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Kia ora,

### **Submission in response to the Review of Copyright Act 1994 Issues Paper**

Thank you for the opportunity to respond to the Review of Copyright Act 1994 Issues Paper. In addition to the completed submission template some supplementary information is provided in-confidence that is not for proactive release.

Turning Knowledge into Value is at the heart of what the National Library does. Fit-for-purpose services, policies and legislation such as the Copyright Act are instrumental in our support for creators, providers and users of knowledge resources to use and create new knowledge and solve difficult problems for the benefit of New Zealanders.

The National Library believes that human rights are at the core of copyright policy, especially the human right of authors to the protection of the moral and material interests resulting from their creations, the right of everyone to enjoy their heritage, and the rights of Māori over their culture.

This submission provides detailed evidence in support of my view that the following changes to the copyright regime would provide clarity and certainty for users of knowledge without impinging on the protection of the rights of creators in copyright knowledge resources. These are:

- Facilitate online access by libraries and archives to orphan works and out-of-commerce works, including material under Crown Copyright;
- Permit copying for non-expressive uses such as data-mining;
- Provide indemnity for libraries and archives to collect and provide access to knowledge resources published on the internet;
- Update the copyright exceptions to allow the National Library and other cultural heritage institutions to effectively carry out digital preservation;
- Enable others to support the National Library in collecting, protecting, preserving and making accessible New Zealand's freely available digital documentary heritage;
- Align Crown Copyright as far as possible with the objectives of NZGOAL;
- Periodic review of copyright to respond to fast technological changes.

Thank you again for the opportunity to comment on the Issues Paper in support of achieving a copyright regime that will enable the National Library to fulfil its mandate to collect, preserve, and protect documents and make them accessible in a manner consistent with their status as documentary heritage and taonga.

I look forward to providing further input where there are future opportunities as part of the Review of Copyright Act 1994. I would be happy to answer any questions or to discuss this submission with you further.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Bill Macnaught', with a stylized flourish at the end.

**Bill Macnaught**  
**National Librarian**

# Submission template

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## Review of the Copyright Act 1994: Issues Paper

### Submission on review of the Copyright Act 1994: Issues Paper

#### Your name and organisation

<b>Name</b>	Bill Macnaught, National Librarian
<b>Organisation</b>	National Library, Department of Internal Affairs

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## Responses to Issues Paper questions

Note on submissions: The following submission is not legal advice and is not attributable to, nor does it reproduce, any legal advice that may have been requested, or given to, the National Library or the Department of Internal Affairs on these points.

### 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?

Yes. The five objectives discussed are appropriate for New Zealand's copyright regime. There is more needed, but the five objectives proposed are appropriate. They capture the dual purpose of copyright to support and reward the creation of works while also providing for reasonable access to those works to facilitate the free trade of ideas.

We do not think that the current copyright system is achieving objectives 2 and 3 as well as it could. We think objective 5 could be updated to better reflect the Crown/Māori partnership relationship.

#### **Need to Update Exceptions**

Regarding objective 2, fast technological changes require fast responses that align our copyright system with the needs of institutions that are enabling New Zealand creativity to flourish. As this submission shows, our copyright exceptions are not responding to the institutional needs of the National Library to fully achieve its purpose under section 7 of the National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003 (the "NL Act"). Collecting and using digital heritage requires the Library to constantly adopt new technologies and we need a copyright system that allows us to use those new technologies. The lack of a copyright regime that allows the Library to use the most up to date and technologically advanced systems for collection, protection and use arguably puts the National Library at a disadvantage to other nations' equivalent institutions, by limiting our capacity to collect and write our history. Similarly, New Zealand could be at a disadvantage in respect of our creative industries if certain technological means cannot be used to keep developing our cultural identity and creativity as a nation.

#### **Regime Uncertainty and Risk**

Objectives 2 and 3 are interconnected. The lack of appropriate exceptions and the lack of solutions for the orphan works problem leave the National Library and many other institutions with no alternative but to take decisions based on risk management, which is at odds with the objective of maintaining integrity and respect for the law. The addition of appropriate exceptions would reduce uncertainty, reduce transaction costs and can solve market failures such as those occurring in relation to orphan works. The National Library cannot fulfil its purpose to enrich the cultural and economic life of New Zealand and its interchanges with other nations without an effective and efficient copyright regime.

#### **Crown/Māori Relationships**

Especially in the context of WAI 262 we think that this objective can be amended to reflect the Crown/Māori partnership relationship space the Crown currently occupies. A narrow compliance focus does not capture this relationship adequately.

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?

### **Copyright and Heritage in the Digital Age**

The National Library proposes that an additional objective be added which recognises the interplay between copyright and heritage in the digital age.

Copyright works have an economic and a cultural value for society. Copyright works created by New Zealanders are part of the cultural heritage of the country and part of our national identity. One objective of the Copyright Act should be to promote the collection, access and use of copyright works as part of New Zealand's documentary heritage. Heritage related services and industries are a cornerstone of the creative and research sectors. With digital technologies there is an increasing intersection between copyright and documentary heritage.

In Europe this link has been recognised since the 1990s. In 1995 the Commission of the European Communities prepared a Paper on Copyright and Related Rights in the Information Society.<sup>1</sup> This paper addressed protection of copyright in three dimensions: cultural, economic and social. The cultural dimension emphasised the importance of cultural heritage. It sought to achieve a balance between protection of cultural heritage and intellectual property rules. The report acknowledged that within the information society use of heritage can lead to the production of creative content, new services, jobs and economic benefit to the European community. The importance of documentary heritage as part of copyright policy has become clearer with projects of mass digitisation, web archiving and the use of heritage collections for data mining and development of artificial intelligence. The recent Copyright Directive for a Digital Single Market (March 2019) emphasises that copyright protection "also contributes to the Union's objective of respecting and promoting cultural diversity while at the same time bringing European common cultural heritage to the fore". Aligned with this objective the Copyright Directive includes several provisions for the heritage sector. Nowadays some of the main functions of the National Library and other heritage institutions depend on copyright exceptions and other copyright provisions that regulate the collection, access, management, preservation and use of heritage. It is important that this relationship between heritage and copyright is acknowledged within the objectives.

### **Resilience to Future Technological Change**

We do not think it is possible to predict future technological change and therefore the Act should, as far as possible, be targeted to achieve the objectives listed, trusting that mechanisms other than copyright legislation will evolve and contribute to achieving these objectives as the environment continues to change.

For the heritage sector clarity and legal certainty are fundamental principles that copyright policy should pursue. Fast technological changes make more frequent periodic reviews of copyright legislation necessary. It would be a good policy to establish a review of the copyright regime every three or five years to consult for new exceptions. This kind of approach exists in the U.S. for exceptions to the circumvention of technological protection measures which are revised every three years (section 1201 of title 17, United States Code) and recently Colombia adopted a new law that will open consultation every three years to update copyright exceptions and limitations (Article 17, Law 1915, 2018).

3

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Should sub-objectives or different objectives for any parts of the Act be considered (e.g., for moral rights or performers' rights)? Please be specific in your answer.

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### **Exceptions for Heritage Institutions to Enable the Knowledge Economy**

Yes, in relation to copyright exceptions and solutions to the orphan works problem an important objective is to support the full potential of heritage and educational institutions to achieve their objectives of enabling and supporting the production of new creative content in New Zealand. This would recognize the importance of the heritage institutions for New Zealand moving towards a digital and knowledge economy.

4

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

#### **Human Rights and Constitutional Principles**

The ideal is a balance between the different objectives and between the different interests. The balance should also consider our fundamental and constitutional principles, including Crown/Māori relationship principles and the Treaty of Waitangi.

The Library wants to note that in the *Issues Paper* and other discussion documents there is no mention of human rights. Human rights must be the guiding principle in designing our copyright policy and weighing and balancing interests, especially the human right of authors to the protection of their interest in their creations, the right of everyone to enjoy their heritage and the cultural rights of indigenous peoples. Article 27 of the Universal Declaration of Human Rights is especially relevant to the discussion: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.

### **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?

#### **Anonymous Works**

The National Library must deal with a large number of works that are of unknown authorship, mainly newspaper articles, photographic works, and advertisements (often contained within other works). The library has found some provisions relating to anonymous works unclear, especially the ones relating to anonymous works in Section 22 and Section 67 of the Copyright Act. The Library suggests there is a need for more clarity about the category of anonymous works and when the copyright term for those works expires. It should be clear that copyright in published anonymous work expires 50 years after publication.

#### **Public Domain Works**

The Library suggests that the Copyright Act provide a definition of public domain or public domain works. The term ‘public domain’ is used constantly but there is no such concept in our copyright law, which creates confusion in the public dialogue about this.

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?

We consider that the application of “skill, effort and judgement” as a test to determine if a work is protected by copyright is unclear and can make copyright apply too widely.

#### **Undesired and Inconvenient Copyright Protection and Uncertainty**

One of the implications of the current test is that data and information that should not be protected by copyright can unintentionally be caught, or that because of uncertainty in identifying if a work is protected, the use of the work could be unnecessarily inhibited.

The Library suggests that further consideration of the role of creativity and/or originality in the test for copyright is required, especially in the digital age.

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?

	See our response to Question 6.
8	What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?
	<p><b>Commissioning Rule</b> The provision about ownership of works under commission works well, including the possibility for agreement to the contrary.</p>
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?
	<p><b>Reduce Complexity by Removing Ambiguity</b> In terms of changes, a huge enabler for information use would be to reduce the current complexity by removing some of the ambiguity. Some of the existing ambiguity arises in the current legislation because it refers to how rights relate to particular technologies – undiscussed technologies then become grey areas.</p> <p>Other ambiguities exist. In terms of computer-generated outputs, are they supplementary descriptions of existing works, or are they new works? This difference is open to interpretation, which can hinder our work. The issue here is that this isn't a black and white choice, it's a long continuum of scenario-specific greys, and picking a grey in the middle is arbitrary because the rights interpretation would then hinge on technically-specific scenarios. Without addressing this ambiguity, we leave room for a scenario where the dynamic generative outputs of logic are potentially new works, with new copyrights – taking this to an extreme, this could mean that an individual browser session is a separate copyrightable IP instance, with an unclear owner, or with multiple owners unaware of transference of rights using networked platforms. The challenge the future legislation will need to address is defining existing work or new works with respect to computer-generated works. A useful mechanism to support this would be to consider incentives for rights-holders to use machine-readable rights layers for describing digital objects, for example using the creative commons framework.</p> <p><b>The Need for Exceptions</b> In terms of AI, an AI implementation itself is a culmination of intellectual output applied in software logic and being able to copyright a specific AI should be considered, if there are exceptions in place. From a knowledge perspective the rights on outputs of that AI should allow at least non-commercial re-use to promote dissemination of the subject matter by students/researchers/academics/non-profits/public sector. Under the current legislation AI-driven or algorithmic outputs might be copyrightable, and not open to re-use or scrutiny, and that may not be in the public interest. The issue here is that there needs to be a balance between commercial benefit and non-commercial transparency because this is currently entirely lacking. We know that algorithms can have negative impacts on a computationally networked society and having no visibility into these is not in the public interest. There is a need to consider copyright exceptions for the scenario of understanding that logic. Commercial rightsholders should be able to assert rights over AI outputs, but those AI outputs should have no mechanisms in place that prevent non-commercial dissemination.</p>
10	<p>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?</p> <p>No response to this question</p>

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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?

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The National Library supports reversionary rights and termination of transfers of copyright when they are in the best interest of authors. However, the topic should be carefully thought through and discussed so that it does not affect rights acquired by the Library and other heritage institutions.

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

### **Crown Copyright and Orphan Works**

A key problem with Crown copyright is that many of the works are orphan works. The National Library's experience of trying to use Crown copyright material is that it is difficult and very often impossible to identify which Department or Crown Agency is currently the rights-holder. Even when we do think we have correctly identified the Department which owns copyright in a work they are often unsure and therefore unwilling to provide authorisation. Tracing ownership is even more problematic where material written by government departments may have been transferred to the private sector as part of privatisation, for example, the Ministry of Works and Opus.

An example of the complexity of Crown copyright is the Appendices of the Journals to the House of Representatives (A-Js). In 2012 the National Library received permission from the Office of the Clerk to digitise and make available post-1944 volumes under a CC-BY licence. In 2018 the Library was advised by the Office of the Clerk that the copyright situation about the A-Js was more complicated than previously thought. The Office of the Clerk noted that several items in the A-Js, including departmental annual reports, will be subject to Crown copyright, but that would remain in control of the relevant departments and not transfer to the Clerk. Other items within the A-Js would be owned by third parties, which could include government departments, but also individuals and non-government organisations. Under the current Act there is some material in the A-Js that has no copyright, such as reports of select committees laid before the House of Representatives. The Office of the Clerk questioned the extent to which copyright in the A-Js exists at all and advised that insofar as it did then it is held by the Office of the Clerk on behalf of the House of Representatives and is not Crown copyright. This situation leaves the Library either taking a risk-based approach to digitising and making this content available or securing permission from all departments, agencies, organisations and individuals involved.

### **One-Stop Crown Copyright Licensing**

A 2018 report from the Office of the Auditor-General recommended that "it would be helpful if one particular government agency were responsible for managing Crown copyright".<sup>2</sup> The National Library supports this recommendation.

### **Copyright Term**

The Library notes that the term of 100 years for Crown copyright does not align with the New Zealand Government Open Access and Licensing Framework (NZGOAL) and recommends that Crown copyright is re-thought to better support New Zealanders' use of public-funded content.

### **Copyright Exception for Heritage Institutions**

The National Library and other heritage institutions should be able by a copyright exception to digitise and make available Crown Copyright material or material that the institution reasonably believes is Crown Copyright.

### **Recovering Costs**

The National Library and other heritage institutions should be able to implement a business model to recover the costs of digitisation of Crown Copyright material. For example, a model of digitisation on demand or charging for high resolution digital copies.

13	<p>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?</p>
	<p>A key purpose of the National Library is to collect, preserve, protect and make accessible New Zealand’s documentary heritage<sup>3</sup>. Copyright protection longer than the minimum required by international treaties could undermine our statutory purpose. As the <i>Issues Paper</i> highlights, there is no evidence of advantages from a longer copyright term than the minimum required in New Zealand.</p>
14	<p>Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?</p>
	<p><b>Limited Protection Term</b></p> <p>The National Library like other heritage institutions collects, protects, preserves and provides access to a large amount of unpublished material. Much of this unpublished material is collected through agreements with donors who may not hold copyright to all the material in collections they are donating. Indefinite copyright protection may create difficulties, including among others, problems with orphan works if donors or their heirs or other copyright holders become difficult to locate. The limited copyright term that operates for published material should apply similarly to unpublished material; this is a long enough period to protect the interests of authors. However, agreements relating to unpublished material should be able to control access and use of the material for a longer period than the copyright protection term. These restrictions should not be related to copyright but to freedom of contract and other relevant areas of law that could apply. The convenience of an indefinite or perpetual restriction by agreement should be analysed outside the confines of this Act, balancing public and private interests.</p>

## Other comments

*[Insert response here]*

### Rights: What actions does copyright reserve for copyright owners?

15	<p>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?</p>
	<p>The National Library suggests that the wording of exclusive rights and other definitions should be expressed as closely as possible to the wording in international treaties. This will provide more certainty about their scope and meaning and will make interpretation easier for experts, citizens in general and for institutions like the National Library that have a mandate to work collaboratively with the international community.</p>
16	<p>Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?</p>

### Immunity/Indemnity

The National Library regularly harvests the whole of the .nz domain as part of its legal mandate to collect and preserve New Zealand documentary heritage. It is impossible in this process for the Library to identify and filter works that infringe copyright. It is likely that some infringing material is collected and may be made available. The Library removes any infringing material from public access on notice but cannot give an assurance that all material in the collection is non-infringing. It would be good if the law recognised the inherent risk as well as the value of large-scale collecting and gave the Library a safe harbour from unintentional infringement.

### Use of the Library's Premises and Facilities

The National Library makes available parts of its premises for public events and as such comes within the definition of "place of public entertainment" in s38. We note that 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.

17

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

### Safe Harbour

In common with other libraries, the National Library provides links on its website to others' content. These links are provided in good faith and any links to infringing content are unintended. Libraries do not provide links for the purpose of authorising infringement or with commercial intent. We recommend that the law protect cultural heritage institutions, including the National Library, from any legal risk in providing links.

## Other comments

*[Insert response here]*

## 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?

The National Library is mandated to collect, preserve, protect and make available New Zealand's documentary heritage. We are responsible for preserving this heritage in perpetuity. To do this effectively our legislative regime, and related regimes such as the Copyright Act, ideally need to permit us to communicate works which have been withdrawn from public access, having been previously communicated or made available.

19

What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?

	<p>The National Library recommends that the concept “communication works” and its definition in the Copyright Act should be rethought. As noted in our response to Question 15, terminology and definitions used in the Act should be expressed as closely as possible to the wording in international treaties. This will provide more certainty about their scope and meaning and will make interpretation easier for experts, citizens in general and for institutions like the National Library that have a legal mandate to work collaboratively with the international community.</p>
20	<p>What are the problems (or benefits) with using ‘object’ in the Copyright Act? What changes (if any) should be considered?</p>
	<p>The use of the word “object” could be understood by some people to suggest that copyright only applies to physical format copies of works. This is clearly not a desirable outcome.</p> <p>The National Library supports the suggestion that the term “object” should be replaced by language that removes any suggestion that some copies do not infringe copyright merely because of the form or medium in which they exist or the way they are accessed. This approach would be preferable to trying to define “object”, which could cause confusion with the use in the Act of “object” as a verb.</p> <p>It may be possible that only “copy” and “copies” are needed, as in the Act these have corresponding meanings to “copying”. We also suggest that the use of “material” in the definition of “copying” is not necessary and is open to misinterpretation in the same way as “object”.</p>
21	<p>Do you have any concerns about the implications of the Supreme Court’s decision in Dixon v R? Please explain.</p>
	<p>No response to this question</p>
22	<p>What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?</p>
	<p>No response to this question</p>
23	<p>What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?</p> <p><b>Freedom to Renounce Copyright and Public Domain</b></p> <p>Copyright holders should have the freedom to renounce copyright. Renouncing copyright could depend on some formalities and a register (some countries for example require that renouncing must be in written form). When a copyright holder renounces copyright the work should enter the public domain. The National Library, other cultural heritage institutions, and New Zealanders in general could benefit from using works in which authors have renounced their rights. During rights clearance processes some authors have shown no interest in having copyright. As part of a copyright and heritage policy we suggest the creation of a register of public domain works (see for example in Brazil: <a href="http://www.dominipublico.gov.br/">http://www.dominipublico.gov.br/</a>). A register would give certainty to users that the author or copyright holder have renounced their rights.</p>
24	<p>Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.</p>
	<p>No response to this question</p>

## Other comments

### 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?
	The National Library supports the current moral right framework and does not consider changes are required.
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 to this question
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?
	<p>With respect to live music recordings, the addition of a new layer of performers' rights (property rights) will further complicate an already complex area of rights management for heritage collecting institutions.</p> <p><b>Exceptions</b></p> <p>We presently receive occasional requests from members of the public for copies of unpublished live recordings held in the Archive of New Zealand Music, and provide advice about which authorisations are needed for us to supply copies. This usually involves different right-holders: songwriter/composer/lyricist; recordist; and performer(s). Where appropriate, we have sometimes taken a managed-risk approach if property rights are added to performers' rights. However, it is uncertain whether the Library would be able to be as flexible once the CPTPP changes come into effect. The process for members of the public requesting copies of recordings will possibly become inefficiently time-consuming trying to locate every performer involved in such live performances, imposing new high transaction costs, and, sometimes identifying and locating performers will be impossible. The Library suggests that copyright exceptions for cultural heritage institutions must be extended to non-infringement of performers' rights when copying for various legitimate reasons (see also Question 41).</p> <p><b>Orphan Works</b></p> <p>The new performers' rights will in effect increase complexity in clearing rights, and more creative content will become orphaned. We recommend that any new system set up to solve the orphan works problem includes a solution for performers' rights.</p> <p><b>Identifying Performers</b></p> <p>There are also potentially situations where it is unclear how the law will operate and how to identify performers – such as members of the public singing along to concert performances. Could they be understood to be “performers”?</p>
28	What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?
	The process for the exception for a librarian to circumvent a TPM is unnecessarily complicated and unclear and permits the librarian to do this only on behalf of a user wishing to exercise a permitted

act. We recommend that the exception be simplified and extended to all library collection management and administration activities.

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

It is clear that the TPMs protection does not prevent or restrict the exercise of a permitted act, and that the qualified person regime permits the librarian of a prescribed library such as the National Library to circumvent a TPM on behalf of a user wishing to exercise a permitted act. However, as noted above, the process which needs to happen for a librarian to circumvent a TPM is unclear.

## Other comments

*[Insert response here]*

### 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?

No response to this question

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 to this question

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 to this question

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 to this question

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

Some of the current definitions are method-specific. This is an ever-swiftly moving feast, meaning some regulation has a limited shelf-life and minimal applicability. A definition approach based on non-technical measures (e.g. caching timeframe), usage context, or principles should be considered.

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

See comment above – definitions should not be method-specific.

36

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

There are limited new issues with Cloud in terms of jurisdiction - these have been encountered in non-cloud environments.

Transparency issues are highly significant with Cloud because it is hard to understand exactly who owns the various parts of “the stack” and where and by whom data is created. This has implications for determination of relevant copyright jurisdiction and can create conflicts. Rather than talking about “Cloud” materials specifically, the legislation could address ownership ambiguities raised by opaque technologies using principles around the transference and transaction mechanisms.

37

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

Yes! However, as per 34/35 above, if these are defined in technically explicit ways, we risk having outdated legislation again very quickly. The obvious example for this is blockchain – certainly we might want to define automated mechanisms for verifying integrity or expressing origin, or expressing machine-readable rights layers, but don’t create legislation that hinges on a term for a specific example of one of those things, like “blockchain”. This will immediately mean the appearance of a “future not-blockchain-like replacement technology” will risk creating loopholes and inconsistency of regulation. A technically-explicit process approach to the review would leave us with legislation vulnerable to disruption, but a method/principle approach might create more robust legislation in the long term. What we should do with future legislation is to use our best efforts to define developing areas in terms of principles or use contexts. Some of these would include virtualisation in all its abstract forms (hypervisors, containerisation, emulators), microprocess/nanotech backdoors (physically-aided compromise), binary blobs (should we trust non-open firmware, we trust it’s understood that we shouldn’t), clustered AI/Meta-AI/General-purpose AI, quantum computing, algorithmic social influence or governance, and machine-readable rights layers.

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?

#### **Exception for Data-Mining and Text Analysis**

Text and data mining are becoming very important techniques not only for commercial purposes but also for academic research and creation of new knowledge in all fields. The National Library, other cultural heritage institutions, and research institutions and universities are increasingly facing the need to have legal certainty for carrying out text and data mining and for opening their collections to researchers who are using these techniques. We understand that there is an international trend for copyright legislation to provide exceptions to cultural heritage institutions for data mining. For example, the European Directive of Copyright in the Digital Single Market says that parties must establish an exception that should allow “reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access”.<sup>4</sup> The lack of that kind of exception in New Zealand would put us in a global competitive disadvantage for creating new knowledge and would impede using our digital heritage for the benefit of New Zealanders.

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?



The National Library supports the inclusion in the Act of an exception for these but recommends that this takes into consideration the right to dignity for individuals, moral rights and appropriate use of indigenous material. See the position of Professor Graeme Austin (<https://www.lawsociety.org.nz/news-and-communications/latest-news/news/a-copyright-exemption-for-parody-and-satire>)

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

The National Library has a mandated role to collect, preserve, protect and make accessible New Zealand's documentary heritage. It is a common international practice for leading heritage institutions to provide short extracts from their resources with the objective of promoting the richness of their collections and access to heritage. It would be helpful for New Zealanders and for us, to fulfil our role, if we could make short extracts (of sound recordings, audio-visual material, literary works, and all kind of works) available to users from our website. For works not already in digital format this would require making the necessary digital copies of entire works from which to provide the extract. The Library suggests that a new exception is required to allow cultural heritage institutions to reproduce copyright material and make extracts available for the purpose of promoting their collections. This would enable users to explore the rich documentary heritage of New Zealand from wherever they are, would encourage greater use of works, and could benefit copyright holders as it could lead to increased sales of works which are still commercially available.

## Other comments

*[Insert response here]*

## Exceptions and Limitations: Exceptions for libraries and archives

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.

### **Reasonable Proportion**

Librarians at the National Library find it difficult to know what is meant by copying a "reasonable proportion" (Section 51).

### **Amount and Substantiality**

Librarians at the National Library find it difficult to know what is meant by "amount and substantiality" (Section 43).

### **Same Subject Matter**

Librarians at the National Library find it difficult determining what can be copied from a periodical on the "same subject matter" when copying from a specialist magazine where all the content relates to the same subject area.

This uncertainty has made Library staff unnecessarily cautious about the copying they do for users and the advice they give users about copying. This has the effect of limiting what would be considered by the Act as legitimate copying by and for users and undermines the intent of the exceptions.

### **Retaining Interloan Copies**

The National Library often receives multiple requests for copies of articles in a short space of time,



particularly to support schools. In the last year 12 articles were requested 20 to 40 times and 8 articles more than 50 times. The need to make a new digital copy each time is inefficient and imposes unnecessary costs on the Library. We suggest that the Library should be able to retain digital copies created to fulfil interloan requests for the purpose of fulfilling later requests.

#### **Unconsented Recordings and Exception around Performers' Rights**

A person may make for "private and domestic use" a recording of a performance without a performer's consent (Section 171(1a)). The making of such recordings has been reasonably common since the use of portable recorders such as Walkman-style cassette recorders to mobile phones nowadays. Such recordings are now being recognised for their potential research and cultural value.<sup>5</sup> They therefore could fall under the mandate of the National Library to collect as part of the Turnbull Library's Archive of New Zealand Music. Audio-visual preservation best-practice is that digital copies be made to provide access to recordings on analogue media. However, if under the current law performers' rights would be infringed if we made such a copy, the lack of a suitable exception risks locking up these recordings until the rights expire 50 years after the year in which the performance took place.

The lack of a libraries and archives exception around performers' rights appears to be an oversight in the Copyright Act. It would be desirable to close this loophole and make it apply both to historic unconsented recordings and future ones. We believe such a change is important for the collection and preservation of New Zealand heritage, and the protection of performers' rights around further uses of unconsented recordings would be unaffected.

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?

#### **Donations of Web Archives**

Web archives are becoming a common source for researchers. It is also a normal practice that universities and researchers in general are building their own thematic web archives, doing their own web harvesting according to their topics and needs. These thematic web archives will become a very important source for future research, especially because they have been curated and they contain unique resources. It is highly possible that in the near future the National Library will receive offers to donate these kinds of resources. Many of them would be of special importance for the documentary heritage of New Zealand and the only way of preserving them in perpetuity would be to have them in our care. But a similar issue would arise as the one we described in Question 41 regarding unconsented recordings. The National Library suggests that, in accordance with our legal mandate of collecting and preserving in perpetuity the documentary heritage of New Zealand, an exception should allow us to receive this kind of material when it is of considerable importance for our history and heritage and preserve it even when there have not been rights clearances for the websites collected.

#### **More Institutions Require a Copyright Exception for Web Harvesting and Web Archiving.**

See our response to Question 45.

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?

No, the Copyright Act does not provide enough flexibility for libraries and archives to facilitate mass digitisation.

#### **Orphan Works and Out-of-commerce Works**

A significant proportion of the National Library's collections having greatest research value was created in the 20th century and is now out of print or remains unpublished. In many cases

publishers are no longer in business and information about authors is limited. In common with other libraries and heritage institutions the Library is experiencing a constantly growing demand for physical content to be converted to digital and made available online. The National Library sees an urgent need to find an efficient solution to support mass digitisation for libraries and archives and to enable access to out-of-commerce works and orphan works. This is extremely important for fulfilling our legal mandate using digital technologies and for our strategic direction of turning knowledge into value which contributes to fostering a knowledge economy in New Zealand.

We want to highlight that this is an international issue with different solutions according to the legal, economic and cultural contexts. While fair use has been used in the U.S. for some mass digitisation projects and the recent European Directive of Copyright in a Digital Single Market (March 2019) has adopted an extended collective licensing approach, the National Library believes that New Zealand can create our own solution based on a more pragmatic approach and fairly satisfy the interests of all stakeholders. For details about the Library's experiences and issues tracing rightsholders and other comments on the issue please see the responses to Question 72.

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?

While the Copyright Act provides some flexibility for libraries and archives for collection management there is a need for more flexibility and to update the exceptions, particularly for preservation. Section 34 of the NL Act provides some exceptions to the Copyright Act for copies of documents received by way of a legal deposit regime requirement under that Act. However, not all the items in the Library's collections have been received or collected under legal deposit, so some of our copying for preservation must take place under the Copyright Act.

#### **Problems for Preservation**

Section 55 of the Copyright Act does not adequately support preservation of works in library collections in the digital environment of the 21st century. A prescribed library can only make a physical format copy of a work in its own collection as per s55(1), if it "is not reasonably practicable to purchase a copy of the item in question to fulfil the purpose" s55(2). However, preservation is not about acquiring another copy, but rather about ensuring the long-term preservation of the work. Preservation will not be achieved by the National Library acquiring an additional copy or copies of, for example, printed newspapers, but by copying these into another format. Preservation for audio-visual materials is also only achieved by format migration<sup>6</sup> not by acquiring additional copies in the same at-risk formats (technological obsolescence).

Section 55(3) does allow for a library to make a digital copy of any item in its collection, but only where the original item "is at risk of loss, damage, or destruction". Waiting to make a copy until the original work is at risk of loss, damage or destruction may not be consistent with the Library's role in protecting New Zealand documentary heritage in perpetuity. Section 55(3) is also subject to the limitation of only being relevant where it is not reasonably practicable to purchase a copy. These conditions can mean the library does not make the best quality copy available for the collection because it is prevented from making a copy at the point of acquisition. Also, the condition that only a single copy can be made is out of step with best-practice digital preservation, which is for at least three copies to be made and stored in geographic locations with different disaster threat levels.<sup>7</sup> From a preservation perspective, more copies in various formats is safer, regardless of the current condition of the original: Lots of Copies Keep Stuff Safe - LOCKSS.

Section 55(3)(c) provides that copying will only occur once the original is only accessible to the public "for purposes of research the nature of which requires or may benefit from access to the original item". It has been the experience of many cultural heritage institutions that providing a digital copy of a work increases interest in seeing the original. So the legislation does not match the

reality or the demand.

In addition, as noted in our answer to Question 41, the current exceptions also fail to allow the Library to make preservation copies of unconsented live recordings, which could be of great cultural value for the nation.

#### **Updating an Exception for Preservation**

The National Library recommends that the Act is amended to allow the National Library and other libraries to effectively undertake preservation in the digital age. The reproduction for preservation should not be limited in number, medium or format, or dependent on the commercial availability of the item being copied. The copies should be allowed at any point in the life of the medium or format that carries the work (without any reference to the original being at risk of degradation). The National Library also recommends that the wording of s55(3)(c) be revised to ensure that adequate access to the original is available for a wide range of purposes. The Library has rules that ensure the protection of material at risk of damage or degradation.

#### **Copying for the Collections of Other Libraries**

The National Library wants to highlight that section 54 (copying for the collections of other libraries) is restricted to books. This limitation to books is outdated taking into consideration our current information environment with a large number of media and formats. Libraries try to acquire many types of works other than books only to find that they are no longer commercially available. This is restricting New Zealanders, mainly those far away from the main libraries of the country, from having access to valuable informational resources. The National Library recommends that this exception be extended to any copyright work commercially unavailable, regardless of its format.

#### **Using Cover Images**

In common with other libraries, the National Library uses cover images to promote publications. Cover images are often freely provided by publishers when they supply copies of publications under legal deposit. The National Library recommends that an exception be added which permits cover images to be used for non-commercial purposes by prescribed libraries.

45

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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?

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The current provisions are limited in their scope for the needs of collecting New Zealand digital heritage in two ways.

#### **Broader Scope for Collecting New Zealand Digital Heritage**

First, the criteria in the NL Act to qualify a work for collection under the legal deposit regime is based (amongst other things) on printing or production in NZ, or commissioning of printing or production outside NZ by a person who is resident in NZ or whose principal place of business is in NZ (Section 29). While a considerable amount of material related to New Zealand fits within these criteria, much is left out. In addition, it can be hard to work out where Internet material was “produced”, nor is the answer necessarily consistent with the policy of the NL Act. In these situations, web curators will be required to ask for authorisation for every page to be collected (as opposed to simply copying the material under the relevant legal deposit category), which is highly inefficient and expensive, and often copyright holders do not reply to requests. This feedback relates to the NL Act, but provides a highly relevant context for consideration of the library exemptions in the Copyright Act.

#### **More Institutions Require a Copyright Exception for Web Harvesting and Web Archiving**

Secondly, at present only the National Librarian, under the relevant legal deposit requirement (National Library Requirement (Electronic Documents) Notice 2006 (“Electronic Documents Requirement”), is permitted to copy and make available content published online. However, the

technologies for web archiving are increasingly easily available to different archives, libraries, universities and heritage institutions, and web material is considered a very important source for historians and researchers in the digital humanities. We understand that U.S. universities, libraries and other institutions are using fair use exceptions for creating web archives; we consider that the equivalent provisions in New Zealand only allow the National Library to do web archiving. This restricts our capacity to collect historical web sources. Principle 3 of the National Library's Collections Policy notes the need for the Library to collaborate and co-ordinate collection-related activities across institutional boundaries. Every day a vast amount of material which forms part of New Zealand's documentary heritage is created and made available online. The National Library wishes and needs to work with other New Zealand institutions, iwi and communities to ensure that a rich and representative collection of New Zealand's digital documentary heritage is collected and preserved for New Zealanders now and in the future. It may be more appropriate to collect and manage some material locally. The National Library would be interested in exploring how this could be achieved while respecting the rights of creators.

#### **Accessibility of New Zealand Web Archive**

The National Library only makes information it has collected from the Internet under the Electronic Documents Requirement available for access and use on the Internet (i.e.: on a National Library operated site) where that material *is* made publicly available on the Internet by its publisher without restriction on its access or use by members of the public. (Section 34, NL Act). There is no evidence of that practice affecting copyright holders. The Library should continue to be able to make such Internet material collected available without restriction. There is no need to alter this position in the current Copyright Act review, but it is important to understand the interaction between these Acts when considering the review.

#### **Use of the New Zealand Web Archive**

A copyright exception should allow academic researchers to use text analysis and data mining tools on the web archive collections.

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?

#### **Cultural Heritage Institutions**

The National Library works closely and collaboratively with archives, museums and galleries, as our mission and functions are similar. This is specially the case with digital technologies where collaborative work between institutions is important and creates efficiencies. The National Library suggests that the Copyright Act creates a category called "Cultural Heritage Institutions" or similar as beneficiaries of the relevant exceptions, and that the Act includes within that category archives, libraries, museums, public sector broadcasting organisations, and galleries that are not-for-profit.

## **Other comments**

*[Insert response here]*

## **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?

	No response to this question
48	Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	No response to this question
49	Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	<p><b>The National Library as an Educational Establishment</b></p> <p>The meaning of educational establishment in the Copyright Act is too narrow. It does not take into account the educational realities of the 21<sup>st</sup> century where many institutions provide educational services as part of their principal services. The National Library staff design and deliver in person and remotely lessons for students, and provide professional learning and support for library staff and teachers (main topics are: school library services, reading engagement and digital literacy, see also our answer to Question 50 regarding these topics and copyright). These educational resources and programmes are delivered as integrated components in formal educational programmes and in support of informal education for all New Zealanders. The National Library plays an important role in the educational information system, supporting learning environments rich in quality and relevant local content. Changes to the definition for educational establishments should be considered to include these teaching, learning and educational practices within the education exceptions.</p>
50	Is copyright well understood in the education sector? What problems does this create (if any)?
	<p>The experience of the National Library is that there is a lot of confusion about copyright in the compulsory education sector.</p> <p>The lack of clarity and certainty regarding education exceptions has the effect of inhibiting students and teachers from taking full advantage of digital technologies for research and educational purposes. This in turn contributes to a perception that copyright compliance is administratively burdensome and expensive in an environment where affordable copying and communicating technologies such as mobile phones and tablets are common and school budgets for library resources are tight.</p> <p>The National Library believes that copyright is an important part of information literacy in the 21<sup>st</sup> century. Misunderstandings about copyright in the compulsory education sector can contribute to noncompliant behaviour by students and teachers, or conversely overly cautious behaviour that unnecessarily restricts use of knowledge resources. There is an opportunity to clarify copyright for educational establishments so that it is taught as an essential part of practising ethical and legal information use as a fundamental skill for digitally literate citizens. A survey of school libraries<sup>8</sup> (citation) found that for 76% of respondents the school library was the central hub for managing and enabling access to resources and that 32% would like to provide teaching and promotion of digital literacy and citizenship (which would include ethical and lawful use of information).</p>

## Other comments

*[Insert response here]*



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

51	<p>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?</p>
	<p>No response to this question</p>
52	<p>What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?</p>
	<p>No response to this question</p>
53	<p>What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?</p>
	<p>No response to this question</p>
54	<p>What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?</p>
	<p>No response to this question</p>
55	<p>What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?</p>
	<p>No response to this question</p>
56	<p>Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programmes?</p>
	<p>The term “programmes” creates some ambiguity because not all logic is a programme; it can instead be a stateful system or an output with a processing capability (e.g. a neural net). We would suggest using the broader term electronic logic, of which programmes are a subset.</p> <p>An exception might be required for emerging forms of electronic logic, providing that logic that influences social interaction be open to non-commercial use (study/personal use/academic use/public sector/non-profit use) without a copyright checkpoint. The principle here is that something that modulates human interaction is modulating something with more than material value, and copyright should not prevent the dissemination of its capability or mechanisms, in order that people might recognise its impact or influence on their choices.</p> <p>We could consider the viability of separating copyright in electronic logic from user-generated content delivered by electronic logic.</p>
57	<p>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?</p>
	<p>No response to this question</p>



## Other comments

[Insert response here]

### 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?

#### **Subscriptions Overriding Exceptions for Interloan and Other Permitted Acts**

The National Library, like many other libraries in New Zealand, enters into licence agreements to access and use electronic resources governed by terms and conditions that prohibit acts not permitted by the exceptions for prescribed libraries in Part 3 of the Copyright Act, or the exemptions for material collected under the legal deposit regime. Common prohibitions in such licences preclude the supply of copies of articles 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. This creates serious difficulties for researchers and prevents reasonable access to works for many New Zealanders.

#### **Unenforceable Agreements**

The National Library recommends that New Zealand's copyright law should be amended to clearly state that terms of the licence agreements are unenforceable in New Zealand in the context of library access, use and copying for collections (or other permissible library functions) when they prevent or restrict libraries and users in the exercise of permitted acts under New Zealand law. We want to highlight the recent regulation in the UK that could be an example for New Zealand, which is solving this problem for libraries in relation to interloan, replacement copies of works (preservation), and copies of published works stating that: *"To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable"*.<sup>9</sup> It is worth noting that this does not prevent licensors taking action against the Library (Crown) in respect of licence breaches where the terms are governed by the laws of a different jurisdiction, and such actions can be heard in a different jurisdiction. This is an unavoidable reality in the world of global licensing and maybe MBIE would like to consider this issue in more depth in the review.

### Exceptions and Limitations: Internet service provider liability

59

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

#### **Safe Harbour**

The current definition of ISP in the Copyright Act is too broad. To fulfil its purpose, the National Library must provide some services that arguably mean it is an ISP for the purposes of the definition. This categorisation does not feel appropriate and exposes the Library to extra risk. The Copyright Act should expressly exclude from the definition of ISP institutions like the National Library or create a clear safe harbour for its services that come under the definition of a ISP.



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?
	No response to this question
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 to this question
62	What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?
	No response to this question

## 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?
	<p>The Library considers that a Māori copyright management organisation could be a good mechanism for licensing Māori works, translations and dissemination of Māori works. A good example of an indigenous CMO is Sámikopiija, created in 1992 representing Sámi rightsholders in Norway, Sweden, Finland and Russia. Different associations are part of this CMO: the Sámi Artists Association, Sámi Book and Newspaper Association, and the Sámi Non-fiction Writers and Translators Association. Among its main objectives this CMO collects information and proposes measures to promote the interests of Sami rightsholders, negotiates and enters into agreements on their behalf, and manages and distributes royalties and compensation for reprographic reproduction and other types of secondary uses of copyrighted works.</p> <p>A Māori CMO could also represent Māori living abroad, helping to disseminate their creative output back in New Zealand (more than 140,000 people with Māori ancestry live in Australia, see Future Demographic Trends for Māori, Te Puni Kōkiri, 2017). As in Norway, promoting the creation of CMOs representing indigenous copyright holders is part of a copyright and of a heritage policy. A Māori CMO would promote economic management and control by Māori of their copyrighted works.</p>
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 to this question
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 to this question

66	<p>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?</p>
	<p>No response to this question</p>
67	<p>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?</p>
	<p>No response to this question</p>
68	<p>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.</p>
	<p>No response to this question</p>
69	<p>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?</p>
	<p>No response to this question</p>
70	<p>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?</p>
	<p>The provisions don't exclude new technologies in principle. Hindrances are more likely to occur in relation to new business models that spring up around the use of new technologies, not directly through the action of new technologies. A good litmus test for future legislation is that the technology used should be transparent to the transaction/transference model.</p>
71	<p>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.</p>
	<p>Please refer to our response to Question 72.</p>
72	<p>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?</p>
	<p><b>Risk Management</b></p> <p>The orphan works problem is a huge obstacle for the National Library in fulfilling its purpose to provide access to documentary heritage and to take advantage of the digital technologies for the benefit of New Zealanders. The current Copyright Act does not establish an Orphan Work category or provisions relating to works where the copyright holder is unknown or cannot be located. As a consequence, the Library must take a risk-based approach for dealing with these kinds of works.</p> <p>We have not created a specific policy for how to deal with these items, as we are aware that we are operating in a vacuum. This situation is making it difficult to proceed with mass digitisation of in-copyright works (most of the 20<sup>th</sup>-century publications which are really important for researchers). When applying our risk-based approach we consider a number of things, including copyright determination, reasonable search and risk assessment.</p>

**Copyright Determination:** This assessment is used to determine the copyright status of the publication being considered for digitisation to evaluate if the work still under copyright or whether copyright has expired. Copyright determination is not a straightforward process. An exhaustive copyright determination must also assess any works within the overall work, which requires a considerable amount of resources (time to identify inserts and time for researching). For pragmatic reasons when working with serial publications sometimes only a sample may be evaluated. Lack of information about authorship and copyright holders makes the copyright status of large numbers of works created in the 20th century uncertain.

**Reasonable Search:** The Library searches for copyright information in different sources depending on the kind of publication to be digitised. Some of these sources are:

- Google searches, social media platforms, White Pages,
- Electoral rolls, the New Zealand Gazette,
- Library catalogues and indexes,
- The Births, Deaths and Marriages Register
- The Companies Office Register
- Probates and online cemetery records
- Professional bodies such as the New Zealand Writers Guild, the Publishers Association of New Zealand
- Collective management organizations such as Copyright Licensing New Zealand
- Archives, including church archives.

**Risk Assessment:** A process to determine the risk profile for the Library in going ahead with digitization.

**Certainty:** We note that increasingly the heritage sector in New Zealand and internationally is calling for a more risk-active approach due to the lack of appropriate legislative measures for solving the needs of the sector. However, we consider that the best policy is that legislation provides certainty to the heritage sector for dealing with orphan works, rather than work-arounds being put in place that cost resource and serve no one.

### **Broadsheet**

The example of *Broadsheet* demonstrates the difficulties, high costs and usually unsuccessful results of dealing with orphan works. The New Zealand feminist magazine *Broadsheet* was published between 1972 and 1997 as 214 issues. The National Library wanted to digitise and make available this publication as it is an important publication for the contemporary history of New Zealand, and many individuals, organisations and institutions had shown interest in it. There were more than 1600 authors that contributed to *Broadsheet* and they retained copyright over their works.

During 2016 and 2017 the National Library contacted authors and got authorisations. Locating and contacting each author takes from 1-5 hours, with many of the authors finally not locatable. The Library decided to abandon this digitisation project due to the high costs of identifying, locating and contacting authors. It was clear that we would not be able to clear all the rights and we were concerned about the risks of proceeding without full clearance.

Since then another organisation has digitised and made the publication available.

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?

Not to our knowledge.

It is important also to note that during the reasonable search for various publications we have found publishers, and hundreds of authors and copyright holders, and they have not requested royalties for their authorisations. They have signed licences and been excited that their works would be digitised and made available online as part of New Zealand heritage.

74

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

#### **Overseas Regimes to Orphan Works Not a Solution**

The National Library has studied overseas regimes for orphan works but we do not consider they are applicable for application in New Zealand. They do not present desirable solutions for our specific New Zealand context, and do not meet the needs of mass digitisation projects by heritage institutions such as the National Library. There is also recent evidence from international experience that these regimes have failed to solve the needs of the heritage sector.

The orphan works problem is an economic problem and therefore any solution should also be an economic and pragmatic one.

The diligent search approach adopted in Europe has been an unworkable solution for mass digitisation. The costs of a diligent or reasonable search are extremely high and inefficient from an economic perspective. On the other hand, extended collective licensing is also not a desirable solution as a private organisation will be collecting royalties for uses that experience shows us authors and copyright holders will often not charge for. In addition, it is very difficult to pay royalties into the hands of the authors of the orphan works.

#### **Need for a Local and Pragmatic Solution**

The National Library thinks that a local solution for our context would be better than looking overseas. The system of compensatory payments established in the Television New Zealand Amendment Act 2011 (Part 4A) could be a workable model that with some changes could be a feasible solution for the heritage sector in New Zealand and respond also to the interests of authors.

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 to this question

## **Other comments**

*[Insert response here]*

## 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 to this question
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?
	No response to this question
78	Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?
	No response to this question
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 to this question
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 to this question
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 there any issues with the border protection measures that should be addressed? Please describe these issues and their impact.
	No response to this question
82	Are peer-to-peer file sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?
	No response to this question
83	Why do you think the infringing file sharing regime is not being used to address copyright infringements that occur over peer-to-peer file sharing technologies?
	No response to this question
84	What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing file sharing regime (if any) should be considered?
	No response to this question
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 to this question
86	Should ISPs be required to assist copyright owners enforce their rights? Why / why not?
	No response to this question
87	Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?
	No response to this question
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 to this question

## Other comments

*[Insert response here]*

### 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 to this question
90	Have you experienced any problems when seeking protection for an industrial design, especially overseas?
	No response to this question
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 to this question
92	Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?
	No response to this question

## Other comments

*[Insert response here]*

## Other issues: Copyright and the Wai 262 inquiry

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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.

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As far as it goes, the *Issues Paper* characterises the Waitangi Tribunal’s analysis of the problems with the current protections provided for taonga works and mātauranga Māori. However, the discussion in *Ko Aotearoa Tēnei* relating to how mātauranga Māori agencies such as the National Library should make mātauranga Māori available, isn’t referenced. [ref chapter 6] This discussion is important because it argues that where collections are made available (for example through digitisation), communities who have a whakapapa relationship with our collections have an opportunity to establish a kaitiaki relationship with their taonga.

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94

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

The definitions distinguishing the two concepts appears to be problematic, for example, who is to say categorically that a newly or recently created work does not “invoke ancestors, or have a living kaitiaki or mauri”? What is the situation where a taonga doesn’t have kaitiaki? The relationship may not be known, or may become known later. These taonga may still have mauri, but do they fall out of the definition of Taonga Works if they don’t have a kaitiaki?

What about items not created by Māori, but which feature Māori ancestors? For example, photographs of unidentified Māori and portraits of Māori by non-Māori. Do these relate to or invoke ancestral connections, thus bringing them within the scope of the definition of Taonga Works?

Currently the Alexander Turnbull Library and National Library follow their own guidelines and policies relating to such works, particularly ‘Te Mauri o Te Mātauranga: Purihia, Tiakina! Principles for the Care and Preservation of Māori Materials’ copied below. This covers areas of Guardianship/Kaitiakitanga; Te Mahi Tahitanga/Relationships; Attribution and Staff Cultural Development.

### **Te Mauri o Te Mātauranga: Purihia, Tiakina!**

#### **Principles for the Care and Preservation of Māori Materials**

Background: These four principles give effect to the National Library's commitment to the Treaty of Waitangi and represent operational “best practice” in terms of managing cultural property.

The principles are also used to inform operational policies relating to all aspects of collection management, access and use, including non-Māori materials.

Te Mauri o te Mātauranga: Purihia, Tiakina! The spirit of knowledge: protect it and take care of it!

#### **Kaitiakitanga**

He kaitiaki a Te Puna Mātauranga o Aotearoa nō ētahi o ngā taonga-ā-tuhi, ā-whakaahua hoki, o Aotearoa. E toru ngā huarahi i riro mai ai ēnei taonga; ko te hoko mai tēnā, ko te hōmai tēnā, ā, ko te waiho mai anō hoki tēnā. Tēnei Te Puna Mātauranga te kī atu nei, āe, he mauri ō ēnei taonga, arā he wairua ora e hono ana i te taonga ki te iwi nāna te taonga i waihanga. He mea whakatō te mauri ki roto i te taonga i te wā o te waihangatanga. Kei te ora tonu te mauri, kei te hono tonu i ngā tīpuna ki ngā iwi hapū.

E noho whakarara ana tēnei kaupapa, arā te kaitiakitanga, ki ngā ture me ngā tikanga mana whakairo hinengaro. Āta whakaae ana ngā kaitiaki ki ngā takohanga o te tiaki me te tohu i ngā taonga, me te pupuri i te āhuetanga kotahi o te taonga me tōna mana, mō ngā rā kei te heke mai, mō nāianei, ā, mō ngā rā kua hori.

#### **Guardianship**

The National Library is a guardian of New Zealand's documentary heritage, of taonga or treasures, which have been collected through purchase, donation or deposit. The Library acknowledges that taonga have mauri, a living spirit, that connects a physical object to the kinship group involved in its creation. The mauri is instilled in an item on its creation. It remains an active part of it and links tīpuna or ancestors to descent groups.

This concept of guardianship is held parallel to, and in addition to, conventional legislation and intellectual property systems. Guardians take on the responsibility to protect and preserve the physical objects as well as their integrity and significance for future, present and past generations.

#### **Te Mahi Tahitanga**

E hiahia ana a Te Puna Mātauranga o Aotearoa ki te mahi tahi ki ngā whānau, ki ngā iwi hapū e whai wāhi ana ki ngā taonga kei Te Puna Mātauranga e puritia ana. Ka noho ēnei mahinga ngātahitanga hei kaupapa whakatau i ngā whiriwhiringa katoa e pā ana ki ngā āhuetanga katoa o te whakahaere i ēnei taonga, tae atu ki ngā mahi tohu, ki ngā whakaaturanga, ki ngā mahi whakaatu anō hoki i ngā kōrero mō te kaituhi. Ka mana tonu tēnei tikanga mehemea nā Te Puna Mātauranga



o Aotearoa te taonga, ko ia rānei te kaitiaki o te taonga, ki tā te ture titiro, kāhore kē rānei.

### **Relationships**

The National Library seeks collaborative relationships with families and descent groups connected to taonga in its collections. These relationships are drawn on to make decisions about all aspects of the management of these items, including conservation, exhibition and attribution regardless of whether the Library is legally the owner or guardian of the item in the collection.

### **Te Whakaatu i Ngā Kōrero mō te Kaituhi**

Tēnā ka rangahaua, ka tuhia iho ngā kōrero, ki ōna taumata e taea ana, mō te kaituhi me tōna ao, me te whakamihi atu ki te mauri o te taonga me ngā iwi hapū e whai wāhi atu ana ki te taonga.

Inā whakatakoto a Te Puna Mātauranga o Aotearoa i ētahi kirimana whakamahi i ngā taonga, me mātua whakauru atu ngā kupu whakamihi e tika ana, me nga kōrero anō hoki mō te kaituhi. Mehemea kāhore i te mōhiotia ēnei kōrero, ka tuhia kētia tētahi kōrero mō te hiahia o Te Puna Mātauranga o Aotearoa ki te whai atu i ēnei kōrero kia mau i a ia. Inā whakaaetia ana te whakarerekē i tētahi taonga, i ētahi taonga rānei hei kaupapa mō tētahi mahi hou, e kī ana a Te Puna Mātauranga o Aotearoa me āta whakamihi mai ki te taonga, te pūtaketanga mai o te mahi hou nei.

### **Attribution**

Contextual information and descriptive attributions, which acknowledge the mauri of taonga and their connections to iwi and hapu will be explored and recorded as fully as possible.

When the National Library makes agreements about the use of taonga, it will require appropriate acknowledgement and attribution of taonga. Where such information is not available the Library's commitment and desire to increase knowledge about taonga will be stated. When agreement is given for works to be modified or incorporated into the development of a new work, the Library will require appropriate acknowledgement of source material.

### **Te Whakapakari i ngā Kaimahi**

E āwhinatia ai ngā kaimahi e noho takohanga ana ki ngā mahi tohu me ngā tikanga o te mana whakairo hinengaro, me whai wāhi atu rātau ki nga kaumātua, ki ngā kaimahi Māori rānei, e āhei ana ki te whakatakoto huarahi atu ki ngā iwi hapū.

Ehara hoki i te mea ka noho te kōrerotanga ki ngā kaimahi Māori hei whakakapi mō te mahi ngātahitanga ki ngā iwi hapū.

Ka whakaarohia, ka kōkiritia ētahi mahi whakangungu kaimahi, hei whakahōhono i te mōhio a nga kaimahi o te whare pukapuka ki nga tikanga hāpori a ngā iwi o te motu.

### **Cultural development**

Staff, particularly those with responsibilities for decision making in the areas of conservation and intellectual property, will have access to kaumātua and or Māori staff with the ability to promote effective relationships with iwi and hapu.

Consultation with Māori staff shall not be an acceptable substitute for the development of collaborative relationships with iwi and hapu.

Professional development opportunities, aimed at deepening the cultural understanding of Library staff, will be developed and maintained.

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?

The aspects of the copyright regime that do not address the concerns of the Wai 262 claimants (ref pars 568-569) quoted in the *Issues Paper*, summarise this. The time-bound nature of copyright clashes with the concept of descendants having an ongoing, inter-generational responsibility to protect taonga. Library staff attended a workshop organised by MBIE on 26 March 2019 to discuss taonga works and copyright. At this workshop Ema Hao'uli summarised various mechanisms of protection for cultural property:

- Legal IP system as adopted from international models (e.g. Copyright laws)
- Defensive protection (e.g. Māori advisory committees, as implemented for the trademarks and patents applications in New Zealand)
- Positive protection (e.g. A taonga works regime). This could include a taonga and kaitiaki register and the creation of an expert commission along the lines of that recommended in Chapter 1 of 'Ko Aotearoa Tēnei'.

Lynell Tuffery-Huria suggested that a new structure is required which would empower whānau, hapū and iwi to have control. We agree that while it may be possible to add defensive protection measures to the existing copyright regime (e.g., creating a Māori advisory committee), the creation of a taonga works regime is also important, because of the inherent limitations in the protection for cultural property which is possible via copyright. It would make sense for the bureaucracy to be an enabler of Māori aspirations.

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, in the absence of a Crown response to Ko Aotearoa Tēnei, this would recognise the Tribunal's argument that copyright and protection of mātauranga Maori need to be considered separately.

It would be good to have a register of traditional owners, perhaps along the lines of the Tribunal's recommendations for a register of kaitiaki and their mātauranga Māori or taonga works. This could be maintained by an expert commission on taonga works, taonga-derived works and mātauranga Māori, as mentioned in par. 572 of the *Issues Paper*.

97

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

Engagement should take into account the findings of the Ngā Taonga Tuku Iho conference held in Nelson (see Te Taihū Ngā Taonga Tuku Iho Communiqué presented to Minister Nanaia Mahuta in March 2019). For example, the importance of whakapapa as a guiding principle for determining who has an interest in taonga.

## References

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<sup>1</sup> European Commission Green Paper on Copyright and Related Rights in the Information Society COM/95/382, 1995.

<sup>2</sup> Office of the Auditor-General. (2018). *Digital access to information services: learning from examples*. Retrieved from <https://www.oag.govt.nz/2018/digital-access/docs/digital-access.pdf>

<sup>3</sup> National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003, s7a.

<sup>4</sup> (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)) Directive on Copyright in the Digital Single Market, art.

<sup>5</sup> For instance, see Alan Galey, 'Looking for a Place to Happen: Collective Memory, Digital Archiving, and the Tragically Hip', *Archivaria: The Journal of the Association of Canadian Archivists* 86 (2018). URL: <https://archivaria.ca/index.php/archivaria/article/view/13642/15043>.

<sup>6</sup> <https://www.iasa-web.org/tc03/4-obsolescence-formats>

<sup>7</sup> National Digital Stewardship Alliance. <https://ndsa.org/activities/levels-of-digital-preservation/>

<sup>8</sup> School libraries and school library services in New Zealand Aotearoa (2018). National Library of New Zealand, SLANZA and LIANZA.

<https://natlib.govt.nz/schools/school-libraries/understanding-school-libraries/importance-of-the-school-library-in-learning-the-research#nzresearch>

<sup>9</sup> The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, Libraries and archives: amendments to Part 1 of the Act