for libraries, LIANZA feels that copyright once expired should not be revived and that exact copies of out of copyright works should equally not qualify for copyright assertion. The recent EU directive on copyright acknowledges this principle for visual art works, stating "*the circulation of faithful reproductions of works in the public domain contributes to the access to and promotion of culture, and the access to cultural heritage. In the digital environment, the protection of such reproductions through copyright or related rights is inconsistent with the expiry of the copyright protection of works*."[ii] However, The EU directive does not take into account considerations about digitising and making available out-of-copyright indigenous material, and LIANZA notes that this would need to be included in the proposed work stream on taonga works discussed in Section 2 of Part 8 of the Issues Paper. LIANZA recommends that clarification be provided about whether, and if so in what circumstances, new copyright is created in digital surrogates of out-of-copyright works. Libraries and other cultural institutions are also faced with the difficulty of the low originality threshold when reproducing some collection objects that may be in copyright. This applies to most ephemeral material (e.g. log books, phone books, minute books) within library collections. In this regard copyright protection applies too widely.
7	**Are there any problems with (or benefits arising from) the treatment of data and compilations in the Copyright Act? What changes (if any) should be considered?**
	No response
8	**What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?**

	No response
9	**What problems (or benefits) are there with the current rules related to computer-generated works, particularly in light of the development and application of new technologies like artificial intelligence to general works? What changes, if any, should be considered?**
	The production of creative works by artificial intelligence is raising a number of complex legal and moral questions, and LIANZA offers only the following general observations. We appreciate that the Act provides clarity for computer-generated works under section 5, giving copyright to "the person by whom the arrangements necessary for the creation of the work are undertaken". We note the room for uncertainty as to whether this person will be the creator of the program or the user of the program. We note the potential for copyright infringement where the production of works by artificial intelligence (AI) requires the input and processing of large numbers of existing works. Works created after AI has analysed large numbers of existing works can raise the question of whether the work will satisfy the originality requirements for copyright. LIANZA notes that AI will increasingly be used for both the commercial and non-commercial purposes and recommends that appropriate exceptions are put in place to enable the use of the widest possible range of copyright works to support non-commercial AI activities. We also highlight that restricting training sets for algorithms to works in the public domain may perpetuate biases, given that the public domain of published material skews toward "wealthier, whiter, and more Western than [published material] today".[iii]
10	**What are the problems (or benefits) with the rights the Copyright Act gives visual artists (including painting, drawings, prints, sculptures etc)? What changes (if any) should be considered?**
	No response
11	**What are the problems creators and authors, who have previously transferred their copyright in a work to another person, experience in seeking to have the copyright in that work reassigned back to them? What changes (if any) should be considered?**
	No response
12	**What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?**
	LIANZA notes that the 100-year term for Crown copyright is at odds with the New Zealand Government Open Access and Licensing Framework (NZGOAL). The long term of protection and regular changes in Government institutions results in many Crown copyright works becoming orphans. This is demonstrated by libraries' experiences of wanting to use Crown copyright material, which is that ownership can be complex, and it is difficult and very often impossible to identify which Department or Crown Agency is currently the rights-holder for material. Determining which Department is the owner of Crown copyright for a work regularly requires a great deal of detective work, and libraries are often unable to commit the resources required to trace ownership. However, even when they do, Departments are often unsure and therefore unwilling to provide permission. This issue was noted in a 2018 report from the Office of the Auditor-General who recommended that "it would be helpful if one particular government agency were responsible for managing Crown copyright."[iv] LIANZA encourages MBIE to eliminate Crown copyright (and apply this retroactively as well as to new works), or to create an assertable Crown copyright but leave open as the default. This would still allow for revenue streams, for example Standards NZ, while permitting access to most Crown

	works. If Crown copyright continues, then LIANZA recommends that an exception be provided for libraries and other cultural heritage organisations to be able to digitise and make available Crown copyright material.
13	**Are there any problems (or benefits) in providing a copyright term for communication works that is longer than the minimum required by New Zealand's international obligations?**
	Libraries collect, preserve and provide access to information. Terms of copyright protection longer than the minimum required by international treaties about copyright undermine this purpose.
14	**Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?**
	The indefinite term possible under section 117 is a problem. While users can still visit the library to access a work of the kind protected by section 117, the inability of a library to ever make the work available online to a wider range of users undermines the value of having the work in the collection. LIANZA recognises that it may sometimes be desirable for libraries to have the freedom to negotiate with donors a longer term of protection than is afforded by New Zealand's copyright legislation. However, we recommend that this should only be for a finite period and not as section 117 currently allows, an indefinite copyright term.

Rights: What actions does copyright reserve for copyright owners?

15	**Do you think there are any problems with (or benefits arising from) the exclusive rights or how they are expressed? What changes (if any) should be considered?**
	LIANZA does not consider changes are needed to exclusive rights or how they are expressed.
16	**Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?**
	Libraries provide their premises for public events and therefore come within the definition of "place of public entertainment" in section 38. There is potential at public events for infringing by performance under sections 38 and 39. We believe that the defence contained in these sections of belief on "reasonable grounds" is clear and sufficient and that no change is required. This recognises that libraries should not be liable for activities which they facilitate in good faith.
17	**What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?**
	Prescribed libraries provide links on their websites to the content of others, and these are provided in good faith, with no intent to authorise infringement or make commercial gain. Any links that prescribed libraries provide to infringing content are unintended and we recommend that the law protect these libraries from legal risk in this provided that the libraries remove the links as soon as possible after becoming aware that they are linking to infringing content.

Rights: Specific issues with the current rights

18	**What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?**
	LIANZA supports the current right of communication to the public. We feel any changes should support a technology neutral stance.
19	**What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?**
	LIANZA recognises the intention of using technology-neutral terminology behind the creation of the category "communication works". However, we think that it might be easier for people to understand what is meant by "communication works" if this is replaced with a right to communicate or make available a work by means of a communication technology. Given that many libraries provide Wi-Fi services to their communities, we would want it to be clear in future legislation that communication works accessed by users does not constitute an infringing re-transmission by the intermediary Wi-Fi provider.
20	**What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?**
	We agree that the use of the word 'object' could imply that the Act only covers physical copies of works and could cause confusion and uncertainty. We agree that the term 'object' should be replaced, or at least defined very clearly in the Act to be format and medium neutral.
21	**Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.**
	No response
22	**What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?**
	Current law is too narrow and doesn't make room for the range of human creativity on the internet – memes, fan fiction, satire and parody, etc. The current law did not foresee a time when interactive creative play through mash-ups would be fundamental to human flourishing. Libraries are important sites for this process because we provide internet access and hardware for the general public. We also run programmes, support classes, and provide access to such material, including preserving it. Under the current law, non-commercial creative expression is limited in ways that stifle innovation and creativity. Internet platforms like YouTube, Twitter, and Facebook are part of most people's everyday lives and creating remixed content for these platforms is an important outlet for creativity. It's bad practice and discourages respect for the law when the law is so far out of step with people's lived experiences and community standards. It also creates opportunities for unexpected lawsuits and lawsuits that unjustly target particular kinds of creative expression. Updating the law to reflect the way people actually use and reuse copyright works will both increase respect for the law, ensure the compliance work done by schools and libraries conforms to general community standards. The current set of limitations and exemptions is simply too narrow to fully capture the range of reuse and transformative creation that technological development has permitted since 1994. A broader exception is needed to permit this kind of non-commercial creative reuse. The Canadian

	Copyright Act provides a non-commercial user-generated content exception as part of their fair dealing (29.21). Other jurisdictions consider this content as part of their fair use exception. Everyone who uses the internet to create user generated content and who enjoys consuming such content is impacted by this problem. Young people in particular are fond of creating this sort of content as part of their normal developmental process as artists, writers, and creators. The scale of the problem is very large; this issue impacts the majority of internet users
23	**What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?**
	Both NZGOAL and some intellectual property legal specialists in New Zealand consider CC0 to be problematic because New Zealand common law does not permit irrevocable waivers. Given this, it would be sensible for MBIE to outline options that allow rightsholders to release material into the public domain in a way that allows risk averse libraries and other heritage institutions to rely on it. LIANZA refers MBIE to Tohatoha's submission for details of what those options might look like.
24	**Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.**
	No response

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

25	**What are the problems (or benefits) with the way the moral rights are formulated under the Copyright Act? What changes to the rights (if any) should be considered?**
	LIANZA supports the current moral rights framework and does not advocate any changes.
26	**What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?**
	No response
27	**Will there be other problems (or benefits) with the performers' rights regime once the CPTPP changes come into effect? What changes to the performers' rights regime (if any) should be considered after those changes come into effect?**
	No response
28	**What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?**
	New Zealand libraries appreciate the provision in section 226 of the Act for librarians of prescribed libraries to circumvent TPMs on behalf of users to exercise a permitted act. However, the process which needs to happen for a librarian to circumvent a TPM involves many steps, which are not always clear, and LIANZA recommends that this should be simplified. For example, it is not clear that the form of the required "declaration to the supplier" is only to be found in the Copyright (General Matters) Regulations 1995.

29	**Is it clear what the TPMs regime allows and what it does not allow? Why/why not?**
	Yes, it is clear that what the regime allows is the circumvention on behalf of a user to exercise a permitted act. However, as noted in our response to 28 the process for doing so is unclear and requires a detailed assessment of the purpose of use which may not be practical in context. Librarians do not always exercise a permitted act directly on behalf of a user, which may make the provisions unclear in practice. TPM circumvention should be permitted for all public benefit uses, for example preservation and collection management.

Exceptions and Limitations: Exceptions that facilitate particular desirable uses

30	**Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use? Have you ever been threatened with, or involved in, legal action? Are there any other barriers?**
	LIANZA supports the current fair dealing exceptions but highlights the lack of certainty and clarity for libraries and their users which in turn inhibits certain uses that would fall under the fair dealing exceptions. Permitted acts recognise important purposes for which works may be used, but are too narrow, and do not allow for activities that are common to serve those purposes given increasing uses of digital media and tools. LIANZA feels that this confusion exists through lack of understanding of these exceptions and how they might relate to a library and their patrons. Common examples include librarians and users confusing fair dealing and fair use, users being given wrong advice to copy only 10 percent of a work for private research and study, and library staff not knowing the difference between copyright law exceptions and licence copying limits. Librarians may also be unsure how to advise students to use the criticism and review exception under fair dealing for their research. This issue affects not only libraries but the wider GLAM and education sectors as the current fair dealing exceptions are too narrow. In order for the Copyright Act to strike a better balance there should be an exception for non-commercial uses that benefit the public interest. The examples noted above are in direct conflict with the last part of Objective 3: “Maintaining integrity and respect for the law.” If libraries and their users don’t have a basic understanding of what fair dealing is and the exceptions that are available to them to allow the dissemination and access to creative works then they are redundant. LIANZA feels that the fair dealing exceptions should be broadened ensure Objective 2 of the Copyright Act is met: "Permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand.”
31	**What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?**
	No response

32	**What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?**
	No response
33	**What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?**
	No response
34	**What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?**
	No response
35	**What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?**
	No response
36	**What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?**
	As many libraries are users of cloud storage, LIANZA supports exceptions that would allow storage and processing on cloud services. The use of cloud services is forcing New Zealand libraries doing their work to operate outside the law. This is in direct conflict with one of the goals of Objective 3 – maintaining respect for the law. LIANZA supports Internet New Zealand's submission on cloud computing and refers MBIE to that submission.
37	**Are there any other current or emerging technological processes we should be considering for the purposes of the review?**
	Makerspaces are an emerging trend in both public libraries and libraries within universities, tertiary institutions and schools worldwide. Makerspaces offer a collaborative space providing communities with access to new technologies (e.g. 3D printing and scanning, augmented reality & virtual reality technology, computational weaving and knitting machines) that would otherwise be out of reach to many users due to the high cost of the hardware. These new technologies can make copies of copyright works, for example through 3D printing, or 2D and 3D scanners. Works created by users may infringe copyright. These uses can be transformational, educational, or fill a gap in the commercial market. Examples include: - copying a 3D component of a legally-owned object for replacement or modification; - scanning an image and using a computerised embroidery machine to embroider the design onto clothing. These examples may be an infringement of copyright, but it is unclear what a library's responsibility towards policing these activities would be. LIANZA also notes that as these technologies become more prevalent, libraries and other cultural heritage institutions will start collecting material that is generated from these technologies in new formats: *As 3D and 4D (the addition of temporal information to 3D data) formats become ubiquitous and as libraries continue to collect information in new forms, for instance the harvesting and archiving of websites or the inclusion of born-digital content, then it stands to reason that 3D files will have a place within libraries in the form of 3D digital surrogates of collection items; AR or VR multimedia publications; animation assets, finding aids, or interpretive materials that take*

existing library collection material and extract additional information using the new technology.[v]

It is important that an updated Copyright Act is technology neutral to allow for these emerging and future technologies, while also allowing for the non-commercial use of new technologies within educational and creative spaces. This would enable further creativity providing net benefits to New Zealand (Objective 2) and provide clarity and certainty (Objective 3). The Canadian Copyright Act contains a non-commercial User Generated Content exception (29. 21) that legitimises these types of activity and future-proofs their Act as technologies change.

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

LIANZA believes that text and data mining of legally obtained works does not infringe on any of the exclusive rights reserved for rightsholders. However, LIANZA does have concerns around some rightsholder practices and believes greater clarity in the law would benefit both rightsholders and researchers using text and data mining.

Currently, rightsholders vary on how they handle text and data mining. Some rightsholders allow it under specific licenses, some without any additional permissions, and others do not allow it at all. LIANZA notes that the Copyright Clearance Center offers a licencing product specifically aimed at this use: RightFindTM XML for Mining.

Because libraries hold the licences for a wide range of information they often act as gate-keepers over these projects. Given the wide range of approaches that various rightsholders have taken, there is clearly room for reasonable disagreement. For this reason, libraries need clarity in the law around what is and is not permitted.

LIANZA believes that the very nature of text and data mining means that only very large rightsholders, such as the big five publishers, are able to benefit from any potential licence. No creator or small rightsholder is likely to attempt to monetise text and data mining, because their portfolios simply are not large enough for it to be profitable. This means that creating a competitive market, one not dominated by a few large rightsholders is extremely difficult, if possible at all.

39 **What do problems (or benefits) arising from the Copyright Act not having an express exception for parody and satire? What about the absence of an exception for caricature and pastiche?**

Parody and satire support freedom of expression. Fair dealing exceptions that cover parody and satire are currently missing from the Copyright Act 1994. New Zealand is among one of the only jurisdictions without this permitted use.

With no exceptions in place instead there are existing “gentlemen’s agreements” between large content producers that exclude small artists and individuals, for example the entertainment television series *The Jono & Ben Show* on TV3 broadcasts many satirical skits and mash-ups of popular songs with no issues. This current situation favours large media companies while chilling the speech of citizens. Another issue is that lecturers and educators often have questions about pastiche and are uncertain if this is covered under the Copyright Act.

LIANZA supports the adoption of fair dealing for parody and satire, and caricature and pastiche, as this is reflected Objective 2 of the Issues Paper "permits reasonable access for use, adaptation and consumption, with net benefits to New Zealand.” LIANZA would support a clause in any future parody and satire exception that ensures the right to dignity for individuals that are the source of parody or satire.

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

LIANZA recommends that an exception allowing the 'right to quote' be considered for inclusion in New Zealand's Copyright Act. Under the Berne Convention, of which Aotearoa New Zealand is a part of, Article 10 states:

> *(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.*[vi]

Given this, LIANZA believes that a right to quote would support MBIE's Objective 4 by bringing us better in line with our international agreements.

Exceptions and Limitations: Exceptions for libraries and archives

41	**Do you have any specific examples of where the uncertainty about the exceptions for libraries and archives has resulted in undesirable outcomes? Please be specific about the situation, why this caused a problem and who it caused a problem for.**

In 2017 LIANZA surveyed the New Zealand library community about copyright. We received 200 individual responses. The survey included several questions about the Act and the library exceptions. Libraries were making use of all the exceptions, but to varying degrees.

Of the 58 respondents to this question, 59% requested that the exceptions be made easier to understand and apply. Only 5% of respondents felt that the law was clear and understandable in its current form. A clear need was expressed that, in addition to providing legislation, the government should provide ongoing training and guidance for librarians in applying copyright legislation.

There is a lot of uncertainty about how much could be copied in different situations. Librarians struggle with what is meant by copying a 'reasonable proportion' and find the guidance in section 43(3) about 'the amount and substantiality' of what can be copied difficult to interpret and apply. This has a chilling effect on legitimate copying by librarians for users and the advice they give users about copying.

There can be uncertainty for librarians about what can be copied from a periodical on the same subject matter. For a general magazine this will be obvious, but less so for specialist magazines where all the content relates to the same subject area.

The requirement that the librarian must destroy any additional copy made when supplying a digital copy for a user's 'research and private study' attracted comment, particularly from academic libraries copying theses. An example was given of approximately 75 minutes per thesis for an institution's Bindery staff to pull down and rebind a thesis for scanning. The scanning can take between 20 minutes (through a document feeder) to twelve hours (fragile material scanned page by page by hand). Doing this more than once has a significant staff cost. Many libraries receive multiple requests for the same works via interloan, and while they would not want to retain digital copies made for all interloan requests, the ability to do so when needed would remove a cost and resourcing burden.

Uncertainty often arises because of inconsistencies in the scope of the exceptions. Inconsistencies include copying for the collections of other libraries under sections 54 and 56C. This exception seems only to apply to books, but section 55 (copying for preservation or replacement) seems to include any kind of work, even a computer program, which is specifically excluded from sections 52, 53 and 54. This sort of inconsistency makes it unnecessarily difficult for librarians to interpret and apply the exceptions available to them.

Another example of inconsistency is the provision for back-up copies. Under section 80, which is outside the library exceptions, back-ups can be made for computer programs, but there is no

	provision for back-up for other vulnerable media found in library collections. There is room for uncertainty whether the library of an organisation conducted for profit can qualify as a "prescribed library". The Copyright (General Matters) Regulations 1995 added to the list of prescribed libraries "libraries that are members of the Interloan scheme", and this was confirmed in the Copyright (General Matters) Amendment Regulations 1998. However, the definition of prescribed library in section 50(1e) seems to say that libraries prescribed by regulations under this Act must not be libraries conducted for profit. LIANZA recommends that in determining the eligibility of a library to be a prescribed library the primary consideration is the purpose of the library, not the organisation it serves.
42	**Does the Copyright Act provide enough flexibility for libraries and archives to copy, archive and make available to the public digital content published over the internet? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?**
	The Copyright Act does not provide enough flexibility for libraries and archives to copy, archive and make available to the public digital content published over the internet. The libraries of educational establishments have some provision under section 44A, but otherwise only the National Library (under the National Library (Te Puna Mātauranga o Aotearoa) Act 2003) can do this for "public documents". The National Library cannot collect everything, and its collection of born-digital content is necessarily selective. The lack of flexibility in the Act means that most New Zealand libraries are unable to copy, archive and make available into the future born-digital content which may be of value to their user community. We recommend that MBIE, the National Library and LIANZA together consider how libraries could support the National Library in ensuring that freely available born-digital content of value to their communities can be collected, preserved and made available.
43	**Does the Copyright Act provide enough flexibility for libraries and archives to facilitate mass digitisation projects and make copies of physical works in digital format more widely available to the public? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?**
	Libraries have a vital community role in facilitating access to information. This includes a role in preserving and making available heritage materials, and to fulfil this purpose libraries need to provide online access to parts of their collections. In 2017, the LIANZA Standing Committee on Copyright surveyed librarians on their experiences with copyright. The survey revealed that several library projects have had to be abandoned, restricted, or changed because of copyright concerns. These concerns were particularly apparent when libraries wanted to carry out digitisation projects and make material available online. A key challenge across all libraries that responded was identifying and locating rights holders. This was felt to be mainly because of the length of copyright duration. Consider for example a work written by someone aged 25 who does not die until the age of 85: the copyright duration for that work is 110 years. The author is long dead, the inheritors of the copyright are often unknown, and frequently the publisher no longer exists and there is little or no information about what happened to their intellectual property. The Copyright Act permits prescribed libraries to digitise and make available complete works for defined purposes, e.g. replacing a published item that is no longer commercially available. LIANZA recommends that consideration be given to a libraries exception to support mass digitisation to provide public access to out-of-commerce works

44	**Does the Copyright Act provide enough flexibility for libraries and archives to make copies of copyright works within their collections for collection management and administration without the copyright holder's permission? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?**
	<u>Copying for preservation and replacement</u> The library exceptions for copying for preservation are well used but are not fit for purpose. Copying for preservation (s. 55) only allows for such copying of an item when the original item "is at risk of loss, damage, or destruction". When copying an item for preservation, particularly digital items, it is sensible to copy at the point of acquisition, when the best copy can be made, possibly shifted into a format considered more appropriate for long term preservation and access. Many libraries in New Zealand need to preserve items in their collections. We refer you to the National Library's submission about this area, and we support them in recommending that the Copyright Act be changed to permit prescribed libraries to copy for preservation at the point of acquisition and to redo copying as may be necessary to ensure the long-term preservation of items where needed. It should be made clear that the purpose of such copying is to ensure the long-term preservation of items and does not permit libraries to create additional copies for the purpose of increasing the number available to their users. <u>Copying for the collections of other libraries</u> The restriction of section 54 (copying for the collections of other libraries) undermines the purpose of the exception - to enable libraries to acquire works that they have not been able to obtain at an ordinary commercial price within the previous six months – as there are many types of works libraries try unsuccessfully to acquire for their collections that are no longer commercially available. LIANZA recommends that this exception be extended to any work commercially unavailable, regardless of its format. <u>Using cover images</u> Most New Zealand libraries use cover images to promote publications. The use of cover images helps bring readers, books and authors together, benefitting all parties involved. LIANZA recommends that an exception be added which permits cover images for New Zealand publications to be used for non-commercial purposes, including but not limited to the provision of thumbnails in library online catalogues.
45	**What are the problems with (or benefits arising from) the flexibility given to libraries and archives to copy and make available content published online? What changes (if any) should be considered?**
	As noted in our response to question 42, it is only the National Library, under its Act, which has the ability to copy and make available "public documents". Many of these "documents" can only be made available onsite at the National Library's Wellington Reading Room, on computers from which you can't print, download or email. If these publications are available in physical format they can be borrowed through the interloan system, but when they are only electronic this is not permitted. LIANZA recommends that MBIE, the National Library, LIANZA and right-holders together consider how access might be improved for New Zealanders unable to visit the National Library in person.
46	**What are the problems with (or benefits arising from) excluding museums and galleries from the libraries and archives exceptions? What changes (if any) should be considered?**
	Museums and galleries are greatly impacted by the exclusion from the libraries and archives exceptions as this greatly prohibits them from carrying out their mandated duties.

Museums and galleries have always shared activities in common with libraries and archives and this is only increasing in the digital environment with greater user expectations for online access to collections. In undertaking many of the activities required to fulfil their public-interest roles, such as copying for preservation and copying for collection management and administration, the staff of museums and galleries are being forced to operate outside the law. If New Zealand's copyright regime is to achieve the objectives the Issues Paper proposes, including "maintaining integrity and respect for the law" the exceptions for libraries and archives should be extended to publicly-funded museums and galleries.

The majority of museums and galleries within New Zealand have a library that has a public function and many of these are part of the interloan scheme and would fall under being a prescribed library definition in the Act. The biggest problem with the current exception is that librarians working within these prescribed libraries are the only individuals within the wider institution that can carry out the permitted copying. Museums and galleries also hold archives of unpublished and published material that would fall under these exceptions, and again only archivists or librarians would be eligible to carry out the permitted activities which is inefficient.

While museums and galleries have inherent similarities with libraries and archives in that they both hold collections of publications, unpublished manuscripts, archives, ephemera and other printed material, there are clear differences as museums and galleries have vast collections of three dimensional objects (including paintings, sculptures, fine and decorative arts, scientific specimens, ethnographic collections, human history collections and other material). The current libraries and archives exceptions are not format neutral so would exclude three dimensional collections from being copied. Distinctions between the collecting missions for the two different types of institutions are also being blurred by emerging digital formats which don't fall neatly within the traditional roles of the different types of GLAM institutions.

LIANZA supports the stance of Te Papa Tongarewa and Auckland War Memorial Museum with regards broadening the library and archive exceptions to include museums and galleries.

Exceptions and Limitations: Exceptions for education

47	**Does the Copyright Act provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?**
	LIANZA is of the opinion that the Copyright Act does not provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies. Current copyright law is format specific. This makes the law unable to maintain currency with technological change. A framework that is technologically neutral is critical for teachers, librarians and educational institutions to fulfil their roles. Under the current law libraries and educational institutions are struggling to work with material in obsolete formats while new technologies available to those institutions have the ability to allow students and teachers to access information resources in formats that are commonplace in 21st century education. Examples of these issues include: The recording of lectures which then may have to have any unlicensed film or communication work deleted before it may be made available to students online; Students' dissertations or theses which would normally be uploaded to the institute's online repository will either have to have material redacted or be entirely deleted if they are found to contain third-party material for which permission has not been able to be obtained; There is a lack of clarity over the ability to use new research methods such as data mining which often lead to the creation of multiple copies of works. MOOCs (Massive Open Online Courses) are offered by tertiary institutes world-wide. They are free and open to unlimited numbers of students, but most online library materials cannot be used in MOOCs as the vendor licences restrict access to only authenticated students of the institute. These courses are usually omitted from licences offered by CMOs. A lecturer arriving at a library with a box of VHS tapes, asking if the librarian knew how he could transfer the contents to DVD. He had no idea of the amount of work that would be required and, after due diligence, it may still not have been possible to do this. It would seem that the education exceptions relate directly to Proposed Objective 2, which seeks to permit 'reasonable access to works for use, adaptation and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand'. Consideration should also be given to providing greater clarity about what is permitted under the education exceptions, particularly around S44 and S48, and to adopting a technology neutral stance so that the Act will be applicable to new technologies of the future.
48	**Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?**
	LIANZA believes the exceptions are too narrow for reasons stated in our responses to Q.47 and Q.49. LIANZA also supports the Universities New Zealand - Te Pōkai Tara response.
49	**Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?**

The educational exceptions are too narrow as Public Libraries, Museums and other GLAM sector institutions are not considered to be educational establishments under the current definition. Libraries that sit within an educational establishment, such as school, tertiary or university libraries, can utilise these exceptions to deliver crucial sessions to students on accessing information through library systems for research and learning.

Public Libraries are now involved in teaching the wider community from pre-schoolers and school children, to octogenarians. Staff involved in teaching at Public Libraries often include trained teachers employed by the library as well as librarians. Teaching can take place in a variety of different ways (e.g. structured "classroom" settings, through "drop-in" community activities and in one-on-one sessions). Generally teaching done by public libraries is either free to the community or at cost.

The recently approved European Union Copyright Directive includes an exception or limitation *…for the sole purpose of illustration for teaching and learning activities carried out under the responsibility of educational establishments, including during examinations or teaching activities that take place outside the premises of educational establishments, for example in a museum, library or another cultural heritage institution.*[vii]

LIANZA believes that the exceptions should be extended to allow for the *purpose* of the copying, not by user or where it takes place. Broadening the educational exceptions to allow for educational activities carried out within other non-profit establishments, including Public Libraries and other cultural heritage institutions, would benefit the public interests of New Zealand communities and aligns with proposed objective 2 of the Issues Paper "permit reasonable access to works for use, adoption and consumption."

Another issue with the current exceptions relates to the copying of films for educational purposes. At present this is unreasonably restrictive, being limited under section 45(2)(a) to "where the lesson is on how to make films or film sound-tracks" and considers this clause should be deleted from section 45(2)(a).

Likewise, copying of sound recordings for educational purposes is unreasonably restrictive, being limited under section 45(4)(a) to "where the lesson – (v) relates to the learning of a language; or (vi) is conducted by correspondence". These two clauses should be deleted from section 45(4)(a). If sub-clause (vi) of section 45(4)(a) is not deleted, the phrase "conducted by correspondence" should be defined, and the definition should include courses conducted online or by distance education.

LIANZA supports the broadening of the educational exceptions to allow for more flexibility when copying films and sound recordings for educational use.

50	**Is copyright well understood in the education sector? What problems does this create (if any)?**

A recent LIANZA survey of librarians asked "What, if anything, would make the exceptions easier for you to use?

The responses highlighted that there is some confusion around the CLNZ education licence and the Copyright Act, with boundaries between the two being unclear to some library workers. Respondents spoke to a range of issues and concerns. The overriding concern was effectively summed up in this comment: "The perception of risk around these activities is also a barrier to our readiness to deliver copyrighted material under exception terms." Lack of clarity in the exceptions and a general lack of copyright knowledge seem to be presenting barriers to using the exceptions. As one commenter wrote, "The lack of clarity renders the exceptions useless."

At the same time, commenters who seemed well placed to understand the exceptions and who did report using them also reported that they presented barriers to their work. One commenter wrote, "For unpublished collections we find that copyright (especially orphan works) constrains our ability to support legitimate research." Others reported concerns about the restrictions placed by the CLNZ licence and the costs incurred throughout New Zealand for the purchase of access to scholarly articles.

Respondents to other survey questions often commented on a lack of understanding of the Act as limiting what they were able to do - either the librarians themselves were unsure of what was permissible, or their managers were uncertain, and were fearful of liability.

A considerable amount of confusion arises through lack of understanding of the education exceptions and how they relate to a library and its patrons. Common examples in particular from libraries within educational establishments include lecturers confusing fair dealing and fair use, students being given wrong advice that they can only copy 10% of a work for private research and study, and lecturers and library staff often not knowing the difference between the copyright law exceptions and the licence copying limits. Another example is that lecturers do not feel comfortable or even know to advise students on how to use the criticism and review exception under fair dealing for their research. Students depositing theses, and the lecturers who are supervising them, are often unaware of their copyright obligations. If the student has included third party works without permission this may lead to the redaction of parts of the work, or its non-inclusion in an institutional repository if the copyright owner cannot be contacted for permission.

It is LIANZA's view that resourcing needs to be made available for training and education around compliance issues and that CMOs, due to a conflict of interest, are not the appropriate bodies to be providing this training.

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

51 **What are the problems (or advantages) with the free public playing exceptions in sections 81, 87 and 87 A of the Copyright Act? What changes (if any) should be considered?**

Section 81 of the act *Playing of sound recordings for purposes of club, society, etc* is a particularly confusing section of the act. It would appear that this exception allows non-profit organisations concerned with the advancement of Education (81.2.b) including Public Libraries to play sound recordings from a CD and would by logical extension include copyright in the score and lyrics. This is certainly how it has been interpreted by some libraries and in advice provided to librarians (e.g. Tony Millet 2013, Questions and Answers on Copyright for Librarians response to question 163/2). However, many Public Libraries have a more cautious approach, pointing out that the score and lyrics are not specifically mentioned. In this case they opt for a costly OneMusic Licence, pay for specific permission (e.g. for particular songs to play in Storytimes sessions) or forego the playing of music. None of these options are ideal when the act already permits playing sound recordings by a non-profit organisation.

In addition Section 81 only applies to sound not film and so not-for-profit entities are required to pay licence fees for showing movies or music videos. Section 81 is format dependant and doesn't reflect how sound is increasingly being consumed as both audio and visual, e.g. recordings of musical performances. As it stands Section 81 is confusing and largely pointless if the exceptions do not extend to the lyrics and score. Specifically referring to the lyrics and score in Section 81 will ensure the exception can confidently be used. Including film in the exception will also provide benefits to New Zealanders (Objective 2) without largely impacting revenues of performers.

The Exceptions in Sections 87 and 87A are also confusing. Organisations including libraries that provide free access to communication works such as TV, radio or internet music services can do so without infringing copyright in the communication work or any sound recording or film included in the communication work. Thus, a movie can be shown in a Public Library if it is part of a communication work (e.g. part of a scheduled broadcaster's offering) but not if it is being played from a DVD. It is also unclear whether a streaming platform such as Spotify, Netflix or Lightbox could be included as a communication work or whether it is a recording. Thus the act is technology dependant and confusing. OneMusic offers licensing for establishments to play radio stations as an incidental part of their operation but this would seem unnecessary under section 87A.
Simplification of these sections of the Act are necessary to provide clarity and certainty, and maintain integrity and respect for the law (Objective 3).

52	**What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?**
	Current copyright law is format specific. This makes the law unable to maintain currency with technological change. A framework that is technology neutral is critical for librarians to fulfil their roles. Under the current law, libraries are struggling to work with material in obsolete formats. While the main problem lies with VHS tapes, material held on reel-to-reel tape, vinyl, floppy disks, CD ROMs, microfiche and even DVDs is often inaccessible as the hardware is no longer available to libraries or their users. Format shifting (for example, copying from a superseded format to a current format) is not permitted, other than sound recordings for personal use under section 81A (which in any case does not apply to libraries), or where the item is at risk of loss, damage, or destruction under section 55(3). This creates particular problems for libraries, which may hold in their collections works in superseded formats for which play-back equipment is no longer available. It is difficult to obtain permission to convert materials as the publishers have often gone out of business, or simply decline permission. If permission is given, the requested fee is sometimes too high for the library to pay. Some libraries manage this by deliberately keeping and maintaining old hardware and equipment, or by sourcing alternative resources instead. However, material in obsolete formats is often weeded (removed from a library collection), leading to a loss of otherwise useful material (including New Zealand resources). The overall effect of this situation is that older, valuable or useful material is no longer accessible and in many cases is being removed from library collections. For heritage material, this is a serious issue. Format shifting by the librarian of a prescribed library should be permitted, and should include any format (e.g. sound recordings, films, videos, DVDs, CDs etc) to any other format. A related issue is that there is currently no provision for format shifting of films, videos, etc. either into digital format or into other formats. A change to the law to allow this under certain circumstances, particularly for educational or library purposes, would be helpful.
53	**What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?**
	No response
54	**What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?**
	No response
55	**What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?**
	No response
56	**Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?**

	The exceptions permitting libraries to rent computer programs, to make back-ups and to copy for replacement or preservation are working effectively. We do, however, recommend that sections 54 and 56C (copying for the collections of other libraries) be expanded to encompass all types of material found in library collections, including computer programs.
57	**Do you think that section 73 should be amended to make it clear that the exception applies to the works underlying the works specified in section 73(1)? And should the exception be limited to copies made for personal and private use, with copies made for commercial gain being excluded? Why?**
	No response

Exceptions and Limitations: Contracting out of exceptions

58	**What problems (or benefits) are there in allowing copyright owners to limit or modify a person's ability to use the existing exceptions through contract? What changes (if any) should be considered?**
	New Zealand libraries often enter into licence agreements for electronic resources with terms and conditions which override some of the exceptions for prescribed libraries in Part 3 of the Copyright Act. Common prohibitions include supplying copies of articles from such resources for inter-library loan, and restrictions on users printing, downloading or emailing copies. As libraries acquire more of their collection content through such subscription and licensing packages this issue is becoming more significant. LIANZA recommends that New Zealand's copyright law should be amended to clearly state that licence agreements and contracts issued by copyright holders should not prevail over copyright law when they are inconsistent with the law. Contacts should not prevent or restrict copyright users in the exercise of permitted acts.

Exceptions and Limitations: Internet service provider liability

59	**What are problems (or benefits) with the ISP definition? What changes, if any should be considered?**
	The Act's definition of ISP is very wide and includes libraries with websites and libraries, such as public and academic, which provide internet services to their users. The aspect addressing hosting of content would include, for example, a networked printing or photocopying service which patrons or staff can use within a library or other organisation. Documents to be printed or photocopied are works, and copies of them will be hosted as part of the printing or copying process. If changes are proposed that increase the obligations of ISPs or their liability for user activity, LIANZA recommends that the definition of ISP be narrowed or that exceptions are put in place for libraries, museums, and other organisations that work for the public interest.
60	**Are there any problems (or benefit) with the absence of an explicit exception for linking to copyright material and not having a safe harbour for providers of search tools (eg search engines)? What changes (if any) should be considered?**
	Please refer to our response to question 17.
61	**Do the safe harbour provisions in the Copyright Act affect the commercial relationship between online platforms and copyright owners? Please be specific about who is, and how they are, affected.**
	No response
62	**What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?**
	Please refer to our response to question 59.

Transactions

63	**Is there a sufficient number and variety of CMOs in New Zealand? If not, which type copyright works do you think would benefit from the formation of CMOs in New Zealand?**
	The experience of libraries is that there are a sufficient number and variety of CMOs in New Zealand.
64	**If you are a member of a CMO, have you experienced problems with the way they operate in New Zealand? Please give examples of any problems experienced.**
	No response
65	**If you are a user of copyright works, have you experienced problems trying to obtain a licence from a CMO? Please give examples of any problems experienced.**
	No response

66	**What are the problems (or advantages) with the way the Copyright Tribunal operates? Why do you think so few applications are being made to the Copyright Tribunal? What changes (if any) to the way the Copyright Tribunal regime should be considered?**
	No response
67	**Which CMOs offer an alternative dispute resolution service? How frequently are they used? What are the benefits (or disadvantages) with these services when compared to the Copyright Tribunal?**
	No response
68	**Has a social media platform or other communication tool that you have used to upload, modify or create content undermined your ability to monetise that content? Please provide details.**
	No response
69	**What are the advantages of social media platforms or other communication tools to disseminate and monetise their works? What are the disadvantages? What changes to the Copyright Act (if any) should be considered?**
	No response
70	**Do the transactions provisions of the Copyright Act support the development of new technologies like blockchain technology and other technologies that could provide new ways to disseminate and monetise copyright works? If not, in what way do the provisions hinder the development and use of new technologies?**
	No response
71	**Have you ever been impeded using, preserving or making available copies of old works because you could not identify or contact the copyright? Please provide as much detail as you can about what the problem was and its impact.**
	In our 2017 survey of New Zealand libraries, 40% of respondents reported that they had not proceeded with digitising materials because of copyright concerns, and chief among the reasons given for this was the inability to identify or locate rights holders. 37% of respondents had not made material available online because of copyright, with a key issue again being the inability to identify or contact rights holders. The 'public good' role of libraries and in some cases, their legislated function, is to provide access to their collections to the public. Access today is not only visiting the library in person: public expectation is for content to be available online. Library collections contain a great number of works which are no longer commercially available. Where rights holders for these cannot be identified or contacted, copyright is constraining libraries in fulfilling their role and also undermining the achievement of proposed objective 2, to "permit reasonable access to works for use, adaptation and consumption where exceptions to exclusive rights are likely to have net benefits for New Zealand." It is worth noting that it is not only "old works" which are a problem; works from any era can become orphaned, including relatively 'young' works.

72	**How do you or your organisation deal with orphan works (general approaches, specific policies etc.)? And can you describe the time and resources you routinely spend on identifying and contacting the copyright owners of orphan works?**
	LIANZA understands that most New Zealand libraries wanting to digitise and make available orphan works complete some form of diligent search as a first step. What will comprise an appropriate diligent search will vary depending on the nature and age of the work being considered, and we know that some libraries base their search on the guidance from National and State Libraries Australia.[viii] LIANZA supports the recommendation from the Australian Roundtable on orphan works that in determining what makes an appropriate diligent search that "it would be better to have guiding principles rather than defined steps." [ix] Typical steps in a search include: Searching the White Pages, Google, online collections of other institutions, NZ biographies on Te Ara, Births, Deaths and Marriages, Archway to find probates, FamilySearch to find digitised probates, New Zealand cemetery records, and the Companies Register. Each of these steps is documented and retained to ensure proof that a reasonable search has been carried out if a copyright owner was to come forward. Conducting a diligent search may prove that the work under consideration is out of copyright. However, if it doesn't, the library will either need to try and contact rights holders for permission or assess the risk involved in digitising and making available without permission. When libraries make available digitised orphan works they may choose to assign an orphan works rights statement to these so that users are aware of their orphan work status. Many libraries also have a copyright takedown notice on their websites. Despite these practices to mitigate risk, the Act does not protect libraries from litigation if a rightsholder were to come forward. This highlights the direct risk that orphan works bring to libraries and other cultural institutions, requiring them to operate outside the law, undermining the aims of proposed objective 3 - "integrity and respect for the law." Please also refer to the submissions from the National Library, Auckland Museum and Te Papa for examples of approaches taken to orphan works.
73	**Has a copyright owner of an orphan work ever come forward to claim copyright after it had been used without authorisation? If so, what was the outcome?**
	LIANZA is aware of Auckland Museum, Te Papa and Auckland Libraries who have examples outlined in their submissions.

74

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

Orphan works schemes are in place or have been proposed in a number of countries. Some schemes rely on licensing for individual works, while others implement extended collective licensing.

Licensing schemes for individual works can quickly become cost-prohibitive for mass digitisation projects, especially on top of the costs for diligent searches.

While extended collective licensing removes the need for diligent search for users, it transfers the responsibility to CMOs so that they can distribute funds to rights-holders. LIANZA also believes that, given New Zealand and overseas experience demonstrating the low number of rights-holders who have reappeared for previously 'orphaned' works, licensing fees paid by libraries under such a scheme would be disproportionally high relative to the number of rights holders who would reappear.

The EU Directive on Certain Permitted Uses of Orphan Works requires member states to allow publicly accessible cultural institutions to reproduce and communicate orphan works after a good faith diligent search. It established a central register of orphan works, from which a rights-holder can remove their works and be given compensation.

Although law reform has not yet passed, the U.S. Copyright Office has long advocated for an orphan works regime in which legal liability is limited for users who conduct a good faith diligent search for the copyright owner. The Office's proposed framework would limit monetary relief for infringement of an orphan work to "reasonable compensation", and would bar monetary relief for infringement by nonprofit educational and cultural institutions.[x]

Options for New Zealand

Completing diligent searching before digitising works gives a high level of confidence that a work is a genuine 'orphan'. This means the risk of a rights-holder appearing is quite low. Given this low risk, paying licence fees to use orphan works is not a good use of public money. LIANZA therefore recommends that libraries be provided with an exception to permit the digitisation and making available of orphan works. There should be limited liability for libraries should a rights-holder resurface.

This aligns with the recommendation of the Australian Law Reform Commission (ALRC) that the Australian Copyright Act allows for limited liability where the user has conducted a reasonably due diligent search and, where possible, attributed the author. National and State Libraries Australia also support the introduction of a limited liability scheme for orphan works:

> *NSLA supports the introduction of legislative reforms to modernise the Copyright Act 1968 (Cth) and to address the issue of orphan works so that both institutions and individuals have the right to freely and fairly use orphan works following a reasonably diligent search for the rights holder. NSLA further advocates the adoption of a limited liability scheme for both institutions and individuals provided a reasonably diligent search has been undertaken, and the use is in good faith.*[xi]

LIANZA would like to work with MBIE, rights-holders and publishers to agree principles for diligent search, including principles that would be economically feasible for mass digitisation projects, and to explore a possible register or rules allowing for reasonable reliance on prior diligent searches.

75	**What problems do you or your organisation face when using open data released under an attribution only Creative Commons Licences? What changes to the Copyright Act should be considered?**
	No response

Enforcement of Copyright

76	**How difficult is it for copyright owners to establish before the courts that copyright exists in a work and they are the copyright owners? What changes (if any) should be considered to help copyright owners take legal action to enforce their copyright?**
	No response
77	**What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?**
	Preserving actions for owners and exclusive licensees ensures that the core holders of rights can oversee and make choices about when actions are brought in their name. Not all owners want legal actions to be brought in their name, and they may face reputational or business risks as a result of particular legal actions.
78	**Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?**
	See response to 77.
79	**Does the cost of enforcement have an impact on copyright owners' enforcement decisions? Please be specific about how decisions are affected and the impact of those decisions. What changes (if any) should be considered?**
	No response
80	**Are groundless threats of legal action for infringing copyright being made in New Zealand by copyright owners? If so, how wide spread do you think the practice is and what impact is the practice having on recipients of such threats?**
	No response
81	**Is the requirement to pay the $5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are the any issues with the border protection measures that should be addressed? Please describe these issues and their impact.**
	No response
82	**Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?**
	No response

83	**Why do you think the infringing filing sharing regime is not being used to address copyright infringements that occur over peer-to peer file sharing technologies?**
	No response
84	**What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing filing share regime (if any) should be considered?**
	Libraries increasingly provide access to the Internet and other digital resources as a core part of their role. That aspect of their role means that provisions on ISP liability may apply to libraries as content hosts or transmitters of content under section 92C, and that the definition of IPAPs under section 122A may also apply in some cases. The infringing file sharing regime requires libraries to take action in response to infringement notices and may in some cases treat them as IPAPs with broader compliance obligations. This can be problematic for libraries, particularly public libraries, who may not be able to identify alleged infringers when they used public-access computers. LIANZA recommends that libraries that take reasonable and practicable steps to prevent infringement should be exempt from liability for user behaviour.
85	**What are the problems (or advantages) with the existing measures copyright owners have to address online infringements? What changes (if any) should be considered?**
	No response
86	**Should ISPs be required to assist copyright owners enforce their rights? Why / why not?**
	The definition of ISPs for sections 92A to 92E is very broad and includes a range of activities involving transmitting and hosting information, which libraries increasingly perform as a key part of their role in the digital era. As noted in our response to question 84, libraries have an obligation to take reasonable and practicable steps to prevent infringement, but these steps need to recognise the library's often limited ability to monitor and identify infringing activity.
87	**Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?**
	LIANZA highlights the limited resources that most libraries have, in particular smaller public libraries, and that if libraries are performing an ISP role and assisting copyright owners then they will need additional resourcing.
88	**Are there any problems with the types of criminal offences or the size of the penalties under the Copyright Act? What changes (if any) should be considered?**
	No response

Other issues: Relationship between copyright and registered design protection

89	**Do you think there are any problems with (or benefits from) having an overlap between copyright and industrial design protection. What changes (if any) should be considered?**
	No response
90	**Have you experienced any problems when seeking protection for an industrial design, especially overseas?**
	No response
91	**We are interested in further information on the use of digital 3-D printer files to distribute industrial designs. For those that produce such files, how do you protect your designs? Have you faced any issues with the current provisions of the Copyright Act?**
	No response
92	**Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?**
	No response

Other issues: Copyright and the Wai 262 inquiry

93	**Have we accurately characterised the Waitangi Tribunal's analysis of the problems with the current protections provided for taonga works and mātauranga Māori? If not, please explain the inaccuracies.**
	LIANZA feels that MBIE has, in its brief summary, accurately characterised the Waitangi Tribunal's analysis of the problems with the current protections provided for taonga works and mātauranga Māori.
94	**Do you agree with the Waitangi Tribunal's use of the concepts 'taonga works' and 'taonga-derived works'? If not, why not?**
	We do not feel that we have the necessary expertise to comment on these concepts. We believe that these concepts need to be discussed and agreed with Māori communities and institutions across Aotearoa.
95	**The Waitangi Tribunal did not recommend any changes to the copyright regime, and instead recommended a new legal regime for taonga works and mātauranga Māori. Are there ways in which the copyright regime might conflict with any new protection of taonga works and mātauranga Māori?**
	Copyright is a Western construct with expiry dates and the concept of the public domain. Protection of Māturanga Māori does not expire in the same way as western intellectual property. Knowledge and kaitiaki responsibility is not owned by a single person or entity and is more frequently shared. There is also some concern about material which contains mātauranga Māori (literature, research, data, images, art) for which the maker is non-Māori. There is the possibility of conflict between the rights holder and the subject of the material.

96	**Do you agree with our proposed process to launch a new work stream on taonga works alongside the Copyright Act review? Are there any other Treaty of Waitangi considerations we should be aware of in the Copyright Act review?**
	Yes, LIANZA supports a parallel stream of work. This work should be done in collaboration with Te Puni Kōkiri, the Ministry for Māori Development and MBIE.
97	**How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?**
	Te Rōpū Whakahau is the leading national body that represents Māori engaged in Libraries, Culture, Knowledge, Information, Communication and Systems Technology. LIANZA recommends that MBIE consult Te Rōpū Whakahau and other Māori stakeholders in line with tikanga Māori.

Other comments

Parallel importing

The Issues Paper does not include a question about parallel importing but notes that reports have shown the continued benefits of secondary importing to the economy. LIANZA would like to record the ongoing importance of parallel importing to New Zealand libraries and recommends that no changes are made to New Zealand's policy of allowing parallel imports.

Copyright Duration in Photographs

Another issue facing libraries and the wider GLAM sector relates to the way to current Copyright Act has been written. Geoff McLay's[xii] report into New Zealand's intellectual property legislation highlights the uncertainty of the copyright duration of photographs taken prior to 1 January 1944. Prior to the new Copyright Act 1994, copyright duration for photographic works lasted for 50 years from the date of creation. When the 1994 Act was introduced, photographic works had the same copyright duration as artistic works (life of the creator plus 50 years). Current practice in dealing with photographs for some libraries is that photographs taken before 1944 are deemed to be out of copyright. Due to the lack of transitional provisions in the 1994 Act, it unclear whether the works that were out of copyright using the old rules are back in copyright under the new rules.

Emerging practice for some New Zealand libraries to use the "No known copyright restrictions" rights statement advised by NZGOAL. This statement indicates that to the best of their knowledge no copyright remains in the underlying work. Auckland Libraries, among other libraries, use this statement for over 130,000 images in the Kura Heritage Collections Online. LIANZA seeks clarification on this issue and supports a transitional arrangement that legally makes photographs taken prior to 1 January 1944 to be deemed out of copyright.

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