Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

Name	Assoc Professor Rebecca Giblin
Organisation	

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Responses to Issues Paper questions

Objectives

1	Are the above objectives the right ones for New Zealand's copyright regime? How well do you think the copyright system is achieving these objectives?
	[Insert response here]
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?

In addition to the stated economic objectives, New Zealand's copyright regime should also have the explicit object of recognising and rewarding creators.

While New Zealand identifies as taking a primarily utilitarian approach to copyright, authors' moral claims are powerful and valid. Considerations traceable to both utilitarian and natural rights approaches co-exist within both major international treaties and domestic laws.[1] The Berne Convention requires protection of authors' moral rights, and also the incorporation of exceptions intended to promote socially valuable uses.[2] Countries with historically instrumentalist traditions adopt policies that are motivated by naturalist considerations (and vice versa).[3] This juxtaposition is well and truly evident in New Zealand's copyright statute, which incorporates both moral rights and performers' rights. Further, if copyright was only about economic incentives, it wouldn't last longer than a maximum of about 25 years. That's been persuasively shown to be the maximum necessary to incentivise even the most lavish investments.[4] The reason why it lasts longer than that is because of the additional claims authors have to rewards from their work.[5]

Understanding and recognising authors' valid claims to recognition and reward is a necessary first step towards developing a system that results in fair payment for authors, fair investment opportunities for cultural intermediaries, and fair access to culture for everyone else. Recognising and rewarding creators should be a primary objective.

3	Should sub-objectives or different objectives for any parts of the Act be considered (eg for moral rights or performers' rights)? Please be specific in your answer.
	[Insert response here]

[1] See for example, Martin Senftleben, *Copyright, Limitations and the Three Step Test* (Kluwer, 2004), especially at 6-10; Alain Strowel, *Droit d'auteur et copyright, Divergences et Convergences* (Bruylant, 1993); Gillian Davies, *Copyright and the Public Interest* (Thomson, 2nd Ed, 2002) 348-351; Jerome Reichman, 'Duration of Copyright and the Limits of Cultural Policy' (1996) 14(3) *Cardozo Arts & Entertainment* 625, 643-4, Sam Ricketson, 'The Copyright Term' (1992) 23(6) *International Review of Intellectual Property and Competition Law* 753, 755. See also broader discussion in Rebecca Giblin and Kimberlee Weatherall, 'If we redesigned copyright from scratch, what might it look like?' in Rebecca Giblin and Kimberlee Weatherall (eds) *What if we could Reimagine Copyright?* (ANU Press, 2017) (available open access at ***https://press.anu.edu.au/publications/what-if-we-could-reimagine-copyright***).

[2] See eg Berne Convention, Articles 6*bis* (requiring recognition of moral rights) and 10 (mandating exceptions relating to fair quotation of works).

As Senftleben argues, it's inaccurate to conceive of the two traditions, European and Anglo-American, as incompatible and separate. Instead, 'the two traditions of copyright law can be described as mixtures of a shared set of basic ideas derived from natural law theory and utilitarian notions alike': Martin Senftleben, *Copyright, Limitations and the Three Step Test* (Kluwer Law International, 2004) 10. See also broader discussion in Rebecca Giblin and Kimberlee Weatherall, 'If we redesigned copyright from scratch, what might it look like?' in Rebecca Giblin and Kimberlee Weatherall (eds) What if we could Reimagine Copyright? (ANU Press, 2017) (available open access at ***https://press.anu.edu.au/publications/what-if-we-could-reimagine-copyright***).

[3] See eg William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18(2) Journal of Legal Studies 325, 361-362; Rufus Pollock, 'Forever Minus A Day? Calculating Optimal Copyright Term', (2009) 6(1) Review of Economic Research on Copyright Issues 35; available at <***papers.ssrn.com/sol3/papers.cfm?abstract_id=1436186***>, 3; Michele Boldrin and David K Levine, 'Growth and Intellectual Property', (Working Paper 12769, National Bureau of Economic Research, December 2006) <www.nber.org/papers/w12769.pdf> (developing an economic model based on the idea that, as the elasticity of total monopoly revenue increases, the scope of copyright should decline with the size of the market, and reached the conclusion that optimal terms are likely seven years or less.)

[4] Rebecca Giblin, 'Reimagining Copyright's Duration' in Rebecca Giblin and Kimberlee Weatherall (eds) *What if we could reimagine copyright?* (ANU Press, 2017), 198 (available open access at ***https://press.anu.edu.au/publications/what-if-we-could-reimagine-copyright***).

4	What weighting (if any) should be given to each objective?
	[Insert response here]

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?
	[Insert response here]
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?
	[Insert response here]
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?
	[Insert response here]
8	What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?
	[Insert response here]
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?
	[Insert response here]
10	What are the problems (or benefits) with the rights the Copyright Act gives visual artists (including painting, drawings, prints, sculptures etc)? What changes (if any) should be considered?
	[Insert response here]
11	What are the problems creators and authors, who have previously transferred their copyright in a work to another person, experience in seeking to have the copyright in that work reassigned back to them? What changes (if any) should be considered?
	Please see my full response in 'other comments' below – I was not able to accommodate it within this text field.
12	What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?
	[Insert response here]

13	Are there any problems (or benefits) in providing a copyright term for communication works that is longer than the minimum required by New Zealand's international obligations?
	As my explanation in 'Other comments' develops, New Zealand currently grants rights upfront, in full, regardless of whether the rightsholder actually exploits them or continues to pay creators. Any discussion about copyright duration and ownership should consider attaching appropriate reciprocal obligations along with those rights.
14	Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?
	[Insert response here]

Other comments

These comments focus on the *ownership* of copyright. They raise new evidence about the problems caused by the current approach of awarding copyright as an upfront lump sum regardless of whether the owner pays the creator or invests in continuing to make their works available.

Copyright is fundamentally a system of incentives and rewards. It incentivises initial production and continued investment in works: not as ends in and of themselves, but to achieve the broader social benefits that come from access to knowledge and culture.[6] On top of that, it rewards authors for their contributions of personality and labour,[7] which is why we grant more than the 25 years of protection that would suffice to incentivise the production of even the most expensive works.[8] Crucially, while the 'incentive' component can be shared between creators and investors as necessary to spur the desired investments, the 'rewards' component can justifiably only be directed to creators themselves.[9]

New Zealand's current approach to awarding copyright, as a fully transferrable upfront 'lump sum', is not optimally achieving either aim. The incentive component is supposed to promote works' continued availability, but rights are awarded in full, upfront, regardless of whether those investments are actually made. Very often they are not, as can be seen in the scale of the orphan works problem evidenced by NZ cultural institutions in their submissions. Neglected copyrights cause works to languish, unexploited, even when cultural institutions or investors want to publish them and authors and readers want them read. This is a collective action problem: individually, most works are worth too little for owners to bother with, but cumulatively their value to society is huge.

Awarding copyright in full, upfront, also interferes with copyright's rewards aim. Copyright's rewards component is justified only for creators themselves, but when copyright is awarded as a fully transferrable lump sum, the benefit often ends up being captured by others. That's because creators often have no choice but to assign all or most of their copyright interest as a condition of distribution or investment.[10] Over-broad taking of rights by investors is one of the reasons why, despite all the money circulating within the creative industries, creators tend to get such a small share. In the 2018

[5] Peter Drahos, *A Philosophy of Intellectual Property* (Routledge, 1996).
[6] Sam Ricketson, 'The Copyright Term' (1992) 23 *International Review of Intellectual Property & Competition Law* 753.
[7] Above n 4.
[8] Above n 5.
[10] See eg Ruth Towse, 'Copyright and Cultural Policy for the Creative Industries', in Ove Granstrand (ed), Economics, Law and Intellectual Property (Kluwer, 2003), 427; Rebecca Tushnet, 'Economies of Desire: Fair use and Marketplace Assumptions' (2009) 51 William & Mary Law Review 513, 545.

NZ earnings survey, authors reported earning around $15,200 per annum from their writing work,[11] and similarly low figures have been widely reported elsewhere.[12] In the meantime, the worlds largest publishers report record profits.[13]

Below, I present new evidence about how upfront, lump sum grants of rights are counterproductively resulting in culture being *less* accessible. I also show how they lead to authors receiving a *smaller* share of the rewards from their work than they otherwise might. I conclude by briefly explaining how the introduction of new reversion rights for authors would help NZ reclaim lost culture, create new opportunities for investors and get authors paid.

1. Rights are awarded to incentivise investments which often don't happen

One of the core justifications for awarding above-incentive copyright rights is that they're necessary to entice investors into continuing to make existing works available.[14] This arises from something called the 'under use hypothesis', which posits that publishers won't invest in works unless they have exclusive rights over them. According to this theory, works in the public domain (for example) will be subject to less investment and therefore be less available than if they were still under copyright.[15]

The scale of the orphan works problem in NZ shows that the existence of copyright rights will not incentivise those investments for the vast majority of works that have no commercial market. Additionally, my research team recently demonstrated that, contrary to the above argument, the existence of exclusive rights can actually lead to culture being *less* available than if the term had been shorter.

We did this via a new empirical study examining the relative availability of ebooks to public libraries in NZ, Australia, Canada and the United States. Commercial publishers license their ebooks to public libraries for lending via aggregators. Elending' has become big business: the largest provider, Rakuten OverDrive Inc (OverDrive) reported 185 million ebook loans worldwide in 2018, up 19% from the year before.[16]

To construct the sample, we identified all authors listed in the Oxford Companion to English Literature (and its Australian, US and NZ editions) who had died between 1962 and 1967. That gave us a list of 250 'culturally valuable' authors, whose works were all in the public domain in New Zealand and Canada, all under copyright in Australia, and either in copyright or in the public domain in the United States (depending on whether their original term had been renewed). We then examined the availability of ebooks by these authors to public libraries in each of the four countries via OverDrive.

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[11] Horizon Research, 'Writers' earnings in New Zealand' (November 2018) <***http://www.copyright.co.nz/Downloads/Assets/Download/5006/1/Writers%20Earnings%20in%20New%20Zealand%20-%20Horizon%20Research%20Report%202018.pdf***>.

[12] Rebecca Giblin, 'What's happening to authors' earnings? Surveying the surveys' *Author's Interest Project* (20 February 2018) <***https://authorsinterest.org/2018/02/20/whats-happening-to-authors-earnings-surveying-the-surveys/***>.

[13] Nicola Solomon, ‚The profits from publishing: authors' perspective' *The Bookseller* (2 March 2018) <***https://authorsinterest.org/2018/02/20/whats-happening-to-authors-earnings-surveying-the-surveys/***>.

[14] Rebecca Giblin, Jacob Flynn and François Petitjean, 'What happens when books enter the public domain? Testing copyright's underuse theory across Australia, New Zealand, the United States and Canada' (forthcoming, 2019), 8-11.

[15] Ibid, 9.

[16] Rakuten OverDrive, 'Public Libraries Achieve Record-Breaking Ebook and Audiobook Usage in 2018' (9 January 2019) <***company.OverDrive.com/2019/01/08/public-libraries-achieve-record-breaking-ebook-and-audiobook-usage-in-2018/>.***

Significantly, more than half of these 'culturally valuable' authors (54%) had no ebooks available to libraries in any of the four countries, regardless of copyright status. This shows that even the shortest current copyright terms (life + 50 years) commonly outlast works' commercial lifespans, even where they continue to have cultural value.

We further found that books were *less* available in countries where they were under copyright than where they were in the public domain. Thus public libraries in NZ and Canada (where all sampled works were in the public domain) had access to more titles and editions than Australia (where they were all under copyright) and the US (where some were under copyright and some were in the public domain). In a control dataset of almost 100,000 books, New Zealand had access to 10.5% fewer books than the US. But in the 'culturally valuable' sample, it had access to 11.7% *more*. Thus, even though the NZ book market is 100 times smaller than that of the US, NZ's access to these culturally significant books is significantly better.

These statistically significant findings suggest that longer copyright terms can actually lead to less investment and poorer availability than shorter ones, counter to one of the core justifications for granting them in the first place. It also shows that freeing up rights to new exploitations can result in new commercial investment whilst simultaneously improving access. The full research paper containing the results I describe here is attached to this submission (Appendix 1).

2. Cultural intermediaries take authors' rewards share too

At the same time New Zealand's lumpsum approach is failing to elicit the desired investments in continued cultural availability, it is also making it more difficult for authors to claim a fair share of the rewards from their work.

Creators often have to transfer or license rights to cultural intermediaries in order to get their works produced and to an audience. More than half the world's nations have express legal provisions to return rights to authors in appropriate circumstances.[17] NZ has no such protections for authors. Instead, it relies entirely on contracts to transfer rights between authors and investors (and to revert them back). The following paragraphs describe some of the main problems with that approach, drawing on findings from our recent study of publishing industry contracts.

a) Excessive licence terms

Creators and investors usually negotiate rights transfers before the work reaches the market, and sometimes before it is even produced. At that point in time nobody yet knows what the work will be worth. Anxious not to miss out in the event it becomes the next big thing, investors typically take the broadest possible rights, usually for the entire term of copyright.

Joshua Yuvaraj and I recently analysed 145 contracts from the archive of the Australian Society of Authors.[18] Nearly all of them took exclusive rights for the full period of copyright. Of the ones that did, almost 20% even purported to take rights for the entirety of any *additional* period in the event the legal copyright term was extended.

As noted above, 25 years of exclusive rights is widely accepted as being the outside amount necessary to incentivise even the most expensive investments.[19] Beyond that, copyright rights are

[17] Joshua Yuvaraj, 'Reversion laws: what's happening elsewhere in the world?' *Author's Interest Project* (4 April 2019) <***https://authorsinterest.org/2019/04/04/reversion-laws-whats-happening-elsewhere-in-the-world/***>.

[18] See Rebecca Giblin, '#notallpublishers' *Author's Interest Project* (18 March 2019) <***https://authorsinterest.org/2019/03/18/notallpublishers/***>.

[19] Above n 4.

justifiable only for authors themselves.[20] But as matters now stand, cultural intermediaries are often taking not just what's necessary to incentivise their investments, but the lion's share of creators' rewards share as well.

In the United States, authors have a right to terminate their copyright contracts 35 years after grant.[21] In Canada (as used to be the case in NZ), rights transfers end 25 years after the author's death.[22] In NZ however, there is no such time limit – nothing prevents cultural intermediaries from taking rights for the entire term, which can last a century or more.

b) Outdated out-of-print clauses

In publishing contracts, the main way for authors to reclaim their rights is by exercising contractual out-of-print clauses.

The classic out-of-print formulation provides that authors can reclaim their rights when their book has been 'unavailable in any edition' and the publisher has not rectified the situation within a specified time (often 12–18 months) of the author giving them notice to do so. Some 67% of all contracts with out-of-print clauses we reviewed had them framed in such a way.

Such clauses struck a fair bargain in the pre-digital era, but no longer pass muster today. In this era of print-on-demand and ebooks, books may technically be 'available' within the meaning of such clauses forever. But as the US Author's Guild has pointed out, that doesn't necessarily mean the publisher is genuinely investing in finding it an audience in the way it would have to if it had to justify a new print edition.[23] This fundamentally changes the bargain between publishers and authors.

The solution to this problem is definitions of 'out of print' that don't rely on mere technical availability. We observed some good examples of those in our research. Triggers for authors to be able to reclaim their rights included 'where less than $100 had been paid in royalties in the previous 12 months', or where there'd been 'fewer than 50 sales in the previous year'. Such formulations protect the publisher's commercial interests while maintaining the spirit of the out-of-print bargain for the author. However, such formulations were a minority, and the Australian Society of Authors has advised that it is regularly seeing contracts with out-of-print clauses based on the outdated notion of technical availability even today. The Society recommends authors not sign such contracts, but not all authors get professional advice before signing – and not all publishers are willing to change their terms to reflect the industry's changed realities.

Some of the out-of-print clauses we observed weren't just outdated – they were frankly unconscionable. One of the most egregious formulations allowed authors to reclaim their rights when their work was unavailable in any edition – but only so long as they repaid any unearned portion of their advance and paid the publisher for various investments they'd made on the book at half their original cost..! But at least the authors bound by such terms had *some* way of getting their rights back when the publisher was no longer exploiting them. More than 10% of the contracts we reviewed had no out-of-print clause at all.[24] While some publishers would doubtless release

[20] Rebecca Giblin, 'Reimagining Copyright's Duration' in Rebecca Giblin and Kimberlee Weatherall (eds) *What if we could reimagine copyright?* (ANU Press, 2017), 198 (available open access at ***https://authorsinterest.org/2019/03/18/notallpublishers/***).
[21] *Copyright Act of 1976*, 17 USC §§203, 304 (2016).
[22] *Copyright Act*, RSC 1985, c C-42, s 14(1); *Copyright Act 1913* (NZ), s 8(2).
[23] 'A Publishing Contract Should Not Be Forever' *Authors Guild* (28 July 2015) <***https://authorsinterest.org/2019/03/18/notallpublishers/***>.
[24] Rebecca Giblin, 'Does Australia *really* need author rights? A response to industry pushback' *Overland* (8 March 2019) <***https://overland.org.au/2019/03/does-australia-really-need-author-rights-a-response-to-industry-pushback/***>.

unwanted books upon request, not all are willing to do so. And having to negotiate on a case-by-case basis increases transaction costs to the point where the author might end up abandoning their rights instead.

Again, other countries have recognised these deficiencies and mandated a different bargain. For example, French law provides that if a book has been published for at least four years, and the author hasn't been paid royalties (or had them credited against an advance) for at least two, they can get their rights back – *regardless* of what the contract says.[25] Such mechanisms respect the commercial bargain between the parties, whilst simultaneously recognising the special ongoing interest of authors in their works.

c) Taking without using

In our archival contract study, we also observed that publishers regularly took broad rights (for example, to publish in world territories and exploit in all languages). That's understandable: since nobody knows that the work is worth at the time the contract is entered into, publishers like to add the few additional words that allow them to extract additional rights just in case. However, those contracts rarely provided for those rights to be returned to authors in the event the publisher did not actually exploit them. That stands in stark contract to some other countries which protect their authors via 'use-it-or-lose-it' provisions. For example, Lithuanian law provides that, if a publisher doesn't publish the work in all languages stipulated in the publishing agreement within 5 years, the author can terminate the agreement with regard to the ones that haven't been exploited, and Spanish law gives authors a similar right.[26]

3. Alternatives: reclaiming lost culture and getting authors paid

As this submission has shown, granting copyright as an upfront lump sum, *regardless* of whether the recipient actually invests in ongoing availability or fairly shares the rewards with creators, is counterproductive to achieving its aims.

The key to fixing these problems is stronger reversion rights for authors. More than half the world's nations already have such rights enshrined in their law.[27] It is possible to design a reversion system that helps get authors better paid, opens new opportunities for investors and simultaneously reclaims lost culture.

I describe such a system in my recent journal article *A new copyright bargain? Reclaiming lost culture and getting authors paid*.[28] In sum, that paper proposes:

- 25 year limits on copyright assignments and exclusive transfers, after which rights return to authors to negotiate fresh exploitations. That might include licensing it again to the same publisher, a different one, or taking advantage of new distribution possibilities – such a digital sales, print-on-demand or licensing direct to public libraries for e-lending.
- Where authors do not reclaim their works, a public steward could do so on their behalf. Funds from the steward's licensing could directly support authorship and the creation of new works in the form of grants, fellowships and prizes. This would eliminate orphan works aged 25 years or older and generate an important new revenue source for authors.

[25] Code de la propriété intellectuelle [Code of Intellectual Property] (France), art L132-17-4.
[26] Law No. VIII-1185 of May 18, 1999, on Copyright and Related Rights (Lithuania), art 45(3); Consolidated Text on the Law of Intellectual Property (Spain), art 62(3).
[27] Joshua Yuvaraj, 'Reversion laws: what's happening elsewhere in the world?' *Author's Interest Project* (4 April 2019) <***https://authorsinterest.org/2019/04/04/reversion-laws-whats-happening-elsewhere-in-the-world/***>.
[28] (2018) 41 *Columbia Journal of Law and the Arts* 369.

The scheme is fully compliant with the Berne Convention and the TRIPS Agreement. That research paper can be downloaded from the footnoted link.[29]

Cultural investors are vital to the creative industries, and they should receive exclusive rights in exchange for their investments. However, investors' interests are not the same as creators' interests. We can start to disentangle them with the following example. Books depreciate quickly, and most have a commercial lifespan of four years of less. However, publishers typically take rights from authors for the entire term of copyright. One of the ways in which they exercise these rights is by licensing books to public libraries for e-lending. As our analysis of almost 100,000 books across five countries (including NZ) shows, publishers commonly license older books on 'exploding' time-limited licences, which see them deleted from library collections after 1 or 2 years even if they have never been borrowed.[30] They also price them similarly to the very newest releases.[31] Such practices make it infeasible for libraries to hold older books in their collections at all. Instead, they tend to spend their money elsewhere.

In this example, the publisher's interest is to maximise their share of library collections budgets, not to ensure that any given book continues to be bought or read. By contrast, the author's interest is to maximise their *own* revenues, and keep their *own* books available and accessible to future readers. With those motivations, authors would likely be keen to price and license their books to libraries on very different terms than the ones we see today.

Appropriately-tailored reversion rights would open up all kinds of opportunities that current arrangements render unfeasible. If authors were to regain their rights after, say, 25 years, it would result in new revenue whilst simultaneously improving access to knowledge and culture. That freeing up of rights would benefit investors as well. Commercial publishers could bid to re-release books in which they think they can breathe new life. For books that no longer have sufficient print demand, the widespread availability of reverted rights would turbocharge markets for digital distribution and print on demand. Authors could also license their books directly to libraries via aggregators such as OverDrive, potentially resulting in a Digital Public Library of NZ stories.

These opportunities are currently blocked by copyright arrangements that it being too easy for investors to take broad rights for the entire term of copyright without reciprocal obligations to keep paying authors or investing in works' continued availability.

Conclusions: not enough money and too much money being left on the table

Under New Zealand's current 'lump sum' approach to awarding copyright, the vast majority of creative works get tied up for the entire term of copyright – even if the publisher is not actively exploiting them, and the author is not getting paid. Society pays (via the grant of copyright) for culture to be made available ongoing – and yet the effect of that grant can be that older works are less available than they would have been without it. At the same time, those laws fail in their other main aim, of recognising and rewarding creators.

Introducing an appropriately-tailored system of rights reversion would maintain incentives for investors, create new investment opportunities through the freeing-up of rights, generate valuable new revenue streams for authors and reclaim lost culture.

[29] Rebecca Giblin, 'A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid' (2018) 41 *Columbia Journal of Law and the Arts* 369, downloadable in full text from https://ssrn.com/abstract=3252838.
[30] Rebecca Giblin, Jenny Kennedy, Charlotte Pelletier, Julian Thomas, Kimberlee Weatherall and François Petitjean, 'What can 100,000 books tell us about the international public library e-lending landscape?' *Information Research* (forthcoming June 2019), preprint available at ***https://ssrn.com/abstract=3354215***, 7.
[31] Ibid, 10-12.

Rights: What actions does copyright reserve for copyright owners?

15	Do you think there are any problems with (or benefits arising from) the exclusive rights or how they are expressed? What changes (if any) should be considered?
	[Insert response here]
16	Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?
	[Insert response here]
17	What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?
	[Insert response here]

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?
	[Insert response here]
19	What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?
	[Insert response here]
20	What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?
	[Insert response here]
21	Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.
	[Insert response here]

22	What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?
	[Insert response here]
23	What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?
	[Insert response here]
24	Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.
	[Insert response here]

Other comments

[Insert response here]

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?
	[Insert response here]
26	What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?
	[Insert response here]
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?
	[Insert response here]
28	What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?
	[Insert response here]
29	Is it clear what the TPMs regime allows and what it does not allow? Why/why not?
	[Insert response here]

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?
	[Insert response here]
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?
	[Insert response here]
32	What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?
	[Insert response here]
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?
	[Insert response here]
34	What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?
	[Insert response here]
35	What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?
	[Insert response here]
36	What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?
	[Insert response here]
37	Are there any other current or emerging technological processes we should be considering for the purposes of the review?
	[Insert response here]
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?
	[Insert response here]
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?

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

Other comments

[Insert response here]

Exceptions and Limitations: Exceptions for libraries and archives

41	Do you have any specific examples of where the uncertainty about the exceptions for libraries and archives has resulted in undesirable outcomes? Please be specific about the situation, why this caused a problem and who it caused a problem for.
	[Insert response here]
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?
	[Insert response here]
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?
	[Insert response here]
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?
	[Insert response here]
45	What are the problems with (or benefits arising from) the flexibility given to libraries and archives to copy and make available content published online? What changes (if any) should be considered?
	[Insert response here]
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?
	[Insert response here]

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?
	[Insert response here]
48	Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	[Insert response here]
49	Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	[Insert response here]
50	Is copyright well understood in the education sector? What problems does this create (if any)?
	[Insert response here]

Other comments

[Insert response here]

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

51	What are the problems (or advantages) with the free public playing exceptions in sections 81, 87 and 87 A of the Copyright Act? What changes (if any) should be considered?
	[Insert response here]
52	What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?
	[Insert response here]
53	What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?
	[Insert response here]

54	What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?
	[Insert response here]
55	What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?
	[Insert response here]
56	Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?
	[Insert response here]
	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?
	[Insert response here]

Other comments

[Insert response here]

Exceptions and Limitations: Contracting out of exceptions

57	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?
	[Insert response here]

Exceptions and Limitations: Internet service provider liability

	What are problems (or benefits) with the ISP definition? What changes, if any should be considered?
	[Insert response here]
	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?

	[Insert response here]
	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.
	[Insert response here]
	What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?
	[Insert response here]

Transactions

58	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?
	[Insert response here]
59	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.
	[Insert response here]
60	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.
	[Insert response here]
61	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?
	[Insert response here]
62	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?
	[Insert response here]
	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.
	[Insert response here]
	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?

	[Insert response here]
63	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?
	[Insert response here]
64	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.
	[Insert response here]
	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?
	[Insert response here]
	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?
	[Insert response here]
74	What were the problems or benefits of the system of using an overseas regime for orphan works?
	[Insert response here]
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?
	[Insert response here]

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?
	[Insert response here]

	What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?
	[Insert response here]
78	Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?
	[Insert response here]
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?
	[Insert response here]
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?
	[Insert response here]
81	Is the requirement to pay the $5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are the any issues with the border protection measures that should be addressed? Please describe these issues and their impact.
	[Insert response here]
82	Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?
	[Insert response here]
83	Why do you think the infringing filing sharing regime is not being used to address copyright infringements that occur over peer-to peer file sharing technologies?
	[Insert response here]
84	What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing filing share regime (if any) should be considered?
	[Insert response here]
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?
	[Insert response here]
86	Should ISPs be required to assist copyright owners enforce their rights? Why / why not?
	[Insert response here]

87	Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?
	[Insert response here]
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?
	[Insert response here]

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?
	[Insert response here]
90	Have you experienced any problems when seeking protection for an industrial design, especially overseas?
	[Insert response here]
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?
	[Insert response here]
92	Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?
	[Insert response here]

Other comments

[Insert response here]

Other issues: Copyright and the Wai 262 inquiry

93	Have we accurately characterised the Waitangi Tribunal's analysis of the problems with the current protections provided for taonga works and mātauranga Māori? If not, please explain the inaccuracies.
	[Insert response here]
94	Do you agree with the Waitangi Tribunal's use of the concepts 'taonga works' and 'taonga-derived works'? If not, why not?
	[Insert response here]
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?
	[Insert response here]
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?
	[Insert response here]
97	How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?
	[Insert response here]

Other comments

[Insert response here]

APPENDIX 1:

WHAT HAPPENS WHEN BOOKS ENTER THE PUBLIC DOMAIN? TESTING COPYRIGHT'S UNDERUSE HYPOTHESIS ACROSS AUSTRALIA, NEW ZEALAND, THE UNITED STATES AND CANADA.

JACOB FLYNN, REBECCA GIBLIN AND FRANÇOIS PETITJEAN

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3401684