Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

Name	Tui Ruwhiu
Organisation	Directors and Editors Guild of New Zealand

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Responses to Issues Paper questions

Objectives

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

Main points

1. **Objective #1 should be the primary objective, with other objectives as a subset.**
2. **The current system is not meeting Objective #1 in respect of film, because the absence of copyright for Directors of audio-visual content and cinematographic film is discouraging the production of creative work in New Zealand.**

We agree with the five proposed objectives and note that the first is the primary objective: to incentivise the creation and dissemination of works.

The system is generally achieving those objectives, although not entirely.

The current law assigns Directors no economic rights to the works they create. This discourages Directors from creating works in New Zealand because they are not being adequately financially rewarded for their unique creative vision and endeavour. Our submission will testify that under the current regime works are NOT being created in New Zealand, people are NOT becoming Directors, and those that do are frequently forced to leave New Zealand to pursue their profession.

We also argue that the current law does not provide "clarity" because although silent on economic rights of Directors, it does assign them authorial "moral" rights. Over 37 other jurisdictions provide both.

This illogical and absurd paradox means that in contrast to their peers such as actors, composers and writers, Directors are unable to assert economic value over their creative endeavour, which forces them into employment positions and commissions, effectively preventing other financial relationships.

2	Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?

Main point

1. **Leave the objectives technology-neutral**

Directors of audio-visual content and cinematographic film are pushing the boundaries of technology, in part because new ways of creating their artistic vision is more empowering than traditional formats. But without the ability to assert economic rights, New Zealand Directors are still at a disadvantage when using new technologies.

This situation illustrates that it is more important to provide a bedrock of regulation that empowers creators. Incorporating technology adaptability into the objectives could have unintended consequences. It is best that regulation is as technology-neutral as possible, even in its objectives.

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

Main points

1. **No view on new objectives, but if there are any, they should be subservient to Objective #1.**

It is tempting to introduce sub-objectives more specific to the sections of the Act. But Objective 1 provides a very clear guide to assessing particular copyright situations, such as the moral and economic rights of Directors and their right to be included in the Act as "authors".

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

Main points

1. **Objective #1 should be the primary objective, and all others are moderations of it.**

MBEI's introduction to the Issues Paper (Part 2) provides a very clear rationale for the existence of copyright. Part 2 is almost entirely dominated by concepts related to the central idea of incentivising and/or recognising ownership of expression of ideas.

Objectives #2 to #5, and any others, are effectively modifications of the central principle that authors create works, whether valued intrinsically, or valued as a tool or product, or as a social and cultural good.

Society, and almost all Authors, want to encourage the creation and dissemination of their works. That remains, and should be, the primary objective. It provides a central rationalisation and guide to help us decide on mitigating factors arising from creative enterprise.

We suggest that the objectives are split; #1 is the primary objective. #2 to #5 are a subset of objectives or 'conditions' on the primary objective.

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

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

Main points

1. **Current categorisation does not cover all new forms and methods of creativity**
2. **There should be a clear category of "cinematographic film"**
3. **Recognising the economic copyright of Directors of audio-visual content and cinematographic film is a prerequisite to recognising the economic copyright of all artists who effectively "direct" the making of creative works.**

An advantage of the way copyright currently works is that categorisation matches the way audiences experience a creative work. It provides a simple, defendable method of defining and labelling a work for the purpose of according copyright.

The problem is that the categorisation of works is increasingly unable to encompass the range of physical and non-physical ways people make creative work.

Nor does it capture the ways people can conceive and add uniqueness to an idea and its expression.

Film direction has existed for over 100 years as a professional and artistic role. It is somewhat analogous to the role of a Theatre Director, Orchestra Conductor or Music Producer.

It's strange that New Zealand's categorisation system includes video shot with modern mobile phones but has bizarrely not set up a category for combinations of moving image and associated sounds that emerged in 1927 as "talkies".

Therefore, a 'new' category of "cinematographic film" should be established in our copyright law, in line with many other jurisdictions worldwide.

It is not only technology that has changed the experience and dissemination of art. The practice of the creative arts has altered as well. Many other art forms now follow the approach of a Film Director, where the artist marshals a wide range of resources such as objects and people, to express a vision. For example, an artist arranging a physical installation in a gallery, or positioning new objects in an existing open space. In digital space this can include mash-ups and novel interrelationships and dependencies of computer games, found and real time data, and graphics.

If we do not have a copyright scheme that can grant a Film Director with economic copyright of the unique arrangement of visuals and sound, we will not be able to provide economic reward and incentive to those wanting to "direct" in novel ways and formats.

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

Main points

1. **The test is apt and fair, but the three factors might not be needed in combination.**
2. **The test is clearly not leading to wide application because it hasn't yet even followed 37 other countries in allowing the economic copyright of Directors of audio-visual content and cinematographic film.**

The test is reasonably fair because it covers the endeavours required to generate something new, especially from existing things. 'Skill' recognises a unique or trained or honed application of practices in creative expression. 'Effort' recognises that time and personal commitment went into the creation. 'Judgement' recognises the unique personality and talent applied to the task of developing something novel. The assistance of technology to the "skill" component of creative endeavours means some work results from mainly effort and judgement. Therefore, it is worth considering changing the test to indicate that all three are NOT needed together at one time.

Either way, the test does not lead to an overly-wide application of New Zealand's copyright protection. This is clear because the test has not yet even caused the extension of copyright to include the economic rights of the 100-year old practice of Screen Direction.

This role clearly meets the test, which is why the moral copyrights of Directors has been recognised. It uses multiple skills such as project and people management, combined with the fluent understanding and practical implementation of visual and aural 'languages'. It requires effort in terms of time involved before, during and after the work is created. It requires, and is the product of, judgement – a very personalised range of decisions that bring about the vision, and assess how to communicate it to the intended audience.

The work of Directors reveals a weakness in the literal and traditional interpretation of what copyright covers. Directors conceive and express a vision (often very different to those of the author of the script or literary work) using moving images and sound.

Directors turn their vision into a film by arranging people, things and environments, equipment, locations, and then the resulting images and sound score.

Directors are critical to the creation of cinematographic films. They make creative decisions about what will appear on the screen through input into creative elements such as the development of the script, the cinematography and its style, the casting and the acting style, the production design, the makeup and costumes, the lighting, the music and soundtrack, the editing and the colour-grading of the final product.

The Director also generally determines where the camera will be placed, what sort of shot will be shot, whether the actors will be fully visible or obscured and plans how the shots will be cut together. The Director also controls the rhythms of the film. In short, the talents and skills of a Director bring the story a distinctive audio-visual style and the unique ability to convey "their message" to the audience.

Despite all the above, Directors are given no economic copyright in the result of their effort, skill and judgement.

If the test has not managed to justify a legitimate and reasonable authorship of Directors, it can hardly be said to have over-reach.

The first remedy of this review should be to grant authorship to Directors.

7	Are there any problems with (or benefits arising from) the treatment of data and compilations in the Copyright Act? What changes (if any) should be considered?
	n/a
8	What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?

Main points

- **Authorship definitions are anachronistic and discourage creation of modern work.**
- **Directors of audio-visual content and cinematographic film and other authors in "modern" formats should be designated authors.**
- **Default rules for first owner of copyright remain the same.**
- **Problems:**
    - **Inconsistent with the law in over 37 other countries**
    - **NZ misses out on export earnings, and Directors on income**
    - **Reinforces existing industry practice in which Directors are poorly paid, so have to go overseas or take other jobs to support their career**
- **Solution**
    - **Simple change to the Copyright Act:**
        - **25 words added to the Copyright legislation so the "principal director" is a part-author of their screen work.**
- **Benefits**
    - **If that law was introduced, the rewards Directors would receive would provide them with the capacity and incentive to create more work.**
        - **A share of copyright could be worth over $25k AUD to each contract a Director signs.**
        - **Being part of the Australian retransmission scheme alone could be worth $6000 AUD over (a 10 year period) for each director involved.**
        - **Being part of global copying schemes would give Directors access to an additional annual pool of minimum $15,000 AUD.**

The benefit of the default rule is that copyright lies with the creator – the person who applied skill, effort and judgement to originate and produce a work.

The exception is on the face of it fair: a person who pays for the work to be created has employed the creator to produce the work for their consumption and ownership [or at least control of what happens with the work].

The problems are 1) definition of an author, and 2) real-world practice.

Author definition is wrong

Directors are not defined as Authors in Section 5 of the Act.

It is anachronistic, and remarkably unsuited to the digital world, that the only creators denied authorship of their own work are the most recent and modern of creators; those who work in

computer-generated content, sound recording and moving images. These forms now dominate the volume of output and public interest. They are also increasingly being used within formats such as artistic and musical work.

Reinforces poor industry practice

The failure to define Directors as authors has established and reinforced an industry practice whereby Directors are commissioned or employed.

This means Directors, unless they are internationally recognised, are in a surprisingly weak and discouraging position when negotiating commissions and employment.

Illustrative of this weakness is the terms and conditions that Producers oblige Directors to sign. Producers have refused to adopt a set of terms and conditions suggested by Directors' representatives, including our own organisation.

Defining Directors as Authors would not affect the default rules for first owners of copyright, because the rights of commissioners remain paramount. What it will do is induce the commissioner to recognise the authorship rights within the contractual arrangements, and specifically set out terms and conditions by which the commissioner obtains the first ownership of copyright.

Our estimation is that a Director's share of copyright could be worth over AUD$25,000 in each contract a Director signs.

Inconsistent with international partners

Over 37 countries award joint copyright to Directors and Producers. Almost all countries that are Member States of WIPO and have significant film industries recognise directors as authors of films. In the United Kingdom, the copyright legislation was amended in 1996 specifically for this purpose and to harmonize the laws in the European Union which conferred authorship on the principal director.

Australian law provides Directors with copyright over retransmission. Screenrights, the Australasian collector of royalties, annually collects royalties for retransmission of scripted drama. New Zealand Directors are not entitled to any of this. If New Zealand copyright law recognised just Directors' rights to retransmission along with producers, we estimate the annual entitlement of a New Zealand Director could be worth AUD$6,000 over a ten-year period.

NZ is not realising export earnings for Director royalties.

Many countries which collect royalties for Directors worldwide in territories where Directors copyright is recognised, will only do so in circumstances of reciprocal rights. This necessarily means that if New Zealand does not grant copyright to directors in their works then other territories will not collect and repatriate monies owing to New Zealand Directors in their territories.

ASDACS, the collecting agency representing New Zealand Directors currently enjoys reciprocal arrangements for **Australian** Directors (only) with 14 international collecting societies for the territories of Spain, Hungary, Finland, Lithuania, Norway, Slovenia, France, Belgium, Luxembourg, Ireland, Poland, Switzerland, Austria, Germany and the Netherlands. These are generally year to year contracts with a termination clause of three months' notice. However, many of the overseas collecting societies refuse to enter reciprocal agreements with ASDACS on the basis that there is no reciprocity for Australia and New Zealand. A good example of this is the Italian collecting society, SIAE who has refused since 2004 to enter such an agreement.

If New Zealand copyright law was harmonised, our Directors could be part of global copying schemes that would give them access to an additional annual pool of a minimum AUD$15,000.

Solution: Joint copyright

The UK and European copyright law should be our model. The UK law was changed in 1996[1] to declare that the joint owners of copyright in a film or television programme are the **principal director** and the **production company or broadcaster** who arranged for the work to be made. Every finished audio-visual work has two joint authors who each own copyright when the work is created. Copyright does not exist in the idea for a creative work or film, only in the finished work.

The exception is if work is created in the course of employment, in which case the employer owns the copyright. Copyright is transferrable.

In the year following the law change the number of feature films being produced in the UK doubled, and has continued climbing ever since[2]. There were no adverse effects on the industry, nor producers.

[1] ***https://www.legislation.gov.uk/ukpga/1988/48/section/10#commentary-c13754601***
[2] ***https://www.statista.com/statistics/296454/volume-of-film-production-uk/***

9	What problems (or benefits) are there with the current rules related to computer-generated works, particularly in light of the development and application of new technologies like artificial intelligence to general works? What changes, if any, should be considered?
	Main points • **Economic rights for Directors of audio-visual content and cinematographic film is the model for economic rights for computer-generated works** The current definitions of authors are woefully inadequate to cover the current and emerging works created using computer tools. The current copyright law does not define as an author a person who marshals any combination of digital resources to produce a creative work. The assumption appears to have been that digital work is generated by people employed for commercial purposes. The result is that despite a very sophisticated level of digital expression now being possible, and dominating modern creative output, the default treatment of digital authorship has enshrined a commissioning or employment economic model into law. This structure has limited (not incentivised) the creation of many digital works; either restricting output to that which meets commercial interests of commissioning agents or restricting it to those people with time outside-of-work to create. Non-commissioned work now tends to be put into creative commons rather than seeking immediate economic return – but often in the hope of building a case for future employment and commissions. The creative commons is a wonderful development, but can rely on digital directors having other employment, and can weaken the ability of very good work to be properly valued. The situation afflicting Directors is a warning to creators in modern digital formats. While they may have the ability to own copyright by acting as the Producer, this is becoming harder as commercial interests take control of production and distribution. The model of a Director with economic and moral rights offers the solution because it breaks old fashioned notions of how people conceive and create works. If you can assign authorship and economic rights to a person who marshals resources to merge moving images and sound in the shape of a film, you can assign economic rights to a person marshalling digital materials on a computer.
10	What are the problems (or benefits) with the rights the Copyright Act gives visual artists (including painting, drawings, prints, sculptures etc)? What changes (if any) should be considered?
	n/a
11	What are the problems creators and authors, who have previously transferred their copyright in a work to another person, experience in seeking to have the copyright in that work reassigned back to them? What changes (if any) should be considered?
	n/a
12	What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?
	n/a

13	Are there any problems (or benefits) in providing a copyright term for communication works that is longer than the minimum required by New Zealand's international obligations?
	n/a
14	Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?
	n/a

Other comments

Economic impact

Our case is that;

1. Directors of audio-visual content and cinematographic film in New Zealand have a relatively low income (median is NZ$50,000), especially compared to others in the same industry in New Zealand.
2. This is due to lack of negotiating power in contracts for employment or commissions.
3. This lack of power is because Directors have no copyright that a producer needs to purchase within a contract.
4. Low income reinforces weakness in contracts and confines selection of work to mainstream small-screen and film projects generated by the New Zealand market.
5. Directors therefore have no capacity for work on the sort of breakthrough projects that can lead to international recognition – such as novel low budget projects - or investing time and money in non-commissioned projects.

New Zealand Directors are fortunate if they are commissioned to make a film once every three years. Fees even for these rare films are not high. The ability to make money between those films is hard – it is confined to television, commercial projects and, these days, niche audience web concepts. Directors are well rewarded for their television work, although less experienced Directors are not.

The more revenue Directors can gain from each rare film project, the more financial support they have between films for other smaller projects.

Problems Case Study: Contract loss $25,000

We estimate that the average value of a Director's rights to copying royalties on any film to be over AUD$25,000[3].

If Directors had joint copyright in a work, a Producer would need to pay to a fee or some other consideration to acquire these rights.

Problems Case Study: Roseanne Liang

To illustrate the point, consider **Roseanne Liang**, who made a feature film (*My Wedding and other Secrets*) seven years ago. Since then she has subsisted on a long-running web series (*Flat3*), and editorial and acting jobs. The first series of *Flat3* was self-funded on a budget of $1000. The third

[3] Calculation based on ASDAC data of the annual Screenrights collection of retransmission rights on behalf of 78 Directors, and value of educational copying and communication, and government copying. The collection period is ten years.

received New Zealand on Air funding of $100,000. Further scripted web-series followed; *Friday Night Bites* and *Unboxed* - all funded at a level that minute-for-minute, was less than 15% the level of broadcast TV funding. None of the funding went to pay her or the creative producers for their time. Her self-written, produced and directed short film *Take 3* won international accolades, as did a commissioned short action film *Do No Harm*. During this period much of her work was largely made possible by the financial support of her family.

After almost a decade in the sector, Liang was commissioned in 2018 to do a full-length version of *Do No Harm.*

Liang's story is not typical. Years of hard graft, subsistence, odd jobs and support from friends and family, can pay off. But for many other it does not. The big chance never comes.

This illustrates a few of our points;

1. **The copyright law has locked in place poor market conditions for New Zealand Directors**. Emerging directors can be paid $350 per day for the first decade of their career (working 10-15 hours per day). For many, it locks in a low paid cycle that doesn't improve. Given that directors are freelancers who work project-to-project, this rate often falls below subsistence.
2. **The amount of work created is constrained by income and circumstance.** Low paid Directors only have the capacity to produce what they can afford. Liang's output was constrained by her own resources, and those of her network. It was not constrained by her capacity for hard work.
3. **Copyright doesn't protect even those Directors who end up doing very well.** Liang has started attracting serious commissions. Her negotiating position in contracts is only backed by law in countries where economic copyright stands, or where there are collective agreements (such as in the US) – and that is not New Zealand. To increase her leverage, Liang is unlikely to be contracting in New Zealand. Additionally, in the event her previous NZ-made work gains renewed interest, she will not be entitled to royalties as a Director of them.
4. **Many NZ Directors move overseas to secure Directing roles**, which are aided financially there by copyright and/or stronger industrial rights (such as the USA). This means our copyright law is not incentivising work within New Zealand – it's possibly incentivising work *outside* of New Zealand.
5. **Many Directors must make commercial advertisements and other promotion videos** to keep themselves financial afloat, which reduces their time to make film and television work. This is another way in which our copyright law is failing to incentivise the creation of artistic work.
6. **Becoming a Producer is not an option.** While fledgling Directors double as producers and writers early in their career, it is not an option for a mature professional. The demands and specialisations of the role are different. New Zealand's funding bodies specifically prevent a Director taking the role of Producer, especially for film. The only New Zealand Director who has taken dual roles successfully and continuously is Peter Jackson – who is in film terms the equivalent of an All Black also being the Team Manager or Coach. As a Producer with Economic rights over his work as a Director, Jackson demonstrates the phenomenal economic benefit which could be derived if all our Directors had a share of the economic rights.

Problems case study: *Death Warmed Up*

We are not aware of joint copyright causing any problems in jurisdictions that have applied it. But we are aware of strange gaps created by the *absence* of shared ownership.

Take for example, the NZ Horror film, *Death Warmed Up*. Those involved in the movie have not been able to enjoy the benefit of a revival in older New Zealand cinema, and horror in particular.

Since the movie was made, the film's Producer has died, and the Production Company has ceased. The copyright has effectively gone into limbo. The Director is still alive, but cannot be recognised as a copyright holder of the film to allow its rejuvenation as part of a legal entity. This led to a 30 year impasse with the NZ Film Commission during which DWU which has remained unavailable and out of circulation.

Comment on S118:

We support the Australian creative works category of a 'cinematographic film' as it accurately describes the end work, and reflects the unique efforts and talents required to create it.

Rights: What actions does copyright reserve for copyright owners?

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

Rights: Specific issues with the current rights

18	What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?
	We prefer technology neutral laws. Film Directors have for a long time been disadvantaged by the original copyright laws setting out traditional formats and concepts of authorship.
19	What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?
	n/a
20	What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?
	n/a
21	Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.
	n/a

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

Main points

- **People could be discouraged from becoming professional artists, because copyright is granted to their 'user-generated' content, but not to content they generate as professionals in roles such as Directors of audio-visual content and cinematographic film or digital artists.**
- **The discrepancy will have the effect of channelling users who show talent in digital forms, into commissions and employment, rather than support their independence.**

Despite the pejorative description in the Issues Paper of user-generated content, we support user content qualifying for copyright. The "users" are the Film Directors and digital creators of the future. Some "users" are now generating content which requires a high amount of judgement in its construction, and they should have the right to be treated as authors and gain economic benefit from their work. While they may not currently initiate the work for financial gain, they have a right to it, especially if their work later becomes valuable.

Indeed, the ability to earn revenue from copyright will entice some of these "non-professionals" to become professional. The irony is that while the law grants them economic copyright of their non-professional work, it will not grant them those rights if they turn into professional Film Directors or digital artists. This major deficiency in the law is highly likely to dissuade people from Directing Films or directing digital art forms. It effectively enshrines the current 'amateur' nature of emerging art, and forces creative people into the path of commissioning or employment.

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

Copyright should be inalienable. If creators can "renounce" their rights, the inequality of bargaining power would lead to Directors being forced by others to relinquish those rights.

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

n/a

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

25	What are the problems (or benefits) with the way the moral rights are formulated under the Copyright Act? What changes to the rights (if any) should be considered?
	Main points • **The benefit of moral rights is that the unique work of Directors of audio-visual content and cinematographic film can be attributed to them.** • **Directors have moral rights based on a rationale that should be enough to make them an author with economic rights. This is a fundamental inconsistency in the Copyright law.** The moral right recognises that Directors are the most significant factor in the unique collection of moving images and sound we call films. Directors impart a unique skill and judgement which create an indelible style and signature across a film. That "signature" look and emotive expression of the Director is their creative output. It is that signature which deserves moral copyright **and** economic copyright. But the moral right is not, as the Issues Paper claims, necessary because the film product is an extension of the creator's personality. The moral right for film directors is necessary because they are viewed by their industry, peers and audience as the central creator of the product. Therefore, they deserve to be recognised as such, for their immediate career prospects, for the regard of their peers, and for posterity. But this is the same as accepting that a Director has a role in making a Film which is essentially that of an author (or co-author). Indeed, for moral rights, the Act groups Directors with roles legally regarded elsewhere in the Act as authors. It is inconsistent for the Act to recognise the moral rights of Directors because the output so singularly reflects their unique effort, skill and judgement, but deny them the economic right to that distinct form of authorship. Therefore, we urge that in line with the demonstration of moral rights, Directors are protected through economic copyright provisions.
26	What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?
	n/a
27	Will there be other problems (or benefits) with the performers' rights regime once the CPTPP changes come into effect? What changes to the performers' rights regime (if any) should be considered after those changes come into effect?
	n/a
28	What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?
	n/a
29	Is it clear what the TPMs regime allows and what it does not allow? Why/why not?
	n/a

Exceptions and Limitations: Exceptions that facilitate particular desirable uses

30	Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use? Have you ever been threatened with, or involved in, legal action? Are there any other barriers?
	n/a
31	What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?
	n/a
32	What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?
	n/a
33	What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?
	n/a
34	What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?
	n/a
35	What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?
	n/a
36	What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?
	n/a
37	Are there any other current or emerging technological processes we should be considering for the purposes of the review?
	n/a
38	What problems (or benefits) are there with copying of works for non-expressive uses like data-mining. What changes, if any, should be considered?
	n/a
39	What do problems (or benefits) arising from the Copyright Act not having an express exception for parody and satire? What about the absence of an exception for caricature and pastiche?
	n/a
40	What problems (or benefit) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?
	n/a

Exceptions and Limitations: Exceptions for libraries and archives

41	Do you have any specific examples of where the uncertainty about the exceptions for libraries and archives has resulted in undesirable outcomes? Please be specific about the situation, why this caused a problem and who it caused a problem for.
	n/a
42	Does the Copyright Act provide enough flexibility for libraries and archives to copy, archive and make available to the public digital content published over the internet? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	n/a
43	Does the Copyright Act provide enough flexibility for libraries and archives to facilitate mass digitisation projects and make copies of physical works in digital format more widely available to the public? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	n/a
44	Does the Copyright Act provide enough flexibility for libraries and archives to make copies of copyright works within their collections for collection management and administration without the copyright holder's permission? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	n/a
45	What are the problems with (or benefits arising from) the flexibility given to libraries and archives to copy and make available content published online? What changes (if any) should be considered?
	n/a
46	What are the problems with (or benefits arising from) excluding museums and galleries from the libraries and archives exceptions? What changes (if any) should be considered?
	n/a

Other comments

Main points

1. **We oppose extension of fair use beyond NZ's current exceptions.**
2. **Fair use already covers what the public may need for education, research and such like. The uses proposed by some internet-based companies are driven not by consideration of the core public good, but because ease of internet access makes these new uses possible. The two things – "public good" and "ease of access" - are not the same.**

'Fair use' serves to predominately benefit multinational organisations such as Google and You Tube seeking to use copyrighted material for their own commercial purposes and not creators and authors, who would be exploited through the free and open use of their work.

The adaption of a US (civil law) based system in a New Zealand legal context creates uncertainty in that 'fair use' relies on amassing case law to determine what fits within its broad and open-ended scope.

Creators and authors (including screen directors) are disadvantaged in that (as individuals), they do not have the financial means to take legal action to test the scope of 'fair use'.

'Fair use' reduces the ability for copyright owners (creators and authors) to license material if works are made available for free under its provisions; undermining their ability to generate income from their work and ultimately disincentivising the creation of new works.

Screen directors are further disadvantaged in that 'fair use' would undermine their already limited control under the only existing right they have - their moral right.

Exceptions and Limitations: Exceptions for education

47	Does the Copyright Act provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	n/a
48	Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	n/a
49	Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	n/a
50	Is copyright well understood in the education sector? What problems does this create (if any)?
	n/a

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

51	What are the problems (or advantages) with the free public playing exceptions in sections 81, 87 and 87 A of the Copyright Act? What changes (if any) should be considered?
	n/a
52	What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?
	n/a
53	What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?
	n/a
54	What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?
	n/a
55	What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?
	n/a
56	Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?
	n/a

57	Do you think that section 73 should be amended to make it clear that the exception applies to the works underlying the works specified in section 73(1)? And should the exception be limited to copies made for personal and private use, with copies made for commercial gain being excluded? Why?
	n/a

Exceptions and Limitations: Contracting out of exceptions

58	What problems (or benefits) are there in allowing copyright owners to limit or modify a person's ability to use the existing exceptions through contract? What changes (if any) should be considered?
	n/a

Exceptions and Limitations: Internet service provider liability

59	What are problems (or benefits) with the ISP definition? What changes, if any should be considered?
	n/a
60	Are there any problems (or benefit) with the absence of an explicit exception for linking to copyright material and not having a safe harbour for providers of search tools (eg search engines)? What changes (if any) should be considered?
	n/a
61	Do the safe harbour provisions in the Copyright Act affect the commercial relationship between online platforms and copyright owners? Please be specific about who is, and how they are, affected.
	n/a
62	What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?
	n/a

Transactions

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

Main points

- **The small number of CMOs is because**
  - **New Zealand is too small to be worth administration, and**
  - **New Zealand copyright law is out of step with other jurisdictions.**
- **Being part of the Australian retransmission scheme alone could be worth $6000 AUD over (a 10-year period) for each Director involved.**
- **Being part of global copying schemes would give Directors access to an additional annual pool of minimum $15,000 AUD.**

The problem for Directors is not whether there are enough CMOs. The problem is that the current law means there are almost no royalties to collect. Collection of fees for Directors, in New Zealand and overseas, doesn't occur because New Zealand's copyright law does not recognise the economic rights of Directors and therefore there is lack of reciprocity through CMOs.

The New Zealand film and arts sector does far better on the international scene than its size justifies. Despite that, the pool of royalties collected is too small to justify many stand-alone CMOs.

This is particularly true for New Zealand Directors because of the lack of economic right in our law.

Australasian organisations such as ScreenRights do the work for New Zealand, and their experience on behalf of Directors illustrates the problems of our law.

Royalties from educational use are the biggest sources for New Zealand artists. In 2015 there was A$30m collected from Australia and A$2m collect from New Zealand. It is shared between Producers, Writers, Composers and Recordings. Usually the producer gets around 66% with writers on 30% and the rest going to Composers and Recordings.

The total retransmission royalties in 2015 was A$8.7m. Australian Directors have an entitlement to the Producers component (66%) of Retransmission royalties. Australian Directors are currently negotiating for a 50/50 split of that entitlement (The Australian Copyright Act does not specify an amount or percentage).

It needs to be remembered that the problems with royalty collection go much further than Australia. Incompatibility of our law with rights for Directors in regions such as Europe means we are missing out globally on royalties for education, retransmission and government copying.

Collection Agencies rely on Article 5 of the Berne convention to argue for their agreements to cover NZ. But Denmark (COPYDAN) refused to include NZ. It was only after long negotiations that Sweden & Italy now include NZ.

We estimate that if New Zealand Directors had reciprocal rights in COPYDAN royalties covering educational copying and communication and government copying they would be entitled to access a share of an annual minimum NZ pool of AUD$15,000.

This is based on the COPYDAN collections of AU$76,000 over two years, with the average collection for NZ Directors in the scheme being AU$15,000.

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

	n/a
65	If you are a user of copyright works, have you experienced problems trying to obtain a licence from a CMO? Please give examples of any problems experienced.
	n/a
66	What are the problems (or advantages) with the way the Copyright Tribunal operates? Why do you think so few applications are being made to the Copyright Tribunal? What changes (if any) to the way the Copyright Tribunal regime should be considered?
	n/a
67	Which CMOs offer an alternative dispute resolution service? How frequently are they used? What are the benefits (or disadvantages) with these services when compared to the Copyright Tribunal?
	n/a
68	Has a social media platform or other communication tool that you have used to upload, modify or create content undermined your ability to monetise that content? Please provide details.
	n/a
69	What are the advantages of social media platforms or other communication tools to disseminate and monetise their works? What are the disadvantages? What changes to the Copyright Act (if any) should be considered?
	n/a
70	Do the transactions provisions of the Copyright Act support the development of new technologies like blockchain technology and other technologies that could provide new ways to disseminate and monetise copyright works? If not, in what way do the provisions hinder the development and use of new technologies?
	n/a
71	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.
	n/a
72	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?
	n/a
73	Has a copyright owner of an orphan work ever come forward to claim copyright after it had been used without authorisation? If so, what was the outcome?
	n/a
74	What were the problems or benefits of the system of using an overseas regime for orphan works?
	n/a
75	What problems do you or your organisation face when using open data released under an attribution only Creative Commons Licences? What changes to the Copyright Act should be considered?
	n/a

Enforcement of Copyright

76	How difficult is it for copyright owners to establish before the courts that copyright exists in a work and they are the copyright owners? What changes (if any) should be considered to help copyright owners take legal action to enforce their copyright?
	n/a
77	What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?
	n/a
78	Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?
	n/a
79	Does the cost of enforcement have an impact on copyright owners' enforcement decisions? Please be specific about how decisions are affected and the impact of those decisions. What changes (if any) should be considered?
	n/a
80	Are groundless threats of legal action for infringing copyright being made in New Zealand by copyright owners? If so, how wide spread do you think the practice is and what impact is the practice having on recipients of such threats?
	n/a
81	Is the requirement to pay the $5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are the any issues with the border protection measures that should be addressed? Please describe these issues and their impact.
	n/a
82	Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?
	n/a
83	Why do you think the infringing filing sharing regime is not being used to address copyright infringements that occur over peer-to peer file sharing technologies?
	n/a
84	What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing filing share regime (if any) should be considered?
	n/a
85	What are the problems (or advantages) with the existing measures copyright owners have to address online infringements? What changes (if any) should be considered?
	n/a
86	Should ISPs be required to assist copyright owners enforce their rights? Why / why not?
	n/a
87	Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?
	n/a

88	Are there any problems with the types of criminal offences or the size of the penalties under the Copyright Act? What changes (if any) should be considered?
	n/a

Other issues: Relationship between copyright and registered design protection

89	Do you think there are any problems with (or benefits from) having an overlap between copyright and industrial design protection. What changes (if any) should be considered?
	n/a
90	Have you experienced any problems when seeking protection for an industrial design, especially overseas?
	n/a
91	We are interested in further information on the use of digital 3-D printer files to distribute industrial designs. For those that produce such files, how do you protect your designs? Have you faced any issues with the current provisions of the Copyright Act?
	n/a
92	Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?
	n/a

Other issues: Copyright and the Wai 262 inquiry

93	Have we accurately characterised the Waitangi Tribunal's analysis of the problems with the current protections provided for taonga works and mātauranga Māori? If not, please explain the inaccuracies.
	n/a
94	Do you agree with the Waitangi Tribunal's use of the concepts 'taonga works' and 'taonga-derived works'? If not, why not?
	n/a
95	The Waitangi Tribunal did not recommend any changes to the copyright regime, and instead recommended a new legal regime for taonga works and mātauranga Māori. Are there ways in which the copyright regime might conflict with any new protection of taonga works and mātauranga Māori?
	n/a
96	Do you agree with our proposed process to launch a new work stream on taonga works alongside the Copyright Act review? Are there any other Treaty of Waitangi considerations we should be aware of in the Copyright Act review?
	n/a
97	How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?
	n/a