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COMPLETE

Collector:

Web Link 1 (Web Link)

Page 2: A bit about you and your submission

Q1 Your name

Melanee Winder

Q2 Your email address

Q3 Please briefly tell us why copyright law interests you

A copyright framework is central to the success of the New Zealand publishing industry and that, far from impeding further innovation, competition, investment and access to goods and services the existing copyright and IP protection framework is the foundation and basis for an innovative and creative publishing industry in New Zealand.

Q4 For the purpose of MBIE publishing the information you provide in this submission, do you wish to remain anonymous? **No**

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

Page 3: Question navigation

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

Part 3 (Objectives),

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

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

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

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

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

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

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

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

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

,

Part 6 (Transactions),

Part 7 (Enforcement of Copyright)

Q7 Q1 Are the above objectives the right ones for New Zealand's copyright regime? How well do you think the copyright system is achieving these objectives?

We cannot overstate the importance of copyright. The weakening of copyright with the legalisation of parallel importing in 1998 has led to a substantial reduction in the investment in local publishing by Hachette and other publishing companies, and the closure of our NZ-based distribution centre with jobs being lost to Australia. We will vigorously campaign to ensure that copyright is not further weakened to ensure that creators (authors, illustrators etc) and producers (publishers) of books are financially rewarded for their efforts. In terms of the objectives above, we believe that copyright is the most efficient mechanism to incentivise the creators and producers of books, and that access to works for use, adaption and consumption, cannot come at the financial detriment of creators and producers. Hachette is happy to work with the Government to ensure that copyright legislation is fit for the modern age, for example we are pleased to make the rules around 'orphaned works' simpler and less onerous for the library sector, but do not support a move from fair dealing to US style fair use following the decimation of the Canadian educational publishing industry following changes there.

Q8 Q2 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?

We acknowledge that there is a high pace of technological change but setting objectives that are both fully adaptable to such change and certain/clear is impossible. The objectives set out above already do enough.

Q9 Q3 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.

The objectives are broad-ranging enough and that there is not a specific need to introduce sub-objectives that would benefit authors and publishers.

Q10 Q4 What weighting (if any) should be given to each objective?

In order of weighting: points 1 and 3 then 2.

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

Q11 Q5 What are the problems (or advantages) with the way the Copyright Act categorises works?

We think the categories are fine.

Q12 Q6 Is it clear what 'skill, judgement and labour' means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?

We agree with the importance of an 'original' work, and improving clarity around 'skill, effort and judgement' would be an advantage in the age of AI, where bots are creating essentially junk books for sale on online platforms like Amazon.

Q13 Q7 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?

We support the Publishers Association of New Zealand (PANZ) submission which states: We support and refer you to the submission of the International Publishers Association on this question.

Q14 Q8 What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?

We support the PANZ submission which states: The default rules work. We support the commissioning rule as it stands.

Q15 Q9 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?

We support the PANZ submission which states: Computer-generated works have little practical relevance to book publishing today and, as a result, we do not see this as a significant issue.

Q16 Q10 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?

It is worth reviewing the work of Australia's Copyright Agency Viscopy around the work of visual artists, particularly for Indigenous artists, although we are not in a position to comment further as this question has little impact on our business.

Q17 Q11 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?

Publishers are continually reviewing the supply chain and investing in new technologies to ensure that work is available for purchase. Hachette has created ebooks of almost their entire backlist and we have a print on demand agreement to meet demand on very old titles. Also, it is worth noting online stores show the entire corpus available – so whereas a bookshop might hold 50k SKUs available for browsing, an online store will have millions for a browser. On being asked to revert rights, we always respond quickly.

Q18 Q12 What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?

Respondent skipped this question

Q19 Q13 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?

Respondent skipped this question

Q20 Q14 Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?

We support the PANZ submission which states: We note that introducing a fixed and reduced term may act as a disincentive for bequeaths and could even see works lost to New Zealand.

Q21 Any other comments on Rights: what does copyright protect and who gets the rights?

Hachette NZ believes that copyright is crucial to the continued success of our industry – publishers, authors, illustrators and booksellers – and to our continuing investment in creativity and innovation. As Hachette NZ relies on new product for 81% of its turnover each year, we are forced to reinvent ourselves continually. Publishers are by nature and necessity creative and innovative; strong copyright protection is essential to our continued prosperity and our continued ability to invest in that creativity and innovation.

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

Q22 Q15 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?

Exclusive rights should be maintained, and in fact there is a case for strengthening them (see below in point 24 on territorial copyright). Exclusive rights have been eroded in Canada in particular, with move to a US Style of Fair Use, instead of a range of sensible exceptions to Fair Dealing. As a result, in Canada, the government decided to no longer pay creators or producers for photocopying educational content in schools. This has decimated the Canadian Educational Publishing industry. In the US, Fair Use is ill defined, with creators having to revert to the courts to resolve perceived infringements. Most creators can ill afford such legal cases.

Q23 Q16 Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?

We would suggest a common-sense approach in terms of secondary liability provisions. For example, a library should not have to seek permission to read a picture book aloud for children's story time sessions.

Q24 Q17 What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?

With the rise of eBooks, levels of digital piracy have risen dramatically. Hachette employs an anti-piracy service, Markmonitor, to identify stolen or pirated eBooks and issue take down notices. In the main, the major online retailers are fairly compliant with these notices, and as a result are not the pain points and Markmonitor do not scan these stores. What is an ongoing and growing problem are pirate sites who are free sharing pirated, stolen or illegal editions. These sites can be very easily located by consumers through search engines and benefit from high traffic and therefore advertising revenues. Overseas registered websites that link to infringing material that is subsequently downloaded by an NZ consumer should be liable. That they are not is a weakness of the current system and we suggest that NZ mirrors the UK approach.

Q25 Any other comments on Rights: what actions does copyright reserve for copyright owners?

Respondent skipped this question

Page 7: Rights: Specific issues with the current rights

Q26 Q18 What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed? **Respondent skipped this question**

Q27 Q19 What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered? **Respondent skipped this question**

Q28 Q20 What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?

A digital copy of a work is the same as a paper photocopy of a work, it is the same content, just consumed slightly differently. We agree with using the term 'object' to remove confusion. What is needed is a reasonable legal definition of 'object' that clarifies that it encompasses all manifestations of the work and allows the creator and producer to be financially rewarded for consumption of the object, regardless of format.

Q29 Q21 Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain. **Respondent skipped this question**

Q30 Q22 What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?

This continues to be a grey area, and we do not tend to prosecute outside of plagiarism thanks to Fair Dealing rules. The introduction of US Fair Use would create even greater uncertainty in this area, with the copyrighted work of creators open to more exploitation for financial gain by others. Fair Dealing and common sense are sufficient and do not impede innovation or creativity, there is no need to move to a Fair Use model.

Q31 Q23 What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?

We have no experience of authors wishing to renounce their rights. It is certainly easier to work with copyright holders or their families to publish the best possible books. On a practical level, it is likely that a work that had been renounced, would be similar to a work where copyright has expired.

Q32 Q24 Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.

The Publishing Industry is run on exclusive rights, and New Zealand operating without territorial copyright is already out of step with the UK, US and Australia. In effect this means, there are no exclusive rights in New Zealand, and US publishers are free to dump unwanted or excess copies of New Zealand books into the New Zealand market. As a result, New Zealand authors may be at risk of substantially reduced income, and less incentive to create further. We invite the government to reconsider territorial copyright as the abolition to territorial copyright did not improve book pricing or availability. Simply put, the benefits of exclusive rights are substantial for creators and producers and the erosion of exclusive rights has led to substantially less investment in New Zealand works and a loss of jobs in the industry.

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

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

In 2013 in response to less favourable market conditions Hachette NZ restructured a workforce of 30 people down to 8 people with a subsequent 60% drop in the number of local titles being published. Similar shrinkage has been seen across all publishers in New Zealand.

Q33 Any other comments on Rights: specific issues with the current rights **Respondent skipped this question**

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

Q34 Q25 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?

Hachette New Zealand supports the current moral rights regime, as providing an appropriate degree of support, recognition and respect to authors. These rights were introduced precisely because other laws did not – and do not – sufficiently provide that support, recognition and respect.

Q35 Q26 What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects? **Respondent skipped this question**

Q36 Q27 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?

Hannah Gadsby recently used phone blocking technology to stop illicit recordings of her new stage show, *Douglas*, a follow up to her Netflix smash hit *Nanette*. Content posted on YouTube, legally or illicitly filmed, can increase subscribers and advertising revenue for the host. Only Hannah Gadsby should be able to benefit from her creation and performance. More clarity around these protections, adapted for the modern age where every phone is also a recording device, would be a good thing, particularly if this brings New Zealand in line with global standards. No problems per se with the CPTPP/WPPT changes but visual recordings and sound should be treated at parity.

Q37 Q28 What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?

TPMs, both Copy Controls and Access Controls are of the greatest importance to us in encouraging legitimate consumption of our content and ensuring publishers and authors are appropriately compensated. It is a concern that the definition of TPM in the Copyright Act does not encompass Access Controls and that this situation has not been remedied through TPP (see Paragraph 254). This is particularly important because much of our content is now consumed through cloud services that rely on Access Controls rather than downloaded files that are secured through Copy Controls. Remedying this so the provisions of Section 226A of the act apply equally to both Access Controls and Copy Controls would be a helpful additional measure.

The current Qualified Person exceptions are sensible though we would be supportive of adding accessibility organisations to this list of exceptions.

Q38 Q29 Is it clear what the TPMs regime allows and what it does not allow? Why/why not?

The TPM regime is clear.

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

Respondent skipped this question

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

Q40 Q30 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?

Hachette New Zealand submits that the introduction of a Fair Use provision would cause a great deal of business uncertainty; and that Fair Use inevitably would have a haphazard development, and transfer to the courts what should be an obligation on the Parliament to fine-tune the respective rights between users and copyright owners. Copyright's purpose is to 'protect the original expression of literary, musical and dramatic works, as well as their industrial form, such as books, sound recordings, films and broadcasts'. If adjustments to the 'copyright balance' are needed, then this should be done carefully and incrementally by Parliament, to ensure that copyright continues to support copyright owner innovation rather than innovation by free-riders.

Q41 Q31 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?

Existing Fair Dealing exceptions are fit for purpose.

Q42 Q32 What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?

Respondent skipped this question

Q43 Q33 What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?

Respondent skipped this question

Q44 Q34 What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?

Respondent skipped this question

Q45 Q35 What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?

Respondent skipped this question

Q46 Q36 What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?

While we support the lawful and reasonable use of cloud computing by consumers – for example, for backups – it is important that any potential copyright exception in this area respects existing TPM. It should not inadvertently open the door to a format shifting exception for literary works which does not currently exist, and that cloud platforms are held responsible for the use of their systems and take steps to prevent illegal filesharing.

We can cite a specific example of this going wrong in <https://www.theverge.com/2018/1/8/16862932/wikileaks-shares-pirated-trump-michael-wolff-fire-and-fury-tweet>.

Q47 Q37 Are there any other current or emerging technological processes we should be considering for the purposes of the review?

There is little value trying to anticipate future technological demand via the copyright legislation – the law should respond to such change iteratively and not try to anticipate everything, which can only lead to unnecessarily sweeping exceptions.

Q48 Q38 What problems (or benefits) are there with copying of works for non-expressive uses like data-mining. What changes, if any, should be considered?

Publishers are broadly supportive of text and data mining for non-commercial (ie research) uses. Any commercial use should be subject to permission/licence from the rightsholder. We also believe that the assumed economic benefits for TDM should be closely scrutinised as previous reviews of copyright such as the 2011 Hargreaves Review in the UK made sweeping assumptions of economic benefit which were challenged by the UK Publishers Association among others.

Q49 Q39 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?

Hachette would support an exception for parody and satire on the lines of the UK model, where fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work, but taking into account the need to balance such free expression against the need to seek permission where possible, to consider the nature of the work in question, and to avoid commercial harm to the original work.

Q50 Q40 What problems (or benefit) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?

Hachette do receive requests for quotation permissions, and nearly always grant these requests. The checking process ensures that large sections of a work are not used by others for profit.

Q51 Any other comments on Exceptions and Limitations: **Respondent skipped this question**
exceptions that facilitate particular desirable uses

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

Q52 Q41 Do you have any specific examples of where the uncertainty about the exceptions for libraries and archives has resulted in undesirable outcomes? Please be specific about the situation, why this caused a problem and who it caused a problem for.

'Orphaned works' are defined as works where it is difficult or impossible to track down copyright holders and causes an incredible amount of extra work for librarians. Australian publishers are working with Australian libraries to review the 'orphaned works' permissions process to simplify and improve greatly for librarians. We recommend a similar exercise in New Zealand.

Q53 Q42 Does the Copyright Act provide enough flexibility for libraries and archives to copy, archive and make available to the public digital content published over the internet? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?

We support the PANZ submission which states: The current exceptions allow the appropriate flexibility for libraries. Most publishers publish work in digital form themselves through making their content available in the ebook market and through digital licensing. It is unclear what role libraries could play in making available digital content of copyright works to the public over the internet. Such activities are already enabled by the commercial market.

Q54 Q43 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?

We believe that the Copyright Act provides sufficient flexibility to facilitate mass digitisation for archival reasons. Any move from archival digitisation to making content available to the general public needs to be weighed against the impact on commercial sales of the relevant work. In particular, the argument that holding a physical copy of a book should allow a library to digitise it and loan it digitally ("Controlled Digital Lending") is the subject of heated discussion in the US, the UK and elsewhere and any move in this direction should be based on carefully weighing any claims of economic benefits versus obvious harm to the author due to significantly reduced income.

Q55 Q44 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?

We are not aware of any practical issues arising from this area, and we would always seek to work constructively with libraries to facilitate this, and that we would not be opposed to this sort of constructive, non-commercial copying.

Q56 Q45 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? **Respondent skipped this question**

Q57 Q46 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?

We see no problem with public museums/galleries having access to this exception for non-commercial uses.

Q58 Any other comments on Exceptions and Limitations: exceptions for libraries and archives **Respondent skipped this question**

Page 11: Exceptions and limitations: Exceptions for education

Q59 Q47 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?

The 2012 changes to copyright law in Canada (excl Quebec) introduced US-style 'fair use' guidelines that have had a catastrophic impact on educational publishers and authors. A full report on the impact of the law changes can be found in the PricewaterhouseCoopers (PwC) report of June 2015 Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines.

In short, the Canadian changes have resulted in creators and innovators receiving much lower rewards for their work. This in turn has resulted in less investment in Canadian content and fewer Canadian titles being published for Canadian educators and students. Ultimately, the Canadian public lose out, with investment in new publications drying up, and with students being provided with out-of-date and sub-standard material (including material created for US students – a different culture and education system).

An analogy might be that furniture manufacturers are not required to supply desks free to schools just because they are for educational use, so it is not clear why intellectual property should not be similarly valued and paid for. The decimation of the Canadian educational publishing industry has resulted in this copyright change to be reviewed ahead of the next review cycle.

Q60 Q48 Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?

No, please see above.

Q61 Q49 Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?

No, please see above.

Q62 Q50 Is copyright well understood in the education sector? What problems does this create (if any)?

Yes, it is well understood. We support the PANZ submission on this point as Hachette New Zealand are a predominantly a trade as opposed to an educational publisher.

Q63 Any other comments on Exceptions and Limitations: exceptions for education **Respondent skipped this question**

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

Q64 Q51 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? **Respondent skipped this question**

Q65 Q52 What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered? **Respondent skipped this question**

Q66 Q53 What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered? **Respondent skipped this question**

Q67 Q54 What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered? **Respondent skipped this question**

Q68 Q55 What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered? **Respondent skipped this question**

Q69 Q56 Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs? **Respondent skipped this question**

Q70 Q57 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? **Respondent skipped this question**

Q71 Any other comments on Exceptions and limitations: exceptions relating to the use of particular categories of works **Respondent skipped this question**

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

Q72 Q58 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?

We support the PANZ submission which states: The creation of a market for digital content has required publishers, retailers, aggregators and others to develop significant innovations in the platforms that will enable consumers to access content on phones and ebook readers, through online databases and educational licenses, inside apps and digital workbooks. Such platforms sometimes restrict easy access to some copyright exceptions. For example, it might be difficult to copy 3% of an ebook from a Kindle in an educational setting. Institutions and individuals understand such restrictions when they acquire this content in this format. We think that the market in this area works well.

Page 14: Exceptions and limitations: Internet service provider liability

Q73 Q59 What are problems (or benefits) with the ISP definition? What changes, if any should be considered?

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

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

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

Q74 Q60 Are there any problems (or benefit) with the absence of an explicit exception for linking to copyright material and not having a safe harbour for providers of search tools (eg search engines)? What changes (if any) should be considered?

See response to Question 59 above.

Q75 Q61 Do the safe harbour provisions in the Copyright Act affect the commercial relationship between online platforms and copyright owners? Please be specific about who is, and how they are, affected.

See response to Question 59 above.

Q76 Q62 What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?

See response to Question 59 above.

Q77 Q63Is there a sufficient number and variety of CMOs in New Zealand? If not, which type of copyright works do you think would benefit from the formation of CMOs in New Zealand?

Copyright Licensing New Zealand works very effectively to license content.

Q78 Q64If you are a member of a CMO, have you experienced problems with the way they operate in New Zealand? Please give examples of any problems experienced.

Hachette NZ are a member of CLNZ and have not experienced any problems with the service they provide to both publishers and authors.

Q79 Q65If you are a user of copyright works, have you experienced problems trying to obtain a licence from a CMO? Please give examples of any problems experienced.

We support the PANZ submission which states: The Publishers Association of New Zealand is co-owner of Copyright Licensing New Zealand alongside the New Zealand Society of Authors. The role of publishers and authors in ownership and governance ensures that CLNZ efficiently and effectively acts in the interests of rights holders, offering educational licenses and returning most of the revenue from those licenses to rights-holders. CLNZ makes available on its website its distribution policy, disputes resolution procedure, and annual reports with full financial analysis. Such transparency has ensured the trust of publishers. Any questions by individual publishers have been handled effectively by CLNZ.

New Zealand legislation around CMOs is out of step with other jurisdictions. The UK only allows an educational institution to take advantage of the limited copying allowed under the educational exception of the Copyright Act if no license is available. If a license is available, then the expectation is that institutions will take up those licenses to engage in copying, thereby rewarding creators. Therefore, such educational institutions operating where a license is available do not require free access to an exception.

Publishers would look for the government to institute that same requirement in New Zealand copyright law. Such a change would also provide more certainty for the New Zealand schools environment. Right now, some schools take up a CLNZ license and some do not, leaving teachers and school trustees in unlicensed schools with limited access to content and vulnerable to allegations of copyright infringement. A clear choice—do not copy; or if you want to copy take up a license—would provide certainty for educators and incentives to creators.

Q80 Q66What are the problems (or advantages) with the way the Copyright Tribunal operates? Why do you think so few applications are being made to the Copyright Tribunal? What changes (if any) to the way the Copyright Tribunal regime should be considered?

We support the PANZ submission which states: The Copyright Tribunal should offer an efficient way for CMOs and their customers to resolve license issues that they have been unable to resolve by direct negotiation. The Tribunal as it stands is ineffective and inefficient in performing that role.

Q81 Q67Which CMOs offer an alternative dispute resolution service? How frequently are they used? What are the benefits (or disadvantages) with these services when compared to the Copyright Tribunal?

Respondent skipped this question

Q82 Q68 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.

Respondent skipped this question

Q83 Q69 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?

Respondent skipped this question

Q84 Q70 Do the transactions provisions of the Copyright Act support the development of new technologies like blockchain technology and other technologies that could provide new ways to disseminate and monetise copyright works? If not, in what way do the provisions hinder the development and use of new technologies?

We support the PANZ submission which states: We welcome technology that assists with clearly identifying attribution and rights associated with a work. However, this question should instead focus, as for any prospective new technology, on whether blockchain is fundamentally of value and well established, before jumping to whether the Act inhibits its use. Our understanding is that blockchain remains very aspirational and nascent in its application, with limited prospective use for literary works (most proponents associate its use with images). New Zealand publishers already contribute to a global and highly-efficient market in structured industry metadata and, as such, the benefits of blockchain appear limited, at this stage.

Q85 Q71 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.

Simply put no, and we would not impede the collection available of old works for library archives.

We support the PANZ submission which states: It is relatively uncommon to not be able to identify the copyright owner of a work. As such, we do not see this as a significant issue in respect of literary works in New Zealand. When producing a work, it can more commonly be an issue for images or individual contributions (such as for compilations or anthologies) when re-issuing a previously published title.

Issues for publishers in dealing with orphan works include: ensuring moral rights and attribution are upheld; that remuneration and the rights-holder's interests are provided for; and that clear remedies for infringement remain.

Q86 Q72 How do you or your organisation deal with orphan works (general approaches, specific policies etc.)? And can you describe the time and resources you routinely spend on identifying and contacting the copyright owners of orphan works?

See response to Question 71 above.

Q87 Q73 Has a copyright owner of an orphan work ever come forward to claim copyright after it had been used without authorisation? If so, what was the outcome?

See response to Question 71 above.

Q88 Q74 What were the problems or benefits of the system of using an overseas regime for orphan works?

See response to Question 71 above.

Q89 Q75 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? **Respondent skipped this question**

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

Page 16: Enforcement of Copyright

Q91 Q76 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?

As publishers, copyright is at the heart of everything we do, so it is not difficult for us to establish copyright.

Q92 Q77 What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?

The cost and time involved in taking legal action is prohibitive for many creators and producers.

Q93 Q78 Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?

We would support the general principle of CMOs being able to take legal action to enforce copyright in circumstances where the copyright holder is unable to do so, or where a CMO by virtue of its position stands a greater chance of success, but subject always to the informed consent of the rightsholder. For example, the Copyright Agency in Australia has recently taken legal action against the New South Wales government for lack of payment over several years for the photocopying of copyrighted material by New South Wales employees. Free is not fair, and we support the Copyright Agency in this legal action on behalf of our authors.

Q94 Q79 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?

We support the PANZ submission which states: Copyright enforcement is expensive because it requires paying for professional legal advice. Such enforcement actions are uncommon because the potential relief that will be awarded by the court is uncertain. It is unclear how to prove loss (how many copies of a book did we not sell because someone posted a free PDF on Facebook?). If it is not clear that such relief will even cover legal costs, then copyright owners are unlikely to enforce their rights.

Q95 Q80 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?

In our experience, no.

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

Given the parallel importation of books is allowed under New Zealand law, we see no value in any border protection measure to prevent the importation of infringing works. Even when an author, particularly a New Zealand author, grants Hachette New Zealand the right to publish their work in New Zealand, a US edition of the same work is not considered an infringing work. Parallel importation rules allow for overstocked UK, US or AU editions of New Zealand works to be dumped or remaindered into the market. A local author will earn nothing from these remainder sales and the risk to New Zealand publishers is increased, decreasing the incentive to invest in New Zealand authors and illustrators. As a result, we will strongly resist any request to pay such a bond.

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

Peer-to-peer file sharing is a major issue for publishers. It is hard to quantify the total scale and impact of the problem, but for Hachette New Zealand's parent company, which manages anti-piracy activity for its subsidiaries, over 310,000 cases of P2P file sharing were detected for the month of January 2019.

Q98 Q83Why do you think the infringing filing sharing regime is not being used to address copyright infringements that occur over peer-to-peer file sharing technologies?

There are issues around the transnational nature of file sharing, with many hosts and sharers located in jurisdictions with weak copyright enforcement regimes.

Q99 Q84What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing filing share regime (if any) should be considered? **Respondent skipped this question**

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

Again, the transnational nature of many infringements is problematic: for example, based on a recent live case, if an internet user in New Zealand downloads an infringing copy of a book from a website registered in Canada and hosted in Belize, which they discovered via a Google search, questions of responsibility, liability and response to action are problematic.

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

We support the PANZ submission which states: The amendments of 2008 and 2011 recognised ISPs as holding a basic responsibility to assist copyright owners enforce their rights. Since then, the evolution of ISPs into hosting and storing ever-greater amounts of content (as distinct from being mere conduits) has only increased the requirement that ISPs assist rights-holders. This change is recognised by new legislation in similar legal jurisdictions such as Australia, UK and Europe. However, legislation here continues to fail to provide ISPs with sufficient incentive to assist copyright owners in preventing file sharing; nor does it provide recourse for rights holders against ISPs for lack of action. The cost of taking action, under an enhanced regime, should acknowledge that (a) ISPs can benefit financially from hosting pirated content; and (b) it is reasonable to include such action within the costs of carrying out their business.

Q102 Q87 Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?

In the UK, if Hachette or other rights holders seek a Section 97A action to order ISPs to block a particular website, we may be liable for the ISPs costs, which is a disincentive to pursue this course. We would appreciate government support to ensure ISPs take action without creators or producers bearing the cost. Such a change would reduce the negative impact of file sharing sites on the creative industries.

Q103 Q88 Are there any problems with the types of criminal offences or the size of the penalties available under the Copyright Act? What changes (if any) should be considered?

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

Q104 Any other comments on Enforcement of copyright **Respondent skipped this question**

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

Q105 Q89 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? **Respondent skipped this question**

Q106 Q90 Have you experienced any problems when seeking protection for an industrial design, especially overseas? **Respondent skipped this question**

Q107 Q91 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? **Respondent skipped this question**

Q108 Q92 Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement? **Respondent skipped this question**

Q109 Any other comments on Other Issues: Relationship between copyright and registered design protection **Respondent skipped this question**

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

Q110 Q93 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.

Respondent skipped this question

Q111 Q94 Do you agree with the Waitangi Tribunal's use of the concepts 'taonga works' and 'taonga-derived works'? If not, why not?

Respondent skipped this question

Q112 Q95 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?

Respondent skipped this question

Q113 Q96 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?

Respondent skipped this question

Q114 Q97 How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?

Respondent skipped this question

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

Respondent skipped this question

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

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

Respondent skipped this question

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

Respondent skipped this question
