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Ministry of Business, Innovation & Employment
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New Zealand

Covering Letter

5 April 2019

Submission on review of the Copyright Act 1994 – Issues Paper

Dear Sir / Madam

Introduction

NZME welcomes the opportunity to make a submission on the Issues Paper *Review of the Copyright Act 1994*, released in November 2018.

In this submission we set out:

- an introduction to NZME and an executive summary of our submission; and
- NZME's submission on the Issues Paper *Review of the Copyright Act 1994*.

Personal details

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Yours faithfully
NZME



Allison Whitney
General Counsel

Review of the Copyright Act 1994 – Submissions by NZME

1. An introduction to NZME

- 1.1 New Zealand Media and Entertainment (**NZME**) is an organisation with a portfolio of radio, digital, e-commerce and print brands. Prime among these are The New Zealand Herald, Newstalk ZB, The Hits, ZM and many more.
- 1.2 NZME is centred at our headquarters, NZME Central, in Auckland CBD, branching out to 47 regional offices, housing various content, sales and activation teams. NZME is a mainstream media entity, with significant numbers of full and part time journalists operating in a media and reporting capacity.
- 1.3 NZME welcomes the Ministry of Business, Innovation and Employment's (**MBIE**) consideration of the Copyright Act 1994 (**Copyright Act**), which is key to the creative media landscape in which it operates. The matters arising from the Issues Paper are significant and nuanced and affect all media entities in New Zealand, not just NZME. This is therefore a very valuable process and NZME appreciates that the views of all interested parties are being taken into consideration in reviewing the law.
- 1.4 These submissions address the matters arising from the Issues Paper which are of most interest and concern to NZME as a media entity. They are not intended to be exhaustive and where any issue is left unaddressed, we note that this should not be taken as a sign of support for or disagreement with the proposals of the Issues Paper and/or MBIE on that issue.

2. Executive summary of submissions

- 2.1 NZME is supportive of amending the Copyright Act in New Zealand to take into account the modern developments of the digital age, as well as global trends towards copyright protection.
- 2.2 NZME considers that, as a matter of priority, the Copyright Act in New Zealand should be updated to ensure that it remains flexible, technology neutral, and continues to promote innovation and creativity in the commercial sector. In particular, NZME considers that:
 - (a) The terminology adopted in any future copyright law should remain balanced, and appropriate for content creators and content users alike, by remaining technology and platform neutral. To this end, we suggest:
 - (i) removing the use of the word 'object' from the Copyright Act; and
 - (ii) updating the fair dealing provisions regarding reporting current events to instead refer to responsible communications on matters of public interest.
 - (b) The current legislation should be amended to properly take into account works generated by artificial intelligence, where there is no readily identifiable human author.
 - (c) The current legislation should be amended to protect both access control and copy control technological protection measures.
 - (d) The current legislation should be amended to restrict the ability of copyright owners to contract out of fair dealing provisions of the Copyright Act, particularly where they hold the monopoly over content that is of particular interest to the New Zealand public.
 - (e) The current legislation should be amended to allow non-exclusive licensees to pursue legal action on behalf of copyright owners, where those copyright owners give consent.

Our submissions in response to particular questions set out in the Issues Paper follow.

3. Data and copyright protection (question 7)

- 3.1 NZME submits that the current efforts based 'skill, judgement and labour' approach in assessing originality should be maintained in relation to data and data compilations.
- 3.2 As noted in the Issues Paper, copyright protection of 'basic data' (ie the information in itself in raw forms) is not generally recognised. However, the *compilation* of data may be recognised as a copyright work if that compilation involves the necessary skill, judgement and labour. This indicates that an appropriate balance has been achieved by ensuring copyright protection is available to entities that either use or manipulate data in a unique manner, which generally requires expenditure of financial and labour resources.
- 3.3 It is submitted that this balanced approach should be maintained, as:
- (a) any 'basic data' not meeting the originality threshold can be freely used by entities in New Zealand (subject to other guiding statutes, such as the Privacy Act 1993);
 - (b) entities are incentivised to expend resources manipulating data to be more effective by obtaining a property right in any original works they create;
 - (c) such an incentive is critical in the digital age, and should be protected; and
 - (d) innovation in a variety of business practices, including those relevant to critical business solutions, would continue to flourish across the commercial sector.
- 3.4 There are significant benefits arising from the current treatment of data and data compilations under the Copyright Act 1994. We accordingly submit that no change to the consideration of such works ought to be implemented.

4. **Default rules of ownership for copyright works (question 8)**

- 4.1 NZME supports the retention of the commissioning rule, and submits that this should be extended to cover all types of copyright work. There is no reason why photographs are subject to the rule but works of literature are not, or why paintings are subject to the rule but a collage, etching or print is not.
- 4.2 If a copyright work is commissioned then in our submission the commissioning party should own the work. This is particularly the case where the idea for the work, the request to create the work and the relevant information needed to create the work originate from the commissioning party and the creator of the work is rewarded for the creation of the work by the commissioning party.
- 4.3 The Issues Paper notes at paragraph 141 that photographers claim the commissioning rule places them at a disadvantage in negotiations with clients, who use the commissioning rule to justify a demand that the photographer assigns copyright to the client. NZME submits that it should not be the role of legislation like the Copyright Act to attempt to shift bargaining power in contractual negotiations to give one category of persons more power. Change for this reason does not advance any of the aims of the copyright regime that are set out at paragraph 101 of the Issues Paper. Instead NZME submits that the person who commissions the work should *prima facie* own the work, and it should then be left to the parties to determine what compensation the person who was commissioned to create the work will receive for that creation, and whether ownership of a work should be assigned to a person other than the commissioner.
- 4.4 Currently media organisations such as NZME take into account that ownership of copyright will belong to us when we commission a work. This is also taken into account when determining how much we are willing to pay a photographer or other person who has been commissioned to create a work. If copyright were not to vest in NZME for commissioned works, then the amount NZME would be willing to pay for that commissioned work would decrease materially. In the modern world, media organisations will in practice use commissioned works more than once, and may use such works in a variety of ways. The value of commissioned works would be materially less if NZME was only able to use the work pursuant to a limited license, or if the author were later able to on-sell or license the work to another party. This would, in turn, stifle this avenue for creative endeavour.

- 4.5 The current commissioning rule means that copyright ownership for most works is *prima-facie* treated the same whether a work is commissioned from a third party contractor or created by an employee, which is a desirable and consistent approach.
- 4.6 If the commissioning rule were limited in any way, it would have the effect of discouraging media organisations from commissioning works from third parties, and instead limiting content creation to their own employees, in respect of which the ownership of the copyright would be clear. This would reduce the opportunities for independent or free-lance content creators to be paid to create new content.

5. **Computer generated works (question 9)**

- 5.1 The current rules relating to computer-generated works do not adequately address where authorship for copyright works should lie where such works are created as a result of the application of new technologies (including artificial intelligence (AI)), and human intervention is minimal, or non-existent.
- 5.2 Under the Copyright Act, the author of a work must be a natural (human) person, or a body corporate. A computer-generated work is one for which there is no clear human author. In such a case, the author will be the person who undertook the arrangements necessary for the creation of the work. As noted in the Issues Paper published by MBIE, this will usually be the computer programmer, or the programmer's employer.
- 5.3 The rapid development of machine learning software has meant that computers are no longer as reliant on human input to create works which satisfy the test for attracting copyright protection. AI has developed to the point where autonomous systems are capable of learning, and generating content, without human intervention. This technology is already being used globally to generate works in journalism, music and gaming, which have no identifiable human 'author'.¹
- 5.4 Currently, the author of any work created by AI will likely be the creator of the programme. NZME submits that where AI software is licenced, the copyright in any work developed from the licenced software should lie with the licensee, as the 'user' of the software, rather than with the programmer.
- 5.5 We are concerned that the failure to provide adequate copyright protection for businesses who license and use AI software to create valuable content, like news reports, is likely to have a chilling effect on the effective use of AI software in business. We perceive it likely that entities would be discouraged from using AI software in their day-to-day operations for fear that the property rights in works legitimately created for them using this technology would ultimately rest with someone else (to whom they have already paid a licensing fee or similar).
- 5.6 It is submitted that clarification of the distinction between circumstances where a user, rather than a programmer, will be the 'author' of a computer-generated work is necessary. Such a clarification would also promote the objective of ensuring copyright provides incentives for the creation and dissemination of works (ie as the licensor of the AI would be financially incentivised through the payment of licensing fees or similar).

6. **Secondary liability provisions (question 16)**

- 6.1 We submit that the 'knows, or has reason to believe' test used for determining the threshold for secondary infringement should be maintained in any copyright reform in New Zealand. This test is simple, clear, and appropriately recognises the inherent difficulty in determining the true author of a copyright work in the online context.
- 6.2 As noted by MBIE in its Issues Paper, the test for secondary infringement generally is whether the person knows, or has reason to believe, that the copy is an infringing copy.

¹ Andres Guadamuz "Artificial intelligence and copyright" (October 2017) Wipo Magazine <https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html>.

- 6.3 In *G-Star Raw C.B. v Jeanswest Corporation (New Zealand) Ltd* [2013] NZHC 2679, at [89] the Court summarised the test as follows:
- (a) knowledge that a product is an ‘infringing copy’ can be actual or constructive knowledge;
 - (b) knowledge may be inferred where there is evidence the defendant *deliberately turned a blind eye to the obvious*; and
 - (c) constructive knowledge requires proof that a defendant was armed with *all relevant information* from which to form that view, and had sufficient time for evaluation to conclude the product was an infringing copy.
- 6.4 In *Inverness Medical Innovations Inc v MDS Diagnostic Ltd (2010) 93 IPR 14 (HC)*, Woodhouse J commented that the words “has reason to believe” should be construed in accordance with their ordinary meaning, and:
- (a) involve a concept of knowledge of facts from which a reasonable man would arrive at that belief (an objective test);
 - (b) facts from which a reasonable man *might suspect* the relevant conclusion are not enough; and
 - (c) the test promotes the allowance of a period of time to enable the reasonable man to evaluate the facts to convert them into a reasonable belief.
- 6.5 This approach appropriately recognises that before liability for secondary infringement can be imposed, the evidence must be capable of establishing the defendant met a particular knowledge threshold.
- 6.6 We submit that this test should be maintained, as it provides legitimate copyright protection for entities that genuinely believe they have legally licensed a copy of a work, where in fact they have unknowingly made use of an infringing copy.

7. **Right of communication to the public (question 18)**

7.1 The Copyright Act currently confers upon the owner of a copyright work the exclusive right to communicate the work to the public. As noted by MBIE in the Issues Paper, this right was introduced by the Copyright (New Technologies) Amendment Act 2008.

7.2 “Communicate” is defined in the Copyright Act 1994 as follows:

“...communicate means to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system, and communication has a corresponding meaning”

7.3 The purpose of the Copyright (New Technologies) Amendment Act 2008 was to:²

- (a) update and clarify how copyright applies to new technologies in today’s digital environment;
- (b) promote a modern legal framework that guides the protection and use of copyright material;
- (c) ensure the effective operation of the Copyright Act in the face of emerging technologies; and

² “Copyright (New Technologies) Amendment Bill passes” (8 April 2008) Scoop Parliament <<http://www.scoop.co.nz/stories/PA0804/S00246.htm>>.

(d) ensure that the Copyright Act remains fair and effective in the face of emerging needs of a dynamic and technology-supporting economy.

7.4 We submit that the right of “communication”, as currently defined in the Copyright Act, is both advantageous and appropriate. The current definition is technologically neutral and recognises the purpose of the protection is for conveying copyright material to persons other than the author, including in the digital age. In turn, this ensures that the Copyright Act is fair, and able to be relied upon by entities who operate on a variety of platforms to engage with their customer base. This is becoming increasingly important for NZME, as the majority of consumer content is now consumed via technology, for example via our websites, apps, and social media platforms.

7.5 NZME is hesitant to support any amendments to this right in favour of a technology specific definition. This is because technology specific definitions are inherently unfair to developers of new communication platforms. This risk of unfairness is further exacerbated by the fact that the law inevitably plays ‘catch up’ with the digital advancements of the day, which would likely leave content producers in an unprotected position. This may have unforeseen consequences, for example by undermining the creation and dissemination of creative works.

7.6 NZME submits that no changes are needed in relation to this approach. If MBIE is minded to suggest amending this definition, we submit that it is imperative that any definition remain technology neutral, to ensure the effective operation of copyright in the face of emerging, as yet unanticipated, technology.

8. Digital content as an object (question 20)

8.1 There are clear limitations with the use of the term “object”, currently contained Copyright Act. This term is used throughout the Copyright Act, particularly so in relation to the definition of an “infringing copy”. For example, under the current legislation, an infringing copy includes a copy that either is, or embodies, an object.

8.2 Somewhat unhelpfully, “object” is not defined in the Copyright Act. The Cambridge Dictionary defines an “object” as “a thing that you can see or touch but that is not usually a living animal, plant, or person”.³ Clearly, on its natural and ordinary meaning, this term cannot be understood to extend to digital versions of works.

8.3 We therefore submit that the use of the word “object” should be removed from the Copyright Act, on the grounds that:

- (a) the term is outdated and no longer fit for purpose; and
- (b) the term is incapable of capturing modern works, and in particular those created and disseminated digitally.

8.4 NZME acknowledges that the term “copying” was amended in 2008 to be defined in broad and technologically neutral terms⁴ in an attempt to modernise copyright protection in New

³ Cambridge Dictionary (online ed.) (undated)
<<https://dictionary.cambridge.org/dictionary/english/object>>.

⁴ Copying –

- (a) means, in relation to any description of work, reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means; and
- (b) [Repealed]
- (c) includes, in relation to an artistic work, the making of a copy in 3 dimensions of a two-dimensional work and the making of a copy in 2 dimensions of a three-dimensional work; and
- (d) includes, in relation to a film or communication work, the making of a photograph of the whole or any substantial part of any image forming part of the film or communication work—

Zealand. As noted in the Issues Paper, it was made clear by way of the amendment that reproducing, recording or storing work in any form, including in a digital form, would be deemed “copying” for the purposes of the Copyright Act. However, there is a clear disconnect between this definition, and (for example) the definition of “infringing copy”, which still refers to the outdated “object” term.

- 8.5 We therefore suggest that, despite the broad definition of “copying”, either:
- (a) the term “object” be removed from the Copyright Act entirely on the basis that it is outdated, irrelevant, and not technologically fluid (this would be our preferred approach); or
 - (b) a broad, technologically neutral definition of the term “object” be inserted into the Copyright Act, to ensure the statute as a whole is capable of adapting to significant, and unforeseen digital developments.

9. ***Dixon v R* – Information as property (question 21)**

- 9.1 NZME does not have any material concerns with the implications of the Supreme Court’s decision in *Dixon v R*. NZME agrees with the Supreme Court that data should be considered to be property, and accordingly if a person gains unauthorised access to a computer system and copies files, they should be liable to criminal penalties as well as civil remedies.
- 9.2 The Crimes Act 1961 defines “property” as including “real and personal property, and any estate or interest in any real or personal property, money, electricity, and any debt, and any thing in action, and any other right or interest”. The definition in the statute is wide enough to capture digital information (as was held by the Supreme Court). It is appropriate to classify digital information as property since digital information:
- (a) can be owned and transferred,
 - (b) can, and increasingly does, have economic value;
 - (c) is capable of being sold; and
 - (d) has a material presence and alters the physical state of the medium on which it is stored (illustrated by the fact that electronic storage can become fully utilised).
- 9.3 Classifying digital information as property (whether tangible or intangible) brings New Zealand into line with jurisprudence in the United States that has found that software is property in that jurisdiction. It also aligns the legal position on this issue between the real world and the digital world.
- 9.4 NZME submits that the decision in *Dixon v R* is not inconsistent with the approach taken by the Copyright Act. The purpose of the Copyright Act is to provide guidance and regulate how particular expressions of data may be used, whereas the Crimes Act (in light of the decision in *Dixon v R*) provides a right to possession and ownership of the primary information itself.
- 9.5 Accordingly NZME submits that no change to the Copyright Act is required as a result of the Supreme Court’s decision in *Dixon v R*.

10. **User-generated content (question 22)**

- 10.1 The current presumption under the Copyright Act is that copyright arises automatically when an original work is created, and that ownership right rests with the content creator, as the “author”. However, ownership of user-generated content on social media is subject to any

and copy and copies have corresponding meanings

contractual arrangements to the contrary (eg terms and conditions contained on social media platforms).⁵

- 10.2 It is submitted that this approach is appropriately balanced, and should be maintained. This is because:
- (a) it is up to each platform owner to ensure they have in place terms and conditions that adequately capture their intellectual property needs (including in relation to copyright); and
 - (b) it is up to individual users to consider these terms and conditions, and determine whether they are willing to be bound by them.
- 10.3 NZME would be seriously concerned by any amendments to New Zealand's copyright law of the sort recently implemented in the European Union. This is because there is a real risk that amending the Copyright Act to govern user-generated content in any different way than content created for other purposes may have a chilling effect, in that individual users may be discouraged from sharing content and participating in online forums. This, in turn, may hinder the creative online economy, and stifle online innovation (contrary to the overall aims and purpose of copyright protection in New Zealand).
11. **Moral rights (question 25)**
- 11.1 The Copyright Act currently provides for moral rights, which are distinct from the economic rights included in copyright. Moral rights are generally unassignable, meaning that even though an author does not own copyright in material, they will continue to maintain moral rights in respect of that material.
- 11.2 The Copyright Act currently provides an exception to the inherent nature of moral rights in an employment context. An employer will not infringe an employee's right to be identified as the author of a work created by that employee during the course of their employment, provided:
- (a) the author cannot readily be identified at the time of the allegedly infringing act; or
 - (b) in the case of a literary, dramatic, musical or artistic work –
 - (i) more than 2 persons were involved in the creation of the work and it is impracticable at the time of the act to identify the respective contributions of each person; and
 - (ii) the employees have not previously been identified in or on published copies of the work.
- 11.3 An employee does not have the right to object to the derogatory treatment, by their employer, of a work created by that employee during the course of their employment, unless:
- (a) the employee is identified at the time of the allegedly infringing act; or
 - (b) the employee has previously been identified in or on published copies of the work.
- 11.4 Where the right to object does apply, the right will not be infringed if the employer publishes a clear and reasonably prominent indication that the work has been subjected to treatment to which the employee has not consented.

⁵ For example, the current [NZME terms and conditions of use](#) specify that in providing information, data, text, software, illustrations, photos, audio, video (**Material**) to NZME, users grant NZME a licence to use and exploit that Material, and that users waive all moral rights in that Material. It is up to each user to agree to those terms and conditions, and accordingly to determine whether they would like to share Material with us.

- 11.5 It is submitted that those who commission copyright works should be granted the same exceptions that are granted to employers in respect of the use that can be made of that commissioned work, without breaching the creator's moral rights.
- 11.6 There is no clear basis for drawing a distinction between employers and commissioning parties in the context of the application of an author's moral rights. A commissioning party, just like an employer, is the automatic first owner of any copyright in commissioned work. The difference between commissioned and employed ownership should be reconciled to:
- (a) ensure an author is not able to unduly demand identification for work, where that work was commissioned and paid for by another individual, and where the author is not reasonably identifiable when the work is used by the commissioning party; and
 - (b) restrict an author's ability to object to allegedly derogatory treatment of a work they created pursuant to a commission, where the author is not identified when the commissioning party makes use of that work.
- 11.7 It is submitted that failure to provide for these exclusions unnecessarily restricts the ability of a commissioning party to fully exercise their economic rights in respect of commissioned works. This undermines the commercial viability of commissioning the creation of new and valuable content and is inconsistent with the position as between employees and contracting parties.
- 11.8 For this purpose, we note that Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works 1928 (to which New Zealand is a party) provides for the protection of the moral right to claim authorship and to object to "any distortion, mutilation...or other derogatory action" in relation to a work. While Article 9 of the TRIPS agreement requires members to comply with Articles 1 – 21 of the Berne Convention, it does not mandate compliance with Article 6bis. In this respect, we therefore submit that there is no reason not to extend the employer exception to commissioning parties.

12. **Technological protection measures (questions 28 and 29)**

- 12.1 Technological protection measures (TPMs) are critical in the digital copyright owner's battle against infringement. NZME is pleased that TPMs will be considered by MBIE in the reform of copyright law in New Zealand.
- 12.2 NZME is comfortable that the TPM regime is clear in what it allows. However, there are some serious limitations to TPMs in New Zealand. In particular, NZME is concerned that:
- (a) the current regime does not contain provisions governing the circumvention of technological mechanisms used by copyright owners to prevent unauthorised access to copyright content (**access-control TPMs**); and
 - (b) the current regime does not prohibit the actual act of circumventing a TPM.

Absence of provisions preventing the circumvention of access-control TPMs

- 12.3 It is submitted that the definition of a TPM should encompass two categories of technological protection measure, namely:
- (a) those that control access to material that is protected by copyright; and
 - (b) those that protect any copyright.
- 12.4 NZME routinely uses TPMs that fall into one or both of these categories, as do many others in the media and entertainment industry. Some technologies may control the terms on which access to a work is granted (such as the technology controls used to manage 'pay-per-view' business models), whilst other technologies have a direct or indirect function of protecting the rights granted to copyright owners (such as technologies that directly prevent infringing copies from being made, or technologies that effectively make infringing copies inoperable).

- 12.5 As there are different types of TPMs used in the digital content and media industry, there are differing ways in which pirates circumvent them. For example, sophisticated hacking utilities such as password cracking or “copy-cracking” tools. It follows that copyright owners need a broad definition of TPM which provides adequate protection for the many different types of TPMs used by them.
- 12.6 The implementation of strong protections for the TPMs used by copyright owners is essential for the continued success of the digital content and media industry. NZME encourages the use of language that provides protection under the Copyright Act for all forms of technology that control access to copyright works and which protect the underlying copyright from infringement.
- 12.7 NZME believes there is a strong case for protecting access-control TPMs (in addition to TPMs that prevent copyright infringement). The need to protect access control TPMs primarily arises from the emergence of new online distribution models. These new models benefit rights holders and copyright users alike: rights holders can exploit new methods of disseminating their copyright works and are therefore encouraged to continue innovating and creating new copyright works, while users can enjoy increased choice as to how and when they access copyright works made available online.
- 12.8 Several online distribution strategies employed by digital content providers (and other industry participants) contain some form of access control, whether that is a password, smartcard or other unique identifier. Some of the online distribution strategies employed include ‘viral marketing’, ‘rent to own’ and ‘subscription/all you can eat’ models. Rights holders that utilise such models do not always place restrictions on the distribution of their copyright works through a copy protection TPM, but instead rely on the online model to place restrictions on the circumstances in which those works can be accessed by users. For example, a user may be able to watch a short second sample of a video made available, but an access control TPM would prevent that user from accessing the entire video until such time as he or she (eg) paid the relevant licence fee. In a ‘rent to own’ distribution model, the copyright owner would use an access control TPM to ensure that the user could not obtain unrestricted access to the relevant work until such time as the relevant licence fee had been paid. Similarly, ‘subscription/all you can eat’ distribution models rely on access control TPMs to restrict access to copyright works in accordance with the scope of the licence granted.
- 12.9 Access control TPMs are essential to each of these online distribution models. This is because, in direct contrast to offline distribution models (that focus on the provision of a permanent copy of a copyright work), online distribution models focus on users experiencing a copyright work (for example, by viewing an artistic work, reading a literary work or playing a computer game), without necessarily providing the user with a permanent copy of that work. In some circumstances, a user’s experience of a copyright work or other subject matter may constitute a substantial reproduction of that work in material form, but that will not always be the case, and in those circumstances, the absence of protection for access-control TPMs is likely to undermine the viability of that product offering altogether. Clearly the expense of applying an access-control TPM to a copyright work will be difficult to justify if it is possible to circumvent that TPM without attracting liability. Thus, in the interests of fostering the development of innovative online distribution methods that benefit rights holders and users alike, we submit that New Zealand should ensure it affords protection to both access-control TPMs and copy control TPMs.
- 12.10 The traditional business model based on tangible copyright works has evolved with the proliferation of broadband and wireless internet access. New technology and high-speed internet access create new markets and support content development, but they also make unauthorised access and/or copying of material much easier.
- 12.11 It is important to appreciate that in the digital environment, strategies to protect the integrity of copyright are of critical importance to copyright owners. Copyright is no less a private property right than ownership of a chattel or land. However, the ease with which copies of copyright works can be made in the digital environment has the capacity to damage the integrity of that private property right.

12.12 NZME submits that it is critical to recognise that the protection of access-control TPMs is essential, due to the variety of types of TPMs used by the digital content and entertainment industry.

Absence of provisions making actual use of a TPM circumvention device actionable

12.13 The act of circumvention itself is not currently prohibited in the Copyright Act. In our submission this is a serious deficiency. Failing to prohibit the use (as compared with supply) of circumvention devices effectively leaves unaddressed the commercial incentive which drives manufacturers and distributors of circumvention devices to engage in their activities. The reason why TPM circumvention device manufacturers make and distribute such devices is because there is a real market for them. If use of circumvention devices itself was prohibited, this would seriously undermine that market and the incentive to produce or distribute such devices.

12.14 In addition, a prohibition against use would be easier to enforce and provide rights holders with a concrete means of protecting their rights, as the manufacturers and distributors of such devices are frequently located off-shore and outside the reach of New Zealand law. It could be expected that a prohibition on use of circumvention devices under the Copyright Act would then in turn make manufacturing or distributing such devices (for the New Zealand market at least) less profitable and therefore less desirable.

12.15 An offence against “use” of a TPM circumvention device should be enacted. This should be in line with those proposed for making, importing, selling and letting for hire a TPM circumvention device, as set out at clause 226C of the current legislation.

13. Fair dealing and its limitations (questions 30 – 33)

Introduction

13.1 Fair dealing is an important exception to copyright infringement in New Zealand. As a media entity, the fair dealing provisions of the Copyright Act directly affect NZME. We are therefore pleased that the fair dealing provisions of the Copyright Act will be considered by MBIE in its review of copyright law in New Zealand.

Activities and use impeded by current framing of fair dealing (question 30)

13.2 NZME strives to adhere to the fair dealing provisions set out in the Copyright Act. Of particular interest and relevance to NZME is the fair dealing exception for the purpose of reporting current events.

13.3 NZME has robust internal policies in place that govern the circumstances in which we publish copyright material for the purposes of reporting current events.

13.4 We do not perceive that a lack of certainty in relation to the fair dealing provisions of the Copyright Act has impeded our activities as a digital media entity. However, NZME is concerned that there are some key barriers to the fair dealing exception for reporting current events in New Zealand which are unintended and which result in inconsistent treatment of copyright works. In particular:

(a) The use of the term “current events” in s 42(2) and 42(3) is problematic. In particular:

(i) Events are not always “current” when they are reported (ie events may come to light years after they occurred and are accordingly news worthy at a time when they are not necessarily “current”).

(ii) It is not always clear what an “event” is, in the sense that, for example:

(A) each match from the Lions Rugby tour could be an “event” which is no longer current the following week, but equally arguably the whole Lions Rugby tour is an “event” in relation to which all games are “current” for the duration of the entire tour; and

- (B) each sporting code, or each race within a code, or the entire Olympics or Commonwealth Games could be an “event”.
- (iii) There is an issue in relation to online publications, which remain “published” and accessible to the public after the end of a usual news cycle. It would be detrimental to the function of the news media as keepers of the historical record for matters which benefited from the fair dealing defence for reporting current events to be deleted from the online historical archive due to a perceived lack of “currency” at a later date.
- (b) As the watchdogs for the public, the media have a role and responsibility to inform the public of the news of the day, and should be encouraged to attract viewers accordingly.

13.5 We suggest that the fair dealing exception for reporting current events should be focussed on whether the nature of the publication using a copyright work is responsible, and within the public interest. We expand on these submissions below.

Problems with the fair dealing exception and suggested changes (question 31)

- 13.6 As noted above, there are significant barriers to the fair dealing defence in New Zealand. The most significant of these relates to the use of the term “current events” in s 42(2) and 42(3) of the Copyright Act. This term is vague, undefined, and in our view, does not truly capture news media reporting in the modern age.
- 13.7 In assessing whether fair dealing with a work is for the purpose of reporting “current events”, the Courts have stated:⁶

“I consider the correct analysis is to address the issue of whether the use of the material is for the purpose of reporting current events as a threshold issue. In some cases it may be so clear that the material is not being used for that purpose, that will be the end of the matter. The defendant’s use will be infringing. However in less clear cases, the factors relevant both to this threshold issue, and to the issue of whether something is fair dealing may be so indistinguishable or so connected that it is necessary to step back and consider the matter as a composite test. Thus, in discussing the meaning of the phrase ‘current events’ in *Pro Sieben Robert Walker L.J.* observed (at 614): ‘The nearer any particular derivative use of copyright material comes to the boundaries, unplotted though they are, the less likely it is to make good the fair dealing defence.’”

13.8 Various Courts have found that:

- (a) the fact that news coverage is interesting, or even to some people entertaining, does not negate the fact that it may be news;⁷
- (b) it is not necessary that the programme using the footage be a regularly scheduled national news programme, or a programme that is dedicated to “hard news”;⁸
- (c) whether it is reasonably necessary to refer to the copyright material to report the current events in question is also a relevant consideration;⁹
- (d) the fact that a competitor of the owner of the copyright in the material wishes to attract readers or viewers is not a motive that of itself will mean that the use of the material by the competitor is not fair. Most broadcasters are also in business, where a desire to win viewers or readership and generate a profit is inevitably at least one motive, even when the dealing is fair;¹⁰ and

⁶ *Media Works NZ Ltd v Sky Network Television Ltd* (2007) 74 IPR 205 (HC) at [43] and [44]:

⁷ *Nine Network Australia Pty Ltd v Australian Broadcasting Corp* (1999) 48 IPR 333 (FCA) at [37], and *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2002] FCAFC 146, (2002) 118 FCR 417, 55 IPR 112 at [104].

⁸ *British Broadcasting Corp v British Satellite Broadcasting Ltd* [1992] 1 Ch 141 at 154.

⁹ *Associated Newspapers Group Plc v News Group Newspapers Ltd* [1986] RPC 515 (Ch).

¹⁰ *British Broadcasting Corp v British Satellite Broadcasting Ltd* [1992] 1 Ch 141 at 157.

- (e) the fact that a broadcaster using the copyright material is a rival of the copyright owner does not, of itself, take the case outside fair dealing either.¹¹

13.9 We submit that the focus should be to consider whether the reporting that relies on the fair dealing exception was conducted responsibly, and was in the public interest. Such an approach would:

- (a) not be inconsistent with the approach taken by the Courts, as summarised above; and
- (b) ensure the fair dealing exception contained in the Copyright Act is both consistent with the legal framework in which the media currently operate, and up to date with recent jurisprudence that governs the news media industry.

13.10 Significantly, the Court of Appeal has recently recognised a new defence of "responsible communication on a matter of public interest" to defamation claims arising from mass media publications¹², and abolished the existing *Lange* privilege for publications concerning political discussion. The new defence recognises the public importance of the media in communicating with society on matters of public interest, and reinforces the importance of responsible journalism. In a similar vein, the Human Rights Review Tribunal has recently held that for the news media exemption contained in the Privacy Act 1993 to apply, it is implicit that the news medium "act ethically and... in a manner that is consistent with the public interest in fair and accurate reporting of news, observations on news or current affairs."¹³

13.11 In our view, this approach is undoubtedly correct. We therefore submit that the fair dealing provisions set out in the Copyright Act should be amended to reflect that fair dealing with a work for the purpose of responsibly communicating a matter of public interest does not infringe copyright in the work. This approach would also bring fair dealing into the modern age, as:

- (a) There are increasingly blurred lines between what is considered "news", with the distinction between news and entertainment inherently blurred (particularly when considering sports and the nature of programming). Determining whether fair dealing is legitimate based on what is in the public interest, rather than simply what is current (ie a time based factor), would be a fair and practical means of addressing varied media content for the purposes of the defence.
- (b) News content remains, and should remain, accessible in more readily retrievable formats than was the case when the Copyright Act was first introduced. The need to remove online material in an attempt to ensure fair dealing in works relates only to publications about "current events" is becoming increasingly impractical, and risks irrevocably damaging the historical record.
- (c) News reporting is now more visual than ever. The fair dealing defence should accordingly recognise the need for visual copyright works to be used to report to the public, based on what is in the public interest.
- (d) The public are much less willing to accept monopolies on filming rights for matters that are of legitimate interest to everyday New Zealanders, where those monopolies may be detrimental to quality news reporting. We submit that amending the exception to remove the requirement that matters be "current", would be an effective means of reconciling the public's view with the fair dealing provision for the purpose of reporting events.

Use of fair dealing for commercial outcomes (question 31)

13.12 In its Issues Paper, MBIE comments that entities often use the fair dealing exceptions principally in pursuit of commercial outcomes, rather than in pursuit of knowledge for which

¹¹ At 158.

¹² *Durie v Gardiner* [2018] NZCA 278.

¹³ *Director of Human Rights Proceedings v Slater* [2019] NZHRRT 13 at [80] – [82].

they are intended. As an example, MBIE cites the recording and making available online snippets of pay-to-view broadcasts of live sports events primarily for the purpose of attracting viewers, and, therefore, increasing advertising income.

- 13.13 We do not perceive any reason why news material published in proper reliance of the fair dealing exception cannot be accompanied by paid advertisements, and/or be commercially beneficial. The media industry primarily relies on advertising as a major source of revenue, and always has. It is not the case that with the proliferation of the internet, news has suddenly become (or should suddenly become) a free commodity. Further, we do not perceive it fair or appropriate that one entity be entitled to benefit commercially from content where that content is of *legitimate* interest and concern to the public. This appears to circumvent the purpose of the fair dealing exception in relation to reporting news events.
- 13.14 We accordingly submit that the legitimate use of the fair dealing exception, which may have associated commercial benefits, should not be prohibited or penalised in any way in New Zealand. The survival of a fair and impartial press depends on the ability of the press to deliver content to viewers / readers in association with revenue streams.

The exclusion of photographs

- 13.15 The fair dealing provisions in the current Copyright Act in respect of reporting current events are out-of-touch with modern day news reporting practices. As indicated by MBIE in its Issues Paper, the current Copyright Act provides an exception against infringement where a work, other than a photograph, is used for the purposes of reporting current events, provided that use is accompanied by a sufficient acknowledgement.
- 13.16 The current Copyright Act limits the fair dealing of photographs to reporting current events by means of a film or communication work (being a transmission of sounds, visual images, or other information). There is no fair dealing exception where photographs are used for the purpose of reporting current events by any other method i.e. use by print media.
- 13.17 It is submitted the distinction between other copyright works, including videos, and photographs, for the purposes of fair dealing is out-of-touch with what is expected in modern day news reporting. This distinction is also unfairly prejudicial to print media. It is in the public interest to reduce obstacles to, and to facilitate, the reporting of all news, across all news media. The perishable nature of news, and the immediacy with which modern society expects to receive information from reputable news media sources, means this distinction has a significant impact on the ability of the media to carry out their role.
- 13.18 Permitting the media to use a photo without permission for reporting in mediums such as newspapers and magazines is not likely to undermine the livelihood of photographers, who will retain copyright in that image. Provided that the use of the photograph is for the purpose of reporting events, and is accompanied by a sufficient acknowledgement, the fair dealing exception should apply to the use of photographs in any means of reporting current events.

Fair dealing for the purpose of reporting current events (question 32)

- 13.19 As stated above, we are of the view that the term “current events” is problematic in the digital age, and should be replaced with a term which recognises that “events” are news worthy at the time at which they become news worthy and which does not tie the availability of the fair dealing defence to a point in time.
- 13.20 We are otherwise generally comfortable with the broad fair dealing for news reporting exception contained in the Copyright Act. NZME would be hesitant to support legislation that is too prescriptive, or attempts to rigidly capture what entities the exception may apply to. This is because retaining flexibility in the provision would ensure that it remains applicable in the digital age.
- 13.21 We do not see any reason why citizen journalists would not be entitled to rely upon the fair dealing exception in reporting current events. Such an approach ensures that key information is made accessible to the public, and accordingly promotes and encourages access to knowledge for all. As noted above, news is becoming increasingly digitised.

Business entities and private persons alike should not be discouraged from sharing matters that are of legitimate public interest simply because relatively little in the way of commentary may accompany the content.

14. Parody and satire (question 39)

- 14.1 NZME supports the introduction of an exception to infringement that would allow for fair dealing with a work for the purposes of parody or satire. The current fair dealing exception for criticism or review is not broad enough in many instances to allow for the use of content in a humorous or ironic way to illustrate and draw attention to social, political and other issues in the public interest (for example corruption or human vices).
- 14.2 It is not usually practicable for a person wishing to satirise a work to first gain permission from the copyright owner. It is particularly difficult to gain permission to use a work for satire or parody where the work in question was created in another country and the copyright owner or author is located overseas.
- 14.3 NZME proposes that an exception for fair dealing with a work for the purpose of satire or parody should cover all types of copyright work and should not include a requirement that the original work be sufficiently acknowledged (as a requirement for acknowledgement could be impractical, unwieldy and overly cumbersome). The exception could be worded, for example, as follows:

Fair dealing for purpose of parody or satire

Fair dealing with a work for the purposes of parody or satire of that or another work or of a performance of a work, does not infringe copyright in the work.

- 14.4 The current lack of a satire or parody defence to copyright has a chilling effect on:
- (a) the creation of original content based on existing works;
 - (b) the use, improvement and adaptation of works created by others; and
 - (c) dissemination and access to knowledge and creative works.
- 14.5 NZME does not believe that the introduction of a satire or parody defence would have a disproportionately negative effect on copyright owners or authors. The possibility of being satirised is unlikely to dissuade most authors or copyright owners from creating original content.
- 14.6 The introduction of a defence for satire or parody would be consistent with the right to freedom of expression as articulated in Section 14 of the New Zealand Bill of Rights Act 1990.
- 14.7 A satire or parody defence would also be consistent with the current practices of business and members of the public. Current technology allows users to quickly create and adapt content and widely disseminate this on the internet (for example) through memes that may use a photograph or drawing as a base and then superimpose words to create a new image. New Zealand copyright law in this area is currently out of step with how the public uses and adapts content in practice, and is out of step with comparable jurisdictions such as Australia, Canada and the United States.

15. Contracting out of the exceptions (question 58)

- 15.1 Currently, there is no limitation on contracting out of the fair dealing exceptions contained in the Copyright Act. We are of the view that copyright law in New Zealand should be amended so as to ensure that these exceptions are protected from being overridden by way of contract.

15.2 As noted by Professor Ian Hargreaves in his report *Digital Opportunity – A review of Intellectual Property and Growth*, a lack of contracting out provisions means:¹⁴

“... a rights holder can rewrite the limits the law has set on the extent of the right conferred by copyright. It create the risk that should Government decide that... law will permit private copying or text mining, these permissions could be denied by contract. Where an institution has different contracts with a number of providers, many of the contracts overriding exceptions in different areas, it becomes very difficult to give clear guidance to users on what they are permitted. Often the result will be that, for legal certainty, the institution will restrict access to the most restrictive set of terms, significantly reducing the provisions for use established by law. Even if unused, the possibility of contractual override is harmful because it replaces clarity (“I have the right to make a private copy”) with uncertainty (“I must check my licence to confirm that I have the right to make a private copy”). The Government should change the law to make it clear no exception to copyright can be overridden by contract.”

15.3 We submit that content creators should not be permitted to contract out of the ability to rely on the exceptions to copyright infringement in the Copyright Act, namely fair dealing. Fair dealing is key exception to copyright law in New Zealand, and validly protects copying for the purposes of research, criticism or review, or the reporting of current events. There are clear policy reasons as to why this exception exists, and it is able to be relied upon by a variety of entities. NZME is of the view that contracting out of this exception should be expressly prohibited because:

- (a) contracting out provisions may have a chilling effect on the use and dissemination of works in New Zealand for fear of copyright infringement action;
- (b) contracting out provisions create uncertainty for users as to what may be permitted for the purposes of fair dealing; and
- (c) without a provision preventing the contracting out of the exceptions, it is likely these exceptions will be of little use or purpose moving forward.

15.4 Further, given the monopoly over license rights that some entities have for various content types (eg for sporting events coverage), it would be very problematic if those entities could then ostensibly enter into a deal whereby parties are required to pay to sublicense some content, but also forced not to use the fair dealing defence for other content.

15.5 We submit therefore that it would be preferable to have certainty as to users’ rights in the context of fair dealing by expressly prohibiting the contracting out of copyright exceptions.

16. **Exception for providers of search tools (questions 60)**

16.1 NZME submits that there should be an exception for providers of search tools (or search engines) who provide links to infringing copyright material. It is not clear in New Zealand whether such linking is infringement (i.e. whether providing links amounts to authorisation), so providing an exception would clarify this issue.

16.2 Merely providing users with information about where to obtain content should not be considered to be an infringing act for the purposes of the Copyright Act 1994, provided no copying of the original work is carried out and sufficient attribution is included.

17. **Safe harbour provisions for Internet Service Providers (questions 61 and 62)**

17.1 There are benefits to the current safe harbour provisions for ISPs, as ISPs should not face liability for primary or secondary copyright infringement in respect of which they have no knowledge. NZME submits however that the safe harbour provisions should not apply once a relevant ISP knows or should know that:

- (a) The ISP is storing infringing material uploaded by one of its users; or
- (b) The ISP is storing a temporary copy of infringing material.

¹⁴ | Hargreaves *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) at 51.

17.2 In cases where an ISP is put on notice by a copyright owner that it is storing infringing material the ISP should be required to immediately:

- (a) remove the infringing copies; and
- (b) take all reasonable steps to detect and delete all infringing copies of a work available on a system under its control,

at the ISP's own cost.

17.3 Copyright owners should not be required to seek injunctive relief in order to require infringing material be removed.

17.4 In order to balance the right of copyright owners against ISPs, a counter-notification procedure should be introduced, where:

- (a) The copyright owner gives notice to the ISP of the existence of infringing content;
- (b) The ISP can elect to file a counter-notice with the Copyright Tribunal (or similar organisation) if it believes the content does not infringe copyright.
- (c) If a counter-notice is filed, the ISP should be required to remove the content that is the subject of the notice on a temporary basis until the matter is determined by the relevant regulator or tribunal ('**Decision Maker**').
- (d) If the Decision-Maker determines the work does infringe copyright, the ISP must immediately detect and permanently remove all infringing copies of the work.
- (e) If the Decision-Maker determines that the work does not infringe copyright, then the ISP may reinstate the content.
- (f) The Decision-Maker should be empowered and encouraged to award costs against an unsuccessful party. Increased costs should be available to address the use of fraudulent, abusive or unfounded notices or counter-notices.
- (g) This process should not limit any person's ability to file proceedings in court if they choose to do so.

17.5 Alternatively, NZME would support the introduction of a procedure similar to the US DMCA notice protocol.

18. **Collective Management Organisations (CMOs) (questions 60 – 65)**

Number and variety of CMOs in New Zealand

18.1 Copyright licensing, and music licensing in particular, is inherently complex. Collective management of rights is the essential mechanism carried out by CMOs. CMO's play a fundamental role in administering the licensing of rights, and lowering the transactions costs. Legally, CMO's make it possible for users to obtain clear rights to a large number of works, where individual negotiations to obtain the necessary permissions from every right owner would be impractical and entail prohibitive time and cost.

18.2 For the commercial user of music, there is a clear advantage in being able to obtain a licence from a *single* source. The role of the CMO is essential in providing this benefit, as the commercial user with a licence from the national CMO is generally safe from actions for

infringement.¹⁵ The key benefit of a CMO from the copyright users' perspective is the ability to access copyright material legally, and without significant research into ownership rights. A single CMO ensures licensing of music is subject to clear and uniform guidelines.

- 18.3 NZME submits that the existence of two general musical works CMO's in New Zealand introduces unnecessary complexity and an additional cost for users who wish to gain access to musical works. A single CMO for the licensing of all general musical works in New Zealand, which combines the current functions of Recorded Music and APRA AMCOS, would simplify the process for obtaining copyright in musical works in New Zealand. This would bring an end to the need for customers to purchase separate licenses from each individual organisation. This has occurred recently in the United Kingdom, with the merge of PPL and PRS for Music, two music licensing societies in the UK. This merger has made it easier for customers to obtain a music licence.¹⁶

Membership of CMOs, and problems with their operation

- 18.4 NZME is a member of the Print Media Copyright Agency, and regularly licences music from Recorded Music NZ and APRA AMCOS.
- 18.5 A CMO is a legal monopoly, and as such, it possesses monopoly powers when dealing with customers who wish to access the works held by that CMO. A CMO is a 'natural monopoly', meaning that the most cost efficient manner of supplying access to copyright works is via a monopoly supplier,¹⁷ as the costs associated with licencing will decrease as more works are added to the CMOs library.
- 18.6 Generally, monopoly power risks the establishment of a higher than otherwise price, and a resulting lower level of consumer welfare. The actions of CMOs should be appropriately regulated to ensure the balance is maintained. While it is beneficial to allow CMO's to operate as a monopoly, there is substantial risk in allowing that monopoly to exert ultimately unrestricted power over how it operates in respect of consumers. The virtual monopoly of CMOs gives rise to a number of user detriments. For example, it can translate into high fees and allocative inefficiency, a lack of transparency around licencing arrangements and significant problems associated with commercial dealings.¹⁸
- 18.7 It is submitted that regulation of CMOs is necessary to ensure efficient supply under a monopoly while limiting the potential risk for abuse of power. Appropriate regulation should endeavour to maximise consumer welfare while ensuring there is sufficient incentive for creators to supply copyright works, and should address:
- (a) pricing mechanisms that can be offered by the CMO;
 - (b) membership rules;
 - (c) distribution of aggregate collective income among members;
 - (d) standards for the appropriate provision of information to users; and

¹⁵ International Confederation of Societies of Authors and Composers "The Importance of Collective Management" (10 June 2015) <www.cisac.org>.

¹⁶ PPL PRS "Who is PPL PRS?" (undated) <<https://pplprs.co.uk/>>

¹⁷ Dr. Richard Watt "Collective Managements as a Business Strategy for Creators: An Introduction to the Economics of Collective Management of Copyright and Related Rights" (2016) WIPO World Intellectual Property Organization <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2016_3.pdf>.

¹⁸ Australian Competition & Consumer Commission "Determination Application for revocation and substitutions of authorisations A91187-A91194 and A91211" (6 June 2014) <<http://apraamcos.com.au/media/3438/2014finaldetermination.pdf>>.

(e) objective standards on which licences should be granted.

18.8 In this respect, NZME submits New Zealand should follow the approach adopted in Australia, by developing a voluntary code. Regular review of the Code of Conduct for Australian Copyright Collecting Societies demonstrates that collecting societies have shown a high level of compliance with the Code since its inception.

19. Issues with the Copyright Tribunal (question 66 and 67)

19.1 The lack of regulation in this area means the only avenue available for addressing disputes involving licencing schemes offered by CMOs is via the Tribunal. In theory, the role of the Tribunal provides a check on the ability of a CMO to use its monopoly position to unfairly restrict access to copyright work i.e. by extracting inequitable licence fees.

19.2 NZME submits the Copyright Tribunal is an expensive and time-consuming option for achieving resolution, particularly for relatively minor matters. We believe the time it takes for the Copyright Tribunal to process complaints is a significant problem with the current system. Further, section 214 of the current Copyright Act, which gives the Tribunal the power to “regulate its procedures as it sees fit, subject to this Act and any Regulations made under it” exacerbates an already lengthy and ambiguous process, as this clause fails to introduce any specific procedural rules. The lack of clear rules as to the powers and procedure of the Copyright Tribunal, and the consequences where a party fails to comply with Tribunal orders, results in unnecessary procedural disputes, often ancillary to the overall dispute.

19.3 NZME considers that more prescriptive and explicit Copyright Tribunal rules (i.e. similar to the UK Copyright Tribunal Rules 2010) are required to ensure the Copyright Tribunal is able to effectively and efficiently address disputes.

20. Social media and the modernisation of content (question 68)

20.1 The rise in popularity of social media platforms, particularly Facebook, has over the years significantly affected the ability of the news media industry in particular to earn revenue through online content and advertising. NZME does rely to a certain extent on the commercial viability of providing editorial content via Facebook. We are happy to provide more information and data to support this submission.

21. Ability for CMO’s to take legal action to enforce copyright (question 78)

21.1 As indicated by MBIE in its Issues Paper, the only parties who currently have standing to enforce copyright are the copyright owners, and their exclusive licensees. As a result of action taken by the Commerce Commission in 2010, CMOs are no longer able to obtain exclusive licenses from copyright owners.

21.2 As CMOs in New Zealand do not hold exclusive rights, they do not have the independent authority to pursue legal action on behalf of their individual members. For an individual member to enforce their rights against infringement of a work, they are required to commence proceedings in their individual capacity, even though the CMO is effectively ‘managing’ the work. NZME considers that where a copyright owner wishes a non-exclusive licensee, including a CMO, to be able to take legal action to stop infringement of one of the rights afforded to them as licensee, the copyright owner should be able to assign the right to take this action.

21.3 The primary issue with reserving legal action for copyright owners and their *exclusive* licensees arises in the CMO context, as this provision effectively restricts the CMO from carrying out one of their primary benefits, being the ability to institute legal action to stop the unauthorised use of members’ works, even where the copyright owner wants the CMO to do so. Providing collective support against infringement is essential to the interests of copyright owners, as without the collective support offered by CMOs, effectively pursuing action against individual infringers is practically impossible. It is virtually impossible for an author to individually manage any of their rights on a global basis, accounting for the multitude of uses,

users, languages, time zones and different distribution channels (particularly in the digital sphere) by which their works may be exploited.

21.4 NZME submits that rights owners should be able to authorise one or more non-exclusive licensees, including a CMO, to administer rights on their behalf, including the right to commence legal action against infringement. NZME considers New Zealand should draw direction from s101A of the UK Copyright, Designs and Patents Act 1988, which allows a non-exclusive licensee to bring an action for infringement of copyright:

(a) if the infringing act was directly connected to the prior licensed act of the licensee; and

(b) the licence:

(i) is in writing and is signed by or on behalf of the copyright owner; and

(ii) expressly grants the non-exclusive licensee this right of action.

21.5 NZME submits it is reasonable for entities to be able to act against infringements connected to their licensed activities in circumstances where they are not the exclusive licensee and where the copyright owner wishes them to act.

22. **Groundless threats of legal action for infringing copyright (question 80)**

22.1 Where a person brings proceedings alleging an infringement of copyright under the current Copyright Act, a Court may, on application, make a declaration that the bringing of proceedings was unjustified, and may make an order for the payment of damages for any loss suffered by the person against whom the proceedings are brought. This protection is seriously deficient, as it offers no actual protection against groundless threats.

22.2 While threats of legal action are a useful tool against infringement, they are often abused by businesses to extort settlements. NZME considers groundless threat provisions are required in the copyright context. Threats of infringement action can be used as a means of damaging a competitor (or extorting a fee) through the use of bullying tactics. The need for this protection is exacerbated by the expense involved in complex litigation (even in the preliminary stages).

22.3 NZME recognises that the Fair Trading Act 1986 offers some protection against threats not capable of substantiation or that are misleading or deceptive. Further, threats that are malicious and false may give rise to various actions in tort, including defamation. For clarity and consistency, it would be useful for unjustified threats to be prohibited in the Copyright Act itself.

23. **Measures to address online infringements (question 85)**

23.1 NZME considers site blocking of infringing websites to address the difficulties of pursuing infringing material overseas (particularly in the online sphere) is of paramount importance in ensuring that effective and efficient enforcement measures can be used to protect copyright.

23.2 The existing notice and take-down regime introduced in 2012 is costly and ineffective, and fails to address the challenges faced by copyright owners in the modern environment. This failure is apparent from the lack of copyright owners implementing this regime, notwithstanding the fact that online infringement has continued to grow exponentially.

23.3 New Zealand law does not currently give judges a clear and specific power to issue 'blocking injunctions' in copyright cases. In many jurisdictions, including the EU and Australia, the ability to obtain a site blocking injunction to stop users from accessing content that infringes copyright has been one of most important measures in preventing access to those websites. The Australian Copyright Act gives judges the power to require local ISPs to block access to foreign websites whose primary purpose is to facilitate copyright infringement.

- 23.4 Generally, content that infringes NZME's copyright is hosted outside New Zealand, and is therefore not able to be "taken down" by local ISP's. NZME submits that the availability of site blocking injunctions is fundamental in ensuring infringing content is not freely accessible.
- 23.5 Section 92B of the current Copyright Act attempts to address this issue, by providing that copyright owners are able to seek injunctive relief in relation to online infringement. NZME considers this provision lacks certainty. The New Zealand Copyright Act should include a provision which unequivocally confirms the jurisdiction of the High Court to issue site blocking injunctions, similar to that given by s 97A of the UK Copyright, Designs and Patents Act 1988.
- 23.6 We submit that clear and unequivocal powers to issue site blocking injunctions are required to address online infringement, but that these measures must be balanced against the fundamental right to freedom of expression. Blocking access to online content raises potential issues with freedom of expression, which is a fundamental right protected by New Zealand's Bill of Rights Act 1990.
- 23.7 In our view, the right to freedom of expression does not operate as a bar against the ability of judges to award site blocking injunctions. However, this right should be a factor for consideration when determining whether such an injunction will be appropriate in the relevant circumstances.
- 23.8 As always, limits should be imposed where there is statutory jurisdiction to grant a no-fault injunction, and appropriate limits must be set on the award of blocking orders, similar to those in place in Australia and the EU. NZME considers the discretion to award a site blocking injunction can be adequately addressed through implementation of a non-exhaustive list of discretionary factors, as is set out as s115(A)(5) of the Australian Act. These factors should include (among others):
- (a) whether disabling access to the online location is a proportionate response in the circumstances; and
 - (b) whether it is in the public interest to disable access to the online location, which will enable the Court to engage in an appropriate 'rights balancing' exercise.