MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

14 May 2019

Mr Nick Hambly

Email: fyi-request-9950-8c1db1e8@requests.fyi.org.nz
cc: benevolentnick@gmail.com

Ref: OIA 1819-1428

Dear Nick

Thank you for your email of 28 March 2019 to the Ministry of Business, Innovation and Employment (MBIE) requesting information under the Official Information Act 1982 (OIA). Further to our requests for clarification on 4 and 9 April 2019, you clarified your request on 12 April 2019 as (verbatim):

> *"a. When creating the Cabinet approval paper, MBIE would have needed to full a study to assist the Minister with the requirement to notify cabinet if any or other pieces of legislation are deemed to potentially be affected by the review process. The Minister notified None. So would like to know how and by what means did this answer become justified.*
>
> *a.*
> *i. Are any non-ministry staff a party to this review-other than those who have participated in formal information sharing undertaken and stipulated in the Review Guidelines.*
> *ii. The foundational documents required for this Review process. Was it strictly by internal process?. if not by whom (title ie. Contractor or lobbyist) and how was such information transferred to the team tasked with this Review process.*
>
> *b.*
> *i. Would like any framework or guidelines/documents/internal memo's on this process.*
> *ii. The titles of the parties took part in this process.*
> *iii. Any outside parties eg from which ministry or outside organisation did they belong to.*
> *iv. If it was an external party by which authority where they deemed as required to be a party to.*
> *v. Did or does this external party maintain any consideration for the passage of the Review.*
>
> *c. After initial Submissions-*
> *i. which other Ministries or external parties are part of this stage of the process.*
> *ii.What guiding principles or defined statements are associated with these 'external parties'*
> *iii. The defined 'next stage'*
>
> *d.*
> *i. What and how does the review ensure International Treaty obligations are followed? Are these obligations a living consideration? If so, what and how does this dialogue manifest itself."*

Because your request is broad and contains a number of elements, for ease of reference I re-list the reference lettering of your request below followed by the response to each particular element in Attachment 1 to this letter.

Some information has been withheld under section 9(2)(a) of the Official Information Act 1982 to protect the privacy of natural persons. I do not consider that withholding this information is outweighed by public interest considerations in making this information available. As noted in the table in Attachment 1, other information is either already publicly available or does not exist.

I trust you find this information helpful. You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at www.ombudsman.parliament.nz or freephone 0800 802 602.

Yours sincerely

Susan Hall
Manager, Business Law
Commerce, Consumers and Communications
Ministry of Business, Innovation and Employment

Attachment 1: Table of documents and responses

Request reference		Title(s) and date(s) of document	Response	Applicable OIA withholding provision
a	When creating the Cabinet approval paper, MBIE would have needed to full a study to assist the Minister with the requirement to notify cabinet if any or other pieces of legislation are deemed to potentially be affected by the review process. The Minister notified None. So would like to know how and by what means did this answer become justified.	n/a	Impact on other legislation to be assessed at future stage of review, depending on preferred option(s) for change.	Section 18(e): document does not exist
a(i)	Are any non-ministry staff a party to this review-other than those who have participated in formal information sharing undertaken and stipulated in the Review Guidelines.	n/a	No non-MBIE staff have been party to review outside of formal processes.	n/a
a(ii)	The foundational documents required for this Review process. Was it strictly by internal process? if not by whom (title ie. Contractor or lobbyist) and how was such information transferred to the team tasked with this Review process.	Review of the Copyright Act 1994: Terms of Reference (June 2017) Cabinet paper (Terms of Reference) (June 2017)	Internal process. Both documents publicly available online at: https://www.mbie.govt.nz/business-and-employment/business/intellectual-property/copyright/review-of-the-copyright-act-1994/	Section 18(d): document is publicly available

Request reference		Title(s) and date(s) of document	Response	Applicable OIA withholding provision
		Briefing 3186: Potential Copyright Act review – options and supporting material (27 April 2017) Briefing 3629: Proposed review of the Copyright Act 1994: Release of Terms of Reference (24 May 2017) Briefing 2126: Review of the Copyright Act 1994: Issues Paper and Cabinet Paper (5 June 2018) (Note that the Annexes 1-3 for Briefing 2126 are available online at https://www.mbie.govt.nz/business-and-employment/business/intellectual-property/copyright/review-of-the-copyright-act-1994/)	n/a	Section 9(2)(a): protect the privacy of natural persons
b(i)	Would like any framework or guidelines/documents/internal memo's on this process.	Businss Growth Agenda Innovation Ministers' Meeting: Background information – Study into the role of copyright and designs in the creative sector (7 December 2016) Briefing 2060: Proposed next steps following release of the *Copyright and the Creative Sector* report (1 February 2017) Briefing 1268: Review of the Copyright Act 1994 (1 December 2017)	n/a	Section 9(2)(a): protect the privacy of natural persons

Request reference		Title(s) and date(s) of document	Response	Applicable OIA withholding provision
b(ii)	The titles of the parties took part in this process.	n/a	Minister of Commerce and Consumer Affairs Manager Principal Policy Advisor Senior Policy Advisor Policy Advisor Graduate Policy Advisor	n/a
b(iii)	Any outside parties eg from which ministry or outside organisation did they belong to.	n/a	Minister of Commerce and Consumer Affairs Ministry of Culture and Heritage Ministry of Foreign Affairs and Trade Te Puni Kōkiri Te Arawhiti Department of Internal Affairs The Treasury Ministry of Justice Crown Law Customs Ministry of Education	n/a

Request reference		Title(s) and date(s) of document	Response	Applicable OIA withholding provision
b(iv)	If it was an external party by which authority where they deemed as required to be a party to.	n/a	Government agencies with overlapping mandate and interests.	n/a
b(v)	Did or does this external party maintain any consideration for the passage of the Review.	n/a	Yes.	n/a
c(i)	After initial submissions - which other Ministries or external parties are part of this stage of the process.	n/a	Minister of Commerce and Consumer Affairs Ministry of Culture and Heritage Ministry of Foreign Affairs and Trade Te Puni Kōkiri Te Arawhiti Department of Internal Affairs Ministry of Justice Customs Ministry of Education	n/a
c(ii)	What guiding principles or defined statements are associated with these 'external parties'	n/a	None.	Section 18(e): document does not exist
c(iii)	The defined 'next stage'	n/a	Publicly available online at:	Section

Request reference		Title(s) and date(s) of document	Response	Applicable OIA withholding provision
			https://www.mbie.govt.nz/business-and-employment/business/intellectual-property/copyright/review-of-the-copyright-act-1994/	18(d): document is publicly available
d(i)	What and how does the review ensure International Treaty obligations are followed? Are these obligations a living consideration? If so, what and how does this dialogue manifest itself.	Review of the Copyright Act 1994: Issues Paper	A proposed objective of copyright in New Zealand is "Meet New Zealand's international obligations". See page 23 of the Issues Paper, available online at: https://www.mbie.govt.nz/business-and-employment/business/intellectual-property/copyright/review-of-the-copyright-act-1994/ The Ministry of Foreign Affairs and Trade is supporting the review.	Section 18(d): document is publicly available
			Further analysis to ensure international treaty obligations are followed will occur at future stages where option(s) for change are developed.	Section 18(e): document does not exist

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Potential Copyright Act review – options and supporting material

Date:	27 April 2017	**Priority:**	High
Security classification:	**In confidence**	**Tracking number:**	3186 16-17

Action sought		
	Action sought	**Deadline**
Hon Jacqui Dean Minister of Commerce and Consumer Affairs	**Agree** to progress next steps towards a Copyright Act review by Monday 1 May 2017.	Monday 1 May

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Gus Charteris	Manager, Business Law	(04) 474 2839	s 9(2)(a)	
Katrina Sutich	Senior Policy Advisor, Business Law	(04) 901 2424		✓

The following departments/agencies have been consulted					
☐ Treasury	☐ MoJ	☐ NZTE	☐ MSD	☐ TEC	☐ MoE
☐ MFAT	☐ MPI	☐ MfE	☐ DIA	☐ TPK	☐ MoH
		Other:			

Minister's office to complete:

☐ Approved ☐ Declined
☐ Noted ☐ Needs change
☐ Seen ☐ Overtaken by Events
☐ See Minister's Notes ☐ Withdrawn

Comments:

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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BRIEFING

Potential Copyright Act review – options and supporting material

Date:	27 April 2017	**Priority:**	High
Security classification:	**In confidence**	**Tracking number:**	3186 16-17

Purpose

This briefing outlines options to commence a review of the *Copyright Act 1994* and seeks your agreement to test the draft Terms of Reference with Business Growth Agenda Innovation Ministers on 10 May 2017.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that officials have prepared a draft Terms of Reference for a review of the *Copyright Act 1994*.

Noted

b **Note** that there are options relating to the launch of a *Copyright Act* review, but officials recommend that you announce a review with the release of the Terms of Reference following consultation with your colleagues and Cabinet approval.

Noted

c **Agree** to seek feedback from your Ministerial colleagues on announcing a potential *Copyright Act* review in June 2017 through the Business Growth Agenda (**BGA**) Innovation Ministers' meeting scheduled for Wednesday 10 May 2017.

Agree / Disagree

Next steps

d **Note** that officials will meet with you on Monday 1 May to discuss the options outlined in this briefing.

Noted

e **Note** that, subject to your agreement, officials will submit the draft Terms of Reference and supporting BGA Innovation paper for distribution to BGA Innovation Ministers on 2 May (ahead of the 10 May meeting).

Noted

Gus Charteris
Manager, Business Law
Building, Resources and Markets, MBIE

27 April 2017

Hon Jacqui Dean
Minister of Commerce and Consumer Affairs

..... April 2017

Background

1. On 1 February 2017, we provided you with a briefing which provided an overview of copyright law and introduced the MBIE-led study into the role of copyright and designs in the creative sector (the **Study**). The Study concluded with release of the *Copyright and the Creative Sector* report in December 2016.

2. The February briefing included recommended next steps towards a potential review of the *Copyright Act 1994* (Briefing 2060 16-17 refers). Relevant context is included throughout this briefing and in ***Annex 1*** for ease of reference.

3. On 2 February you agreed that officials prepare a draft Terms of Reference for a *Copyright Act* review, for you to test with your colleagues.

4. This briefing:
   a. provides relevant context on the purpose of copyright and the Study (in ***Annex 1***);
   b. briefly recaps why the *Copyright Act* should be reviewed;
   c. sets out options for the timing and process of launching a *Copyright Act* review; and
   d. provides draft documents to support our recommended approach for launching a review, including:
      i. draft Terms of Reference; and
      ii. documents to support discussions at the Business Growth Agenda (**BGA**) Innovation Ministers' meeting on Wednesday 10 May.

Why review the *Copyright Act*?

The Study identified stakeholder concerns with the *Copyright Act*

5. As previously advised (Briefing 2060 16-17 refers), the Study sought to understand how copyright is used in practice (by creators and other rights holders) and in context (i.e. alongside all of the other drivers for creation and dissemination). Among the many trends and themes which are identified in the Study, MBIE officials heard that:
   a. In some areas the law's application to new technologies is unclear or inadequate (e.g. policy work on the 2008 amendments was completed before "streaming" was widespread).
   b. Using or building on the works of others' can prove difficult where it is impractical to seek permission (e.g. information-gathering via data and text mining can involve copying vast screeds of content).
   c. Enforcement can be difficult (e.g. costs to take actions against individual infringers can be prohibitive).

6. The Study concluded in December 2016 with the release of a report, *Copyright and the Creative Sector*, summarising the information gathered. The report makes clear that the Study is the start of a conversation and that one possible outcome of the Study is a review of the *Copyright Act*.

Copyright laws need to be regularly monitored to ensure they are fit for purpose

7. As previously advised (Briefing 2060 16-17 refers), copyright issues are complex, pervasive, difficult to isolate, subject to ever-changing technologies and rarely tested in the New Zealand courts.

8. Copyright law therefore needs to be monitored and refined/updated to ensure that:

   a. it is clear how it applies to new technology (e.g. streaming); and

   b. the default rule (do not copy or distribute without permission of the copyright owner) does not apply in situations where there may be little policy rationale for requiring permission (e.g. data or text mining, or copying necessary to facilitate basic functionality of new technology).

There is growing pressure to review the *Copyright Act*

9. As previously advised (Briefing 2060 16-17 refers), the *Copyright Act* was scheduled to be reviewed in 2013, but was put on hold pending the conclusion of the Trans-Pacific Partnership negotiations (CAB Min (13) 15/6 refers). Since the 2013 Cabinet decision to delay the review there has been growing pressure from stakeholders to review the *Copyright Act*, with some calling for more flexible exceptions and others seeking stronger protection (e.g. longer term; additional enforcement provisions).

The draft Terms of Reference signals the Government's commitment to stakeholder input and getting the settings right

10. To ensure any review delivers an efficient and effective regulatory regime, it is important that:

    a. the review prioritises the areas that are most likely to make the greatest impact; and

    b. government receives input and buy-in from the diverse range of stakeholders who rely on, and are affected by, the regime.

11. We have developed draft Terms of Reference, attached as ***Annex 2***, by building on what we have heard through the Study and taking into account the need for a flexible and open review process, with a framework that is informed by stakeholders.

12. The draft Terms of Reference clearly signals that the identified objectives, together with the scope and staging of the review, will be informed by a future public consultation process.

13. The draft Terms of Reference set out:

    - objectives for the review;
    - objectives of copyright (noting that these will be tested through consultation at the issues paper stage);
    - context for the review, including what the regime does, details of the last major review, and information on the Study and the international environment;
    - next steps, including release of a broad ranging issues paper with questions for public input, followed by determination of scope and staging; and
    - an indicative process for the legislative review.

14. This approach emphasises that the Government is keen to hear from stakeholders and is committed to getting the settings right.

15. Some stakeholders are likely to be supportive of a comprehensive review of the *Copyright Act*, particularly those that seek more flexible exceptions. Other stakeholders, including larger rights holders, are strongly opposed to further or more flexible exceptions and are likely to advocate for changes to enhance protection. We expect strong and divergent views as to what the copyright settings should be.

Timing and process for commencing a review

16. There are a number of factors to take into account in determining the best timing and process for commencing a review. These are:

    a. building on the momentum developed through the Study, in terms of both the currency of the information and the level of stakeholder engagement;

    b. developing a flexible and open process, allowing government to gather feedback and evidence on potential issues and contributing to stakeholder buy-in; and

    c. resourcing and readiness.

Options for commencing a review

17. Officials consider that there are two main options for commencing a *Copyright Act* review. These are:

    - Option 1: Launch a review in the coming months by release of Terms of Reference (***recommended***).
    - Option 2: Delay announcement of a review.

18. We recommend Option 1 as it better meets objectives (a) and (b) as discussed below.

Option 1: Launch a review and release Terms of Reference ***(recommended)***

19. Officials consider that the best way to prioritise and achieve input and buy-in from stakeholders is by releasing a high level Terms of Reference which provides guiding principles for a legislative review.

Benefits

20. This approach would build on the momentum generated through the Study, in terms of both the currency of the information and the level of stakeholder engagement.

21. Launching a review would also respond to stakeholder calls for a review and be consistent with Cabinet's decision to review the *Copyright Act* following the conclusion of the Trans-Pacific Partnership (**TPP**) negotiations.

22. Importantly, this approach would allow officials to engage openly with stakeholders and the public as we develop an issues paper. It would also allow the Government to signal its commitment to stakeholder input and getting the settings right, and help to develop a framework that is informed by stakeholders (in an otherwise polarised debate).

Process

23. We anticipate that you will seek Cabinet approval before publically announcing a review. We have assumed that any announcement would be made in advance of the "pre-election period" (commencing on Friday 23 June 2017).

24. A *Copyright Act* review is relevant to a number of portfolios and will be an important step towards ensuring that New Zealand has regulatory settings that support innovative new products and services. The Study also forms part of the BGA's Building Innovation workstream and, within that, the Building a Digital Nation workstream.

25. We recommend that, before going to Cabinet, you seek your Ministerial colleagues' feedback on commencing a *Copyright Act* review at the 10 May 2017 BGA Innovation Ministers' meeting (**BGA Innovation Meeting**). We have provided a draft paper to support the BGA Innovation Meeting discussion, attached as ***Annex 3***, and will provide supporting talking points if this is your preferred option.

Risks

26. The launch of a review is likely to result in increased stakeholder and media interest, and potentially international interest. You may receive technical questions from your Ministerial colleagues, some of whom have expertise and a keen interest in copyright issues.

27. To ensure you are prepared for these conversations, we could schedule copyright information sessions with you. We would also develop further supporting material.

28. The proposed timeline for announcement, including the Cabinet process, is tight. This may have resource implications and potentially slow down other processes (e.g. work to progress accession to the *Marrakesh Treaty*).[1]

Alternative processes for launching a review in the coming months

29. In the interests of completeness, we note that you could announce a review:
    a. without releasing a Terms of Reference. However, doing so is likely to invite questions and speculation from stakeholders and media around the scope and staging of the review. It may risk reducing buy-in to the review as, in the absence of information, some stakeholders could jump to what they see as worst case scenarios.
    b. by consulting on the Terms of Reference (i.e. seeking public feedback). We consider that there is little to be gained from seeking stakeholder views on the Terms of Reference, particularly as many of the critical issues (e.g. the objectives of copyright) will be tested through an issues paper.

Option 2: Delay announcement of a review

30. Another approach would be to make no public announcement about a *Copyright Act* review at this stage, but to continue work on an issues paper.

Benefits

31. The main benefit of this approach is that you would have further time to consider relevant background materials and issues in preparation for consulting with your Ministerial colleagues and any media and stakeholder engagement. This would avoid the need to go through a Cabinet process at this stage, avoiding the potential resource implications (outlined in paragraph 28).

Process

32. Subject to your priorities, under this option officials could still continue work on an issues paper in the coming months. If so, and depending on timing, the Government could instead announce a review of the *Copyright Act* alongside the release of an issues paper.

33. Under this option, you may still wish to socialise your preferred approach with Ministerial colleagues through the BGA Innovation Meeting.

Risks

34. A risk associated with this option is that officials would develop the issues paper without openly engaging with stakeholders about the Government's intended process, which may compromise stakeholder buy-in and officials' ability to openly test ideas.

35. We also consider that delaying announcement of the review beyond 2017 is likely to attract criticism. Stakeholders perceived the Study as a precursor to a review, and in 2013 the Government signalled that a scheduled review of the Act would follow the conclusion of the TPP.

[1] Announcing a review during the "pre-election period" may be an option, but officials would seek advice from the Cabinet Office before providing a view on this.

36. Delaying announcement of a review may also require further work to re-establish a dialogue with stakeholders at a later date, rather than building upon the momentum and goodwill generated by the Study.

Next steps

Discuss options with officials

37. We are scheduled to meet with you on Monday 1 May at 5.30pm to discuss the options and provide you with further background information on the regime, stakeholders and key issues.

Agenda item at BGA Innovation Meeting

38. If you wish to take draft Terms of Reference to the BGA Innovation Meeting, we will confirm the agenda item and provide the supporting BGA paper to the BGA Innovation secretariat (for distribution to BGA Innovation Ministers) on Tuesday 2 May.

39. If you would prefer to delay announcement of a review, you may still wish to socialise your preferred approach with Ministerial colleagues through the BGA Innovation Meeting (or the subsequent meeting in June), and we could tailor any supporting material as necessary.

Next steps to commence a review in June 2017

40. If you wish to commence a review, following the BGA Innovation Meeting officials will prepare a draft Cabinet paper and finalise the draft Terms of Reference for your consideration, before being lodged for Cabinet consideration. We anticipate release of the Terms of Reference in the days following Cabinet approval (late June).

41. Ahead of any Cabinet decisions, we would continue to provide clear messaging that there has been no formal decision to review the Act. Once a decision is made, the focus would be on clearly conveying the process, timing and scope of each stage, together with the importance of establishing guiding principles before considering the issues.

Release of issues paper - Early 2018

42. Following release of the Terms of Reference, the next step would be to release an issues paper. This would draw on key themes that emerged through the Study, as well as wider stakeholder engagement.

Possible process and timing for further stages of review

43. Depending on Ministerial priorities, following consultation and analysis of submissions on an issues paper, subsequent steps may include:

- Consultation on an options paper in late-2018 or early 2019.
- Consultation on an exposure draft of the proposed legislation in 2020.

Proposed Timeline

44. Our proposed timeline is set out below:

Action	Indicative dates (2017)
Provide draft Terms of Reference (**ToR**) and supporting BGA paper to BGA Innovation secretariat	Tuesday 2 May
BGA Innovation Meeting discussion	Wednesday 10 May
Provide the updated ToR, draft Cabinet Paper and briefing to your office	Wednesday 24 May
Ministerial consideration of the draft ToR and Cabinet Paper	Wednesday 24 – Wednesday 31 May
Lodge Cabinet Paper and ToR	Thursday 1 June
EGI Cabinet Committee consideration	Wednesday 7 June
Cabinet consideration	Monday 12 June
Review launched and ToR released	Thursday 15 June
"Pre-election period" commences	Friday 23 June
Development of issues paper	Late June – late 2017

Annexes

Annex 1: Background on copyright and the Study

Annex 2: Draft Terms of Reference for a review of the *Copyright Act*

Annex 3: Draft paper to support discussions at the BGA Innovation Meeting

Annex 1: Background on copyright and the Study

What does copyright do and why are copyright settings important?

45. Copyright is a set of rights granted under the Copyright Act. It arises through the creation of an original work and protection does not require registration.

46. Copyright protects the expression of ideas, rather than the ideas themselves. For example, if you discuss a concept for a blog, copyright law will not protect that idea but when you write a blog post, the text will receive copyright protection as a literary work (provided it is original). Only the work produced – the expression of the idea – will be protected.

Copyright provides exclusive rights to incentivise creation and dissemination…

47. The exclusive rights of copyright owners include the right to:

- **copy the work**, including recording, reproducing or downloading a copy or creating a new work that copies a substantial part of the original;
- **issue copies of the work to the public**, including publishing books, distributing CDs to music retailers or selling a t-shirt with a painting printed on it;
- **perform, play or show the work in public**, including a band performing live music at a bar, a retail store playing background music or a cinema showing a movie;
- **communicate the work to the public**, including a TV station broadcasting a sports match, and a person posting a video, photograph or story on social media; and
- **adapt the work**, including translating a novel from one language to another or adapting a novel into a movie script.

48. Copyright policy seeks to incentivise the creation and dissemination of original works. Without the ability to protect works from unauthorised copying/distribution, there would be fewer incentives to create and disseminate important social, cultural and commercial works.

49. New Zealand is a party to international treaties administered by the World Intellectual Property Organization and multilateral agreements (such as the World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property Rights*) which largely dictate minimum standards for copyright protection.

…but over-protection can inhibit innovation and important cultural activities

50. Over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and trade. It can also inhibit important cultural activities, such those of as educational, library and archival organisations.

51. Over-protective copyright settings may also impede 'follow-on' creation — that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services.

52. The *Copyright Act* provides certain exceptions to owners' exclusive rights and the exclusive rights apply for a temporary period (which differs depending on the type of creative work).

53. There is ongoing debate about how flexible and broad the exceptions should be, and how long the term of copyright should be.

Copyright reform is underway in other jurisdictions

54. Major reviews are proposed or underway in the European Union, Canada and Singapore.

55. Australia may also consider a review of its copyright legislation following the public release of the Australian Productivity Commission report on Australia's intellectual property (**IP**) arrangements. The report recommends the adoption of a broad "fair use" exception, which is a general and flexible exception to copyright. Australia (like New Zealand) currently has a "fair dealing" exceptions regime, which is more prescriptive.

56. Of note, copyright amendment legislation is currently before the Australian Senate. It will make law changes to better facilitate Australia's obligations under the *Marrakesh Treaty.*

What were the main drivers for the Study?

Ensuring that copyright settings are fit for purpose, particularly in the context of rapid technological change

57. New technologies have rapidly changed the way that products protected by copyright and designs regimes are produced and disseminated. Officials identified that a better understanding of copyright use in the market was required before embarking on any legislative review of the *Copyright Act*.

Available data is limited

58. Data is important for evidence-based policy making. However there is very little data available on copyright for a number of reasons, including:

- copyright protection is automatic — there is no registration process and so no central repository of copyright data;
- where copyright-specific data exists, it is privately held within the industry; and
- it is difficult to determine what impact copyright settings have on the economic performance of the sector or the wider economy (i.e. what is the causative effect).

Opportunity to understand how copyright is used without being drawn into a polarising debate

59. Copyright policy is often the subject of polarising debate. While there is broad consensus that copyright protection is important, there is heated debate about what the ideal copyright settings should be. For example some argue that, in order to incentivise creation of quality works in a digital environment, increased protections are required in order to ensure adequate economic returns. Others suggest that current copyright settings inhibit innovation and follow-on creation and are too protective of commercial interests.

Annex 2: Draft Terms of Reference for a review of the *Copyright Act*

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Review of the Copyright Act 1994

[DRAFT] TERMS OF REFERENCE

Objectives of the review

New Zealand's copyright regime is governed by the Copyright Act 1994. The Act sets rules relating to copyright protection, infringement, exceptions and enforcement. It has not been reviewed in over a decade.

The Government wants to ensure that the copyright regime keeps pace with technological and market developments and is not inhibiting the provision of, and access to, innovative products and services, which will underpin higher levels of wellbeing in New Zealand. This is a focus of the Government's work in the *Business Growth Agenda* — working toward *Building Innovation* and, within this, *Building a Digital Nation*.

Building on the *Copyright and the Creative Sector report*, the Government is committed to understanding the landscape in which copyright settings operate and ensuring that our regime is fit for purpose in New Zealand in a changing technological environment.

The objectives of this review are to:

- assess the performance of the Copyright Act against the objectives of New Zealand's copyright regime (discussed further below)
- identify barriers to achieving the objectives of New Zealand's copyright regime, and the level of impact that these barriers have
- formulate a preferred approach to addressing these issues – including amendments to the Copyright Act, and the commissioning of further work on any other regulatory or non-regulatory options that are identified.

Objectives of copyright

Copyright seeks to incentivise the creation and dissemination of original works. It generally allows authors the exclusive right to copy, disseminate and adapt their works. Authors can also transfer or license those rights. Without the ability to protect works from unauthorised copying or distribution (e.g. recorded music, fine art, digital art, movies, educational literature, software code), there would be fewer incentives to create and disseminate important social, cultural and commercial works.

However, copyright must strike a balance. Over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and 'follow-on' creation — that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services. It can also inhibit important cultural activities, such as those of educational, library and archival organisations.

New Zealand's copyright law is intended to benefit New Zealanders as a whole. This requires consideration of the impacts on creators, users and consumers.

As a starting point, the following objectives of New Zealand's copyright regime have been identified:

- provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so
- permit access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits
- ensure that the copyright system is effective and efficient, including providing clarity and certainty, minimising transaction costs, and maintaining integrity and respect for the law
- meet New Zealand's existing international obligations.

These objectives are not set in stone, and will be tested through consultation on an issues paper.

Context

Copyright is unlike other forms of intellectual property, such as patents, because there is no need to register a copyright work.

Copyright is also unique due to the broad range of content it applies to. While many copyright works require significant investment of money, talent and/or time (such as a feature film or a professional painting), other copyright works are cheap and easy to make (such as a photo captured with your phone). Many of us inadvertently create copyright works every day.

Copyright Act 1994

The Copyright Act provides New Zealand's copyright regime. This includes specifying:

- the works covered by copyright, the qualifications and ownership of copyright and the duration of copyright
- the acts that constitute infringement of copyright (i.e. the exclusive rights of the copyright owner and licensees)
- exceptions to infringement of copyright (including 'fair dealing' with a work)
- moral rights to be identified as an author or director, and to object to derogatory treatment of the work
- performers' rights
- technological protection measures and copyright management information
- licensing and transfer of copyright
- enforcement and remedies for infringement, including civil proceedings, the Copyright Tribunal, border protection measures and powers of enforcement officers.

The last major review of the Copyright Act took place from 2001 to 2004 resulting in the *Copyright (New Technologies) Amendment Act 2008*. This introduced:

- protection for "communication works" (previously broadcasting)
- new exceptions for transient or incidental copying
- decompilation of computer programs
- format shifting and time shifting
- limitations of liability for ISPs
- greater protection for technological protection measures
- new protections for copyright management information.

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Study into the role of copyright and designs in the creative sector

The copyright regime plays an important role in the creative sector. A study into the role of copyright and designs in the creative sector was launched in October 2015 to help the Government better understand how copyright is used in practice.

The final report, *Copyright and the Creative Sector*, was released in December 2016. It was the culmination of information from 71 interviews, two sector workshops, an online survey and an online consumer focus group.

The report illustrates the diversity of the creative sector, in terms of the works created, the drivers for creation, the means of distribution and the revenue models. It highlights some of the opportunities and challenges posed by developments in digital technology.

Understanding the landscape – how copyright is operating on the ground – is a first step toward developing high quality policy.

We invite feedback on the report (email creativesectorstudy@mbie.govt.nz). Stakeholder views will continue to inform our thinking.

International environment

The international environment is a significant factor in any review of the Act, as:

- International agreements set the broad framework for our settings and limit our flexibility to make changes in certain areas.
- Many dealings with copyright work across borders.
- Foreign companies play a significant role in the creation and distribution of large amount of content that is available in New Zealand.

The need to ensure copyright laws are fit for purpose in a changing technological environment has been recognised in a number of other major jurisdictions. For example, copyright reviews are proposed or underway in the European Union, Canada and Singapore. Changes to Australian copyright law are also being considered by the Australian Senate.

What's next?

The next step will be **release of an issues paper for public consultation in early 2018**. The issues paper will likely be broad ranging and include a number of questions for public input.

The overall scope of the review, and the staging of it, will be informed by that consultation process. An indicative process for review of the Act is set out below:

Through future consultation processes, we would encourage submitters to support their submissions with appropriate evidence. Evidence will play an important role in our analysis of issues and any options for reform. The United Kingdom Intellectual Property Office has published a *Guide to Evidence for Policy*, which is a useful tool to help guide the information provided throughout the future processes.

Annex 3: Draft paper to support discussions at the BGA Innovation Meeting

POTENTIAL REVIEW OF THE COPYRIGHT ACT : *Ensuring NZ's regulatory regime is fit for purpose in a changing technological environment*

"The challenge is to respond to the turbulence which digital technology has caused for copyright in a way that facilitates the emergence of new businesses, without undermining the basic model of copyright, which has sustained creative businesses for more than three centuries"

Professor Ian Hargreaves, *Digital Opportunity – UK Review of Intellectual Property and Growth*

"A solid information base and continuous assessment are crucial assets in the formulation of policies and strategies and for developing coherent copyright and related rights systems... Efficient copyright policies are based on a profound understanding of the copyright system's operation and the context in which the system operates"

Foundation for Cultural Policy Research (Finland), *Assessing the Operation of Copyright and Related Rights Systems*

A study into the role of copyright and designs in the creative sector was launched in October 2015 to help the Government better understand how copyright is used in practice. The final report, *Copyright and the Creative Sector*, was released in December 2016. It has received very positive feedback from a diverse array of key stakeholders.

The Study was an important first step in ensuring that New Zealand's regulatory settings keep pace with technological and market developments and support innovation.

I am of the view that the Copyright Act needs to be reviewed to ensure the regime is fit for purpose in a changing technological environment

"The Act has not kept pace with new technologies or activities like text mining"
Library

"We are unable to make use of fair use... We can't compete in an uneven environment"
Documentary production company

"You send a takedown notice, and five seconds later it is up there again"
Music industry body

"There are no tools to combat streaming- the three notice regime does not apply"
Broadcaster

It is timely to signal a review of the Copyright Act

- The Act has not been reviewed for almost a decade — we want to ensure New Zealand's copyright regime keeps pace with technological and market developments and is not inhibiting the provision of innovative products and services.
- Following publication of the report on the Study, stakeholders have asked whether the Government intends to review the Copyright Act.
- There is an opportunity to build on the Study's momentum — government now has up-to-date information on how the creative sector is using the copyright regime in New Zealand, and a high level of sector engagement on key issues.
- A review in 2017 would also place New Zealand at the centre of an international conversation on the role of copyright in the digital age, with major reviews proposed or underway in the EU, Canada and Singapore.

Ensuring we bring stakeholders on board would be the focus

- I propose announcing a review of the Copyright Act in June 2017, with an accompanying Terms of Reference.
- The Terms of Reference would emphasise that the Government is keen to hear from stakeholders and committed to getting the settings right, ensuring New Zealand's regulatory regime is fit for purpose in a changing technological environment.
- The Terms of Reference would provide some context for the review, outline the objectives for the review and indicate next steps.
- The next step would be to release an issues paper (late 2017). Officials will draft an issues paper in the coming months.
- Further steps may include an options paper and an exposure draft of the proposed legislation.

Copyright Act review: Possible issues

- Drawing on the key themes that emerged during the Study, some of the points a review might address include:
  - The application of the Act to digital technology (e.g. streaming; data and text mining; artificial intelligence).
  - Testing whether the current exceptions and limitations remain appropriate (e.g. parody; orphan works).
  - Testing whether current enforcement provisions are fit for purpose.
  - Investigating the interaction of the Copyright Act with other legislation (e.g. the Designs Act 1953).
  - Clarifying the purpose and intention of the Act.
  - Considering how our regime interacts with, and compares to, other jurisdictions.
  - Considering recommendations in the WAI 262 report.

1994	2008	2013	Oct 2015	Dec 2016
Copyright Act is enacted (modelled on UK law)	Act updated to clarify how copyright applies to new technologies	Scheduled review of Act put on hold until the conclusion of the TPP negotiations	Study into the role of copyright and designs in the creative sector launched	Release of report on the Study, *Copyright and the Creative Sector*

Announce review (release Terms of Reference) (June 2017) → Consultation on an issues paper (early 2018) → Consultation on an options paper → Consultation on an exposure draft Bill

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Proposed Review of the Copyright Act 1994: Release of Terms of Reference

Date:	24 May 2017	**Priority:**	High
Security classification:	**In confidence**	**Tracking number:**	3629 16-17

Action sought		
	Action sought	**Deadline**
Hon Jacqui Dean Minister of Commerce and Consumer Affairs	**Agree** to lodge the updated Cabinet paper by Thursday, 1 June 2017.	Thursday, 1 June 2017
	Forward the attached covering letters together with the draft Cabinet paper and Terms of Reference to the Minister of Finance, the Minister of Justice, the Minister of Trade, the Minister of Science and Innovation and the Minister for Arts, Culture & Heritage for comment.	Thursday, 25 May 2017

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Gus Charteris	Manager, Business Law	(04) 474 2839	s 9(2)(a)	
Katrina Sutich	Senior Policy Advisor, Business Law	(04) 901 2424		✓

The following departments/agencies have been consulted					
☐ Treasury	☐ MoJ	☐ NZTE	☐ MSD	☐ TEC	☐ MoE
☐ MFAT	☐ MPI	☐ MfE	☐ DIA	☐ TPK	☐ MoH
		Other:			

Minister's office to complete:

☐ Approved ☐ Declined
☐ Noted ☐ Needs change
☐ Seen ☐ Overtaken by Events
☐ See Minister's Notes ☐ Withdrawn

Comments:

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Proposed Review of the Copyright Act 1994: Release of Terms of Reference

Date:	24 May 2017	**Priority:**	High
Security classification:	**In confidence**	**Tracking number:**	3629 16-17

Purpose

To provide you with a Cabinet paper seeking approval to publically release the attached Terms of Reference for the review of the *Copyright Act 1994*.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that officials have prepared the attached draft Cabinet paper for your consideration.

Noted

b **Note** that we have prepared the attached covering letters for you to send to the Minister of Finance, the Minister of Justice, the Minister of Trade, the Minister of Science and Innovation and the Minister for Arts, Culture & Heritage to seek their views on the draft Cabinet paper and Terms of Reference prior to seeking Cabinet approval to launch a review:

Noted

c **Note** that officials are currently undertaking departmental consultation and will incorporate any feedback from agencies and your Ministerial colleagues before providing you with the finalised Cabinet paper and Terms of Reference on 31 May 2017.

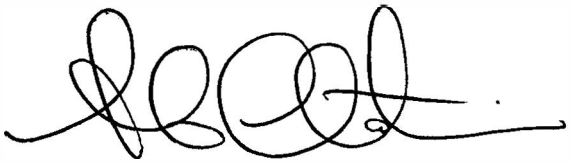
Noted

d **Agree** to lodge the updated finalised Cabinet paper with Cabinet Office by Thursday 1 June for consideration by the Cabinet Economic Growth and Infrastructure Committee (**EGI**) on Wednesday, 7 June 2017.

Agree / Disagree

e **Note** the attached talking points for the EGI meeting.

Noted



Gus Charteris
Manager, Business Law
Building, Resources and Markets, MBIE

24 May 2017

Hon Jacqui Dean
Minister of Commerce and Consumer Affairs

..... / ..... / .....

Background

1. We have prepared the attached Cabinet paper (**Annex 1**) seeking approval to launch a review of the *Copyright Act 1994* by releasing the Terms of Reference for the review.

2. We provided a draft version of the Terms of Reference with our briefing of 27 April 2017 (3186 16-17 refers). The briefing set out the rationale for launching a review, highlighting:

   - the wide-ranging impact of copyright legislation across the creative sector and for consumers of creative content
   - that rapid technological change has resulted in significant changes in creative content delivery markets and the way that content is used
   - that the Act has not been substantively reviewed in over 10 years with a scheduled review in 2013 being placed on hold pending the completion of the TPP negotiations.

3. The draft Terms of Reference provide an outline of the process for the review, rather than any substantive discussion of the issues that will be examined, and are intended to ensure that stakeholders have the opportunity to participate in the early stages and plan their engagement in the review. The Terms of Reference clearly signal that the identified objectives for copyright, together with the scope and staging of the review, will be informed by a future public consultation process.

4. This approach allows the possibility of staging the later phases of the review to enable the policies that will have the greatest impact to be prioritised.

5. You agreed to test the possibility of launching a review by releasing a terms of reference in June 2017 with your Ministerial colleagues at the 11 May 2017 BGA Innovation Ministers' meeting (**BGA Innovation Meeting**). Ministers were supportive of the proposal.

6. We note that you also wish to consult with a number of other Ministerial colleagues who did not attend the BGA Innovation Meeting (discussed below).

7. We recommend that following this further consultation, you seek Cabinet approval for the publication of the Terms of Reference. The attached Cabinet paper seeks this and outlines the rationale for, and purpose of, the review.

8. We have provided you with suggested talking points for the EGI meeting in **Annex 2**.

Next steps

Further engagement with Ministerial colleagues

9. As discussed at your weekly officials' meeting on 22 May 2017, you also wish to test the views of your Ministerial colleagues who have an interest in copyright matters (and who did not attend the BGA Innovation meeting).

10. We have prepared covering letters (provided in **Annex 3**) for the Minister of Finance, the Minister of Justice, the Minister of Trade, the Minister of Science and Innovation and the Minister for Arts, Culture & Heritage.

11. Minister Joyce and Minister Adams were consulted at key milestones throughout the course of the study into the role of copyright and designs in the creative sector (the Study) in their previous Ministerial portfolios. They were also closely involved in the TPP implementation process (including relating to copyright matters). Minister McClay will have an interest in a copyright review from the perspective of our trade agenda. Minister Barry will have an interest as a Copyright Act review will directly impact many Arts, Culture and Heritage stakeholders. Minister Goldsmith will be interested from an innovation perspective and as the previous Minister of Commerce and Consumer Affairs.

Finalising the Cabinet paper and Terms of Reference

12. Any feedback from Ministers would ideally be provided to officials by COP Tuesday, 30 May if you wish to lodge the Cabinet paper on Thursday, 1 June.

13. Note that officials will also undertake departmental consultation in the week prior to lodging.

14. We will provide you with a finalised version of the Cabinet paper and Terms of Reference on Wednesday, 31 May. This will take into account any feedback received from your Ministerial colleagues and through the departmental consultation process.

Cabinet process

15. We propose that you submit the finalised Cabinet paper on Thursday, 1 June for consideration by the Cabinet Economic Growth and Infrastructure Committee (EGI) on Wednesday, 7 June.

Communications

16. Subject to Cabinet approval, the Terms of Reference will be published on the MBIE website in late June. We will work with your office to develop a media statement announcing the review, highlighting the review process and the opportunities for stakeholder engagement.

Proposed Timeline

17. Our proposed timeline is set out below:

Action	Indicative dates (2017)
Forward the draft ToR, Cabinet Paper and covering letter to your Ministerial colleagues for comment	Thursday, 25 May
Ministerial comment or changes to be incorporated into the ToR or Cabinet Paper provided to officials	Wednesday, 31 May
Lodge Cabinet Paper and ToR	Thursday, 1 June
EGI Cabinet Committee consideration	Wednesday, 7 June
Cabinet consideration	Monday, 12 June
Review launched and ToR released	Thursday, 15 June
Development of issues paper	Late June – late 2017

Risks

18. There are some risks associated with launching a *Copyright Act* review, however officials consider these can be effectively managed through careful timing, consultation processes and consistent communications. We have provided reactive Q+As for any questions you may receive relating to the identified risk areas through our regular reporting process.

Managing a polarising debate

19. As previously advised, we expect strong and divergent views on what our copyright settings should look like.

20. Commencing a review by releasing a Terms of Reference allows government to openly engage with stakeholders in relation to a review while avoiding being caught in a polarising debate before we set a framework for what the review is aiming to achieve.

Managing expectations around timing

21. There have been a number of press releases from various sources stating or implying that a *Copyright Act* review has commenced or will commence in 2017.

22. Some stakeholders may call for the review to progress quickly with a deeper exploration of the issues at the outset. However, as outlined in the attached Cabinet paper, the proposed approach provides an important opportunity to work with stakeholders to develop key questions before locking in a framework.

High public and media interest is likely

23. The launch of a review is likely to result in increased stakeholder and media interest, and potentially international interest.

24. To ensure you are prepared for these conversations, we could schedule copyright information sessions with you. We would also develop further supporting material.

25. You may receive technical questions from your Ministerial colleagues, some of whom have expertise and a keen interest in copyright issues.

26. We have provided tailored covering letters for you to send to your Ministerial colleagues, seeking their views which may flush out any concerns prior to the Cabinet process.

Annexes

Annex 1: Draft Cabinet paper – Review of the Copyright Act 1994: Terms of Reference

Annex 2: Talking points and Q+As for EGI

Annex 3: Covering letters for Ministerial colleagues

Annex 1: Draft Cabinet paper – Review of the Copyright Act 1994: Terms of Reference

Office of the Minister of Commerce and Consumer Affairs
Chair, Cabinet Economic Growth and Infrastructure Committee

Review of the *Copyright Act 1994*: Terms of Reference

Proposal

1. I seek approval to launch a review of the *Copyright Act 1994* by releasing the attached Terms of Reference (see **Annex 1**).

Background

2. The *Copyright Act* protects original creative works (e.g. films, books, songs, photos) by granting the creator of the work certain exclusive rights (e.g. copying the work, issuing copies of it to the public, performing the work in public). It also provides a number of exceptions to these rights to allow for specific uses of works that are considered to be in the public interest (e.g. for the purposes of criticism, review or private study).

3. The copyright regime incentivises the creation and dissemination of original creative works. It affects how people create, distribute and access information. It is, therefore, a critical system to facilitate a knowledge-based economy.

4. The *Copyright Act* was last significantly reviewed more than 10 years ago, from 2001 to 2004 resulting in the *Copyright (New Technologies) Amendment Act 2008*. The scheduled review of these amendments in 2013 was put on hold pending the conclusion of the Trans-Pacific Partnership (**TPP**) negotiations (CAB Min (13) 15/6 refers). Copyright changes required under TPP were implemented in December 2016. I believe it is the appropriate time to launch a review.

5. A review is an opportunity to consider the appropriate balance in the regime. Without the ability to protect works from unauthorised copying/distribution, there would be fewer incentives to create and disseminate important social, cultural and commercial works. However, over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and trade. Over-protective copyright settings may also impede follow on creation – that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services.

6. Aspects of the current regime are now out of date. Rapid technological change has resulted in significant changes in creative content delivery markets and the way that content is used. For example 'streaming', which is now a key content delivery mechanism, had only just emerged during the last review. Other examples include uses of big data and cloud storage.

7. Given the vast technological changes that continue to change the way we create, distribute and consume content, it is important to ensure that the regime is fit for purpose. I believe there is a solid economic case for moving forward with a review now.

Comment

8. Copyright issues are complex, pervasive and rarely tested in the New Zealand courts. Copyright law, therefore, needs to be monitored and updated to ensure that it is clear how it applies to new and emerging technology, such as 'streaming' or artificial intelligence. Outdated law can bring uncertainty, which results in costs to creators, right holders and users alike.

9. It is also important to ensure that the default rule (do not copy or distribute without permission of the copyright owner) does not apply in situations where there may be little policy rationale for requiring permission, such as copying necessary to facilitate basic functionality of new technology. Over-protection can inhibit innovation and important cultural activities.

10. A *Copyright Act* review will be an important step towards ensuring that New Zealand has regulatory settings that do not inhibit the development of innovative new products and services.

11. The Ministry of Business, Innovation and Employment, in consultation with the Ministry for Culture and Heritage, recently conducted a study into the role of copyright and designs in the creative sector (the **Study**) to deepen government's understanding of how copyright is used in practice and to help identify policy issues. The resulting report *Copyright and the Creative Sector* was published in December 2016.

12. The Study has gathered useful evidence of how copyright operates in context and has highlighted that the current regime is complex and unclear in its application to many modern practises.

13. The Study has also identified issues for possible consideration ranging from potential missed opportunities (e.g. lacking clarity around innovative or cultural activities that rely on copying, such as artificial intelligence or documentary-making), to difficulties enforcing rights (e.g. taking action can be resource-intensive and costly).

14. The Study's report emphasised that the Study was the start of a conversation and that one possible outcome was a review of the *Copyright Act*.

There have been increasing calls for a review

15. Since the 2013 Cabinet decision to delay the review there have been growing calls from stakeholders to review the *Copyright Act*. The conclusion of TPP has intensified these calls. There have also been media reports that the *Copyright Act* review is scheduled to take place this year.

16. Stakeholder views on the purpose of copyright and appropriate copyright settings are often polarised. While there is broad consensus that copyright protection is important, there is heated debate about what the ideal copyright settings should be.

17. Many stakeholders consider that the regime is out of date. Some stakeholders, such as technology companies, educational institutions, consumer groups and heritage organisations, suggest that current copyright settings inhibit innovation and follow-on creation and are too protective of commercial interests. They generally call for more flexible exceptions. Others, including larger rights holder organisations such as music and print licensing organisations and television producers, seek stronger or more effective protection such as enhanced enforcement provisions to ensure adequate economic returns in a digital environment.

18. Launching a review would respond to stakeholder calls for a review and be consistent with Cabinet's decision to review the *Copyright Act* following the conclusion of the TPP negotiations.

Signalling an open and flexible process

19. Copyright is a complex area, and we will not be able to resolve all issues to everybody's satisfaction. However, it is important that we do what we can to ensure the regime supports innovative new products and services and is fit for the digital environment.

20. I consider that the best way to prioritise the policies that are likely to create the biggest impact and to seek input and buy-in from stakeholders is to release a high level Terms of Reference which provides guiding principles for a legislative review.

21. This approach would:

    21.1 build on the momentum generated through the Study, in terms of both the currency of the information and the level of stakeholder engagement

    21.2 allow officials to engage openly with stakeholders and the public as an issues paper is developed

    21.3 allow the Government to signal its commitment to stakeholder input and getting the settings right.

Terms of Reference

22. The Terms of Reference provide context on copyright and the *Copyright Act*, and highlight developments that have occurred since the Act was last reviewed. The Terms of Reference also set out the objectives for the review, which are to:

    22.1 assess the performance of the *Copyright Act* against the objectives of New Zealand's copyright regime

    22.2 identify any barriers to achieving the objectives and their level of impact

    22.3 formulate a preferred approach to addressing these issues.

23. The Terms of Reference clearly signal that the identified objectives for copyright, together with the scope and staging of the review, will be informed by a public consultation process.

24. This approach will enable us to stage the later phases of the review to prioritise the policies that will have the greatest impact.

25. I aim to seek Cabinet approval to release an issues paper for consultation in early 2018 to seek public views on the issues that are identified. The Terms of Reference includes a high-level indicative process for the project. The overall scope of the review, and the staging of it, will be informed by the initial consultation process.

Consultation

26. The Treasury, the Ministry for Culture and Heritage, the Ministry of Justice and the Ministry of Foreign Affairs and Trade have been consulted on the Cabinet paper and the attached Terms of Reference.

27. The Department of Prime Minister and Cabinet has been informed.

Financial Implications

28. There are no fiscal implications from the proposals in this paper.

Human Rights

29. There are no human rights implications from the proposals in this paper.

Legislative Implications

30. There are no legislative implications from the proposals in this paper.

Regulatory Impact Analysis

31. Regulatory impact analysis requirements are not applicable to the proposal in this paper.

Publicity

32. MBIE will publish the Terms of Reference on its website. I may also release a media statement announcing the review.

Recommendations

I recommend that the Committee:

1. **note** that the Copyright Act 1994 was due for review in 2013 and Cabinet decided to delay the review pending the conclusion of the Trans Pacific Partnership negotiations;

2. **note** that the Ministry of Business, Innovation and Employment, in consultation with the Ministry for Culture and Heritage, recently conducted a study into the role of copyright and designs in the creative sector which deepened the Government's understanding of how copyright is used in practice and has identified issues for possible consideration in a review;

3. **note** that the copyright regime, which is a critical system to facilitate a knowledge-based economy,

    a. is considered by many stakeholders to be out of date; and

    b. could be inhibiting innovation and important cultural activities;

4. **agree** to a review of the *Copyright Act*;

5. **agree** to the public release of the attached Terms of Reference;

6. **note** that the process I am proposing for the review will allow the scope and staging of the review to be determined following consultation on an issues paper, enabling the Government to prioritise the policies that will have the greatest impact;

7. **authorise** the Ministry of Business, Innovation and Employment to make this Cabinet paper publicly available on its website;

8. **note** that I expect to seek Cabinet approval to release an issues paper in early 2018.

Hon Jacqui Dean
Minister of Commerce and Consumer Affairs

____/____/____

Annex 1: Terms of Reference for a review of the Copyright Act 1994

Review of the Copyright Act 1994

TERMS OF REFERENCE

Objectives of the review

New Zealand's copyright regime is governed by the Copyright Act 1994. The Act sets rules relating to copyright protection, infringement, exceptions and enforcement. It has not been reviewed in over a decade. The last major review of the Copyright Act took place from 2001 to 2004 resulting in the *Copyright (New Technologies) Amendment Act 2008*.

The Government wants to ensure that the copyright regime keeps pace with technological and market developments and is not inhibiting the provision of, and access to, innovative products and services, which will underpin higher levels of wellbeing in New Zealand. This is a focus of the Government's work in the *Business Growth Agenda* — working toward *Building Innovation* and, within this, *Building a Digital Nation.*

Building on the *Copyright and the Creative Sector* report, the Government is committed to understanding the landscape in which copyright settings operate and ensuring that our regime is fit for purpose in New Zealand in a changing technological environment.

The objectives of this review are to:

- assess the performance of the *Copyright Act* against the objectives of New Zealand's copyright regime (discussed further below)
- identify barriers to achieving the objectives of New Zealand's copyright regime, and the level of impact that these barriers have
- formulate a preferred approach to addressing these issues – including amendments to the *Copyright Act*, and the commissioning of further work on any other regulatory or non-regulatory options that are identified.

Objectives of copyright

Copyright seeks to incentivise the creation and dissemination of original works. It gives authors the exclusive right to copy, disseminate and adapt their works. Authors can also transfer or license those rights. Without the ability to protect works (e.g. books, recorded music, fine art, digital art, movies, educational literature, software code) from unauthorised copying or distribution, there would be fewer incentives to create and disseminate important social, cultural and commercial works.

However, copyright must strike a balance. Over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and 'follow-on' creation — that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services. It can also inhibit important cultural activities, such as those of educational, library and archival organisations.

New Zealand's copyright law is intended to benefit New Zealanders as a whole. This requires consideration of the impacts on creators, distributors, users, consumers and all other people affected by copyright.

As a starting point, the following objectives of New Zealand's copyright regime have been identified:

- provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so
- permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand
- ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law
- meet New Zealand's international obligations.

These objectives are not set in stone, and will be tested through consultation on an issues paper.

Context

Copyright is unlike other forms of intellectual property, such as patents, in that there is no need to register a copyright work.

Copyright is also unique due to the broad range of content it applies to. While many copyright works require significant investment of money, talent and/or time (such as a feature film or a professional painting), other copyright works are cheap and easy to make (such as a photo captured with your phone). Many of us inadvertently create copyright works every day.

Copyright Act 1994

The *Copyright Act* provides New Zealand's copyright regime. This includes specifying:

- the works covered by copyright, the qualifications and ownership of copyright and the duration of copyright
- the acts that constitute infringement of copyright (i.e. the exclusive rights of the copyright owner and licensees)
- exceptions to infringement of copyright (including 'fair dealing' with a work)
- moral rights to be identified as an author or director, and to object to derogatory treatment of the work
- performers' rights
- technological protection measures and copyright management information
- licensing and transfer of copyright
- enforcement and remedies for infringement, including civil proceedings, the Copyright Tribunal, border protection measures and powers of enforcement officers.

The last major review of the Copyright Act took place from 2001 to 2004 resulting in the *Copyright (New Technologies) Amendment Act 2008*. This introduced:

- protection for "communication works" (previously broadcasts and cable programmes)
- new exceptions for transient or incidental copying
- decompilation of computer programs
- format shifting and time shifting
- limitations of liability for ISPs
- greater protection for technological protection measures
- new protections for copyright management information.

Study into the role of copyright and designs in the creative sector

The copyright regime plays an important role in the creative sector. A study into the role of copyright and designs in the creative sector was launched in October 2015 to help the Government better understand how copyright is used in practice.

The final report, *Copyright and the Creative Sector*, was released in December 2016. It was the culmination of information from 71 interviews, two sector workshops, an online survey and an online consumer focus group.

The report illustrates the diversity of the creative sector, in terms of the works created, the drivers for creation, the means of distribution and the revenue models. It highlights some of the opportunities and challenges posed by developments in digital technology.

Understanding the landscape – how copyright is operating on the ground – is a first step toward developing high quality policy.

We invite feedback on the report (email creativesectorstudy@mbie.govt.nz). Stakeholder views will continue to inform our thinking.

International environment

The international environment is a significant factor in any review of the Act as:

- International agreements set the broad framework for our settings and require that we do not depart from some approaches in certain areas.
- Many dealings with copyright works occur across borders.
- Foreign companies play a significant role in the creation and distribution of a large amount of content that is available in New Zealand.

The need to ensure copyright laws are fit for purpose in a changing technological environment has been recognised in a number of other major jurisdictions. For example, copyright reviews are proposed or underway in the European Union, Canada and Singapore. Changes to Australian copyright law are also being considered by the Australian Senate.

What's next?

The next step will be **release of an issues paper for public consultation in early 2018**. The issues paper will likely be broad ranging and include a number of questions for public input.

The overall scope of the review, and the staging of it, will be informed by that consultation process. An indicative process for review of the Act is set out below:

Through future consultation processes, we would encourage submitters to support their submissions with appropriate evidence. Evidence will play an important role in our analysis of issues and any options for reform. The United Kingdom Intellectual Property Office has published a *Guide to Evidence for Intellectual Property Policy*, which is a useful tool to help guide the information provided throughout the future processes.

Annex 2: Talking points and Q+As for EGI

Talking Points

- I believe there is a solid economic case for moving forward with a Copyright Act review now.
- The Copyright regime affects how people create, distribute and access information. It is therefore a critical system to facilitate a knowledge-based economy.
- Ensuring regulation of intangibles is fit for purpose in an online environment is also a pivotal part of facilitating weightless exports.
- However, the current regime is complex, difficult to apply to real life situations and may not be fit for purpose in the digital age. It could become a poster child for a regulatory regime that constrains innovative and knowledge-based economic activity. Some good examples of this include:
    - ***Missed opportunities*** – copyright could be constraining the development of innovative technologies that rely on big data and cloud based services – areas like artificial intelligence and virtual reality.
    - ***The current regime is out of date*** – it was developed at a time when 'streaming', now a key content delivery mechanism, barely existed.
    - ***Enforcement is often costly and difficult*** – rights holders lack efficient mechanisms to enforce their rights.
    - ***Law is not respected*** – overprotection, inconsistent protection and complexity may be resulting in a lack of respect for the law.
- Given the vast technological changes that continue to change the way we create, distribute and consume content, it is important to ensure that the regime is fit for purpose.

- Launching a review by releasing a Terms of Reference in late June would:
    - build on the momentum generated through the Government's *Study of the role of copyright and designs in the creative sector* , which was completed in December last year – in terms of both the currency of the information and the level of stakeholder engagement
    - respond to stakeholder calls for a review and be consistent with Cabinet's decision to review the *Copyright Act* following the conclusion of the TPP negotiations
    - allow officials to engage openly with stakeholders and the public as they develop an issues paper.
- A review is also an opportunity to consider the appropriate 'balance' in the regime, particularly given that we may need to accept a longer term of copyright protection in the future. For example, through implementing TPP-type provisions. Some of our trading partners seek to export higher levels of protection without also exporting flexibilities that may provide a degree of balance in their domestic copyright regimes. We need to look at this closely.
- The Terms of Reference clearly signal that the identified objectives for copyright, together with the scope and staging of the review, will be informed by a future public consultation process (an issues paper).
- This approach will enable us to stage the later phases of the review to prioritise the policies that will have the greatest impact.

Q+As

What would the review cover?

- We would want to consider how to address the examples I mentioned earlier by:
- ***Making sure we don't miss opportunities*** –
    - Our digital industries are increasingly focused on products that involve processing and analysing large amounts of data.
    - This includes areas like artificial intelligence, data-mining and virtual reality.
    - The legality of how some of this information is processed and analysed is a grey area.
    - Many countries have addressed these legal uncertainties or are looking to do so.
    - If we don't provide clarity, there is a risk that these businesses and their investors will choose to invest in other places rather than in New Zealand.
- ***Ensuring the regime is fit for purpose in the digital age*** –
    - Consumers are increasingly accessing movies, TV shows and music by streaming them over the internet, rather than having their own copy on their PC or phone.
    - This has resulted in a number of areas of uncertainty for businesses, consumers and institutions around the legality of streaming content, including issues such as live streaming and streaming from legitimate overseas websites.
- ***Reducing inefficiencies*** –
    - There could be an opportunity to enhance the role of the Copyright Tribunal to provide a more cost effective and efficient system of licencing, managing and enforcing copyright works.
- ***Encourage greater respect for the law*** –
    - The development of new technologies and practices has meant that the Copyright Act treats different formats and mediums in different ways, creating complexity, inviting questions around tech neutrality and reducing respect for the law.
    - For example, the "fair dealing" provisions for news reporting mention use of photographs, but not video, which is an increasing part of online news reporting.
    - Another example is that copying a CD (that you own) on to your PC is allowed, but copying a DVD is not.
    - There's an opportunity to develop a more technology neutral regime that is better able to adapt to a rapidly changing digital environment.

- Potential high level issues that an issues paper might cover are:
    - The application of the Act to digital technology (e.g. application to "streaming"; clear rules relating to data and text mining).
    - Testing whether the current exceptions and limitations remain appropriate (e.g. currently we don't have an exception for parody; clear rules for use of works where the copyright owner is unknown/unable to be tracked down).

- Testing whether current enforcement provisions are fit for purpose (e.g. difficulties enforcing rights in an online environment).
- Investigating the interaction of the *Copyright Act* with other legislation (e.g. it's possible to have both copyright protection and protection under the *Designs Act 1953*).
- Clarifying the purpose and intention of the *Copyright Act* (e.g. some stakeholders are of the view that the role of copyright is to maximise returns for the sector; others are of the view that it should protect works only to the extent that it incentivises creation).
- Considering how our regime interacts with, and compares to, other jurisdictions.

- There is the possibility of staging the work, to progress the policies that will make the greatest impact.

What about WAI 262?

- Recommendations from the report on Waitangi Tribunal claim number 262 could be within scope, but no decisions would need to be made on this at the Terms of Reference stage.
- One of the WAI 262 recommendations which the Government may wish to look into is the creation of a mechanism by which kaitiaki (a guardianship role) can prevent any future commercial use of taonga works (e.g. a traditional cultural expression) or mātauranga Māori (traditional knowledge).

What do stakeholders want?

- I expect strong and divergent views as to what the copyright settings should be, but I do not expect a strong backlash to the launch of a review.
- Some stakeholders, such as technology companies, educational institutions, consumer groups and heritage organisations are supportive of a comprehensive review of the *Copyright Act*. In particular, they seek more flexible exceptions.
- Other stakeholders, including larger rights holders, are strongly opposed to further or more flexible exceptions and are likely to advocate for changes to enhance protection.

There are clearly issues, but are they resolvable?

- It is a complex area, and we may not be able to resolve all issues. However, it is important that we do what we can to ensure the regime supports innovative new products and services and is fit for the digital environment.
- We will make a decision on the scope of the review following consultation on an issues paper.
- We also need to recognise that the pace of technological change is likely to be much faster than legislation can keep up with. This will influence the design of the regime.

What are you proposing to do about streaming?

- I intend to incorporate it within the matters to be considered through the review. We will need to get our heads around how the copyright regime relates to digital goods and services and tech neutrality, including the relationship with parallel importation.

What about parallel importing?

- As you'll be aware, New Zealand allowed the parallel importing of physical goods in the late 1990s. There is a question of whether these provisions apply to digital goods and how that might work in practice. More work needs to be done on this.

How does it fit with the Government's priorities?

- A *Copyright Act* review is relevant to a number of portfolios and will be an important step towards ensuring that New Zealand has regulatory settings that support innovative new products and services.
- The creative sector study formed part of the BGA's Building Innovation work stream and, within that, the Building a Digital Nation work stream.
- Ensuring regulation of intangibles is fit for purpose in an online environment is a pivotal part of facilitating weightless exports.
- This work has parallels with the other government work to align the physical and digital environment – for example, the convergence work programme and GST on intangibles.

How does this impact our trade agenda and the TPP agreement?

- A *Copyright Act* review should not impact our trade agenda. Nor will it require us to change what has been agreed in TPP.
- The relationship between a potential *Copyright Act* review and on-going trade negotiations could be a good news story, as it clearly shows that trade negotiations do not prevent our ability to develop copyright settings that are responsive to the New Zealand context (within the parameters of existing international obligations).
- The consultation processes in a review may also provide useful insights into stakeholder views and help identify offensive and defensive interest for any trade negotiations.

So why was the review put on hold because of the TPP negotiations?

- This was because the negotiations involved comprehensive copyright text covering issues that could be the subject of a review. The TPP negotiations concluded in December 2015. While there is some uncertainty around the future of TPP, any further negotiations are unlikely to result in additional copyright protections. The rationale for putting a review on hold therefore no longer exists.

What's happening in other countries?

- There are proposals in the EU to update regulations for the digital environment, including new responsibilities for digital distributors, such as YouTube.
- Canada is about to undertake a five-year legislative review of its *Copyright Act.*

- The United Kingdom recently amended its *Copyright Act*, introducing new exceptions for parody, updating certain exceptions to be more technology neutral and introducing a licensing regime for works where the author or creator cannot be contacted (orphan works). The UK Government also provided kick-start funding to the Copyright Hub, an online information and licensing tool.
- Singapore released a consultation paper in late 2016 proposing wide-ranging changes to its copyright law.
- Late last year the Australian Productivity Commission released a report on Australia's intellectual property arrangements, which recommended a number of policy changes, including that the Australian Government introduce a broad copyright exception for "fair use". Following from this, the Australian Government may decide to review the federal *Copyright Act.*
- In addition, copyright amendment legislation is currently before the Australian Senate. It will make law changes to better facilitate Australia's obligations under the *Marrakesh Treaty* (which aims to facilitate greater access to accessible format works for individuals with a print disability).

How does a Copyright Act review build on the creative sector study/report?

- The study was the start of a conversation with the sector and the public, and a review of the *Copyright Act* would allow us to continue the conversation.
- A review of the Act was delayed in 2013 due to TPP negotiations. The creative sector study was launched to facilitate positive engagement with the sector and understand issues outside of a formal law reform process.
- The study has gathered useful evidence of how copyright operates in context and identified issues for possible consideration by policymakers— but it has also shown that the environment is complex.

Annex 3: Covering letters for Ministerial colleagues

Office of Hon Jacqui Dean

Minister of Commerce and Consumer Affairs
Minister for Small Business
Associate Minister for ACC
Associate Minister of Local Government

Hon Amy Adams
Minister of Justice
PARLIAMENT BUILDINGS

Proposed Review of the Copyright Act

Dear Minister

I want to test with you the possibility of launching a review of the Copyright Act in June 2017 by releasing a terms of reference. The draft Cabinet paper and Terms of Reference are attached for your information.

I am interested in your views both from your perspective as the Minister of Justice, and from your experience in your previous roles as Minister of Broadcasting and Minister for Communication and your involvement in the study of the role of copyright and designs in the creative sector.

I believe there is a solid economic case for moving forward with a review now. The copyright regime is a critical system to facilitate a knowledge-based economy. And ensuring regulation of intangibles is fit for purpose in an online environment is also a pivotal part of facilitating weightless exports.

Stakeholders are telling the government that the current regime is complex, difficult to apply to real life situations and may not be fit for purpose in the digital age. It could become a poster child for a regulatory regime that constrains innovative and knowledge-based economic activity. Some good examples of this include:

- missed opportunities – copyright could be constraining the development of innovative technologies that rely on big data – areas like artificial intelligence, data mining and virtual reality.
- the current regime is out of date – it was developed at a time when 'streaming', which is now a key content delivery mechanism, barely existed.
- enforcement is often costly and difficult – rights holders lack efficient mechanisms to enforce their rights.
- law is not respected - overprotection, inconsistent protection and complexity may be resulting in a lack of respect for the law.

Private Bag 18041, Parliament Buildings, Wellington 6160, New Zealand. Telephone +64 4 817 6843 Facsimile +64 4 817 6543

I consider that launching a review by releasing a Terms of Reference in late June would:

- build on the momentum generated through the Government's Study into the role of copyright and designs in the creative sector (the Study), in terms of both the currency of the information and the level of stakeholder engagement;
- respond to stakeholder calls for a review and be consistent with Cabinet's decision to review the Copyright Act following the conclusion of the TPP negotiations; and
- allow officials to engage openly with stakeholders and the public as they develop an issues paper.

The Terms of Reference signal that the identified objectives for copyright, together with the scope and staging of the review, will be informed by a future public consultation process (an issues paper).

This approach allows the possibility of staging the later phases of the review, to enable policies that will have the greatest impact to be prioritised.

At this stage I intend to lodge the attached Cabinet paper with Cabinet Office on 1 June for consideration by the Cabinet Economic growth and Infrastructure Committee on 7 June.

If you have any comments or concerns please let my office know by COP Tuesday 30 May. Alternatively, I would be happy to discuss next steps towards a Copyright Act review with you.

Yours sincerely

Hon Jacqui Dean
Minister of Commerce and Consumer Affairs

Office of Hon Jacqui Dean

Minister of Commerce and Consumer Affairs
Minister for Small Business
Associate Minister for ACC
Associate Minister of Local Government

Hon Steven Joyce
Minister of Finance
PARLIAMENT BUILDINGS

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I am interested in your views both from your perspective as the Minister of Finance, and from your experience in your previous roles as Minister of Economic Development and Minister of Science and Innovation and your involvement in the study of the role of copyright and designs in the creative sector.

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Hon Jacqui Dean
Minister of Commerce and Consumer Affairs

Office of Hon Jacqui Dean

Minister of Commerce and Consumer Affairs
Minister for Small Business
Associate Minister for ACC
Associate Minister of Local Government

Hon Maggie Barry
Minister for Arts, Culture and Heritage
PARLIAMENT BUILDINGS

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I am interested in your views from your perspective as the Minister of Arts, Culture and Heritage and your involvement in the study of the role of copyright and designs in the creative sector.

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Hon Jacqui Dean
Minister of Commerce and Consumer Affairs

Office of Hon Jacqui Dean

Minister of Commerce and Consumer Affairs
Minister for Small Business
Associate Minister for ACC
Associate Minister of Local Government

Hon Todd McClay
Minister of Trade
PARLIAMENT BUILDINGS

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Hon Jacqui Dean
Minister of Commerce and Consumer Affairs

Office of Hon Jacqui Dean

Minister of Commerce and Consumer Affairs
Minister for Small Business
Associate Minister for ACC
Associate Minister of Local Government

Hon Paul Goldsmith
Minister of Science and Innovation
PARLIAMENT BUILDINGS

Proposed Review of the Copyright Act

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I am interested in your views both from your perspective as the Minister of Science and Innovation and from your experience as the previous Minister of Commerce and Consumer Affairs and close involvement with the study of the role of copyright and designs in the creative sector.

I believe there is a solid economic case for moving forward with a review now. The copyright regime is a critical system to facilitate a knowledge-based economy. And ensuring regulation of intangibles is fit for purpose in an online environment is also a pivotal part of facilitating weightless exports.

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Hon Jacqui Dean
Minister of Commerce and Consumer Affairs

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Review of the Copyright Act 1994: Issues Paper and Cabinet Paper

Date:	5 June 2018	**Priority:**	Medium
Security classification:	**In Confidence**	**Tracking number:**	2126 17-18

Action sought		
	Action sought	**Deadline**
Hon Kris Faafoi Minister of Commerce and Consumer Affairs	**Agree** to the recommendations. **Forward** this briefing and its attachments to the Ministers specified in the recommendations.	11 June 2018

Contact for telephone discussion (if required)			
Name	**Position**	**Telephone**	**1st contact**
Tasha Petrie	Manager, Business Law	04 901 8624	✓
Marcus Smith	Senior Policy Advisor	04 978 3424	

The following departments/agencies have been consulted
The Treasury, Crown Law, Department of Internal Affairs, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of Culture and Heritage, Ministry of Education, Ministry for Māori Development, and the New Zealand Customs Service.

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments:

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Review of the Copyright Act 1994: Issues Paper and Cabinet Paper

Date:	5 June 2018	**Priority:**	Medium
Security classification:	**In Confidence**	**Tracking number:**	2126 17-18

Purpose

1. The purpose of this briefing is to:

   a. provide you with a copy of the draft *Copyright Act 1994* Review – Issues Paper (**Issues Paper**) we have prepared for your review

   b. seek your agreement to submit the draft Issues Paper, together with the draft Cabinet paper we have prepared, to the Cabinet Economic Development Committee (**DEV**) for consideration at its meeting on 27 June 2018.

Executive summary

Background

2. A review of the *Copyright Act 1994* was launched in June 2017, with the release of high-level terms of reference. In December 2017 you agreed that the first stage of the review should focus on problem identification through the release of an issues paper. This briefing asks for your agreement to submit to Cabinet the Issues Paper attached in **Annex 1**, subject to any feedback you have on it.

Issues Paper

3. The Issues Paper seeks to elicit information and evidence on the objectives of the copyright regime, the rights provided in the *Copyright Act*, their enforcement, exceptions to those rights, transactions (buying, selling and licensing copyright), and other issues like the protection of industrial designs and the Waitangi Tribunal's Wai 262 report.[1] We anticipate that the areas likely to attract most attention from submitters are exceptions, liability for internet services providers and the Wai 262 report.

4. Two parts of the Issues Paper we particularly recommend you give your attention to are the draft Minister's foreword we have prepared for potential inclusion and the section that deals with the Wai 262 inquiry.

5. We have prepared a section that acknowledges the Wai 262 report because we anticipate that there will be strong expectations from Māori and the wider community that the Government consider the Waitangi Tribunal's recommendations on taonga works as part of the copyright review. Failure to do so could undermine confidence in the copyright review process. In the Issues Paper, we suggest that a separate stream of work may be required to progress on the Wai 262 recommendations and we seek submitters' views on this approach.

[1] In 2011, the Waitangi Tribunal (Tribunal) published its report on the Wai 262 Claim, entitled *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*.

Cabinet paper

6. In seeking approval to release the Issues Paper, the draft Cabinet paper draws attention to the inclusion of a section on Wai 262, as this section will create a public expectation that the Government will develop a policy on the protection of taonga works. We invite your feedback on the draft Cabinet paper (**Annex 2**), which describes the Issues Paper and our approach to public consultation on the copyright regime.

7. The Issues Paper does not propose any reforms. We therefore anticipate (and note in the Cabinet paper) that its release is low risk.

Recommended action

8. The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that we have prepared the attached drafts of the Issues Paper and associated Cabinet paper for your feedback.

Noted

b **Agree** to submit the Issues Paper and Cabinet paper (amended to incorporate any feedback you may have) for consideration by DEV at its meeting on Wednesday, 27 June 2018.

Agree / Disagree

c **Note** that:

i. the terms of reference released on 29 June 2017 contained the Government's proposed objectives for the copyright regime

ii. the proposed objectives in the terms of reference do not include an objective regarding the Treaty of Waitangi

iii. in the Issues Paper, we have added to the list of objectives a new objective of ensuring the *Copyright Act* is consistent with the Treaty of Waitangi.

Noted

d **Agree** to seek Cabinet approval to add an objective of ensuring the *Copyright Act* is consistent with the Treaty of Waitangi.

Agree / Disagree

e **Note** that we will provide you with talking points ahead of the DEV meeting.

Noted

f **Note** that the Issues Paper proposes to acknowledge the work required to respond to the Wai 262 inquiry.

Noted

g **Forward** a copy of this briefing, together with the draft Issues Paper and the Cabinet paper, to the Ministers responsible for Arts, Culture and Heritage; Crown/Māori Relations; Education; Economic Development; Māori Development; and Broadcasting, Communications and Digital Media.

Yes / No

Tasha Petrie
Manager, Business Law

5 June 2018

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs

..... / ..... / .....

Background

9. A review of the *Copyright Act 1994* was launched in June 2017, with the release of high-level terms of reference.

10. In December 2017, we briefed you on the context for the review and the main copyright concepts and issues [briefing 1268 17-18 refers]. A full review of the *Copyright Act* is necessary to ensure the copyright regime keeps pace with technological and market developments.

11. You agreed that the first stage of the review should focus on problem identification through the release of an issues paper, which would help to inform the scope and staging of the review [briefing 1268 17-18 refers]. We have prepared a draft of that paper (**Annex 1**) for your comment.

Content and nature of the Issues Paper

12. The Issues Paper asks the public to provide information and evidence on how well the *Copyright Act* works in practice. We consider that releasing the Issues Paper is low risk from a stakeholder management point of view. At this stage of the review the Government is only seeking assistance identifying potential issues with the copyright regime, preliminary to considering potential policy changes.

13. The Issues Paper seeks to test issues organised under the following headings:

- *Objectives* – Whether the objectives identified in the terms of reference are appropriate,[2] and whether any important objectives are missing. The Issues Paper also invites comment on the possible objective of providing a framework for the equitable treatment of content across technological platforms.
- *Rights* – Whether the rights provided by the *Copyright Act* and rules of ownership provide the right incentives for the creation and dissemination of works, and how well suited these provisions are to a digital environment.
- *Exceptions and limitations* – Whether our exceptions and limitations appropriately balance the interests of copyright owners against the importance of allowing reasonable use of works.
- *Transactions* – Whether the transaction provisions (which govern the buying, selling and licensing of copyright) create efficient market conditions for copyright works.
- *Enforcement of copyright* – What barriers copyright owners face in seeking to enforce their rights.
- *Other Issues* – Whether industrial designs should have dual protection under the *Copyright Act* and the *Designs Act 1953* and how the Government should approach the recommendations on taonga works in the Waitangi Tribunal's 2011 report: *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*.

[2] In summary, these are to provide incentives for the creation and dissemination of works, permit reasonable access to works, ensure that the copyright system is effective and efficient and meet New Zealand's international obligations.

Topics in the Issues Paper likely to attract the most attention from submitters

14. While (in the scheme of the review) the Issues Paper itself is unlikely to generate controversy, it explores a few topics that submitters are likely to have strong views on. These are:

- whether the exceptions regime facilitates data mining and artificial intelligence and, if not, whether it should
- whether New Zealand should adopt a fair use exception, like the United States, which is not limited to a particular use or purpose
- educational exceptions, their interface with licensing arrangements and whether they reflect current teaching practices
- library and archive exceptions and their role in digitisation processes
- internet services providers' responsibility for providing links to infringing copyright material
- the Wai 262 report as it relates to copyright.

Length and readability of the Issues Paper

15. We understand that Ministers on DEV have questioned the length and user-friendliness of some public consultation documents. In the case of this Issues Paper, there is a tension between these two priorities. It examines a very complex area of the law, within which interested groups have brought numerous issues to our attention. We see a lengthy document as necessary to properly examine the variety of issues, but also to make what are often very technical matters accessible to ordinary readers. Much of the feedback we have so far received on the draft Issues Paper (eg from other agencies) is that more explanation and detail would improve the paper's readability. We have done what we can to accommodate that feedback without lengthening the paper.

16. Our priority in preparing the Issues Paper has been to lay the foundation for informed submissions that will enable us to credibly evaluate how well aspects of the copyright regime are working. However, we have also tried to reduce the burden on submitters by:

a. asking high-level questions, rather than more specific questions designed to test particular facts, assumptions or issues

b. taking care to ensure the Issues Paper can be easily navigated, as we expect that many readers will have an interest only in certain topics

c. designing, for higher-level engagement, a two-pager summarising what is in the Issues Paper (**Annex 3**) and guidance on how to make an effective submission.

Two parts of the Issues Paper you should pay particular attention to

Minister's Foreword

17. You have the option of providing a Minister's Foreword at the front of the Issues Paper. We have drafted one for your review (included in **Annex 1**).

Wider question about how to respond to the Wai 262 inquiry

What does the Wai 262 report say about copyright?

18. In 2011, the Waitangi Tribunal (Tribunal) published its report on the Wai 262 Claim. The report, entitled *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (the 'Wai 262 report'), examined, among other things, how the intellectual property system protects expressions of mātauranga Māori (Māori traditional knowledge), taonga works[3], taonga-derived works[4] and mātauranga Māori itself.

19. The Tribunal found that the Crown has an obligation under the Treaty of Waitangi to protect the kaitiaki[5] interest in taonga works and mātauranga Māori, and provide Māori with a reasonable measure of control over the use of taonga works and mātauranga Māori. It considered that intellectual property law (including copyright, but also trademarks, designs and geographical indications) protects the kaitiaki interest "only to a very limited extent".

20. The Tribunal did not recommend any changes to the copyright regime. Instead, it recommended a new, standalone regime to protect taonga works, taonga-derived works and mātauranga Māori, and the establishment of a new expert commission to administer the regime.

Proposed approach to the Wai 262 inquiry in the Copyright Act review

21. We have briefed you previously on our proposed approach to considering the Wai 262 taonga works recommendations [briefing 1075 17-18 refers].

22. Progressing work to protect taonga works, taonga-derived works and mātauranga Māori through a new regime will require a significant, multi-year process. We consider that this process should be progressed alongside the *Copyright Act* review (rather than as part of the review, given the broad scope of the Tribunal's recommendations). However, the Ministry of Business, Innovation and Employment is not currently resourced to begin this work in addition to the *Copyright Act* and *Plant Variety Rights Act* reviews.

23. In the meantime, we recommend that we use the *Copyright Act* review Issues Paper as an opportunity to assure Māori and the wider community that we are actively considering the Wai 262 recommendations on taonga works, communicate our proposed approach to this work to Māori stakeholders and seek submitters' views.

The 'Copyright and the Wai 262 Inquiry' section

24. We have drafted a section on 'Copyright and the Wai 262 inquiry' that covers the Tribunal's discussion on taonga works and mātauranga Māori, and its recommendation that separate protection outside of the conventional intellectual property system is required. We seek submitters' views on:

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[3] A taonga work is a work, whether or not it has been fixed, that is in its entirety an expression of mātauranga Māori. Examples include: haka, karakia, waitata, carvings and other Māori cultural expressions.
[4] A taonga-derived work is a work that derives its inspiration from mātauranga Māori or a taonga work but does not relate to or invoke ancestral connections, nor contain or reflect traditional narratives or stories in a direct way. Examples include modern tattoo designs, contemporary jewellery and textile.
[5] Those whose lineage or calling creates an obligation to safeguard the taonga itself and the mātauranga that underlies it.

- the Tribunal's findings
- its use of concepts such as 'taonga work'
- whether there may be Treaty of Waitangi considerations additional to the Tribunal's findings in a copyright context.

25. We also suggest in this section that, given the significance of this work, a separate work stream specifically for taonga works and mātauranga Māori may be required at the options stage of the *Copyright Act* review. We seek submitters' views on the proposed approach, including how we should engage with Māori and the broader community in this particular process.

26. It has been almost seven years since the release of the Wai 262 report. We know that Māori stakeholders will expect to see genuine engagement with the Tribunal's analysis in the Issues Paper, and we are cognisant that failure to meet these expectations at this early stage will undermine our ability to build trust and confidence in both the *Copyright Act* review process and the proposed taonga works and mātauranga Māori process. In this context, we have taken considerable care in drafting the 'Copyright and the Wai 262 inquiry' section, and consider that it will facilitate constructive engagement with interested groups. Key agencies (including TPK, MoJ, MCH, DIA and MFAT) are supportive of our approach.

Seeking approval from DEV to release the Issues Paper

27. The Cabinet paper (**Annex 2**) provides an overview of the key drivers for the review, briefly explains our proposed approach to public consultation (including the release of an Issues Paper) and highlights the issues that are most likely to attract attention.

28. Note that in addition to seeking approval to release the Issues Paper, the Cabinet paper seeks approval for the following:

- *A new Treaty of Waitangi objective of the review* – The Issues Paper invites comment on the objectives proposed in the terms of reference for the review of the *Copyright Act 1994*, with the addition of 'ensuring the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi'. The inclusion of this objective would show a commitment to reviewing the copyright regime with appropriate regard to Crown obligations under the Treaty of Waitangi in respect of taonga works and mātauranga Māori identified by the Wai 262 inquiry (discussed above).

- *A 16 week consultation period* – To get the most meaningful engagement of stakeholders and informative submissions, we propose a deadline for submissions of 16 weeks from release of the Issues Paper. We would use that period to generate interest in the Issues Paper and host a number of workshops for stakeholders to participate in.

- *Further changes to the Issues Paper* – The Issues Paper is still in a draft form. In addition to making any changes you might request, we will continue to refine and polish it before you submit it for consideration by DEV. The Cabinet paper also seeks authority to continue making editorial and other minor improvements to the Issues Paper leading up to its public release.

Asking Cabinet to note the section: Copyright and taonga works

29. The draft Cabinet paper draws to Cabinet's attention the discussion in the Issues Paper on the Wai 262 Inquiry. This section of the Issues Paper will create a public expectation that the Government will develop a policy on the protection of mātauranga Māori, taonga works and taonga-derived works in response to the Waitangi Tribunal's Wai 262 recommendations. This would respond to Chapter 1 of the Tribunal's report. We intend that the work we are doing on the *Plant Variety Rights Act* and taonga species would respond to Chapter 2 of the report.

Consultation

30. The Treasury, Crown Law, Department of Internal Affairs, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of Culture and Heritage, Ministry of Education, Ministry for Māori Development and the New Zealand Customs Service have been consulted on the Issues Paper and the Cabinet paper. We have incorporated agencies' feedback into the Issues Paper and Cabinet paper.

31. Given the breadth and depth of the *Copyright Act*, it is not always clear how copyright issues relate to significant issues in other portfolios. To help to facilitate a conversation between you and other Ministers on the review and its relevance to them, we have prepared the table attached as **Annex 4**. Note that, for completeness, this includes the interests of a wider group of Ministers than we recommend you forward this briefing to. We have tested this table with the agencies we have worked with.

32. Overall, we do not think it likely that other Ministers will have significant concerns with the main issues in the paper, given that the Issues Paper would only be inviting public comment on issues with the *Copyright Act* at this stage of the review.

33. Stakeholders outside government are also largely aware of the Government's intention to release the Issues Paper and have been providing their views on issues that are important to them during the review process. We intend to continue actively meeting with these stakeholders and encouraging formal submissions on the Issues Paper.

Communications

34. We will draft a media statement for you to release that encourages public engagement with the Issues Paper.

Risks

General

35. Copyright is a controversial subject and there are diverse stakeholder perspectives. Some stakeholders may be unhappy with the questions we pose and our description of particular aspects of copyright. We plan to manage this risk by continuing to work openly with a diversity of stakeholders and emphasising our immediate focus on soliciting evidence and information of actual problems from a wide range of sources.

36. Some of the content in the Issues Paper will likely be relevant to ongoing court proceedings related to the extradition of Mr Kim Dotcom to the US for various offences including for copyright piracy. Although the Issues Paper does not discuss the appeals, some of the matters discussed in it are currently under appeal. Examples of this include the discussion of the infringement of copyright works in digital format and the scope and application of 'safe harbours' for internet service providers. We have sought to draft the discussion of these issues in the paper in a manner that is not prejudicial to any of the parties involved in the proceedings. The Crown Law Office is comfortable with the relevant content.

The Wai 262 report

37. As mentioned earlier, we have prepared a section in the Issues Paper that demonstrates a commitment to engage with the Waitangi Tribunal's report in respect of mātauranga Māori, taonga works and taonga-derived works. A decision not to proceed with this work in future would likely have a substantial negative impact on Crown/Māori relations. We have specifically sought to draw attention to the public expectation that will be set by the release of this paper in the Cabinet paper to highlight this risk to your colleagues.

38. It is possible this section of the Issues Paper may provoke some negative reactions from Māori and other interested submitters. There are three key concerns that we anticipate:

    - People may interpret the Government's preference not to consider the relevant Wai 262 recommendations on taonga works as part of the *Copyright Act* review as an indication that it does not intend to consider them at all.
    - People may be frustrated that responding to the relevant Wai 262 recommendations remains subject to Cabinet decision, likely next year. This may be seen as an indication that this work is less of a priority than the *Copyright Act* review.
    - People may be frustrated that the Crown has not formally responded to the other Wai 262 recommendations (outside of intellectual property).

39. We will provide you with Q+As to address these concerns closer to the release of the Issues Paper. The key messages are:

    - The Government often hears feedback from Māori that the Government does not involve Māori early enough in its processes. The Issues Paper provides an opportunity for Māori and stakeholders to have their say about how the Government should engage with them on the relevant Wai 262 recommendations before it decides its approach to this process.
    - The intention is that, if a work stream on taonga works is launched, it will progress in parallel with the *Copyright Act* review. That means that officials will develop options for copyright reform and the protection of taonga works and mātauranga Māori at the same time. It is important that any new regimes arising from these processes interface well with each other, and with the rest of the intellectual property system.

40. We have sought to make it clear in the 'Copyright and the Wai 262 Inquiry' section that the Government intends to undertake a genuine process to consider the relevant Wai 262 recommendations.

Next steps

41. We will:

- continue to make minor improvements to the draft Issues Paper
- work with your office to accommodate any feedback you (or your Ministerial colleagues) have on the draft Issues Paper and Cabinet paper
- be available to meet with you at your convenience to discuss any of these matters
- deliver talking points for you in advance of DEV.

42. Once you have consulted relevant Ministers and the papers are in order for submission to DEV, we will:

- prepare a media statement and Q+As
- be in communication with your office regarding the timing of the Issues Paper's release (and publication of supporting documents).

43. Once submissions on the Issues Paper have closed, we will brief you on our analysis of them. The next major milestone would be the development of an Options Paper, which tests possible solutions to the issues established through submissions on the Issues Paper. The following table outlines an indicative timetable for developing and releasing an Options Paper based on consideration by DEV on 27 June 2018:

Milestone	Due Date
Cabinet paper and Issues Paper lodged with Cabinet Office	21 June 2018
DEV considers release of the Issues Paper	27 June 2018
Cabinet confirms release of the Issues Paper (the following dates are subject to this decision)	2 July 2018
Media statement announcing release of the Issues Paper	By 9 July 2018
Stakeholder workshops	Late August 2018
Closing date for submissions to be received	November 2018
Analysis of submissions completed	Early 2019
Summary of submissions and recommendations for next steps provided to you	Early 2019
Draft Options paper for reform of the *Copyright Act* prepared	2019
Cabinet approval to release Options Paper	2019

Annexes

Annex 1: Draft Issues paper for the *Copyright Act 1994* review.

Annex 2: Draft Cabinet paper.

Annex 3: Two-page summary of the Issues Paper.

Annex 4: Table summarising relevance of *Copyright Act* to other portfolios.

Annex 1: Issues Paper for the Copyright Act 1994 Review

Annex 2: Cabinet Paper

Annex 3: Two-page summary of the Issues Paper

Annex 4: Table summarising relevance of Copyright Act to other portfolios

1. Areas that overlap with your wider responsibilities within the Commerce and Consumer Affairs portfolio:

    - e-commerce issues, including trade in digital goods and services
    - parallel importation
    - the role of platforms
    - consumer access to digital content.

2. Areas that overlap with other portfolio interests include:

Portfolio	Areas of interest
Economic Development	• Creative sector economy (including WeCreate initiatives) • Screen sector policies • Innovation policy • Incentivising a knowledge economy
Broadcasting, Communications and Digital Media	• Enforcement issues relating to the internet, streaming and platforms • Digital convergence, including changes to broadcasting settings • Digital economy, including use and ownership of data (and relationship to emerging technologies such as the 'Internet of Things' and 'Artificial Intelligence')
Government Digital Services	• Digital inclusion (eg divides/access/digital literacy) • Digital rights/ethics • Digital disruption/open access
Arts, Culture and Heritage	• Measuring the value of culture, heritage and arts, including non-market value • Copyright exceptions for libraries, archiving and heritage organisations • Galleries, Libraries, Archives and Museums (GLAM) Sector • Sustainable growth for the cultural sector, including sustainable careers for artists and cultural workers • Funding and oversight of key institutions • Encourage public participation in culture creation and performance, as well as culture consumption • Traditional knowledge. • Screen sector policies

Internal Affairs	• Responsibility for Archives New Zealand and the National Library • Copyright exceptions for archiving and heritage organisations and digital communication • Links between copyright and the Public Lending Right and Legal Deposit • Crown copyright • Traditional knowledge • Galleries, Libraries, Archives and Museums (GLAM) Sector
Crown/Māori relations	• Traditional Knowledge • Wai 262
Māori Development	
Disability Issues	• Copyright exceptions that facilitate equitable access for people with disabilities • Marrakesh treaty
Education	• First ownership of copyright • Crown copyright • Copyright licensing and copyright exceptions and limitations, particularly in relation to educational exceptions
Trade and Export Growth	• Provisions relating to copyright and traditional knowledge/traditional cultural expressions in multilateral and other international agreements including Free Trade Agreements • International trade in and use of creative works and content including traditional knowledge/traditional cultural expressions • Crown copyright
Justice	• Enforcement provisions (civil procedures and remedies and criminal offences and penalties) • Copyright Tribunal • Courts and appeal processes, alternative dispute resolution • Privacy and BORA issues • Crown copyright

BGA Innovation Ministers' Meeting

BACKGROUND INFORMATION – Study into the role of copyright and designs in the creative sector: Next steps

7 December 2016
BGA Innovation Ministers

Purpose

1. MBIE has completed its study into the role of copyright and designs in the creative sector (the **Study**). The report on the Study is to be released publicly in mid-December.
2. This paper provides background information to Business Growth Agenda (**BGA**) Innovation Ministers on potential next steps following the public release of a report on the Study. One of the potential outcomes of the Study is a review of New Zealand's Copyright Act 1994 (the **Act**).
3. Following release of the report on the Study, stakeholders are likely to ask whether the Government intends to review the Act. The purpose of this agenda item is to update Ministers on the Study and discuss the timing and scope of a potential review.

Copyright settings play an important role in New Zealand's economy

4. Copyright seeks to incentivise the creation and dissemination of original works. Without the ability to protect works from unauthorised copying/distribution (e.g. recorded music, fine art, digital art, movies, educational literature, software code), there would be fewer incentives to create and disseminate important social, cultural and commercial works.
5. However, over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and trade. It can also inhibit important cultural activities such as educational, library and archival functions.
6. More importantly, over-protective copyright settings may impede 'follow-on' creation — that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services.
7. Copyright law therefore needs to be monitored and refined/updated to ensure that the default rule (do not copy or distribute without permission of the copyright owner) does not apply in situations where there may be little policy rationale for requiring permission (e.g. data or text mining, or copying necessary to facilitate basic functionality of new technology).
8. The Study is an important first step in ensuring that New Zealand's copyright regime keeps pace with technological and market developments. The regime should continue to incentivise the creation and dissemination of works and not inhibit the provision of innovative products and services.

Short history of New Zealand's Copyright Act

9. Below is a high level timeline of the development of the Act:

1994	2008	2013	Oct 2015
Copyright Act is enacted (modelled on UK law)	Act updated to clarify how copyright applies to new technologies	Scheduled review of Act put on hold until the conclusion of the TPP negotiations	Study into the role of copyright and designs in the creative sector launched

10. The Act was due to be reviewed in 2013 to assess its effectiveness for digital technology (five years after the 2008 amendments came into force) [POL Min (03) 14/13 refers]. However, in 2013 Cabinet decided to postpone that review until the Trans-Pacific Partnership negotiations were concluded [CAB Min (13) 15/6 refers].

Study aim: gather an evidence base before embarking on a legislative review

11. The Study was launched in October 2015 to deepen government's understanding of the role of copyright and registered designs in the creative sector. It forms part of the BGA's Building Innovation workstream (including Digital Economy) and the New Zealand Government Convergence Work Programme.

12. Because copyright arises through the creation of an original work and protection does not require registration, there is no single data source. Copyright is pervasive, however its causative effect is very difficult to measure.

13. The Study therefore sought to understand how copyright is used in practice and in context by talking to sector participants directly (69 interviews and over 100 workshop participants), surveying the sector (440 responses), and seeking consumer views (online focus group).

14. Talking to a range of creators, producers, distributors and users allowed Ministry of Business, Innovation and Employment (**MBIE**) officials to gather a diverse range of perspectives and build a collection of case studies and other data. This information forms a solid basis for launching a review of the Act.

15. Among the many trends and themes which are identified in the Study, MBIE officials have heard that:

    a. In some areas the law's application to new technologies is unclear or inadequate (e.g. policy work on the 2008 amendments was completed before "streaming" was widespread).

    b. Using or building on the works of others' can prove difficult where it is impractical to seek permission (e.g. information-gathering via data and text mining can involve copying vast screeds of content).

    c. Enforcement can be difficult (e.g. costs to take actions against individual infringers can be prohibitive).

16. The report on the Study will be released publicly in mid-December.

It is timely to signal a review of the Copyright Act

17. Based on what MBIE has heard through the Study and other stakeholder engagement, there is a strong case for launching a review of the Act.

18. There is an opportunity to build on the Study's momentum. Government now has up-to-date information on how the creative sector is using the copyright regime in New Zealand, as well as a high level of sector engagement on key issues.

19. A review in 2017 would also place New Zealand at the centre of an international conversation on the role of copyright in the digital age, with major reviews proposed, underway or recently completed in the European Union, Canada, the United Kingdom, and Singapore.

20. A Copyright Act review may also be on the cards for Australia following the public release of the Australian Productivity Commission's report on Australia's intellectual property arrangements (likely early 2017).

Priorities for 2017

21. Copyright issues are complex, pervasive, difficult to isolate, subject to ever-changing technologies and rarely tested in the New Zealand courts. Copyright is also relevant to a number of Ministerial portfolios.

22. To ensure any review delivers an efficient and effective regulatory regime, it would be important that:

    a. The review prioritises the areas that are most likely to make the greatest impact.

    b. Government receives input from the diverse range of stakeholders who rely on, and are affected by, the regime.

Early 2017

23. The immediate focus for 2017 would be to clarify the review's Terms of Reference. Given the absence of an explicit purpose statement in the Act, and the divergent stakeholder views on the purpose and role of copyright, a high level Terms of Reference which seek feedback on guiding principles for a legislative review may be appropriate.

24. Officials would prepare a draft Terms of Reference in the new year, for potential release early in the second quarter of 2017.

Late 2017

25. Following consultation and analysis of submissions on the Terms of Reference, the next step would be to release an issues paper. Drawing on key themes that emerged through the Study, as well as wider stakeholder engagement, some of the points an issues paper might address are outlined in ***Annex 1***.

Beyond 2017

26. Following consultation and analysis of submissions on an issues paper, subsequent steps may include:

    a. Consultation on an options paper in mid-2018.

    b. Consultation on an exposure draft of the proposed legislation in 2019.

Next steps

27. Officials can provide more detailed advice to Ministers on the preferred scope and process for reviewing the Act once draft Terms of Reference have been prepared.

Annex 1: Some of the points an issues paper may address

Possible issue	***Example / explanation***
The application of the Act to digital technology	• Developments not explicitly considered in 2008 reforms include "streaming", data and text mining, the "internet of things", artificial intelligence, and 3D printing
Testing whether the current exceptions and limitations remain appropriate	• Cultural institutions have difficulty dealing with "orphan works" (i.e. the copyright owner cannot be identified/found) • No parody exception, so new productions that parody existing works (increasingly common with the proliferation of user-generated content on the internet) may be breaking the law • Concerns that platforms hosting user-generated content receive too much protection (i.e. safe harbour)
Testing whether current enforcement provisions are fit for purpose	• Difficulties enforcing rights for online infringement, both in terms of cost (relative to the size of any claim) and other practicalities
Investigating the interaction of the Copyright Act with other legislation (e.g. the Designs Act 1953)	• There is some overlap between designs protected by copyright and those protected under the registered designs regime (governed by the Designs Act 1953) — further work may be necessary to determine whether this overlap creates inefficiencies or barriers
Clarifying the purpose and intention of the Act	• There are differing views about the purpose of copyright, which can point to different interpretive principles / policy objectives
Considering how our regime interacts with, and compares to, other jurisdictions	• Overlap of copyright and designs law in New Zealand is unusual, and may pose risks if the local protection mechanism does not exist in other jurisdictions • Local creators seek a level playing field with international competitors (e.g. "fair use" exception for documentary producers and game developers)
Considering recommendations in the WAI 262 report	• Considering whether to address any of the WAI 262 recommendations which relate to protection of taonga works or mātauranga Māori

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Proposed next steps following release of the *Copyright and the Creative Sector* report

Date:	1 February 2017	**Priority:**	Medium
Security classification:	**In confidence**	**Tracking number:**	2060 16-17

Action sought

	Action sought	Deadline
Hon Jacqui Dean Minister of Commerce and Consumer Affairs	**Agree** to next steps by Thursday 9 February 2017.	Thursday 9 February
	Agree to forward this paper and the *Copyright and the Creative Sector* report to the Minister for Communications for his information by Tuesday 7 February.	Tuesday 7 February

Contact for telephone discussion (if required)

Name	Position	Telephone		1st contact
Gus Charteris	Manager, Business Law	(04) 474 2839	s 9(2)(a)	
Katrina Sutich	Senior Policy Advisor, Business Law	(04) 901 2424		✓

The following departments/agencies have been consulted

☐ Treasury	☐ MoJ	☐ NZTE	☐ MSD	☐ TEC	☐ MoE
☐ MFAT	☐ MPI	☐ MfE	☐ DIA	☐ TPK	☐ MoH
		Other:			

Minister's office to complete:

☐ Approved ☐ Declined
☐ Noted ☐ Needs change
☐ Seen ☐ Overtaken by Events
☐ See Minister's Notes ☐ Withdrawn

Comments:

BRIEFING

Proposed next steps following release of the report on copyright and the creative sector

Date:	1 February 2017	**Priority:**	Medium
Security classification:	**In confidence**	**Tracking number:**	2060 16-17

Purpose

This briefing:

- briefly introduces the *Copyright and the creative sector report*, including key drivers, context, process, findings and feedback from the study;
- outlines other relevant copyright-related developments;
- outlines next steps towards a potential Copyright Act 1994 review; and
- seeks your agreement to preparing a draft Terms of Reference for a Copyright Act review to take to Cabinet.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that the report on the study into the role of copyright and designs in creative sector (**Copyright and the Creative Sector report**) was publically released on Thursday 15 December 2016 by the previous Minister of Commerce and Consumer Affairs.

Noted

b **Note** that the Copyright and the Creative Sector report appears to have been well received, with positive feedback from creative sector stakeholders, academics and relevant government agencies.

Noted

c **Note** that, prior to release of the Copyright and the Creative Sector report, the previous Minister of Commerce and Consumer Affairs sought feedback from his Ministerial colleagues on a potential Copyright Act 1994 review in 2017 through the Business Growth Agenda Innovation meeting (**BGA Innovation meeting**) scheduled for Wednesday 7 December 2016.

Noted

d **Note** that while the December BGA Innovation meeting was cancelled, the supporting papers outlining the rationale, timing and process for a review were distributed to all relevant Ministers for comment. No concerns were raised and Minister Joyce signalled he was open to the proposal.

Noted

Next steps

e **Agree** that officials continue to prepare Terms of Reference for a Copyright Act review.

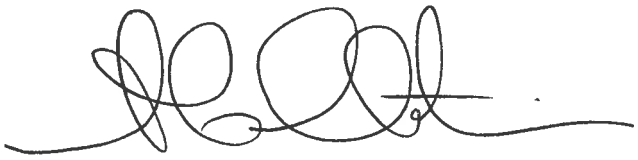
Agree / Disagree

f **Note** that, subject to your agreement, officials will provide you with draft Terms of Reference for your comment by Tuesday 7 March 2017. Before release of any Terms of Reference, you will need to seek Cabinet approval to launch a review and consult on the Terms of Reference.

Noted

g **Forward** this briefing and a copy of the Copyright and the Creative Sector report to the Minister for Communications, for his information, by Tuesday 7 February 2017.

Agree / Disagree



Gus Charteris
Manager, Business Law
Building, Resources and Markets, MBIE

01 / 02 / 2017

Hon Jacqui Dean
Minister of Commerce and Consumer Affairs

..... / ..... / .....

Background

1. In October 2015, the previous Minister of Commerce and Consumer Affairs launched a study into the role of copyright and designs in the creative sector (**the Study**), the purpose of which was to gather a solid evidence base before embarking on any review of the Copyright Act 1994. A report on the Study was publicly released on Thursday 15 December 2017 (the **Copyright and the Creative Sector report**).
2. Prior to the release of the Copyright and the Creative Sector report, the previous Minister of Commerce and Consumer Affairs sought his Ministerial colleagues' feedback on commencing a Copyright Act review.
3. The possible launch of a Copyright Act review was included on the agenda of the 7 December 2016 Business Growth Agenda Innovation meeting (**BGA Innovation meeting**). The Attorney-General and the Minister for Arts, Culture & Heritage were also invited to attend the meeting. The supporting papers provided to Ministers outlined key findings from the Study and recommended that it was timely to signal a review of the Act. The first proposed step was for officials to prepare a Terms of Reference for potential release in the first half of 2017.
4. The BGA meeting was cancelled. Relevant Ministers were instead invited to provide written feedback on the supporting papers. No concerns were raised and Minister Joyce signalled he was open to the proposal.
5. The Copyright and Creative Sector report and the BGA Innovation meeting papers were provided to you on Wednesday 21 December 2016.
6. This briefing provides further context relating to copyright, the Study and the rationale and proposed timing for a review. It also seeks your agreement to officials preparing a Terms of Reference for a Copyright Act review.

What does copyright do and why is it important to get the settings right?

7. Copyright is a set of rights granted under the Copyright Act. It arises through the creation of an original work. Unlike some forms of intellectual property protection (e.g. patents), protection does not require registration. Protected works include recorded music, fine art, digital art, movies, literature, software code and works of architecture.
8. Copyright protects the expression of ideas, rather than the ideas themselves. For example, if you discuss a concept for a new blog with a friend, copyright law will not protect that idea. Once you begin writing a blog post, the text will receive copyright protection as a literary work (provided it is original). Only the work produced – the expression of the idea – will be protected.

Copyright provides exclusive rights to incentivise creation and dissemination…

9. The exclusive rights of copyright owners include the right to:
   - **copy the work**, including recording, reproducing or downloading a copy or creating a new work that copies a substantial part of the original
   - **issue copies of the work to the public**, including publishing books, distributing CDs to music retailers or selling a t-shirt with a painting printed on it
   - **perform, play or show the work in public**, including a band performing live music at a bar, actors performing a play at a theatre, a retail store playing background music or a cinema showing a movie
   - **communicate the work to the public**, including a TV station broadcasting a sports match, a radio station broadcasting or live streaming an interview via radio or webcast and a person posting a video, photograph or story on social media
   - **adapt the work**, including translating a novel from one language to another or adapting a novel into a movie script.

10. Copyright policy seeks to incentivise the creation and dissemination of original works. Without the ability to protect works from unauthorised copying/distribution, there would be fewer incentives to create and disseminate important social, cultural and commercial works.

11. New Zealand is a party to international treaties administered by the World Intellectual Property Organization and multilateral agreements (such as the World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property Rights*) which largely dictate minimum standards for copyright protection.

...but over-protection can inhibit innovation and important cultural activities

12. Over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and trade. It can also inhibit important cultural activities such as educational, library and archival functions.

13. More importantly, over-protective copyright settings may impede 'follow-on' creation — that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services.

14. The Copyright Act provides certain exceptions to owners' exclusive rights and the exclusive rights apply for a temporary period (which differs depending on the type of creative work).

15. There is ongoing debate about how flexible and broad the exceptions should be, and how long the term of copyright should be.

Copyright laws need to be regularly monitored to ensure they are fit for purpose

16. Copyright issues are complex, pervasive, difficult to isolate, subject to ever-changing technologies and rarely tested in the New Zealand courts.

17. Copyright law therefore needs to be monitored and refined/updated to ensure that:

    a. it is clear how it applies to new technology (e.g. streaming) and;

    b. the default rule (do not copy or distribute without permission of the copyright owner) does not apply in situations where there may be little policy rationale for requiring permission (e.g. data or text mining, or copying necessary to facilitate basic functionality of new technology).

The Study

What were the main drivers for the Study?

There is growing pressure to review the Copyright Act

18. The Copyright Act was scheduled to be reviewed in 2013. The table below sets out a high level timeline of the development of the Act:

1994	Copyright Act is enacted (modelled on UK law)
2008	Act updated to clarify how copyright applies to new technologies, with a review scheduled for five years later to assess the Act's effectiveness for digital technology [POL Min (03) 14/13 refers]
2013	Scheduled review of the Copyright Act put on hold until the conclusion of the Trans-Pacific Partnership (**TPP**) negotiations [CAB Min (13) 15/6 refers]
2015 (Oct)	The launch of the study into the role of copyright and designs in the creative sector
2015 (Nov)	TPP negotiations concluded

2016 (Dec)	Copyright and Creative Sector report released Previous Minister of Commerce and Consumer Affairs tests launching Copyright Act review with BGA Innovation Ministers

19. Since the 2013 Cabinet decision to delay the review there has been growing pressure from stakeholders to review the Copyright Act, with some calling for more flexible exceptions and others seeking stronger protection (e.g. longer term, additional enforcement provisions).

Ensuring that copyright settings are fit for purpose, particularly in the context of rapid technological change

20. New technologies have rapidly changed the way that products protected by copyright and designs regimes are produced and disseminated. The previous Minister of Commerce and Consumer Affairs decided that a better understanding of copyright use in the market was required before embarking on any legislative review of the Copyright Act.

Available data is limited

21. Data is important for evidence-based policy making. However there is very little data available on copyright for a number of reasons, including:

    - copyright is automatic and there is no registration process and no central repository of copyright data;
    - where copyright-specific data exists it is privately held within the industry;
    - it is difficult to determine to what extent copyright settings impact the economic performance of the sector, or what impact they have on the wider economy. The causative effect of copyright is very difficult to measure and much of the data drawn on in studies measures the size of the "copyright", "creative" or "cultural" sector (the definition of which is highly contested), rather than the role of copyright. For example, the Screen Association of New Zealand Position Paper, "Balancing Copyright in New Zealand" uses the economic performance and output of the New Zealand screen sector as a rationale for increasing copyright protection, rather than analysing the actual impact of copyright settings on the sector.

Opportunity to understand how copyright is used without being drawn into a polarising debate

22. Copyright policy is often the subject of polarising debate. While there is broad consensus that copyright protection is important, there is heated debate about what the ideal copyright settings should be. For example some argue that, in order to incentivise creation of quality works in a digital environment, increased protections are required in order to ensure adequate economic returns. Others suggest that current copyright settings inhibit innovation and follow-on creation and are too protective of commercial interests. It is common to jump to solutions about what the law should be, without considering how the law operates in practice.

23. The Australian Law Reform Commission noted in its 2014 report *Copyright and the Digital Economy* that analysis of copyright settings is often contentious, unreliable and highly speculative.

24. In the Australian Productivity Commission (**APC**) report on Australia's intellectual property (**IP**) arrangements, released publically in December 2016, the APC also suggested that IP reform can prove contentious:

> *Some vocal interest groups have long shaped Australia's IP arrangements to advance their own interests. … Government will need to show steely resolve to pursue a better balanced IP system in the face of strong vested interests.*

How did the Study fit into Government priorities and with other portfolios?

25. The Study formed part of the BGA's Building Innovation workstream and the New Zealand Government Convergence Work Programme. It was also an important step towards ensuring that New Zealand has regulatory settings that support innovative new products and services.

26. Copyright is also relevant to a number of Ministerial portfolios. Copyright is a key concern for many in the creative sector, as well as stakeholders in the wider Arts, Culture and Heritage portfolio. The dissemination of copyright works is of high importance to the media sector, and is therefore important to the Communications portfolio.

27. Ministry of Business, Innovation and Employment (**MBIE**) officials led the Study, working in close collaboration with Ministry for Culture and Heritage officials.

What did the Study result in?

28. The Study sought to understand how copyright is used in practice (by creators and rights holders) and in context (i.e. alongside all of the other drivers for creation and dissemination) by talking to sector participants directly (70 interviews and over 100 workshop participants), surveying the sector (440 responses), and seeking consumer views (online focus group).

29. Talking to a range of creators, producers, distributors and users allowed officials to gather a diverse range of perspectives and build a collection of case studies and other data. This information forms a solid basis for launching a review of the Act.

30. Among the many trends and themes which are identified in the Study, MBIE officials heard that:

    a. In some areas the law's application to new technologies is unclear or inadequate (e.g. policy work on the 2008 amendments was completed before "streaming" was widespread).

    b. Using or building on the works of others' can prove difficult where it is impractical to seek permission (e.g. information-gathering via data and text mining can involve copying vast screeds of content).

    c. Enforcement can be difficult (e.g. costs to take actions against individual infringers can be prohibitive).

31. The Copyright and the Creative Sector report was released in December 2016, with clear messaging that the report was the start of a conversation and that one possible outcome of the Study was a review of the Copyright Act.

Positive feedback on the Copyright and Creative Sector report

32. The report has been well received by key stakeholders, including creative industry body WeCreate, advocacy group InternetNZ, individuals within the creative sector and copyright academics.

Launching a review in 2017

The rationale for commencing a review in 2017

33. Officials' view is that, based on what we heard during the Study and through the TPP implementation process, a review of the Copyright Act is warranted. Placing a review of the Copyright Act on hold provided an opportunity to develop a solid evidence base before embarking on a legislative review. With current information on how the creative sector is using the copyright and designs regime, and the high level of engagement from the sector on the issues, it is timely to commence a review and build on the Study's momentum. Possible issues that could be addressed are outlined in ***Annex 1***.

34. Launching a review would respond to growing stakeholder calls for a review and be consistent with Cabinet's decision to review the Act following the conclusion of TPP negotiations.

35. A review in 2017 would also ensure New Zealand keeps pace with international conversations on the role of copyright in the digital age. Major reviews are proposed, underway or have been recently completed in the European Union, Canada, the United Kingdom, and Singapore.

36. Australia may also consider a Copyright Act review following the public release of the APC report on Australia's intellectual property arrangements. The APC recommends the adoption of a broad "fair use" exception, which is a general and flexible exception to copyright. Australia (and New Zealand) currently has a "fair dealing" exceptions regime, which is more prescriptive.

37. We will brief you when the Australian Government responds to the report. In the meantime, a brief summary of the copyright aspects of the report is included in ***Annex 2***. We also attach the Overview section of the APC report in ***Annex 3***.

38. Officials will also attend the upcoming Australian Digital Alliance forum which will focus on the APC findings related to "fair use".

The immediate focus is to clarify the Terms of Reference

39. To ensure any review delivers an efficient and effective regulatory regime, it would be important that:

    a. The review prioritises the areas that are most likely to make the greatest impact.

    b. Government receives input from the diverse range of stakeholders who rely on, and are affected by, the regime.

40. Officials consider that the best way to achieve this is by releasing a high level Terms of Reference which seeks feedback on guiding principles for a legislative review. This is particularly important given the absence of an explicit purpose statement in the Act and the divergent stakeholder views on the purpose and role of copyright.

Risks and mitigations

41. There are some risks associated with launching a Copyright Act review, however officials consider these can be effectively managed through careful timing, consultation processes and consistent communications. We have provided reactive Q+As for any questions you may receive relating to the identified risk areas through our regular reporting process.

Managing a polarising debate

42. Some stakeholders are likely to be supportive of a comprehensive review, particularly those that seek more flexible exceptions. Other stakeholders, including larger rights holders, are strongly opposed to further or more flexible exceptions and are likely to advocate for changes to enhance protection. We expect strong and divergent views as to what the copyright settings should be.

43. Commencing a review by consulting on the Terms of Reference provides an important opportunity to seek feedback on key questions relating to guiding principles for the review. This would allow government to avoid being caught in the debate before we set a framework for what the review is aiming to achieve.

Managing expectations around timing

44. There have been a number of press releases from various sources stating or implying that a Copyright Act review has commenced or will commence in 2017. Stakeholders are asking whether, and how, the Government intends to review the Copyright Act.

45. Commencing a review by consulting on the Terms of Reference may result in criticism that the process is too drawn out. Some stakeholders may call for the review to progress quickly with a deeper exploration of the issues at the outset. However, as outlined above, it provides an important opportunity to seek feedback on key questions before locking in a framework.

46. Ahead of any Cabinet decisions, we will continue to provide clear messaging that there has been no formal decision to review the Act. Once a decision is made, the focus would be on clearly conveying the process, timing and scope of each stage, together with the importance of establishing guiding principles before considering the issues.

Risks of not commencing a review

47. We consider that delaying the review beyond 2017 is likely to attract strong criticism. Stakeholders perceive the Study as a precursor to a review, and the Government has been clear that a scheduled review of the Act would follow the conclusion of TPP.

48. Delaying a review would impact our ability to draw on the Study research and findings while they are current. It may also require further work to re-establish a dialogue with stakeholders at a later date, rather than building upon the momentum and goodwill generated by the Study.

Next steps

Engaging with the sector

49. Officials will continue to engage with the sector and interested parties on the Copyright and Creative Sector report and will keep you informed of any feedback.

50. WeCreate, the industry body representing members from the television, film, books, music, games, photography and visual arts sectors, is hoping to run a 'Creative Economy Conversation' forum in the first half of this year. We will work with your office to identify whether there is an opportunity for you to speak at this forum and other industry events.

Further engagement with Ministerial colleagues

51. As outlined in paragraphs 24-26 above, copyright is relevant to a number of portfolios and Government priorities. It is therefore important to continue to consult closely with relevant Ministers.

52. The previous Minister for Communications and the Minister for Arts, Culture and Heritage were consulted at key milestones throughout the course of the Study. They, together with Minister Joyce and the Attorney-General, were provided opportunities to comment on the Copyright and the Creative Sector report before it was finalised.

53. You may wish to discuss the proposed approach and rationale for a Copyright Act review with Minister Bridges, seeking his views as the new Minister for Communications and the Chair of the BGA Innovation workstream.

Commence drafting Terms of Reference

54. Subject to your agreement officials will prioritise preparing Terms of Reference for a review.

55. We will work to refine this document over the coming weeks, with a view to providing you with a draft for consideration by Tuesday 7 March 2017. Once this is finalised, we will be able to determine the best way to progress any review.

Seek Cabinet approval to commence review

56. Subject to your agreement, officials will prepare a draft Terms of Reference to take to Cabinet for potential release in the second quarter of 2017.

Possible process and timing for further stages of review

57. Officials can provide more detailed advice to Ministers on the preferred scope and process for reviewing the Act once draft Terms of Reference have been prepared. Possible process and timing, depending on Ministerial priorities, might include:

Late 2017 – Issues Paper

a. Following consultation and analysis of submissions on the Terms of Reference, the next step would be to release an issues paper. This would draw on key themes that emerged

through the Study, as well as wider stakeholder engagement. Some of the points an issues paper might address are outlined in ***Annex 1***.

Beyond 2017 – Options paper and Exposure draft

b. Following consultation and analysis of submissions on an issues paper, subsequent steps may include:

- Consultation on an options paper in mid-2018.
- Consultation on an exposure draft of the proposed legislation in 2019.

58. Officials' experience is that in technical and highly polarised areas of policy there is great value in the continued testing and development of ideas through a reform process, including stronger relationships with stakeholders, greater buy-in and better analysis and understanding of the issues.

Proposed Timeline

59. Our proposed timeline is set out below:

Action	Indicative dates (2017)
Preparation of draft Terms of Reference (**ToR**)	February
Provide the draft ToR, Cabinet Paper and briefing to your office	Thursday 16 March
Ministerial consideration of the draft ToR and Cabinet Paper	Friday 18 – Thursday 23 March
Lodge Cabinet Paper and draft ToR	Thursday 30 March
EGI	Wednesday 5 April
Cabinet approval to launch review	Monday 10 April
Public Consultation on the ToR (we have suggested 8 weeks, but this could be reduced to 6)	Tuesday 18 April –Friday 16 June
Consideration of submissions and development of Issues Paper	Late June – late November

Annexes

Annex 1: Possible issues that could be addressed

Annex 2: Developments in Australia

Annex 3: Overview section of the APC report

Annex 1: Possible issues that could be addressed

Possible issue	*Example / explanation*
The application of the Act to digital technology	• Developments not explicitly considered in 2008 reforms include "streaming", data and text mining, the "internet of things", artificial intelligence, and 3D printing
Testing whether the current exceptions and limitations remain appropriate	• Cultural institutions have difficulty dealing with "orphan works" (i.e. the copyright owner cannot be identified/found) • No parody exception, so new productions that parody existing works (increasingly common with the proliferation of user-generated content on the internet) may be breaking the law • Concerns that platforms hosting user-generated content receive too much protection (i.e. safe harbour)
Testing whether current enforcement provisions are fit for purpose	• Difficulties enforcing rights for online infringement, both in terms of cost (relative to the size of any claim) and other practicalities
Investigating the interaction of the Copyright Act with other legislation (e.g. the Designs Act 1953)	• There is some overlap between designs protected by copyright and those protected under the registered designs regime (governed by the Designs Act 1953) — further work may be necessary to determine whether this overlap creates inefficiencies or barriers
Clarifying the purpose and intention of the Act	• There are differing views about the purpose of copyright, which can point to different interpretive principles / policy objectives
Considering how our regime interacts with, and compares to, other jurisdictions	• Overlap of copyright and designs law in New Zealand is unusual, and may pose risks if the local protection mechanism does not exist in other jurisdictions • Local creators seek a level playing field with international competitors (e.g. "fair use" exception for documentary producers and game developers)
Considering recommendations in the WAI 262 report	• Considering whether to address any of the WAI 262 recommendations which relate to protection of taonga works or mātauranga Māori

Annex 2: Developments in Australia

Australian Productivity Commission inquiry into Australia's intellectual property arrangements.

1. In August 2015 the Australian Treasurer requested that the Australian Productivity Commission (**APC**) undertake an inquiry into Australia's intellectual property (**IP**) arrangements. The APC was tasked with examining whether Australia had the right balance between promoting competition and protecting intellectual property, while considering international trade obligations. The specific objective of the inquiry was to ensure that the IP system provides appropriate incentives for innovation, investment and the production of creative works, while ensuring it does not unreasonably impede further innovation, competition, investment and access to goods and services.

2. Following the release of an issues paper and public consultation, the APC released its draft report on 29 April 2016. In June 2016, we provided a briefing summarising the draft report to the previous Minister of Commerce and Consumer Affairs.

3. Following consultation on its draft paper, the APC presented its final report to the Australian Government in September 2016. The final report was released publicly on 20 December 2016.

4. While there are some differences between Australian and New Zealand IP arrangements, a number of the APC's recommendations and findings are relevant in a New Zealand context. In particular, the report makes a number of recommendations relating to Australia's *Copyright Act 1968 (Cth)*. Of note, the report recommends that the Australian Government should:

    a. make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception;

    b. permit consumers to circumvent technological protection measures for legitimate uses of copyright material;

    c. amend the *Copyright Act 1968 (Cth)* to make clear that it is not an infringement for consumers to circumvent geoblocking technology (and avoid any international agreements that would prevent or ban consumers from doing so);

    d. strengthen the governance ad transparency arrangements for collecting societies; and

    e. implement a 'fair use' exception; and

    f. limit liability for the use of 'orphan works' where a user has undertaken a diligent search to locate the relevant rightsholder.

Annex 3: Overview section of the APC report

Australian Government
Productivity Commission

Intellectual Property Arrangements

Productivity Commission Inquiry Report

Overview & Recommendations

No. 78, 23 September 2016

An appropriate reference for this publication is:

Productivity Commission 2016, *Intellectual Property Arrangements*, Inquiry Report No. 78, Canberra.

Publications enquiries

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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

Contents

The full report is available from www.pc.gov.au

Overview

Key points

- Australia's intellectual property (IP) arrangements fall short in many ways and improvement is needed across the spectrum of IP rights.
- IP arrangements need to ensure that creators and inventors are rewarded for their efforts, but in doing so they must:
  - foster creative endeavour and investment in IP that would not otherwise occur
  - only provide the incentive needed to induce that additional investment or endeavour
  - resist impeding follow–on innovation, competition and access to goods and services.
- Australia's patent system grants exclusivity too readily, allowing a proliferation of low-quality patents, frustrating follow–on innovators and stymieing competition.
  - To raise patent quality, the Australian Government should increase the degree of invention required to receive a patent, abolish the failed innovation patent, reconfigure costly extensions of term for pharmaceutical patents, and better structure patent fees.
- Copyright is broader in scope and longer in duration than needed — innovative firms, universities and schools, and consumers bear the cost.
  - Introducing a system of user rights, including the (well-established) principles–based fair use exception, would go some way to redress this imbalance.
- Timely and cost effective access to copyright content is the best way to reduce infringement. The Australian Government should make it easier for users to access legitimate content by:
  - clarifying the law on geoblocking
  - repealing parallel import restrictions on books. New analysis reveals that Australian readers still pay more than those in the UK for a significant share of books.
- Commercial transactions involving IP rights should be subject to competition law. The current exemption under the Competition and Consumer Act is based on outdated views and should be repealed.
- While Australia's enforcement system works relatively well, reform is needed to improve access, especially for small– and medium–sized enterprises.
  - Introducing (and resourcing) a specialist IP list within the Federal Circuit Court (akin to the UK model) would provide a timely and low cost option for resolving IP disputes.
- The absence of an overarching objective, policy framework and reform champion has contributed to Australia losing its way on IP policy.
  - Better governance arrangements are needed for a more coherent and balanced approach to IP policy development and implementation.
- International commitments substantially constrain Australia's IP policy flexibility.
  - The Australian Government should focus its international IP engagement on reducing transaction costs for parties using IP rights in multiple jurisdictions and encouraging more balanced policy arrangements for patents and copyright.
  - An overdue review of TRIPS by the WTO would be a helpful first step.
- Reform efforts have more often than not succumbed to misinformation and scare campaigns. Steely resolve will be needed to pursue better balanced IP arrangements.

Overview

1 The task at hand

Intellectual property arrangements are important

Intellectual property (IP) arrangements offer opportunities to creators of new and valuable knowledge to secure sufficient returns to motivate their initial endeavour or investment. In this respect, they are akin to the property rights that apply to ownership of physical goods.

But ideas are not like physical goods in other key respects. As observed by Thomas Jefferson more than 200 years ago, the use of an idea by one party does not reduce its capacity for use by another:

> He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. (Jefferson 1813)

Ideas also provide economic and social value as others draw on them and extend the frontiers of knowledge. For these reasons, property rights over ideas and their expression are not granted in perpetuity and limitations are placed on their application.

IP rights take a variety of forms. The most familiar are patents, copyright and trade marks, but there are others, including rights over performances, designs, plant varieties and circuit layouts. A single product can — and often does — embody many IP rights (figure 1).

IP arrangements form part of the broader innovation system. The role they play differs depending on the right afforded. Patents and copyright seek to promote product innovation and the creation of new works. Design rights seek to encourage improvements in the look and feel of consumer products. Trade marks differ again, providing consumer information and protecting brand reputation.

Figure 1 **IP phone**

Today's smartphones are protected by over 1000 **patents**, including for their semiconductors, cameras, screens, batteries and calendars.

Copyright protects the artwork and software code within smartphones.

Design rights protect the aesthetics, and the placement of cameras, buttons and screens.

Circuit layout rights protect the electrical integrated circuits.

Brands, logos and other distinctive marks such as 'iPhone' are protected by **trade marks**.

But IP rights can lead to IP wrongs

Because IP rights give their holders the ability to prevent others from using that IP, there is a risk parties will unduly exercise market power. As noted by the Harper Competition Policy Review, this may allow owners of IP rights to extract excessive royalties from IP licences or place anticompetitive restrictions on knowledge dissemination, with adverse knock-on effects for innovation and ultimately consumers.

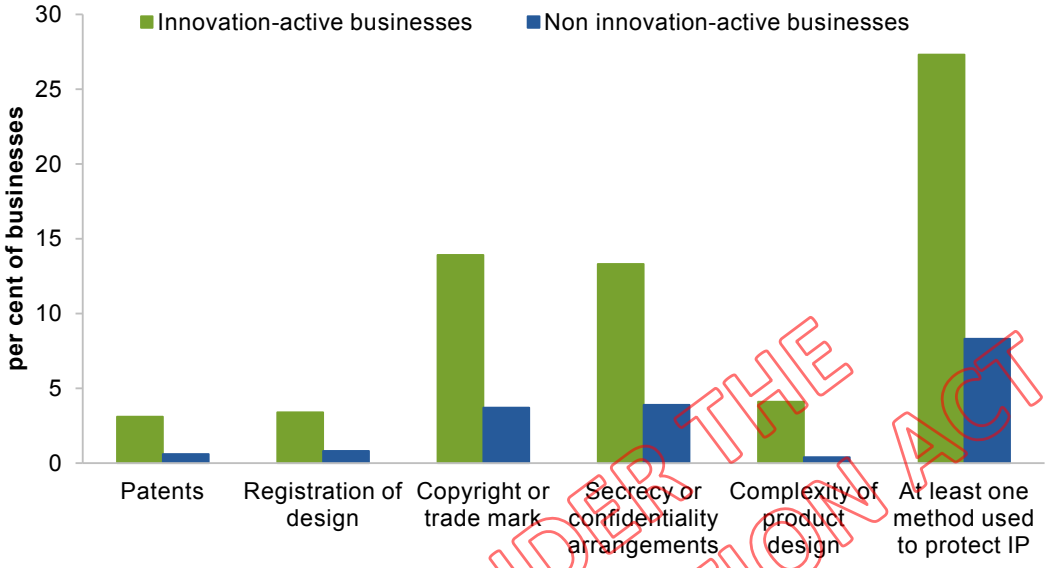
When innovation is cumulative, IP rights can reduce the flow of benefits from new ideas and processes. This is particularly harmful for Australian firms, who tend to 'adopt and adapt' innovations, building on the knowledge of others. Overly strong restrictions on diffusion can be so detrimental to innovation as to undo the benefits of the IP system in the first place:

> … a poorly designed intellectual property regime — one that creates excessively "strong" intellectual property rights — can actually impede innovation. … Knowledge is the most important input into the production of knowledge. Intellectual property restricts this input; indeed, it works by limiting access to knowledge. (Stiglitz 2008, pp. 1694, 1710)

And while patents and other IP rights can encourage innovation, they are not always necessary for it (figure 2). For example, in industries where the speed of technological change is fast moving, innovators tend to rely more on market-based arrangements, such as first-mover advantage. Similarly, IP rights are less important where innovations are difficult to copy or only entail minor development costs.

Poorly designed IP rights impose costs irrespective of whether countries are net importers or exporters of IP. However, Australia is overwhelmingly a net importer of IP, and the gap between IP imports and exports is growing rapidly. This means that the costs to consumers and follow-on innovators from higher prices and restricted availability are not offset by increases in Australian producer profits.

Figure 2 **IP rights are used alongside other mechanisms[a]**



[a] Businesses can nominate more than one type of protection.

Advancing reform in a constrained environment

There have been many recent reviews into IP, such that some inquiry participants have understandably questioned the need for yet another. However, previous reviews have focused on specific areas of IP, such as innovation patents, pharmaceutical patents, design protection, and copyright, and so lacked a consistent and coherent approach across Australia's IP arrangements — a point highlighted by the Harper Competition Policy Review. The Commission has taken a more holistic perspective to identify ways that the IP system could be improved.

The goal of IP policy should be to achieve a balance between the incentive to create and the risk of damaging the productive use of new ideas through over-protection, while also recognising that Australia's IP arrangements form part of a global system. With the overarching objective of maximising community wellbeing, the Commission has identified four guiding principles that the IP system should embody — it should be effective, efficient, adaptable and accountable (figure 3).

In applying these principles, the Commission has considered each aspect of the IP system — how rights are assigned, used and enforced. The Commission has also examined the governance and institutional arrangements underlying IP policy development, decision-making and implementation.

Figure 3 **The Commission's approach**

Overarching objective: to maximise wellbeing of Australians

Goal: *That the IP system provides appropriate incentives for innovation, investment and the production of creative works while ensuring it does not unreasonably impede further innovation, competition, investment and access to goods and services.*

Principles to apply to the IP system to achieve this goal:

Effective	**Efficient**	**Adaptable**	**Accountable**
The system should be effective in encouraging *additional* ideas and in providing incentives that ensure knowledge is disseminated through the economy and community.	The system should provide incentives for IP to be created at the lowest cost to society. This principle includes considering whether IP rights generate returns that are sufficient to encourage new ideas, the relative merits of public and private IP generation, and the longer-term effects on competition and innovation from granting IP rights.	The system should adapt to changes in economic conditions, technology, markets and costs of innovating.	The policies and institutions that govern the system, and the way that changes are made to them, need to be evidence-based, transparent, and reflect community values.

But IP arrangements are not a blank slate. Many aspects of Australia's IP arrangements have come about, or been strengthened, to give effect to commitments in international agreements. These agreements often contain prescriptive obligations relating to key policy levers such as the duration and scope of protection, and significantly curtail Australia's capacity to change domestic policy arrangements.

There are also practical constraints to independent IP policy-making. IP is a globally tradeable asset and Australia is a relatively small market. Significantly departing from the IP arrangements in other countries could frustrate Australia's access to overseas innovations.

While these constraints may see Australia fall short of achieving a balance across all aspects of IP arrangements, the Commission has identified much we can do to progress reform. Doing so necessitates an approach that:

- examines reform opportunities within the limits imposed by our international obligations
- embeds institutional and governance arrangements that promote transparent, informed and coherent policy outcomes
- advocates for multilateral change where the stakes are sufficiently high.

It also requires a dedicated reform champion with resolve to pursue change in the face of strong vested interests.

2 Copy(not)right — looking at the evidence

Copyright protects the material expression of literary, dramatic, artistic and musical works, as well as books, photographs, sound recordings, films and broadcasts.

In addition to being instrumental in rewarding creative and artistic endeavour, many creators value the recognition that the copyright system provides. It does so by granting creators the exclusive right to reproduce or adapt their work in material form, as well as to publish, perform, and communicate their work to the public. Exercise of these rights is commonly licensed to intermediaries, such as publishers, record companies, film studios, broadcasters, and copyright collecting societies.

However, copyright protection in Australia suffers from a number of shortcomings. It is overly broad, applying equally to: commercial and non-commercial works; works with very low levels of creative input; works that are no longer being supplied to the market; and works where ownership can no longer be identified. Further, copyright does not target those works where 'freeriding' by users would undermine incentives to create new works. As such, Australia's copyright arrangements are skewed too far in favour of copyright owners to the detriment of consumers and intermediate users.

Despite many claims to the contrary, the Commission is not recommending any changes to the length of copyright term — doing so would require amendments to international agreements such as the Berne Convention, TRIPS and AUSFTA. But even within the limits of these agreements, there is scope to do more.

Overly long term reduces community access to valuable works

Copyright protects literary, musical, dramatic and artistic works for the duration of the creator's life plus 70 years, sound recordings and films for 70 years, television and sound broadcasts for 50 years, and published editions for 25 years. To provide a concrete

example, a new work produced in 2016 by a 35 year old author who lives until 85 years of age will be protected until 2136.

Evidence (and logic) suggests copyright protection lasts far longer than is needed. Few, if any, creators are motivated by the promise of financial returns long after death, particularly when the commercial life of most copyright material is less than 5 years. Studies have found that a term of around 25 years enables rights holders to generate revenue *comparable* to what they would receive in perpetuity (in present value terms). Of course, some very successful works have commercial lives well beyond a few years, as repeatedly cited by inquiry participants in submissions and public hearings. But it remains the case that these are exceptions to the norm.

While some copyright holders claim that there are few, if any, costs associated with excessive term, this has not been borne out in practice. Many works become commercially unavailable during their period of copyright protection. Overly long copyright term perversely increases the likelihood and duration for which works are unavailable. Demand for works that have been created, but are not being supplied while under copyright protection, reduces community welfare and returns to original rights holders and potential new providers. Nothing better exemplifies the costs of excessive copyright term than the fact that once copyright expires and works enter the public domain, many become commercially available again.

Long periods of copyright protection, coupled with automatic application and no registration requirements, also result in 'orphan works' — works protected by copyright but unusable by consumers, libraries, and archives because the rights holder cannot be identified. The existence of orphan works has become a greater issue as libraries and archives have sought to make their collections available online. The Australian National Film and Sound Archive estimated as much as 20 per cent of its collection is orphaned or abandoned and highlighted examples of projects that have been shelved, and opportunities to celebrate Australia's heritage foregone, due to the time and expense of identifying the relevant rights holders.

Governments and academics, here and overseas, continue to explore innovative options for promoting a better balance on copyright term. In the United States (US), for example, the Register of Copyrights has publicly discussed the idea of requiring registration for rights holders to benefit from copyright term in excess of life plus 50 years (registration is already required to bring a court action for infringement in the US). Such arrangements would underscore the notion that rights holders should face obligations in order to benefit from protections.

A fairer system of user rights

Australia's current limited exceptions, fair dealing being the most well-known, do little to restore the copyright balance.

Australia's exceptions are too narrow and prescriptive, do not reflect the way people today consume and use content, and do not readily accommodate new legitimate uses of copyright material. Legislative change is required to expand the categories of use deemed to be fair. Even when this occurs, changes have simply 'caught up' with existing community practice — Australia did not legalise the wide-spread practice of home VCR recording until as late as 2006, by which time most VCRs were household relics. Universities Australia summarised the extent of the problem:

> After 20 years of reviews that have considered this question, the evidence is in: Australia's existing inflexible, purpose-based copyright exceptions are no longer fit for purpose. They are holding Australia back, not just in our universities and schools, but also in our digital industries. Innovative and useful technologies, and new ways of using content in socially beneficial ways, automatically infringe copyright in Australia unless their use falls within one of the existing narrow, purpose-based exceptions. (sub. DR453, p. 1)

Australia's narrow purpose-based exceptions should be replaced with a principles-based, fair use exception, similar to the well-established system operating in the US and other countries. As part of modernising its copyright arrangements, Israel recently adopted fair use to enable better access to copyright material 'for the advancement of culture and knowledge'. Fair use would similarly allow Australia's copyright arrangements to adapt to new circumstances, technologies, and uses over time.

Some inquiry participants suggested that the benefits from fair use are largely academic because, although current exceptions do not reflect how people use copyright material in the digital age, rights holders do not pursue infringements for 'ordinary' uses. The example of teenagers sampling music and videos to make mash ups was raised more than once.

But the opportunities Australian businesses and consumers forego because of the current inflexible exceptions are much more extensive. Participants argued that Australia's current exceptions frustrate the efforts of online businesses seeking to provide cloud computing solutions, prevent medical and scientific researchers from taking full advantage of text and data mining, and limit universities from offering flexible Massive Open Online Courses. The education sector has also indicated that fair use would avoid the current perverse situation where Australian schools pay millions of dollars each year to use materials that are freely available online.

Recent analysis undertaken by EY for the Australian Government assessed the benefits and costs of introducing a broad US-style fair use exception, and concluded that adoption of fair use in Australia would be a net benefit to the Australian community. While intrinsically difficult to assess, the analysis (unlike others commissioned by inquiry participants) examined the impact of fair use on Australian consumers and the broader community, users of copyright material such as schools and libraries, and rights holders. Some aspects of fair use offer larger gains, including education and government use, and improved community access to orphan works. Other changes reduce uncertainty for consumers and businesses, improving Australia's innovation environment.

Rights holders have argued against the adoption of fair use in Australia. They claim that by design, fair use is imprecise and would create significant legal uncertainty for both rights holders and users. Initial uncertainty is not a compelling reason to eschew a fair use exception, especially if it serves to preserve poor policy outcomes. Australia's current exceptions are themselves subject to legal uncertainty, and evidence suggests that fair use cases, as shown in the US, are more predictable than rights holders argue. Moreover, courts routinely apply principles-based law to new cases, such as in consumer and employment law, updating case law when the circumstances warrant doing so.

And over time, both rights holders and users will become increasingly comfortable with making judgements about when uses of copyright material are likely to be fair. Where the courts are called on to determine whether a new use is fair, legislation would require that they be guided by four fairness factors:

- the purpose and character of the use
- the nature of the copyright material
- the amount and substantiality of the part used
- the effect of the use upon the potential market for, or value of, the copyright material.

Rights holders also argued fair use would significantly reduce their incentives to create and invest in new works, holding up Canada as an example. Some have proclaimed that fair use will equate with 'free use', particularly by the education sector. But these concerns are ill-founded and premised on flawed (and self-interested) assumptions. Changes in Canada's publishing industry had little to do with copyright exceptions (where fair dealing still prevails) and more to do with other market factors. Notably, the Australian education sector has repeatedly made clear that fair use would coexist with the current education statutory licence scheme.

Indeed, rather than ignore the interests of rights holders, under fair use the effect on the rights holder is one of the factors to be considered. Where a use of copyright material harms a rights holder, the use is less likely to be considered fair. In the US, where fair use is long established, creative industries thrive.

In addition to the fairness factors above, uncertainty would be further limited by including a non-exhaustive list of illustrative fair uses to guide rights holders and users. By drafting the fairness factors to closely follow the wording of Australia's existing fair dealing exceptions, as well as the wording of fair use overseas, existing Australian and foreign case law (particularly from the US where fair use has operated for some time) would provide an additional source of guidance. The use of foreign case law to reduce uncertainty was a key factor in Israel's successful implementation and transition to a fair use regime. Among heavy users of copyright material, such as education and government users, as well as those in the creative sector, the Commission notes the abundance of guidelines developed collaboratively to further assist users in how to make judgements.

Making it easier for users to access legitimate content

Rights holders and consumer organisations raised concerns about online copyright infringement. Some see Australia's efforts to curb unauthorised downloading as woefully inadequate; others consider existing steps as overreach. Arguments made in submissions reflect the polarised stance on this issue.

Research consistently demonstrates that timely and cost effective access to copyright-protected works is the best way for industry to reduce online copyright infringement. Therefore, in addition to implementing a new exception for fair use, the Commission is recommending making it easier for users to access legitimate copyright-protected content.

Geoblocking

Geoblocking restricts a consumer's access to digital products, enabling rights holders and intermediaries to segment the Internet into different markets and charge different prices (or offer different services) to consumers depending on their location.

The use of geoblocking technology is pervasive, and frequently results in Australian consumers being offered a lower level of digital service (such as a more limited music or TV streaming catalogue) at a higher price than in overseas markets. Studies show Australian consumers systematically pay higher prices for professional software, music, games and e-books than consumers in comparable overseas markets. While some digital savvy consumers are able to avoid these costs (such as through the use of proxy servers and Virtual Private Networks), most pay inflated prices for lower standard services and some will ultimately infringe.

The Australian Government should make clear that it is not an infringement of Australia's copyright system for consumers to circumvent geoblocking technology and should avoid international obligations that would preclude such practices.

Parallel importation of books

Parallel import restrictions (PIRs) on books are the physical equivalent of geoblocking. Except in limited cases, Australian booksellers are prevented from purchasing stock from lower priced suppliers overseas, but must purchase from an Australian publisher regardless of the price. This restriction applies to booksellers only — Australian consumers can purchase books themselves from overseas online retailers. The restrictions can put Australian booksellers at a competitive disadvantage, and result in those Australians unable to purchase online paying higher prices.

No fewer than eight past reviews, including by the Commission, and most recently by the Harper Competition Policy Review, have recommended that prohibitions on parallel imports be repealed. The Australian Government supports the removal of the restrictions

and agreed to progress this reform subject to the recommendations of this inquiry regarding transitional issues.

In responding to a range of false claims and flawed analyses made by participants, the Commission has undertaken a comprehensive analysis of book prices, comparing the price of over 1000 like-for-like titles sold in Australia and the UK (and 400 in Australia and the US). Over three quarters of the books in the sample were more expensive in Australia than the UK, with Australian prices around 20 per cent higher. Under reasonable assumptions regarding discounting and freight costs, the Commission estimates the benefits to Australians from repealing the restrictions could be around $25 million per year.

The publishing industry has stridently opposed the removal of the restrictions. In doing so it has put forth a number of (often contradictory) arguments, including that the:

- restrictions do not raise the price of books in Australia, but at the same time are crucial to supporting the production of Australian literature (which would require a premium on Australian book prices)
- price of Australian books is competitive with those in the US and UK, yet removal of PIRs would result in importation of cheaper books and the demise of local publishing
- removal of the restrictions would unduly harm local authors. Yet the Commission has found the benefits of the restrictions are overwhelmingly enjoyed by global publishers and offshore authors.

The Commission found arguments about the role of publishers in supporting local authors particularly unconvincing. In order for this to occur, publishers would need to charge higher prices (which they deny) and channel the revenues from these higher prices back to Australian authors. During public hearings the Commission sought (but did not receive) evidence from publishers on the quantum of support they provide to Australian writers and how their support differs from that provided by publishers in other jurisdictions where PIRs do not apply, such as the US.

The Commission recognises the cultural and educational value of books is significant. While most of these benefits are captured in the price readers are willing to pay, some are not. However, these broader benefits are best targeted by direct public support — as is already provided by Australian Governments (of around $40 million each year for Australian books and authors) — rather than through the ill-targeted PIRs.

Publishers also expressed concern that removing PIRs will harm Australian booksellers. Yet the Commission received evidence that Australian publishers act as the local supplier when individuals import books from foreign online retailers. In this way, publishers appear less concerned about Australian consumers accessing books at lower prices than they are about ensuring their continued primacy in the local supply chain. Dymocks highlighted how PIRs unequally discriminate against Australian booksellers:

> … when an Australian customer makes a purchase from UK based Book Depository the order is fulfilled through a local Australian publisher rather than being sent from the UK. Australian

booksellers — unable to source supply from overseas — are not given the same freedom. (sub. DR613, p. 1)

And concern that overstocked books in foreign markets (remainders) would harm Australian publishers ignores the fact that, for the majority of books, the same publishing house holds both the Australian and foreign rights. For example, the Commission matched 1126 book titles across the Australian and UK market and found that 95 per cent were published in both markets by the same publisher or an owned subsidiary. Claims that lower priced books from overseas — especially those of Australian authors — will be 'dumped' in Australia are unsubstantiated and misleading, and may reflect a desire by some publishers to continue price discriminating against Australian readers.

In short, no new evidence was presented in this inquiry that overturns the existing case for removing the restrictions. The Australian Government should proceed with its announced plans to repeal parallel import restrictions, with effect no later than the end of 2017. Additional transitional arrangements are not needed given the positive confluence of efficiencies made by the Australian publishing industry and broader economic circumstances.

3 Patents — getting the fundamentals right

Patents can advance human knowledge by encouraging socially valuable innovation that would not have otherwise occurred. However, if poorly calibrated, they also impose net costs on the community. By design, patent protection inhibits competitors from freely using an inventor's technology, but over-protection can stifle competition more broadly, leading to reduced innovation and excessive prices. Moreover, by blocking subsequent innovators, patent protection can perversely inhibit the advancement of knowledge through 'follow-on' innovation.

Notwithstanding reforms introduced under the 2012 *Raising the Bar* initiative, Australia's patent system remains tipped in favour of rights holders and against the interests of the broader community.

- A multitude of low-value patents make it harder for innovators to signal the value of their inventions to investors, and also frustrate follow-on innovators and researchers who are forced to invest in costly workarounds. Costs are ultimately borne by the users of technology.
- Australia provides stronger patent rights than most other advanced economies. As a net importer of patented technology, the strength of rights is particularly costly for Australia.

As in other areas of IP, reform options are restricted by Australia's international obligations. However, within these constraints, the Commission has identified a package of reforms that would go some way to striking a better balance.

Making clear what Australians want from their patent system

Consistent with the absence of overarching principles to guide IP policy, the Patents Act does not have an objects clause to guide legal interpretation. Many participants supported the principle of introducing an objects clause to provide greater guidance to decision makers involved in the design and application of the Act.

An objects clause would provide a number of benefits. Greater guidance would play an important role given the scope for administrative and judicial interpretation to diverge over time from policy intent. Setting out broad objectives would also help the Act remain adaptable and fit for purpose as technologies emerge and economies and business models evolve.

An objects clause should make clear that the principal purpose of the patent system is to enhance the wellbeing of Australians by promoting technological innovation, and by promoting the transfer and dissemination of technology. In so doing, the patent system should balance the interests of producers, owners and users of technology.

Reforming the inventive step

An invention must satisfy five criteria to qualify for patent protection, including that it involve a non-obvious 'inventive step' (box 1). The test for inventive step is particularly important because it provides the closest proxy for an invention's technological advance. A high inventive step means that only significant improvements on existing inventions achieve patent protection, while a low inventive step means that incremental advances can secure the same term and scope of protection.

Box 1 What are the criteria for granting a patent?

IP Australia grants patents to inventions that meet the criteria outlined in the Patents Act. To satisfy the criteria for a standard patent, inventions must:

- be a '*manner of manufacture*' — described by the courts to be an invention that involves human intervention to achieve an end result, and has an economic use
- be *novel* — the invention must be novel in light of 'prior art information' (information about the current state of technology)
- involve an *inventive step* compared with the prior art base — the invention must not be obvious to a person skilled in the relevant art in light of 'common general knowledge' (knowledge of a worker in the field)
- be *useful* — there must be a specific, substantial and credible use for the disclosed invention
- have *not been secretly used* — the invention cannot be used before the priority date (the date from which a patent application is assessed against the patent criteria — typically the date when a party first files an application).

In assessing whether an application has an inventive step, IP Australia must consider a number of factors, including the:

- definition of the invention
- 'prior art', or current state of technology
- minimum advance over the prior art required to meet the test, or 'obviousness test'
- 'person skilled in the art', who is assumed to have common general knowledge.

The inventive step has been subject to ongoing reform. Most recently, the *Raising the Bar* initiative increased the inventive step threshold by reforming the definitions of prior art and common general knowledge. This has moved Australia's requirements closer to the thresholds applied in the US and the European Union (EU).

These reforms have moved the inventive step in the right direction, but there are grounds to go further. Measures of patent quality suggest that thresholds in the US and EU fall short of the ideal, and so are not sufficiently high benchmarks. And post-*Raising the Bar* patent outcomes (analysed by the Commission) indicate IP Australia still has a greater propensity to grant patent applications that have been rejected by the European Patent Office (EPO).

Ongoing disparities between outcomes in Australia and the EU are not surprising, as Australia still applies a less rigorous test for obviousness. In particular, the required minimum advance over the prior art in Australia is a mere 'scintilla of invention', which is highlighted by some patent attorneys and referenced in IP Australia's Patent Examiners Manual. Evidence also suggests that the inventive step is not always effective in filtering out patents that fail to advance technology.

A robust case exists for raising the inventive step further to reduce the proliferation of low-value patents. Raising the threshold would also help to address specific concerns with pharmaceutical and software patents (see below). To raise the threshold, the required advance over the prior art should be increased and efforts should be taken to better ensure only technological inventions pass the inventive step.

Given the weight of evidence that patent systems are out of balance, these unilateral reform options would leave the inventive step below the optimal level. Going further and significantly raising the threshold above the level applied in other countries would, however, entail risks. Such endeavour is best pursued in collaboration with like-minded countries.

Improving the evidence base for granting patents

As patents may impose costs on the community, judgements about whether or not to grant a patent must be well informed.

Patent examiners draw on a significant amount of information when deciding whether to grant a patent, including on the current state of technology. In many cases an applicant will have better access to such information than patent examiners.

In Europe, a patent applicant must identify the technical features of the invention in their set of claims. This enables the patent office to better target genuine advances in technology, establishes a clearer link between the prior art and the market protection being sought, and allows follow-on innovators to identify the core technical element of a patent claim.

Given applicants are best placed to identify the technical features of their invention, requiring them to do so as part of an application for an Australian patent would impose minimal burden while helping to ensure only technological inventions are granted patent protection.

Making better use of patent fees

The structure and level of patent fees is another policy lever for improving the patent system. The Australian Government should set patent fees to promote broader IP policy objectives, rather than the current primary objective of achieving cost recovery.

Renewal fees influence decisions about whether to maintain a patent. As such, they can help achieve a number of policy aims, including reducing economic rents that arise from patent holders exercising market power, limiting the risk that patents are used strategically, and ensuring only valuable patents are held in force.

As a policy lever, renewal fees are underutilised. Many patented inventions require less than 20 years protection. Yet renewal fees only increase in three stages across the life of a standard patent. The structure of renewal fees in Australia should be reformed to increase more steeply with patent age, akin to the approach in the UK.

Claim fees, in combination with effective rules on how claims are constructed, can decrease the scope of claims, and in so doing the breadth of market protection. Fewer claims also decrease the time taken to review applications.

The structure of claim fees in Australia suggests they can be better deployed to discourage rights holders casting claims too widely and from using the system strategically. Currently, applicants only pay a flat fee for each claim in excess of 20 claims. Australia should adopt a similar approach to Japan, South Korea and Europe by lowering the initial threshold for claim fees, and applying much higher fees for applications with a large number of claims.

4 Other patent system improvements

The 'second-tier' patent experiment has failed

In addition to standard patents, Australia has a (second-tier) innovation patent system (IPS). The system's objective (and that of comparable systems overseas) is to promote innovation by small- and medium-sized enterprises (SMEs). Compared to the standard patent system, the IPS provides more contained rights — innovation patents are limited to five claims and the maximum duration of protection is eight years. Australia's IPS is little used. In 2015, innovation patents made up fewer than 5 per cent of patents in force.

The IPS was introduced in response to concerns that the previous petty patent system was not meeting the needs of firms (especially SMEs) that invested in 'incremental innovations'. Reflecting this, the 'innovative step' required to receive an innovation patent is lower than the inventive step for standard patents; even where innovation patents apply to obvious contributions, they have been found valid by the courts.

The low innovative threshold has proven more harmful than helpful, including (perversely) for SMEs. It has encouraged a multitude of low value patents, covering everything from a pet bed to a pizza box that converts to a bib. This, in turn, has reduced the credibility that patents provide for attracting finance for commercialisation, and created uncertainty for other innovators who are unsure whether they are infringing on another party's patent. Patent attorneys openly advertise ways in which users can game the system, including to improve their bargaining position in patent disputes and to frustrate entry by competitors.

Some participants have called for the IPS to be abolished; others have called for its reform. Were the IPS to be reformed, there would be strong grounds to exclude obvious inventions by setting the innovative step at the same level as the inventive step for standard patents. It would also be necessary to address strategic behaviour, most likely by reintroducing a mandatory examination process, and limiting the period in which damages could apply. However, reforming the IPS along these lines would see innovation patents resemble petty patents, and so represent a return to an approach already found to be lacking — tantamount to a policy 'Groundhog Day'. The community's interests, and the interests of SMEs, would be better served by abolishing innovation patents and directly tackling the IP issues of greatest concern to SMEs, such as patent infringement and enforcement costs.

Software patents — staying on track

The rise of the digital economy means that software is now a part of many everyday goods and services, and is a vital building block for new ideas and technologies. But while software represents the future, the legal constructs of software patents are stuck in the past — using concepts that stem from England's 1624 Statute of Monopolies. Unsurprisingly, the use of a four century old definition has proven challenging to apply to contemporary innovations.

Software innovations are also increasingly at odds with the economic underpinnings of the patent system. Software development typically occurs rapidly, builds sequentially on existing ideas, and is getting cheaper. In contrast, patents provide a long period of protection and can frustrate follow-on innovation. Over the last decade, there has been growing concern that software patents are being used to protect simple or straightforward ideas, and to gain exclusivity over existing business processes that are merely automated using a computer, rather than being particularly novel.

Recent court decisions have helped to narrow the circumstances where computer-implemented innovations can gain patent protection. Business methods are no longer patentable, and other software innovations must now embody some technical contribution in order to qualify for patent protection. The Commission's proposed patent reforms would assist further in limiting low-value software patents.

The patentability of software merits close and ongoing scrutiny given its importance to the modern economy, and to ensure that the effect of recent legal decisions has been in the best interests of the community.

5 Pharmaceuticals — a better policy prescription

The pharmaceutical sector relies on IP protection more than most, since many pharmaceutical advances require large upfront investment in research and development and are easy to copy. In addition to the standard suite of IP protections, the pharmaceutical sector benefits from bespoke IP arrangements.

Extensions of term

Further to the 20-year term applying to all patents, pharmaceutical patents can qualify for an additional five years of protection. Extensions of term (EoT) are capped at an effective market life of 15 years. These bespoke arrangements were intended to attract pharmaceutical research and development investment to Australia and to improve incentives for innovation by providing an effective market life for pharmaceuticals more in line with other technologies.

However, Australia's EoT scheme has had little effect on investment and innovation; Australia represents a meagre 0.3 per cent of global spending on pharmaceutical research and development. As pharmaceutical companies have acknowledged, the prospect of future returns in such a small market (accounting for only 2 per cent of global pharmaceutical revenues) provides little in the way of additional incentive.

Moreover, the benefits sought from EoT arrangements have proven largely illusory, resulting in a costly policy placebo. Poor targeting means that more than half of new chemical entities approved for sale in Australia enjoy an extension in patent term, and consumers and governments face higher prices for medicines.

Rather than compensating firms for being slow to introduce drugs to the Australian market, extensions should only be allowed where the actions of the regulator result in an *unreasonable* delay. Timeframes (of around one year) set by Government for the Therapeutic Goods Administration (TGA) provide a ready benchmark for determining what constitutes a reasonable processing period. EoT should only be granted where the time taken by the regulator exceeds this period. The Commission estimates that this approach would lower the cost of pharmaceuticals in Australia and save consumers and taxpayers more than $250 million per year.

Sharing rather than protecting data

The confidential data submitted in support of regulatory approval processes are also protected for a period of five years. During this period, manufacturers of generic pharmaceuticals must independently prove that their products are safe and effective, even though they are chemically identical to already approved drugs.

Pharmaceutical companies have pressed the Australian Government to extend the duration of data protection. They view data protection as an insurance policy to guard against what they see as inadequate patent protection. Most recently, negotiations for the Trans-Pacific Partnership Agreement saw (unsuccessful) calls to extend data protection for biologics from 5 to 12 years.

Despite decade-long claims of inadequate patent protection, there is little evidence of a problem. Even if isolated cases were verified as genuine, extending protection to a broad class of products to address exceptional cases would represent a blunt and costly response. And using data protection as a proxy for patent protection has drawbacks. Beyond the obvious absence of disclosure of information to promote further innovation, data protection lacks other important balances that apply to patents. Data protection arises automatically and cannot be challenged in court.

As well as there being strong grounds for resisting further calls to extend the period of data protection, there is a case for making data more widely available. At present, not only are follow-on manufacturers prevented from relying on clinical data for a period of five years, the data is kept confidential indefinitely. Allowing researchers access to this data could provide substantial public health benefits. But doing so unilaterally would have some downsides. Companies may respond by delaying the release of medicines in the Australian market. Accordingly, any moves to publish the relevant data need to be internationally coordinated.

Reducing the scope for strategic behaviour

The ability of companies to leverage their IP rights to forestall entry by generics — effectively extending the term of exclusivity — can have a significant negative impact on consumers and (through the Pharmaceutical Benefits Scheme (PBS)) on taxpayers.

Firms can use a variety of strategies to further extend the commercial life of their products including (so-called) evergreening and pay-for-delay.

Evergreening refers to the strategy of obtaining multiple patents that cover different aspects of the same product, typically on improved versions of existing products. Some of these patents relate to genuine improvements that increase consumer wellbeing, such as significantly reducing side effects of certain medications. However, some 'improvements' may involve a slightly different chemical combination or process of production, which show no appreciable difference to the user. An additional benefit of changing the inventive step is it would reduce the scope for the latter type of behaviour — by granting new patents only for genuinely inventive products.

Pay-for-delay refers to the practice whereby patent holders pay generic manufacturers, as part of a settlement for a patent infringement case, to keep their products off the market beyond the scope of a patent. Delays of this kind limit competition by restricting the number of products on the market and any subsequent price reductions, including those triggered under the PBS.

In contrast to the US and Europe, which have arrangements to detect suspect agreements, Australia has taken a 'see no evil' approach to pay-for-delay settlements. A transparent reporting and monitoring system should be put in place to detect pay-for-delay settlements. This would require reporting to the Australian Competition and Consumer Commission (ACCC) settlement arrangements between originator and follower pharmaceutical companies that affect the timing of market entry for a generic version of a product into the Australian market. To minimise compliance and transition costs, monitoring arrangements should be based on those employed by the US Federal Trade Commission.

6 Other IP rights

Australia's IP arrangements encompass other protections. Protections are available for the physical features of products (designs) and their branding or styling (trade marks). *Sui generis* rights are intended to fill apparent gaps in established IP protection, such as in plant varieties and circuit layouts.

Registered designs

Registered design rights serve a niche yet important role in Australia's IP rights system — protecting the appearance of products that have an industrial or commercial use.

Inquiry participants expressed concerns about Australia's design rights system, including the low uptake of design rights due to the cost of registration and enforcement, and a poor understanding of design law, which can lead to designers inadvertently losing their rights or failing to seek protection in the first place.

The Australian Government has committed to making changes that would partly address these issues. Following a review by the Advisory Council on Intellectual Property, the Government has agreed, among other things, to the introduction of a grace period for filing registered design applications. This will help ensure designers do not inadvertently lose eligibility for design protection and allow them to undertake some market testing prior to incurring the cost of filing.

The Commission is also recommending some general measures to improve dispute resolution processes, discussed below. These reforms would go some way to addressing concerns among designers about enforcement costs and access to dispute resolution options.

Many participants see joining the Hague Agreement as offering the potential for lowering the costs of registration. Under Hague, Australian designers would be able to seek protection in multiple countries through a single international application. But the benefits to Australian firms, and in particular SMEs, are likely to be much smaller than some anticipate. Filing for protection under the Hague Agreement is not necessarily cheaper than directly filing for protection, particularly where firms seek protection in a limited number of countries. More importantly, joining the Hague Agreement would involve extending the maximum term of protection for registered designs from 10 to 15 years.

The Australian Government has already agreed to further investigate the costs and benefits before making a decision to sign on to Hague. Consistent with the approach taken by the Commission in this inquiry, such a process should ensure the gains from 'harmonisation' outweigh the costs of extending term, and that the interests of Australian consumers are adequately considered.

Trade marks

Trade marks help consumers to identify goods and services and provide a means for businesses to build and maintain a positive reputation.

But when trade marks are granted too broadly or in too great a number, they can inhibit new market entrants by making branding difficult — an outcome known as 'cluttering'. These difficulties have been exacerbated by legislative change, which has broadened the 'presumption of registrability', resulting in protection being sought and granted more often.

While legislative change has made it easier to achieve trade mark protection, there has been less effort to ensure unused marks — such as those held by defunct firms — are removed quickly from the trade mark register. Requiring trade mark applicants to nominate whether they are using the mark applied for, and if not, to later provide evidence of use in order to retain trade mark rights would remedy this problem.

The protection and information that trade marks convey is also causing confusion for consumers. Marks are being used to convey an 'impression' of provenance or quality. For example, there have been recent cases where goods have been marked with terms or logos to indicate they are handmade in picturesque locales like the Barossa Valley or Byron Bay, when in fact they are factory produced in industrial centres. Strengthening the existing requirements for marks not to be misleading or confusing would address this issue.

Firms also find the trade mark regime confusing, often conflating the protection afforded by a trade mark with that of registering a business name. This confusion can result in firms undertaking costly rebranding after unintentionally infringing on a trade mark. Linking the trade mark and business name registers would reduce this confusion.

The law that governs the importation of legitimately trade marked goods produced in other countries also needs reforming. While the Trade Marks Act contains provisions about when parallel imports may be allowed, recent legal cases have 'muddied the waters' to the point where firms are unsure if they are able to import marked goods legally. Amending the Act to make clear that parallel imports are allowed, would resolve the uncertainty and ultimately benefit the community.

Plant breeder's rights

Plant breeder's rights (PBRs) provide their holders with exclusive, time-limited control over the sale and propagation of registered plant varieties. PBR protection is less extensive than patent protection because of the breeder's exception, which recognises the incremental and long-term nature of conventional plant breeding, and allows new plant varieties to be used in further breeding programs.

PBRs have helped transform agricultural plant breeding in Australia by introducing competition and price signals to a market that was previously characterised by a high degree of state provision. Growers pay directly for access to new plant varieties, and their willingness to pay rewards successful breeders.

Notwithstanding the success of the regime in encouraging greater private sector activity, plant breeders and other stakeholders have expressed concern that the scope of protection provided by PBRs is being undermined by technological changes. This may have opened the door to greater free-riding on protected varieties. Currently, so long as they do not register copied varieties with IP Australia, breeders are potentially able to copy and sell PBR-protected varieties with only minor variations, undermining the protection afforded by the right. Amending the Act would address this.

Misrepresentation of varieties and refusal to pay royalties remain concerns, particularly for breeders of pasture crops. Improving compliance with PBR and licensing agreements is best achieved through closer cooperation and consultation, with industry groups best placed to lead these efforts.

Circuit layout rights

Circuit layout rights (CLRs) protect the layout designs (three-dimensional topography) of integrated circuits. The rights granted to circuit designers are narrow, and rapid change in the industry has brought the need for CLRs into question. Most circuits are custom designed for specific purposes and not generally adaptable for other uses.

Australia's adoption of CLRs is illustrative of the 'protect first, assess later' way IP rights have been expanded in the past. While the legislative protection for circuit layouts was premature, given international obligations, the removal of such rights would cause more problems than solutions. Retaining CLRs remains the 'least worst' option.

7 Improving the broader landscape

Improving interactions between IP rights and competition policy

IP rights holders currently enjoy an exemption from aspects of Australia's competition law. But the rationale for the exemption has largely fallen away. IP rights and competition are no longer thought to be in 'fundamental conflict'. IP rights do not, in and of themselves, have significant competition implications.

Recognising that competition and IP policy are not at odds, a better approach would allow the ACCC to address any anticompetitive conduct, while minimising uncertainty for rights holders and licensees. Repealing the exemption, combined with ACCC guidance on the application of competition law to IP transactions, would achieve this outcome.

No less than seven reviews have recommended repealing the exemption. The only remaining obstacle to doing so will be removed when recommendations of the Harper Competition Policy Review, to limit the scope of 'per se' prohibitions on anticompetitive conduct, are given effect.

Commercialisation of publicly-funded research

IP arrangements can facilitate commercialisation of publicly-funded research by allowing exclusivity over certain inventions created with the benefit of public funding. Where IP rights are used in combination with broader innovation policies, such as direct funding for research, it is important that the neutrality of public sector funding allocation is not compromised.

The current policy settings for publicly-funded research, whereby recipients of funding own any resultant IP, and specialised technology transfer offices facilitate the dissemination of research results, are generally sound.

However, copyright restrictions on access to publicly-funded research publications limit the dissemination of knowledge, and digitisation has significantly diminished the rationale for limiting access in this way. Publicly-funded research publications should be available to the public under open access arrangements after a 12 month embargo period.

Suggestions for a 'use it or lose it' approach to university-owned IP are not supported by the available evidence, and may impose a higher barrier to access than existing compulsory licensing arrangements. Recent concerns around low rates of research collaboration have prompted government, academic and industry-led initiatives to improve the commercialisation of publicly-funded research. These initiatives should be given time to work before any further interventionist approaches are considered.

Making it easier to resolve IP disputes

While large, well-resourced firms are able to satisfactorily resolve their IP disputes, SMEs are often deterred from doing so due to the high costs and risks involved. Participants pointed to the UK's Intellectual Property Enterprise Court (IPEC) as one model for addressing these concerns. The Commission has examined this model and the evidence suggests that the IPEC has improved access to justice for SMEs, who now have an avenue for timely and low cost dispute resolution.

The Federal Court has already initiated reforms to improve the efficiency of IP litigation in Australia. While welcome, these reforms are unlikely to provide the savings to litigants afforded by the IPEC model. The benefits of the IPEC derive from its ability to minimise parties' court appearances and the limits on claimable damages and costs. Some see the specialist nature of the court as further contributing to its success.

The Federal Circuit Court was established to be a lower cost court with less formal rules. Consistent with this approach, the Federal Circuit Court routinely refers IP cases to mediation prior to litigation. Its 'low-cost DNA' and informal approach makes it well-placed to play a greater role in resolving lower value IP disputes.

The Commission recommends the Federal Circuit Court introduce a specialist IP list, with procedural rules similar to the IPEC. The Court's jurisdiction should be expanded to cover the full range of IP matters, mandatory caps should apply to cost and damages awards, and strict case management adopted to minimise court events. A separate small claims track suitable for self-represented litigants should provide an informal forum for low-value cases.

The Commission anticipates that these reforms will result in some additional demand for the Court's services. The Court should be adequately resourced to ensure that any increase in its workload does not result in longer resolution times.

8 Charting a new course in IP policy

Strengthening domestic governance arrangements

Australia has strayed on IP policy for a number of reasons. The absence of an overarching objective, policy framework and reform champion have collectively contributed to poor policy outcomes.

To promote a more coherent, economywide perspective, there would be value in specifying the overarching objectives of the IP system to inform the broader community and guide agencies and departments involved in IP policy development and administration. A common framework for formulating IP policy would also assist; the four principles employed by the Commission throughout this report provide a ready starting point (figure 3).

Responsibility for policy development and advice being shared across multiple agencies has further contributed to poor policy outcomes. The Department of Industry, Innovation and Science (DIIS) has kept a low profile in IP policy debates and has afforded few resources to this responsibility. IP Australia has played a more active policy role, but in doing so has blurred the line between policy development and administration. To help clarify the respective roles of the IP administrator and the department, and to increase transparency, the Minister responsible for IP should outline the functions and responsibilities for IP Australia through a public statement of expectations. The statement could cover issues such as the Government's overall objectives for the IP system (mentioned above) and how IP Australia should contribute to IP policy development.

The Commission also considered whether consolidating responsibility for IP policy (including for copyright) into a single department would promote a more coherent approach. While such an approach has merit, on balance the Commission considers that the Government should instead introduce an interdepartmental IP Policy Group that is responsible for overseeing IP policy development. Doing so would provide many of the same benefits of policy consolidation, but with relatively low costs and disruption to the system. This should be complemented with formal arrangements specifying how agencies and departments will work together to achieve the objectives of the IP system and adhere to the common policy framework.

Good governance is equally important for private sector intermediaries. In Australia, as well as overseas, copyright collecting societies issue collective licences, collect payments from users, and distribute royalties to their rights holder members. Collective licensing has merit to the extent that it can help reduce transaction costs, particularly for high volume, low-value transactions. But the ability to collectively license IP rights can also give rise to market power.

It is for this reason that Australia's collecting societies are governed by a voluntary code of conduct and (while lesser known) subject to ACCC scrutiny. However, participants raised concerns about the efficacy of the current code of conduct and the extent to which it constrains the behaviour of collecting societies.

There are grounds for bolstering these arrangements. The code is voluntary and does not appear to be as robust as those operating in other jurisdictions, such as Europe. The ACCC should review the guidelines to ensure that they not only reflect contemporary international best practice, but are being followed. This review would also inform whether the guidelines are made mandatory.

Better understanding and pursuing our international interests

A 'more is better' mindset, and poor consultation and transparency, have proven problematic in Australia's international IP dealings. International agreements that commit Australia to implement specific IP provisions — such as the duration of patent or copyright protection — have worked against Australia's interests. These agreements typically involve trade-offs, and keen to cut a deal, Australia has capitulated too readily.

Australia's cooperation with other countries on IP arrangements should focus on minimising the transaction costs associated with assigning, using and enforcing IP rights, and encouraging more balanced policy arrangements for patents and copyright. Supporting global cooperation among international patent offices through the World Intellectual Property Organization is a good example.

Good policy outcomes also depend on a high-quality information and evidence base, underpinned by transparent policy development. Many inquiry participants expressed concerns with Australia's approach to negotiating IP provisions in international agreements, and the absence of meaningful stakeholder consultation. As international treaties strongly influence Australia's IP settings, and are difficult to reverse, transparency and substantive public consultation processes are critical.

As the Commission and others have previously recommended, greater use of independent and public reviews, and more effective consultation, would improve treaty-making processes. These recommendations are equally applicable to agreements dealing with Australia's IP arrangements.

There is also scope to better identify and articulate defensive and offensive interests. Some examples could include maintaining the right to draft exceptions and limitations (such as in public health) and identifying 'no go' outcomes (such as retrospective extensions of IP rights).

Finally, the Commission has identified specific reforms that Australia should pursue with like-minded countries in the 'long game' of achieving more balanced IP settings. These include introducing formalities for copyright, improving the quality of patents, and

allowing manufacture of pharmaceuticals for export, as well as the publication of clinical trial data. This should not be seen as an exercise in horse-trading or cajoling. Many of the issues are equally problematic in other countries. An overdue review of the TRIPS Agreement by the World Trade Organization would be a helpful first step.

9 An improved IP system has broad benefits

International agreements significantly constrain Australia's flexibility for IP policy reform. Nonetheless, the Commission has identified improvements to better target IP protection while not unduly disadvantaging rights holders. The package of reforms is expected to improve community wellbeing.

- Consumers would benefit from access to new and cheaper goods and services, and more easily avoid unintentional infringement.
- Government and ultimately taxpayers would benefit from a substantial reduction in health costs through a more efficient PBS.
- Rather than hindering innovation and creativity as claimed by some participants, IP reform would also invigorate innovation as:
  - Australian firms will be able to take full advantage of opportunities in cloud computing solutions
  - medical and scientific researchers will be able to better utilise text and data mining
  - universities will have the flexibility to offer Massive Open Online Courses
  - the education sector will avoid paying millions of dollars each year to use materials that are freely available online
  - innovative SMEs will be able to innovate without fear of infringing frivolous or strategic patents and be better able to enforce legitimate rights through low-cost dispute resolution mechanisms.

Table 1 summarises the anticipated benefits from pursuing the Commission's recommendations.

But achieving reform will not be easy. Some vocal interest groups have long shaped Australia's IP arrangements to advance their own interests. And in the past, reform efforts have more often than not succumbed to misinformation and scare campaigns. The same tactic has been deployed here, with some parties publishing more fiction than fact about the Commission's draft report. Government will need to show steely resolve to pursue a better balanced IP system in the face of strong vested interests.

Table 1: Summary of reforms and their expected benefits

Proposed reform	*Expected benefits*
PATENTS	
Raise the inventive step for patent eligibility, add an objects clause to the Patents Act, improve patent filing processes, restructure patent fees and abolish the innovation patent system (7.1, 7.2, 7.3, 7.4 and 8.1).	Elevate patent quality over time to improve the signal value of patents, reducing thickets, limiting strategic misuse and shortening pendency, stimulating innovation and business activity. Restructuring renewal fees will reduce the risk that poor quality patents remain entrenched.
Reform extensions of term for pharmaceutical patents (10.1).	Reforming extensions of term will lower the cost of pharmaceuticals, benefiting consumers and saving the government an estimated $258 million each year. Additional public health benefits will arise from improved access to affordable medicines.
Improve monitoring of settlements between originator and generic drug companies (10.2).	Reducing opportunities for pay-for-delay settlements will ensure timely access to affordable medicines and improve competition in the pharmaceuticals market for the benefit of consumers.
COPYRIGHT	
Replace Australia's existing fair dealing exceptions in the Copyright Act with a broad and open-ended fair use exception (6.1).	Australia's copyright system will better adapt to technological change and new uses of copyright material, without compromising incentives to create. Improved access to copyright works would increase economic activity and community welfare. Material gains include: • In the case of orphan works, flexible exceptions that improve access are conservatively estimated to generate new economic activity worth between $10 million and $20 million per year. • Consumers would enjoy better access to archived, commercially-unavailable, or otherwise hard-to-access works. • Fair use would end the practice where education and government users pay statutory licence fees for freely available online material, saving taxpayers an estimated $18 million per annum.
Repeal parallel import restrictions for books (5.3).	Australian consumers will be able to directly access competitively priced books in Australian bookstores. Compared to average selling prices in the UK, prices in Australia are higher by an average of 20 per cent. This will benefit consumers (especially students), Australian bookstores, and overall community welfare.
Strengthen the Copyright Act to make clear circumventing geoblocking technology is not a copyright infringement (5.2).	Consumers of software, TV shows, movies, music and games gain from better access and more competitive prices. Greater consumer certainty will drive competition and reduce price differentials between Australian and overseas markets — which were about 49 per cent in professional software, 67 per cent in music, and 61 per cent in games in 2013.

Proposed reform	*Expected benefits*
ACCC review to ensure best practice in governance, reporting and transparency arrangements for collecting societies (5.4).	Best practice governance and transparency will improve the efficiency of collecting societies and their distribution practices, and facilitate fair negotiations between users and rights holders. Separate accounting of statutory and voluntary licence revenue will ensure taxpayer funds achieve value for money.
OTHER IP RIGHTS	
Trade marks	
Expedite the removal of unused marks, and make it harder to register misleading marks (12.1).	Fewer but more accurate trade marks will enhance their value to businesses and consumers.
Link the business name and trade mark registers, and allow the importation of legitimately marked goods (12.1).	Linking the trade mark and business name registers will reduce renaming and rebranding costs caused by unintentional infringement, while allowing legitimate imports will lead to lower prices and greater choice for consumers.
Plant Breeders' Rights	
Enable IP Australia to make essentially derived variety declarations in respect of any new plant variety (13.1).	Improved enforcement and compliance will increase incentives to invest in pasture and fodder crop breeding, contributing to genetic gain increases and boosting livestock farming productivity and profitability.
ENFORCEMENT AND GOVERNANCE	
Enhance the role of the Federal Circuit Court by introducing a dedicated IP list with caps on claimable costs and damages (19.2).	Individuals and SMEs would face lower costs to resolve IP disputes through the court system. Lower risks and costs provide rights holders with greater certainty while improving access to enforcement and justice.
Expand the safe harbour scheme to cover all online service providers (19.1).	Online service providers, such as cloud computing firms, would face fewer impediments to establish operations in Australia. The copyright system will be more adaptable as new services and technologies are developed, facilitating greater innovation. Aligning with international systems further reduces business uncertainty.
Implement an open access policy for publicly-funded research (16.1).	Publicly-funded research publications will be cheaper to access, facilitating faster and wider dissemination of the knowledge and ideas contained within them.
Identify overarching objectives and a common framework for IP policy development, and establish an interdepartmental policy group and other formal working arrangements between agencies (17.1). Develop best practice guidance for developing IP provisions in international treaties (17.2).	Adherence to a whole-of-government policy framework will promote a more balanced and integrated approach to IP policy and its development. More independent input and transparency in trade negotiations involving IP will promote public confidence and help ensure any changes to IP laws are in Australia's interests.
Work with like-minded countries through multilateral forums to achieve more balanced IP settings and to reduce transaction costs (18.1).	Greater balance in IP arrangements will facilitate the production of creative works and innovation (including follow-on innovation), boosting productivity. Reducing the risks and costs of seeking protection abroad will facilitate the flow of IP and capital across borders.

Recommendations and findings

Chapter 2: An analytical framework for assessing the IP system

RECOMMENDATION 2.1

In formulating intellectual property policy, the Australian Government should be informed by a robust evidence base and be guided by the principles of:

- *effectiveness*, which balances providing protection to encourage additional innovation (which would not have otherwise occurred) and allowing ideas to be disseminated widely
- *efficiency*, which balances returns to innovators and to the wider community
- *adaptability*, which balances providing policy certainty and having a system that is agile in response to change
- *accountability*, which balances the cost of collecting and analysing policy–relevant information against the benefits of having transparent and evidence–based policy that considers community wellbeing.

Chapter 4: Copyright term and scope

FINDING 4.1

The scope and term of copyright protection in Australia has expanded over time, often with no transparent evidence-based analysis, and is now skewed too far in favour of copyright holders. While a single optimal copyright term is arguably elusive, it is likely to be considerably less than 70 years after death.

Chapter 5: Copyright use and licensing

RECOMMENDATION 5.1

The Australian Government should amend the *Copyright Act 1968* (Cth) to:

- make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception
- permit consumers to circumvent technological protection measures for legitimate uses of copyright material.

RECOMMENDATION 5.2

The Australian Government should:

- amend the *Copyright Act 1968* (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology, as recommended in the House of Representatives Standing Committee on Infrastructure and Communications' report *At What Cost? IT pricing and the Australia tax*
- avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.

RECOMMENDATION 5.3

The Australian Government should proceed to repeal parallel import restrictions for books to take effect no later than the end of 2017.

RECOMMENDATION 5.4

The Australian Government should strengthen the governance and transparency arrangements for collecting societies. In particular:

- The Australian Competition and Consumer Commission should undertake a review of the current code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees.
- The review should consider whether the current voluntary code: represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.

Chapter 6: Fair use or fair dealing — what is fair for Australia?

RECOMMENDATION 6.1

The Australian Government should accept and implement the Australian Law Reform Commission's final recommendations regarding a fair use exception in Australia.

RECOMMENDATION 6.2

The Australian Government should enact the Australian Law Reform Commission recommendations to limit liability for the use of orphan works, where a user has undertaken a diligent search to locate the relevant rights holder.

Chapter 7: The patent system — getting the fundamentals right

RECOMMENDATION 7.1

The Australian Government should incorporate an objects clause into the *Patents Act 1990* (Cth). The objects clause should describe the purpose of the legislation as enhancing the wellbeing of Australians by promoting technological innovation and the transfer and dissemination of technology. In so doing, the patent system should balance over time the interests of producers, owners and users of technology.

FINDING 7.1

The *Raising the Bar* initiative moved the inventive step and other elements of patent law in the right direction by raising the threshold for granting a patent. There is a strong case, however, for further raising the threshold.

RECOMMENDATION 7.2

The Australian Government should amend ss. 7(2) and 7(3) of the *Patents Act 1990* (Cth) such that an invention is taken to involve an inventive step if, having regard to the prior art base, it is not obvious to a person skilled in the relevant art. The Explanatory Memorandum should state:

- a 'scintilla' of invention, or a scenario where the skilled person would not 'directly be led as a matter of course', are insufficient thresholds for meeting the inventive step
- the 'obvious to try' test applied in Europe would in some instances be a suitable test.

IP Australia should update the Australian Patent Office Manual of Practice and Procedure such that it will consider the technical features of an invention for the purpose of the inventive step and novelty tests.

RECOMMENDATION 7.3

IP Australia should reform its patent filing processes to require applicants to identify the technical features of the invention in the set of claims.

RECOMMENDATION 7.4

The Australian Government and IP Australia should set patent fees to promote broader intellectual property policy objectives, rather than the current primary objective of achieving cost recovery. To this end, the Australian Government, with input from IP Australia, should:

- restructure patent renewal fees such that they rise each year at an increasing rate (including years in which patents receive an extension of term) — fees later in the life of a patent would well exceed current levels
- reduce the initial threshold for claim fees, and increase claim fees for applications with a large number of claims.

Chapter 8: The innovation patent system

RECOMMENDATION 8.1

The Australian Government should abolish the innovation patent system.

Chapter 9: Business method patents and software patents

FINDING 9.1

Raising the inventive step, requiring technical features in patent claims, and the inclusion of an objects clause would better balance the patent rights of software innovators and users.

Chapter 10: Pharmaceuticals - getting the right policy prescription

RECOMMENDATION 10.1

The Australian Government should reform extensions of patent term for pharmaceuticals such that they are only:

(i) available for patents covering an active pharmaceutical ingredient, and

(ii) calculated based on the time taken by the Therapeutic Goods Administration for regulatory approval over and above 255 working days (one year).

The Australian Government should reform s. 76A of the *Patents Act 1990* (Cth) to improve data collection requirements for extensions of term, drawing on the model applied in Canada. Thereafter no extensions of term should be granted until data is received in a satisfactory form.

FINDING 10.1

There are no grounds to extend the period of data protection for any pharmaceutical products, including biologics.

RECOMMENDATION 10.2

The Australian Government should introduce a system for transparent reporting and monitoring of settlements between originator and generic pharmaceutical companies to detect potential pay-for-delay agreements. This system should be based on the model used in the United States, administered by the Australian Competition and Consumer Commission, and include guidelines on the approach to monitoring as part of the broader guidance on the application of the *Competition and Consumer Act 2010* (Cth) to intellectual property (recommendation 15.1).

The monitoring should operate for a period of five years. Following this period, the Australian Government should review the regulation of pay-for-delay agreements (and other potentially anticompetitive arrangements specific to the pharmaceutical sector).

Chapter 11: Registered designs

FINDING 11.1

The Australian Government has committed to implement many of the recommendations made by the Advisory Council on Intellectual Property in its recent review of Australia's designs system. These measures will help address participant concerns about the cost of acquiring registered design rights, and the lack of understanding of design law.

Recommendation 19.2 provides for a low-cost avenue for IP enforcement currently sought by designers.

Chapter 12: Trade marks and geographical indications

RECOMMENDATION 12.1

The Australian Government should amend the *Trade Marks Act 1995* (Cth) to:

- reduce the grace period from 5 years to 3 years before new registrations can be challenged for non-use
- remove the presumption of registrability in assessing whether a mark could be misleading or confusing at application
- ensure that parallel imports of marked goods do not infringe an Australian registered trade mark when the marked good has been brought to market elsewhere by the owner of the mark or its licensee. Section 97A of the *Trade Marks Act 2002* (New Zealand) could serve as a model clause in this regard.

IP Australia should:

- require those seeking trade mark protection to state whether they are using the mark or 'intending to use' the mark at application, registration and renewal, and record this on the Australian Trade Mark On-line Search System (ATMOSS). It should also seek confirmation from trade mark holders that register with an 'intent to use' that their mark is actually in use following the grace period, with this information also recorded on the ATMOSS
- require the Trade Marks Office to return to its previous practice of routinely challenging trade mark applications that contain contemporary geographical references (under s. 43 of the Trade Marks Act)
- in conjunction with the Australian Securities and Investment Commission, link the ATMOSS database with the business registration portal, including to ensure a warning if a business registration may infringe an existing trade mark.

RECOMMENDATION 12.2

The Australian Government should amend the *Australian Grape and Wine Authority Act 2013* (Cth) and associated regulations to allow the Geographical Indications (GIs) Committee to amend or omit existing GIs in a manner similar to existing arrangements for the determination of a GI (including preserving the avenues of appeal to the Administrative Appeals Tribunal). Any omissions or amendments to GIs determined in such a manner should only take effect after a 'grace period' determined by the GI Committee on a case-by-case basis.

Chapter 13: Plant Breeder's Rights

RECOMMENDATION 13.1

The Australian Government should proceed to implement the Advisory Council on Intellectual Property's 2010 recommendation to amend the *Plant Breeder's Rights Act 1994* (Cth) to enable essentially derived variety (EDV) declarations to be made in respect of any variety.

Chapter 14: Circuit layout rights

FINDING 14.1

Dedicated intellectual property protection for circuit layouts is not ideal and seldom used, but given Australia's international commitment to protect circuit layouts and no superior alternatives, the best policy option is to maintain the status quo.

Chapter 15: Intellectual property rights and competition law

RECOMMENDATION 15.1

The Australian Government should repeal s. 51(3) of the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act) at the same time as giving effect to recommendations of the (Harper) Competition Policy Review on the per se prohibitions.

The Australian Competition and Consumer Commission should issue guidance on the application of part IV of the Competition and Consumer Act to intellectual property.

Chapter 16: IP and public institutions

RECOMMENDATION 16.1

The Australian, and State and Territory governments should implement an open access policy for publicly-funded research. The policy should provide free and open access arrangements for all publications funded by governments, directly or through university funding, within 12 months of publication. The policy should minimise exemptions.

The Australian Government should seek to establish the same policy for international agencies to which it is a contributory funder, but which still charge for their publications, such as the Organisation for Economic Cooperation and Development.

FINDING 16.1

The adoption of an additional 'use it or lose it' provision for patents owned by publicly-funded organisations is not warranted.

Chapter 17: Intellectual property's institutional arrangements

RECOMMENDATION 17.1

The Australian Government should promote a coherent and integrated approach to IP policy by:

- establishing and maintaining greater IP policy expertise in the Department of Industry, Innovation and Science
- ensuring the allocation of functions to IP Australia has regard to conflicts arising from IP Australia's role as IP rights administrator and involvement in policy development and advice
- establishing a standing (interdepartmental) IP Policy Group and formal working arrangements to ensure agencies work together within the policy framework outlined in this report. The Group would comprise those departments with responsibility for industrial and creative IP rights, the Treasury, and others as needed, including IP Australia.

FINDING 17.1

Australia's approach to negotiating IP provisions in international treaties could be improved through greater use of independent impact assessment and more meaningful stakeholder consultation.

RECOMMENDATION 17.2

The Australian Government should charge the interdepartmental IP Policy Group (recommendation 17.1) and the Department of Foreign Affairs and Trade with the task of developing guidance for IP provisions in international treaties. This guidance should incorporate the following principles:

- avoiding the inclusion of IP provisions in bilateral and regional trade agreements and leaving negotiations on IP standards to multilateral fora
- protecting flexibility to achieve policy goals, such as by reserving the right to draft exceptions and limitations
- explicitly considering the long-term consequences for the public interest and the domestic IP system in cases where IP demands of other countries are accepted in exchange for obtaining other benefits
- identifying no go areas that are likely to be seldom or never in Australia's interests, such as retrospective extensions of IP rights
- conducting negotiations, as far as their nature makes it possible, in an open and transparent manner and ensuring that rights holders and industry groups do not enjoy preferential treatment over other stakeholders.

Chapter 18: International cooperation in IP

RECOMMENDATION 18.1

The Australian Government should:

- pursue international collaborative efforts to streamline IP administrative and licensing processes separately from efforts to align standards of IP protection. In so doing, it should consider a range of cooperative mechanisms, such as mutual recognition
- use multilateral forums when seeking to align standards of protection.

RECOMMENDATION 18.2

The Australian Government should play a more active role in international forums on intellectual property policy — areas to pursue include:

- calling for a review of the TRIPS Agreement (under Article 71.1) by the WTO
- exploring opportunities to further raise the threshold for inventive step for patents
- pursuing the steps needed to explicitly allow the manufacture for export of pharmaceuticals in their patent extension period
- working towards a system of eventual publication of clinical trial data for pharmaceuticals in exchange for statutory data protection
- identifying and progressing reforms that would strike a better balance in respect of copyright scope and term.

Chapter 19: Compliance and enforcement of IP rights

RECOMMENDATION 19.1

The Australian Government should expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services.

FINDING 19.1

Timely and competitively-priced access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.

RECOMMENDATION 19.2

The Australian Government should introduce a specialist IP list in the Federal Circuit Court, encompassing features similar to those of the United Kingdom Intellectual Property Enterprise Court, including limiting trials to two days, caps on costs and damages, and a small claims procedure.

The jurisdiction of the Federal Circuit Court should be expanded so it can hear all IP matters. This would complement current reforms by the Federal Court for management of IP cases within the National Court Framework, which are likely to benefit parties involved in high value IP disputes.

The Federal Circuit Court should be adequately resourced to ensure that any increase in its workload arising from these reforms does not result in longer resolution times.

The Australian Government should assess the costs and benefits of these reforms five years after implementation, also taking into account the progress of the Federal Court's proposed reforms to IP case management.

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Review of the Copyright Act 1994

Date:	1 December 2017	**Priority:**	Medium
Security classification:	**In Confidence**	**Tracking number:**	1268 17-18

Action sought

	Action sought	Deadline
Hon Kris Faafoi Minister of Commerce and Consumer Affairs	**Agree** that officials continue work on the issues paper and provide you with a draft for comment in early 2018. **Forward** the attached briefing to the Minister for Arts, Culture and Heritage, the Associate Ministers for Arts, Culture and Heritage, and the Minister of Broadcasting, Communications and Digital Media.	11 December 2017

Contact for telephone discussion (if required)

Name	Position	Telephone		1st contact
Gus Charteris	Manager, Business Law	04 474 2839	s 9(2)(a)	
Katrina Sutich	Senior Policy Advisor	04 901 2424		✓
Jess Birdsall-Day	Senior Policy Advisor	04 901 1609		

The following departments/agencies have been consulted (if required)

MCH, MFAT

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments:

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Review of the Copyright Act 1994

Date:	1 December 2017	**Priority:**	Medium
Security classification:	**In Confidence**	**Tracking number:**	1286 17-18

Purpose

To seek your approval for next steps for the review of the *Copyright Act 1994* and to update you on:

- key drivers and important context for the review of the Act,
- what copyright seeks to achieve, and
- the current direction of the review, with a summary of most of the issues identified to date (attached as ***Annex 2***). The purpose of providing this material is to give you a sense of the scope of the review and a more detailed introduction to copyright concepts and debates.

Executive summary

1. A review of the *Copyright Act 1994* was launched in June 2017 with the release of a high level terms of reference. This document signalled that an issues paper would be released for consultation in early 2018.

2. It is more than 10 years since the last significant review of the Act and the context in which copyright operates has changed. Key context for the review includes:
   - *The Creative Sector Study*, which provides an important backdrop to the review and highlights the impact of rapidly changing technology in the creation, distribution and consumption of content in New Zealand.
   - *New Zealand has a unique cultural heritage* and it is timely to consider the nature of intellectual property, the nature of the kaitiaki relationship with taonga works, taonga-derived works and mātauranga Māori.
   - *The international context is influential*, particularly the international agreements that set the framework for most of our copyright settings and the dealings with copyright that increasingly take place in a borderless online world.

3. Copyright is a set of rights granted under the Copyright Act. It arises through the creation of an original work. Protected works include recorded music, fine art, digital art, movies, literature, software code and works of architecture.

4. Copyright policy seeks to provide a balance between incentives to create and disseminate original works with exceptions to ensure appropriate access (such as educational, library and archival functions), and reuse to facilitate important "follow-on creation".

5. Stakeholder views on copyright tend to be polarised, and there is ongoing debate about the nature and flexibility of exceptions and the optimal term of copyright. A review is an opportunity to consider the appropriate balance in the regime.

6. As part of our process for the review we are currently identifying key issues with the regime, meeting with a broad range of copyright stakeholders and examining key research.

7. We intend to structure the issues paper around the following headings:

- *Objectives* – testing the objectives identified in the terms of reference.
- *Rights* – including the criteria for protection, categories of works, crown copyright, moral rights and related rights.
- *Exceptions* – to facilitate particular uses (e.g. research), to enable functions of particular users (e.g. libraries), to allow use of particular works in particular circumstances (e.g. to make braille copies of literary works).
- *Transactions* – including licensing, assignment, the role of Collective Management Organisations, the role of the Copyright Tribunal, rights management (including emerging alternatives such as Blockchain), and orphan works.
- *Enforcement* – including considering civil, criminal and border enforcement as well as issues relating to access to justice.

8. We intend to consider a range of issues that have been identified under each heading, test our understanding of the status quo, the problem, and the magnitude of the problem. The issues identified to date are summarised in ***Annex 2***.

9. This process will help us to ensure that we clearly define and understand the issues. Investigating possible solutions to the issues identified and developing an options paper for public consultation will come later.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that a review of the Copyright Act 1994 was launched in June 2017, with the release of high level terms of reference.

Noted

b **Note** that the intended approach to the review was to focus the initial stage on problem identification via consultation on an issues paper, which would help to inform the scope and staging of the review.

Noted

c **Note** that officials are currently preparing a draft issues paper, in which we can update the strategic context to reflect the new Government's priorities, which subject to your confirmation, could be released around April 2018.

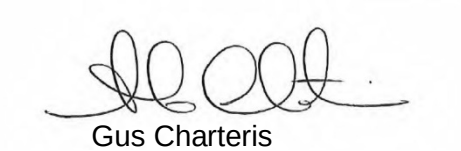
Noted

d **Agree** that officials continue work on the issues paper and provide you with a draft for comment in late February 2018.

Agree / Disagree

e **Forward** a copy of this briefing to the Minister for Arts, Culture and Heritage, the Associate Ministers for Arts, Culture and Heritage, and the Minister of Broadcasting, Communications and Digital Media**.**

Forwarded



Gus Charteris
Manager, Business Law

1 December 2017

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs

..... / ..... / .....

Background

10. In June 2017 the previous Minister of Commerce and Consumer Affairs launched a review of the *Copyright Act 1994*, with the release of a high level terms of reference (attached as ***Annex 1***). Submissions were not sought on the terms of reference.

11. The terms of reference suggested that the next step would be release of an issues paper for consultation in early 2018. Officials are currently preparing a draft issues paper that we intend to provide for your comment in late February next year.

12. This approach would align with the Labour Party's Manifesto commitment to "[u]ndertake a full review of the Act so that an updated Copyright Act balances the right of artists to be remunerated and of consumers to participate in modern society." However, there is scope for the Government to adopt an alternative process if desired.

13. This briefing seeks your approval for next steps for the review of the *Copyright Act*. It includes a summary of the key drivers and context for the review, an introduction to what copyright seeks to achieve and the current direction of the review. We have also provided a summary of the issues that the review will likely cover (attached as ***Annex 2***).

Context for the review

A review of the *Copyright Act* was overdue

14. The *Copyright Act* was last significantly reviewed more than 10 years ago, from 2001 to 2004 resulting in the Copyright (New Technologies) Amendment Act 2008. The scheduled review of these amendments in 2013 was put on hold pending the conclusion of the Trans-Pacific Partnership (**TPP**) negotiations (CAB Min (13) 15/6 refers). Copyright changes required under (the original) TPP were enacted (but not implemented) in December 2016[1] and a decision was made to launch a review in mid-2017.

The Creative Sector Study is an important backdrop to the review

15. An important piece of context for the review is the Creative Sector Study, launched in October 2015. The Ministry of Business, Innovation and Employment (**MBIE**) led the study, in consultation with the Ministry for Culture and Heritage (**MCH**). The aim was to deepen government's understanding of the role of copyright in the creative sector in New Zealand, helping to build a solid evidence base before launching a formal legislative review.

16. We focussed on the life cycle of a creative work – from creation, to production, to distribution, to consumption – and worked hard to capture views from a range of creative sector participants. We conducted over 70 face-to-face interviews, tested what we heard with a wider group through workshops held in Auckland and Wellington, completed an online survey of the sector and commissioned an online consumer focus group.

17. The study culminated in the release of a public report in December 2016 (attached as ***Annex 3***). Rather than identifying specific problems and proposing solutions, the report summarised what we had heard throughout the study, with a focus on how copyright applies to the array of creative works and the emerging themes we identified. The report highlighted the impact of rapidly changing technology in the creation, distribution and consumption of content. High level insights, set out in Section 2 of the report, included:

    - The creative sector is diverse and copyright is important to most.
    - There are new opportunities and challenges in development and production processes, disseminating and accessing works, and seeking revenue and enforcing copyright.

[1] Most of these changes appear likely to be suspended under the Comprehensive Progressive Trans-Pacific Partnership Agreement.

- New works and formats are emerging.
- Copyright is complex and often poorly understood by creators and users alike.

18. We considered the study and resulting report to be the start of a conversation between government and the creative sector (and within the sector) about copyright policy and its complexities, and invited feedback on the report. The report has received praise from a wide range of stakeholders and provides important context for the review.

New Zealand has a unique cultural heritage

19. We note Labour's Manifesto commitment to "[e]xplore how creative rights for traditional knowledge, including Māori, Pacific and other cultural designs, images, songs and dances, can be protected where these cultural taonga are not owned individually, yet are increasingly subject to commercial exploitation in New Zealand and overseas."

20. While the Creative Sector Study explored the role of copyright in New Zealand's creative sector, it did not specifically look at how traditional cultural expressions were protected and used. In the final report we acknowledged that the Wai 262[2] claim raised a number of complex issues about the nature of intellectual property, the nature of the kaitiaki relationship with "taonga works", taonga-derived works and mātauranga Māori. Further information on the claim and the report are set out in Briefing No. 0642-17/18 (provided to your office on 1 December 2107).

21. As outlined in that briefing, the Government has yet to respond to the recommendations on Māori traditional cultural expressions or taonga works, which relate to the copyright regime. MBIE will be working with interested agencies and seeking Ministerial direction to consider how to progress this work.

The international context is influential

22. The international environment is a significant factor in reviewing the Copyright Act because:

- ***International agreements set the broad framework for our copyright settings*** and require that we do not depart from some approaches in certain areas. For example, minimum terms of protection are set by United Nations-level international agreements (generally 50 years, or life plus 50 years).
- ***Many dealings with copyright works occur across borders***, so copyright rules should not be considered in isolation from our key trading partners.
- ***Foreign companies play a significant role*** in the creation and distribution of a large amount of content that is available in New Zealand. Available data suggests that New Zealand is a net importer of copyright works, which affects how we assess the net effect of any changes to our settings.

The review has a number of cross-portfolio connections

23. The Copyright Act review has a number of cross-portfolio connections and we are working closely with a number of agencies. The key cross-portfolio connections are summarised in ***Annex 4***. We recommend you forward this briefing to the Minister for Arts, Culture and Heritage, the Associate Ministers for Arts, Culture and Heritage, and the Minister of Broadcasting, Communications and Digital Media.

24. Under the previous Government, cross-portfolio connections and work programmes were organised under the *Business Growth Agenda* programme. The new Government will have its own approach and the strategic context for the review could be re-framed and signalled within the issues paper.

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[2] The WAI 262 claim was about the place of Māori culture, identity and traditional knowledge in New Zealand's laws, government policies and practices. The inquiry spanned 20 years and the WAI 262 report was released in 2011.

What does copyright do and why is it important to get the settings right?

25. Copyright is a set of rights granted under the Copyright Act. It arises through the creation of an original work. Unlike some forms of intellectual property protection (e.g. patents), protection does not require registration. Protected works include recorded music, fine art, digital art, movies, literature, software code and works of architecture.

26. Copyright protects the expression of ideas, rather than the ideas themselves. For example, if you discuss a concept for a new blog with a friend, copyright law will not protect that idea. Once you begin writing a blog post, the text will receive copyright protection as a literary work (provided it is original). Only the work produced – the expression of the idea – will be protected.

Copyright provides exclusive rights to incentivise creation and dissemination…

27. The exclusive rights of copyright owners include the right to:

- **Copy the work**, including recording, reproducing or downloading a copy or creating a new work that copies a substantial part of the original.
- **Issue copies of the work to the public**, including renting out a CD or DVD, or making copies of works (not in circulation) available for purchase.
- **Perform, play or show the work in public**, including a band performing live music at a bar, actors performing a play at a theatre, a retail store playing background music or a cinema showing a movie.
- **Communicate the work to the public**, including a TV station broadcasting a sports match, a radio station broadcasting or live streaming an interview via radio or webcast and a person posting a video, photograph or story on social media.
- **Adapt the work**, including translating a novel from one language to another or adapting a novel into a movie script.
- **Authorise** (for example through a licence agreement) others to do any or all of the above.

28. Copyright policy seeks to incentivise the creation and dissemination of original works. Without the ability to protect works from unauthorised copying/distribution, there would be fewer incentives to create and disseminate important social, cultural and commercial works.

…but over-protection can inhibit creation and innovation and important cultural activities

29. Over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and trade. It can also inhibit important cultural activities such as educational, library and archival functions.

30. More importantly, over-protective copyright settings may impede 'follow-on' creation — that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services.

31. In this context, the Copyright Act provides certain exceptions to owners' exclusive rights and the exclusive rights apply for a temporary period (which differs depending on the type of creative work). There is ongoing debate about how flexible and broad the exceptions should be, and how long the term of copyright should be.

32. We note the Labour Party's Manifesto commitment to "[e]xplore how to give New Zealand families better access to the wealth of cultural and heritage material relating to them that is held by public institutions, so that New Zealanders learn about their own history and whakapapa and develop a rich appreciation of the contribution their families and communities have made to this country".

33. A review is an opportunity to consider the appropriate balance in the regime (see ***Annex 2*** for a more detailed diagram of how we view this balance).

Copyright affects a diverse array of individuals, businesses and other organisations

34. The creative sector is diverse, encompassing film producers, software developers, musicians, authors, publishers, fine artists and many others. All tend to create, as well as use, copyright works. "Use" may include getting a licence to incorporate another creative work into their own (e.g. music synced into a film) or simply via inspiration through consumption (e.g. visiting an art gallery).

35. Most members of the public are consumers of copyright works (e.g. music, films, books etc) as well as creators of copyright works (e.g. when taking photos, writing emails etc). These types of works are protected by copyright regardless of whether the author wants protection (because copyright attaches automatically i.e. without the need to register). A person wanting to allow public uses of their creative works must proactively "open" their work up via a licence, such as a Creative Commons licence.

Views on copyright are polarised

36. Stakeholder views on the purpose of copyright and appropriate copyright settings are often polarised. While there is broad consensus that copyright protection is important, there is heated debate about what the ideal copyright settings should be.

37. Many stakeholders consider that the regime is out of date. Some stakeholders, such as technology companies, educational institutions, consumer groups and heritage organisations, suggest that current copyright settings inhibit innovation and follow-on creation and are too protective of commercial interests. They generally call for more flexible exceptions. Others, including larger rights holder organisations such as music and print licensing organisations and television producers, seek stronger or more effective protection such as enhanced enforcement provisions to ensure adequate economic returns in a digital environment.

38. Many stakeholders have been calling for a review for some time and actively engage with government. There have been high levels of interest in the review. Officials have met with a diverse range of stakeholders and several (without prompting) have produced very detailed papers to inform the issues paper.

What is our process?

39. The focus of current work is identifying key issues with the current regime. We are meeting with a broad range of copyright stakeholders and examining key research in this area to develop an issues paper which will help to inform the scope and staging of the review. Officials are currently preparing a draft issues paper that we intend to provide for your comment in late February next year.

40. The terms of reference suggested that the next step would be release of an issues paper for consultation in early 2018. Subject to your approval (and subsequently Cabinet's approval), we intend to release this issues paper for public consultation in the first half of 2018.

41. The issues paper process will help us to ensure that we clearly define and understand the issues.

42. Following the release of an issues paper, the usual policy process would involve analysing the public submissions and providing advice to Ministers on the themes and issues raised in the submissions as well as the scoping and staging of next steps in the process. It is at this stage that we would likely begin to investigate possible solutions to the issues identified and start to develop an options paper for public consultation.

What kinds of issues will be explored through the review?

43. We have taken a first principles approach to considering issues with the copyright regime. The draft issues paper is structured around the following headings:

    - ***Objectives*** – testing the objectives identified in the terms of reference.
    - ***Rights*** – including the criteria for protection, categories of works, crown copyright, moral rights, related rights (performers rights, Technological Protection Measures).
    - ***Exceptions*** – to facilitate particular uses (e.g. research), to enable functions of particular users (e.g. libraries), to allow use of particular works in particular circumstances (e.g. to make braille copies of literary works).
    - ***Transactions*** – including licensing, assignment, the role of Collective Management Organisations, the role of the Copyright Tribunal, rights management (including emerging alternatives such as Blockchain), and orphan works.
    - ***Enforcement*** – including considering civil, criminal and border enforcement as well as issues relating to access to justice.

44. Each of the headings covers either key issues for the scoping of the review or core components of the copyright system and these are all briefly summarised in the draft issues paper. We intend to consider a range of issues that have been identified under each heading, which will be followed by questions to test our understanding of the status quo, the problem, and the magnitude of the problem.

45. We are currently working on the issues paper and have prepared a summary of most of the issues identified to date (attached as ***Annex 2***). The purpose of providing this material is to give you a sense of the scope of the review and a more detailed introduction to key copyright concepts and debates.

Approvals sought and next steps

46. We seek your approval to continue with our preparation of the issues paper consistent with the process outlined in this briefing.

47. We recommend reframing the strategic context for the review (as discussed at paragraph 23 above) and will work with your office on appropriate framing.

48. Subject to your approval, we will provide you with a draft issues paper in late February 2018 for your comment.

Communications and risks

49. Stakeholder views on optimal copyright settings are quite polarised and there are very well resourced organisations that have a strong interest in New Zealand's copyright settings. A number have already produced information and reports to support their position. There is likely to be strong pressure to avoid changing policy settings in either direction that are not aligned to those business interests.

50. Our approach to managing this risk is to do the following:

    - Continue to work openly with a wide cross-section of stakeholders and build on the trust and understanding developed through the *Copyright and the Creative Sector* study.
    - Ensure that views of actively engaged stakeholders are considered alongside the views of less well-resourced, less centrally organised sectors.
    - Our initial focus will be on drawing out the actual problems with the regime (to avoid the polarisation that comes from jumping to possible solutions).

- Encourage evidence-based submissions from stakeholders.
- Take time to build solutions that are appropriate for the New Zealand context, acknowledging there may not be solutions for some issues.

Annexes

Annex 1: Terms of Reference

Annex 2: Summary of issues to be addressed in the issues paper

Annex 3: Copyright and the Creative Sector Report

Annex 4: Cross-portfolio connections

Annex 1: Terms of Reference for the review

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Review of the Copyright Act 1994

TERMS OF REFERENCE

Objectives of the review

New Zealand's copyright regime is governed by the Copyright Act 1994. The Act sets rules relating to copyright protection, infringement, exceptions and enforcement. It has not been reviewed in over a decade. The last major review of the Copyright Act took place from 2001 to 2004 resulting in the *Copyright (New Technologies) Amendment Act 2008*.

The Government wants to ensure that the copyright regime keeps pace with technological and market developments and is not inhibiting the provision of, and access to, innovative products and services, which will underpin higher levels of wellbeing in New Zealand. This is a focus of the Government's work in the *Business Growth Agenda* — working toward *Building Innovation* and, within this, *Building a Digital Nation*.

Building on the *Copyright and the Creative Sector* report, the Government is committed to understanding the landscape in which copyright settings operate and ensuring that our regime is fit for purpose in New Zealand in a changing technological environment.

The objectives of this review are to:

- assess the performance of the *Copyright Act* against the objectives of New Zealand's copyright regime (discussed further below)
- identify barriers to achieving the objectives of New Zealand's copyright regime, and the level of impact that these barriers have
- formulate a preferred approach to addressing these issues – including amendments to the Copyright Act, and the commissioning of further work on any other regulatory or non-regulatory options that are identified.

Objectives of copyright

Copyright seeks to incentivise the creation and dissemination of original works. It gives authors the exclusive right to copy, disseminate and adapt their works. Authors can also transfer or license those rights. Without the ability to protect works (e.g. books, recorded music, fine art, digital art, movies, educational literature, software code) from unauthorised copying or distribution, there would be fewer incentives to create and disseminate important social, cultural and commercial works.

However, copyright must strike a balance. Over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and 'follow-on' creation — that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services. It can also inhibit important cultural activities, such as those of educational, library and archival organisations.

New Zealand's copyright law is intended to benefit New Zealanders as a whole. This requires consideration of the impacts on creators, distributors, users, consumers and all other people affected by copyright.

As a starting point, the following objectives of New Zealand's copyright regime have been identified:

- provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so
- permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand
- ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law
- meet New Zealand's international obligations.

These objectives are not set in stone, and will be tested through consultation on an issues paper.

Context

Copyright is unlike other forms of intellectual property, such as patents, in that there is no need to register a copyright work.

Copyright is also unique due to the broad range of content it applies to. While many copyright works require significant investment of money, talent and/or time (such as a feature film or a professional painting), other copyright works are cheap and easy to make (such as a photo captured with your phone). Many of us inadvertently create copyright works every day.

Copyright Act 1994

The *Copyright Act* provides New Zealand's copyright regime. This includes specifying:

- the works covered by copyright, the qualifications and ownership of copyright and the duration of copyright
- the acts that constitute infringement of copyright (i.e. the exclusive rights of the copyright owner and licensees)
- exceptions to infringement of copyright (including 'fair dealing' with a work)
- moral rights to be identified as an author or director, and to object to derogatory treatment of the work
- performers' rights
- technological protection measures and copyright management information
- licensing and transfer of copyright
- enforcement and remedies for infringement, including civil proceedings, the Copyright Tribunal, border protection measures and powers of enforcement officers.

The last major review of the Copyright Act took place from 2001 to 2004 resulting in the *Copyright (New Technologies) Amendment Act 2008*. This introduced:

- protection for "communication works" (previously broadcasts and cable programmes)
- new exceptions for transient or incidental copying
- decompilation of computer programs
- format shifting and time shifting
- limitations of liability for ISPs
- greater protection for technological protection measures
- new protections for copyright management information.

Study into the role of copyright and designs in the creative sector

The copyright regime plays an important role in the creative sector. A study into the role of copyright and designs in the creative sector was launched in October 2015 to help the Government better understand how copyright is used in practice.

The final report, *Copyright and the Creative Sector*, was released in December 2016. It was the culmination of information from 71 interviews, two sector workshops, an online survey and an online consumer focus group.

The report illustrates the diversity of the creative sector, in terms of the works created, the drivers for creation, the means of distribution and the revenue models. It highlights some of the opportunities and challenges posed by developments in digital technology.

Understanding the landscape – how copyright is operating on the ground – is a first step toward developing high quality policy.

We invite feedback on the report (email creativesectorstudy@mbie.govt.nz). Stakeholder views will continue to inform our thinking.

International environment

The international environment is a significant factor in any review of the Act, as:

- International agreements set the broad framework for our settings and require that we do not depart from some approaches in certain areas.
- Many dealings with copyright works occur across borders.
- Foreign companies play a significant role in the creation and distribution of a large amount of content that is available in New Zealand.

The need to ensure copyright laws are fit for purpose in a changing technological environment has been recognised in a number of other major jurisdictions. For example, copyright reviews are proposed or underway in the European Union, Canada and Singapore. Changes to Australian copyright law are also being considered by the Australian Senate.

What's next?

The next step will be **release of an issues paper for public consultation in early 2018**. The issues paper will likely be broad ranging and include a number of questions for public input.

The overall scope of the review, and the staging of it, will be informed by that consultation process. An indicative process for review of the Act is set out below:

Through future consultation processes, we would encourage submitters to support their submissions with appropriate evidence. Evidence will play an important role in our analysis of issues and any options for reform. The United Kingdom Intellectual Property Office has published a *Guide to Evidence for Intellectual Property Policy*, which is a useful tool to help guide the information provided throughout the future processes.

Annex 2: Summary of issues to be addressed in the issues paper

1. The issues paper stage is intended to take a comprehensive first principles look at the *Copyright Act*. The scope is wide and we intend to look at the operation of all parts of the Act and a full range of copyright issues. We do not propose considering issues that have been addressed recently through the TPP consultation process, such as copyright term extension or performers' rights (but have provided a brief description of these issues at the end of this Annex).

2. We are still working on the issues paper and will further refine, and may add to, the issues identified below. The information provided below is high level. Please let us know if you would like more detailed advice or background material on any of the issues.

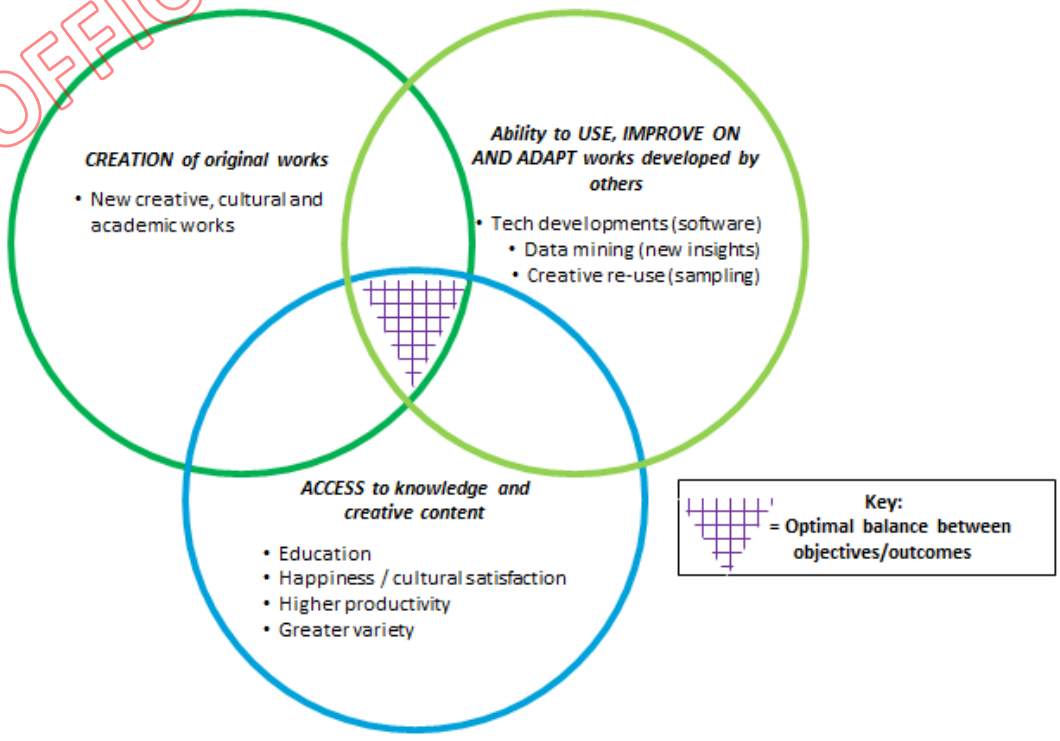
Objectives

3. Through the issues paper we will ask whether submitters agree with the objectives of New Zealand's copyright regime, identified in the terms of reference. These are to:

   - provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so
   - permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand
   - ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law
   - meet New Zealand's international obligations.

4. In information and reports stakeholders have provided to us since the launch of the review, some stakeholders have indicated that they do not agree with the objectives outlined above. Some rightsholders in particular see the purpose of copyright as being to protect their business models and investment, rather than as an input into incentivising creation and dissemination for the benefit of the public. We do not agree with this narrow interpretation and propose to front-foot this in the issues paper.

5. The word 'balance' is frequently used in copyright debates and often for different purposes. It is the objectives and outcomes we are seeking to 'balance', not the competing interests of different stakeholders – this is reflected in the model we have created below.



6. The model represents our view that the copyright system should seek to balance the following (not always competing) outcomes:

   - creation of original works
   - use, improvement and adaptations of original works
   - dissemination and access to creative works.

7. We intend to seek stakeholders' views on this model. In particular we want to test whether each of the outcomes is dependent upon the others, and whether optimal settings for each should increase the quality and quantity of content overall. For example, creators learn from, and are inspired by, earlier creations. Creation does not occur in a vacuum.

Rights

8. Rights provide incentives to invest in the creation and dissemination of creative works. This section of the paper covers the requirements and subject matter for copyright protection and the rights provided by copyright.

9. ***Copyright should protect the expression of an idea, not the idea itself***
It is often said that copyright protects the expression of an idea. We think that this is an important basis for assessing good copyright policy. Where copyright protects an idea itself, it could be inhibiting the free flow of ideas, which is fundamental to a knowledge economy. One key area that we will need to explore is the extent to which the protection we provide for databases may be locking up the underlying data itself. This could have impacts on emerging technologies that rely on big data inputs.

10. ***Copyright protects original works, but our threshold for originality may be too low***
For a work to receive copyright protection it must simply be original and meet the relevant definition (e.g. "literary work" or "sound recording"). There is not generally a "quality" threshold. In some countries, judges have interpreted originality to require something extra – for example, "creative spark" (United States). New Zealand courts have tended to follow United Kingdom precedent and assess the threshold on the basis of skill, labour and judgement. Under this test, a telephone directory has been found to qualify as an "original" work and so receives protection. We consider this an important area to look into further, questioning whether New Zealand has a lower threshold for originality than is optimal.

11. ***Is "communication work" as a category of work performing as intended?***
One of the key changes made in the 2008 amendments was the introduction of a "communication work", covering any broadcast, transmission by cable or wireless means, including any internet transmission. It is a very broad category and New Zealand is unique in the way that we protect communication works. The intent was to ensure the regime could adapt to new technologies and methods of delivering content by providing an inclusive and technology neutral category. It is important to test whether this category of work has met this intent and whether there have been any unintended consequences, such as overprotection.

12. ***There is a lack of reliable information for copyright works and no copyright register***
Our international obligations require that copyright protection we provide shall not be subject to any formality, such as registration.[3] However, many countries have voluntary registration systems, which can provide benefits such as making it easier for owners to enforce their rights and easier for users to trace owners to seek permissions. We are interested in submitters' experiences of operating with, or without a voluntary registration system (particularly those that have relied on copyright protection in other countries that do provide registration).

[3] Article 5(2) of the *Berne Convention for the Protection of Literary and Artistic Works.*

13. ***Re-thinking Crown copyright***
The *Copyright Act* protects copyright in works created by the Crown (e.g. reports authored by officials), excluding legislation and certain parliamentary procedural documents. Generally, Crown copyright has a longer term of protection than works by non-Crown authors. We are of the view that Crown copyright works may be over-protected and this needs re-thinking.

14. ***Copyright is given to authors or commissioners, and some believe the rules are unfair***
The exclusive rights provided by copyright, such as the right to copy or play the work in public, are generally provided to authors. In some cases, the "author" will be the writer or artist. For films and sound recordings, the "author" is the person who made the arrangements necessary for the recording (often considered to be the producer). Directors believe they should be entitled to copyright. Sometimes, the "author" will not be the first owner of copyright, and instead the owner will be the person who commissioned the work, or the employer of the "author". Photographers believe they should not be subject to the commissioning rule and should be the first owner of copyright by default.

15. ***New ways of creating and sharing content may not be reflected in the Act***
The incentives provided by copyright and copyright rules do not appear to align with the proliferation of user-generated content. This type of content is generally created by non-professionals, with low levels of investment. It is heavily inspired by existing content and is not usually created for commercial purposes. Examples include memes, fan fiction, blogs and mash-ups. We intend to consider the extent to which these avenues of self-expression might be inhibited by the copyright regime and the types of rights that should be allocated.

16. ***Some of the exclusive rights may not be framed appropriately for the digital age***
Exclusive rights generally align with infringing acts, which provide grounds for rightsholders to take action. We intend to explore whether these rights and the corresponding infringing acts are still appropriately framed. For example, whether the right of **communication to the public** and the acts that are deemed to infringe this right address the new ways in which consumer's access and share content. We also intend to consider whether there is uncertainty around the right to **authorise** (others to perform any of the exclusive rights) because authorisation does not currently link to any specific infringing act.

17. ***It is not clear whether receiving a "stream" can be an infringing act***
A person that uploads a stream (of content they do not have permission to share) is likely to be infringing by copying the work and by communicating the work. However, it is not clear whether any infringing acts apply to a person that receives that stream. Streaming has become a dominant form of sharing and accessing content and we consider that it is important that we look at how streaming is treated compared to other methods of accessing content.

18. ***There is an overlap between the Copyright and Designs Act regimes***
Currently "industrial designs" (the ornamental or aesthetic aspects of an industrially produced article) are protected both under the *Copyright Act* and by registering them under the *Designs Act 1953*. This is unusual internationally. While there are some advantages to dual protection there are also consequences that may be disadvantaging New Zealand designers. We will seek views on whether dual protection is in New Zealand's overall interest.

19. ***Technological Protection Measures (TPMs) are controversial***
TPMs are "digital locks" that rightsholders use to stop their material being accessed or copied without their permission. An example is the technological measures an online news provider may put in place to enforce paywalls to access certain articles. TPMs can facilitate the development of online business models for the delivery of copyright works to consumers. They are particularly common in the film and television industry, where they are used to limit the availability of content to a specific geographic region (commonly referred to as "**geographic segmentation**").

Currently the Act prohibits dealing in TPM circumvention devices or providing TPM circumvention services. In some countries, TPMs are afforded further protection – for example, the simple act of circumventing a TPM (whether or not the circumvention involved a restricted act) is treated as copyright infringement. Some amendments (not in force) were made to the TPMs regime through the Trans-Pacific Partnership Agreement Amendment Act 2016. However, TPM obligations have been suspended under the Comprehensive Progressive Trans-Pacific Partnership (CPTPP). The proposed amendments were controversial (in short, while advocates of open internet were concerned about the additional protection that was given, rights holders felt that the protection did not go far enough). We consider that the current TPM regime has the balance between protection and access about right, but will look at whether the regime imposes any costs or requires clarification. We also intend to look at the issue of geographic segmentation and the extent to which it should be protected by the copyright regime.

20. ***Moral rights are complex to navigate and may be difficult to rely on in practice***
Moral rights are granted to authors and include the right to be identified as the author and the right to object to derogatory treatment. The moral rights section of the Act is long and complex with numerous exceptions to each right and detailed rules around the treatment of different types of works. We want to test how the regime operates in practice and consider whether the regime could be simplified.

Exceptions and limitations

21. Exceptions to copyright are important to facilitate desirable and appropriate use and access to copyright works. Our view is that an effective copyright regime should permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand. Our international obligations require us to confine exceptions and/or limitations to:

- certain special cases,
- which do not conflict with a normal exploitation of the work, and
- which do not unreasonably prejudice the legitimate interests of the rightsholder.

22. Exceptions fall within three main categories:

- Class of **uses** – anyone can rely on these exceptions for the described purpose (e.g. **fair dealing** exceptions for the purposes of criticism, review and new reporting – they tend to be less prescriptive).
- Class of **users** – these exceptions can be used only by a particular class or a group of people or organisations (such as educational institutions or libraries and archives can use the exceptions for certain educational or archival purposes – they tend to be very prescriptive).
- Class of **work** – these exceptions allow particular activities in relation to certain copyright works (such as exceptions relating to computer programs to facilitate backing up, decompiling and studying computer programs).

23. The *Copyright Act* includes some fair dealing exceptions that relate to classes of uses and a large number of specific exceptions that relate to classes of users and works. A small number of countries, including the United States, have a more flexible ‘fair use’ exception regime. Whether a use is ‘fair’ is determined by a court process, applying general principles that look at the purpose, nature, amount, and effect of the use. The main difference, compared to fair dealing, is that it is not limited to a particular use or purpose.

24. ***Our exceptions need re-examining, including considering exceptions for data-mining, parody and satire, cloud storage…***
We have heard that there are many desirable uses that are not reflected in our exceptions regime. These include:

- non-expressive and innovative uses, such as datamining for the purposes of developing artificial intelligence (with a potential chilling effect on innovation)
- uses that facilitate freedom of expression, such as parody and satire, or social and political commentary
- uses that facilitate common technological processes, such as cloud storage
- uses that align with our international obligations, such as a specific exception for quotations.

25. ***….but it's important we don't jump to solutions like 'fair use' at this early stage***
Many stakeholders such as technology companies, educational institutions, consumer groups and heritage organisations advocate for the introduction of more flexible exceptions such as fair use to address these issues. They contend that current copyright settings inhibit innovation, follow-on creation and knowledge/heritage dissemination. However stakeholder views are polarised on the benefits of fair use versus fair dealing. Larger rights holder representative organisations, such as WeCreate, advocate against inclusion of flexible exceptions such as fair use.

We consider that we can frame the debate more constructively by seeking to understand problems with the current regime rather than jumping to solutions. We do not consider that it is helpful (or necessary) to frame exceptions and limitations as a binary choice – for example, between flexible fair use or specific/narrow fair dealing. For this reason, we intend to identify and test the magnitude of each of the issues before considering what the regime should look like.

26. ***The fair dealing exceptions are rarely tested and do not define key terms***
The exceptions for criticism and review, reporting current events and research and private study do not define key terms and lack judicial interpretation, which may be creating uncertainty and a reluctance to rely on these exceptions. We intend to ask how these exceptions are operating in practice.

27. ***Library and archives exceptions may be impeding digitisation efforts and could be too narrow***
A number of institutions are now seeking to reach audiences beyond the walls of their institutions by creating digital copies of items in their collections and communicating these copies to a wider audience. They see the digitisation of their content as a natural extension of their current role and mandate, contributing to the identity and cultural heritage of New Zealanders and to a non-commercial knowledge network. Digitisation requires that the copy replace the original, which may be leading to quality degradation, or be resulting in the loss of valuable original materials. The current regime may be impeding these important digitisation processes. We will also look at whether the exceptions for libraries and archives should apply to museums.

28. ***Library and archive exceptions need to be considered in a broader context***
We intend to consider how copyright exceptions for libraries operate within the broader context of the sector, outside of the copyright regime. These include the Public Lending Right (a fund distributed to New Zealand authors based on the number of physical copies of books libraries hold) and Legal Deposit (requiring that copies of all New Zealand literary works be deposited with the National Library).

29. ***Educational exceptions may not reflect current teaching practices***
The educational exceptions are designed to facilitate traditional classroom based learning, however learning is increasingly taking place online. This has produced challenges for teachers. We consider that the exceptions should be re-examined in this context.

30. ***Educational exceptions encourage licensing arrangements, but there are concerns that the licence scheme provided in the exceptions is not used appropriately***
The educational exceptions allow multiple copies to be made and distributed to students as long as the extract copied does not exceed more than 3% or 3 pages (whichever is greater). This quantity can be extended to 10% by a voluntary licence. Rightsholders are concerned that schools may be copying more than they are entitled to without obtaining the voluntary licence.

31. ***Rules around contracting out of exceptions could be explored***
Several other jurisdictions have looked at rules relating to attempts by rightsholders to contract out of exceptions. Some advocate for rules that would render unenforceable any contractual provision that restricts or prevents acts otherwise permitted by specific library and archives exceptions. We would be interested in testing whether contracting out of exceptions is an issue.

32. ***Some exceptions, such as 'format shifting' and 'time shifting' may be out of date***
The rationale for format shifting is that, once a person has purchased recorded music, they should be free to 'format shift' that recording – rather than having to pay for the same music again. The need for a format shifting exception arose during the transition from physical media to digital music, and before video enabled devices such as smart phones were developed. However, the exception has arguably become less relevant through the rise of music and video streaming and associated changes in business models (e.g. fee for access rather than fee for purchase). If a format shifting exception is retained we will need to consider whether it should also apply to films and any other content.

The time shifting exception was introduced to legitimise the common practice of consumers recording material on VCRs to watch later. However, this exception has arguably become less relevant with the development of streaming video on demand services. For example, the two largest free-to-air broadcasters in New Zealand offer access to their previously broadcasted content through Freeview Plus and their on-demand applications.

We will also briefly look at a number of other technical exceptions to test how they are operating in practice.

33. ***Differing treatment for different recorded music rightsholders appears unjustified***
There are often multiple copyright works within a single product. For example, a commercially released song will have a number of copyright works: in the musical score (a musical work), the lyrics (a literary work) and the recording (a sound recording). These copyright works are often owned by different entities but are all essential components of the product.

The *Copyright Act* includes free public playing exceptions that relate to some, but not all, relevant copyright works. The exceptions provide that businesses (such as cafes, bars, gyms and hair dressing salons) that play the radio or television, or stream music or video, "in public":

- **do not** infringe copyright in the broadcast, sound recording and film (and so do not need a licence for these components), but
- **do** infringe copyright in the underlying music, lyrics or script (and would need to obtain the relevant licence).

It is unclear why different copyrights that exist in the same products should be treated differently, and it appears to create problems for licence enforcement purposes.

34. ***ISP liability and safe harbour rules are hotly contested***
Safe harbours limit the liability of internet service providers (**ISP**) (including online hosts such as Google) for copyright infringement in certain circumstances. For example, if a user uploads copyright infringing content to YouTube, YouTube is unlikely to be found liable for copyright infringement provided they follow certain rules. To fall within the safe harbours, ISPs must remove or disable access to content they host when notified that the content infringes copyright. This notification is often referred to as a 'takedown notice'.

Some of the issues we intend to look at include:

- the definition of ISP and whether it might be framed too broadly,
- the cost burden of safe harbour processes for rightsholders, and
- whether the current regime is effective, including considering potential implications on freedom of information on the Internet.

Transactions

35. It is important to have clear rules and checks and balances in place to facilitate a well-functioning market in copyright works. This section will focus on rules around assignment and licensing. Copyright owners can transfer one or more of their exclusive rights to another person. They can also give another person permission to do one of the things only copyright owners can do (for example, to copy or distribute the works). The permission, along with any conditions of use, is a copyright licence.

36. Copyright licensing arrangements can be complex. A copyright owner can license different rights to different licensees. For example, the copyright owner of a manuscript could issue the right to make copies to a printing company and the right to issue copies to the public to a distributor.

37. ***The operation of Collective Management Organisations could be explored***
Collective management organisations (**CMOs**) (sometimes referred to as "copyright collecting societies") play an important role in facilitating a well-functioning market in copyright works. They reduce transaction costs for copyright owners to license their works and enable users to locate and deal with one entity, rather than multiple individual copyright owners. However, there are very few CMOs operating in New Zealand and so there is little competition. CMOs are not expressly regulated under the Act. We intend to seek views on the operation of CMOs in New Zealand.

38. ***The role and performance of the Copyright Tribunal is an area of concern for rightsholders***
The Copyright Tribunal has limited jurisdiction. It can resolve licensing scheme disputes and hear applications under the file sharing regime (discussed below at paragraph 45). The *Copyright Act* makes provision for licensing schemes operated by CMOs to be reviewed and modified by the Copyright Tribunal. It is an important safeguard against CMOs taking advantage of their market position to set unreasonable prices, terms and conditions. However, the Tribunal is rarely used and we have heard concerns about the high costs and lengthy process associated with using the Tribunal. We intend to explore this through the issues paper.

39. ***Orphan works are a problem for heritage organisations***
Copyright works for which their owners are not easily identifiable or contactable are generally referred to as **orphan works**. Obtaining permission to use an orphan work is extremely difficult and can be a barrier to their use (including the ability of libraries and archives to digitise orphan works and make them available). This is particularly problematic for older works and is exacerbated by the lack of a registration system for copyright works. Many countries have introduced rules in their copyright regimes, with varying degrees of success, to address orphan works.

40. ***Is the Act facilitating development of emerging tools for managing copyright works?***
The transactions regime of the *Copyright Act* needs to provide incentives for, and support, the creation of new technologies that assist creators and rightsholders to disseminate and monetise their works. One emerging technology is blockchain, which has the potential to provide a secure method of proving when a work was created and who owns copyright in the work. We intend to seek views on whether such new technologies have been, or are likely to be adopted, and whether the Act might present any barriers to their use.

Enforcement

41. An efficient and effective enforcement regime is critical to the overall functioning of the copyright system. Without enforcement procedures, the rights granted under the *Copyright Act* would be meaningless.

42. The enforcement regime also provides remedies against the infringement of copyright. Remedies are important for ensuring rightsholders can be compensated for any damage caused by an infringer and for deterring others from engaging in infringing actions.

43. ***Are existing civil and criminal procedures, remedies and penalties fit for purpose?***
The range of existing civil procedures and remedies, along with the current offences and penalties, have not been reviewed for some time. It is important to ensure that they are framed appropriately for the digital age. They need to be effective and efficient for deterring copyright infringements and ensuring copyright owners are appropriately compensated for any damage arising from infringement of their copyright.

44. ***New remedies, such as Court orders for site blocking injunctions, may be required***
The development of new technologies is presenting new challenges for copyright owners to deter copyright infringements over the Internet. Traditional remedies, such as injunctions against individual infringers are no longer effective, especially where the source of infringement is outside of New Zealand. Many countries now permit their courts to order local ISPs to block their account holders from accessing overseas websites facilitating infringement (**site blocking injunction**).

    SkyTV is in the process of making an application for a site blocking injunction to the Auckland High Court. It is not clear, however, that either the Copyright Act or High Court Rules permit the High Court to issue such an injunction. We intend to consider the merits of introducing specific site blocking powers, which will include considering who should bear the costs.

45. ***The three notice file sharing regime has not been used since 2015***
The Copyright Act was amended in 2011 to introduce an efficient, low cost enforcement regime with the objective of deterring individuals from infringing copyright through using peer-to-peer (P2P) file sharing technologies and providing compensation for copyright owners. The regime has only been used by one rightsholder and has not been used at all since 2015. The review will consider whether a file sharing regime is still needed, and, if so, what modifications might be required to improve its effectiveness as an enforcement measure.

46. ***Access to justice is an issue – would alternative dispute resolution or small claims process assist?***
The copyright owner and their exclusive licensees may take legal action against anyone found to be infringing their exclusive rights without their permission (in the High Court or District Court). This process is costly, time consuming and very difficult to justify for small scale or casual infringements by any one individual. However, the collective impact of multiple individuals committing small scale infringements can be significant for rightsholders. We intend to consider whether it might be appropriate to introduce alternative and more cost effective procedures to assist rightsholders to address small scale infringements.

Issues that may come up but that we do not propose to specifically address

47. ***The term of protection for copyright is adequate (and can't be reduced)***
This is not an area we propose focussing on through the review process, but it is likely an area you will hear a lot about. Minimum terms of protection are set by United Nations-level international agreements (generally 50 years, or life plus 50 years), and the prevailing view among most academics and economists is that this is a more than adequate term of protection to provide incentives to create and disseminate creative works. An extension of term was proposed through the TPP, which was estimated to result in a cost of approximately $55 million per year to the New Zealand economy over the very long term. Although that particular figure was highly contested by rightsholders, it is our strong view (based on prevailing economic and academic literature), that a twenty year extension to the term would result in a net cost to the New Zealand economy.

48. ***Performers' rights regime will be changing and is not in scope for the review***
Performers' rights in New Zealand are reasonably limited compared to the protection afforded in some other countries. Performers of a song or speech are given the right to prevent the recording of their performance (other than for private and domestic use) and to prevent any copying or dissemination of any unconsented recording. A more comprehensive regime will be introduced as part of our CPTPP obligations and we do not propose addressing performers' rights through the review.

Annex 3: The Copyright and Creative Sector Report

A hardcopy has been provided to Minister Faafoi.

A copy of the report is available online: ***http://www.mbie.govt.nz/info-services/business/intellectual-property/copyright/copyright-and-the-creative-sector/copyright-and-the-creative-sector.pdf***

Annex 4: Cross-portfolio connections

1. Areas that overlap with your wider responsibilities within the Commerce and Consumer Affairs portfolio:

    - e-commerce issues, including trade in digital goods and services
    - parallel importation
    - the role of platforms
    - consumer access to digital content.

2. Areas that overlap with other portfolio interests include:

Portfolio	**Areas of interest**
Economic Development	• Creative sector economy (including WeCreate initiatives) • Screen sector policies • Innovation policy • Incentivising a knowledge economy
Broadcasting, Communications and Digital Media	• Enforcement issues relating to the internet, streaming and platforms • Digital convergence, including changes to broadcasting settings • Digital economy, including use and ownership of data (and relationship to emerging technologies such as the 'Internet of Things' and 'Artificial Intelligence')
Arts, Culture and Heritage	• Measuring the value of culture, heritage and arts, including non-market value • Copyright exceptions for archiving and heritage organisations • Relationship lead for many key stakeholders • Funding and oversight of key institutions, including NZ On Air, Film Commission, Music Commission, CreativeNZ • Encourage public participation in culture creation and performance, as well as culture consumption
Internal Affairs	• Responsibility for Archives New Zealand and the National Library • Copyright exceptions for archiving and heritage organisations • Links between copyright and the Public Lending Right and Legal Deposit
State Services (Open Government)	• Crown Copyright and NZ Goal
Māori Development	• Traditional Knowledge

Disability Issues	• Copyright exceptions that facilitate equitable access for people with disabilities
Education	• First ownership of copyright • Copyright licensing and copyright exceptions and limitations, particularly in relation to educational exceptions
Trade and Export Growth	• Links to Free Trade Agreements • International trade in creative works and content
Justice	• Enforcement provisions (civil procedures and remedies and criminal offences and penalties) • Copyright Tribunal • Courts and appeal processes, alternative dispute resolution • Privacy issues