



# New Zealand Film & TV Bodies – Submission in response to MBIE’s Copyright Issues Paper

**Joint Submission**  
**5 April 2019**

## Executive Summary

The New Zealand Film & TV Bodies<sup>1</sup> welcome the opportunity to respond to the Ministry of Business, Innovation and Employment's Copyright Issues Paper. As representatives of the creative screen sector we are proud of our contribution to the financing, production and distribution of New Zealand screen content, as well as our contributions to the explosion of new services available in New Zealand and their rapid adoption by consumers.

The review of New Zealand's copyright legislation is both timely and important. Timely, because the impacts of the digital transition are more keenly understood now with the creative sector is under severe pressure as a result of having to compete with free – infringing – versions of its own content, combined with market power from some of the digital intermediaries who financially benefit from this infringement, yet are shielded from financial risk associated with liability. And important because this review provides an opportunity for New Zealand to redress that imbalance and contribute to the creation of an internet that works for all.

There are too many questions contained in the Issues Paper to summarise all of our responses here, but here are some of our key issues:

- A review process that contains directly contradictory objectives is in conflict with itself. We believe that the dominant objective of the review should be linked to the original purpose and objective of copyright: to incentivise the creation of new works to the benefit of society.
- Having said that, we do not oppose a review of new exceptions, provided they address a specific problem or social need, and are restricted to non-commercial use of copyright works.
- Digital intermediaries who have an active role in relation to the content they either host or provide access to (for instance through data collection, the sale of advertising, curation and programming) should be liable for the infringement of its users in the absence of a license agreement.
- Safe Harbour protection, therefore, should be appropriately limited to intermediaries who have a passive role in relation to the content, for instance those who build and maintain the physical infrastructure of the internet in New Zealand.

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<sup>1</sup> Further details on members of the New Zealand Film & TV Bodies can be found in Appendix 1

- Most digital piracy originates from beyond New Zealand's borders and is therefore out of reach of New Zealand's judicial system. No-fault injunctions against those intermediaries best placed to disable access to online locations found to have the primary purpose or effect of infringing or facilitating the infringement of copyright is an appropriate step which has been widely adopted globally and has proven to result in reduced infringement.

The New Zealand Film & TV Bodies welcome the opportunity to answer questions or provide further information if required.

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## About us

This is a joint submission on behalf of the Australia New Zealand Screen Association (ANZSA), the Home Entertainment Association New Zealand (HEANZ), the National Association of Cinema Operators-Australasia (NACO), the New Zealand Motion Picture Distributors Association (NZMPDA), the New Zealand Motion Picture Industry Council (NZMPIC), from here on referred to as the New Zealand Film and TV Bodies.<sup>2</sup> Together we represent a wide range of film and TV interests in New Zealand, underpinning a sector that in 2016/2017 contributed \$3.5 billion in gross revenue and \$1.1 billion in GDP value add to the New Zealand economy and supported an estimated 26,600 FTE jobs.<sup>3</sup>

The bodies represented in our submission make a significant contribution to New Zealand's economy and cultural wellbeing. For example:

- We are responsible for the distribution of 9 out of the Top 10 NZ films in cinemas over the past five years, including films such as *Hunt for the Wilderpeople*, *What we do in the Shadows* and the *Breaker Upperers*, and have generated 82% of total box office realised by New Zealand films over that same period.<sup>4</sup>
- We are responsible for the distribution of each of the 300 most successful international theatrical releases over the past five years and have generated 96% of the total box office realised by international films distributed in NZ over the past five years overall. We estimate 82% of these box office receipts stay in New Zealand, supporting the local economy, going to the cinema operators, generating advertising income for NZ media organisations and a wide variety of local suppliers.<sup>5</sup>
- We have a long track record of investing in New Zealand's excellent production sector, bringing large international productions to New Zealand from *Lord of the Rings* and *Avatar*, to *The Meg* and *Mulan*. In addition to the direct economic benefits, these productions have contributed to tourism income (Hobbiton and Middle Earth)<sup>6</sup>, and the creation of facilities now available for the broader New Zealand production sector.<sup>7</sup>

Our submission will underline the significance of a robust copyright framework on the ability of the screen sector to deliver these benefits. Ensuring fair compensation for creative endeavour, and certainty for investors in that endeavour, is critical to the

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<sup>2</sup> More information about the New Zealand Film and TV Bodies can be found in Appendix 1.

<sup>3</sup> Stat NZ, Screen Industry 2016/17, <<https://www.stats.govt.nz/information-releases/screen-industry-201617>>.

<sup>4</sup> Data on file, based on analysis of NZMPDA box office data.

<sup>5</sup> Data on file, available on request. The remaining 18% contributes to the cost of the creation of that content

<sup>6</sup> Carol Pinchefskey, *The Impact (Economic and Otherwise) of Lord of the Rings/The Hobbit on New Zealand*, Forbes.com.

<<https://www.forbes.com/sites/carolpinchefskey/2012/12/14/the-impact-economic-and-otherwise-of-lord-of-the-ringsthe-hobbit-on-new-zealand/#1e80ff5431b6>>.

<sup>7</sup> Patrick Frater, *Warner's 'Meg' helps launch New Zealand's Kumeu Film Studio*, Variety, <<https://variety.com/2017/film/asia/meg-helps-new-zealand-kumeu-film-studio-1202001354/>>.

screen sector ecosystem. We therefore welcome this review and the opportunity to respond comprehensively to questions that go to the heart of issues that threaten the sustainability of the sector.

The rapid advance of new technologies has represented both opportunity and threat for the screen sector. While digital platforms have created opportunities for content production and distribution – providing a multitude of innovative ways to give consumers flexible, timely, low cost access to content – they have also facilitated an almost friction-less way to disseminate infringing content, threatening the commercial model on which the sector is based.



## New Zealand's screen industry has embraced digital technologies and the internet

From its origins in silent films exclusively shown in cinemas, the screen sector has embraced the advent of television, pay TV, video tapes and optical discs, and the Internet is no different. The below table clearly highlights this:



### NEW ZEALAND: THE EXPLOSION OF CONSUMER CHOICE IN THE DIGITAL AGE

	TRADITIONAL (early 2000's)	DIGITAL (2019)
NO FEE/ AD-SUPPORTED		
SUBSCRIPTION		
TRANSACTIONAL HOME ENTERTAINMENT	<p>Rent</p> <p>Buy</p>	<p>TVOD</p> <p>EST</p>
CINEMAS		<p><b>glossary</b></p> <ul style="list-style-type: none"> <li>• AVOD: Advertising-supported Video on Demand</li> <li>• SVOD: Subscription Video on Demand</li> <li>• TVOD: Transactional Video on Demand</li> <li>• EST: Electronic Sell-Through</li> </ul>

Meanwhile all of New Zealand's 449 cinema screens have all been converted to digital projection. And in 2018, home entertainment digital revenues clearly exceed physical revenues, with digital revenues now making up 72% of total home entertainment revenue.<sup>8</sup>

The same embrace of new technologies is true on the creative side. Creators have always been constrained by what is possible in their story-telling and have eagerly embraced new technology to bring the worlds they create to life. From the pioneering French director Georges Méliès,<sup>9</sup> who frequently used automatons in the glass studio he built in 1897 to conceive the world's first science fiction movies, to the digital technology mastered and improved by Weta Digital on films like *Lord of the Rings* and *Avatar* today.

That attitude is best exemplified by the following quote from Blackmagic Design CEO Grant Pety:<sup>10</sup>

*"In Los Angeles they don't care if the technology can do it or not. If the technology can't do it they call us up and say 'We want to do this'. There is very much a research and development aspect to the way the film industry in Los Angeles works. They won't let themselves be constrained by the fact the technology isn't up to it. What they want to see is the technology pushed forward."*

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<sup>8</sup> Data on file with HEANZ. Digital revenues defined as EST, TVOD and SVOD. Physical Revenues defined as optical disc retail and rental.

<sup>9</sup> Meredith Woerner, What Martin Scorsese's Hugo Taught Us About the Grandfather of Science Fiction Film, Georges Méliès, Gizmodo, <<https://io9.gizmodo.com/what-martin-scorseses-hugo-taught-us-about-the-grandfat-5861647?IR=T>>

<sup>10</sup> Interview with Blackmagic Design CEO Grant Pety; Cara Waters, *The Aussie tech company behind the Oscar nominees*, Sydney Morning Herald, <<https://www.smh.com.au/business/small-business/the-aussie-tech-company-behind-the-oscar-nominees-20190124-p50tg1.html>>

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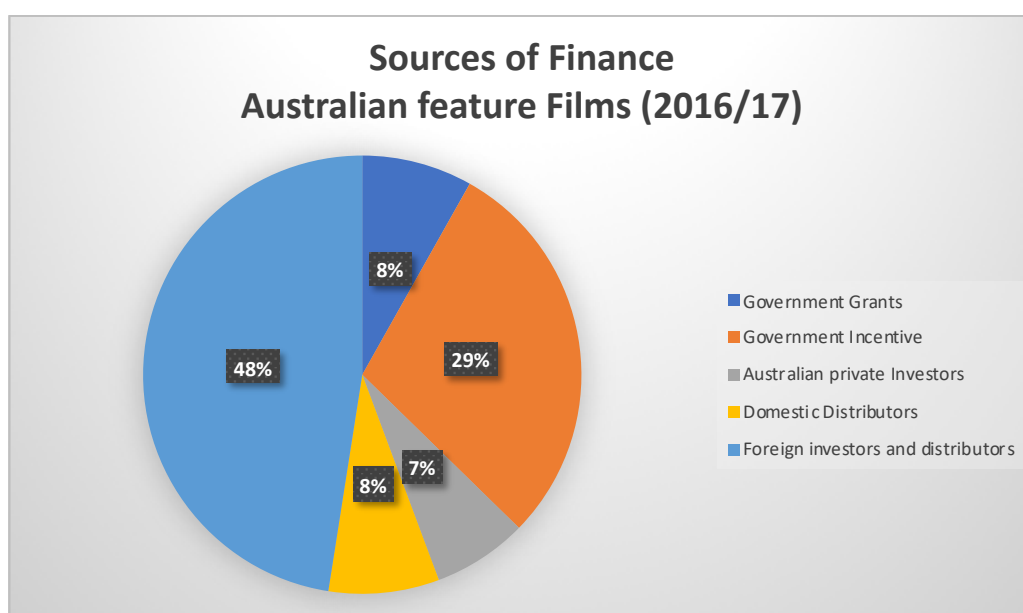
## New Zealand's screen production eco-system.

Screen Production represents one of the more expensive forms of creative expression. We are not aware of any publicly available data on the cost of the average New Zealand film, but Australia offers a good proxy with an average production budget of A\$8.37 million per film.<sup>11</sup>

Unlike other forms of creative expression, which can commence with nothing more than the creative expression of one or a few people, film requires extensive collaboration and fundraising before production can even commence. Going from creative idea to commencing production can and does take years.<sup>12</sup>

The key financing building blocks usually consist of government funding (NZFC grants) and incentives (SPG), coupled with market-based investments. These market-based investments can be split in two segments; private investment, and advances linked to the licensing of distribution rights prior to the commencement of production.

We are not aware of any New Zealand public data being available, but Australia may once again offer a good comparison.<sup>13</sup>



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<sup>11</sup> Screen Australia, *Australian Feature Film Production Activity*, <<https://www.screenaustralia.gov.au/fact-finders/production-trends/feature-production/australian-feature-films>>

<sup>12</sup> See for instance *The Breaker Upperers*, which took five years to go from idea to release. <<https://concreteplayground.com/auckland/arts-entertainment/how-jackie-van-beek-and-madeleine-sami-from-the-breaker-upperers-made-this-years-funniest-comedy>>

<sup>13</sup> Screen Australia, *Australian feature films, sources of finance*, <<https://www.screenaustralia.gov.au/fact-finders/production-trends/feature-production/australian-feature-films/sources-of-finance>>

Market-led sources make up 63% of total investment in Australian features and this investment is directly linked to the commercial revenue and profit potential for the movie as a whole, or for the profit potential of the specific distribution rights acquired. Put simply, a distributor or investor will invest only in so far as she believes the market will provide a return.

Just looking at the end credits of any feature film highlights the highly collaborative nature of screen content production; producers, writers, directors, actors, stunt men and women, cinematographers, gaffers, costume designers, set designers and the carpenters who build the sets, visual effects artists, composers, musicians, hairdressers, make-up artists, drivers, caterers, accountants. As we will see in subsequent sections, there has been considerable strain on the investment potential in screen content, putting at risk the employment of, and cultural expression by, these thousands of New Zealanders who work on screen productions.

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## New Zealand's screen industries are under pressure.

Screen content is easily digitised, and as such it was one for the first industry sectors to be exposed to the disruptive nature of the internet. The internet has brought benefits for creators as it has lowered the cost of reproduction and distribution. But this benefit has not been limited to legal reproduction and distribution, arguably the cost benefit for illegal and unauthorised reproduction and distribution has been greater as it doesn't require licensing agreements and payments, as well as the reporting processes that underpin the legal reproduction process, nor the cost of applying technical protection measures that seek to prevent unauthorised and unpaid distribution.

Dr. George Barker makes a compelling argument that the negative effects of digital convergence appear to have outweighed the positive effects to date, resulting in reduced economic contribution, output and employment for New Zealand's economy:<sup>14</sup>

*'Our review of the data suggests that while convergence may have initially had a beneficial effect for the New Zealand film and TV industry, over the long term and during the spread of online piracy, production and post-production revenues, and total revenues in the screen industry in New Zealand have not kept pace with inflation and economy-wide growth, while employment and output have fallen. As a result, the total lost or foregone screen industry revenues to the NZ economy over the ten-year period since the advent of BitTorrent in 2004 is around \$4.6 billion. The deficit or loss since 2004 averages \$465 million a year, but by 2014 and 2015 had reached as high as nearly \$800 million a year.'*

Dr. Barker also argues this has reduced the volume of New Zealand creative works available:

*"Despite the gap between actual screen industry revenues and what revenues would have been if they had kept pace with inflation and economy-wide growth, there may be a hypothetical version of an expanded creative market where prices dropped significantly, but the volume of film and TV creative works in New Zealand increased. The SIS has only collected data on output since 2011, but contrary to that view, our analysis shows that television programming output in New Zealand fell, so that by 2015 the total number of one off TV programmes was 67% of the 2012 total, and the number of series 85% of the 2012 total, while feature film output was flat."*

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<sup>14</sup> George Barker, *Digital Convergence and Diminished Creative Industry Growth: A New Zealand Case Study* (July 28, 2016). <<https://ssrn.com/abstract=2818563>>

Whilst these shortfalls occurred in a rapidly changing environment and therefore it is not possible to causally link all shortfall to access to unauthorised content, they suggest a strengthening of copyright may be required in the digital age if copyright's first objective – to incentivise the creation of new works – is to be achieved, and at an absolute minimum serve to highlight that any proposals to weaken New Zealand's copyright settings should be accompanied with a comprehensive assessment of the likely impact on creators' incentive to create before any such changes are adopted.

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## New Zealand's piracy problem; 29% of New Zealanders have pirated screen content in the past 6 months.

Sky commissioned a quantitative study<sup>15</sup> in 2018 of 1,000 adult New Zealanders on the incidence of piracy and the attitudes about it. Key findings included:

- 29% of New Zealanders undertake digital piracy at least once every 6 months.
- This excludes watching infringing content on YouTube or Facebook, which 22% of New Zealanders believe to have done at least once every 6 months.<sup>16</sup>

Expressing the piracy problem as a percentage doesn't convey the sheer size of the problem. Only actual volume data can do that. A sample of popular sites used for online piracy of films and TV shows<sup>17</sup> had 8.4 million visits and 52.4 million page views from New Zealand in January 2019 alone.<sup>18</sup>

These numbers demonstrate the size and scope of digital piracy today. The full impacts of copyright piracy, both economically and culturally, are difficult to quantify, but its impacts on the digital marketplace are likely to be substantial. The Dr. Barker paper referenced before suggests the cost in New Zealand alone could be as high as \$800 million<sup>19</sup>, whilst the global impact of film piracy is conservatively estimated to be a US\$160bn loss, according to a Frontier Economics study.<sup>20</sup> Another recent study in the USA by Carnegie Mellon determined that if film piracy were eliminated in the theatrical window alone, then box-office revenues would increase by 15% or US\$1.3 billion per year.<sup>21</sup>

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<sup>15</sup> The Navigators, *Digital Piracy in New Zealand*, 11 September 2018. [LINK TO BE ADDED](#)

<sup>16</sup> It is very hard for consumers to accurately report what is and isn't infringement on these social media platforms. As a result of safe harbours legislation these platforms cannot be held liable for the content uploaded by their users so long as they passively respond to takedown notices, despite monetising and curating this content. This makes infringement via these social media sites hard to ascertain via research.

<sup>17</sup> Sites used for online piracy include sites with a large number of copyright removal requests according to the Google Transparency report, and sites in other lists such as [www.operationcreative.uk](http://www.operationcreative.uk) and blocked sites lists.

<sup>18</sup> Data by SimilarWeb. SimilarWeb data used in this ANZSA custom analysis represents visits to websites by New Zealand desktop users in January 2019 to a sample of 100 sites used for online film & TV piracy. SimilarWeb is a market intelligence company that uses a combination of panel, crawler, ISP and other data for its data estimations. See: <https://www.similarweb.com/ourdata> and <https://www.similarweb.com/blog/wp-content/uploads/2016/08/SW-vs-Direct-Measurement.pdf> for more information. [Data on file with MPA.]

<sup>19</sup> See footnote 13

<sup>20</sup> Frontier Economics, *The Economic Impacts of Counterfeiting and Piracy* (February 2017), at pp. 23-39, <[https://www.inta.org/communications/documents/2017\\_frontier\\_report.pdf](https://www.inta.org/communications/documents/2017_frontier_report.pdf)>. The study sets out methodological reasons why "it is most likely that the value of total digital piracy exceeds our estimates by a considerable amount." The study also attempts to quantify the broader social and economic costs of piracy.

<sup>21</sup> Ma, Liye and Montgomery, Aland and Smith, Michael D., *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion*, Carnegie Mellon University (Feb 24, 2016), <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2736946](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946)>

## Improved Availability and Affordability of Content in New Zealand

Claims are regularly made that piracy can be solved by simply making content more easily available in a timely manner and at affordable prices.<sup>22</sup> Most creators would agree that changing the way content is delivered to consumers is part of the solution, and that it is the responsibility of the content industries to make this happen.

In fact, the table on page 9 demonstrates that New Zealanders have never had more choices to enjoy screen content, from free advertising-funded on-demand services, to subscription-based on demand models, to one-off transactions in cinemas, online rental or via physical disc purchase.

New Zealanders are embracing these new distribution channels with Roy Morgan reporting that adoption of streaming services is happening at a faster rate in New Zealand than in Australia.<sup>23</sup> Nearly 2 million New Zealanders have a Netflix subscription in their household, followed by Lightbox with 830,000 and Neon with 295,000.

These services offer access to large content libraries for a small monthly subscription fee.

		AUS	NZ	USA
All prices are NZD per month				
<b>Netflix</b>	Basic Plan	\$10.41	\$11.49	\$11.75
<b>Amazon Prime Video</b>	Basic Plan	\$7.29	\$7.29	\$19.11
<b>Lightbox (NZ)</b>	Standard	n/a	\$12.99	n/a
<b>Neon (NZ)</b>	TV Package	n/a	\$11.99	n/a

Major content producers are preparing to further increase consumer choice, with Disney, NBC Universal and Time Warner all planning new streaming services.<sup>24</sup>

Virtually every major TV show is now globally released – often on a streaming platform like Netflix or Neon - or fast-tracked from the US, meaning there is (usually) no delay

<sup>22</sup> Ibid. 15. Interestingly, non-pirates believe others pirate to avoid paying and due to their disregard for the law, which indicates they believe the reasons named for piracy are excuses or justifications.

<sup>23</sup> Roy Morgan, *Netflix on verge of 2 million viewers in New Zealand*, <<http://www.roymorgan.com/findings/7701-roy-morgan-pay-tv-subscription-tv-netflix-lightbox-skytv-neon-vodafone-tv-youtube-june-2018-201808100738>>

<sup>24</sup> Disney is planning to launch Disney+, <<https://variety.com/2018/digital/news/disney-disney-streaming-service-launch-2019-1203023789/>> and NBC Universal (<<https://variety.com/2019/tv/news/nbcuniversal-streaming-service-details-1203108034/>>) and Time Warner (<<https://www.forbes.com/sites/nelsongranados/2018/11/30/atts-warner-media-streaming-service-to-launch-in-2019-will-it-succeed/#4fbb725a4c49>>) are planning to launch further streaming services, although none have announced New Zealand launch dates yet.



for New Zealand audiences to be able to access them. While these shows are often behind Pay TV or SVOD paywalls,<sup>25</sup> this situation is no different from any other country in the world. Series such as *Stranger Things* (Netflix), *Game of Thrones* (HBO) or *The Grand Tour* (Amazon) can only be found as part of a subscription bundle. These shows are similarly behind affordably-priced paywalls in the US, the UK and every other country in which they have been made available.

In addition to this, there is a large volume of content that is distributed via a windows-based system where a film is first released in cinemas, then made available via digital EST and TVOD models and to purchase on optical discs, before becoming available on streaming platforms or free to air or cable television later. There have also been substantial changes in this approach as well:

- 46 of the top 100 films released in New Zealand cinemas in 2018 were available in New Zealand before they were released in the US, with the average window between US and New Zealand theatrical release date of Top 100 films down from 72 days in 2002 to 4 days in 2018.<sup>26</sup>
- Electronic Sell Through (EST) new release movie prices are generally lower in New Zealand than comparison markets Australia, United Kingdom and United States, and are comparable for Transactional Video on Demand (TVOD).<sup>27</sup>

Despite all of these efforts 8.4 million piracy site visits originated from New Zealand in January 2019 alone, demonstrating that more needs to be done to address the piracy problem.

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## **Solving New Zealand's piracy problem requires a multi-pronged approach.**

Even digital entrants represented in our joint submission, like Netflix (which makes a very large content library available for just \$11.49 per month) and Madman Entertainment (whose AnimeLab makes available a large Japanese Anime collection under an advertising video on demand or subscription video on demand basis), continue to see the corrosive effects of infringement on their business models.

There is now a broad body of evidence that suggests that no single measure can reduce copyright infringement by more than 30%. A holistic approach, which combines timely and affordable access to content along with education and enforcement, is required.

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<sup>25</sup> Subscription Video on Demand (SVOD) offers consumers a large selection of content, which they can watch at their convenience for a small monthly fee.

<sup>26</sup> See Appendix 2 for further details.

<sup>27</sup> See Appendix 3 for further details.

A number of papers analysing academic literature clarify and confirm this position.<sup>28</sup> Some of its key conclusions are summarised in the following table.

Category	Description	Impact
<b>LEGISLATION</b>	Site-Blocking in the UK <sup>29</sup>	Increase of usage of paid streaming sites by 12% on average, a reduction of 30% in traffic to piracy websites overall
<b>LEGISLATION</b>	Graduated Response (HADOPI) in France	Causal increase in digital music sales by 22-25%
<b>ENFORCEMENT</b>	Shutdown of MEGAUPLOAD.COM <sup>30</sup>	Causal increase in digital movie revenue 6 – 10%, and of course a 100% reduction in traffic to MEGAUPLOAD
<b>AVAILABILITY</b>	Removal of NBC content on iTunes as a result of commercial conflict	Increase in piracy rates of affected content of 11%
<b>AVAILABILITY AND AFFORDABILITY</b>	Making content available on catch-up TV (ABC US and Hulu) for free	Decrease in piracy of that content by 15-20%

This research illustrates that online infringement is a complex issue that cannot be addressed with a single response, such as greater access. In this sense it is similar to other social issues, such as drink driving and smoking. It is well understood that such issues require a comprehensive approach in order to be successful, including enforcement measures where appropriate.

In our response to the questions asked, we will identify the pathways to accessing pirate content and offer suggestions on how best to disrupt these pathways.

<sup>28</sup> See Smith and Telang , Assessing the academic literature regarding the impact of media piracy on sales, (August 2012), <https://www.riaa.com/reports/assessing-the-academic-literature-regarding-the-impact-of-media-piracy-on-sales/>, Danaher et al., *Understanding Media Markets in the Digital Age: Economics and Methodology* (November 2013), <<https://ssrn.com/abstract=2355640>>, Danaher et al, *Copyright Enforcement in the Digital Age: Empirical evidence and conclusions* (November 2015), <[https://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_10/wipo\\_ace\\_10\\_20.pdf](https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_10/wipo_ace_10_20.pdf)>

<sup>29</sup> Brett Danaher et al., “The Effect of Piracy Website Blocking on Consumer Behaviour” (November 2015), <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2612063](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612063)>. We will review this paper in greater detail in the next section.

<sup>30</sup> Danaher B. and M.D. Smith (2013) “Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales”, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2229349](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229349)>

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## **New Zealand's creators deserve a digital eco-system that is fair and equitable.**

As we will demonstrate in our response to the questions in the Issues Paper, a lack of accountability on the internet has created an environment where creators are forced to compete with free versions of their own works. Access to these free versions is often facilitated by major digital platforms such as Google, YouTube and Facebook, which have fallen short in taking responsibility for their role in providing access to infringing content.

We believe NZ's copyright review process can contribute strongly to creating a fair and equitable internet that works for all New Zealanders. We believe that at its core it's a debate about whether the internet needs to be regulated and where community standards need to be applied, or whether it's an ungoverned wild west.<sup>31</sup>

We thank MBIE for the opportunity to participate in this process, and we look forward to working with MBIE and other stakeholders to develop a copyright framework that helps New Zealand's screen industry to flourish, with all the associated economic and cultural wellbeing benefits, and which ensures New Zealanders continue to get access to the latest international content at the same time as the rest of the world.

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<sup>31</sup> See also Michael Koziol, *'Turning point': Mitch Fifield flags further government regulation of the internet'*, October 8, 2018, Sydney Morning Herald, < <https://www.smh.com.au/politics/federal/turning-point-mitch-fifield-flags-further-government-regulation-of-the-internet-20181008-p508e9.html>>

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## Answers to the Issues Paper's questions

### Objectives (Part 3)

- 1 Our copyright law should focus on encouraging New Zealanders to create original work for consumption here and abroad. Vast cultural and economic benefits flow from intellectual property regimes that offer clear and robust protection for creativity and inventiveness.<sup>32</sup>
- 2 To that end, the Copyright Act must ensure that:
  - 2.1 digital works are adequately protected from online piracy;
  - 2.2 local authors enjoy the same level of protection given to those in other countries so as not to disadvantage New Zealanders on the world stage;<sup>33</sup>
  - 2.3 author's moral rights are well protected (but not confused with the economic rights inherent in ownership); and
  - 2.4 the law gives authors, owners, users, ISPs and all others in the copyright ecosystem bright line certainty around the rules of the game.<sup>34</sup>
- 3 Picking up that last point, and as a further general comment on objectives, we think it important that New Zealand maintain its alignment with the UK in intellectual property matters. Doing so gives New Zealand the continuing benefit of English common law developments tied to our own legal tradition which can guide the application of copyright in this country.<sup>35</sup> And wherever possible, New Zealand copyright law should also be consistent with Australian law given Closer Economic Relations and the overlap in our cultural heritage.<sup>36</sup>
- 4 The fact is that there are very few substantive New Zealand High Court decisions on the Copyright Act. And none in tricky areas like fair dealing for

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<sup>32</sup> See, for instance, EPO and EUIPO "Intellectual property rights, intensive industries and economic performance in the European Union" (2016); N Pham, J Pelzman, J Badlam, A Sarda "The economic benefits of intellectual property rights in the Trans-Pacific Partnership" (2014); R Merges "The economic impact of intellectual property rights: an overview and guide" (1995) 19(2) *Journal of Cultural Economics* 103.

<sup>33</sup> Berne Convention, article 6(1) entitles country A to restrict the protection of works of authors from country B where country B fails to protect adequately the works of authors from country A.

<sup>34</sup> Recent research indicates that, at least in the online environment, copyright is not clearly understood: Australian Department of Communications and the Arts, "Consumer survey on online copyright infringement 2018" (June 2018).

<sup>35</sup> For more on the tradition, see, P Sumpter *Intellectual Property Law* (3<sup>rd</sup> ed, CCH New Zealand, 2017) at p 5.

<sup>36</sup> Australia New Zealand Closer Economic Relations Trade Agreement (1983), arts 1 and 18.

instance. The 1994 Act was, of course, modelled on its UK counterpart.<sup>37</sup> That approach has delivered relative certainty in the void left by the fact that few copyright disputes are litigated to trial or beyond in this country. It would take decades to develop any New Zealand common law on sui generis Copyright Act provisions. We strongly encourage officials to develop New Zealand law in a way which gives the country access to quality guidance from the UK and Australian courts.

### Question 1: objectives of New Zealand's copyright regime

- 5 We broadly agree with four of the five proposed objectives. In saying that we emphasise that where you are to have more than one objective, additional objectives must be consistent with, and subservient to, copyright's overriding focus which lies in incentivising the creation of original work.
- 6 At a policy level, looking at the proposed objectives, we sense a risk in trying to deliver all things to all people. You cannot readily do that within any one statutory instrument. As a practical matter, Parliament must pick an objective and craft provisions which serve that purpose. Again, copyright law is simply about protecting original work for the benefit of authors and owners so they may share it with the public and be encouraged to create more work over time. That is the objective to be implemented by the Copyright Act with, of course, an eye on international commitments and the Crown's Treaty of Waitangi obligations.
- 7 While on this point, we note it is possible that the authors of the Issues Paper see things differently to us with talk of "the copyright paradox" and a "tension at the heart of copyright".
- 8 We see no paradox and no tension.
- 9 Copyright is no different to a patent or a trade mark; or indeed to any other tangible item like a car or sofa. There is no presumption in personal property law that third parties can enjoy access to private property without the owner's permission. The same is true in copyright. The only rider being that, in keeping with British Commonwealth law, we have developed certain precisely defined permitted acts and exceptions to advance the public interest in social and cultural areas like news reporting, education, maintaining libraries and facilitating public administration.<sup>38</sup> But those limitations on copyright – carefully developed over time – do not translate into anything more than they are; and certainly not into a broader objective of "permit[ting] reasonable access to works for use, adaption and consumption", as the Issue Paper

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<sup>37</sup> P Sumpter *Intellectual Property Law* (3<sup>rd</sup> ed, CCH New Zealand, 2017) at p 5. For this reason, most sections of the Copyright Act 1994 advise readers to compare the New Zealand statute with particular provisions in the UK's Copyright, Designs and Patents Act 1988.

<sup>38</sup> Copyright Act 1994, Part 5. Compare with the limited exceptions in Part 3 of the Copyright Act 1962.

suggests.<sup>39</sup> We are opposed to that sort of idea becoming an objective in copyright law when (1) it never has been and (2) it conflicts with the incentive to create work in the first place.

### *Articulating the objectives*

10 We suggest three consistent objectives:

10.1 Protecting original works to incentivise and enable the creation and dissemination of that material (principal objective).

10.2 Providing bright line rules to enhance understanding of, and respect for, copyright amongst all those in the copyright ecosystem (ancillary objective).

10.3 And meeting New Zealand's international, Treaty of Waitangi and constitutional obligations (ancillary objective).<sup>40</sup>

### **Question 2: additional objectives and future technological change**

11 We agree that the copyright regime must be adaptable and resilient given technological developments.

12 That said, flexibility must not come at the expense of clarity, certainty and effectiveness.

13 Previous Copyright Act reform has sought to future proof the legislation.<sup>41</sup> But history tells us it is hard to predict the future. Rather than try and account for any and every eventuality, we favour five year reviews to check the Act remains fit for purpose.

14 In saying that we have seen how copyright reviews can take many years to produce an outcome.<sup>42</sup> So we suggest that, say, the Copyright (General Matters) Regulations 1995 carry some prescription around the process and time available for routine reviews. That approach should:

14.1 help de-politicise copyright law; and

14.2 deliver certainty with officials and stakeholders knowing well in advance what they need to do and when they need to do it thereby facilitating timely amendments to the Act as required in a dynamic environment.

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<sup>39</sup> MBIE's proposed objective two.

<sup>40</sup> This third objective simply combines MBIE's proposed objectives four and five.

<sup>41</sup> See, for example, Copyright (New Technologies) Amendment Act 2008; Copyright (Infringing File Sharing) Amendment Act 2011.

<sup>42</sup> The first discussion paper leading to the 2008 digital amendments was released in 2001. This review process was meant to begin in 2013 and will continue, we expect, well into 2020.

### **Question 3: sub-objectives for different parts of the Copyright Act**

- 15 “Objectives” in legislation aid purposive interpretation when lawyers write opinions and the courts rule on contentious matters. But there is no substitute for clarity and certainty in the actual text of the legislative instrument.
- 16 We do not support sub-objectives for different parts of the Copyright Act. We think that approach will cause confusion and uncertainty.
- 17 We appreciate the practice of sub-objectives exists in legislation as diverse as, for instance, the Commerce Act 1986 and the Smoke-Free Environments Act 1991. But in both cases – and in all other cases – there has been a precise reason for the approach. With the Commerce Act, the reason was the inclusion of a part on regulated industries which really ought to have its own legislation. In the SFEA’s case, the approach helped explain what was a highly controversial and socially progressive legislation at the time it was introduced.
- 18 Copyright law is not in that sort of territory. The law has been well understood and thoughtfully developed since the Statute of Anne 1710. “Sub-objectives” are not found in, for instance, the UK’s CDPA or the Australian Copyright Act 1968 which might suggest that New Zealand law was somehow branching out on its own. Again, we think that would be a mistake. We respectfully suggest that New Zealand maintain and enhance its alignment with the UK and Australia for the reasons we gave earlier.

### **Question 4: weighting of objectives**

- 19 Copyright law’s fundamental objective is to incentivise and enable the creation and dissemination of original work. At paragraph 10 above, we suggested that that objective join (2) certainty and (3) fulfilment of the country’s international and constitutional obligations as the key drivers of copyright law. That said, those additional two objectives are really inherent goals in any legislation. So we see no need to ascribe any particular weighting to these important but ancillary objectives.

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## Rights (Part 4)

### Section 1: what does copyright protect and who gets the rights?

#### Question 5: categorisation of works under the Copyright Act

- 21 The Copyright Act recognises eight types of original work, ranging from literary and dramatic work through to film and artistic works.<sup>43</sup> As the Issues Paper recognises, these categorisations reflect requirements in international treaties.
- 22 We acknowledge that some of the terminology may not intuitively identify the scope of the work it describes. But that is largely unavoidable given:
- 22.1 the nomenclature stems from international practice and treaties (so there is little scope to change it in any substantive way); and
- 22.2 the difficulty of finding a single term that fully captures the ambit of each type of work.
- 23 In the result, we see no problem with the way the Act categorises work: each category has a long-established meaning courtesy of the Act's interpretation section. If MBIE wished to make the legislation more accessible it could recommend, for instance:
- 23.1 the addition of a table like Table 3 at paragraph [113] of the Issues Paper; and/or
- 23.2 a reorganisation where s14's list of works is accompanied by the interpretation section's definition of those works all in the same provision – a one-stop-shop, as it were.

#### Question 6: threshold for copyright

- 24 The test of “skill, judgment and labour” for a work to be “original” is clear and correct. There is no need for any change.

#### *The New Zealand threshold*

- 25 Copyright exists in expression that “originates from its author” and which is “the product of more than minimal skill and labour”.<sup>44</sup> Copyright does not exist in copied work, because copyright is a reward for skill, judgment and labour in the creative enterprise.<sup>45</sup>

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<sup>43</sup> Copyright Act 1994, s 14.

<sup>44</sup> *Henkel KgaA v Holdfast New Zealand Ltd* [2007] 1 NZLR 577 (SC) at [37].

<sup>45</sup> *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339, (2004) IPR 650 at [16].



26 While originality is said to be a low threshold,<sup>46</sup> it does not follow that copyright protection applies too widely or copyright is, ironically, some sort of threat to the creation of further expression. As the Supreme Court explained in *Henkel KgaA v Holdfast New Zealand Ltd*, “the greater the originality, the wider will be the scope of the protection which copyright affords and vice versa.”<sup>47</sup> In other words, where there is a high degree of originality, the Court will draw an inference of copying even if there are various differences between the works in question. By the same token, where originality is low, infringement requires virtually an exact reproduction.<sup>48</sup>

27 We see no problem with the current originality threshold which tracks England, Australia and Canada.<sup>49</sup>

*No need to add “novelty”*

28 Some European countries require “novelty” before there can be originality. But copyright is “not concerned with the originality of ideas, but with the expression of thought”<sup>50</sup> and so the objective standards of novelty, usefulness, inventiveness, aesthetic merit quality or value do not apply.<sup>51</sup> Adding a novelty standard obscures the point of copyright: it protects particular expression, not the ideas expressed.<sup>52</sup> Moreover, adding novelty would reduce the certainty over when copyright exists, and would take New Zealand out of line with England, Australia and Canada.

29 While the Issues Paper notes that under United States common law, “originality” requires a “creative spark”, that observation does not accurately capture the American position. In the United States a work is original if it is an “independent creation” possessing a minimum degree of “creativity”.<sup>53</sup> The “independent creation” requirement is met so long as the work is not literally copied from another work even if it is fortuitously identical to an existing work. The “creativity” element then sets an “extremely low”<sup>54</sup> threshold that is easily satisfied because it only requires that a work “possess some creative spark, ‘no matter how crude, humble, or obvious’ it might be.”<sup>55</sup>

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<sup>46</sup> *Henkel KgaA v Holdfast New Zealand Ltd* [2007] 1 NZLR 577 (SC) at [38].

<sup>47</sup> *Henkel KgaA v Holdfast New Zealand Ltd* [2007] 1 NZLR 577 (SC) at [38].

<sup>48</sup> *Land Transport Safety Authority of New Zealand v Glogau* [1999] 1 NZLR 261 (CA) at 271.

<sup>49</sup> K Garnett, G Davies and G Harbottle *Copinger and Skone James on Copyright* (16th ed, Sweet & Maxwell, London, 2011) at [3-130]; For the United Kingdom, see: *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at p 287 (HL). For Australia, see: *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14; (2009) 239 CLR 458. For Canada, see: *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339, [2004] SCC 13.

<sup>50</sup> *University of London Press, Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 (EWHC) at 608–609.

<sup>51</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, [2005] 1 WLR 3281 at [31].

<sup>52</sup> *Bonz Group (Pty) Ltd v Cooke* [1994] 3 NZLR 216 (HC) at 219 cited with approval in *Henkel KgaA v Holdfast New Zealand Ltd* [2007] 1 NZLR 577 (SC) at [17].

<sup>53</sup> *Feist Publications Inc. v Rural Telephone Service Co.* 499 US 340 (1991) at 358–359.

<sup>54</sup> *Feist Publications Inc. v Rural Telephone Service Co.* 499 US 340 (1991) at 349.

<sup>55</sup> *Feist Publications Inc. v Rural Telephone Service Co.* 499 US 340 (1991) at 349.

30 Given the way America approaches originality, we consider the New Zealand threshold to be roughly the same, if not a higher standard than that employed in the United States.

*No issue with how the threshold applies*

31 We are not aware of any actual issues with the originality threshold in New Zealand. We see no need for change.

32 The Issues Paper only points to one example where a telephone directory was held to have been original so protected as a literary work. The Issues Paper goes on to say that courts in Australia and the US have held otherwise. From there, the Issues Paper claims at paragraph [122] that it may be that some works would receive copyright protection in New Zealand, but not in other countries.

33 That observation seems premised on an incorrect reading of the New Zealand, Australian and US cases. The New Zealand case involved the Yellow Pages section of the phone book which the High Court held involved individuals spending many hundreds of hours of time “marry[ing] up each business with its appropriate business and geographical classification” and then “assembling” the information on the page.<sup>56</sup> That effort clearly satisfied the originality threshold. The Australian and US cases the Issues Paper cites where courts reached the opposite conclusion were quite different from the New Zealand matter:

33.1 The Australian case involved an automated process to produce the White Pages and Yellow Pages. The automation meant that no individual was involved in producing the phone directories and so no individual applied any skill, judgment or time by individuals in compiling the data.<sup>57</sup>

33.2 The US case concerned the phone directory equivalent of the White Pages. Because the directory had to be arranged with person’s surname in alphabetical order, there was no selection of information and so no skill or judgment involved in assembling the phone directory.<sup>58</sup>

34 If the facts of the New Zealand case had been before the Australian or American courts who decided *Telstra* and *Feist* respectively, those courts would have found there to be copyright in the New Zealand Yellow Pages.

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<sup>56</sup> *YPG IP Ltd v Yellow Pages Group Ltd* HC Auckland CIV-20070404-2839, 13 July 2007 at [45].

<sup>57</sup> *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2010] FCAFC 149 at [89]–[90].

<sup>58</sup> *Feist Publications Inc. v Rural Telephone Service Co.* 499 US 340 (1991) at 349.

*No change required*

- 35 We believe the phone book amplification of originality confirms that the threshold in New Zealand is both clear and correct. We do not see any reason to change it when all that would do is create uncertainty while delivering no cultural or economic return.

**Question 8: default rules for copyright ownership**

- 36 In our experience, the Copyright Act's default rules on authorship and ownership work well. They are well understood. And they meet our international obligations. There is no case for change.
- 37 The rules are well summarised in Table 4 of the Issues Paper. If MBIE felt that the rules should be more accessible it could, as with the meaning of the "works", recommend including something like Table 4 in the Copyright Act itself.
- 38 We add a little more detail below.

*Authorship*

- 39 At the heart of copyright lies the idea that those who create an original piece of work should be recognised as the author of that work.
- 40 Authorship carries with it certain moral rights arising from the fact that authors both identify with their work and are identified through that work. It follows that authorship is non-transferable.
- 41 It is, however, important not to confuse authorship with ownership of copyright:
- 41.1 Authors of copyright works do not necessarily own the work. Authorship, as a concept, acknowledges creativity.
  - 41.2 Ownership, by contrast, acknowledges that copyright is personal property often generated in the course of employment or under contract where a third party bears the financial risk of balancing the cost of creation against returns from dissemination.
- 42 We note that the Issues Paper raises the authorship/ownership dichotomy in its discussion of film production at paragraphs [144]-[148]. In doing so the Paper reports that some directors say that not being recognised as an author lowers their bargaining power with producers.<sup>59</sup> We are uniquely well-placed to comment on this issue. In short, we see no difficulties with the current

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<sup>59</sup> Issues Paper at paragraph [148].

regime. The truth is that skilled directors have considerable bargaining power and are well-placed to negotiate a package that reflects their contribution.

- 43 In any event, we think it would be wrong for there to be a default rule that directors are the authors of works of film. For one thing, directors often occupy roles as diverse as the film's ultimate creator, to a person implementing the vision for the film created by the script writer and/or producer. Moreover, many films have multiple directors; and directors can be replaced during the filming or post-production of a movie, like in the recent films *Solo: A Star Wars Story* and *Bohemian Rhapsody*. In short, being a film director means so many different things that, as a matter of principle, it would be irrational for there to be a default rule casting directors as authors.
- 44 In saying that, it bears emphasis that the current approach does not leave directors in the cold. They have moral rights to their work.<sup>60</sup> And many directors are also the producer giving them both a moral and economic interest in the film. Take for example, *What We Do in the Shadows* where Taika Waititi was a director and producer (as well as a screenwriter and actor); or *The Hobbit: An Unexpected Journey* directed and produced by Sir Peter Jackson (who was also a screenwriter).
- 45 For completeness we note that law makers in Australia considered whether to change the established position and make authors out of directors. They decided not to.<sup>61</sup> New Zealand should follow suit.

#### *Ownership of copyright*

- 46 Section 21 contains the default rules for who owns the copyright in a work. Unless modified by contract, the copyright owner is either:
- 46.1 the author of the work; or
- 46.2 if the author was an employee paid to make the work, or a contractor commissioned to produce the work, then the employer or the person who commissioned the work is the owner of any copyright.
- 47 These default rules establish the correct position. As a matter of general principle, if someone creates new work she should own that work *unless* the author made it for someone else.
- 48 Argument to the contrary confuses the distinction between the author having moral rights in her work, and the purely economic question of who owns copyright.

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<sup>60</sup> Copyright Act 1994, s 94(1)(b).

<sup>61</sup> Copyright Act 1968 (Cth), s 98.

- 49 Copyright law cannot respond to requests to reframe market outcomes. Creators like photographers, for example, can either negotiate a higher rate or contract to retain ownership in their work. If an author is highly-skilled and their skills or judgment are not fungible, then that person can command a higher price or negotiate favourable terms. If on the other hand an author isn't in demand, that is a matter of market forces. Copyright law cannot and should not fix subjective opinions about whether individuals are fairly paid for the production of commissioned original work.
- 50 We recognise that some countries have amended their copyright laws so that a person who commissions a work is no longer the first owner of copyright. However, doing so in New Zealand would make the rules around ownership more complicated and less coherent with employers owning copyright, but not those who commission the work pursuant to a slightly different form of contract. We think that commissioners and commissionees should be free to negotiate and enter into contracts that set out clearly which party would own the rights to the works produced.
- 51 If New Zealand chooses to discard the long-standing commissioning rule, we suggest the Copyright Act be amended to clarify that the "author" of film and sound recordings is the person contracting others to contribute to a filming or recording.<sup>62</sup> To do otherwise would disrupt film industry business models that have been in place for a long time.

#### **Question 9: computer generated works**

- 52 The use of artificial intelligence is likely to grow significantly in film making. In our view, where computer generated works are directed by an individual, the author and copyright owner is the person who arranged for the AI to create the content, as is currently the position under section 5(2)(a) of the Copyright Act for certain works.
- 53 However, if the computer generation is done automatically with no input from an individual then a question mark hangs over whether there is an author at all. Australian case law indicates that where a work is "overwhelmingly the work" of a computer without any individual contributing to the work or having any conception of the actual form of the work, then the work could not be copyright because it was not made by an author.<sup>63</sup>
- 54 The authorship issue could be resolved by extending the concept in section 5(2)(a) dealing with computer generated works to all the other types of works in section 5(2). But originality may still be an issue for a completely computer-generated process. If a machine has itself produced something without any

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<sup>62</sup> To make our law consistent with the UK, Canada, Australia and the US: Issues Paper at fn 81.

<sup>63</sup> *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2010] FCAFC 149 at [89]–[90].

input or direction from an individual, it is unclear whether there has been any application of skill, judgement and effort other than by the computer.

55 We are concerned that AI could produce works on a scale that cannot yet be calculated, outcompeting human endeavours and nullifying the skill, judgment and effort that is the basis for granting copyright over a work. Given that the purpose of copyright is to encourage and support people in creating new content, we do not think the Copyright Act should make further provision at this stage for completely automated computer-generated works beyond the existing section 5(2)(a).

### **Question 11: copyright re-assignment**

56 We see no issue with copyright re-assignment and no need for change.

57 In the film and television industry ownership of copyright is almost always assigned to the producer or production company, with rights then assigned, or exclusive licences granted, to distribution companies.

58 The Issues Paper speaks of authors who, having transferred their copyright, cannot take advantage of new methods of distributing the work and wanting the copyright back. In response, we observe that any such concern is not an issue for copyright law; it is simply a matter of contract. Where an author chooses to transfer his or her copyright for value, it is not for the Copyright Act to give it back if the author later regrets the deal.

59 For completeness we note that, if an author wants to retain the ability to disseminate the work in other mediums, the author is free to transmit only part of the copyright.<sup>64</sup>

60 Parties to contracts involving copyright, are in the same place as parties to any personal property transaction. The Copyright Act cannot and should not override the fundamental principle of freedom of contract.<sup>65</sup> Doing so is unheard of outside cases of fraud and misrepresentation.

### **Question 13: copyright term for communication works**

61 Copyright in communication works currently last 50 years from initial broadcast.<sup>66</sup> As the Issues Paper notes, New Zealand's international obligations require that communication works be protected for at least 20 years.

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<sup>64</sup> Copyright Act 1994, s 113.

<sup>65</sup> *Vector Limited v Electricity Authority* [2018] NZCA 543 at [53].

<sup>66</sup> Copyright Act 1994, s 24(1).

62 We think that the 50 year minimum for communication works is appropriate. A consistent approach between types of works is important. Other comparable works— sound recordings and film – have a 50 year term.

63 And we note, too, that the current 50 year period tracks the position in the UK,<sup>67</sup> Australia,<sup>68</sup> and Canada.<sup>69</sup> There is no policy or practical reason for New Zealand to branch out on its own and seek to reduce the term below 50 years. If anything, research indicates that extending the term from 50 to 70 years would have a net benefit for the New Zealand economy.<sup>70</sup>

## **Section 2 – actions reserved for copyright owners**

64 Copyright grants the copyright owner the exclusive right to perform any of the section 16 “restricted acts” for the duration of the copyright.

65 Copyright, like all intangible property, only exists to the extent owners can readily enforce their rights through the legal system.

### **Question 15: exclusive rights in copyright**

66 No changes are needed to the exclusive rights set out in section 16. The nature and scope of these rights is well settled in New Zealand and around the world. It would be inappropriate – and probably contrary to New Zealand’s international treaty commitments – to amend or reduce these rights in any way. Doing so could expose the country to WTO litigation.

### **Question 16: secondary liability**

67 The secondary liability provisions appear to work well enough.

68 We suggest, though, that section 35(2)(a)’s rebuttable presumption that an object is an infringing work be carried over into section 36. Doing that would provide a coherent and consistent approach to the secondary liability provisions covering importing, possessing and/or dealing with infringing work.

### **Question 17: liability for authorisation**

69 Authorisation, primarily online authorisation, is a significant issue in a digital economy. Most copyright infringement of movies, television shows and broadcasts happen online, with search engines, like Google, or user generated sites, like Reddit, playing a critical role in informing users of the location of the content and then assisting them to access that location hosting the illegal content.

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<sup>67</sup> Copyright, Designs and Patents Act 1988 (UK), s 14(2).

<sup>68</sup> Copyright Act 1968 (Cth), s 95.

<sup>69</sup> Copyright Act (RSC 1985), s 23.

<sup>70</sup> G Barker “Copyright Term Extension – Economic Effect on the New Zealand Economy” (LECA, 2016) at 3 and 16.

70 It is difficult to calculate precisely the impact of online authorisation. However, Google's Transparency Report states that Google has been asked to remove search results for nearly 4 billion URLs and over 2 million specified domains, by over 167,000 copyright owners.<sup>71</sup> These numbers indicate the size of the problem copyright owners are facing in dealing with online authorisation.

#### *Guidance on authorisation*

71 We see some value in giving statutory guidance on authorisation. The Copyright Act sets out no test for authorisation; nor does it spell out any factors indicating when someone has authorised copyright infringement.<sup>72</sup> The Act only states that authorised means to do work "by or with the licence of the copyright owner".<sup>73</sup>

72 Case law clarifies that authorisation requires a person to expressly or impliedly "sanction, approve, countenance" or "grant or purport to grant [the right to]" another person to carry out any restricted action.<sup>74</sup> But authorisation is not satisfied by merely enabling, assisting or even encouraging the doing of a restricted act.<sup>75</sup>

73 In assessing whether authorisation has occurred, the Australian Courts have indicated that four questions are highly-relevant:<sup>76</sup>

73.1 First, did the alleged authoriser have control over the means used to infringe copyright and therefore a power to prevent or stop infringement?

73.2 Second, what was the nature of the relationship between the alleged authoriser and the person who infringed the copyright?

73.3 Third, did the alleged authoriser take reasonable steps to prevent or avoid copyright infringement?

73.4 Fourth, did the alleged authoriser have actual or constructive knowledge of the copyright infringement or that infringement would be likely?

74 At the same time, the Courts have consistently stressed that these factors do not and cannot set out a conclusive test for authorisation. The reason no test

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<sup>71</sup> Requests to remove content due to copyright <https://transparencyreport.google.com/copyright/overview?hl=en>.

<sup>72</sup> Note the definition of "authorised" in s 2(1) only properly applies to lawful uses as it refers to works done "by or with the licence of the copyright owner" or "pursuant to section 62".

<sup>73</sup> Copyright Act 1994, s 2(1).

<sup>74</sup> *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] 1 AC 1013; *Falcon v Famous Players Film Co* p1926] 2 KB 272 at 499.

<sup>75</sup> *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 at [90].

<sup>76</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 13.



can be formulated is because authorisation is highly-fact dependent, meaning that any attempt to prescribe a “ready-made test” for authorisation is “doomed to failure”.<sup>77</sup>

75 However, recognising these questions as a useful guide, the Australian Copyright Act was amended in 2000 to include them (merging the last two) as matters to be taken into account in determining if there was authorisation.<sup>78</sup> We suggest New Zealand do the same.

76 We also suggest that the Australian proposal of defining clear mandatory industry standards outlining what reasonable steps digital intermediaries are expected to comply with should be adopted in New Zealand. As the Australian Competition & Consumer Commission (**ACCC**) has noted in its recent preliminary report into digital platforms, there is some uncertainty about the third question relevant to authorisation: did the alleged authoriser take reasonable steps to prevent or avoid copyright infringement.<sup>79</sup> The ACCC commented that:<sup>80</sup>

*“A mandatory code or standard could also outline reasonable and effective steps for a digital platform to prevent distribution of copyright content or otherwise seek to fairly divide the burden of enforcement between the content hosts and the rights holders. Under such an approach, rights holders would benefit from a more efficient and equitable way of enforcing copyright, and digital platforms would benefit from a reduction in the likelihood of being found liable of authorising an infringement.”*

77 We agree that a mandatory code would significantly benefit both copyright owners and digital platforms. We suggest that this code could be a regulation made under the Copyright Act, allowing the code to be regularly updated.

78 A 2017 paper highlights that such an approach would actually serve to benefit responsible platforms at the expense of those providing access to infringing content.<sup>81</sup>

*“Increasing the risk of liability for infringement results in a “separating equilibrium,” with one platform offering only legitimate and high-value content and another offering a combination of illegitimate and low-value content. Effective platform liability should ultimately change the*

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<sup>77</sup> *Winstone v Wurlitzer Automatic Phonograph Co of Australia Pty Ltd* [1946] VLR 338 at 345.

<sup>78</sup> Copyright Act 1968 (Cth), s 26(1A).

<sup>79</sup> Australian Competition and Consumer Commission *Digital Platforms Inquiry – Preliminary Report* (December 2018) at 160–161.

<sup>80</sup> At 160.

<sup>81</sup> Beard, Ford and Stern, *Fixing Safe Harbor: An Economic Analysis*, Phoenix Centre for Advanced Legal and Economic Public Policy Studies, 2017, <<http://www.phoenix-center.org/pcpp/PCPP52Final.pdf>>

*structure of the platform industry, which we believe should improve enforcement of copyright law.”*

#### *Status of authorisation*

- 79 It is appropriate and important that authorisation continue to be an act of primary infringement.
- 80 Only the copyright owner can authorise other people to do one of the restricted acts. Those with no right to authorise, but who through words or actions have done so, should be liable for primary infringement. It can be no excuse that someone may not have intended to authorise another to infringe copyright because civil copyright infringement does not depend on intention. The law balances the position by recording that innocent infringement simply limits the remedies open to the rightsholder who cannot, for instance, claim damages in such a situation.<sup>82</sup>

#### *Linking as authorisation*

- 81 Linking to infringing content should constitute “authorisation” under the Copyright Act in certain contexts. While we do not think that any hyperlink devoid of context should automatically create liability, if the website with the hyperlink indicates that the content can be accessed through the link then that website is encouraging people to use the hyperlink; in short, authorising people to access the work in question. For these reasons we consider that the Australian Courts are correct in their view that providing links to infringing material can constitute authorisation.<sup>83</sup> New Zealand law should be the same.
- 82 We see close parallels with the law of defamation here. Defamation treats hyperlinks by themselves as content neutral. But where the website presents content from the hyperlinked material then that can count as publication of the defamatory material.<sup>84</sup> If hyperlinking can amount to publication of defamatory allegations, we see no difference in principle why publishing hyperlinks to infringing material should not be authorisation.

#### *Where authorisation happens*

- 83 As the Issues Paper points out, authorisation liability is currently limited in that the authorisation has to happen in New Zealand. The internet renders this requirement obsolete. New Zealand should follow the English approach and not require that authorisation has to happen in New Zealand, only the subsequent infringing act.

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<sup>82</sup> Copyright Act 1994, s 121(1).

<sup>83</sup> *Universal Music Australia Pty Ltd v Cooper* [2005] FCS 972; (2005) 150 FCR 1 at [84]–[86].

<sup>84</sup> *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722 (CA) at [32]; *Trkulja v Google LLC* [2018] HCA 25

## Section 3 – specific issues with current rights

### Question 18: right of communication to the public

- 84 At present, “communication to the public” is broad enough to encompass technologies as they change and adapt. The focus of the definition being to “transmit or make available” by “communication technology”.<sup>85</sup> We consider the definition to be sufficiently future-proofed for now.
- 85 Because of how the term is phrased, any communication of a work to the public using technology will involve “communication technology”, regardless of what future technology is involved.

### Question 19: communication works

- 86 A communication work is the transmission of sounds, visual images and/or other information “for reception by members of the public”.<sup>86</sup> Like “communicate” “communication work” is phrased in technologically neutral terms capturing everything from watching a live television broadcast to streaming sport on a mobile device through to watching a programme on-demand on a computer.
- 87 The Issues Paper identifies a concern around how people understand “members of the public”, and whether this term captures streaming to an individual in their home. We do not share this concern. “Members of the public”, in this context and other statutes,<sup>87</sup> does not mean that the entirety of the public must be able to access the works. As the Interpretation Act 1999 explains, words in the plural include the singular so transmitting information to a single member of the public would be a communication work. For this reason, the New Zealand courts have indicated that technology enabling one-to-one communication infringed copyright.<sup>88</sup> That is the correct position and one consistent with European law.<sup>89</sup>
- 88 Lastly, on re-transmission, we consider that the re-transmission of a communication work from a member of the public to another would amount to infringement. By contrast, the transmission of a signal going through a router or band expander does not amount to a re-transmission as that sort of transmission is not new.

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<sup>85</sup> Copyright Act 1994, s 16(1)(f).

<sup>86</sup> Copyright Act 1994, s 2(1).

<sup>87</sup> The term “members of the public” is used in 280 other statutes, orders and regulations.

<sup>88</sup> *Munwha Broadcasting Corp v Young International 2009 Ltd* HC Auckland CIV-2010-404-203, 17 December 2010 at [104].

<sup>89</sup> *ITV Broadcasting v TVCatchup Ltd* (C-275/15), 1 March 2017.

### Question 20: “object” in the Copyright Act

- 89 “Object” is not defined in the Copyright Act 1994, with its precise meaning at large since the word replaced the 1962 legislation’s concept of “article”. The current Act needs to define the term. We support effective codification of the Court of Appeal’s analysis in *Ortmann and Ors v United States of America*.<sup>90</sup> It is vital that the Act is clear, as the Court of Appeal was, that “object” includes digital works, not just physical articles.

### Question 21: the decision in *Dixon v R*

- 90 We see no issue here. *Ortmann and Ors v United States of America* is of course consistent with *Dixon v R*.<sup>91</sup> While *Dixon* is confined to its context, there is nothing unusual or inconsistent with the law recognising property rights in digital files or compiled information. Data compilations are currently protected as literary work where the compilation otherwise meets the originality test.

### Question 22: user-generated content

- 91 “User-generated content” is and should be treated the same as any other use of copyright material. The same rights do and should exist for copyright holders, and the same exceptions do and should apply to users of copyright material. We do not see anything unique about this sort of content which could justify any different treatment (even if that were possible within the copyright law rubric – which it isn’t). There is and can only be one copyright law for all.
- 92 We also note that there exists a well-functioning market for licensing film clips, stills and music samples that provide an easy one-stop-shop and reduce the administrative burden on the users seeking licences.<sup>92</sup> We would oppose any suggested reform which undermined existing and future markets for licensed content.
- 93 For completeness we add that there is, of course, a wide gap between “user generated content” and “user uploaded content”. The law is and will certainly remain that any user uploading content to a digital platform must own the relevant copyright in the work or have permission to deal in the content.

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<sup>90</sup> *Ortmann v United States of America* [2018] NZCA 233, [2018] 3 NZLR 475 at [147]–[148].

<sup>91</sup> *Dixon v R* [2016] 1 NZLR 678 (SC).

<sup>92</sup> For example, Screenrights: <https://www.screenrights.org/screen-audiences/screenrights-licences/>; Motion Picture Distributors Association of NZ Inc: [http://www.mpda.org.nz/about/mpda-org-nzpublic-performance-licensing-\\_motion-p-13-07-17](http://www.mpda.org.nz/about/mpda-org-nzpublic-performance-licensing-_motion-p-13-07-17); APRA AMCOS: <http://apraamcos.co.nz/music-customers/licence-types/>; One Music: <https://www.onemusicnz.com/music-licences/>.

#### **Question 24: exclusive rights**

- 94 We have no concerns with the existing exclusive rights granted to copyright owners. The current rights offer adequate protection for copyright owners and address the different forms of copyright.
- 95 We would strongly oppose any moves to reduce or limit the exclusive rights as doing so would undermine the value of copyright lowering the incentive to create new work.
- 96 The only change we think necessary is to s124 of the Act which deals with the exercise of concurrent rights. The section currently requires an exclusive licensee to join the copyright owner to any enforcement proceeding except with leave of the court. We understand the rule is to ensure the owner and exclusive licensee do not advance separate claims allowing them to “double dip” on damages.
- 97 At the very least we ask that the section be amended so that an exclusive licensee can pursue site blocking orders, for example, without adding the owner as a party to a proceeding (a proceeding which the owner will naturally support but may not wish to be involved in). Site blocking applications seek no damages and so there can be no prejudice to any respondent. And of course there can be no prejudice to the owner either, as the relationship between the owner and the licensee is prescribed by contract.

#### **Section 4 – Moral rights, performers’ rights and technological protection**

- 98 Moral and performers’ rights recognise that those involved in authoring or performing certain works have a relationship with their work. In most contexts, a work reflects on an individuals’ reputation and it follows that the law should protect that reputation. That said, in assessing any options or submissions in this area, it is important to recall the moral and performers’ rights focus on recognition not commercialisation.

#### **Question 25: the formulation of moral rights under the Copyright Act**

- 99 The moral rights in the Copyright Act reflect the fact that the author (and for films, the director) has a relationship with his or her creation. As a result, the author or director should:<sup>93</sup>
- 99.1 be identified as the author or director of the work, because she is the person whose skill, time and effort created the work;

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<sup>93</sup> Copyright Act 1994, ss 94, 98 and 102.

- 99.2 be free from having a work that is not hers being attributed to her, because in some cases false attribution could damage the author's or director's reputation; and
- 99.3 have the ability to stop derogatory treatment of her work because such treatment devalues the work and consequently impacts on the author's or director's reputation.
- 100 These moral rights are neither too limited nor difficult to understand. They are all about protecting creative reputation. With both attribution and false attribution already addressed in the Copyright Act, we cannot envisage another form of treatment of the work beyond derogatory treatment that would impact on the reputation of an author or director.
- 101 The UK and Australia each grant the same scope of moral rights as New Zealand and there is no case for change.
- 102 Any move to extend or add to these moral rights risks interfering with the economic rights reserved for the copyright owner. Using moral rights to grant non-owners an economic interest in the work confuses the purpose of moral rights, which is to enhance and protect an individual's reputation.

#### Questions 28–29: TPM protections

- 103 TPM protections are essential in the digital environment and squarely in the public interest. For one thing, where a TPM regime is well written, it protects copyright in the digital age, meeting the fundamental objective of copyright law. But more than that, TPMs enable content distributors to offer the market new products like, for example, SVOD and TVOD services. In this sense, TPMs allow consumers to buy and consume the precise content they are interested in, at a time, place and on a device that best suits them.
- 104 In the current networked digital environment, unauthorised online dissemination of a work causes immediate and enormous damage to that work. Once TPM protections are circumvented, the work is exposed and unprotected from further acts of exploitation.<sup>94</sup> Release one TPM circumvented copy of a work on the internet, and that act can spawn thousands of unauthorised and freely available copies within a few clicks. For that reason, international copyright treaties oblige signatories, including New Zealand, to prohibit the act of TPM circumvention.<sup>95</sup>

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<sup>94</sup> See, for instance, the example of Aquaman 4K, Chris Smith, *Pirates may have cracked Apple's iTunes 4K movie encryption*, 7 March 2019, <https://www.trustedreviews.com/news/itunes-4k-movie-torrent-3672538>.

<sup>95</sup> WIPO Copyright Treaty, art 11; WIP Performances and Phonograms Treaty, art 18,

*Amendments required to current regime*

- 105 The above said, New Zealand's current TPM framework only prohibits devices that can be used to circumvent TPMs.<sup>96</sup> The Copyright Act does not prohibit the *act of* circumventing TPMs. The CPTTPA partially recognises this anomaly. As amended by the CPTTPA, the Copyright Act will prohibit circumventing access control TPMs; but the amendment needs to go further and prohibit circumventing copy control TPMs.<sup>97</sup>
- 106 Doing so would make New Zealand copyright law consistent with Australia, Europe, and the United States where copyright owners can stop those who knowingly circumvent a TPM, or do so in circumstances where they ought to know what they are doing is wrong.<sup>98</sup> We also need the amendment to meet the WIPO Copyright Treaty which requires contracting parties, including New Zealand, to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures ... that restricts acts ... which are not authorized by the authors concerned or permitted by law."
- 107 For completeness we note that stopping people from circumventing TPMs would not prevent those who legitimately need to do so from going about their business. There are exceptions to the TPM circumvention ban which could be extended along with the extension on the circumvention prohibition.<sup>99</sup>

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<sup>96</sup> Copyright Act 1994, ss 226A and 226C.

<sup>97</sup> Copyright Act 1994, s 226AC as introduced by s 39 of the Comprehensive and Progressive Amendment for Trans-Pacific Partnerships Amendment Act 2016.

<sup>98</sup> See: Copyright Act 1968 (Cth), s 116AN; Digital Millennium Copyright Act 17 US Code 1201; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>99</sup> Australia and the US also have further exceptions for encryption research. Distinct exceptions for Australia include instances of inoperability, computer security training, and online privacy.

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## Exceptions and limitations (Part 5)

108 The Berne Convention is the constitution of modern international copyright law. Its three-step test for exceptions is the starting point for assessing any existing or proposed copyright limitation:<sup>100</sup>

108.1 The exception can only apply in certain special cases.

108.2 The exception cannot conflict with the normal exploitation of work.

108.3 And, the exception cannot unreasonably prejudice the author's legitimate interests.

109 It bears emphasis, though, that just because a possible exception meets each step does not mean Berne signatories should build the exception into national copyright law.

110 Exceptions must be demonstrably justified on the grounds that they (1) comply with Berne and (2) address specific problems and/or advance a compelling social or cultural function. Incidental use, for instance, is obviously in that category. So too are news reporting and providing resources for the visually impaired, amongst other finely crafted permitted acts. As we note in a moment, we think there is a case for other acts to join Part 5 including parody and satire.

111 Before turning to the detail, though, we suggest that the following principles should guide any assessment of any proposed new or amended exceptions:

111.1 First, exceptions must address a specific problem or social need.

There must be publicly available empirical evidence demonstrating that the problem or need exists and that the proposed limitation will fix the problem or meet the need while not unreasonably diluting copyright in affected works.

111.2 Secondly, exceptions must be restricted to non-commercial use of copyright works.

112 We are concerned that there is a powerful lobby group within the global technology industry pushing for ever broader copyright exceptions around the world, including New Zealand. These lobbyists speak in broad strokes about how wider exceptions will create "dynamic environments" and foster entrepreneurship.<sup>101</sup> It is important to appreciate, as MBIE will, that any

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<sup>100</sup> Berne Convention, art 9(2).

<sup>101</sup> See, for example, Google's submission to MBIE on the implementation of the Trans-Pacific Partnership Intellectual Property Chapter, 30 March 2016.



powerful corporate seeking weaker intellectual property law has a vested commercial interest in doing so. There is of course nothing wrong with having a vested interest – we have one – but that interest must be in the open.<sup>102</sup> On behalf of the screen content industry, our interest lies in robust copyright law because copyright drives the creation and dissemination of films and television programmes. As we said at the outset, our industry supports popular culture and contributes significantly to the New Zealand economy. The same is not necessarily true of, for example, YouTube, which continues to be a major source of piracy, and continues to extract value from it via ad revenue and the sale of analytical products.

113 We believe a 2016 paper offers an appropriate model, which is rooted in the purpose of copyright, for determining the optimum level of exceptions in response to a variety of factors.<sup>103</sup> The paper finds that exceptions should be stricter when:

113.1 the cost of the original work is high;

113.2 the size of the market for the original work is small;

113.3 piracy and other forms of leakages, which simply reduce the market potential for the original work, are large;

113.4 the cost of distributing secondary works is lower;

113.5 small amounts of transformation matter a lot to consumers; and

113.6 the fixed cost of producing secondary works are smaller.

## **Section 1 – Exceptions that facilitate particular uses**

### **Questions 30–31: experience with and problems relating to the exceptions for criticism, review, news reporting and research or study**

114 We do not have any examples of being impeded by the current fair dealing exceptions for criticism, review or news reporting and research or study.

115 The criticism, review and news reporting exception is wide enough to enable people to comment on works, analyse, critique or report them to the public. These activities all benefit the public and are used for purposes other than that which the work is created. Because the purpose has to be criticism, review or

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<sup>102</sup> We add that it is also important to be clear-eyed about the fact that there are third party organisations funded to advocate for vested corporate interests.

<sup>103</sup> Beard, Ford and Stern, *Fair Use in the Digital Age*, Phoenix Center for Advanced Legal and Economic Public Policy Studies, 2016, <<http://www.phoenix-center.org/pcpp/PCPP51Final.pdf>>

news reporting, the use within those parameters does not conflict with the copyright owner's economic interest in the work.

- 116 While some may point to litigation between Sky Television and media companies in their discussion of these questions, that proceeding did not relate to the media's main coverage of the sports, but to articles with extensive highlight clips, often lasting several minutes. The case settled. But had it gone to trial, focus would have fallen on whether the media companies' exploitation of SKY's work took unjustified commercial advantage of the material in question.
- 117 Similarly, the research or private study exception is wide enough to allow legitimate uses for private purposes. We do think, however, that the list of factors in s 43(3) of the Copyright Act should be repealed as some are inherent in the exception (for example the "purpose" of the copying and the amount and substantiality of the part copied), while others only add to the uncertainty, such as the effect of the copying on the potential market for the work. How can a private individual work out what that is?
- 118 All that needs to be clear is that the research or private study is for a "non-commercial purpose" – a concept inherent in the "private" study part of the exception, but not necessarily its research limb.
- 119 While these amendments should clarify each exception, we suggest that any remaining uncertainty be addressed through education. There are limits on legislation's ability to educate or explain concepts to the wider community. In Australia the Copyright Council publishes information sheets about specific issues in copyright law as a way of educating copyright users.<sup>104</sup> This approach works well in New Zealand in areas like tax, privacy and trade practices where the IRD, Privacy Commissioner and the Commerce Commission for instance each do an excellent job in their production and dissemination of soft law material. Perhaps MBIE, via IPONZ, could do the same?

#### **Questions 34– 35: incidental copying and transient reproduction**

- 120 We see no any issue with section 41, dealing with incidental copying. We do, however, think that section 43A, which covers transient reproduction, should be amended so that activities like temporary internet caching are permissible.
- 121 As the Issues Paper notes, New Zealand's incidental copying exception is broader than other countries. It allows incidental copying of different works, like capturing the music playing in the background of a café when the café is being filmed for a documentary; or on artwork that appears in the background

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<sup>104</sup> [www.copyright.org.au/ACC/Find\\_an\\_Answer/ACC/Public\\_Content/Find\\_an\\_Answer.aspx](http://www.copyright.org.au/ACC/Find_an_Answer/ACC/Public_Content/Find_an_Answer.aspx).

when filming. In those cases, there is no *deliberate* copying as the copying is plainly *incidental* to the principal work. We do not understand there to be any uncertainty over what “incidental” means, particularly because section 41(2) makes it clear that deliberately copying a work is not incidental. Defining “incidental” further may actually limit its use and create unforeseen problems.

122 Similarly, there is no need to define the terms used in section 43A dealing with transient reproduction. It is clear what section 43A is aimed at and defining the terms like “incidental” or “transient” may make this section redundant or difficult to apply given unanticipated future technology. We would leave it as is.

123 As the Issues Paper points out, because of section 43A’s terminology, even existing technologies like internet caching may not be covered by the exception because of the requirement that the copying is both an “integral” and “essential” part of the technological process. Internet caching is important for streaming content, but it may not be “essential”. So we support dropping the requirement that the copying is “essential” so that section 43A only requires that the incidental or transient copying be an integral part of a technological process for making or receiving a communication or to lawfully use a work. Doing so would align us with the Australian approach.<sup>105</sup>

#### **Questions 36–37: cloud computing and emerging technological processes**

124 We do not consider there to be any need for a specific cloud computing exception or exceptions for other emerging technological processes. Our members and others involved in distributing digital copies of works already licence to consumers in flexible ways allowing for different backup options. Just think of Netflix, iTunes, Apple Music or Spotify where the content can be accessed online or downloaded to a particular device.

125 Increasingly more and more digital content is available through paid monthly subscriptions or able to be rented for a set period. Monthly subscriptions save consumers money long term, but only work because the service provider retains control over the content. If a user cancels a subscription then they can no longer access content. But if a user is entitled to make a back-up copy of the work they can then continue to access that work without a monthly subscription.

126 While some might think it convenient to back-up to the cloud (or even to another hard drive), if a person is permitted to make a personal copy in either situation then they are effectively allowed to circumvent TPMs which prevent

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<sup>105</sup> Copyright Act 1968 (Cth), s 43B.

this type of backing up. As we have explained earlier, TPMs underpin the value in the copyright and once TPMs can lawfully be circumvented then the law is simply hoping that the content will not be shared. And hope does not stop piracy.

#### **Question 38: data-mining and other non-expressive uses**

- 127 While we recognise that data-mining is likely to increase and may sometimes serve a socially-useful purpose, we do not believe that there is currently a demonstrable need for a new exception in this area. Anyone who wants to copy information from copyright works should obtain a licence to do so from the copyright owners. A licence fee is an input cost, like any other.
- 128 If a specific fair dealing exception for text and data mining is introduced, we support a specific exception along the lines adopted in the UK. The UK exception makes it clear that the person has to (1) have lawful access to the work, (2) carry out the computational analysis for “the sole purpose of research for a non-commercial purpose”, and (3) acknowledge the copyright in the work (where that is possible).<sup>106</sup> We think these limitations are necessary because fair dealing cannot be an excuse for unlawful access and should not allow someone to profit from using a copyright work.

#### **Question 39: parody and satire**

- 129 We accept and support a parody and satire exception along the lines of the UK provision.
- 130 Both parody and satire depend on the original work to different degrees, but build on that work for another creative and socially useful purpose. Both involve applying a further layer of skill, thought and effort to create their parody or satirical work.

#### **Question 40: quotations and extracts**

- 131 We do not think people or organisations should be able to use extensive quotes or extracts of original works for any purpose without a copyright licence. As the Issues Paper points out, quotes or extracts are permitted for some purposes, but not others including as commercial uses.<sup>107</sup> We do not support any expansion of the current position when that may disrupt the existing well-functioning licencing markets.

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<sup>106</sup> Copyright, Designs and Patents Act 1988 (HK), s 29A.

<sup>107</sup> Issues Paper at paragraph 321.

## Section 2 – Exceptions for libraries and archives

132 We support the ability of libraries and archives to deal with content to preserve it or, as part of its operations, lend it out.

133 However, we do not support libraries or archives being able to copy the content to distribute it more widely or in a different form. For example, if a library has bought a movie on a VHS tape 15 years ago it cannot then copy that film to DVD or make it available for streaming when the library could either purchase the DVD or an online version of the film from a legitimate source.

### Question 42: flexibility for libraries to archive and copy

134 We support libraries having the right to copy works. But we think libraries need clear and certain guidelines to follow when copying. We suggest that the existing provisions be amended as required, rather than trying to make the exceptions more flexible and therefore less certain.

135 Rather than assist libraries and archives in their work, adding flexibility will likely hamper the libraries' and archives' use of any exception as it did in Australia.<sup>108</sup> The Australian experience is that greater flexibility in ability to use copyright work actually had a chilling effect: it resulted in a high degree of uncertainty around what could be copied and how much could be taken. So most librarians held back on copying, being unable or unprepared to seek the legal advice that might have clarified the situation.

136 Given the Australian experience, we agree it is preferable that exceptions be very clearly defined to make them administrable by the institutions they are there to serve.

### Question 43: mass digitalisation

137 While we understand the need for digitisation of some works to preserve them, as is currently permitted by the Copyright Act,<sup>109</sup> we do not think libraries and other institutions should be able then make the digital copies publicly available on the internet. Just because a library has purchased a single copy of a work does not then entitle it, without seeking an appropriate licence, to make copies of that work publicly available.

### Question 44: collection management purposes

138 We generally support libraries and archives being able to make copies of part or the whole of a work for the purposes of collection management and

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<sup>108</sup> National Library of Australia's submission to the Australian Law Reform Commission for the "Copyright and the digital economy" inquiry.

<sup>109</sup> Copyright Act 1994, s 55.

administration. Given that infringement requires a substantial part of a work to be copied, the main issue will be around thumbnail images of an artistic work, which in the film and television industry will mainly concern the cover or associated art work.

- 139 Provided that the copies are thumbnails, this type of infringement does not harm copyright owners and would assist libraries and archives in their work which is not for a commercial purpose. If libraries and archives are finding authorisation for using thumbnails a real problem, which the Issues Paper suggests that they do, we would support a limited exception for libraries to copy artistic works for collection management and administrative purposes.

### **Section 3: Exceptions for education**

- 140 We accept that educational institutions should have specific fair dealing exceptions required to help teachers teach and students to learn. But copyright licensing still has its role alongside limited exceptions. On that front, several educational institutions have licences to use different works, like Universities New Zealand whose members have general licences for copying TV shows, broadcasts, podcasts, music, newspapers and magazines. There are also organisations that provide one-stop shops for copyright licensing for different educational providers, like the New Zealand School Trustees Association for schools.<sup>110</sup>
- 141 We consider that the limited exception to copying for educational purposes of films and sound recordings is appropriate. As is the ability to play or show the sound recording, film or sound recording at the educational institution.<sup>111</sup> In our view, these exceptions are clear and set out the precise circumstances where copying or showing the work will not amount to infringement.

#### **Question 47: flexibility for educational institutions**

- 142 The only issue with how the exceptions for educational institutions relating to film and sound recordings that the Issues Paper raises relates to whether teachers can show the film or sound recording on the internet, rather than just at the educational institution. We consider that the answer is that, unless the institution has a licence, the answer should be “No.”, because it is impossible to determine who will then watch or listen to that film and/or sound recording.
- 143 Showing a film or playing a sound recording to students or staff members of the educational establishment at the establishment is deemed to not be playing or showing a work in public, and so is not infringement.<sup>112</sup> However, if

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<sup>110</sup> <https://www.nzsta.org.nz/advice-and-support/copyright-licensing/>.

<sup>111</sup> Copyright Act 1994, ss 45 and 47.

<sup>112</sup> Copyright Act 1994, s 47(2).

others who are not students or teachers are present then the playing or showing of the film or sound recording is not protected, because it would not be solely for the education of those present.

- 144 If the work was streamed on the internet, there is no way for the educational establishment to ensure only students or staff watched or listened to the film and/or sound recording, or that those watching or listening were doing so for the purpose of instruction.
- 145 We think the answer should be that if an educational establishment needed to show the film or sound recording over the internet, they should seek a licence to do so. Neither we nor our members are aware of any issues with educational establishments trying and failing to get licences to show films and/or play sound recordings to students. We would be interested to engage further on this issue if educational institutions identify it as an issue.

## Section 4: Exceptions relating to the use of particular categories of works

### Question 52: format-shifting exception

- 146 We do not see any need to expand the existing format-shifting exception. The current exception is limited to allowing a sound recording to be copied so it can be played on another device for personal use.<sup>113</sup>
- 147 While the Issues Paper points to significant technological changes since this exception was introduced, those changes, if anything, reduce the need to expand the format-shifting exception. In the last five or so years, most people have begun to access their music and movies through subscription services such as Apple Music, Google Play, Spotify, Netflix, Amazon Prime, Neon, Lightbox ... the list goes on. Demand for physical files has fallen and will likely continue to drop over time. With these new ways of accessing content, there is little need for a consumer to transform another physical file, such as a movie, into a digital file.
- 148 Further, allowing a user to do so jeopardises different pricing structures that have been developed to give consumers greater choice for how they consume content. For example, consumers are able to purchase *The Breaker Upperers*<sup>114</sup> on DVD for \$18.98, on Blu-ray for \$24.98, or to buy it for \$19.99 or rent it for \$7.99 on iTunes, and they will soon be able to view it as part of their SVOD subscription. Allowing a consumer to format shift a copy undermines

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<sup>113</sup> Copyright Act 1994, s 81A.

<sup>114</sup> Prices accurate as of 14 March 2019. Checked via JBHifi.co.nz and iTunes

this flexible access approach and will likely lead to a reduction in consumer formats being made available.

- 149 What is more, format shifting often will involve circumventing TPMs. As we have already explained, doing so jeopardises content protection and makes it increasingly likely that copies will then be shared.

#### **Question 53: time-shifting exception**

- 150 We think that the time-shifting exception works well, although we note that it will increasingly become redundant.

- 151 As the Issues Paper acknowledges, the time-shifting exception was designed to legitimise people recording programmes to watch them at a later time. While time-shifting is still common with some services, like Sky's MY SKY, or on some multimedia devices, with the rise of on-demand services from most broadcasters and other content providers, the use of time-shifting recordings is likely to fade away. But for now, the exception should be preserved, although not in any way expanded.

#### **Question 55: other exceptions for communication works**

- 152 The other exceptions for copying or using communications works are targeted at specific issues. The exceptions are therefore well-framed and strike the right balance.

### **Section 5: Contracting out of the exceptions**

#### **Question 58: copyright owners' ability to limit contracting out**

- 153 Copyright owners should continue to be able to exclude or modify a user's ability to use the exceptions through contract. Contractual limits on whether an exception applies reflect the operation of market forces and promotes clarity. At the end of the day, the copyright owner owns the work and controls its dissemination. The exceptions do not change that position. Nor do they limit the scope of the copyright protection. The exceptions only provide what is effectively a limited statutory licence permitting certain use of the work where that use would otherwise be copyright infringement.
- 154 Because contractual limits are an exercise of the copyright owner's freedom of contract, which the courts have described as a fundamental right,<sup>115</sup> prohibiting or restricting the copyright owner's ability to contract out should only be done when necessary and to the minimum extent necessary. We do

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<sup>115</sup> See the recent Court of Appeal's decision in *Vector Ltd v The Electricity Authority* [2018] NZCA 543 at [53] and [54] and the Court's indication that freedom of contract also engages s 17 of the New Zealand Bill of Rights Act 1990.



not understand there to be specific examples where contracting out has created real problems.

155 Also, limiting contracting out in any great degree would put New Zealand out of sync with several other countries. Depending on the nature of limits placed on contracting out, copyright owners may choose not to enter into contracts governed by New Zealand law, which in turn could limit consumer law protection for New Zealand users.

156 If changes to limit contracting out were to be considered, then we suggest that any limitations should:

156.1 not be drawn widely and should only apply where there is a demonstrable need, supported by evidence, to prohibit contracting out;

156.2 only apply where a licence for the use is not available from the copyright owner on commercially reasonable terms;

156.3 not permit TPMs to be circumvented; and

156.4 provide that such contractual provisions are unenforceable, not void.

## **Section 6: ISP liability**

157 We accept that true ISPs – those who provide traditional internet connection services – need safe harbours to protect themselves from the fact that their users continuously infringe copyright. They occupy a passive role in relation to the content that travels through their “pipes”.

158 However, those safe harbours do not mean that ISPs can or should shirk responsibility for tackling copyright piracy facilitated through their networks. As we come to later in our submission, New Zealand must have a clear path to cost-effective site blocking orders which require ISPs to play their small part curbing piracy because they are the ones best placed to take action within the copyright ecosystem.

### **Question 59: the definition of ISP**

159 We are concerned that the existing definition is too broad. It properly covers those that offer the transmission, routing, or provision of digital online communications between or among points specified by the user. In other words: traditional ISP activities.

160 But we are concerned that the second, never tested, limb of the definition goes too far. That second limb offers the safe harbour to those who “host material on websites or other electronic retrieval systems that can be accessed by a user”.

- 161 As a point of principle, safe harbour availability must turn on an ISP's relationship with the content.
- 162 There are digital platforms like YouTube which monetise infringing content by serving it up with individually targeted ads. Moreover, to keep users on the platform, and hence to keep monetising the visits, YouTube curates content through auto-recommendations. On one reading of the definition of ISP, its second limb could cover such a platform. But plainly there can never be any basis for giving a digital platform immunity where it is taking an active role in relation to the content and profiting from copyright infringement.
- 163 We consider that the principled dividing line has to be on how the intermediary interacts with copyrighted content. Safe harbours should only protect passive service providers, like retail service providers or other services that facilitate access for users to content. However, entities that provide services that play an active role in relation to the content, by organising its presentation or promoting it, should not qualify for safe harbour protection. Treating those entities as an ISP is a misnomer; one used to get them what is effectively a free licence to use or facilitate access to copyright material.
- 164 Digital platforms, like search engines or social media platforms, all occupy a similar position where they distribute vast amounts of third-party content online. The platforms profit through serving multiple groups of users at once, providing value to each group based on the presence of other users.<sup>116</sup> For example, "one side of a platform may consist of individuals who use its search services to find content or products while another side consists of businesses wanting to advertise to targeted groups of those individuals."<sup>117</sup> In providing those services, these digital platforms actively deal with content by selecting and curating content, evaluating content based on specific criteria, and ranking and arranging content for display. Furthermore, these platforms collect data related to the content or content queries, which gives them the ability to micro-target audiences in a way that traditional media can't.<sup>118</sup>
- 165 There is no principled basis for platforms that actively deal with content, often profiting from doing so, being given a safe harbour. Instead, as we have suggested earlier at paragraph 76, these platforms should be subject to a mandatory code setting out reasonable steps for taking down or preventing access to copyrighted works. If the platforms fail to comply with this code, they should be treated as having authorised any infringement.

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<sup>116</sup> Australian Competition and Consumer Commission *Digital Platforms Inquiry – Preliminary Report* (December 2018) at 21.

<sup>117</sup> Australian Competition and Consumer Commission *Digital Platforms Inquiry – Preliminary Report* (December 2018) at 21.

<sup>118</sup> See Appendix 4 for an example on how Facebook allows an advertiser to target copyright-infringement related interests.

166 We wish to work with MBIE on an ISP definition that facilitates investment in ICT infrastructure, but does not offer online platforms a free pass to monetise works without paying an appropriate fee. As the ACCC has found in its Preliminary Report in its Digital Platforms Inquiry, platforms such as Google and Facebook possess substantial market power and providing them with a safe harbour would further exacerbate the imbalance between these companies and the copyright owners seeking to extract fair value from their copyright works.

#### **Question 60: search engines and safe harbour**

167 We have already partially addressed the position of search engines in the preceding question about the definition of ISP.

168 Search engines are important gateways for users to find and access infringing content. Research in the US indicates that 74% of users said they used a search engine to discover or navigate to domains with infringing content.<sup>119</sup> That same research also found that 20% of all visits to infringing content were influenced by a user searching for content on a search engine.<sup>120</sup>

169 Closer to home, research by Screen Audience Research International in Australia found that 50% of people who pirate content use a search engine at some point to navigate to a specific infringing content. That same study found that over 70% of new “pirates” use searches as their way into finding pirate sites, of which 44% claiming they were not looking for infringing content when they found the pirate sites in search results.<sup>121</sup>

170 Search engines have the ability to limit access to or at least make it more difficult to discover piracy sites. Research indicates that these steps have a significant impact on users accessing pirate websites.<sup>122</sup>

171 Despite acting as a gateway to piracy, many mainstream search engines do little to tackle piracy. Many search engines will only take steps to demote or de-list search results when forced to by government agencies. But when it comes to copyright owners, in New Zealand our experience is that the search engines resist doing anything to stop copyright infringement and even sometimes promote and advertise infringing websites. For example, type “free movies” into Google and the first result, an advertisement, is for

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<sup>119</sup> Millward Brown Digital “Understanding the Role of Search in Online Piracy” (2014) at 2.

<sup>120</sup> Millward Brown Digital “Understanding the Role of Search in Online Piracy” (2014) at 3.

<sup>121</sup> Screen Audience Research International “The Role of Search in Content Piracy – Australian Survey Key Findings” (March 2018) at 7–19.

<sup>122</sup> Screen Audience Research International “The Role of Search in Content Piracy – Australian Survey Key Findings” (March 2018) at 29; L Sirvan, M Smith, R Telang “Do Search Engines Influence Media Piracy” (2014) Heinz College Research.

[www.123movies.guide/Full+movies](http://www.123movies.guide/Full+movies), a site that gives links to illegally stream movies like *Captain Marvel*.<sup>123</sup>

- 172 As we have suggested earlier, we consider that the relationship search engines – as they operate today – have in relation to the content is an active one, and therefore should not come within the definition of “ISP” or be given a safe harbour. Instead, search engines should be liable for authorisation infringement unless they follow a mandatory code that defines the required steps to prevent access to infringing content.<sup>124</sup>

### **Question 61: impact of safe harbour on commercial relationships**

- 173 Whether or not the safe harbour provisions distort commercial relationships depends on the size of the safe harbour. As we have said above, where it protects just traditional ISPs providing a “mere pipe” service, then there is no issue. But where the online platform monetises content – as search engines and sites like YouTube do – then they can and do look to safe harbours to protect their business model at the expense of copyright owners.
- 174 Safe harbours are not meant to give online platforms that actively use content a free licence to allow their users to infringe copyright. And yet, our members’ experience is that online platforms often use the fact that there is a safe harbour to refuse to negotiate a licence or to drive the licence fee down.
- 175 This use of safe harbours to drive the price down or get content for free, does not just alter the commercial relationship between copyright owners and online platforms. It also alters the commercial relationship between copyright owners and legitimate licensees, which in turn impacts the ability to invest in new content.
- 176 Film and television requires extensive fundraising before production can begin. A critical component to getting financing includes being able to offer exclusive distribution rights. For example, why would a broadcaster pay large licence fees to show, say *Last Week Tonight with John Oliver*, if that content is uploaded to YouTube without YouTube being required to do anything to stop that illegal content? And why should YouTube or the user who uploaded the content be able to profit off any advertising revenue or other income generated by showing the infringing content?
- 177 Without being able to promise exclusivity, including by agreeing to take action to stop infringement, commercial relationships are degraded and the value

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<sup>123</sup> Search query results on google.co.nz on March 15, 2019. For perspective, Google Transparency Project shows that Google has taken down URL’s on over 900 domains associated with the 123movies brand. The top 50 of these domains alone have received over 1.8 million individual notices. Despite this Google Search continues to accept advertisements from suspicious 123movies domains. Data on File with ANZSA. See Appendix 5 for search result.

<sup>124</sup> See paragraph 76.

paid for less exclusivity drops accordingly, meaning that there is less money to generate new content.

- 178 While New Zealand is a small market, the issue is the same here as it is around the world: copyright law must strike a balance between copyright owners and the online platforms that depend on copyright owners' proprietary content. Those that play a passive role, like ISPs, should enjoy safe harbour where they discharge their obligations to curb piracy. Those platforms more actively engaged with other people's content must be blocked from entering any safe harbour regime and be encouraged to enter into a license arrangement with the content owner or ensure no access is given to the content.

### **Question 62: changes to safe harbour regime**

- 179 If the definition of ISP is properly restricted to the first limb of those providing internet services, we consider that the safe harbour regime only needs to be amended slightly to address some shortcomings. If, however, the current broad definition of ISP is maintained, capturing both passive and active service providers, then the safe harbour regime needs to be significantly overhauled.

#### *The safe harbour regime for a narrowly defined ISP*

- 180 The current safe harbour provisions provide too broad an immunity to ISPs and places too much of the burden on copyright owners. For ISPs to take advantage of Safe Harbours they are required to take steps to limit their users' copyright infringement after being notified by a copyright owner:

180.1 sending infringement notices to a user and, if the District Court makes an order, suspending that user's access for the ordered period;<sup>125</sup> and

180.2 taking down or prevent access to material that the ISP stores.<sup>126</sup>

- 181 Both steps are limited in their effectiveness.

- 182 The infringing file-sharing process is ineffective for four reasons:

182.1 It is limited to file sharing when increasingly infringement takes place by streaming.

182.2 It requires copyright owners to identify a specific user infringing copyright when often the copyright owner will not be able to so.

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<sup>125</sup> Copyright Act 1994, ss 122C–122F. 122P.

<sup>126</sup> Copyright Act 1994, ss 92C–92E.

182.3 It targets the users, rather than the source of the illegal content.

182.4 And the process takes time and expense, with three different notices (each costing \$25), and then having to apply to the Copyright Tribunal or the District Court for compensation or orders to suspend an account for up to 6 months.

183 Like the peer-to-peer file sharing provisions, the provisions requiring ISPs to disable access to infringing materials when put on notice is also too limited because it only applies to ISPS that store content. Also, because of the relative ease for users to simply re-upload their content on the same platform or elsewhere, the notice and takedown provisions do not prevent the rapid reappearance of infringing content.

184 We consider that these deficiencies can be addressed by removing the limitation that the ISP stores content, as the focus should be on whether the ISP facilitates access to the infringing materials.

*Changes to the safe harbour provisions if a wide definition of ISP is kept*

185 If the wide definition of “ISP” is retained, encompassing both active and passive services, then major changes to the safe harbour provisions would be required to take account of both the passive and active users of content. For example, if active users of content, like YouTube or some search engines, came within the definition of “ISP” then they should be required to take active steps to prevent access to or take down infringing content, rather than just sit back and wait until copyright owners notified them of the particular content that had to be taken down. Further, intermediaries who have an active relationship with the content they provide access to should also be required to account for any profit, like advertising revenue, made from allowing access to the copyright material.

186 These are only examples of some of the changes that would be required if a wide definition of ISP is adopted. However, because we consider that a narrow definition should be adopted we have not fully developed all the changes to the safe harbour provisions. Those changes would be necessary to ensure that the burden on preventing copyright infringement is fairly distributed and falls, at least in part, onto the ISPs that actively use content. Furthermore, as we have stated in paragraph 76, we believe these conditions should be set out under authorisation liability, not under safe harbours.

## Transactions (Part 6)

187 Copyright is directed at incentivising creators to make and disseminate original works. Copyright protection does that by giving the owners exclusive rights over qualifying work. Those rights prevent others from exploiting the work which enables the owner to commercialise the creativity where possible. Copyright owners may earn a commercial return from copyright in three ways:

187.1 by performing the exclusive rights for a fee or selling the product of those rights for a fee;

187.2 by licencing others to exploit some or all of the exclusive rights for a set fee or a return on the fees charged by the exclusive licence; or

187.3 by transferring some or all of the exclusive rights to another person for a fee or a return on the fees charged by the new owner.

188 Each revenue stream needs protecting with the copyright owner entitled to choose what they want to do with their work. In this section we do not engage with the questions about CMOs or the Copyright Tribunal, but address orphan works.

### Questions 71–74: orphan works

189 We acknowledge that orphan works can cause some problems for creators who wish to use them to create new works. Our members do not generally encounter orphan works. But when they do encounter orphan works, they tend to steer clear of using the orphan works because of the uncertainty around them.

190 To address the problem that orphan works can create, we suggest that the use of orphan works should be treated as innocent infringement provided that reasonable diligence has been made to track down the copyright owner. The Copyright Act could be amended by incorporating a provision that if the user (and not a third party) has conducted a reasonably diligent search for the copyright owner before using the work, and has been unable to identify that owner (and therefore cannot obtain a licence), the subsequent use of the orphan work is treated as an innocent infringement under s 121(1) of the Copyright Act.

191 However, if the copyright owner later comes forward, we consider that as with innocent infringement, the user may have to account for profit, but should not be liable for damages. As a matter of principle, there is no justifiable basis why the owner should be prevented from being compensated for use of his or her copyright work. We also think that from a practical perspective, if the user

didn't have to account for profit or pay a licence fee, the lack of consequences would encourage users to carry out limited searches for the owner of works.

- 192 We think that the goal of an orphan works regime is to provide the opportunity for uses of works for which the copyright owner cannot be found following a diligent search, not to maximize the volume of uses undertaken without the knowledge or permission of the copyright owner. For that reason, we do not support any permissive exceptions allowing orphan works to be used without any liability for paying for that use.



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## Enforcement of copyright (Part 7)

- 193 Effective enforcement is critical for copyright to fulfil the objectives of rewarding creators and incentivizing the creation of new works. Practically speaking, if copyright is not easily enforced it does not and cannot deter infringement.
- 194 Strengthening enforcement to deal with online infringement is a key area for improvement.
- 195 Twenty years ago, photocopiers were still the biggest threat to creative effort. But now, of course, infringement typically takes place online. If you want to read a book, watch a movie, stream live sport, get an image of an artwork and so on you can do so quickly and often for free.<sup>127</sup> Equally, because of advances in technology, it is now often cheaper and quicker for an infringer to copy and disseminate an illegal copy of a work compared to the rights holder producing and distributing legitimate copies.
- 196 Of course, trying to deal with copyright infringement on the internet is difficult because the people who host or make available the infringing copies are difficult to identify and can have multiple servers scattered around the world.<sup>128</sup>
- 197 Throttling online infringement requires a system that allows copyright owners to efficiently and effectively stop people in New Zealand accessing those infringing sites. Then there's the education angle: New Zealanders need to understand copyright infringement and the harm it does to creative industries.

### Question 76: establishing copyright ownership

- 198 It is not difficult for owners to establish they own the copyright in a movie or television programme. Section 128 of the Copyright Act says that statements in a film identifying the producer and director, is evidence of authorship, directorship and ownership. Importantly, the section also states that these statements are presumed to be correct.<sup>129</sup>
- 199 Section 128 also enables others with an interest in the work, like successors in title or licensees, to rely on the statements in the film about ownership and then, via contract, prove that they have acquired the rights in question.

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<sup>127</sup> Although with the dangers of also getting other things for free, like malware.

<sup>128</sup> According to the EU's Counterfeit and Piracy Watch-List, US-based Cloudflare is accused of offering services to approximately 40% of the world's pirate sites, helping to anonymize their operators and hide sites' true hosts. Out of the top 500 infringing domains based on global Alexa rankings, 62% (311) are using CloudFlare's services, <[http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc\\_157564.pdf](http://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157564.pdf)>

<sup>129</sup> Copyright Act 1994, s 128(3).

### **Question 77: problems reserving legal action to owners and licensees**

- 200 There is no issue with reserving legal action to copyright owners and exclusive licensees. Like other intellectual property rights, copyright encompasses a bundle of rights personal to the owner(s) and/or exclusive licensees. It should be up to the owner or licensee to decide whether they want to enforce the rights or not, not someone else.
- 201 As we have said already in this submission, we would support a change in the law so that an exclusive licensee alone can sue for infringement provided that they show they have given notice to the copyright owner. The law should not compel copyright owners to be involved in infringement proceedings,<sup>130</sup> as that only increases the costs involved for everyone making it harder to enforce copyright, thereby decreasing its value. Proving (by, say, affidavit) that the copyright owner has notice of the proceedings but has chosen not to be involved should be enough.

### **Question 80: groundless threats**

- 202 We do not see groundless threats as an issue. We are not aware of groundless threats being made in New Zealand. We also note that groundless threats are much more of a patent matter where patentees – for sound public policy reasons – are discouraged from threatening infringement unless they have complete faith that their patent is valid.

### **Question 82–84: infringing file-sharing**

- 203 While illegally streaming content has picked up, peer-to-peer (**P2P**) file sharing is still being used to infringe copyright. We need only point to the Pirate Bay, a P2P file sharing site, perennially in the top websites accessed by New Zealanders.<sup>131</sup>
- 204 But it is fair to say that the infringing file sharing regime is not widely used, if used at all. There are two reasons for that:
- 204.1 First, there is a high cost to using this regime. In addition to the filing fees, copyright owners incur their own costs in engaging in the process, being both administrative and legal costs.
- Second, there is little use in having a single user's access being restricted at the end of what is a lengthy process. Stopping a single user does nothing to reduce overall copyright infringement, except perhaps send an appropriate

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<sup>130</sup> See Copyright Act 1994, s 124.

<sup>131</sup> <https://www.alexa.com/topsites/countries/NZ>.

message that infringement is unacceptable. **Questions 85–87: ISP involvement in stopping online infringement**

205 We think the best option that copyright owners have to stop copyright infringement in an online environment is to go to the root of the problem and prevent users from accessing infringing websites. The most common way to do this is for copyright owners to seek site-blocking orders requiring ISPs to block specific sites or domains of those sites.

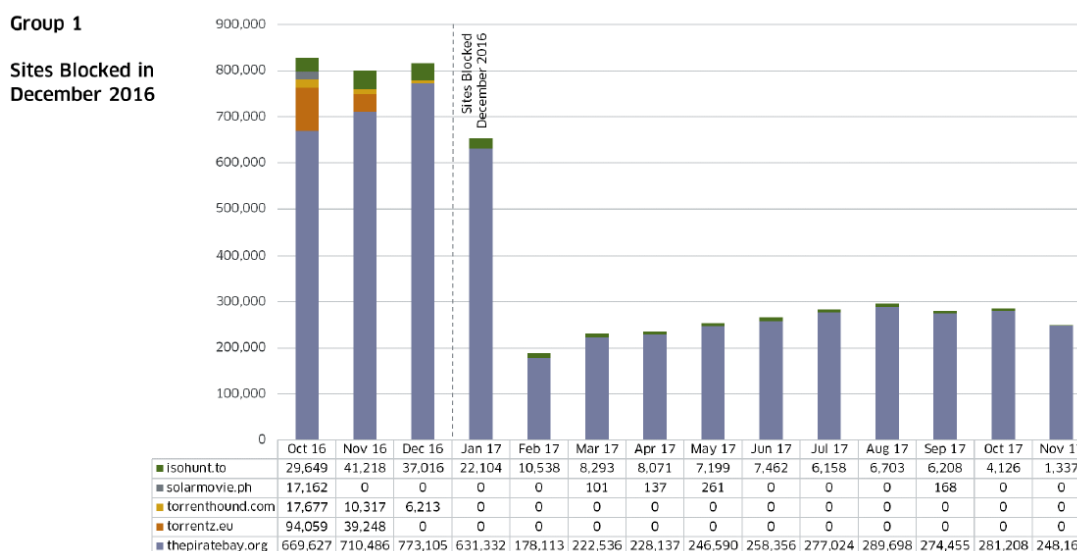
206 We accept that site-blocking orders do not eliminate all piracy. No single action ever will. But the site-blocking orders do throttle the public’s access to and use of pirate sites and, perhaps more importantly, they also send a valuable message to the community, through landing pages and associated publicity, that copyright piracy is illegal and consumers should opt for trusted licensed viewing platforms instead.<sup>132</sup> A recent Australian report, for instance, found that within 11 months of the first site blocking orders in Australia:<sup>133</sup>

206.1 use of the 347 blocked sites decreased by 53.4%;

206.2 use of the top 50 infringing sites decreased by 35.1%; and

206.3 overall use of the top-250 sites decreased by 25.4%.

207 The report’s graphic illustration of those numbers is telling:



<sup>132</sup> See for example: Incopro, “Site Blocking Efficacy Study: United Kingdom” (13 November 2014); Incopro, “Site Blocking Efficacy: Australia” (February 2018); Australian Department of Communications and the Arts, “Consumer Survey on Online Copyright Infringement 2018” (June 2018)

<sup>133</sup> Incopro, “Site Blocking Efficacy: Australia” (February 2018).

208 Plainly site-blocking orders can substantially deter access to pirate sites. And deterring access is important because, as an Australian government study found:<sup>134</sup>

208.1 57% of people said they would give up looking for unauthorised content if they were faced with a blocked site; and

208.2 34% said they would then seek an alternative lawful platform.

209 A causal relationship has also been established between site blocking and increased legal consumption. Researchers at Carnegie Mellon published a paper based on two court orders: the blocking order directed at The Pirate Bay in May 2012, and blocking orders directed at 19 major piracy sites in October and November 2013.<sup>135</sup> The paper concludes that when 19 sites were blocked access to pirated sites overall fell by 30%, while there was also a causal 12% increase in traffic to legal sites. As the authors note in their abstract:

*“Our results show that blocking The Pirate Bay only caused a small reduction in total piracy — instead, consumers seemed to turn to other piracy sites or Virtual Private Networks that allowed them to circumvent the block. We thus observed no increase in usage of legal sites. In contrast, blocking 19 different major piracy sites caused a meaningful reduction in total piracy and subsequently led former users of the blocked sites to increase their usage of paid legal streaming sites such as Netflix by 12% on average. The lightest users of the blocked sites (and thus the users least affected by the blocks, other than the control group) increased their clicks on paid streaming sites by 3.5% while the heaviest users of the blocked sites increased their paid streaming clicks by 23.6%, strengthening the causal interpretation of the results. Our results suggest that website blocking requires persistent blocking of a number of piracy sites in order to effectively migrate pirates to legal channels, but also that the increased availability of legal digital services can make antipiracy efforts more effective.”*

210 Site-blocking is commonly ordered throughout the world, including in the UK, Australia and Singapore. New Zealand should follow suit. While we think that site-blocking orders can be granted under s92B of the Copyright Act and/or the High Court’s inherent jurisdiction, we think that making jurisdiction crystal clear in legislation is the best course. Doing so will reduce uncertainty and

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<sup>134</sup> Australian Department of Communications and the Arts, “Consumer Survey on Online Copyright Infringement 2018” (June 2018).

<sup>135</sup> B Danaher, M Smith and R Telang, “The Effect of Piracy Website Blocking on Consumer Behaviour” (2015, revised 2018) Carnegie Mellon <  
[https://www.researchgate.net/publication/314471814\\_The\\_Effect\\_of\\_Piracy\\_Website\\_Blocking\\_on\\_Consumer\\_Behavior](https://www.researchgate.net/publication/314471814_The_Effect_of_Piracy_Website_Blocking_on_Consumer_Behavior)>.

increase efficiency by recording exactly how and when an injunction can be granted.

211 In striking the balance between copyright owners and ISPs, one of the main issues will be costs allocation. If ISPs have to bear all the costs then, while in isolation this may not be too onerous, cascading requests to block sites may see ISP compliance costs add up over time. By the same token, if copyright owners have to pay costs, including the cost of creating or updating the ISPs' technology to block sites, then that is plainly unfair and will put the regime beyond rights holder's ability to use it. The best approach is a balance like that achieved in the UK. There the position is as follows:

211.1 ISPs cover all the cost of establishing the capability to block sites; these costs being an ordinary cost of business for most ISPs around the world; and

211.2 copyright owners cover the ISPs' administration costs for blocking the specific websites and maintaining the site-blocks (which in Australia the courts have set at AU\$50 per domain per ISP group).

212 An effective way to keep costs down is to set up an administrative site-blocking regime with the Copyright Tribunal making site-blocking orders. This approach avoids the expense and delays in applying to the Courts for orders. Similar administrative regimes have been created by countries in the EU and Asia, and the United Kingdom is considering following suit.<sup>136</sup> We think that New Zealand should too.

#### **Question 88: criminal offences and sizes of the penalties**

213 Copyright is personal property. Where someone knows that they are infringing copyright by carrying out the exclusive rights without a licence they are effectively stealing from the copyright owner (if you take any piece of tangible personal property without permission you have committed a Crimes Act 1961 offence). Section 131 of the Copyright Act recognises that intangible property is little different with criminal sanctions available against those who knowingly infringe copyright for commercial benefit.<sup>137</sup>

214 We see no problem with a criminal offence for knowingly infringing copyright. Indeed, the TRIPS Agreement requires signatories have such an offence on

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<sup>136</sup> Intellectual Property Office, *UK Government response to the call for views regarding illicit IPTV streaming devices*. page 2, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/750177/Gov-Response-call-for-views-Ilicit-IPTV.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750177/Gov-Response-call-for-views-Ilicit-IPTV.pdf)

<sup>137</sup> *Wang v Police* HC Auckland CRI-2004-404-476, 23 March 2005 at [39].

the books.<sup>138</sup> Similar criminal provisions exist in other member states, including the UK, Australia and the US.

- 215 The penalty for knowingly infringing copyright depends on what form the infringement takes. Where the knowing infringement relates to dealing with an infringing copy, the fine is capped at \$10,000 for each infringing copy, with the total not exceeding \$150,000. For illegal public performances, the fine is up to \$150,000. As well as a fine, in both cases the infringer can also be imprisoned for up to five years.
- 216 We see nothing wrong in the maximum level of penalties. In *Wang v Police Baragwanath J* observed that infringing section 131 is “tantamount to dishonest dealing in another’s property” and the “five year maximum is short” of other comparable offending.<sup>139</sup>
- 217 We note that even in serious cases, the Courts seem to adopt a low starting point. In *Police v Vile*, one of the few cases where a person was prosecuted for infringing section 131, the Court decided that a period of imprisonment for 9 months was appropriate (with the possibility of serving that on home detention) as well as having to pay reparation.<sup>140</sup> The Court described the type of offending there as “serious, sophisticated [and] commercial.”<sup>141</sup>
- 218 Finally, it is useful to note that overseas jurisdictions have much higher penalties than New Zealand. In Canada an offender can be fined \$1m or sent to prison for five years.<sup>142</sup> Similarly, in the UK offenders convicted of an indictable offence can be sentenced to prison for up to 10 years or an unlimited fine imposed.<sup>143</sup>
- 219 While the higher penalties overseas may be attractive where there are larger markets, we consider that the current penalties are appropriate for the New Zealand context. On that basis, we suggest no change should be made to section 131.

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<sup>138</sup> TRIPS Agreement, article 61.

<sup>139</sup> *Wang v Police* HC Auckland CRI-2004-404-476, 23 March 2005 at [39].

<sup>140</sup> *Police v Vile* [2007] DCR 24.

<sup>141</sup> At [38].

<sup>142</sup> Copyright Act 1985 (RSC), s 42.

<sup>143</sup> Copyright, Designs and Patents Act 1988 (UK), s 107.

## Conclusion

The New Zealand Film & TV Bodies appreciate the opportunity to provide feedback and reiterate that it supports a strong copyright framework which fairly rewards creators, incentivizes the creation of copyright works to be enjoyed at home and abroad and provides consumers with a wide variety of good quality film and television content. We are available to provide further information on request.

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## Appendix 1: Full descriptions of members of the New Zealand Film & TV Bodies

**Australia New Zealand Screen Association (ANZSA)** represents the film and television content and distribution industry in Australia and New Zealand. Its core mission is to advance the business and art of film making, increasing its enjoyment around the world and to support, protect and promote the safe and legal consumption of movie and TV content across all platforms. This is achieved through education, public awareness and research programs, to highlight to movie fans the importance and benefits of content protection. ANZSA has operated in New Zealand since 2005 (and was previously known as the New Zealand Federation Against Copyright Theft and the New Zealand Screen Association). ANZSA works on promoting and protecting the creative works of its members. Members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Netflix Inc.; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc., and Fetch TV.

**Home Entertainment Association of New Zealand (HEANZ)** was formerly known as the Video Association of New Zealand (VANZ). HEANZ is a non-profit entity that deals with regulation and administration within the New Zealand Home Entertainment Industry, particularly in relation to the distribution of film, television and documentary product into the home entertainment market i.e. DVD, Blu-Ray and online. The members of HEANZ are: Universal Pictures (which also distributes titles of 21st Century Fox and Paramount Pictures); Roadshow Entertainment (which also distributes titles of Warner Bros.) and; Sony Pictures (which also distributes titles of Walt Disney Studios).

**National Association of Cinema Operators – Australasia (NACO)** is a national organisation established to act in the interests of all cinema operators in Australia, New Zealand and the Pacific. NACO members include the major cinema exhibitors Event Hospitality and Management Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, as well as prominent independent exhibitors Reading Cinemas, Palace Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners which together represent over 1400 cinema screens across Australia and New Zealand, 235 of which are in New Zealand.

**New Zealand Motion Picture Distributors Association (NZMPDA)** is a non-profit entity that deals with regulation and administration within the New Zealand Motion Picture Industry, particularly in relation to the distribution of theatrical films. The NZMPDA is responsible for the collection and reporting of national box office takings, together with the preparation and distribution to the exhibition sector of weekly release schedules. Member companies of the NZMPDA are Paramount Pictures NZ, Walt Disney Motion Pictures, Roadshow Entertainment NZ (holding the Warner Bros



Theatrical License), Sony Pictures Releasing, Twentieth Century Fox (also holding the Universal Pictures Theatrical license). These member companies contributed approximately 84% of the total National box office in 2018 which totalled \$203 million.

**New Zealand Motion Picture Industry Council (NZMPIC)** is an informal body that was established in 2009 to allow for a cohesive approach to broader industry issues, with a particular focus on strong copyright protection as all its members rely on this for the investments they make day in day out, from the investment in films to the investment in new cinemas and cinema upgrades, which create jobs around the country. It is also responsible for planning and hosting an annual Motion Picture Industry conference for the exhibition sector.

The council members include all the major and several independent film distribution companies, the Film Video & Labelling Body, the major exhibition chains and the Independent Exhibitors Association. NZMPIC members have distributed 9 out of the top 10 New Zealand films by box office performance during the past five years and are responsible for 82% of the box office realised by New Zealand films over that period.

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## Appendix 2: Analysis of changes in release windows between New Zealand and US theatrical release dates.

One ‘availability’ concern often mentioned is the perceived delay between US and the New Zealand theatrical release dates. Whilst there may be many valid reasons for differences in release dates,<sup>144</sup> the industry recognises that consumers’ expectations on availability of content have been changing and distributors have responded with reduced international windows<sup>145</sup> where commercially feasible. Over the past 15 years the industry has made a concerted effort to take such an approach, and in analysing the facts, it becomes readily apparent that the perception of delay is in fact just that.

We analysed the difference in theatrical release dates between New Zealand and the US using data from the New Zealand Motion Pictures Distributors Association.<sup>146</sup> We looked at the top 100 films released for a number of years between 2002 and 2018 (see table below). Out of these we selected all films which were also released in the US and omitted New Zealand films (as such films are usually released in New Zealand well before the US, making the theatrical window look artificially smaller than it actually is). This selection represented 80% of total box office revenue in the years reviewed. This analysis clearly shows that the windows between releases in the US and New Zealand have been reduced significantly over the years, from films being released 72 days earlier in the US than New Zealand in 2002, to just 4 days in 2018. Additionally, of the 91 films in our selection in 2018, 46 were released in New Zealand before they were released in the US. By comparison, in 2002 only 6 out of the 94 films were released in New Zealand before the US.

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<sup>144</sup> Reasons include:

- the opposing seasons between the Northern and Southern Hemisphere and the corresponding timing differences for school holidays;
- the finite capacity of screens and therefore the capacity to actually screen films at any given point in time (40,000 in the US versus 450 in New Zealand);
- the choice of a content owner to test a film in one market before committing to the significant marketing and distribution expenses required to release a film globally; or
- simply the competitive nature of the negotiations for those independent films where rights are not held by one entity across the world.

<sup>145</sup> Please note that distributors determine windows individually. The material submitted here is aggregated industry information.

<sup>146</sup> Data on file with the New Zealand Motion Pictures Distributors Association.

Year	Difference in average window of release between US and New Zealand (in days)	Difference in weighted average window between US and New Zealand (in days and weighted by NZ Box Office)	Number of top 100 films released in New Zealand prior to US
2002	-72.31	-43.53	6
2005	-46.96	-26.67	14
2007	-34.81	-19.95	16
2010	-26.30	-16.74	29
2012	-19.04	--8.65	35
2014	-14.17	-10.99	35
2016	-9.30	-8.82	47
2018	-4.16	-2.84	46

## Appendix 3: Analysis of EST and TVOD pricing in New Zealand, Australia, UK and USA: pricing is in line with major comparable markets

We have collated the most recent available data and compared the prices for legal digital content platforms across New Zealand, Australia, the UK and the US. The data below shows that there is no material difference in the affordability for movies on digital platforms in New Zealand versus other key markets.

Movies in Electronic Sell-Through (EST, also known as Download-To-Own) format are exceptionally good value in New Zealand. In the Standard Definition (SD) format, New Zealand is cheaper than the comparison markets, and for the High Definition (HD) format New Zealand prices are below Australia and the United States.

EST (US\$)	2013	2014	2015	2016	2017	2018
New Zealand SD	13.00	15.06	12.60	12.54	12.03	12.43
Australia SD	15.66	15.07	12.39	12.50	12.01	12.87
UK SD	13.90	14.72	11.50	11.77	10.92	14.21
US SD	14.18	14.59	14.65	14.34	13.77	12.80
New Zealand HD	15.71	16.75	14.15	14.59	14.15	14.45
Australia HD	21.34	19.94	15.39	14.33	14.13	14.68
UK HD	17.79	19.35	15.00	12.45	13.03	12.17
US HD	18.03	17.36	17.14	16.04	15.63	14.58

For Transactional Video on Demand (TVOD), New Zealand is broadly in line with the comparison markets, just fractionally above the other three on SD, but just below the United Kingdom on HD.

TVOD (US\$)	2013	2014	2015	2016	2017	2018
New Zealand SD	4.75	4.91	4.16	4.16	4.36	4.92
Australia SD	4.42	4.30	3.85	3.92	4.02	4.66
UK SD	4.63	4.99	4.26	4.34	4.12	4.78
US SD	3.71	3.95	4.29	4.43	4.29	4.61
New Zealand HD	6.53	6.63	5.22	5.05	5.15	5.41
Australia HD	5.27	5.12	4.54	4.49	4.67	5.00
UK HD	6.41	6.76	5.56	4.85	5.18	5.56

### About the data:

The Australian Home Entertainment Distributors Association commissions IHS Screen Digest each year to measure VOD and EST pricing across both the Standard Definition and High Definition formats. For those services where an automated price check is supported (approximately one third of services), this analysis includes the pricing of the entire catalogue of such a service – usually exceeding thousands of

titles. For the services where automatic price-checking is not facilitated (approximately two thirds of services covered) a manual review is performed on the basis of a sample of the Top 50 new release titles in each format at the time (these typically represent approximately 60% of sales in any given period)

- All pricing data is cleared from GST/VAT/Sales Tax.
- VOD includes both internet VOD and VOD delivered within a Pay-TV environment.
- Exchange rate forecasts are fixed to those of the last complete calendar year.
- 2018 using Q3 2018 exchange rate' column recalculates average 2018 prices based on Q3 2018 exchange rate.

## Appendix 4: Facebook Ad-Manager – micro-targeting based on interest in online infringement.

The screenshot displays the Facebook Ad Manager targeting interface for an ad set named "NZ - 18+". The interface is divided into several sections:

- Ad set name:** NZ - 18+ (with a gear icon for settings).
- Switch to Quick Creation:** A button in the top right corner.
- Targeting Options:**
  - Create new / Use a saved audience:** A dropdown menu.
  - Custom Audiences:** A text input field with "Add a previously created Custom or Lookalike Audience" and "Exclude | Create new" options.
  - Locations:** A dropdown menu set to "Everyone in this location". Below it, "New Zealand" is selected. A map of New Zealand is shown with a pin on the North Island. Below the map are "Add locations in bulk", "Age" (18 - 65+), "Gender" (All, Men, Women), and "Languages" (Enter a language...) fields.
  - Detailed targeting:** A section titled "INCLUDE people who match at least ONE of the following". It lists interests: "Copyright infringement", "Popcorn Time", "The Pirate Bay", and "Torrentz". Below the list are "Add demographics, interests or behaviours", "Suggestions", and "Browse" options.
- Summary Panel (Right Side):**
  - Audience size:** A gauge showing "Your audience selection is fairly broad." with "Specific" and "Broad" markers.
  - Potential reach:** 14,000 people.
  - Estimated daily results:**
    - Reach:** 2.4K-6.9K (with a progress bar).
    - Post Engagement:** 42-264 (with a progress bar).
  - Disclaimer:** "The accuracy of estimates is based on factors such as past campaign data, the budget you've entered and market data. Numbers are provided to give you an idea of performance for your budget, but are only estimates and don't guarantee results."
  - Feedback:** "Were these estimates helpful?"
- Tip:** A blue callout box states: "Tip: Adding more options here will make your audience bigger. To refine your audience, use the links below to exclude people or narrow based on other details."

## Appendix 5: Google.co.nz search query 15 March 2019

3/15/2019 "free movies" - Google Search

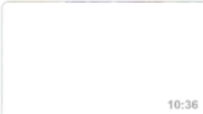


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