

Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

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Responses to Issues Paper questions

Objectives

1	Are the above objectives the right ones for New Zealand's copyright regime? How well do you think the copyright system is achieving these objectives?
	<i>See responses to Questions 2 and 4 below.</i>
2	Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?
	Although any copyright regime must incentivize creation of works and provide reasonable access for adaptation of works, those objectives not the only objectives that a copyright regime should aim to achieve. Indeed, the goals of promoting creation and

access to knowledge matter precisely because they promote larger goals of human well-being and progress. Put differently: Copyright is about promoting authorship, and authorship matters because it relates to socially beneficial objectives such as self-actualization, skill-building, social justice, community building and free expression. Therefore, both copyright's scope and its limits should be shaped with these considerations in mind.

As a nonprofit organization established in 2007 to promote and protect fanworks from commercial exploitation or legal challenge, the OTW has first-hand knowledge of how fanworks can promote these goals. "Fanworks" are new creative works based on existing media; outside media fandom, the term "remix" is often used. The OTW provides information to fans who need assistance when faced with related legal issues or media attention. Our website hosting transformative noncommercial works, the Archive of Our Own ("AO3"), has over 1.5 million registered users and receives an average of 26 million page views per day. In addition to having many users in New Zealand (on a recent day, AO3 received 183,000 page views from New Zealand, translating to approximately 27,000 unique visitors from New Zealand), the OTW also has several hundred members, donors, and/or volunteers in New Zealand, who have significant interests in a balanced copyright regime.

Empirical research reveals that remix culture is a global phenomenon with similar characteristics around the world, including New Zealand. See Aram Sinnreich & Mark Latonero, Tracking Configurable Culture from the Margins to the Mainstream, 19 J. COMPUTER-MEDIATED COMMUNIC. 798, 798 (2014) ("[o]ur analysis, based on results from thousands of adults around the globe, shows that. . . remixes, mashups, and other forms of 'configurable culture' [have] become mainstream phenomena"); Pamela J. McKenzie et al, "User-generated online content 1: Overview, current state and context" (2012) 17:6 First Monday, online: <<http://firstmonday.org/ojs/index.php/fm/issue/view/366>>; see also Michael B. McNally et al, "User-generated online content 2: Policy implications" (2012) 17:6 First Monday, online: <<http://firstmonday.org/ojs/index.php/fm/issue/view/366>>. The relevance of user-generated content platforms and fair use to the US economy has also been the subject of several studies: see, for example, Computer and Communications Industry Association (CCIA), Fair Use in the U.S. Economy (Washington, D.C.: CCIA, 2017), online: <<https://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>>; see also Re:Create Coalition, Unlocking the Gates: America's New Creative Economy (Re:Create Coalition, 2018), online: <<http://www.recreatecoalition.org/wp-content/uploads/2018/02/ReCreate-Creative-Economy-Study-Report.pdf>>"

The OTW has first-hand knowledge that socially beneficial objectives such as self-actualization, skill-building, community building, and social justice grow out of a copyright regime that permits and promotes the creation of fanworks. The OTW has documented empirical evidence from around the world that creating fanworks empowers new speakers, provides personal benefits, provides political and cultural insights, provides opportunities to otherwise-marginalized speakers, teaches important skills, and saves lives. See, e.g., Comments of the Organization for Transformative Works to the USPTO/NTIA (October 2013), online:

<<http://www.transformativeworks.org/wp-content/uploads/old/Comments%20of%20OTW%20to%20PTO-NTIA.pdf>>

In response to a recent OTW call for comments from New Zealand-based fanworks creators (https://archiveofourown.org/admin_posts/12416), commenters indicated that the same is true for fans in New Zealand: through creating transformative works, they found valuable and supportive communities; learned to express themselves in their own voices; developed a variety of valuable skills, including writing, literary analysis, podcasting, and graphic design; and engaged in critical discussions of media and social justice issues. These benefits depend on the ability to create works based on existing works, and simply can't be found elsewhere for many creators. Indeed, it is not unusual for fans to describe their ability to create transformative works as having saved their lives.

In response to the call for comments noted above, we received many messages from New Zealand-based fans. We include a selection of them here to illustrate some of the benefits of a copyright regime that permits and promotes the creation transformative works based on pre-existing copyright works:

- “As a New Zealander, I have been participating in Transformative Works Fandom online since we got at-home internet in the 1990s. Creating, editing and reading transformative fanworks (written, audio and video) has greatly improved my communication skills, my writing skills and my ability to empathise with others. It has also given me a network of like-minded friends and fellows in New Zealand (many of us have formed relationships and now live together, for example) and all around the world, giving us access to many more experiences and cultures. . . .”
- “I got half way into [writing a novel] and realised I wasn't ready to do the complexity of emotion justice and I needed to practice. I needed to be better, so I could tell this story properly and young people around NZ would know that we kiwis were worth writing about, that being queer was worth writing about, that being a queer kiwi was worth writing about.

“So I practiced on Harry Potter and Draco Malfoy - two boys who'd also known each other in school and never got along. I practised, I tried out some angst, some suffering, some emotional pain and retribution and forgiveness. I finished two fanfiction novels and a bunch of short stories. And I got better. I had a community and an outlet and feedback, to learn and grow and be able to do my 'real' stories justice. And I got better. Lots better. So much better I re-read the first chapter of this book about two boys, just a couple days ago, and I realised I could rewrite it and improve it and give something even greater to our country's young people.

“So now I just need to finish that 'real' novel, but this time I've got the tools, the practice, the support, friends who write, queer friends who write, and I believe in myself a little more. I know, better than I did, that I can do it, that what I write will make a difference, and that it'll help.

- “I discovered online community and fanfiction at a time when my life was all going downhill. Those stories comforted me, being able to read these stories of my favorite characters struggling and coming out stronger, and of finding true love or family when they had none. Since this was after a break up, and when I was living alone it was especially important for me. . . . Please consider the value of creative exchange in helping people in difficult times.”
 - “Restricting the creative voices of fans to create their works would be, for me, a move that would silence one of the most powerful ways people communicate globally about events that move us. We can use fanworks to talk about themes in media, or manipulate media we love into a medium to talk about issues in the wider world. . . . Fanworks allow fans worldwide to connect and talk in spaces where we all have something in common, and enriches social commentary on popular media that people often take at face value. Fan works of all kinds are something I really enjoy and strongly support. I'd hate to see the ability of Fans to create restricted in any way.”
 - “. . . Transformative works are a fascinating and advanced level of cultural dissemination, and will grow increasingly influential in future. . . .”
 - “[A] great deal of fan fiction focuses on [caring for others who are suffering from trauma, often tagged on AO3 with 'Hurt/Comfort.' Works under this category often explore the effects of abuse in empathetic and caring ways; they allow abused characters to be flawed and in pain, but also to recognize they are deserving of love. As a victim of abuse, reading and writing transformative works which promote a loving attitude towards those who suffering have directly benefited my self-talk and therefore my mental health. . . .”
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- “I discovered fandom about 10 years ago, and it's honestly saved my life. I'm an older fan and I love writing and making art, and rediscovering my creativity and being part of the fan community has gotten me through some very tough times. Those include the Christchurch earthquakes after which I had to evacuate my elderly parents and care for my Mum in my home while she died slowly from Parkinson's disease, and while Dad was in a rest home with worsening dementia. Without fandom as an outlet, and my fannish friends, I wouldn't have made it through. . . .”
- “. . . The friends I've made in the OTW, the incredible works I've read, and all the support and advice from the community have made it one of the best places to be on the internet. I really hope that we in New Zealand can step up and lead the world with fan-friendly laws that allow us to continue expressing ourselves creatively!”
- “I have been involved in fandoms for over twenty years, and fanfiction and fanart have been two of the biggest influences in my life. Without these creative outlets, I would not have met my best friend, or been able to develop my comedy and writing abilities. I would not have learned to use photoshop, or begun critiquing mainstream media in a meaningful way. . . .”

“Fanworks have been around for centuries or even millenia, and serve to promote the content they borrow from. Fanworks are important to millions of people worldwide, and to limit the fair use of media would be taking away their creative outlet.”

- “. . . I'm from New Zealand. I've always struggled to make friends at school and later at university. I've struggled to meet people who have the same interests. If it wasn't for the internet, fandom spaces and AO3 itself, I would be currently extremely lonely.

“But, because of websites such as this, I've had the chance to meet new people. I've made friends I've held for over 4 years already simply because of this website. It's helped my depression and social anxiety by a ton. It's helped me come out of my shell and comment on other writer's fanfictions. And thus, make friends along the way too. . . .”

- “. . . I was scared as a child. I was scared that people would figure out I thought differently, I was scared they'd see how much I hated myself and lock me in an asylum. Fandom gave me courage. It let me talk to people like me. It let me hear from the people that'd gone through things I had. It was a very difficult period of

my life, and it's still ongoing today. When I needed room, when I needed help, when I needed a voice, fandom was there. . . .”

- “I am a kiwi resident and have lived here since i was under 10.

“I was a fan of cartoons from a young age and they helped me as a method of escapism during extremely hard times. I am 25 years old now, and if i hadn't of discovered fanworks and the community that came with them, i know i would of not reached this age and would have been just another unfortunate statistic.

“The community has not only introduced me to lovely and supportive friends but also provided a place for me to be creative, where i could not otherwise. Especially when it felt like i was the only person in my real life with these interests.

“I started writing when i was older, and the benefits have been immense. Not including helping with my writing skills for school and my mental health

“Creative writing is not only a consistent hobby of mine and i know it would be reaching to say it saved my life, but it gave me a place in a community, and a sense of being, which i couldn't find in my everyday life”

- “I'm a New Zealander who has benefited massively from transformative works. My writing skills have increased immensely, as have my vocabulary and it really helped me in my education and career. I have also gained a lot of friends and support from the fanwork community and it helped me connect with people all around the world in a time when it's so easy to become shut off from the world.”
- “Making transformative works...has incredibly enhanced my writing skills, allowing me to join writing competitions and considering I'm dyslexic it has majorly helped with my reading skills as well. I've met amazing people in fandoms as well. I see writing as an art and I use this site often to better my craft of writing, by getting helpful advice, critic, and personal motivation. As a person who struggles with depression, seeing all these kind and amazing messages definitely is a source of self care for me.”
- “. . . I'd say that, like a lot of hobbies, fanfic is intensely social, which, introvert that I am, I like a lot. It also makes it... fun... to extend oneself. I'm one of those writers who, if I don't know that exact price of wool in the particular region and timeframe of my story, *I might actually die*. So there's an odd kind of self-education in there. 17C French politics, 19C Persian lifestyles, tango... It's enriched my life. It's also how I do literary analysis, in the main. Picking up tiny

details of a character's actions, marrying them with canonical events elsewhere, trying to reconcile contradictions: it's one way to dig into a text in a way I find very satisfying."

- "Transformative works are storytelling (through many different forms of media) that connect all of us as humans. I have learned so much from fanworks. About gender, religion, history, and the magnitude of human experiences. I've laughed, I've cried, and my heart has nearly burst with happiness. I've made friends all over the world, with lives vastly different to my own. Fanworks have taken me places I never would have expected to go otherwise, and I am richer for it."
- "I'm a young transgender man of 20, and I can confidently state that transformative works and the communities that develop them and around them are most of the reason I was able to come to that conclusion. They helped me communicate with a wide range of people, and learn a great deal about topics I otherwise would have avoided like the plague in my desperate attempts to remain 'a normal kiwi girl'. Despite family support, it was only my ability to engage with and learn from others in a playbox I was already familiar with- the characters we'd already grown to love, all of us bringing different perspectives and pushing one another to hone our crafts (whether it be visual art, or writing, or music, or anything) and better ourselves [that enabled me to understand who I was]."
- "Fan works, and the ability and the freedom to create and access them, has without a doubt saved my life.

"I absolutely mean this quite literally: in my hardest moments of depression, anxiety and suicidal ideation, the ability to access and create and interact with others about fictional stories--books, TV shows, games, webcomics, anything that I liked--enabled me to be distracted from my own troubles for a time which made/makes them easier to handle.

"I discovered fan fiction when I was 14, almost 12 years ago. It was my escape. It was my fun treat. It was my teacher. It was common ground to make friends. It was my creative refiner's fire, a safe space in which I could connect with like-minded people and explore ideas, abstract concepts, sexuality, my understanding of the world, emotions, and simply the human experience. It enabled me to practice writing and drawing with subject matter that I enjoyed and felt safe with, in places I knew I wasn't being judged for being myself. It enabled me to share parts of myself I felt I couldn't share with people I knew in real life. It supported me as a community even when I didn't have any friends in real life and even when I wasn't reaching out to people online, just knowing that other creators were making art or writing stories for me to enjoy was so very

comforting. Fan works have and continue to show me windows into lives and worlds where it is ok to be someone different; worlds where I see someone like me represented and celebrated in a way I just don't see anywhere else.”

Furthermore, a copyright system should promote social justice by encouraging and enabling authorship by as wide an array of people as possible. A copyright system that permits and promotes the creation of transformative works not only enables New Zealand creators to engage in empowering self-expression, hone socially valuable skills, and build creative community, but particularly advances these goals among underrepresented voices. Research establishes that remix creation historically comes disproportionately from minority groups such as women; gay, lesbian, bisexual, transgender, and queer people; and racial minorities of all sexes and orientations. This is unsurprising, because “talking back” to dominant culture using its own audiovisual forms can be particularly attractive to and empowering for disempowered speakers. See, e.g., See Kristina Busse, Introduction, 48 Cinema J. 104, 105-06 (2009) (remix cultures disproportionately female); Julie Levin Russo, User-Penetrated Content: Fan Video in the Age of Convergence, 48 Cinema J. 125, 126 (2009) (identifying remix as a queer genre); Olufunmilayo B. Arewa, From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context, 84 N.C. L. REV. 547, 561, 622 (2006) (remix’s appeal to racial minorities). By providing expressive outlets and communities for underrepresented speakers, remix gives those speakers voices, which contributes to the expressive richness of culture as well as empowering them personally.

As some of the New Zealand fan-creator stories indicate:

- “When you look at many fanworks, they support minorities who often are not depicted in popular media, allowing a celebration of diversity.”
- “. . . I think the freedom to creatively interpret and reinterpret established properties is absolutely fundamental; after all, all media consists, on some level, of a recombination of existing archetypes/components, and I believe the law should recognise and protect this freedom. The alternative would be an unforgivable stifling of creativity and creative self-expression, particularly by groups and demographics with limited voice in ‘mainstream’ media.”
- “[R]eading fan fiction has been very helpful for exploring my own sexuality. In my experience, sexuality has often been a source of shame to myself and my female friends. From the age of twelve, I was teased several times by male friends who demanded if I masturbated or not. There was also a great deal of homophobia in my Christchurch public school, with other students mocked for seeming 'gay.' I remember feeling deeply disgusted by my own sexual desires, and when I developed a crush on another girl in my late teens, I was initially horrified.

“Fan fiction was something that helped me to accept myself and my sexual and romantic desires. Fan fiction is full of diverse sexualities and sexual experiences. According to research it mostly written by women (with another large section of writers non-binary people and queer men); I would say that this is a huge factor in what makes it such a 'safe space' for young women such as I was. After being raised on media and within a society dominated by the straight cis male sexual gaze, entering a world dominated by the female sexual gaze is curative for the sense of shame and confusion that many young women feel. . . .”

- “. . . I have made fanworks from the time I first read Charlie and the Chocolate Factory aged 6 all the way up to now, as an adult in a wide variety of fandoms including books, tv and movies. People are innately drawn to creating fan works and it's important they have the right to do so for transformative purposes and for parody, education and criticism - it enriches our cultural creativity as a whole to do any or all of those things.”
- “I'm currently in college, but when I was younger there wasn't any kind of language around mh [mental health] issues. As a result, my generalised and social anxiety wasn't picked up on. I knew that there was something wrong. But no one had any words for it, & they all thought that I was oversteering or overthinking. It didn't get better. By the time I entered Intermediate, I was planning on killing myself if the next two years didn't go well.

“I encountered a language for [mental health] issues via fandom. There were creators out there, female creators, queer creators, creators of color, and queer female creators of color. There was a community. And that community helped me understand what I was going through. I'm going to counselling currently. My family doesn't believe in mental health issues and they're the asylum or nothing kind of people.

“Writing fanfic let me express myself in ways I hadn't let myself or wasn't allowed to anywhere else. fandom gave me a voice. without it, i would be dead now.”

- “Making and enjoying fanworks is important to me as they are the best and easiest way to see myself reflected in the media. I love the diversity of genders and sexuality explored in fanworks . . .”
- “. . . The ability to play in the artistic creations of others - their worlds and characters - allows many people who are under-represented and marginalised to adapt popular and beloved works in ways make those worlds inclusive of them.

“Through the arts, we come to know ourselves and others better, and explore what it is to be human. By allowing the transformative, creative use of existing works, the benefits of imagination and storytelling can be extended to everyone, not just those who represent income-generating mainstream culture.

“Fan art and fiction is a way our popular culture comments on, improves, criticises, fixes, deconstructs and rebuilds itself. . . .”

Copyright law should take into account the myriad ways in which transformative works are socially valuable and should adopt a liberal approach to such works.

- 3 Should sub-objectives or different objectives for any parts of the Act be considered (eg for moral rights or performers’ rights)? Please be specific in your answer.
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See response to Question 2 above.

- 4 What weighting (if any) should be given to each objective?
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The OTW believes that New Zealand should seek to achieve a balance between its first two copyright objectives of incentivizing creation of works as well as providing reasonable access for adaptation of works. Indeed, in response to an OTW call for stories from New Zealand fanwork creators

(https://archiveofourown.org/admin_posts/12416), users illustrated the explicit connection between these two objectives. Creators of transformative fanworks gain the inspiration and skills to create through access for adaptation of works, and in turn, build and enhance markets for the works they adapt:

- “When I was younger I enjoyed writing, and would spend hours on original stories. However I hit a block and stopped writing for years. It saddened me that I couldn’t find the motivation to return to something I loved doing. Eventually I came across fanworks, particularly fanfiction, and enjoyed reading the works. The variety of genres, the re-imagining of characters, the multitude of plots amazed me and in the end, inspired me. I picked up writing again, starting with a few short fanfics. It’s become a hobby of mine again, and importantly is supported by a community of people with differing creative interests. In particular, my writing skills have improved through connections with community members who edit the works (unpaid, simply because they enjoy and want the content). . . .”
- “I’ve read fanfiction, and seen other fan creations for unfamiliar franchises that have caused me to buy a game, book or song, or go see a movie at the cinema, where otherwise I wouldn’t have thought I was interested or sometimes just wouldn’t have ever heard of them. I’ve seen fanart or comics that made me suddenly remember how great a series was, and have a sudden urge to dig it out again. Some properties would literally lose their entire appeal to me if I couldn’t share pictures of the characters I make in them, or read more stories based in that world - I want to be an active fan in a community of fans, not a passive, isolated consumer.”
- “. . . Fandom gave me a sense of community and encouraged me to pick up writing again when I had dropped it years ago. So many writers get their start in writing fan fiction before they gain courage to start an original work and I’ve seen it help so many people. Being able to share with other people and have them comment and talk to you about your story was huge for me. It just isn’t possible with original stories where most of the time, you’re writing alone. . . .”
- “. . . It is through AO3 that I first discovered my love of writing, and gained an appreciation for what writing could do, and could be. AO3 provided my first outlet for self-expression as a fanfic writer, and as a writer in general, and connected me with a wider community that continues to support and inspire me. . . .”

- “If I didn't have the space and ability to create fanfiction, I don't think I'd have any motivation to write at all, even though one of my high school dreams was (and honestly still is) to become a published author. Fanfiction is an incredibly important practice space for me, that lacks the anxiety of any sort of local writing group where you hand people your work and have to watch them read it. Without it, I would just be full of thoughts with no outlets.”
- “Something I also find satisfying about fanfic as an art form is the intertextuality. Eh, how do I explain? So back in the day, when W. B. Yeats wrote a poem about Leda and the Swan, he didn't have to explain who either of these entities were. Anybody likely to read his poem would have the smattering of Classics to know he was talking about the parents of Helen and the antecedents of the Trojan War. So he didn't have to set all of that up in his poem, he could just concentrate on the emotion, the portent, the beauty and ruthlessness of his words. In original fic, I can't take that for granted. In fanfic, though, I can count on a shared reference pool. I can make allusive references to a character's backstory, or, we-the-audience know a particular secret that I'm never saying out loud in this story but the dramatic irony is rich and fruity as the characters blunder around. I can pick up interpretations from other writers and bounce them back and forth. There is a responsiveness to the genre that I would not have if I were waiting for a publisher to decide if my work were good enough to justify hosting space and/or printing costs. And I'm a literature geek. I *like* responsiveness and intertextuality. . . .”
- “[W]riting fan fiction has directly influenced my career path, in that it allowed me to improve my writing skills under a pseudonym and to get support and feedback for that writing: to learn what worked and what didn't and why. I am currently a fellowship student at one of the top MFA programs in the world; I know I would never have arrived here (I would not even have had the confidence to apply) if I had not had the support of the AO3 community for so many years.”
- “. . . I've always loved writing but it's hard to get into it without the motivation of sharing it with others; fanfic gives you that ability. . . .”
- “. . . I have discovered media that I would not have otherwise known about because I read all of an authors stories in one fandom and loved their work so much I started reading the stories they had written for fandoms I had never heard of. . . .”

- “. . . It's been a pleasure to write my own stories and to share it with people who liked them. If it wasn't for a place like AO3, I wouldn't ever have been able to do such a thing! The community here is so supportive!”
- “[T]hat low entrance threshold that currently exists for publishing fanfiction: it's amazing for bringing in young writers and developing their skills. It's a truism that the best way to improve is by doing, and fanfic is pretty welcoming to beginners with subpar spelling and awkward grammar. (Maybe they're young. Maybe English is their second or third or fourth language. Maybe they have dyslexia and never thought they'd get published but this story is burning in their brain.) It's a delight to see them get better, fueled by their enthusiasm.”
- “. . . Like millions of others, I've found the ability to share, collaborate and comment in a global marketplace of ideas has elevated my craft as a writer.”
- “For me, if anything, being involved in fandom has made me contribute more financially to the original creators than what I would have otherwise. Through fandom and consuming transformative works, I have become more invested in the original works, and ended up buying the books/DVDs/streaming tv shows and films. I would not have spent this money without the transformative fanworks, resulting in a gain for the original creators.”
- “I have been sharing fan fiction on AO3 for approximately 3 years. Doing this has not only allowed me a form of creative expression for characters that I love, but has also helped me develop my own writing style and the confidence to move forward into publishing. Without this first step of being able to explore new worlds with familiar faces, I would not be where I am and I would not be looking forward to where I can still go.

“This form of expression is vital for the growing the mind, for emboldening the spirit, and for showing a person what they just might be capable of.”

- “...every good creator of original works inevitably is a fan of other works, and probably created fan art or at least read a fan fiction or two. Reading and working with other's creations informs and enriches your own approach to creating and it allows you to make your own creations so very much better. Silencing, devaluing or making it illegal to create fan works is doing the same to the future of film, print, art and more. Condemn fan works in any way, and you are nailing in the coffin of our society's artistic potential.”

Balanced copyright law that facilitates remix and other forms of user-generated content (“UGC”) is thus vital to the digital and creative economy.

Achieving a balanced copyright requires robust limitations and exceptions. To that end, a robust doctrine of fair dealing is essential to maintaining the balance between copyright holders and users. Well-delineated exceptions for user-generated content and guidelines regarding TPM circumvention will also help achieve this balance.

Rights: Specific issues with the current rights

- 18 What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?

The OTW has no response at this time.

- 19 What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?

The OTW has no response at this time.

- 20 What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?

The OTW has no response at this time.

- 21 Do you have any concerns about the implications of the Supreme Court's decision in *Dixon v R*? Please explain.

The OTW has no response at this time.

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

New Zealand should consider adopting an explicit exception or carve-out for noncommercial user-generated content that does not compete with exploitation of the market for the underlying work, such as that adopted by Canada in 2012. See Copyright Act 29.21. In contrast to retroactive defenses to infringement claims, such as fair dealing (which also applies in Canada), Canada's user-generated content provision (while imperfect and lacking clarity in some respects) has introduced a measure of ex-ante predictability that UGC falling within the provision's ambit is not

	an infringement of copyright law. New Zealand-based fan creators and remixers would benefit from such an explicit exception as well as a liberal fair dealing or fair use regime.
23	What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?
	<i>The OTW has no response at this time.</i>
24	Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.
	<i>See responses to Questions 2, 4, and 22 above, and Questions 25, 28, and 39 below.</i>

Other comments

The OTW has no other comments at this time.

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

25	What are the problems (or benefits) with the way the moral rights are formulated under the Copyright Act? What changes to the rights (if any) should be considered?
	<p>The definition of “derogatory treatment” in the Copyright Act hinges on a use being “prejudicial to the honour or reputation of the author or director.” This definition is vague and doesn’t embrace fair dealing, especially in the face of New Zealand’s absence of any explicit exception for parody and satire. Indeed, as currently formulated, New Zealand does not appear to provide robust protection for any kind of criticism under the “derogatory treatment” umbrella despite identifying criticism and commentary as fair dealing. This cuts too broadly to maintain copyright’s careful balance between incentivizing creation and providing reasonable access. Users have the right to reasonably access copyrighted works to engage in parody, satire, commentary, criticism, and other transformative uses that could be considered “prejudicial to the honour or reputation of the author or director,” given the vagueness of that term. Therefore, much of this socially valuable and beneficial creativity could be chilled by the way the moral rights are formulated, thus tipping the copyright balance.</p>

26 What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?

The OTW has no response at this time.

27 Will there be other problems (or benefits) with the performers' rights regime once the CPTPP changes come into effect? What changes to the performers' rights regime (if any) should be considered after those changes come into effect?

The OTW has no response at this time.

28 What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?

Users have many legitimate reasons to circumvent TPMs, including taking advantage of their fair dealing rights in digital, as opposed to analog, media. However, because the current regime prohibits communication regarding such permissible circumvention techniques in certain circumstances, effectively these users have been deprived of their ability to exercise their rights. Requiring laypersons to make judgment calls about possible infringement before engaging in communications about TPM can be chilling when it comes to remix communities and UGC that might be poorly understood by others. In addition, those uses protected by fair dealing are inevitably harmed when those communicating about TPM err on the side of caution regarding the possibility that those uses are infringing.

In examining providing an exception for users to circumvent TPMs to create remix videos, the United States identified numerous situations where such activities represent important social interests. For example, artist Dumbfoundead edits himself into iconic movie scenes to highlight the absence of Asian male protagonists in Hollywood films: see Dumbfoundead, *SAFE* (YouTube, May 26, 2016), online: <<https://www.youtube.com/watch?v=mmvqb9Uzu8k>>. On a similar theme but with a different technique, Dylan Marron creates “Every Single Word Spoken By a Person of Color” in various classic and current Hollywood films, cutting 120 minutes down often to less than a minute, creating powerful testimony about the invisibility and, especially, the voicelessness of people of color in popular film. Dylan Marron, online: <<https://www.youtube.com/user/dylanmarron/videos>>. Likewise, Vidder Eruthros recently created *Field Work*, a remix of the Indiana Jones films that highlights the cultural imperialism and destructiveness of the titular hero: see Eruthros, *Field Work*, online: <<https://eruthros.dreamwidth.org/342017.html>>. Such uses should not be stymied by the inability to communicate regarding their rights.

As the above examples make clear, the circumvention of TPMs is particularly important for creators underrepresented in mass culture, who use remix to talk back to that culture, to identify what it leaves out and explain what they see, and to gain skills that will promote their advancement inside and outside their communities. These same underrepresented artists’ activities are more likely to be misunderstood as copyright-infringing, thus denying them access to the TPM-circumvention information they need.

29 Is it clear what the TPMs regime allows and what it does not allow? Why/why not?

See response to Question 28 above.

Other comments

The OTW has no further comments at this time.

Exceptions and Limitations: Exceptions that facilitate particular desirable uses

30 Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use? Have you ever been threatened with, or involved in, legal action? Are there any other barriers?

The OTW has no response at this time.

31 What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?

The OTW has no response at this time.

32 What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?

The OTW has no response at this time.

33 What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?

The OTW has no response at this time.

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

The OTW has no response at this time.

35 What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?

The OTW has no response at this time.

36 What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?

The OTW has no response at this time.

37 Are there any other current or emerging technological processes we should be considering for the purposes of the review?

The OTW has no response at this time.

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

The OTW has no response at this time.

39 What do problems (or benefits) arising from the Copyright Act not having an express exception for parody and satire? What about the absence of an exception for caricature and pastiche?

The OTW believes that an express exception for parody, satire, caricature, and pastiche would all be desirable. All of these categories of works have proven value in to society. Although the OTW has argued that Australia should adopt a fair use framework in place of its fair dealing exception, there is some evidence that an exception for parody and satire has improved the clarity of Australian copyright law and encouraged valuable uses. See <https://www.artslaw.com.au/articles/entry/the-parody-and-satire-defence-what-do-we-make-of-it-so-far/>.

If New Zealand remains committed to fair dealing instead of a more flexible fair use approach, we would also encourage the adoption of other explicit carve-outs. For instance, as discussed above, we would also propose an exception for noncommercial user-generated content that does not compete with exploitation of the market for the underlying work, such as that adopted by Canada. See *Copyright Act* 29.21. In connection with such an exception, or in addition to it, we suggest that New Zealand consider exceptions that expressly include fan practices of recreating or re-imagining fictional costumes (known as “cosplay”) or of using multiplayer video game environments as animation engines to create new works within games (known as “machinima”). Both cosplay and machinima involve the unlicensed use

of copyrighted materials for transformative purposes without a license from the copyright owner. Although such uses may not easily qualify as “criticism or commentary,” some of the most critically-valuable of these (for example, cosplay that experiments with characters’ races or genders, or machinima that explores the use of sex or violence in games) are also the most likely to be placed at risk by censorship-inviting schemes that rely on licensing or copyright-owner tolerance. They are therefore prime examples of the sort of activity that should be protected by fair dealing.

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

The OTW has no response at this time.

Other comments

The OTW has further comments at this time.

Enforcement of Copyright

76 How difficult is it for copyright owners to establish before the courts that copyright exists in a work and they are the copyright owners? What changes (if any) should be considered to help copyright owners take legal action to enforce their copyright?

The OTW has no response at this time.

77 What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?

The OTW has no response at this time.

78 Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?

The OTW has no response at this time.

79 Does the cost of enforcement have an impact on copyright owners’ enforcement decisions? Please be specific about how decisions are affected and the impact of those decisions. What changes (if any) should be considered?

The OTW has no response at this time.

- 80 Are groundless threats of legal action for infringing copyright being made in New Zealand by copyright owners? If so, how wide spread do you think the practice is and what impact is the practice having on recipients of such threats?
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The OTW has no response at this time.

- 81 Is the requirement to pay the \$5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are there any issues with the border protection measures that should be addressed? Please describe these issues and their impact.
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The OTW has no response at this time.

- 82 Are peer-to-peer file sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?
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See response to Question 86 below.

- 83 Why do you think the infringing file sharing regime is not being used to address copyright infringements that occur over peer-to-peer file sharing technologies?
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See response to Question 86 below.

- 84 What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing file sharing regime (if any) should be considered?
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See response to Question 86 below.

- 85 What are the problems (or advantages) with the existing measures copyright owners have to address online infringements? What changes (if any) should be considered?
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See response to Question 86 below.

- 86 Should ISPs be required to assist copyright owners enforce their rights? Why / why not?
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The OTW strongly believes that ISPs should not be subject to monitoring or filtering obligations, and that safe-harbor provisions such as New Zealand's system allowing for notice-and-takedown of infringing material provide the best balance between the copyright objectives of incentivizing creation and providing access to works.

Any burden-shifting from copyright owners to ISPs would place ISPs in a position of monitoring infringements of works that are not theirs and whose legal rights they do not know. With a lack of full knowledge, any increased risk of liability would encourage ISPs to err on the side of caution and remove a great deal of content that is permissible. Studies show that the current system results in over-removal of legitimate content. See Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 Notre Dame L. Rev. 499 (2017); Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of Dmca Takedown Notices*, 18 Va. J.L. & Tech. 369, 405 (2014); Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. Telecomm. & High Tech. L. 101 (2007); Benjamin Wilson, *Notice, Takedown, and the Good-Faith Standard: How to Protect Internet Users from Bad-Faith Removal of Web Content*, 29 St. Louis U. Pub. L. Rev. 613 (2010). Any increase in duties to ISPs would only worsen this problem.

To the extent that New Zealand considers any attempt to require ISPs to assist copyright owners in enforcing their rights, such attempts must protect small ISPs from the likelihood of being overburdened by monitoring or filtering obligations or destroyed by potential liability. The safe harbors protecting ISPs from large-scale expensive assistance in copyright enforcement were initially intended at least in part to protect the development of small ISPs. The fact that some ISPs have now become vast in their own right does not lessen the need to continue to protect developing ISPs. In fact, if anything, it reinforces the utility of safe harbors in helping to form socially beneficial internet platforms. Therefore, while the OTW does not advocate for any changes to the current system governing ISPs, if changes occur they should be extremely narrowly tailored in scope.

The OTW specifically advocates against requiring or encouraging the use of "filters" to screen copyrighted UGC. Such filters are not only prohibitively expensive for most ISPs but also notoriously unreliable. See

<https://www.theverge.com/2016/7/13/12165194/youtube-content-id-2-billion-paid>;

<https://arstechnica.com/tech-policy/2012/08/how-youtube-lets-content-companies-claim-nasa-mars-videos/>;

<https://boingboing.net/2018/09/05/mozart-bach-sorta-mach.html>;

<https://thenextweb.com/google/2012/02/27/a-copyright-claim-on-chirping-birds-highlights-the-flaws-of-youtubes-automated-system/>;

<https://boingboing.net/2014/11/25/youtube-nukes-7-hours-worth.html>;

<https://www.classicalmpr.org/blog/classical-notes/2015/12/02/can-silence-be-copyri>ghted. Moreover, filters' propensity for false positives coupled with copyright holders' demonstrated propensity for overreaching means that even original creativity could be blocked from uploading to widely accepted platforms like Wattpad.

Finally, it would be impossible for any automated filter to truly account for the complexities of fair dealing. Therefore, any regime that favors the use of filters would harm fair dealing immeasurably and distort copyright's balance between incentivising creativity and providing reasonable access. Employment of filters would hollow the public's ability to access copyrighted materials for any number of legitimate uses. For instance, filters could operate to block the uploading of a number of uses important to remix culture, such as videos, fanart, fanfiction, and cosplay, from such important community platforms as YouTube and Tumblr.

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

See response to Question 86 above.

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

See response to Question 86 above.

Other comments

The OTW has no further comments at this time.