

Copyright Review Issues Submission

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Introduction

This submission is from the Museum of New Zealand Te Papa Tongarewa (Te Papa).

This submission addresses the Issues Paper Review of the Copyright Act 1994. While this submission is focused on the impact of copyright law on Te Papa, we have had the benefit of reviewing, in draft, the submissions of LIANZA and Auckland War Memorial Museum Tāmaki Paenga Hira. Te Papa supports those submissions.

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Context – Te Papa’s Legislative and Operational Framework

The governing Board of Te Papa is a Crown entity. Under the Crown Entities Act 2004, Te Papa is a statutory entity, being a body corporate established under section 6 of the Museum of New Zealand Te Papa Tongarewa Act 1992.

The Museum of New Zealand Te Papa Tongarewa Act 1992, in section (4) *Purpose* establishes the role of the Museum as follows:

(4) The purpose of this Act is to establish a National Museum that, under the name Museum of New Zealand Te Papa Tongarewa, shall provide a forum in which the nation may present, explore, and preserve both the heritage of its cultures and knowledge of the natural environment in order better –

To understand and treasure the past;
To enrich the present; and
To meet the challenges of the future

Te Papa is an autonomous Crown entity, and must have regard to government policy when directed to by its responsible Minister, the Minister for Arts, Culture and Heritage. The Museum's Act states that the Minister may not give a direction to the Board in relation to cultural matters.

Te Papa has made a commitment to being a bicultural organisation, and acknowledges the importance of the Treaty of Waitangi and the partnership implicit in the Treaty. Te Papa's Bicultural Policy is designed to ensure the development of a strong operational partnership between Tangata Whenua and Tangata Tiriti that is active throughout the organisation and at the governance level.

Objectives

Te Papa supports the development of objectives for New Zealand's copyright regime. The proposed objectives reflect what copyright should seek to achieve in the New Zealand context. With proposed objective 2 "net benefits for New Zealand" should accommodate not only pure economic benefits but also wellbeing of New Zealand and New Zealanders in non-market domains.

Rights

Rights - Question 6 Skill, Judgement & Labour

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

It is not clear what 'skill, judgement and labour' means as a test as to whether a work is protected by copyright. For Te Papa, the issue is not whether the test makes copyright protection apply too widely. The issue is, when using this test, that it is sometimes unclear whether copyright applies at all. Te Papa has clear processes to follow if a work is in copyright and clear processes if a work does not qualify for copyright protection. Where it is uncertain whether copyright exists, significant resources in staff time and, in some cases, budget for legal advice is required to navigate the uncertainty and mitigate the risk.

There are a growing number of Galleries, Libraries, Archives, and Museums (GLAM) institutions in New Zealand that are providing high resolution digital surrogates of collection items available for viewing on the internet and also for download and reuse / remix by users. Equally there are other GLAM institutions that allow viewing of digital surrogates of collection items on the internet but wish to retain control over the reuse / remix of the digital surrogates they own. In order to ensure they retain control, often these institutions claim copyright in these exact copies (the digital surrogates) of out-of-copyright works. The uncertainty in the copyright status of digital surrogates of out-of-copyright works results in inconsistent practice across the sector and confusion for users of the services provided by the GLAM sector.

The emerging GLAM practice within New Zealand is that exact digital copies of out-of-copyright two-dimensional works do not qualify for copyright because the digital copies are exact copies. The original 2D works are collection items such as out-of-copyright photographic prints, photographic negatives, oil paintings, art prints, drawings, watercolours, music scores, literary works, wallpapers, dress patterns, tapa cloth, embroidery samplers etc. The creation of high quality digital surrogates of these 2D works can involve the labour of professional photographers or scanners to ensure the photography or scanning process creates a digital surrogate that is as close an exact copy to the original as possible. This includes time spent lighting the original work and colour matching the resulting digital surrogate. Te Papa, Auckland War Memorial Museum Tāmaki Paenga Hira, National Library of New Zealand and other New Zealand GLAMs use the indicator “No Known Copyright” to indicate that, to the best of their understanding no copyright remains in either the 2D works or the digital surrogates of those 2D works. “No Known Rights” is the term recommended by the New Zealand Government Open Access and Licensing framework.¹

The uncertainty as to whether copyright exists in digital surrogates has been commented on by the UK Intellectual Property Office.

The UK advice from the Intellectual Property Office stated:

*Simply creating a copy of an image won't result in a new copyright in the new item. However, there is a degree of uncertainty regarding whether copyright can exist in digitised copies of older images for which copyright has expired. Some people argue that a new copyright may arise in such copies if specialist skills have been used to optimise detail, and/or the original image has been touched up to remove blemishes, stains or creases. However, according to the Court of Justice of the European Union which has effect in UK law, copyright can only subsist in subject matter that is original in the sense that it is the author's own 'intellectual creation'. Given this criteria, it seems unlikely that what is merely a retouched, digitised image of an older work can be considered as 'original'. This is because there will generally be minimal scope for a creator to exercise free and creative choices if their aim is simply to make a faithful reproduction of an existing work.*²

The European Union Amendment Directive on Copyright in the Digital Single Market (approved on 26 March 2019) includes an article that clarifies this point for their Member States:

(53) The expiry of the term of protection of a work entails the entry of that work into the public domain and the expiry of the rights that Union copyright law provides in relation to that work. In

¹ “No Known Rights, NZGOAL (version 2)”. New Zealand Government, 21 December, 2016. <https://www.data.govt.nz/manage-data/policies/nzgoal/nzgoal-version-2#no-known-rights> Accessed 15 March, 2019.

² “Copyright Notice: digital images, photographs and the internet. Copyright Notice Number 1/2014”. Intellectual Property Office, Newport, November 2015. <https://www.gov.uk/government/publications/copyright-notice-digital-images-photographs-and-the-internet> Accessed 15 March, 2019

*the field of visual arts, the circulation of faithful reproductions of works in the public domain contributes to the access to and promotion of culture, and the access to cultural heritage. In the digital environment, the protection of such reproductions through copyright or related rights is inconsistent with the expiry of the copyright protection of works. In addition, differences between the national copyright laws governing the protection of such reproductions give rise to legal uncertainty and affect the cross-border dissemination of works of visual arts in the public domain. Certain reproductions of works of visual arts in the public domain should, therefore, not be protected by copyright or related rights. All of that should not prevent cultural heritage institutions from selling reproductions, such as postcards.*³

The Amendment states:

Article 14

Works of visual art in the public domain

*Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.*⁴

Like the UK and the EU there are still New Zealand GLAM institutions challenged with rising digital expectations of its users and audiences and limited financial resources with which to meet these expectations. All revenue sources are important to ensure the long term viability of the GLAM sector. Those institutions wishing to retain control of the digital surrogates of their collection items can do so via supply and access contracts. Access to the high resolution images considered commercially valuable can be restricted to those that agree to supply contracts. By ensuring that the test for copyright protection is understood and has clarity, the Act will ensure that the GLAM sector provides accurate copyright statuses for all GLAM digital surrogates.

Te Papa notes the issue of the 'skill, judgement and labour' test is not restricted to exact copies of 2D works. As the democratisation of 3D scanning and 3D printing advances, the uncertainty of the test is affecting other types of activities. Te Papa has grappled with whether copyright exists in 3D scans of moa bones. The existing moa bones are scientific specimens and have no copyright. An organisation wished to access the bones, 3D scan the bones, and claim copyright in the 3D scanning outputs - the data measurements, the computer renderings, and any 3D printed copies of the moa bones. The copyright was argued to exist because of the investment of "sweat of the brow" i.e. the time, skill and energy it took to create and process the scans into files that could guide a 3D printer. Te Papa considered it questionable whether the 'creative spark' in these new works existed and whether the

³ "Final text of the Directive as submitted to the Parliament on 26 March 2019". 20 March 2019
http://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271_EN.pdf Accessed 29 March 2019
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⁴ "Final text of the Directive as submitted to the Parliament on 26 March 2019". 20 March 2019
http://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271_EN.pdf Accessed 29 March 2019
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staff of the organisation would expend enough skill, judgement, and labour for the 3D scans to qualify as new copyright works. The Copyright Act and case law provided limited guidance as to whether the threshold of originality was met.

Te Papa resolved the issue by contracting out of the copyright complexity and negotiating an access contract. Te Papa remains unsure whether any copyright exists in resulting 3D scans and scanning outputs. This uncertainty is hindering Te Papa from developing processes to use 3D scanning and printed outputs in its commercial operations. Te Papa does not want to be in a position of claiming copyright where copyright does not exist but equally Te Papa might wish to develop commercial licensing of 3D scans (for models, figurines etc) if copyright does exist.

If 3D scanning and outputs from 3D scanning are considered to benefit from copyright protection then, as 3D technology advances over time and the skill, judgement and labour required to create successful 3D scanning outputs reduces, will copyright then continue to apply? Resolving this uncertainty will assist with gaining clarity in the Act.

Rights - Question 8 Default rules of Copyright Ownership

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

Employees creation of sound recordings and video

In Section 21 (2) of the Act films and sound recordings and computer generated works are excluded from the list of works created by an employee in the course of their employment where the employer is the first owner of copyright. With the democratisation and ease of creating film and sound recordings and computer generated works increasing and staff being hired by a variety of industries to specifically create these types of works, it would aid clarity and certainty if these types of works were added to the list of works where the first owner of copyright was the employer. Alternatively the removal of specific list of types of works associated with this rule could be considered as this would ensure the employer is the first owner of copyright in all works created by employees in the course of their employment.

Examples of roles creating video and sound recordings for Te Papa include Digital Producer roles (managing the production of video and sound creation for exhibitions) e.g.

<https://www.youtube.com/watch?v=09ips64rhK8> created for showing in the Pacific Sisters exhibition, Digital Editor role (creating short, evergreen videos for Te Papa)

<https://www.youtube.com/watch?v=h3ETD3rPnFQ> , and Social Media Advisor role (creating short, viral-friendly video for social media platforms)

<https://www.facebook.com/TePapa/videos/325193154693538/>

Te Papa has resolved the inconsistency in the first owner of copyright in works by employees by ensuring that Te Papa's employment contracts and contracts for services are clear as to who will own the copyright in all works produced under a contract for service or employment. Other GLAM institutions may not have the in-depth knowledge of the Copyright Act to be aware that the sound recordings and films created by the employee producing these works may have a different first owner of copyright than the employer. Consideration should be given to whether there is value in making the first owner of copyright rules more consistent.

Commissioning rule

The commissioning rule is working well for Te Papa as it provides a point of leverage when negotiating the commissioning of works. The commissioning rule also continues to have value for Te Papa as Te Papa staff are often contributing to the creative energy and decision-making occurring during the creative process leading up to the delivery of the work. The amount of this contribution can vary significantly from commission to commission.

Te Papa often commissions new copyright works for its collection including paintings, sculpture, and art photography. The contribution of staff to this type of creative work is likely to be significantly less and Te Papa commonly assigns copyright in the commissioned work back to the fine artist while ensuring a generous licence allowing Te Papa's reuse of reproductions of the work. However, the majority of the commissioning agreements Te Papa enters into are not fine art commissions but rather for works created for its exhibitions, publications, and website. These commissioned works include props, models, visitor interactives, films and sound recordings, games, software, photography, data sets, designs and graphics. There is often a significant creative contribution on the part of Te Papa staff towards the creation of these works and Te Papa ensures that it retains copyright ownership in those commissions.

The commissioning rule is inconsistently understood by those that Te Papa commissions from. For example the commissioning rule is generally not well understood by fine artists but is very well understood by commercial photographers. Often good faith negotiations require Te Papa to provide information on the commissioning rule so both parties start negotiations from a position of knowledge.

Te Papa works to maintain long term positive relationships with those people and businesses it commissions from. In order to ensure that no misunderstandings arise regarding intellectual property ownership, Te Papa will document the outcome of negotiations in a contract for service or commissioning contract.

Rights - Question 10 Artist Resale Right

Do artists receive a fair share of the revenue generated from their works? What are the problems (or benefits) are there with the rights the Copyright Act gives visual artists (including painting, drawings, prints, sculptures etc)? What changes (if any) should be considered?

Te Papa provided a submission on the Artist Resale Right when it was originally considered.

https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/49SCGA_EVI_00DBHOH_BILL8522_1_A27554/museum-of-new-zealand-te-papa-tongarewa

The main points of this submission have been amended to answer this question.

Te Papa acknowledges the policy issue of the gains in value of early artworks by established artists accruing to parties other than the artist. Te Papa neither objects to nor supports the principle of the Artists' Resale Right.

Retail sales via Museum retail outlets

Te Papa's commercial directorate is in the business of dealing in works of art, object art and works of artistic craftsmanship such as cast and blown glass, ceramics, jewellery, textiles, and wooden carving sourced from named artists. The commercial directorate stocks these artworks either on a consignment basis or on a full outright sale basis.

If an Artists' Resale Right is considered Te Papa urges those drafting the right to consider commercial dealers. Artworks retailed on consignment do not accrue a resale royalty as the sale on consignment is the first sale i.e. the commercial directorate is selling the item for the first time as an agent for the artist. Depending on how the right was drafted artworks stocked as a result of a full outright sale from the artist to the retailer would accrue a resale royalty as the retail sale from the retailer to the customer would be the second sale.

Te Papa believes that accruing a resale royalty in this situation would disadvantage artists.

One of the objectives of the proposed mandatory resale right was to

...provide an economic incentive to artists to continue to produce artistic work and to derive ongoing benefit from that production⁵

Full outright sale arrangements result in an immediate payment for work to the artist, as opposed to selling the work on commission and paying the artist once the work is sold. In an outright sale of an

⁵ Copyright (Artists' Resale Right) Amendment Bill, 10 March 2009
<http://www.legislation.govt.nz/bill/government/2008/0184/latest/whole.html> Accessed 29 March 2019

artwork bought as retail stock by a retailer, the retailer takes on the full risk of the sale of the work. Any resale royalty accrual would act as a disincentive to retail outlets purchasing artwork as retail stock and could inhibit an artist from developing a distribution network for her/his work.

Te Papa believes artwork purchased directly from an artist for the purposes of retail stock should be exempt from a resale royalty on the first resale of that work for a specified length of time. Artworks sold to retailers as stock are generally resold within a relatively short period and are unlikely to accumulate value during this short time frame.

Purchasing Artistic Works for GLAM Collections via Private Sale

Te Papa acquires works of art for its permanent collection from private sellers where no agent is involved in the sale. The Bill was originally unclear whether not-for-profit cultural institutions such as Te Papa were to be liable to pay a resale royalty on these private sales.

Te Papa would not consider itself to be dealing in artistic works when purchasing from a private individual for its permanent collection as these works are not acquired with the intention that they will be resold. Te Papa regards itself to be acting in the course of its functions as outlined in its Act.

- (7) Functions
- (1) The principal functions of the Board are –
- (b) To collect works of art and items relating to history and the natural environment

Clarification is needed on whether private sales arranged between private individuals and not-for-profit cultural institutions such as libraries, museums and art galleries will accrue resale royalties. If these types of sales do incur a royalty, new systems and procedures for administering this obligation will need to be developed by not-for-profit cultural institutions as it is unlikely that private individuals will be in a position to accommodate this easily.

Purchasing Artistic Works for GLAM Collections via Dealers, Auction Houses, or Other Art-Market Intermediaries

Depending on the definition of artistic work under the draft Bill the royalty may apply to all collecting areas of Te Papa including Taonga Maori, Pacific Cultures, Art, History, and Natural Environment collecting. The definition applies to paintings, sculpture, prints, photographs, drawings, scientific drawings, carving, weaving, models, original graphic designs, object art, and decorative arts.

Depending on how the resale right clauses are drafted, if the obligation to pay the royalty lies with the seller or their agent, it is anticipated by Te Papa that the royalty is likely to be passed on to the buyer in

some form. While an extra cost will not prevent not-for-profit cultural institutions from bidding or obtaining works for their collections, it should be noted that acquisition budgets rarely keep pace with increases to market prices. Additional costs (such as those likely to be borne as a result of the introduction of the Resale Right) will further impact on the ability of such organisations to acquire work, a reduction in the numbers of works bought contributing to an overall tightening of the market in the face of an attempt to improve it.

Artistic Works by Unknown Artists

If a resale right is advanced any such Bill addressing this issue should consider how eligibility is determined for works by unknown artists. Artworks by unidentified artists can still hold significance to the extent where collecting institutions such as GLAMs would consider acquiring those works for public collections.

Regulations governing any designated Collecting Agency

Access to and disclosure of records held by the agency – Te Papa assumes that any collecting agency designated with collecting and distributing any Artist Resale Right will maintain a registry of artists including contact details of the artist or their estate and – in order to establish the artist resale right duration – the dates of death of artists. This register will be one of the few centralised sources of information regarding contact information for artists and their estates. Te Papa, like other cultural institutions, is often in the position of seeking information on artists and their estates to establish copyright duration and to request copyright licences to reproduce artistic works. Te Papa believes that information held by the collecting agency should be available to those researching copyright duration or seeking contact information for artists who are also copyright owners.

Orphan artistic works – Te Papa anticipates that there will be occasions where, should a collecting agency be designated with distributing the right, the collecting agency will be unable to distribute royalties from the sale of some artistic works as reasonable efforts to trace the artist or the estate of the artist may fail. Consideration should be given as to whether the collecting agency will be expected to conduct a search for artists or their estates as part of its duties and, if so, what would constitute a reasonable search effort. A documented “reasonable effort” may be of use with orphan works designation.

Rights - Question 12 - Crown Copyright

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

Te Papa holds quantities of Crown Copyright works in its collection. The issue of the administration of Crown Copyright works not only applies to those works created since the establishment of NZGOAL but also any unpublished work created by employees of the Crown in the past 100 years and any published work created in the past 50 years.

The difficulties Te Papa faces in licensing these in-copyright works includes:

- Determining whether a government issued work is Crown Copyright
- Determining which government agency is the inheriting body of the rights in the work.
- Convincing the department employee dealing with Te Papa's enquiry that their government department has the right to administer copyright in the work and can legally issue Te Papa a copyright licence to reproduce the work

An example of the difficulties caused by determining whether a work is a Crown copyright work are the letters, poems, and stories written by soldiers deployed during World War One. Are these Crown Copyright works? There were literary and artistic works created by soldiers and published in Troopship magazines printed and distributed on board. Were Troopship publications Crown copyright works? What about the private letters home read and amended by censors employed by the Crown? The letters were written while soldiers were employed by the Crown so are the letters Crown copyright works or copyright to the writer?

A specific example of where staff time was devoted to assessing and attempting to clear Crown copyright is this item:

Letter of condolence, 3 October 1918, France, by Reverend George Cruickshank. Gift of Miss Phyllis A Rolfes, 1966. Te Papa (GH011681/1) <https://collections.tepapa.govt.nz/object/777386>

This letter of condolence formed one of a number of items connected with Herman Rolfe. Mr Rolfe's personal effects were donated by his mother to the museum shortly after the end of WW1 and formed a key part of the content used in Te Papa's WW100 commemorations work a century later. This letter of condolence was unpublished and written by an employee of the Crown in 1918. Te Papa believes this literary work was written in the course of the duties of a Crown employee and therefore qualifies for Crown Copyright. Crown Copyright in the letter was not due to expire until after 31 December 2018. The letter was identified in 2008 as content possibly for use related to the WW100 project and photographed. Copyright was assessed shortly afterwards and licensing correspondence addressed to the government department considered most appropriate and sent in 2010. Despite a number of attempts through various avenues to that government department no response was received. The digital reproduction of this letter was not published in Te Papa's Collections Online and was not included in the content provided for the launch of the WW100 project. Te Papa conducted a risk assessment in 2015 and determined that the risk of objection to any reproduction was low and made the decision to take the risk and reproduce the work in its Collections Online database and various other online platforms without having copyright permission in place. There has been no contact or complaint during the time the work remained in copyright. Had Te Papa been more risk averse this letter would not have

been included in Te Papa's WW100 commemorations at all. The work ascended to the public domain after 31 December 2018 and remains online.

This example demonstrates the staff time and energy it took to establish copyright ownership and the repeat of licensing effort and additional risk mitigation judgement required before the work could be used in a non-commercial commemorative project.

If Crown Copyright is to continue then Te Papa recommends that a centralised government administration arm be established to manage Crown copyright works. If Crown Copyright is to be waived it should be retrospectively waived to cover all those Crown Copyright works created in the past 100 years.

If Crown Copyright in all works created in the past 100 years was waived, it would not impact on the burden of the research required to ascertain whether a work is a Crown work or whether a Crown work includes third party content. It would add to the incentive to research the details surrounding the creation of an historic Crown work as determining that the work was definitely a Crown work would remove copyright considerations. There will always be content where records no longer exist to provide definitive proof whether a work was Crown copyright or copyright owned by others but the increased incentive for research will assist in restricting the number works with an uncertain copyright status.

Rights - Question 14 Indefinite Copyright term for works referred to in section 117

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

Yes –the indefinite nature of the copyright term is a concern. The general term of copyright for literary, dramatic, musical and artistic works is long. Copyright administration often requires negotiations with the third generation descendants from the creator of the work before copyright expiry occurs. The indefinite nature of the copyright term for these types of works will inevitably result in works becoming separated from those with an interest in the copyright and the work becoming orphaned. The GLAM institution administering the work in this state is then placed in a position where it cannot fulfil its functions as a collecting institution.

It is likely that there are instances where this situation exists as this arrangement has occurred in the past and the item is of such significance that the collecting institution retains it. In those instances providing a mechanism to ensure a finite term to the conditions imposed would be of benefit.

This clause should be considered for removal from the legislation. When a copyright owner transfers or bequeaths unpublished literary, dramatic or musical work, or an artistic work other than a photograph

to an institution, it is more appropriate for bequests and any conditional bequest to be discussed between the institution and the person considering the bequest prior to the bequest occurring.

Rights - Question 15 Graphic Designs and Commercial Art

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?

Clause 179 of the issues paper notes that the doing of a restricted act is an infringement even if done indirectly e.g. making copies of a product could infringe the drawings used in the manufacture of the product. Te Papa notes that this also includes making copies of a product featuring copyright works such as graphic designs created for printing on products e.g. biscuit tins, cereal boxes, cans of fruit etc. The common perception held by the public is that these types of products have only trademark protection. Te Papa is aware of the existence of copyright in the graphic designs created by the graphic artist for printing on the product. Te Papa understands that these graphic designs qualify for the general copyright duration of end of the calendar year 50 years after the year on which the author dies. In order to avoid infringing Te Papa does pursue copyright licensing with those companies that have either produced or inherited the rights from those that have produced products that featuring the commercial art and are part of Te Papa's collection. Examples of products featuring commercial art where Te Papa has received licensing include chocolate boxes, food tins, and seed packets. This is an example of the copyright considerations and licensing pursued by GLAMs when considering reproducing collection items for non-commercial GLAM uses such as online collection catalogues, within exhibitions, and in education programmes. A fair dealing exception to ensure that New Zealand GLAMs can fulfil their non-commercial, public good functions should be considered.

Rights - Question 22 User Generated content

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

The pejorative terminology used in the issues paper implies a value judgement on the quality of user-generated copyright works. Using the terms "non-professionals" and "low levels of investment" in association with user-generated content is a generalisation. With the ever-advancing democratisation of professional tools, user development of content, like any other type of content creation, results in works that vary in quality, quantity, significance, time commitment and application of professional skills.

The problems and benefits with how the Copyright Act applies to user generated content are the same as those that apply to other types of content generation involving remix. The issue lies in the level of copyright clearance knowledge and resources available to the authors. Professionals and commercial businesses often have representatives to take responsibility for rights clearance and copyright licensing. To generalise, a member of the public often has a lesser understanding of copyright constraints.

The “User-generated content” discussed in issue 22 could be considered a subset of Remix culture - whether the new work is created by a teenager in her bedroom or produced by a renowned artist in her studio - a new work is created in response to and including elements of other copyright works.

A GLAM example of where user-generated content, quotation, remix, and copyright is an issue is the Te Papa’s acquisition of the artwork *Top 16, 2007-2017* by Janet Lilo. This is a site responsive multimedia installation work acquired by Te Papa for the national collection in 2018. The work consists of a neon sculpture “Share the Love” inspired by a feature on Bebo (a social media platform) where users could ‘share the luv’ in the form of graphic hearts posted on personal pages, a photographic montage of printed avatar images copied from the now-defunct Bebo social media platform, a white ‘brick wall’ interactive component where visitors are encourage to share their own messages and illustrations through drawing while in the gallery, benches where visitors are encouraged to sit, interact and share conversation and views, and a mashup video of YouTube videos of people covering two popular songs. These videos were taken from YouTube by the artist, Janet Lilo, and then edited by her to create the mashup video that formed part of the artwork. From a curatorial perspective this installation is considered of national significance.

As an artist tuned in to how cultural trends affect the way people present themselves, Janet’s work is often responsive to local or global phenomena, and as such forms a valuable archive of the way New Zealanders have moved into the digital era, and the cultural changes that have come as a result. Her practice is socially conscious and collaborative. She often works with communities to investigate language, representation, communication and information sharing in playful and thought provoking ways. Many of her works open themselves up to the public encouraging an interactive response, forming a bond between artist, artwork and public. Janet is a 21st Century artist responding to and documenting the way people, communities and societies behave in this 21st century era of technological change.⁶

From a copyright perspective the photographic montage and mashup video elements incorporated into this installation involve user generated content and infringe numerous copyright rights. These copyright infringements, by both the artist of the work and those whose work she remixed, were considered during the acquisition process, mitigated where possible, and the artwork was approved for acquisition despite the infringements and because of the artwork’s significance.

Risk mitigation including contacting one of the GLAM institutions that had acquired the work *The Clock*, 2010 an art installation by video artist Christian Marclay.

When he started to make The Clock, Marclay expected that copyright would not be a substantial obstacle, theorizing that "If you make something good and interesting and not ridiculing

⁶ Nina Taonga “Acquisition Proposal Significance statement” Unpublished statement by the Curator Pacific Art in Te Papa’s Collection Management database, 26 October 2017 Accessed 29 March 2019

someone or being offensive, the creators of the original material will like it." He did not get copyright clearances for any of the films used. He stated that although his use was illegal, "most would consider it fair use". Because of the film's copyright status, museums have offered it as part of their general admission instead of charging for separate tickets.⁷

Whereas the fair use defence may well be applicable when displaying this work in the United States of America, the work is likely infringing in legal jurisdictions restricted to specific fair dealing exceptions that do not include a general quotation exception. One of the mitigating measures adopted by GLAM institutions affected by restricted copyright exceptions is to display *The Clock* with no admission charge to avoid generating revenue and accusations of commercial use.

The issues Te Papa faced in determining copyright risk with the *Top 16* artwork are an example of the issues GLAMs are facing with copyright when collecting this type of remix art. Te Papa recognises the importance of the artistic tradition of taking source material and producing a new creative work that reproduces the source material and reframes the original narrative and gives a fresh perspective both to the source material and the context in which it first existed. Consideration should be given to ensuring that this type of creative activity and art practice can be legalised within the copyright regime not only for renowned artists of the art world but also for members of the public.

Rights - Question 23 Inability to Renunciate Copyright

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

The inability to renunciate copyright for State Services agencies is a point that was raised in the New Zealand Government Open Access Licensing (NZGOAL) Framework documentation

92 Legally, there are questions as to whether and the extent to which the Crown and other State Services agencies can, in fact, waive (or abandon) copyright under the Copyright Act 1994 and potential inconsistencies with the moral rights regime in that Act.

93 At a policy level, guidance which advocated all-of-government or even selective waiving of Crown copyright (for departments) and copyright (for other State Services agencies) would be a substantial move and one which is considered more appropriate for consideration in the context of any future reform of the Copyright Act, which is primarily a matter for the Ministry of Business, Innovation & Employment (MBIE). It could raise a range of issues which are more appropriately dealt with as a matter of law reform.⁸

⁷ "The Clock (2010 film)", Wikipedia [https://en.wikipedia.org/wiki/The_Clock_\(2010_film\)](https://en.wikipedia.org/wiki/The_Clock_(2010_film)) 27 January 2019. CC BY-SA 3.0 Accessed 29 March 2019

⁸ "CC Zero / CC0 (not supported), NZGOAL (version 2)". New Zealand Government, 21 December, 2016. <https://www.data.govt.nz/manage-data/policies/nzgoal/nzgoal-version-2#cc-zero> Accessed 15 March, 2019.

NZGOAL does not support the use of the CC0 Public Domain Dedication

95 An individual agency is not necessarily precluded from deciding to use CC0 if it wishes (that is a question for the agency) but, for the reasons above, NZGOAL does not support it.⁹

The Issues paper states in section 223

Creators or copyright owners wishing to renounce all of their rights could use the Creative Commons (CC0) No Rights Reserved licence. However, such licenses can be revoked.

This text seems is direct conflict with the legal code wording of the CC0 Public Domain Dedication which states (with Te Papa's highlight):

2. Waiver. *To the greatest extent permitted by, but not in contravention of, applicable law, Affirmer hereby overtly, fully, permanently, irrevocably and unconditionally waives, abandons, and surrenders all of Affirmer's Copyright and Related Rights and associated claims and causes of action, whether now known or unknown (including existing as well as future claims and causes of action), in the Work (i) in all territories worldwide, (ii) for the maximum duration provided by applicable law or treaty (including future time extensions), (iii) in any current or future medium and for any number of copies, and (iv) for any purpose whatsoever, including without limitation commercial, advertising or promotional purposes (the "Waiver"). Affirmer makes the Waiver for the benefit of each member of the public at large and to the detriment of Affirmer's heirs and successors, fully intending that such Waiver shall not be subject to revocation, rescission, cancellation, termination, or any other legal or equitable action to disrupt the quiet enjoyment of the Work by the public as contemplated by Affirmer's express Statement of Purpose.*

3. Public License Fallback. *Should any part of the Waiver for any reason be judged legally invalid or ineffective under applicable law, then the Waiver shall be preserved to the maximum extent permitted taking into account Affirmer's express Statement of Purpose. In addition, to the extent the Waiver is so judged Affirmer hereby grants to each affected person a royalty-free, non-transferable, non sublicensable, non-exclusive, irrevocable and unconditional license to exercise Affirmer's Copyright and Related Rights in the Work (i) in all territories worldwide, (ii) for the maximum duration provided by applicable law or treaty (including future time extensions), (iii) in any current or future medium and for any number of copies, and (iv) for any purpose whatsoever, including without limitation commercial, advertising or promotional purposes (the "License"). The License shall be deemed effective as of the date CC0 was applied by Affirmer to the Work. Should any part of the License for any reason be judged legally invalid or ineffective under applicable law, such partial invalidity or ineffectiveness shall not invalidate the remainder of the License, and in such case Affirmer hereby affirms that he or she will not (i) exercise any of his or her remaining Copyright and Related Rights in the Work or (ii) assert any associated claims*

⁹ "CC Zero / CC0 (not supported), NZGOAL (version 2)". New Zealand Government, 21 December, 2016. <https://www.data.govt.nz/manage-data/policies/nzgoal/nzgoal-version-2#cc-zero> Accessed 15 March, 2019.

*and causes of action with respect to the Work, in either case contrary to Affirmer's express Statement of Purpose.*¹⁰

That those drafting the Copyright Act Review Issues Paper had uncertainty as to the legal position of the CC0 Public Domain Dedication indicates there is significant need to clarify the Act on this point and ensure there exists legal certainty around the ability for copyright holders to waive their rights should they wish to do so. The uncertainty as to whether it is possible for a copyright holder to irrevocably renounce all their rights will have an effect on Te Papa into the future. New Zealand creators are already using the CC0 Public Domain Dedication to ensure their works ascend to the public domain prior to the end of the designated copyright term. An example are these images of Tui that have been loaded to the iNaturalist.com website using the CC0 Public Domain Dedication.

https://www.inaturalist.org/observations?photo_license=CC0&place_id=any&subview=grid&taxon_id=12580 Accessed 26 March 2019.

Te Papa has and continues to use similar CC0 Public Domain Dedicated images by reproducing them in exhibition graphic panels and within digital interpretive media, including audio-visual productions and digital labels, for exhibitions. As the CC0 Public Domain Dedication becomes more common, it becomes more likely that GLAM collecting institutions such as Te Papa will acquire CC0 Public Domain Dedicated works for their collections. Having legal certainty in this renunciation of copyright and its irrevocability would ensure that GLAM institutions can continue to abide by the wishes of the creator / copyright owner.

Despite the lack of support by the NZ Government Open Access Licensing Framework, Te Papa is using the CC0 Public Domain Dedication in association with a dataset of information and quotes collected from visitors (with visitors consent). CC0 was considered the best fit as the dataset is intended to be openly shared with researchers, is anonymised by design, and contains short literary works contributed by anonymous users under a CC0 Public Domain Dedication.

Te Papa had earlier licensed another set of data for reuse. That dataset consisted of information related to its collections. Te Papa would prefer to dedicate this database to the public domain using a CC0 Public Domain Dedication but the lack of support by NZGOAL was not encouraging. Instead Te Papa licensed the dataset using a CC BY with an attribution waiver. This licence choice was not consistent with international best practice when licensing collections data. If CC0 was supported by NZGOAL, it is likely Te Papa would adopt this public domain dedication for this dataset. This option is preferred because is consistent with other GLAM institutional practice internationally and would aid in clarity of terms of use for users both in New Zealand and worldwide. There is a growing international movement to standardise metadata associated with GLAM collections. The CC0 Public Domain Dedication is the emerging preferred rights statement. Currently there are 581 heritage institutions worldwide that are

¹⁰ "Creative Commons CC0 1.0 Universal Legal Code" 1 December 2018.

<https://creativecommons.org/publicdomain/zero/1.0/legalcode> Accessed 15 March 2019

known to release collections for open reuse. The majority releasing collections data use the CC0 public domain dedication.¹¹

This international consistency assists content aggregators such as DigitalNZ, Trove, Europeana, and Digital Public Library of America and ensures the general public not only of New Zealand but the world have digital access to and reuse possibilities of this data.

Some government departments and state agencies have also expressed an interest in using CC0 Public Domain Dedication when making works publicly available and reusable by the public. If NZGOAL continues not to support using CC0, state agencies will remain reluctant to use the CC0 Public Domain Dedication. With datasets, the lack of a CC0 Public Domain Dedication exposes users of those datasets to the inconvenience of license stacking and confusion. Clarifying this point in the law will likely have a roll on effect to NZGOAL documentation, then applied by state agencies, then experienced by members of the public and, as more examples of CC0 Public Domain Dedicated works are seen, will lead to the democratisation and education about Creative Commons copyright licensing and public domain dedications in general.

Example: Te Papa's Rights Manager received an enquiry from an archivist at a city council regarding using the CC0 Public Domain Dedication. The city council archive is making images, taken prior to 1944 by their own city council employees, available on Flickr under the Creative Commons Public Domain mark.¹²

If these works were in copyright the city council would be the copyright owner as it was the employer of the photographer. The archivist had followed the Digital NZ advice on copyright duration of historic photographs¹³ and used the Public Domain mark to assert that copyright has expired in those photographs. A user approached the archivist about uploading the images from Flickr to Wikipedia as the user was wanting to illustrate Wikipedia articles with these images. However, as Wikipedia falls under the USA copyright jurisdiction rather than the New Zealand copyright jurisdiction, the photographs must either be out of copyright using the USA copyright term or licensed allowing open reuse before they were eligible for upload. The archivist consulted with the Cornell University Copyright Term and Public Domain in the United States resource¹⁴ and confirmed these photographs were not out of copyright in the United States of America. Thus, even though a Public Domain mark was used in association with them, the photographs could not be uploaded and reproduced in Wikipedia without the consent of the copyright owner. The city council archivist wanted to support upload of the images to

¹¹ A. Wallace & D. McCarthy "Licence/Rights Statement for Metadata (if Stated) - Survey of GLAM open access policy and practice" 8 May 2018. https://docs.google.com/spreadsheets/d/1WPS-KJptUJ-o8SXtg00llcxqQIKJu8eO6Ege_GrLaNc/edit?usp=sharing Accessed 15 March 2019

¹² Creative Commons "Public Domain Mark" <https://creativecommons.org/share-your-work/public-domain/pdm/> Accessed 29 March 2019

¹³ DigitalNZ "Public Domain Guide" <https://digitalnz.org/make-it-digital/enabling-use-re-use/public-domain-guide> Accessed 29 March 2019

¹⁴ Cornell University Library Copyright Information Centre "Copyright Term and Public Domain in the United States" <https://copyright.cornell.edu/publicdomain> Accessed 28 March 2019

Wikipedia as her council is interested in raising the quality of Wikipedia articles on Dunedin and Southland for the benefit of its citizens and visitors. Using the CC0 Public Domain Dedication seemed the best way forward to the archivist but the archivist was concerned at the lack of support of the CC0 Public Domain Dedication in NZGOAL. After discussing the issue with Te Papa's Rights Manager, the city council archivist selected and used the CC0 Public Domain Dedication as under note 95 of NZGOAL.¹⁵ Te Papa notes there was an investment of staff time required from both the archive and Te Papa to consider all the issues and outline the benefits and disadvantages before a decision could be made. This investment of staff time could be avoided if there were greater clarity on and support for copyright holders waiving their copyright in New Zealand law and for the CC0 Public Domain Dedication to be supported under NZGOAL.

There is also the issue where the original analogue work is out of copyright and there is uncertainty whether copyright exists in the digital surrogate using the "skill, judgement, and labour" test. The use of the CC0 Public Domain Dedication in relation to these digital surrogates provides certainty that any copyright that may be argued to exist in the digital surrogate due to the "sweat of the brow" is unequivocally and explicitly waived. The use of CC0 Public Domain Dedication by GLAMs will provide ultimate certainty for the user that there is no copyright risk to reusing and/or remixing the work.

In conclusion, as copyright is a property right it seems illogical that there is no mechanism in place for copyright owners to renounce the rights provided to them automatically under the legislation. The Act exists to encourage creators to be rewarded for their creativity and thus be encouraged to create more works. If a creator or copyright holder believes she would be better served by ensuring her works ascend to the public domain earlier than the legislated copyright duration expiry date, then that should be her right under the law. This should be able to be actioned legally by the copyright owner and without the ability for others to revoke that decision in the future.

Exceptions and Limitations

Exceptions - Question 30 Criticism, review, news reporting and research or study

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 the 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 to making use of this exception?

¹⁵ "CC Zero / CC0 (not supported), NZGOAL (version 2)". New Zealand Government, 21 December, 2016. <https://www.data.govt.nz/manage-data/policies/nzgoal/nzgoal-version-2#cc-zero> Accessed 15 March, 2019.

Te Papa often receives requests for publication quality images of copyright works featured in its exhibitions so requestors can use the images of work in connection with criticism and review of the exhibition or news reporting about the exhibition. In these instances Te Papa ensures it has a copyright licence in place with the copyright holder permitting Te Papa to supply these images to third parties for the uses such as criticism, review, news reporting, marketing and promotion. Where Te Papa does not hold a copyright licence Te Papa does not normally supply the image of the work as Te Papa might be held liable for supply if the third party reuses the images in ways not described when first requesting the images. The quality of the images of the works available online preclude the requestor from taking a copy for their specified use as Te Papa controls the quality of the images it makes available to the public in its Collections Online database and website.

Exceptions - Question 34 Incidental copying

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

Te Papa uses this exception and supports the existence of this exception. This exception is beneficial as it permits freedom of expression. Te Papa often photographs and films visitors, exhibition spaces, and events within exhibition spaces and uses these images and footage in many ways including marketing and publication. Because of the location of the shoots, the images and footage often include copyright works that are on temporary display within Te Papa. In determining whether the copyright work included in the image or footage is incidentally copied, Te Papa staff ask the question – is it the intention of the photographer or videographer to photograph or film the work itself or is the intention to photograph or film the activity or space? Could the work included in the image or film be “swapped out” for another work without disrupting the intent of the photo or film? If the intention of the photographer or videographer is not to copy the work and the work could theoretically be “swapped out” without impacting the intent of the photograph then Te Papa regards the work to be incidentally copied and uses this exception when publishing the resulting image or footage to the public.

Exceptions - Question 38 Data mining

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

Te Papa supports an exception for non-expressive uses like text and data mining as this type of use allows researchers and innovators to gain new knowledge. Te Papa notes that, in addition to the other

jurisdictions listed in the issues paper, the recent approval of the EU Copyright Directive discusses¹⁶ and makes mandatory an exception for this type of activity.¹⁷

Exceptions - Question 40 Quotations

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

Consideration should be given to changing the New Zealand Copyright Act to include a “right to quote” exception. Such an exception would remove the current restrictions to freedom of expression.

The Berne Convention states:

*(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.*¹⁸

The Australian Law Reform Commission stated in its Copyright and Digital Economy report

*Article 10(1) is generally considered to impose an obligation to provide an exception for fair quotation. That is, unlike the other exceptions provided for under the Berne Convention, fair quotation is framed as a mandatory provision, as ‘something that must be provided for under national laws, rather than as something that may be done at the discretion of national legislators’.*¹⁹

New Zealand does not have a quotation exception. Any use of quotations from in-copyright works requires permission unless the use is covered by one of the other exceptions granted under the “fair dealing” provisions of the Act.

There are two issues to consider -

¹⁶ “Final text of the Directive as submitted to the Parliament on 26 March 2019”. 20 March 2019 http://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271_EN.pdf Accessed 29 March 2019 pages 9-18

¹⁷ “Final text of the Directive as submitted to the Parliament on 26 March 2019”. 20 March 2019 http://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271_EN.pdf Accessed 29 March 2019 page 93

¹⁸ World Intellectual Property Office “Article 10, Bern Convention for the Protection of Literary and Artist Works” 28 September 1979 https://www.wipo.int/treaties/en/text.jsp?file_id=283698#P144_26032 Accessed 11 March 2019

¹⁹ Australian Law Reform Commission “Copyright and the Digital Economy (ALRC Report 122)” <https://www.alrc.gov.au/publications/9-quotation/fair-dealing-purpose-quotation> Accessed 29 March 2019

In what circumstances should the common practice of quoting be permitted under copyright law?

and

If the law is updated to permit a fair dealing exception for quotation, will the exception be copyright work type and technology neutral?

Te Papa often uses attributed short quotations. In some instances - notably in relation to scholarly publications - Te Papa does not seek copyright clearance prior to use as the use of the attributed short quotations is permitted under section 42 (1) of the Copyright Act which states

*Fair dealing with a work for the purposes of criticism or review, of that or another work or of a performance of a work, does not infringe copyright in the work if such fair dealing is accompanied by a sufficient acknowledgement.*²⁰

In other instances Te Papa seeks clearances prior to using quotations. Examples where clearance is sought are where attributed short quotations are reproduced in graphic panels, audio-visual presentations, and other display medium in exhibitions to highlight personal stories related to events or items of significance, reproduction of quotes from visitors and users of Te Papa's services in exhibitions, annual reports, sponsorship reporting, and marketing and promotional material, use of quotations in publications where the use is not related to criticism or review.

Te Papa has had an issue with the lack of quotation exception in that numerous quotes are used (with attribution) within Te Papa's collection management database to help describe collection items, outline the significance of the collection items, support the reasons for the collection items being accepted into the national collection, and to provide a narrative about the collection items. Te Papa considers these uses to fall within the "...purposes of criticism or review..." exception as the Curators are using quotations to demonstrate the point they are trying to make. It is a common scholarly practice to quote others with attribution. Te Papa's scholars and curators often quote from and reference other publications when they write peer reviewed journal papers. This practice has also been applied when they write similar narrative, significance, and descriptive text within Te Papa's collection management database. This database supplies content and context to Te Papa's collections online web presence <https://collections.tepapa.govt.nz/>. This reliance on the criticism and review exception has subsequently caused an issue when Te Papa created an application programming interface (API) to release Te Papa's collections dataset to programmers for reuse. When using an API, programmers write code to call down Te Papa's data and reproduce it in another platform (one example is the DigitalNZ platform viewable on <https://digitalnz.org/>). This call down and reproduction could include, but is not limited to, combining the dataset with other datasets. Te Papa could not be sure that, for the subset of

²⁰ "42 – Criticism, review, and news reporting; Copyright Act 1994"
<http://www.legislation.govt.nz/act/public/1994/0143/117.0/DLM345961.html> Accessed 29 March 2019

data containing quotations, the uses the programmers put Te Papa's data to would be covered by the criticism and review exception. With this uncertainty and without a fair dealing exception specially allowing for use of quotations, Te Papa spent an estimated 15 hours of staff time deciding on a way forward. The choices considered were:

- removing the quotations from the dataset (thus affecting the quality of the narrative and scholarly work about Te Papa's collections),
- excluding those fields that might have values that contained quotations (thus affecting the quality and usability of the dataset, lowering its cultural value and making it less desirable for programmers - an audience Te Papa is keen to engage with and support)
- allowing the reproduction acknowledging the risk of infringement action and putting in place mitigation steps such as take down and removal of the quotation on objection of the rights holder.

Te Papa went forward with a combination of option 1 and option 3 and included documentation on the issue in the API release so the programmers were also aware of the issue. Additional staff time of around 30 hours was spent reviewing and removing the data elements featuring quotations considered higher risk from the dataset. Te Papa considered the issue and weighed up the risk of infringement action against its statutory functions, including disseminating information relating to its collections²¹, before the decision was taken to take the risk and go ahead with authorising the reproduction of the remaining quotations to ensure Te Papa's scholarship and collection information could be disseminated in an innovative way. Those narratives including longer quotations were removed and taken down from both from Collections Online and the API as Collections Online had been rebuilt using the same API due for public release. Te Papa supports a fair dealing exception for quotation as this would provide certainty for the GLAM sector when distributing scholarship in machine readable ways such as APIs.

While the majority of Te Papa's use of quotations has been limited to quotations from literary works, Te Papa supports a quotation exception that is type-of-copyright-work neutral and that can accommodate a range of transformative artistic practices such as remix, collage, sampling, scrapbooking, zine making, and mashup. These techniques have been used and continue to be used by artists to create transformative works of art. A quotation exception permitting this art practice would ensure the maintenance of the integrity and respect for the law and support freedom of expression.

Te Papa has collected a number of works where the artist has used the techniques of collage and scrapbooking to create an artwork. The techniques of collage and scrapbooking are not copyright-infringing acts in the analogue world as the artist is taking found analogue material and creating something new with it rather than copying it. The issue of copyright arises for Te Papa when it wishes to document these analogue works and reproduce digital images of the work online or for other uses.

²¹ "Functions - Museum of New Zealand Te Papa Tongarewa Act 1992" section 7 (1) h
<http://www.legislation.govt.nz/act/public/1992/0019/latest/DLM260227.html> Accessed 29 March 2019

Examples of this are the thirty three collage panels made by Chrissie Witoko that are now part of Te Papa's collection²² and Te Papa filming²³ and publicising Zine making as an art activity.²⁴

However, where the found material is digital or digitised prior to the transformative artistic act, the found material used in a born-digital collage artwork must first be copied. Without a quotation exception or licence in place this copying is an infringement. Two artworks, both recent commissions from the artist Kerry Ann Lee, are excellent examples of this type of artistic digital collage. *Knowledge on a beam of starlight*, 2016²⁵ used digital images of Te Papa collection items. These images were in-copyright and the sole copyright owner was Te Papa. They were available to the general public for high resolution download and copying via Te Papa's Collections Online database as the images were licensed with a Creative Commons Attribution - NonCommercial - NoDerivatives 4.0 copyright licence. Te Papa encouraged the artist to use the Collections Online database to identify appropriate images to use in the creation of her artwork. Te Papa acknowledged that this Creative Commons licence was not suitable for the artist's needs and issued the artist a licence permitting her to use and change these images to create her artwork.

For Kerry Ann Lee's next commission for Te Papa, *Return to Skyland*, 2019²⁶ she again used Te Papa's images of works in Te Papa's collection but this time also included digital images she had herself taken of found material or digital images she had sourced. These images were altered and recoloured, overlaid with drawings and other details and, at times, overprinted with lines from a poem to form a digital video work titled *Distant resonance*. Other found images were digitised and digitally collaged to create a wall paper pattern that was printed and hung on the lounge walls and incorporated into the installation that is *Return to Skyland*, 2019. While Kerry Ann Lee was issued with a licence from Te Papa to cover the remix and repurposing of those images where Te Papa was the sole copyright owner, Te Papa placed the burden of copyright clearance and risk of reproduction of any other copyright works onto the artist.

Another GLAM example of where quotation, remix, and copyright is an issue is the Te Papa's acquisition of the artwork *Top 16, 2007-2017* by Janet Lilo. This is a site responsive multimedia installation work acquired by Te Papa for the national collection in 2018. The work consists of a neon sculpture "Share the Love" inspired by a feature on Bebo (a social media platform) where users could 'share the luv' in the form of graphic hearts posted on personal pages, a photographic montage of printed avatar images

²² Museum of New Zealand Te Papa Tongarewa "Queen of the Evergreen, Collections Online"
<https://collections.tepapa.govt.nz/topic/3751> Accessed 29 March 2019

²³ Museum of New Zealand Te Papa Tongarewa "Zine making with Kerry Ann Lee" YouTube, 12 May 2015
<https://www.youtube.com/watch?v=0jHdmzuJoBs> Accessed 29 March 2019

²⁴ Helen Lloyd "Zine-making student workshops with Kerry Ann Lee" 25 November 2014
<https://blog.tepapa.govt.nz/2014/11/25/zine-making-student-workshops-with-kerry-ann-lee/> Accessed 29 March 2019

²⁵ Museum of New Zealand Te Papa Tongarewa "Knowledge on a beam of starlight"
<https://www.tepapa.govt.nz/about/past-exhibitions/2016-past-exhibitions/knowledge-on-beam-starlight>
Accessed 29 March 2019

²⁶ Museum of New Zealand Te Papa Tongarewa "Kerry Ann Lee: Return to Skyland"
<https://www.tepapa.govt.nz/visit/exhibitions/toi-art/kerry-ann-lee-return-skyland> Accessed 29 March 2019

copied from the now-defunct Bebo social media platform, a white 'brick wall' interactive component where visitors are encouraged to share their own messages and illustrations through drawing while in the gallery, benches where visitors are encouraged to sit, interact and share conversation and views, and a mashup video of YouTube videos of people covering two popular songs. These videos were taken from YouTube by the Janet Lilo and then edited by her to create the mashup video that formed part of the artwork. From a curatorial perspective this installation is considered of national significance.

As an artist tuned in to how cultural trends affect the way people present themselves, Janet's work is often responsive to local or global phenomena, and as such forms a valuable archive of the way New Zealanders have moved into the digital era, and the cultural changes that have come as a result. Her practice is socially conscious and collaborative. She often works with communities to investigate language, representation, communication and information sharing in playful and thought provoking ways. Many of her works open themselves up to the public encouraging an interactive response, forming a bond between artist, artwork and public. Janet is a 21st Century artist responding to and documenting the way people, communities and societies behave in this 21st century era of technological change.

Acquisition Proposal Significance statement, 26 October 2017 by Nina Taonga, Curator Pacific Art, Te Papa

From a copyright perspective the photographic montage/collage and mashup video elements incorporated into this installation infringe a number of copyright rights. These copyright infringements were considered during the acquisition process, mitigated where possible, and the artwork was approved for acquisition despite the infringements and because of the artwork's significance.

The issues Te Papa faced in determining copyright risk with the *Top 16* artwork are an example of the issues GLAMs are facing with copyright when collecting this type of quotation activity related to works that are not literary in nature. Consideration should be given to ensuring that this type of creative quotation can be legalised within the copyright regime so that freedom of expression is protected. A quotation exception that is not specific to literary works would be a useful addition for those artists creating artworks using digital collage or remix techniques.

The quotation exception for the UK extends the existing fair dealing exceptions for "criticism or review" at [section 30 CDPA](#). It allows quotation ("whether for criticism, review or otherwise"), provided that:

- *it is fair dealing;*
- *there is sufficient acknowledgement;*
- *it uses no more than is required; and*
- *the original work has been made available to the public.*

Comment - There is no statutory definition of "fair dealing", but the English courts have established that it is an objective test: how would a fair-minded and honest person have dealt

with the work? Relevant factors include the amount of the copyright work that has been used and whether that use affects the market for the original, e.g. by competing with it.

The UK Intellectual Property Office's guidance suggests that short quotations of a copyright work in an academic paper or history book are permitted under this exception, but long extracts are not. Interestingly, it also suggests that, in exceptional circumstances, quoting a photograph will be allowed, provided the use does not conflict with the copyright owner's normal exploitation of it.²⁷

Exceptions – Question 46 Exclusion of Museums & Galleries

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?

The issue with excluding museums and galleries from the libraries and archives exceptions is that without these exceptions museums and galleries actively infringe copyright when working on the functions they share with libraries and archives. Galleries, Libraries, Archives, and Museums all collect, preserve, and make available works for the public good, providing an important resource for creators, researchers, educators, and the general public. The range of copyright works collected across GLAMs is similar, albeit that galleries and museums generally have a smaller portion of literary works in their collections and libraries and archives have a smaller proportion of non-literary works. Galleries, libraries, archives and museums exist for similar purposes and fulfil similar functions. In order to ensure that the copyright system is clear and certain for all GLAMs and that the integrity and respect for the law is maintained, the exceptions should be changed to include galleries and museums so all GLAM organisations can be treated consistently under the law.

The report *Archiving our Culture in a Digital Environment: Copyright Law and Digitisation Practices in Cultural Heritage Institutions* suggests that the “three step test” provisions in Article 13 of the Agreement of Trade-Related Aspects of Intellectual Property Rights can be satisfied while providing more appropriate exceptions for GLAMs.²⁸

Galleries and museums are very similar to libraries and archives in that they are

“...non-profit, permanent institutions in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and

²⁷ Kathy Berry “UK – New private copying, quotation and parody copyright exceptions” 8 December 2017 <https://www.linklaters.com/en/insights/publications/tmt-news/tmt-news--december-2014/uk--new-private-copying-quotation-and-parody-copyright-exceptions> Accessed 29 March 2019

²⁸ Susan Felicity Corbett “Archiving Our Culture in a Digital Environment: Copyright Law and Digitisation Practices in Cultural Heritage Institutions” 30 November 2011. New Zealand Law Foundation Report, 2011. <http://dx.doi.org/10.2139/ssrn.2040977> Accessed 26 March 2019

*intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.*²⁹

Comparing the purpose of the New Zealand National Library with the functions of the Museum of New Zealand as legislated in their respective Acts and by highlighting and colour-matching those activities that are similar, it is clear that there are strong similarities in purpose. It seems markedly unfair that the current Copyright Act supports our librarian and archivist colleagues with exceptions aimed at ensuring libraries and archives are able to fulfil their functions, while the staff of museum and galleries, who hold heritage collections of the same cultural and research value, are not similarly supported.

7 Purpose of National Library

The purpose of the National Library is to enrich the cultural and economic life of New Zealand and its interchanges with other nations by, as appropriate,—
collecting, preserving, and protecting documents, particularly those relating to New Zealand, and making them accessible for all the people of New Zealand, in a manner consistent with their status as documentary heritage and taonga; and
supplementing and furthering the work of other libraries in New Zealand; and
*(c) working collaboratively with other institutions having similar purposes, including those forming part of the international library community.*³⁰

7 Functions

(1) The principal functions of the Board are—

- (a) to control and maintain the Museum:*
- (b) to collect works of art and items relating to history and the natural environment:*
- (c) to act as an accessible national depository for collections of art and items relating to history and the natural environment:*
- (d) to develop, conserve, and house securely the collections of art and items relating to history and the natural environment in the Board's care:*
- (e) to exhibit, or make available for exhibition by other public art galleries, museums, and allied organisations, such material from its collections as the Board from time to time determines:*
- (f) to conduct research into any matter relating to its collections or associated areas of interest and to assist others in such research:*
- (g) to provide an education service in connection with its collections:*
- (h) to disseminate information relating to its collections, and to any other matters relating to the Museum and its functions:*

²⁹ International Council of Museums "Museum Definition" <http://icom.museum/en/activities/standards-guidelines/museum-definition/> Accessed 19 March 2019

³⁰ "National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003" <http://legislation.govt.nz/act/public/2003/0019/latest/DLM191997.html> Accessed 29 March 2019

- (i) *to co-operate with and assist other New Zealand museums in establishing a national service, and in providing appropriate support to other institutions and organisations holding objects or collections of national importance:*
- (j) *to co-operate with other institutions and organisations having objectives similar to those of the Board:*
- (k) *to endeavour to make the best use of the Board's collections in the national interest:*
- (l) *to design, construct, and commission any building or structure required by the Museum.*³¹

Preservation, Conservation, and Protection

It is a legislative requirement that Te Papa conserve and house securely the collections of art and items related to history and natural environment in the Board of the Museum of New Zealand Te Papa Tongarewa's care. In fulfilling this legislative requirement Te Papa often copies works to aid conservation practices and prevent damage. Examples of copying include creating photographic copies to enable conservators to mark out where damage is occurring without risking the original work, to assist in determining the most appropriate conservation treatment, and also to record and document the conservation treatments applied to the original works. 3D scans of works are used to create foam moulds within packing cases used for exhibition tours. This type of copying ensures the work can be stored and travel safely and mitigates risk of damage to the original work. The democratisation of 3D scanning is resulting in a growth of experimentation to determine how this increasingly affordable technology will provide other avenues to document and preserve works of cultural heritage.

Te Papa also copies to create back-ups of digital artworks and copies to preserve the analogue work e.g. digitally scanning acetate film. This preservation activity is a core function of all GLAM institutions caring for collections, is non-commercial, and does not affect the market of the original work as the preservation copies are not publicly distributed. This activity happens as part of Te Papa's day to day work and often well before any anticipated deterioration of the original work. However, without permission from the copyright holder, this copying is an infringement under the Copyright Act. While Te Papa does try and contact and obtain copyright permission for this type of copying, the preservation function is a legislated function required of Te Papa and often preservation copying will occur prior to any copyright licensing being negotiated.

In addition to galleries and museums being included in the exceptions to allow preservation, the preservation exception needs updating to make it practical for the wider GLAM sector. Te Papa notes that section 55 of the Copyright Act is very limiting on librarians and archivists. Te Papa interprets the key objective of this exception as supporting the preservation of collection items rather than to "replace copies of works". Te Papa notes and supports the restriction on the exception as applying "only where it is not reasonably practicable to purchase a copy of the item in question to fulfil the purpose." Te Papa

³¹ "Museum of New Zealand Te Papa Tongarewa Act 1992"
<http://www.legislation.govt.nz/act/public/1992/0019/latest/DLM260227.html> Accessed 29 March 2019

notes it is best practice for preservation copies to be taken when a collection item is in the best condition. Being restricted to waiting until a work is at risk of loss, damage or destruction before preservation copies are taken is not best practice. When digitising collection items for preservation multiple preservation copies are sometimes required. Also restricting the accessibility of the original item is not appropriate when considering the diversity of copyright works that this exception should cover. Copyright works are not only literary works. If the original work was a sculpture – retaining clause 55 (3) d would result in an institution being unable to exhibit the original work because a preservation copy in the form of a 3D scan had been created.

The European Union have recently approved the European Copyright Directive in order to harmonise exceptions and limitations to copyright and neighbouring rights within the Union. Included in this directive is a mandatory preservation exception (Article 6)³² and an explanation³³ about the exception and how it applies to publicly accessible libraries or museums, archives or film or audio heritage institutions.

Te Papa supports consideration of a similarly worded exception for New Zealand.

Collection management, administration & internal record keeping

Technological advancements have caused changes in the administrative tools a museum uses in order to fulfil its functions. Replacing physical card files documenting, describing, and locating collection items, museums now have relational databases that document the museum's collection and its care. Images of collection items are used within these relational databases for administrative purposes and to aid collection, location, and rights management. The records and associated images of collection items are used in internal administrative tasks such as creating audit/stocktake lists to check locations and security, to complete conservation surveys to aid preservation and protection, for insurance purposes, for exhibition and publication object lists to aid exhibition or publication development, to create lists to pursue copyright clearance, and to enable staff to work within the database cataloguing by gathering and assembling and adding more information about collection items. Record photography of the work for internal administrative purposes is often completed prior to copyright assessment and any copyright licensing being sought. Often rights holders wish to see images of works to check that the works are correctly attributed and fall under their copyright administration prior to granting a licence. These administrative copies are not publicly available and do not have any effect on any existing commercial market for such copies. There is no exception in the Copyright Act for this type of copying and these copies are infringing copies. An exception should be considered to facilitate the work of Galleries, Libraries, Archives and Museums and to maintain the integrity of and respect for the law.

³² "Final text of the Directive as submitted to the Parliament on 26 March 2019". 20 March 2019
http://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271_EN.pdf Accessed 29 March 2019
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³³ "Final text of the Directive as submitted to the Parliament on 26 March 2019". 20 March 2019
http://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271_EN.pdf Accessed 29 March 2019
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Access

There is a lack of knowledge generally regarding the exceptions and limitations to the Copyright Act among the general public. There is an awareness that certain copyright exceptions exist, however the limitations of each particular exception are not well understood by the general public. Te Papa has, at times, had difficulty in managing expectations of its users with regard to copyright.

A researcher might ask one of Te Papa's librarians or Te Papa's archivist for a copy of a part of a work for the purposes of private study and research and receive a copy of a section of the work lawfully under the exceptions provided to librarians and archivists by Clauses 50 to 56C of the Copyright Act. But the same researcher expecting the same service from a Te Papa collection manager responsible for another part of Te Papa collection will not be provided with a similar outcome. Often researcher will need to be informed that the collection manager is not authorised to provide a copy under the exceptions provided under the law.

The definition of *archive* also appears to exclude public art galleries and museums as neither museums nor galleries are mentioned in the Copyright Act. The definition of *archive* detailed in Section 50 subsection (1) (a) (Vi) might be interpreted to include museums and art galleries as an archive is defined as any "collection of documents of historical significance or public interest" and that are held by a body "that does not keep and maintain the collection for the purpose of deriving a profit". However, in order to qualify for the definition, the collection of documents must fall within the definition of a document within the meaning of Section 2 of the Official Information Act 1982 i.e. *document means a document in any form; and includes—*

(a) any writing on any material:

(b) any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored:

(c) any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means:

(d) any book, map, plan, graph, or drawing:

(e) any photograph, film, negative, tape, or other device in which 1 or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

This definition does not apply to supplying copies (such as photographs) of clothing, jewellery, carvings or sculptures and a variety of other collection items that qualify for copyright.

Te Papa encourages review of the Act to enable all GLAMs to support researchers requesting copies of works for the purposes of research and private study.

Online and Physical Onsite Display: An Exception or Measures to support GLAMs to communicate their collections

Te Papa seeks a change to meet the scholarly, educational, and exhibition needs of the cultural heritage sector in addition to those exceptions already provided to the library and archive communities. Te Papa supports the adoption of the fair dealing, limited exceptions drafted by the International Council of Museums (ICOM) to assist museums in carrying out their scholarly, educational, and exhibition related activities in an environment where museums are expected to carry out such activities both online and onsite.

*For millennia, libraries, archives and museums, institutions included under the cultural heritage umbrella, were concerned with tangible collections. With the advent of new technology and means of communication, how, where and by what means cultural heritage is communicated has changed dramatically. It is not sufficient to circulate or provide access to physical collections. Cultural heritage institutions cannot expect scholars, educators, patrons, and visitors to make physical visits their only means of accessing collections. The expectation from the public is that museums and other like cultural heritage institutions must now also facilitate access using modern means of communication to reproduce and distribute material, art, and artefacts in their collections.*³⁴

The online access exception proposed by the International Council of Museums (ICOM) would be limited in that it would apply only

- to public art galleries, archives, libraries and museums
- where copying related directly to the cultural heritage institution's mission and mandate
- to the amount of the work that is absolutely necessary to carry out the function i.e. if a museum can perform its function with a lower resolution image it should do so
- only to those activities relating to education, exhibition, and museological scholarship. For the sake of clarity, these exceptions would not apply to activities related to the production and distribution of retail and merchantable products

The exceptions would also be limited to certain uses, specifically

- for the purposes of an art gallery, archive, library or museum publishing a scholarly work where the publication is for educational purposes
- for the purposes of creating and displaying an exhibition, giving a lecture, or for carrying out a cultural heritage institutions education programme
- in the course of preservation of a work in a cultural heritage institutions collection

The exceptions should apply universally to electronic and analogue media and include reproducing copyright works and making them available for display both onsite and publicly available on the Internet. Any reproduction or distribution of a copyright protected work by an art gallery, library,

³⁴ Legal Affairs Committee of the International Council of Museums. "Declarations and Statements - Statement by the International Council of Museums Concerning Exceptions." 2015 https://icom.museum/wp-content/uploads/2018/06/declaration_copy_WIPO_ICOM_eng.pdf Accessed on 19 March 2019

archive or museum, within the context of any exception, should be carried out with full attribution to the author.

Te Papa invests significant staff time and energy in researching and communicating with authors, artists, makers, and copyright owners to negotiate non-commercial copyright licences that allow broader reuse than the exception proposed by ICOM. Where Te Papa is able to engage in negotiations with the copyright owner, over 70 percent of responses accept the royalty-free, non-commercial license with no additional changes. Te Papa would argue that this amendment would not unreasonably prejudice the interests of copyright holders or present any conflict with what should be regarded as a normal exploitation of their commercial rights.

Recently Singapore has been considering a number of policy points around their own Copyright Act. One proposal under discussion is Proposal 10 Facilitating the Work of Galleries, Libraries, Archives and Museums. In this proposal is discussed new exceptions to copy for the purpose of exhibition and inclusion in exhibition-related publicity materials. The outcome has been a conclusion that

Conclusion 10(a): There will be new exceptions to allow museums and galleries (which are non-profit or when they display items from the National Collection), non-profit libraries and non-profit archives to make copies of items or publicly perform audio-visual materials for the purposes of exhibition.

The following are the key elements:

- *The item or audio-visual material must be in the permanent collection of the institution.*
- *Copies of items can also be made for the purpose of inclusion in publicity materials, provided that:*
 - *Any reproduction should not be at a level to be a reasonable substitute for the work.*
 - *Any fee charged should only be on a cost-recovery basis.*³⁵

The recent approval of the European Union Copyright Directive includes measures³⁶ to support cultural heritage institutions of Member States in digitising and making available online in-copyright but out-of-commerce works.

Te Papa encourages the review to consider how GLAMs might be permitted to reproduce works to assist them in carrying out their scholarly, educational, and exhibition related activities both onsite and online.

³⁵ Ministry of Law Singapore & Intellectual Property Office of Singapore “Singapore Copyright Review Report” 17 January 2019.
<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Press%20Release/Singapore%20Copyright%20Review%20Report%202019/Annex%20A%20-%20Copyright%20Review%20Report%2016%20Jan%202019.pdf> page 41-42
Accessed 19 March 2019

³⁶ “Final text of the Directive as submitted to the Parliament on 26 March 2019”. 20 March 2019
http://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271_EN.pdf Accessed 29 March 2019
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The Libraries and Archives Exceptions

Ensuring that these exceptions are explicitly available to all the cultural heritage sector including public art galleries and museums will encourage consistency of practice across the sector with regard to copying for preservation and collection management and administration. It will also provide consistency across the legislative framework and ensure those GLAM institutions with their own Acts are able to fulfil their legislative functions without breaching the Copyright Act. Legislation for specific museums in New Zealand include:

- Museum of New Zealand Te Papa Tongarewa Act 1992
- Auckland War Memorial Museum Act 1996
- Museum of Transport and Technology Act 2000
- Otago Museum Trust Board Act 1996
- Canterbury Museum Trust Board Act 1993

Exceptions – Question 49 Are the education exceptions too narrow?

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

These exceptions are available to those who give lessons at an educational establishment; An educational establishment is defined under the Copyright Act 1994 as:

- (a) *any school to which the Education Act 1989 or the Private Schools Conditional Integration Act 1975 applies;*
- (b) *any—*
 - (i) *special school; or*
 - (ii) *special class; or*
 - (iii) *special clinic; or*
 - (iv) *special service—*
established under section 98(1) of the Education Act 1964;
- (c) *any special institution within the meaning of section 92(1) of the Education Act 1989;*
- (d) *any early childhood service within the meaning of section 309 of the Education Act 1989;*
- (e) *any—*
 - (i) *institution; or*
 - (ii) *private training establishment; or*
 - (iii) *government training establishment—*
within the meaning of section 159(1) of the Education Act 1989, that is not conducted for profit;
- (f) *any body, or class of body, that is not conducted for profit and that is approved by the Minister of Education as an educational establishment for the purposes of this Act by a notice published in the Gazette*

One of Te Papa’s legislated functions is to *...provide an education service in connection with its collections.*³⁷ Te Papa and other museums delivering similar education services do not qualify for any of the acts permitted in relation to copyright works associated with education. Te Papa employs a number of qualified educators to provide educational services to the learners of New Zealand. These services are curriculum linked education programmes and learning resources for the classroom. Te Papa is not a beneficiary of the funding provided under the Ministry of Education’s Learning Experiences Outside the Classroom (LEOTC) curriculum support project but, like those institutions with programmes and resources developed with LEOTC funding, Te Papa provides authentic, hands-on, interactive learning experiences that complement and enhance classroom learning. The lack of an educational exception available to Te Papa’s educators requires Te Papa to sometimes withhold copyright works from use in these programmes as licensing negotiations were unsuccessful or weren’t completed in time for the delivery of the programme.

The final text of the European Union Copyright Directive that was recently approved includes an exception or limitation *...for the sole purpose of illustration for teaching and learning activities carried out under the responsibility of educational establishments, including during examinations or teaching activities that take place outside the premises of educational establishments, for example in a museum, library or another cultural heritage institution.*³⁸

Consideration should be given to expanding the definition of educational establishment to those not for profit institutions that provide experiences that complement and enhance classroom learning.

Transactions

Transactions Orphan Works - Question 71 Not able to identify or contact the copyright holder?

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.

Yes - Te Papa invests significant funding in digitising and making available in its online catalogue [Collections Online](#) digital surrogates of its collection items. As the digitisation resource is finite there is a selection process to determine what items or sections of the collection will be the focus of a digitisation project. Copyright status is one part of a scoring process to select projects. Works that are out of

³⁷ “Functions - Museum of New Zealand Te Papa Tongarewa Act 1992” section 7 (1) g <http://www.legislation.govt.nz/act/public/1992/0019/latest/DLM260227.html> Accessed 29 March 2019

³⁸ “Final text of the Directive as submitted to the Parliament on 26 March 2019”. 20 March 2019 http://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271_EN.pdf Accessed 29 March 2019
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copyright in New Zealand and (as far as can be determined easily) internationally receive the highest score for rights. Those that are copyright licensed for Te Papa's non-commercial use receive a mid-value score. This is because public reuse of the digital surrogates is restricted by copyright. Those that are considered orphan works receive a mid-value score because public reuse of the digital surrogates is restricted due to copyright. Those requiring licensing receive a low value score as staff time is required to research rights holders, trace contact information, issue license applications, and process approvals, declines and lack of responses. Those collection items where licenses for online use have been declined by the copyright holders receive the lowest score for the rights area. This scoring is combined with other scores based on such issues as preservation urgency, fragility of object media, significance and uniqueness, immediate usefulness by Te Papa, public demand, and ease of digitisation (including imaging, data upgrade, and collection management issues such as rehousing of the originals). This combination of scores results in an overall score to rank digitisation priority.

As a result of the lack of an exception for museums similar to the preservation exception granted to libraries and archives under the Copyright Act, Te Papa invests staff time in the rights assessment process and the results of the assessment does skew the selection of digitisation projects towards the copyright-free material. This, in turn, skews the content available to view in Te Papa's Collections Online database. While this practice costs staff time to administer, it is most damaging in the distorting effect it has on the public perception of what cultural works of New Zealand are deemed significant.

This skewing of digitisation projects to favour out of copyright material is common among GLAM institutions.

*...analysis suggests that copyright law has a considerable impact on digitisation practices across the sector, including in the selection of material to digitise and the public accessibility of digital content.*³⁹

Te Papa notes that issues of orphaning is not restricted to only old works. Rights clearance experience at Te Papa indicates that the most difficult works to trace rights holders for date from the 1970s to 1990s.

When considering reproducing works for use in Te Papa's outputs e.g. Te Papa Press books, free exhibitions, touring exhibitions, educational activity books, website use, Te Papa marketing and promotion - Te Papa has a risk assessment approach. When works are considered for reproduction where Te Papa was not able to identify the copyright holder or where Te Papa has been unsuccessful in tracing the contact information for the copyright holder, the Te Papa Rights Manager assesses those instances and provides advice to staff on the risk of the copyright holder being identified or coming forward. Please note this situation does not include those instances where a known copyright holder does not respond to copyright licence applications for that particular reproduction - that is the copyright

³⁹ Emily Hudson & Andrew T. Kenyon "Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives. U of Melbourne Legal Studies Research Paper No. 300." <https://ssrn.com/abstract=1065622> Accessed 29 March 2019

holder's prerogative and an absence of a response is treated in the same way as a copyright holder declining a licence. The advice provided by the Rights Manager can range from

- suggesting substitutions of works with other more easily licensed or out of copyright works, or
- suggesting further research avenues for tracing the rights holder, or
- noting that substitution would not be suitable given the context of the reproduction and advising reproducing the work on the condition that a standard, market rate copyright fee be put aside to ensure that licensing payment can be made should a rights holder be identified at a future date, or
- advising not using the work.

This risk assessment advice is influenced by:

- whether the product in which the work is proposed to be used is revenue generating
- whether reproductions of the work has been publicly available in the past and for how long without the copyright holder coming forward
- how long ago the diligent search was conducted
- the extent of the diligent search
- whether the reproduction is easily removed e.g. taken offline or in a document easily reprinted

Examples where digitisation has not occurred or the project has yet to advance to digitisation include:

- National Art Gallery exhibition catalogues
- Older issues of the publication *Tuhinga: Records of the Museum of New Zealand Te Papa Tongarewa* and its predecessors the Museum of New Zealand Records, the National Museum of New Zealand Records, and the Dominion Museum Records in Ethnology.
- Photography of Record album covers

Transactions Orphan Works - Question 72 How does your organisation deal with orphan works?

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?

This question is asking for a response only part of the issue facing GLAMs. Before dealing with orphan works institutions must invest time and resources to try and identify and contact copyright owners through a diligent search to a reasonable standard, and before that institutions first have to identify whether the work is in copyright or out of copyright. Copyright duration in itself is a complex question and requires significant investment of staff time to determine. The process Te Papa follows is:

Step 1 Determining copyright status of the work

The first part of the process is to determine whether the work is in or out of copyright. Attached to this submission is the 10 page A3 flowchart Te Papa uses to determine copyright duration in the New Zealand jurisdiction.⁴⁰

This document has taken significant staff time to assemble and has also been reviewed by a lawyer at the discounted cost of \$5,000 + GST. The lawyer also generously contributed a number of hours free of charge to Te Papa to ensure the review was completed. This document could still contain errors due to the complexity of not only of the current Copyright Act, but also the associated transitional arrangements. However it is currently Te Papa's best efforts at unpicking the complexity to assist with determining copyright duration. If any errors are found in the flow chart please email copyright@tepapa.govt.nz so corrections can be made.

Te Papa also acknowledges the risk outlined by Geoff Mclay in the "Strategy and Intellectual Property – Scoping the Legal Issues" regarding material uploaded to the internet.

It remains, however, that New Zealand enjoys a substantially lesser copyright period regime than Australia, the United Kingdom or the United States, and that material uploaded onto the Internet in New Zealand may not infringe copyright in New Zealand but may infringe copyright in other jurisdictions where the material is downloaded. Courts in other jurisdictions may indeed believe that such uploaded materials in New Zealand without constraint on downloading in other jurisdictions would amount to an authorisation of infringement in those jurisdictions. Of course, this is not so much a problem for the New Zealand government to deal with but it is worth noting, to form part of any guidance given to digital content providers by the government when formulating the Digital Strategy.⁴¹

As a mitigation measure Te Papa checks the copyright duration of the source country of the work for certain types of work - notably fine art including art photography, film, music, and sound recordings. If the work is out of copyright both in the New Zealand and source country Te Papa will clear the work for reuse for the public with the rights statement "No known copyright". This information is recorded in Te Papa's collection management database, the work is noted as cleared for reproduction and the process stops.

⁴⁰ Victoria Leachman. "Working out Copyright Duration for Te Papa's Collections" 2018 <https://drive.google.com/file/d/1C1CC3jnIYWfDBn5vNfrolLKHw1gJnw9Z/view?usp=sharing> Accessed 29 March 2019

⁴¹ Geoff McClay. "Strategy and Intellectual Property – Scoping the Legal Issues: NZ Digital Content Strategy Working Paper 2" April 2006 page 26 https://www.parliament.nz/resource/mi-nz/48SCCOSCAdvicefA1015_A2324/eb394db6a731de9a65a5912c6d92808a743f5157 Accessed 29 March 2019

Step 2 Determine copyright duration of the work

If the work is determined to be in copyright then, if information about the work and about the creator of the work permit, a copyright expiry date is established.

If the copyright in the work is likely to expire in the next three years then, unless reproductions are required for a particular project, it is likely that Te Papa will not further invest staff time in copyright research and then licensing. Te Papa will more likely wait until the copyright duration expires. The time taken for copyright research and licensing is better invested in those works with longer durations still to expire. Te Papa sends out around 200 - 250 license applications for collection items each year. Each of these applications may cover multiple works where the rights are held by a single copyright holder. Because the number of licenses sent out are limited by staff resource, Te Papa tries to maximise the impact of its copyright licensing correspondence by targeting those copyright holders that manage the most number of works in Te Papa's collection, or those copyright holders that manage works included in upcoming projects, or those works that have already been digitised.

Works where Te Papa has halted research work and are waiting for the copyright term to expire before reproducing in Collections Online include:

1940-0007-1; A cold day at Villars; Gray, Ronald <https://collections.tepapa.govt.nz/object/41351>

1940-0004-12; In the Cotswolds; Burleigh, Averil <https://collections.tepapa.govt.nz/object/38706>

1954-0023-4; Campers; 1929; Russell, Walter <https://collections.tepapa.govt.nz/object/38054>

O.040911; Lumberers; circa 1920; Hill, Alexander Wilson

<https://collections.tepapa.govt.nz/object/1331449>

Step 3 Failing to identify or find the copyright holder

Te Papa has staff that are expert in researching provenance and history associated with items of tangible cultural heritage. Like other GLAMs, Te Papa places a high value on connecting and reconnecting tangible cultural works with authors, illustrators, composers, performers, artists, makers, designers, commercial artists, manufacturers, kaitiaki, and copyright holders. However there are instances where researchers will hit dead ends despite all diligent efforts. Companies go out of business, artists die with no beneficiaries, the author of a work dating from the 1970s may be known to have married but her change of name is unknown resulting in her being unable to be traced, the residence of a copyright holder is damaged as a result of an earthquake and he moves with no forwarding address known. These types of instances will be familiar to anyone involved in research and copyright clearance.

Te Papa holds a large number of orphan works of all copyright work types. Te Papa conducts a diligent search to a reasonable standard on each work before assigning it an "orphan work" status. The diligent search approach will differ depending on what type of work it is and the amount of information Te Papa

holds or can find about the work and the circumstances of the work's creation. Te Papa has developed its practices referring to:

- Society of American Archivists *Orphan works: Statement of Best Practices* May 2009 <https://www2.archivists.org/groups/intellectual-property-working-group/orphan-works-statement-of-best-practices> Accessed 29 March 2019
- Intellectual Property Office, UK *Orphan Works Diligent Search Guidance for applicants* 16 March 2018 <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants> Accessed 29 March 2019

Legally, reproducing orphan works without a licence is an infringement. This situation leads to a risk assessment approach to copyright infringement where, in order to pursue their mandate, public art galleries, libraries, archives, and museums are forced to decide whether to copy the work in full knowledge that the reproduction is an infringement. Those institutions willing to take a calculated risk will reproduce infringing copies of these works. Further risk mitigation is likely with most institutions ensuing that only low resolution infringing copies are available online and an immediate takedown process is in place should contact from a copyright holder be made. Those institutions less willing to take the risk will choose not to reproduce copies of orphan works at all. Te Papa does reproduce orphan works it considers low risk in Collections Online <http://collections.tepapa.govt.nz/> – Te Papa's online catalogue. Te Papa has a takedown process in place should a copyright holder come forward or be identified. Te Papa recognises that

Such an approach is legally precarious; cultural institutions are technically infringing copyright law but are relying only on their 'not for profit' public good status and the institution's 'takedown' policy as protection from any potential legal action against them.⁴²

Paintings, prints and drawings, photographs, sculpture, furniture, ceramics, industrially applied designs, jewellery, clothing, commercial products, commercial art

In determining the circumstances under which the work was made and conducting a search to determine copyright duration Te Papa will likely already know some biographical information about the artist / maker e.g. full name, where and when died, any known family. If a work is a commissioned work e.g. photograph or painted portrait commissioned by a sitter or a family member of a sitter then the copyright holder may be the commissioner and the research focus changes from tracing the artist contact information to the commissioning party. Often Te Papa does not have any further information on whether the artist contracted out of the commissioning rule - in those instances the search may include both the artist and the commissioner. There are times e.g. portrait photography from commercial photography studios where it's unclear who paid for the work to be created (the commissioner) or even the identity of the person that sat for the portrait. Te Papa will reproduce orphan

⁴² Susan Felicity Corbett & Mark Boddington "Copyright Law and the Digitisation of Cultural Heritage. Centre for Accounting, Governance & Taxation Research Working Paper No. 77." 1 September 2011 page 13 <http://dx.doi.org/10.2139/ssrn.1806809> Accessed 29 March 2019

works such as these in its Collections Online database in the hopes that the copyright holder comes forward and identifies themselves.

Te Papa will also checking its own records to see what the artist / maker contact information we hold. Acquisition information can provide information on dealer galleries and donors and possibly also correspondence with the artist / maker that might have an address. Also between the 1950s and 1980s there were times when artists donated and assigned the copyright in newly acquired artworks to the National Art Gallery (now Te Papa). If there is current contact information or any strong leads are found in Te Papa's records then these are followed up and, if a known address is identified then a copyright licence is sent to the last known address in the hopes that the artist / maker still lives there or may have the licence forwarded to them.

If no current contact information or any strong leads are found in Te Papa's records then Te Papa contacts other collecting institutions that hold the artist / maker's work. Those most likely to have a positive result are those already reproducing digital surrogates of the artist / maker's work online. If there is no useful information provided by the other collecting institutions (possibly because the other institution has conducted a similar search and found nothing or has yet to do a copyright holder search) then Te Papa staff seek clues elsewhere to see what is known about that artist / maker, their family, where they died, and their employer's business.

This research could involve:

- Google searches
- Social media platform stalking of possible relations, inheriting companies, company directors
- Births Deaths and Marriages historical records to determine biographical dates
- Cemetery searches to determine biographical dates and area of death
- Probate searches in Archives NZ and New Zealand high courts not only for the probate of the artist / maker but also often probates for the surviving spouse of the artist / maker and then also possibly onto probates of children to determine who may have inherited the copyright
- Checking membership listings of the relevant copyright management organisation e.g. Copyright Agency, Copyright Licensing Limited
- Searching in Companies Office records to determine the history of the company for whom the artist / maker worked
- Searching IPONZ records to determine when brand names / trademarks expired for clues as to when a company may have gone out of business
- Searching the designs register for any possible designer contact information
- Writing to or emailing or telephoning people who might be related to the artist, biographers of the artist, and/or family friends where known
- For those artists / makers of other nationalities Te Papa searches the databases and websites of similar organisations listed above including National Archives UK, USA copyright registers, DACs & Bild-Kunst, WATCH and FOB (writers artists and their copyright holders and firms out of business databases managed by the University of Reading), Grace's Guide to British Industrial History, and The Gazette (UK official public record).

Due to delays in receiving replies to correspondence and also changing priorities, these searches can be pursued for years.

A typical example of a diligent search is one Te Papa conducted for works in copyright to the Estate of Winifred Hardman – the artist of the works.

22 Aug 2017 Correspondence: Emailed Tim Jones at Christchurch Art Gallery for contact information of copyright holder. Tim Jones emailed that no copyright contact information was held by Christchurch Art Gallery.

25 Oct 2017 Correspondence: Emailed an inquiry to Suffolk Painters <http://suffolkpainters.co.uk>
Biography info from website: Winifred Elizabeth Beatrice Hardman, was born at Rawtenstall, Lancashire on 25 May 1890, daughter of George Henry Hardman (1855-1899), a wool & cotton manufacturer, and his wife Anne Eliza née Catterall (1855-1934), who married at St Cuthbert, Lytham, Lancashire on 27 July 1881. In 1891, aged 10 months, Winifred was living at Alder Grange, Bank Street, Lower Booths, Rawtenstall with her parents, 37 year old George and 35 year old Anne, with four siblings, George Henry 9, Richard Campbell 8, William Haworth 7 and Victoria Helen Mary 4, all born at Rawtenstall and they retained six indoor servants. Educated at home by a governess, she then studied at St John's Wood School of Art and the Royal Academy Schools, winning the Armitage bronze and a silver medal for perspective. Portrait painter, mural decorator and signboard artist who exhibited at Goupil Gallery; International Society; Liverpool Walker Art Gallery; Manchester City Art Gallery; New English Art Club; Royal Academy; Redfern Gallery and Royal Scottish Academy 1914-1939 from Chelsea, London. Winifred and her mother, when of 44 Redcliffe Road, Chelsea, London S.W.10, travelled to Genoa, Italy in 1928 and in 1939, Winifred was a 'painter', living at Woodside, Common Road, Harrow, Middlesex and she also spent some time in South Africa where she painted 'Zulu Warrior'. As Commander (ATS) W. E. B. Hardman, a member of the Ipswich Art Club 1945-1949 and exhibited from 24 Mill Road, Cambridge in 1944 three oils 'Summer Bunch', 'Marjorie' and 'Mrs Patterson', in 1946 two oil paintings 'Peonies' and 'Livia Breglia' and in 1947 from c/o Westminster Bank, 300 King's Road, Chelsea, two more oils 'The Umfaan' and 'The Call of Peter and Andrew'. She was of The Poplars, Bosham, Chichester, Sussex in 1953, when she sailed for Sydney, Australia. Winifred died at Walton End, Walton Lane, Bosham on 16 April 1972, she was unmarried and her estate was valued at over £128,000.

<https://suffolkartists.co.uk/index.cgi?choice=painter&pid=2037>

No information known by person that runs the website.

17 Nov 2017 Web search: JSTOR search for articles/ journals which include or mention Winifred Hardman- No Information found. Search on Askart.com and Artnet.com. No result.

23 Jul 2018 Web search: Not listed in DACS or Art UK websites. As Christchurch Art Gallery have reproduced orphan works for some years risk is considered low. Te Papa will also reproduce works in the hopes the copyright holder comes forward.

Works where the artist / maker is unknown

The diligent search time invested in works where the artist / maker is unknown is often significantly shorter than the time spent when the artist / maker is identified. Where an artist / maker is unknown, Te Papa is faced with the issue of first trying to identify the maker. If a maker is unable to be identified

as the work has no makers signature or marks and no indication on who it might be, then no further research is possible. We need public help to identify the work so, where a digital surrogate exists, Te Papa publishes it in Collections Online in the hopes that someone comes forward and identifies the maker and Te Papa can pursue the diligent search. Works that fall into this category can be items such as handmade pottery <https://collections.tepapa.govt.nz/object/61146> , artistic works sourced from Pacific island communities <https://collections.tepapa.govt.nz/object/337278> , and photographs taken after 1 January 1944 where the photographer is unknown <https://collections.tepapa.govt.nz/object/122979> .

Books, Music Albums, Films, other Published printed material

For this material Te Papa is unlikely invest in copyright research and licensing / orphan works identification in order to digitise these works and reproduce them in Collections Online. For these works it is more likely that rights holders exist and are still protective of the types of licenses granted to reproduce this content. Previous experience in licensing the use of images of these works in free-entry exhibitions has shown that fees will be likely be charged for use of images of these works. Unless the work is required for a specific Te Papa project, copyright research and licensing / orphan works identification of this type of material is deferred in favour of other works as reproduction online without a licensing fee being charged is less likely. Te Papa has no budget allocated to pay copyright fees for the public good reproduction of an image of the work in Collections Online. Te Papa is not receiving any revenue benefit from the collections online project activity and has invested significantly in staff time and energy to making the database available online and accessible to the public of New Zealand. The decision was made at the beginning of the Collections Online project that that if copyright fees were required by the copyright holder, Te Papa would withdraw from licensing negotiations for this use and note in its database that the work was not to be reproduced online without the permission of the rights holder and payment of a fee.

Review of Orphan work status

Te Papa also conducts a review of the copyright status whenever reuse is proposed. Once a work is available to view online it is more likely that someone will want to use the digital surrogate or display the original work or provide more information about the work and its maker. Also periodically Curators, other Te Papa staff or external researchers may do further investigations, identifying makers and discovering biographical data and clues to trace copyright holders. Every time an orphan work is included in an object list for a new project, the Rights team will review the copyright holder research to determine whether there are any new leads that have emerged since the last diligent search and whether any previously known leads need to be followed up.

Staff resourcing and time

It is difficult to extract the staff time invested in orphan works research from the copyright research and licensing workload of a project. However, a recent project to assess and licence 808 artworks-on-paper

for reproduction in Te Papa's Collections Online database has been the responsibility of a part-time Rights Officer. For the 2018 calendar year rights research into these works took approximately 640 hours and resulted in 81 orphan works (by 16 artists), 6 works (2 artists) have ongoing research requirements and are highly likely to be orphaned, and 145 applications for non-commercial museum use licences covering the remaining works were sent out to prospective copyright holders. Of those 51 works (27 of those license applications) now require additional research to locate the copyright holder as the applications did not reach the appropriate person. These works may also ultimately be orphaned. 9 licences await confirmation of copyright holder status, 30 licences are with the current copyright holders and awaiting responses or are in discussion and 79 licences were negotiated to a resolution. I note that the licenses negotiated allow Te Papa to reproduce the artworks for a wide range of non-commercial museum uses not just reproduction in Collections Online.

Te Papa has invested heavily in rights research into its collection since 2006. The number of orphan works in the collection currently stands at over 55,000. Other less well-resourced GLAM institutions may take the decision not to reproduce their orphan works online. A significant portion of New Zealand cultural works are unavailable digitally despite being out-of-commerce works, having low commercial value, and/or low risk of objection when reproducing images of these works online. As cultural heritage institutions worldwide respond to the growing public pressure to digitise and communicate their collections online, more and more orphan works will and are being identified.

Transactions Orphan Works – Question 73 Has a copyright owner of an orphan work come forward?

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?

Te Papa has found that online publication of copies of orphan works allows copyright holders to visually identify copyright works and prompts the copyright holder to contact Te Papa to advise us of their contact details. In two of the five instances noted below, copyright holders have viewed images of orphaned works in Te Papa's Collections Online database, contacted Te Papa, and been reconnected with their copyright rights. Whether the copyright holder would have been able to identify their works by the text description alone and without online reproduction of the orphan work is debateable. Certainly the rights holders had not been in contact with Te Papa prior to the online reproduction being published.

Of the over 55,000 items that are designated as orphan works in Te Papa's Collections Online database the following examples of orphan works resolution have occurred:

Copy of a portrait of a Māori tupuna used in an exhibition.

Te Papa borrowed an original 1980s photographic print from a family member of the tupuna to photograph the work to create a graphic panel for an exhibition. There was no maker information on the original print or its framing. The family member did not want the work unframed for photography so Te Papa was unable to check the reverse of the print itself. The risk was assessed as possible that the copyright holder might come forward during the exhibition. The project manager put aside a sum that was the market rate for licensing a photograph for this type of use just in case the copyright holder identified themselves. The photographer of the image visited the exhibition, noted that the graphic panel credited the image to an “unknown photographer”, identified the photograph as one of his and requested a label change to credit him. Te Papa staff followed up with him and determined that his employer was the copyright owner of the photograph. Te Papa staff updated the database with the correct information, sought and received a copyright licence for the use, paid the standard copyright licence fee, reprinted the label to ensure the crediting was accurate, and passed on to the lender of the original print the name and contact information of the photographer and copyright holder. This was a successful outcome that satisfied everyone involved.

Wedding photography dating from the 1950s

Te Papa was contacted by a copyright holder when they identified their 1950s wedding photographs reproduced in Collections Online. The copyright holder was startled to find their wedding photographs in Te Papa’s collection. They requested that Te Papa inform them how Te Papa had acquired those photographs and also requested that the digital images be removed from Collections Online. Te Papa staff initiated an immediate take down of the images on receipt of the correspondence from the copyright holder. Te Papa staff then provided the copyright holder with the acquisition information about the collection and informed them that, as the copyright holder had paid for the creation of the photographs it was very likely they were the holder of the copyright in those images. Te Papa acknowledged the right of the copyright holder to determine how and where these works were reproduced and informed the copyright holder that the digital surrogates were taken offline immediately on receipt of the initial correspondence. Te Papa reassured the copyright holder that the images would not be further reused or published without the copyright holder’s written permission for the remainder of the term of copyright. Te Papa also requested a copyright licence. This licence was declined by the copyright holder and the images remain taken down. Te Papa supplied high resolution digital copies of the wedding photographs to the copyright owner. Te Papa benefited from this contact by being able to build a relationship with the copyright holder, by ensuring the contact information with the copyright holder was current, and by expanding the information held about images. The identifying information about those pictured within the images and a better description of the event depicted was provided by the copyright holder for Te Papa’s records. The copyright holder was reassured by and satisfied with the promptness of Te Papa’s response and pleased that the images were no longer reproduced online.

Manufactured beach towel is a textile artwork

Te Papa was contacted by a copyright holder when they identified an image of a copyright work online. In this case the description of the work and the work itself misled Te Papa staff into believing that the work qualified for the shorter copyright duration available to industrially applied works of artistic craftsmanship. The work was described as and looks like an industrially applied beach towel with a mass produced design in the fabric. The copyright holder provided valuable information to Te Papa and informed Te Papa that the work was not an industrially applied design because more than 50 copies of the beach towel had not be reproduced. This changed the context of the work to a screen printed, limited edition, fabric artwork. Because the work had been believed to be out-of-copyright, the image of the work had also been used in the production of a Christmas card that was distributed free of charge. The change in context of the work required a recalculation of the copyright jurisdiction to end of the calendar year of the death of the artist + 50 years. Te Papa had taken the images of the work down from Collections Online when first approached by the copyright holder to allow Te Papa to investigate and research the claim. Because the work had been used in a product albeit one that had been distributed free of charge, Te Papa offered to pay the standard market rate for a copyright licence to use the image of the work in a gift card for commercial sale. This offer was accepted. Te Papa also applied for and received a non-commercial copyright licence to allow Te Papa to reproduce images of the work for museum uses. Again the outcome was satisfactorily resolved for all parties, Te Papa received more information about a work in its collection and updated its records with the copyright holders contact information.

A Māori cloak is in copyright

The maker of a Māori cloak dating from the 1890s was unknown. Because of the age of the cloak Te Papa estimated that there was a strong likelihood the cloak was out of copyright as it was very likely that the maker of the cloak had died greater than 50 years ago. The cloak was photographed and published in Collections Online on the assumption it was out of copyright. Following significant research by a Curator the weaver of the cloak was identified and the whanau of the weaver reconnected with this taonga. This research also led to the realisation that the weaver had made the cloak early in her life and had lived to the age of 101. The weaver's date of death was provided by her whanau and whanau representatives were notified that in addition to kaitiakitanga they also likely had legal copyright ownership in the work. Te Papa discussed the copyright with them and requested they consider granting Te Papa a copyright licence for images of the work to be reproduced in Collections Online and for other non-commercial museum uses. The whanau representatives granted permission and signed a copyright licence for the remaining copyright term.

Works by Gerald Brockhurst

Te Papa staff had assigned orphan works status to the works of the artist Gerald Brockhurst in 2008 after a diligent search from 14 February 2007 to 28 March 2008. The works were declared orphaned and reproduced in Collections Online. In 2017, in response to a proposed project use, another diligent search

was conducted and this time the administrator of copyright in the estate of Gerald Brockhurst was successfully identified, contacted, and a licence negotiated. These works are now no longer orphan works. Te Papa now holds a licence to reproduce the works for non-commercial museum purposes including on the Collections Online database. Te Papa also contacted other institutions holding Brockhurst works to inform them of the existence of the copyright holder so they too could approach the copyright holder for licences.

Transactions Orphan Works – Question 74 Overseas regimes for orphan works

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

United Kingdom (UK)

For the issues associated with the UK orphan works scheme for GLAM institutions please also refer to Victoria Leachman's National Digital Forum presentation on this topic from the *10 minute 30 second* mark. <https://www.youtube.com/watch?v=qDmFmTg3mpE>

The UK Orphan work scheme requires a diligent search to be conducted to a reasonable standard, the licence issued by the Scheme excludes online use as it is limited to the UK jurisdiction only, the licence is time limited with an expiry date of 7 years after issue, the maximum number of works per licence is 30, and the scheme requires payment of both an administration fee and a licensing fee. Te Papa understands the uptake of the scheme to be limited.⁴³

For GLAM institutions wishing to conduct their public good functions of providing access to orphan works in their collections, and having already invested significant staff time and resources on a diligent search to a reasonable standard for each work prior to submitting an application to the licensing scheme, the limited value of the scheme is obvious and the low uptake unsurprising. The application fee and the albeit minimal licensing fee paid and repaid on a 7 year licensing cycle is an additional burden for heritage institutions to limit liability on what is already likely to be a low risk, limited economic but high public good value, non-commercial reuse. While the licensing scheme may have some value in reducing risk for commercial reuses of orphan works where revenue is likely to be generated as a reward - it is of limited value for those reuses that are the core functions of GLAM institutions.

⁴³ Thomas Michael Ash "Where are all the orphans? How effective is current legislation in enabling cultural heritage institutions to make orphan works available online?" January 2018. University of London. <https://core.ac.uk/download/pdf/147830433.pdf> Accessed 14 February 2019

European Union (EU)

The EU Orphan works exception has more beneficial outcomes and has been a useful exception for those EU institutions wishing to make accessible orphaned works such the feminist woman's magazine Spare Rib⁴⁴. The EU Orphan works exception is restricted to a limited set of works focussing only on written text, film and sound recordings only. This very limitation makes it less likely to be of use to large numbers of the orphan works held by the gallery and museums of the GLAM sector.

..“relevant work” means a work to which sub-paragraph (3) applies which is—
(a) a work in the form of a book, journal, newspaper, magazine or other writing which is contained in the collection of a publicly accessible library, educational establishment or museum, an archive or a film or audio heritage institution;
(b) a cinematographic or audio-visual work or a sound recording which is contained in the collection of a publicly accessible library, educational establishment or museum, an archive or a film or audio heritage institution; or
*(c) a cinematographic or audio-visual work or a sound recording which was commissioned for exclusive exploitation by, or produced by, one or more public service broadcasting organisations on or before 31 December 2002 and is contained in the archives of that organisation or one or more of those organisations.*⁴⁵

Singapore

Recently Singapore has been considering a number of policy points around their Copyright Act. One proposal under discussion is *Proposal 7: Whether and How to Enable the Use of Orphan Works*.⁴⁶

After considering their position and noting the overall low usage of the orphan works registries in the UK and Canada, Singapore have decided not to establish an orphan works registry. Similarly they have also rejected limitation of remedies to a reasonable fee in a subsequent court case or case brought by the copyright owner before a tribunal. They note that their proposal to expand the exceptions available to heritage institutions such as galleries, libraries, archives and museums under Proposal 10 may address the main source of demand for an orphan works solution. Te Papa notes that the exceptions detailed in Proposal 10 exclude online use by GLAMs. With online use excluded and the assumption from the public that heritage collections are available to view online, Te Papa considers the conclusions drawn in the

⁴⁴ The Guardian “Spare Rib goes digital: 21 years of radical feminist magazine put online”
<https://www.theguardian.com/media/2015/may/28/british-library-spare-rib-feminist-magazine-online> Accessed 29 March 2019

⁴⁵ Copyright, Designs, and Patents Act 1988 Schedule ZA1
<https://www.legislation.gov.uk/ukpga/1988/48/schedule/ZA1> Accessed 14 February 2019

⁴⁶ Ministry of Law Singapore & Intellectual Property Office of Singapore. “Singapore Copyright Review Report” 17 January 2019 page 29 - 31
<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Press%20Release/Singapore%20Copyright%20Review%20Report%202019/Annex%20A%20-%20Copyright%20Review%20Report%2016%20Jan%202019.pdf> Accessed 19 March 2019,

Singapore Copyright Review Report on orphan works to be a missed opportunity and anticipates that Singapore will need to revisit the issue of orphan works in the years to come.

New Zealand Safe harbour

There currently exists in New Zealand copyright law a regime providing safe harbour provisions limited liability for Internet Service Providers. A similar type of regime may be a more effective approach to provide a balanced response to support the public good activities of all GLAMs and provide an acceptable way forward for the orphan works issue.

*A safe harbour reflects a policy that certain activities are sufficiently important that they should not be inhibited by the risk of copyright proceedings.*⁴⁷

An paper by Sam Coad in 2018 puts forward the idea that

*“creating a fit-for-purpose safe harbour would empower [GLAM] institutions to employ digitisation within a framework of reasonable copyright constraints. Accordingly, this paper constructs a potential safe harbour that permits non-commercial GLAM digitisation. The proposed safe harbour continues to protect commercial copyright interests and tikanga through the imposition of strict statutory conditions.”*⁴⁸

Te Papa, as a public good institution, has a great deal of investment in building and maintaining a trusted relationships with the general public and copyright holders specifically. Te Papa welcomes contact from copyright holders and respects their wishes. The practice Te Papa has established to date for orphan works is predicated on an immediate takedown of digital surrogates of orphan works when receiving contact from a copyright holder and good will negotiation with regard to all other uses.

The general public believes that everything of heritage value is already online. GLAM professionals are well aware that only a fraction of the world’s documentary and tangible heritage is online – linear kilometres of archival records, film, sound recordings, hundreds of thousands of objects and millions of scientific specimens all wait their turn for digitisation in the cultural heritage institutions of New Zealand alone. A sizeable portion of these will be orphan works. To ensure that the public of New Zealand have access to view these works online Te Papa would strongly encourage the committee to investigate a safe harbour or fair dealing exception to allow the reproduction and publication online.

⁴⁷ Graeme Austin "Why the not-for-profit cultural sector needs tailor-made copyright safe harbours" 13 February 2018
<http://theconversation.com/why-the-not-for-profit-cultural-sector-needs-tailor-made-copyright-safe-harbours-89564> Accessed 29 March 2019

⁴⁸ Sam Coad "Digitisation, copyright and the GLAM sector: Constructing a fit-for-purpose safe harbour regime" 2018. Unpublished paper submitted for the LLB (Honours) Degree, Faculty of Law, Victoria University of Wellington, 2018. Supervised by Graeme Austin. Accessed 18 February 2019

Other Issues

Taonga works - Question 93 Characterisation of Waitangi Tribunal's analysis

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.

Te Papa believes this is an accurate characterisation of the Waitangi Tribunal's analysis of issues relating to the Copyright Act.

Taonga works - Question 94 Agreement with concepts of 'taonga works' and 'taonga derived works'

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

Te Papa does not object to the concepts and definitions of the phrases 'taonga works' and 'taonga derived works' coined by the Waitangi Tribunal.

Taonga works - Question 95 Conflict between regimes

The Waitangi Tribunal did not recommend any changes to the copyright regime, and instead recommended a new legal regime for taonga works and mātauranga Māori. Are there ways in which the copyright regime might conflict with any new protection of taonga works and mātauranga Māori?

The issues paper included the following figure in section 572:

Wai 262 recommendations on taonga works and mātauranga Māori

New commission	New mechanisms	New principles
<ul style="list-style-type: none">• administer new objection processes• maintain register of taonga works• publish guidelines for use, care and protection of taonga works and mātauranga Māori	<ul style="list-style-type: none">• to prohibit the offensive or derogatory public use• to prevent commercial use without consultation	<ul style="list-style-type: none">• development of principles to assist decisions about the nature of kaitiaki involvement in commercial use of taonga works

Te Papa notes that until the Ministry put forward options on what new protections they propose for taonga works and mātauranga Māori it is difficult to comment on any anticipated conflicts with the copyright regime. If the protections that MBIE propose are in line with the protections recommended by the Waitangi Tribunal, the only conflict Te Papa can anticipate is when copyright holders wish to commercially benefit from more recent images and footage of tupuna and taonga works and their desires clash with the wishes of descendants of those depicted and the kaitiaki of those taonga works.

Taonga works - Question 96 MBIE's proposed process

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?

Te Papa supports any actions by the Ministry looking to advance the Crown response to the WAI262 report. However Te Papa urges the Ministry not to consider the outlined work stream to replace the need for a formal Crown response to the Waitangi Tribunal report.

It should be noted that this work stream has not had the networking and conscious raising benefit that the copyright work stream has received to date with the extended run up to the Copyright Act review. The addition of this parallel review predisposes this new work stream to issues including possible limited community engagement with the review due to lack of communication with the community and lack of time for those kaitiaki to consider and respond to the Issues paper and the new work stream in general. This lack of time and engagement with the communities may impact on the success in developing specific proposals for legislative change to protect the kaitiaki interest in taonga works and mātauranga Māori. If this process is to be run alongside the Copyright Act Review – the Ministry should consider the likely higher resourcing required to ensure that engagement with kaitiaki is effective and responses encouraged.

Taonga works - Question 97 How should MBIE engage with Treaty Partners

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

There has been years of investment in communication and engagement with the communities interested in copyright legislation running up the review of the Copyright Act including but not limited to: workshops, one-on-one discussions, attendance to conferences, presentations to community groups.

Conferences and seminars have been held by bodies representing those commercially benefiting from copyright.

Similar levels of engagement should be considered and actioned, despite the compressed timeframe imposed upon this work stream. The Crown should shoulder a greater part of the burden for engaging with and hearing from Treaty partner groups and subject experts. This would include, but not be limited to, establishing a rolling programme of visits and presentations to kaitiaki groups such as Iwi Trust Boards and Marae working groups, organising and running numerous hui at times convenient to the groups the Ministry wish to consult with, and meeting with key iwi representatives and subject experts. Te Papa encourages the Ministry to consult with subject experts such as, but not limited to, Aroha Mead, Maui Solomon, and the speakers and organisers of the conference Ngā Taonga Tuku Iho 2018: A Conference on Māori Cultural and Intellectual Property Rights.

This programme could also be an opportunity to provide upskilling and further education to this section of the public on the differences and limits of the Copyright Act and any proposed new regime resulting from a Crown response to the recommendations of the WAI262 report. A high level of engagement between MBIE and Te Puni Kōkiri via the Te Puni Kōkiri Policy to Pā, Pā to Policy programme of work and MBIE and Te Arawhiti – The Office for Maori Crown Relations may be required to run this programme effectively.

Other Issues - Photographs where copyright expired prior to the Copyright Act 1994 & the transitional arrangements of the Copyright Act 1994

As pointed out by Geoff McLay in 2006 in his report *Strategy and Intellectual Property – Scoping the Legal Issues: NZ Digital Content Strategy Working Paper 2*

A particular problem in the Copyright Act is the uncertainty of the protection of photographs. While this is a matter of poor drafting, the problem of photographs perhaps might serve as an example of more general problems. Before 1994, photographs were protected for 50 years from the date of creation, i.e. when they were first taken. In 1994 the New Zealand government brought the New Zealand statute into line with overseas provisions and replaced the 50 year rule with a rule of the life of the photographer and 50 years. While there was a certain logic in the extension of the period to make it consistent with other artistic works, the extension created great difficulties for those who run digital libraries of photographic images, often in museums or libraries. It required considerable extra transaction costs in terms of searching for the owners of copyright in photographs that are over 50 years old. Maybe in relation to particularly important commercial images such a process is not onerous and indeed is commercially correct. In relation to a vast amount of images held by many New Zealand museums and libraries the process is overly burdensome. Adding to this burden is the uncertainty created by poor statutory drafting in

*relation to the transitional provisions. While the Act is clear that works still in copyright when the new statute came into force on 1 January 1995 remained in copyright and were subject to the new extended time, no transitional provision was made in relation to photographs in which copyright had expired before 1 January 1995. This is different from the United Kingdom Act on which the New Zealand statute was based, which expressly provides a transitional rule in relation to such photographs. While the likely interpretation of the Act is that copyright in pre-1945 photographs was not revived by the 1994 Act, this is not clear. It requires those who are involved in the supply of photographs or in their digitisation to take a risk as to what the correct time period is.*⁴⁹

Suzy Frankel states:

*The general position is that the 1994 Act does not revive copyrights that have previously expired.*⁵⁰

and

There is no transitional rule; copyright depends on whether copyright exist under the 1962 Act. There is a question as to whether copyright lasts from the date a photograph was taken and 50 years, even if it was taken 50 years before the Copyright Act 1994 came into force and hence was out of copyright. The transitional provision in sch 1, cl 12 of the 1988 United Kingdom Copyright Act provides:

(2) Copyright in the following descriptions of work continues to subsist until the date on which it would have expired under the 1956 Act - ...

*(c) published photographs and photographs taken before 1st June 1957.*⁵¹

The transitional arrangements are unclear whether copyright in photography created prior to the commencement of the Copyright Act 1994 and was out of copyright was revived when the copyright duration changed in the Copyright Act 1994 from the end of the calendar year of creation + 50 years to the end of the calendar year of the death of the photographer + 50 years. For those photographers still living or who had died less than 50 years ago but whose works were taken before 1 January 1944 uncertainty exists as to whether copyright was revived.

The common practice in the GLAM sector in New Zealand is that photographic works taken prior to 1 January 1944 (i.e. 51 years before the commencement of the Copyright Act 1994) are and remain out of copyright in the New Zealand jurisdiction. The guidance provided by the NZ National Library via the

⁴⁹ Geoff McClay "Strategy and Intellectual Property – Scoping the Legal Issues: NZ Digital Content Strategy Working Paper 2" April 2006 page 25 https://www.parliament.nz/resource/mi-nz/48SCCOSCAdvicefA1015_A2324/eb394db6a731de9a65a5912c6d92808a743f5157 Accessed 4 March 2019

⁵⁰ Susy Frankel "Intellectual Property in New Zealand, 2nd edition." Wellington, LexisNexis NZ Ltd, 2011 page 256

⁵¹ Susy Frankel "Intellectual Property in New Zealand, 2nd edition." Wellington, LexisNexis NZ Ltd, 2011 page 257

DigitalNZ Make it Digital website⁵² is used often by GLAM organisations and is considered best practice for the sector. Those institutions that follow this guidance include Te Papa, Auckland War Memorial Museum, and the National Library of New Zealand (including the Alexander Turnbull Library). However, confusion about copyright duration and lack of knowledge about best practice remains for some institutions in the New Zealand GLAM community resulting in inconsistency, lack of clarity, and uncertainty.

A growing number of GLAM institutions are contributing digital surrogates of collection items to Digital NZ. The uncertainty of copyright duration of historic photographs exacerbates the uncertainty in the GLAM community about the copyright status of digital surrogates of older analogue photographs. This results in the copyright status of digital surrogates of analogue photographic prints and negatives being allocated an “All Rights Reserved” rights statement. Entering a search term into the DigitalNZ website, restricting the search to images, and filtering by date to those created prior to 1944 and filtering by rights status for “All Rights Reserved” shows a list of digital surrogates of analogue photographs that are very likely to be out of copyright in the New Zealand jurisdiction but are likely to have been affected by this uncertainty. The number of institutions and range of images is large and likely to grow as digitisation continues and more contributors are recruited to add content to DigitalNZ. <https://digitalnz.org/>

Te Papa encourages those responsible for the Copyright Act review to fix this drafting issue in order to bring certainty and reliability to the Act on this matter.

Other Issues – Clarity in the Act

Te Papa encourages the review to consider how amendments to the Act could improve clarity and certainty for all parties with an interest in the copyright status of works. Certainty and clarity are lacking in the current Act. Te Papa has invested funds and a significant portion of staff time to develop a flow chart to help determine the first owners of copyright and whether works are in copyright or out-of-copyright in the New Zealand jurisdiction. The length and complexity of this flowchart is indicative of the complexity of the Act.⁵³

⁵² DigitalNZ “Copyright Status Flowcharts” <https://digitalnz.org/make-it-digital/enabling-use-re-use/copyright-status-flowcharts> Accessed 29 March 2019

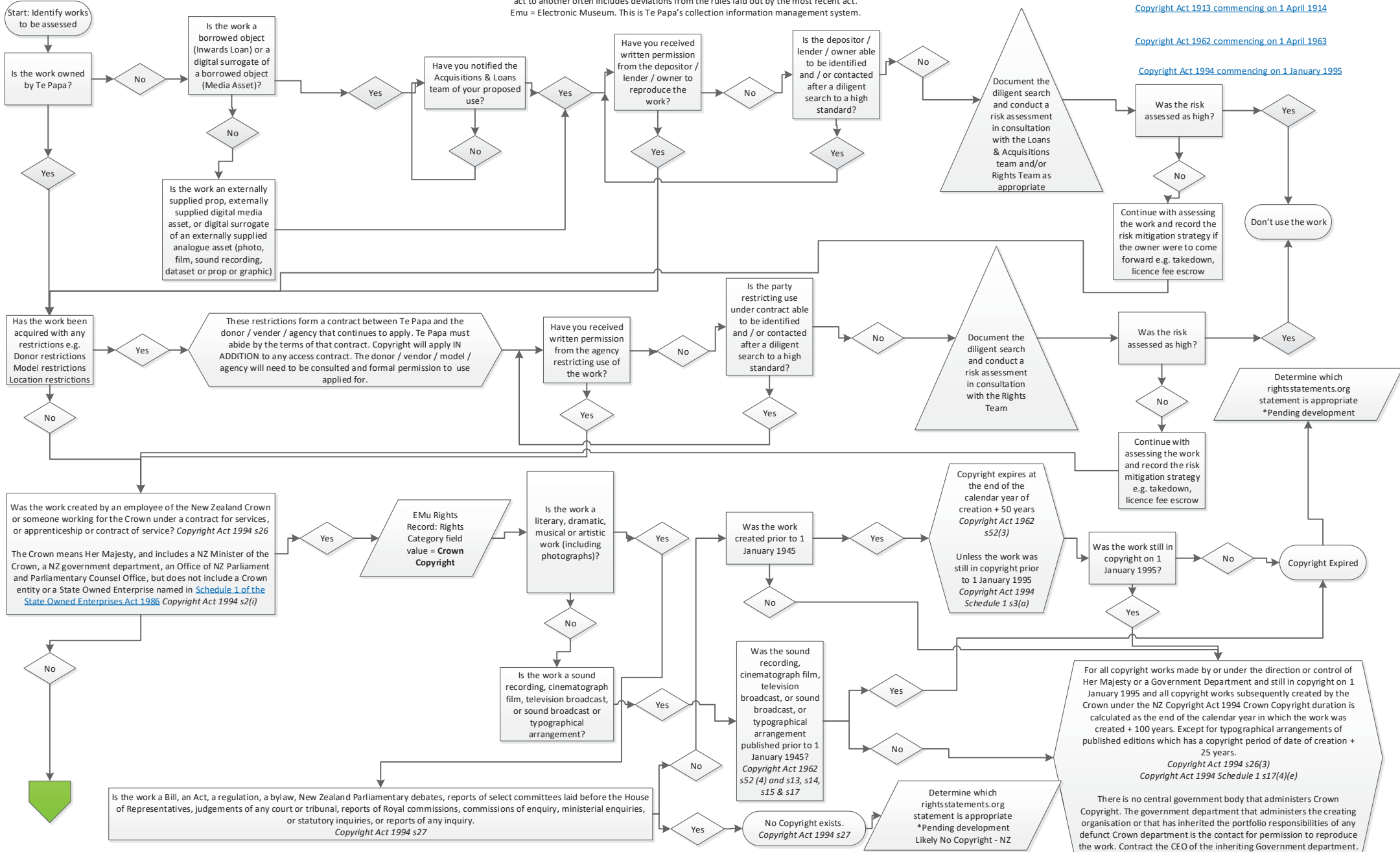
⁵³ Victoria Leachman. “Working out Copyright Duration for Te Papa’s Collections” 2018 <https://drive.google.com/file/d/1C1CC3jnIYWfDBn5vNfrolLKHw1gJnw9Z/view?usp=sharing> Accessed 29 March 2019

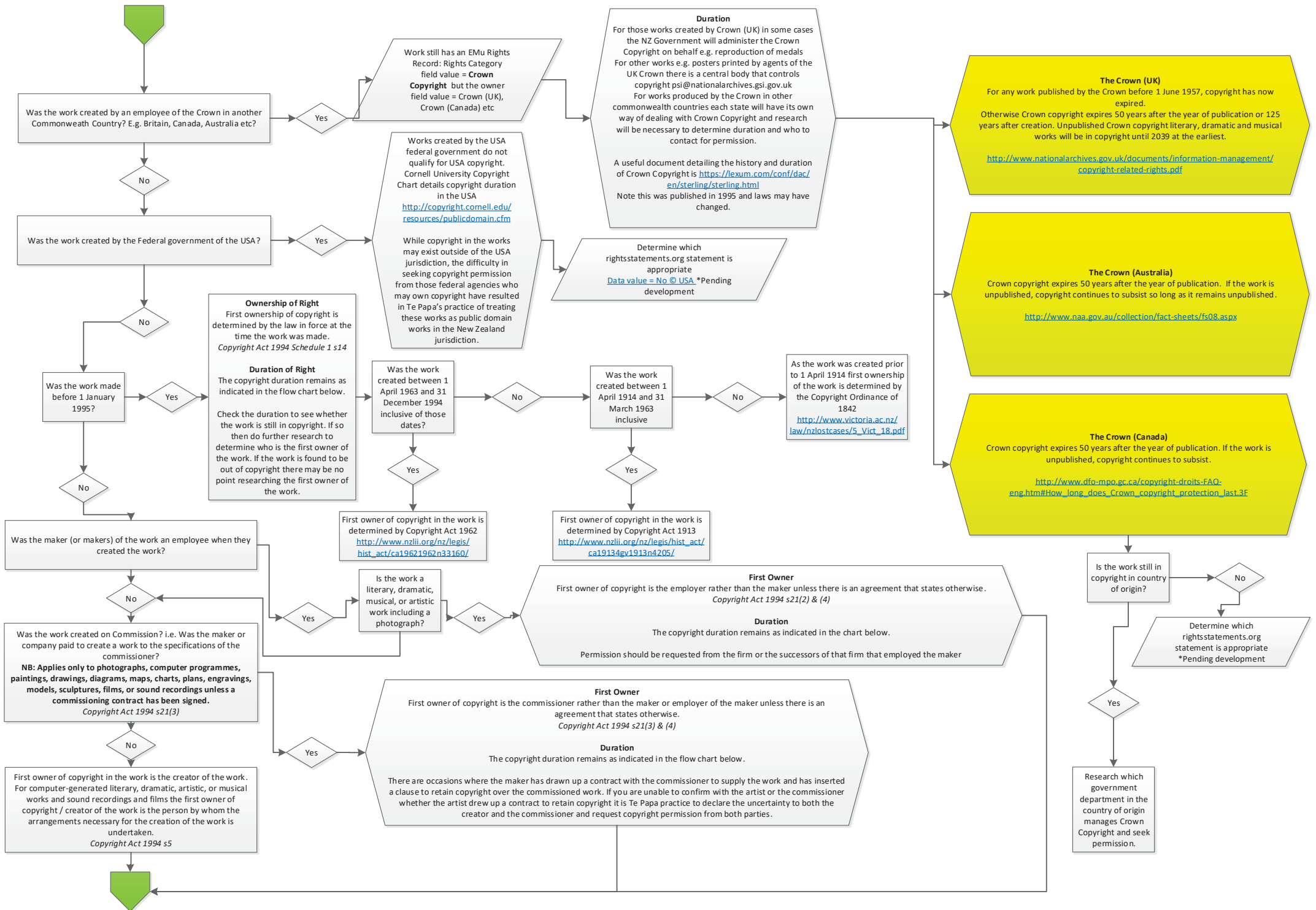
Working out Copyright Duration for Te Papa's Collection

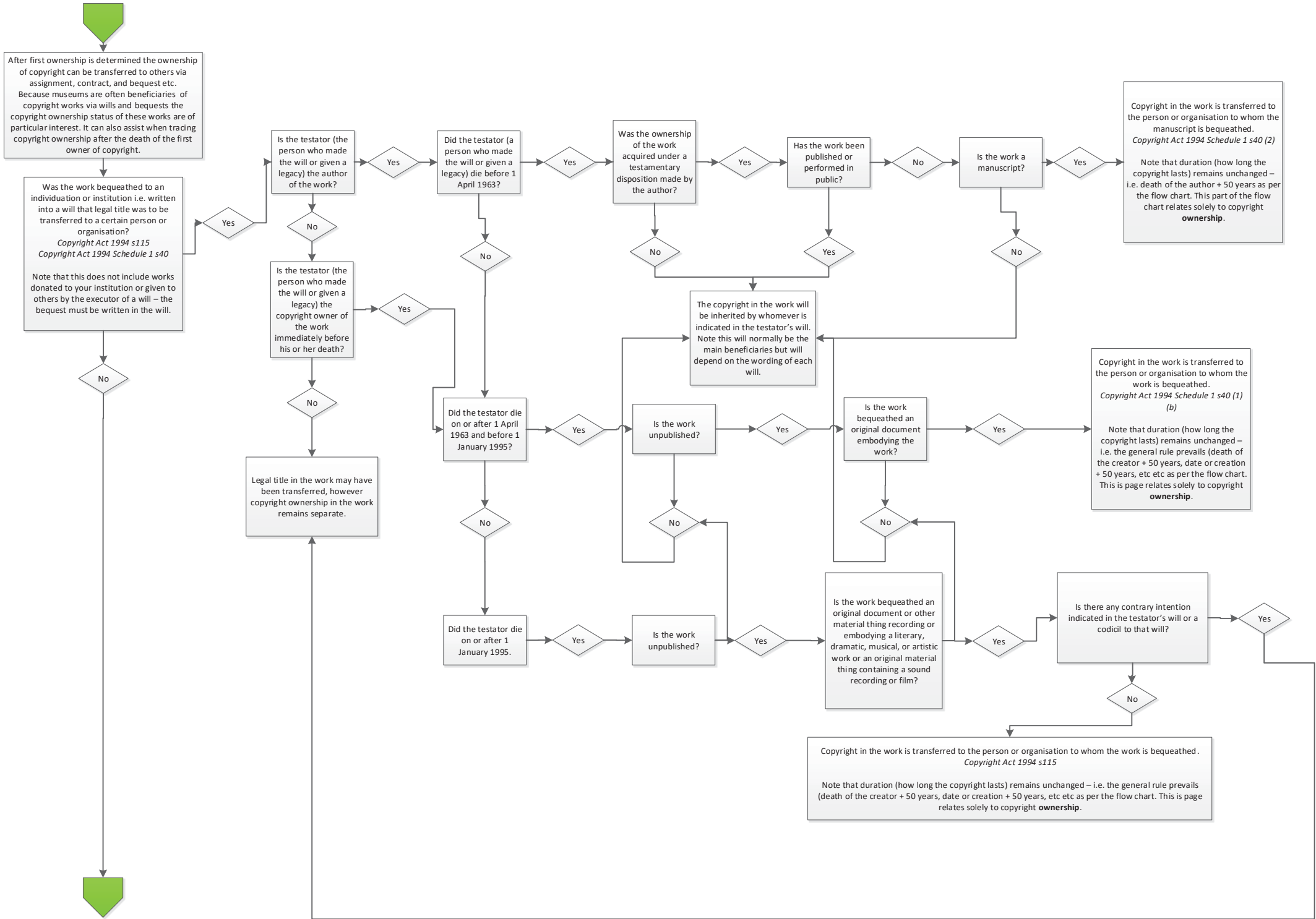
Under the Berne Convention the principle of national treatment is also extended to cases in which the author is not a national of the country of origin of his or her work. In such cases, the author is entitled to the same protection as nationals of such countries. Article 5(3) Generally for works created in New Zealand by New Zealand nationals who died more than 50 years ago Te Papa recognises the works are out of copyright in the NZ jurisdiction and labels them with the NZGOAL "No Known Copyright Restrictions" copyright statement when reproducing online. <https://www.ict.govt.nz/guidance-and-resources/open-government/new-zealand-government-open-access-and-licensing-nzgoal-framework/>

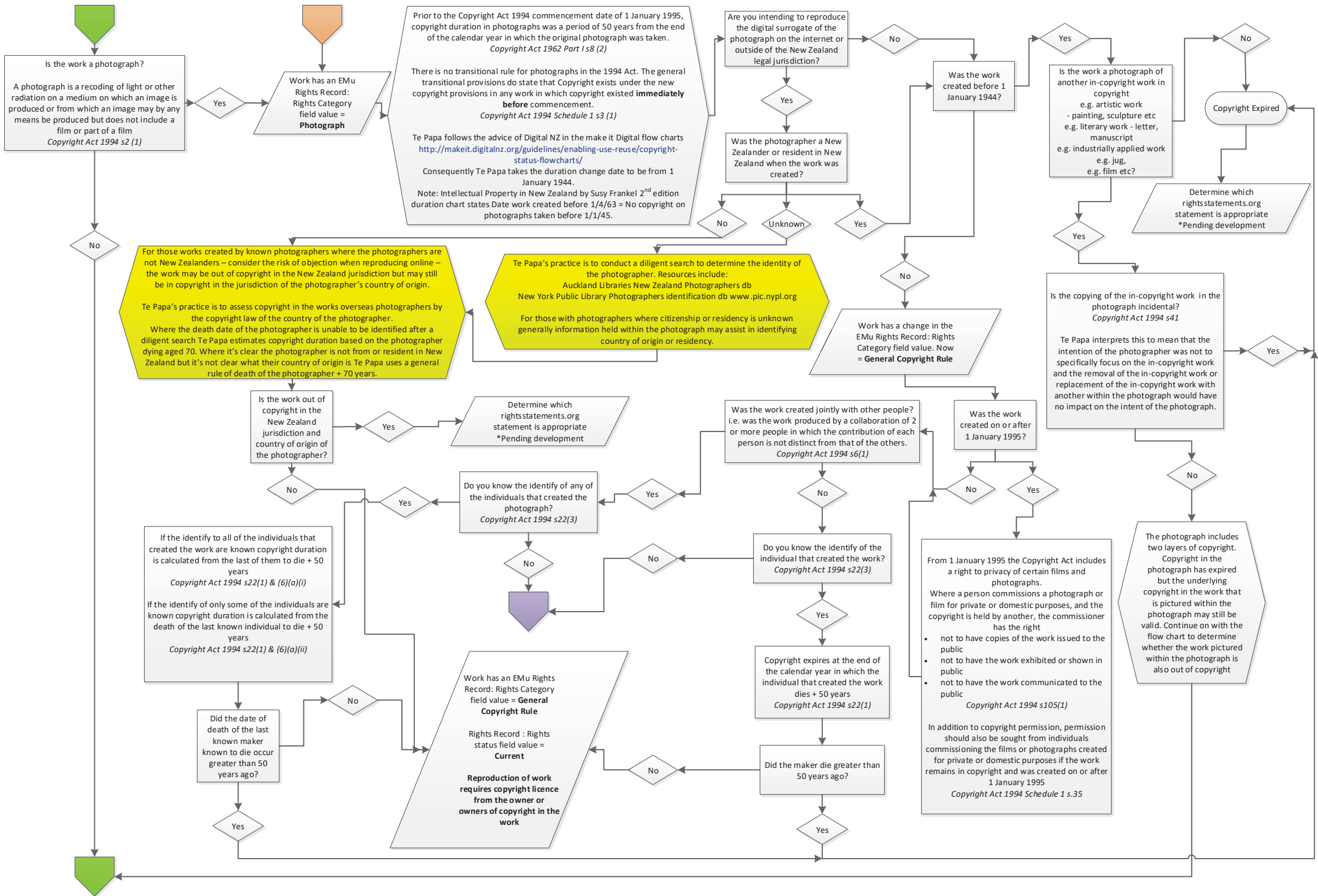
For Non-New Zealand authors / creators whose country of origin are partners in the Berne Convention and have death + 70 years as the general duration, Te Papa applies an end-of-calendar-year-of-death-of-the-author/creator + 70 years duration when considering reproduction online or copying outside of the New Zealand legal jurisdiction. This includes online. If the work qualifies for a shorter copyright duration in its home country, Te Papa will apply those rules e.g. Japan has a general copyright duration of end of the year of death of the author + 50 years.

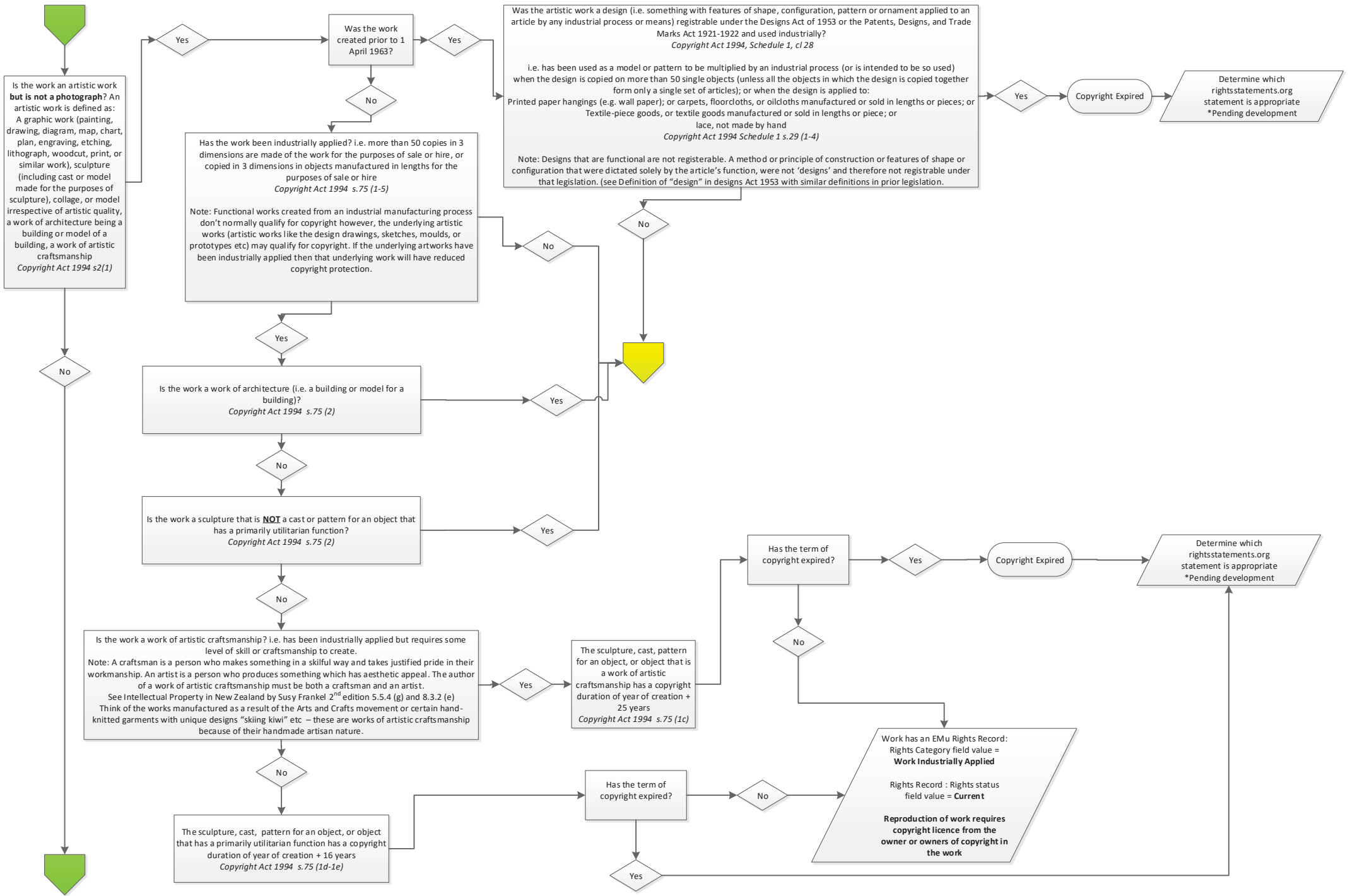
This flowchart is attempting to bring certainty of copyright duration for those tasked with researching the copyright status of items in heritage collections at Te Papa. These types of collections are more likely to contain copyright works created under copyright laws that have been updated and changed. The transition from one act to another often includes deviations from the rules laid out by the most recent act. [Copyright Act 1913 commencing on 1 April 1914](#)
[Copyright Act 1962 commencing on 1 April 1963](#)
[Copyright Act 1994 commencing on 1 January 1995](#)
 Emu = Electronic Museum. This is Te Papa's collection information management system.

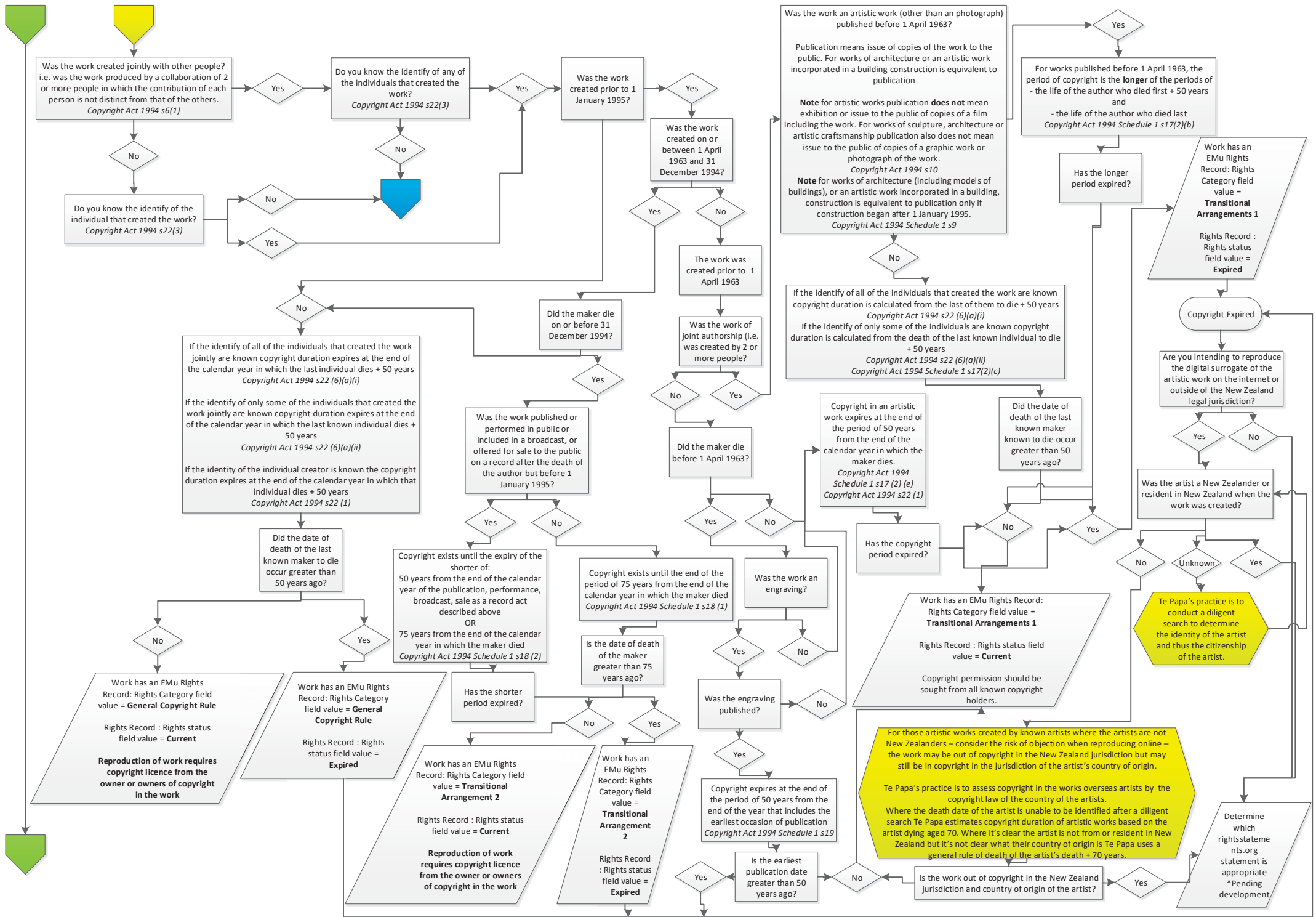












Was the work created jointly with other people? i.e. was the work produced by a collaboration of 2 or more people in which the contribution of each person is not distinct from that of the others.
Copyright Act 1994 s6(1)

Do you know the identify of any of the individuals that created the work?
Copyright Act 1994 s22(3)

Was the work created prior to 1 January 1995?

Was the work created on or between 1 April 1963 and 31 December 1994?

Was the work an artistic work (other than an photograph) published before 1 April 1963?

Publication means issue of copies of the work to the public. For works of architecture or an artistic work incorporated in a building construction is equivalent to publication

Note for artistic works publication **does not** mean exhibition or issue to the public of copies of a film including the work. For works of sculpture, architecture or artistic craftsmanship publication also does not mean issue to the public of copies of a graphic work or photograph of the work.
Copyright Act 1994 s10

Note for works of architecture (including models of buildings), or an artistic work incorporated in a building, construction is equivalent to publication only if construction began after 1 January 1995.
Copyright Act 1994 Schedule 1 s9

For works published before 1 April 1963, the period of copyright is the **longer** of the periods of - the life of the author who died first + 50 years and - the life of the author who died last
Copyright Act 1994 Schedule 1 s17(2)(b)

Work has an EMU Rights Record: Rights Category field value = **Transitional Arrangements 1**

Rights Record : Rights status field value = **Expired**

If the identify of all of the individuals that created the work jointly are known copyright duration expires at the end of the calendar year in which the last individual dies + 50 years
Copyright Act 1994 s22 (6)(a)(i)

If the identify of only some of the individuals that created the work jointly are known copyright duration expires at the end of the calendar year in which the last known individual dies + 50 years
Copyright Act 1994 s22 (6)(a)(ii)

If the identify of the individual creator is known the copyright duration expires at the end of the calendar year in which that individual dies + 50 years
Copyright Act 1994 s22 (1)

Did the maker die on or before 31 December 1994?

Was the work of joint authorship (i.e. was created by 2 or more people)?

If the identify of all of the individuals that created the work are known copyright duration is calculated from the last of them to die + 50 years
Copyright Act 1994 s22 (6)(a)(i)
If the identify of only some of the individuals are known copyright duration is calculated from the death of the last known individual to die + 50 years
Copyright Act 1994 s22 (6)(a)(ii)
Copyright Act 1994 Schedule 1 s17(2)(c)

Was the work published or performed in public or included in a broadcast, or offered for sale to the public on a record after the death of the author but before 1 January 1995?

Did the maker die before 1 April 1963?

Copyright in an artistic work expires at the end of the period of 50 years from the end of the calendar year in which the maker dies.
Copyright Act 1994 Schedule 1 s17 (2) (e)
Copyright Act 1994 s22 (1)

Did the date of death of the last known maker known to die occur greater than 50 years ago?

Was the artist a New Zealander or resident in New Zealand when the work was created?

Copyright exists until the expiry of the shorter of:
50 years from the end of the calendar year of the publication, performance, broadcast, sale as a record act described above
OR
75 years from the end of the calendar year in which the maker died
Copyright Act 1994 Schedule 1 s18 (2)

Copyright exists until the end of the period of 75 years from the end of the calendar year in which the maker died
Copyright Act 1994 Schedule 1 s18 (1)

Was the work an engraving?

Work has an EMU Rights Record: Rights Category field value = **Transitional Arrangements 1**

Rights Record : Rights status field value = **Current**

Copyright permission should be sought from all known copyright holders.

Te Papa's practice is to conduct a diligent search to determine the identity of the artist and thus the citizenship of the artist.

Work has an EMU Rights Record: Rights Category field value = **General Copyright Rule**

Rights Record : Rights status field value = **Current**

Reproduction of work requires copyright licence from the owner or owners of copyright in the work

Work has an EMU Rights Record: Rights Category field value = **General Copyright Rule**

Rights Record : Rights status field value = **Expired**

Work has an EMU Rights Record: Rights Category field value = **Transitional Arrangement 2**

Rights Record : Rights status field value = **Current**

Reproduction of work requires copyright licence from the owner or owners of copyright in the work

Work has an EMU Rights Record: Rights Category field value = **Transitional Arrangement 2**

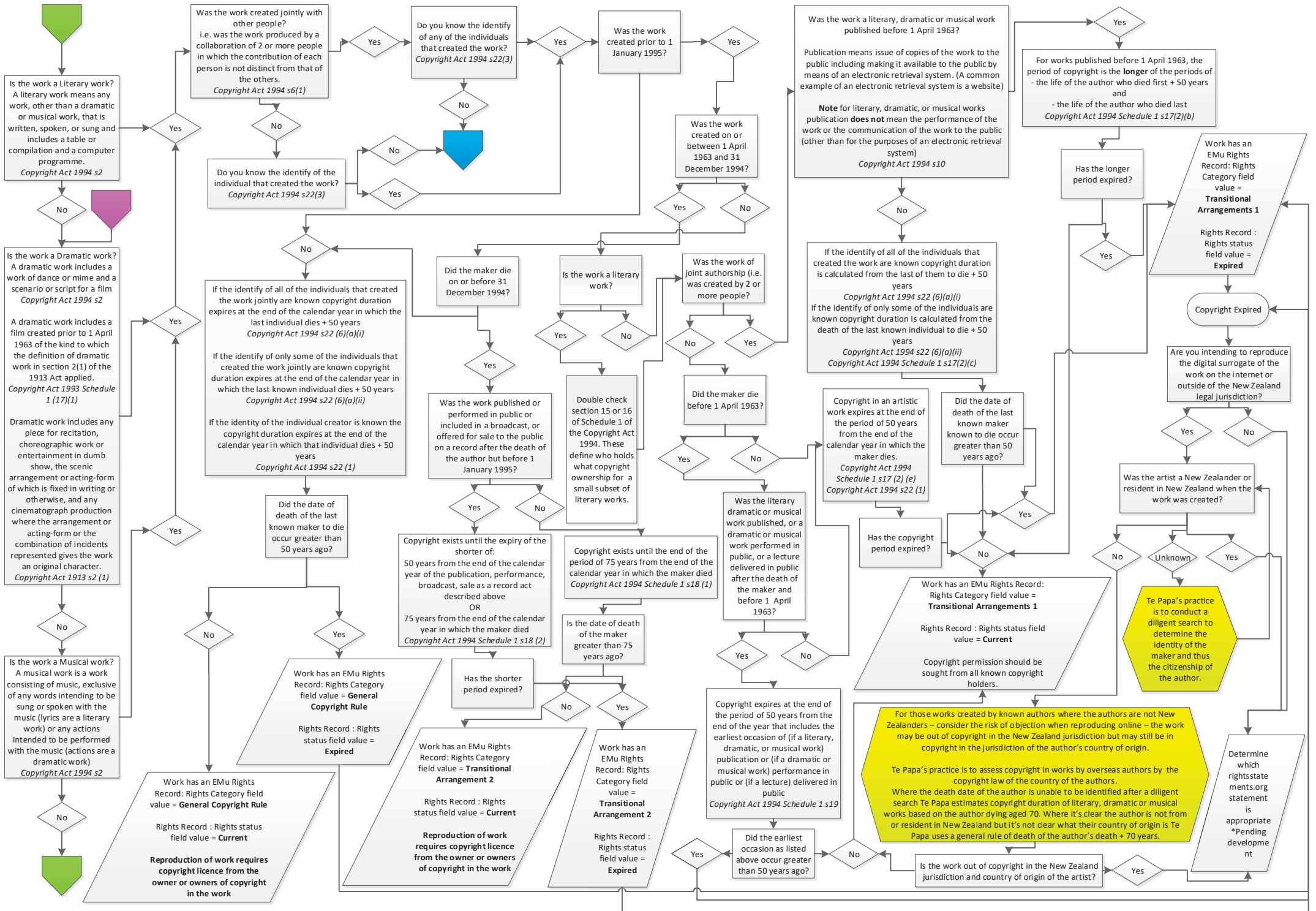
Rights Record : Rights status field value = **Expired**

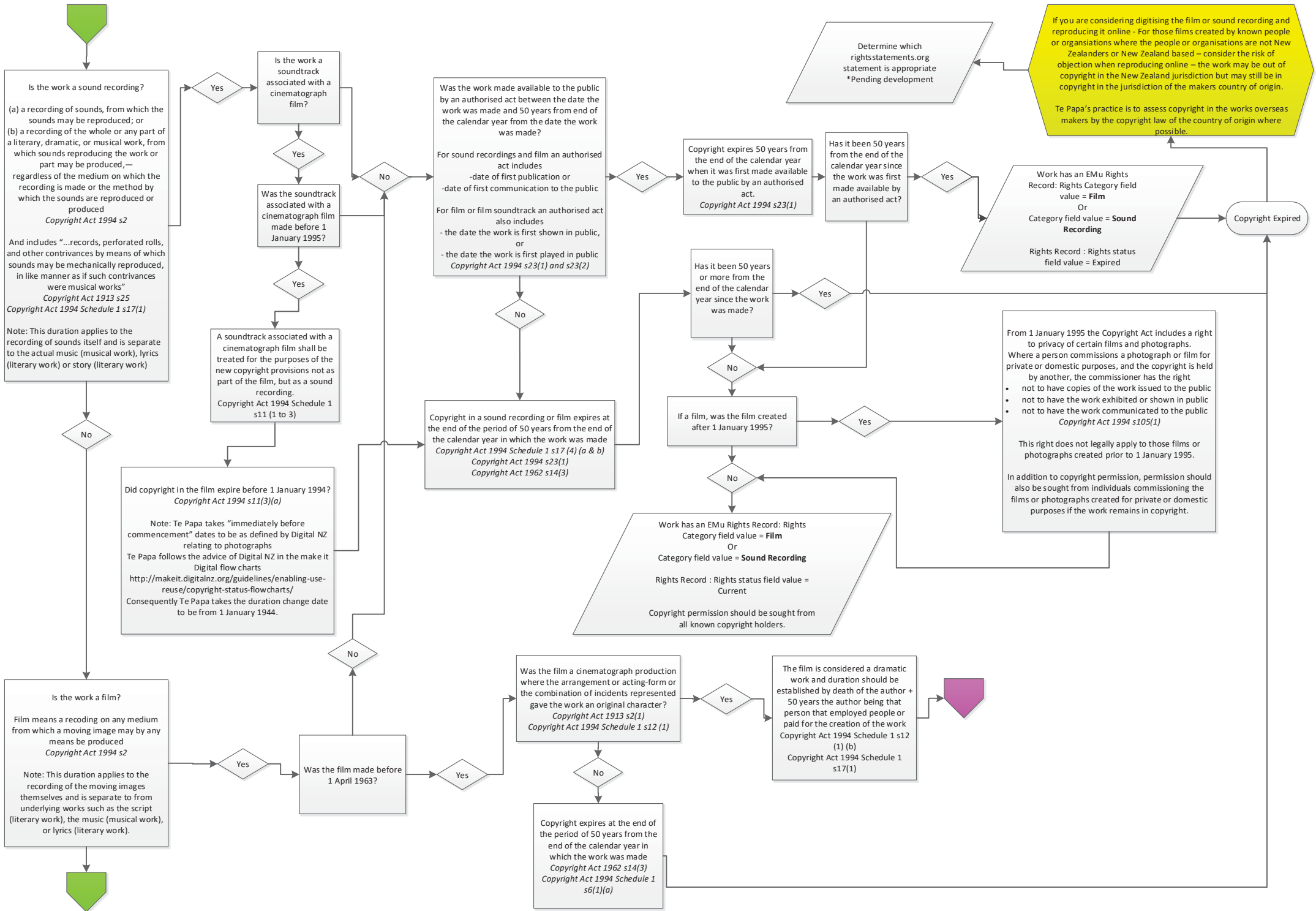
Copyright expires at the end of the period of 50 years from the end of the year that includes the earliest occasion of publication
Copyright Act 1994 Schedule 1 s19

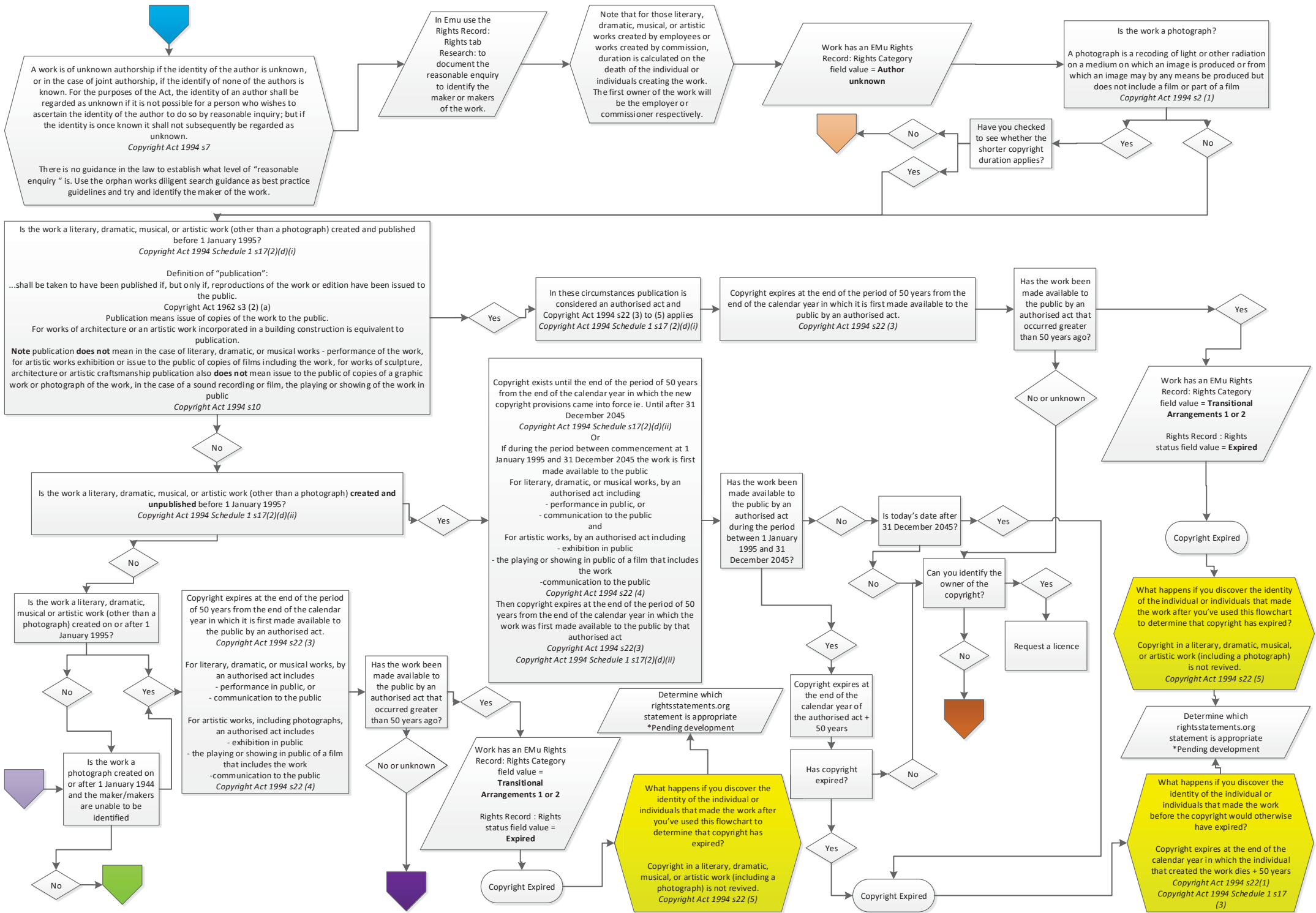
For those artistic works created by known artists where the artists are not New Zealanders – consider the risk of objection when reproducing online – the work may be out of copyright in the New Zealand jurisdiction but may still be in copyright in the jurisdiction of the artist's country of origin.

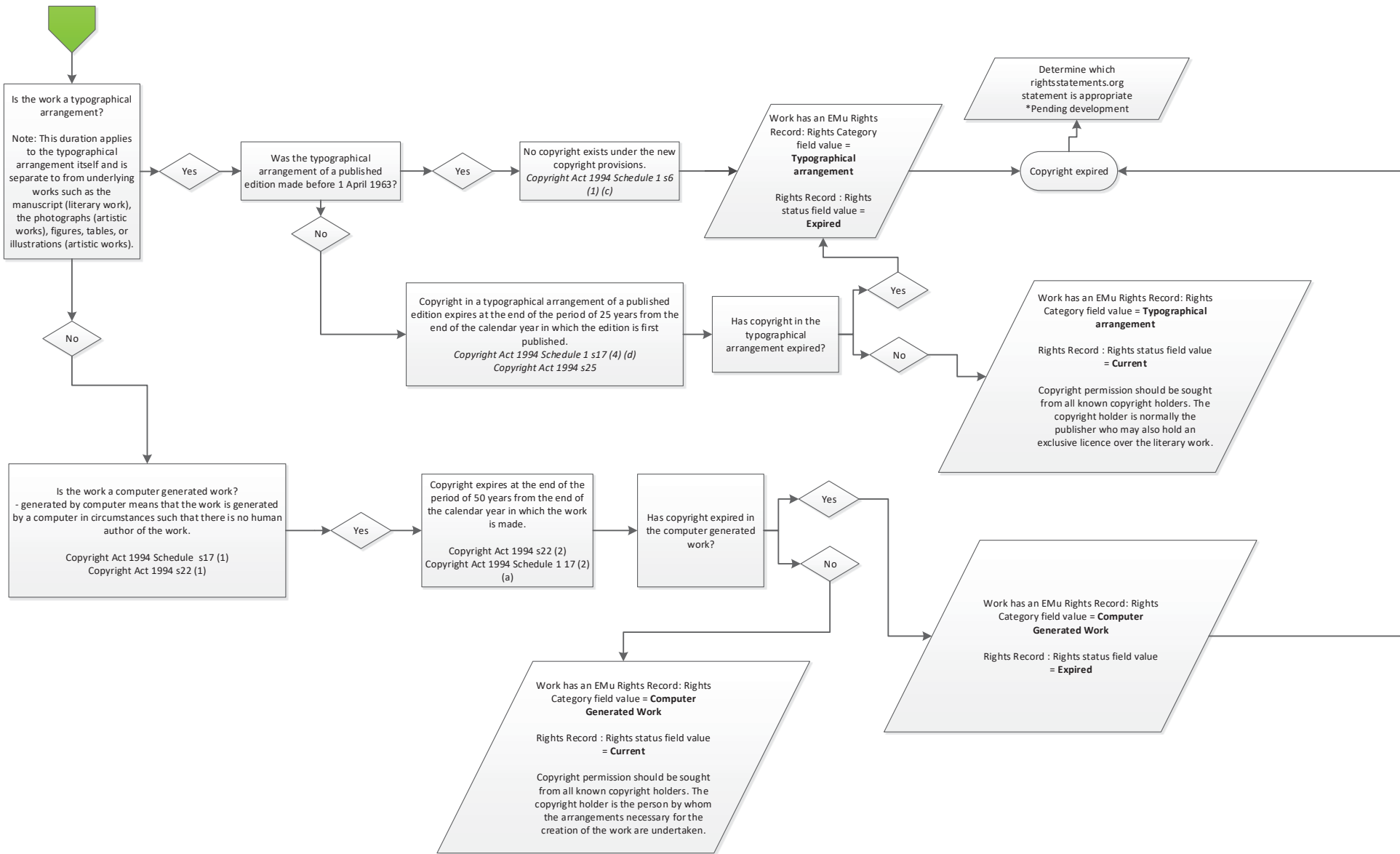
Te Papa's practice is to assess copyright in the works overseas artists by the copyright law of the country of the artists.
Where the death date of the artist is unable to be identified after a diligent search Te Papa estimates copyright duration of artistic works based on the artist dying aged 70. Where it's clear the artist is not from or resident in New Zealand but it's not clear what their country of origin is Te Papa uses a **general rule of death of the artist's death + 70 years.**

Determine which rights statements.org statement is appropriate *Pending development









Orphan works, Identifying copyright holders and contact information



A diligent search has been completed and failed to identify the maker and/or copyright holder of the work and/or failed to identify the death date of the maker and/or trace the contact information for the maker and/or copyright holder. The search has been documented and there are no leads left.

Often Te Papa has not been able to establish the date of death of a maker or only knows the date of creation or date of acquisition of an artistic work including works of mana taonga, handmade textile items, tourist items from the Pacific, other non-manufactured works. Te Papa's approach has been to reasonably assume a work by an identified artist with an unknown date of death or an unknown artist is out of copyright using this formulae:

Establish latest estimated date of production by consulting with appropriate Curator
 Assume work created when creator was 25
 Assume creator died aged 75 and add 70 years

EMu Rights Record: Rights Status field value = **Orphaned**

Copyright expires after 31 December 2045
Copyright Act 1994 Schedule 1 s17(d)(ii)

Note: If you choose to reproduce the work - reproduction of orphan works is an **unauthorised act**

Orphan works
 To reproduce orphan works is an infringement under the law. If the copyright owner is identified later or discovers the reproduction and objects to the reproduction then the risk will include:

- Destruction of any hardcopy of the material that reproduces the work
- Removal of the reproduction from the product
- Monetary compensation paid to the copyright owner for loss suffered in respect of the infringement

Before authorising the reproduction of an orphan work

- Consult with the Rights Manager who will be able to give you a risk assessment on reproducing the work.
- If the reproduction is digital consider establishing a takedown plan
- If the reproduction is analogue consider accruing a standard sum to offer as a copyright licence fee should the copyright holder be identified.
- Consider including a statement in association with the work similar to "Every effort has been made to locate the copyright owners of material used in this project. In cases where this has not been possible copyright owners are invited to contact Te Papa – enquiries@tepapa.govt.nz"

Each time Te Papa conducts a risk assessment on reproducing the work a further diligent search should be conducted. Often digitisation and research by other organisations will result in the copyright holder being traced sometime after Te Papa's search failed to trace the copyright holder so following up on additional leads that occur after a new search is important.

Is the work very likely to be out of copyright using the formulae?

Yes

No

Rights record: Rights Status = **Expired**
 Copyright duration = copyright duration formulae expiry result

Determine which rightsstatements.org statement is appropriate
 *Pending development

Te Papa has a practice of reproducing orphan works in Te Papa's Collections Online database. This is because the risk of infringement action is low and because reproducing the work increases the likelihood of a copyright holder coming forward and identifying themselves.

Te Papa has a takedown process it actions if a copyright holder does come forward. Te Papa has a practice of immediately taking down the reproduction of the work, ensuring the takedown has been actioned in response to a valid request, and then applying to the copyright holder to grant Te Papa the standard non-commercial museum use copyright licence used by Te Papa.

Diligent search assistance

A google search is the best place to start when searching for information on artist death dates, biographical information, representing dealer galleries, other GLAMs with works by the same maker in their collections. This site lists some good google search tips <http://www.lifehack.org/articles/technology/20-tips-use-google-search-efficiently.html>

Useful sites to seek copyright holder biographical details, identities and contact information for New Zealand makers include:

- Births Deaths and Marriages Online <https://www.bdmhistoricalrecords.dia.govt.nz/Home/>
- Archives New Zealand – search for probates for deceased makers to determine who may have inherited their estate. You can either visit to view or order copies (fees apply) <https://www.archway.archives.govt.nz/>
- Probates and wills greater than 50 years old have been digitised and appear here: <https://www.familysearch.org/search/catalog/1865481>
- This collection can be looked up by knowing the court at which the probate was filed and the probate number – this information is available from the Archives NZ Probate entry.
- Papers Past – digitised NZ newspapers up until 1950s <https://paperspast.natlib.govt.nz/>
- New Zealand telephone white pages – not as useful as it was some years ago <https://whitepages.co.nz/>

For New Zealand photographer information search Auckland Libraries Photographers Database <http://www.aucklandcitylibraries.com/DigitalLibrary/resourcepages/photographersdatabase.aspx>
 The blog Early New Zealand Photographers is also helpful <https://canterburyphotography.blogspot.co.nz/>
 For international photographers check out World Photographers Identities Catalogue <http://pic.nypl.org/>

For companies information The New Zealand companies office is helpful <https://www.companiesoffice.govt.nz/companies>
 IPONZ will also have information on trademarks registered over time <https://app.iponz.govt.nz/app/Extra/IP/TM/Qbe.aspx?sid=636430726292831253>
 For British manufacturers this website is useful http://www.gracesguide.co.uk/Main_Page

Searching other GLAM databases can also be useful – for NZ institutions use Digital NZ <https://www.digitalnz.org/>
 The unpublished collections search of Alexander Turnbull Library can search on works or on people <https://tiaki.natlib.govt.nz/#home>
 For European makers Europeana is helpful <https://www.europeana.eu/portal/en>
 "The WATCH DB" Writers Artists and their Copyright Holders website <http://norman.hrc.utexas.edu/watch/>
 Visual Art Collecting Agencies <http://www.bildkunst.de/en/service-for-users/artist-search/reproduction-rights.html>
 Getty Union of Artists Names <https://www.getty.edu/research/tools/vocabularies/tgn/index.html>
 Published collections – to identify original publisher use <https://tepuna.on.worldcat.org/discovery>
 VIAF can help with biographical and publisher information <https://viaf.org/>
 Biographical information: Wikidata https://www.wikidata.org/wiki/Wikidata:Main_Page

New Zealand does not have Orphaned works diligent search guidelines. There does exist in other legal jurisdictions guidelines that can assist:
 UK orphaned works diligent search guidelines <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants>
 Society of American Archivists Statement of Best Practice for Orphan works: <https://www2.archivists.org/sites/all/files/OrphanWorks-June2009.pdf>

Links to helpful sites for copyright duration in other legal jurisdictions
 USA <https://copyright.cornell.edu/publicdomain>
 EU public domain calculator <http://outofcopyright.eu/>

Other helpful copyright sites
 Library and Information Association of New Zealand Aotearoa <https://lianza.org.nz/our-work/voice-profession/copyright/copyright-resources>
 Copyright Cortex EU <https://copyrightcortex.org/about>

Disclaimer and Copyright Statement

Disclaimer

These flowcharts are provided for informational purposes only and focus primarily on determining the ownership and duration of copyright in works held by Te Papa. We hope the flowcharts are useful for others in the GLAM (Galleries, Libraries, Archives, and Museums) sector and we have taken reasonable steps to ensure they are correct but we are not providing legal advice and will not be responsible for the consequences of another party relying on the flowcharts. You are responsible for seeking your own legal advice where required. If you disagree with any element of the flowcharts, please let us know by emailing copyright@tepapa.govt.nz

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