

# The Authors, Illustrators, Designers, Editors and Publishers who make New Zealand's Books Reject MBIE's Radical Attack on the Creative Sector

New Zealand Society of Authors; Publishers Association of New Zealand and Copyright Licensing New Zealand Interim Response to New MBIE Paper

Following Meeting Held 2 December 2019 on 'Review of the Copyright Act 1994: MBIE's approach to policy development'

*'I think copyright is an amazing thing. Somewhere back in history, someone created legislation that allowed artists to get paid. Copyright makes me feel that my work's not for nothing. It's hard enough to be a musician. If we didn't have mechanisms to protect our work it would be almost impossible.'* – Bic Runga

Authors and publishers welcomed the copyright review and the *Copyright and the Creative Sector*<sup>1</sup> report, which captured the dynamics of creative ecosystems and the key role of copyright in sustaining those ecosystems and the livelihood of the creators at their heart.

The *Issues Paper*<sup>2</sup> was also, in general, an even-handed attempt by MBIE to hear about what didn't work in our current copyright law and how we might fix it.

In a move that was not outlined in the process for the Review, MBIE released a new paper on 13 November 2019 (*The Paper*<sup>3</sup>). In our view, and those of other creator groups, this upends the approach to date. *The Paper* does several things:

1. **It shifts the goal posts.** *The Paper* changes the rules in the middle of the copyright review. It contains new objectives and new rationales for a radical anti-copyright agenda that attacks the creative sector and is not open for consultation.
2. **It breaks the rules on evidence-based policymaking.** *The Paper* fails to meet the basic standards of evidence-based policymaking articulated by MBIE itself. It is full of wild un-referenced, hypothetical theorising and lacks concrete evidence from submissions or peer reviewed literature.
3. **It is an attack on the Creative Sector.** The report ignores completely the role of copyright in sustaining the economic and cultural contribution of the creative sector in New Zealand and the 87,000<sup>4</sup> talented people it employs. *The Paper* instead attacks our creative sector: arguing that it unfairly rewards only successful creators, that it produces look-a-like music and books and movies, and that it is built on distributors and investors ripping off creators.
4. **It argues that creators don't need to be paid.** The report suggests that copyright and financial incentives don't really matter to creators. *The Paper* argues that because creators say they love their work and appear to accept a relatively low

<sup>1</sup> <https://www.mbie.govt.nz/assets/527e65d882/copyright-and-the-creative-sector-december-2016.pdf>

<sup>2</sup> <https://www.mbie.govt.nz/business-and-employment/business/intellectual-property/copyright/review-of-the-copyright-act-1994/>

<sup>3</sup> <https://www.mbie.govt.nz/assets/review-of-copyright-act-1994-mbies-approach.pdf>

<sup>4</sup> NZIER, The Evolution of Kiwi Innovation, 2017

median-income, that means copyright and financial incentives aren't important for sustaining creative output.

5. **It says that New Zealanders aren't getting access to books, movies and music.** *The Paper* insists that – despite bookshops and libraries, audiobooks and ebooks, Spotify and Netflix – the creative economy doesn't actually give New Zealanders any real access to creative work. *The Paper* proposes that New Zealand's creative sector is instead a 'market failure' that requires government intervention to lower prices.
6. **It redefines 'access' as 'free use without paying the creator'.** The report argues that real access to copyright work for New Zealanders can only be achieved through a radically expanded notion of 'exceptions' to copyright. Such exceptions would allow New Zealanders (and internet companies) to get free content and avoid paying creators whenever someone thinks there's a 'net benefit' to New Zealand in doing so.
7. **It recognises every human right and living standard except the right of people in the creative sector to earn a living.** The report builds its anti-copyright agenda out of a remarkably partial reading of the government's Living Standards Framework and Human Rights Law, parroting the arguments proposed to benefit overseas-based internet giants and ignoring the rights of people in the New Zealand creative sector to earn a living.

This approach to copyright would completely undermine the creative industries, including New Zealand publishing that provides our authors, illustrators, editors, designers and publishers with a livelihood.

The radical new policy comes at a time when the government has multiple other projects and initiatives underway that aim to do the opposite – to grow the creative sector's contribution to the New Zealand economy and to support sustainable careers in the arts and cultural sector.<sup>5</sup> As *Copyright and the Creative Sector* recognised, revenue from copyright is the most important part of creators' income.

It is concerning to us that, in the meeting on Monday 2 December, MBIE indicated that they needed to 'better understand your industry'. The document *Copyright and the Creative Sector* was published after extensive consultation with the creative industries, including publishing. It clearly lays out how the publishing ecosystem operates and how copyright works in that ecosystem. The submissions to the Issues Paper from our three organisations also clearly set out how the world of books works in New Zealand and yet none of this is referenced in the new paper.

MBIE fundamentally misunderstands the creative role of illustrators, editors, designers, publishers, bookstores etc. in creating a book and finding its audience. It imagines supporting lone creators while the ecosystem in which creators thrive is left to die. And it proposes that the real problem is publishers ripping off authors, which is just an insult without evidence.

Our members reject this framework as a fair and reasonable basis from which to proceed with the Review. We call on MBIE to drop this aberrant paper and return to the process and standards that had previously guided the Review.

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<sup>5</sup> <https://mch.govt.nz/sustainable-cultural-sector-careers>

## **1. Shifting the Goalposts**

*The Paper changes the rules in the middle of the copyright review. It contains new objectives and new rationales for a radical anti-copyright agenda that attacks the creative sector and is not open for consultation.*

MBIE has changed the rules during the process of policy development without adequate consultation with stakeholders. The Issues Paper set out the planned copyright-review process in detail. 150 stakeholders – including authors, publishers, libraries and museums, collective management organisations and others responded with many useful submissions about what worked in the real world, what didn't, and how we might fix what was broken. The next stage was for MBIE to prepare an Options Paper which would be open for consultation.

Instead, MBIE have released *The Paper*. The document:

- Sets out new objectives for copyright as well as new objectives for the Review.
- Develops new rationales for a radically permissive copyright regime, centered on some human rights (but not others) and a flawed application of the Government's new Living Standards Framework.
- Does not engage with or reference the hundreds of pages of evidence submitted in response to the Issues Paper by creators and their organisations.
- Adopts in full InternetNZ's anti-copyright agenda (from partial readings of human rights law and the LSF to opposing the interests of 'creators' and 'distributors').
- Is not open for consultation.

**Authors and publishers believe that this radical rethinking by officials about copyright and the New Zealand's creative sector deserves proper scrutiny by those who know something about it. Authors and publishers work with copyright every day - it is how they make a living. They deserve to be listened to.**

## **2. Breaking the Rules on Evidence-based Policy Making**

*The Paper fails to meet the basic standards of evidence-based policymaking articulated by MBIE itself. It is full of wild un-referenced, hypothetical theorising and lacks concrete evidence from submissions or peer reviewed literature.*

At the outset of the Review, MBIE stated that it planned to follow the *UK IPO Guide to Evidence for Policy*.<sup>6</sup> The content of the new paper does not follow this Guide. The UK IPO sets an aspiration for evidence used in policy development to be "clear, verifiable and able to be peer-reviewed". This standard for evidence was made very clear to all stakeholders at a meeting held at MBIE on 15 June 2018, prior to the *Issues Paper* being published, where a Powerpoint slide was shown that detailed a "spectrum of evidence". It was also at this meeting that MBIE noted "Most of the evidence rests in industry and MBIE is relying on industry to bring that forward". This is what our industry has both done in submissions, and is in the process of doing with the Sapere Research Group work.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/510985/Guide\\_to\\_evidence\\_for\\_policy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/510985/Guide_to_evidence_for_policy.pdf)

Instead of building objectives and approaches out of a base of evidence, however, *The Paper* instead:

- Uses the word 'may' 36 times.
- References no evidence from submissions to the Issues Paper on key issues such as the scale of the copyright industries, the relationship between imported and local creative production or new digital business models - all of which are extensively evidenced in submissions.
- Spends most of *The Paper* indulging in unreferenced, unevidenced prognostications on the digital future.
- Repeatedly articulates theories and prognostications that run counter to the established scholarly literature and evidence base.

## WHY EVIDENCE MATTERS

To make the case for its radical rethinking of copyright law, *The Paper* follows the arguments of Google, Facebook, InternetNZ etc to suggest that digital has so fundamentally reshaped how we create, distribute and use creative content that our copyright laws also require fundamental change.

The report argues:

Technological advancements have also significantly lowered the financial investment required to produce (and reuse or adapt) certain kinds of copyright works (eg photographs, films and sound recordings), provided more of us with the means of production (and reuse or adaptation), and increased the quality of output that is possible for a similar amount of investment. The costs of taking copyright works to market, widely disseminating copies and managing transactions have also generally been reduced by digital technologies. While this has generally increased the size of the potential market for works (the number of consumers capable of being reached and the ease of reaching them), lower production costs tend to result in more works competing for a share of the same market

Some commentators argue that technology has already upset this traditional economic thinking to such an extent that a fundamentally different approach to copyright policy is required for it to be useful in a digital paradigm.

What is the problem here?

First, the only reference cited actually contradicts the claim made (Footnote 8: 'We note, however, that the extent to which digital delivery has removed transactions costs is consistently overstated according to Furnival (2015) *The Economics of Collective Copyright*, page 13.')

Second, the most recent peer-reviewed assessment of the literature on digital's impact on the copyright ecosystem also contradicts the report's claim. Sacha Wunsch-Vincent in 'The Economics of Copyright and the Internet: Moving to an Empirical Assessment Relevant in the Digital Age' ([https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_econstat\\_wp\\_9.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_econstat_wp_9.pdf)) writes that digital 'arguably and at first sight' lowered costs to create, copy and distribute. But these 'at first sight' points 'need to be put into perspective, however, when looking at professionally produced content. Most content sectors have actually experienced increased costs of production in a digital context'. She continues:

At the outset, it can be said that the basic tradeoffs and associated questions behind the copyright system remain unchanged. The basic tenets of the economics of copyright, and hence the motivation for copyright laws and regulation, remain valid in the internet age.

Initially it was expected that content creators would largely 'disintermediate' intermediaries, potentially generating more profits from themselves... Developments since have proven experts

of these early days wrong. ... Instead the role of intermediaries and aggregators for digital content seems to be growing. The notions that the cost of content production will drop to zero, that creators can do away with the content industry or that user-generated content will supplant professional content are now largely discarded.'

While earlier assumptions were of a costless, immediate and free global distribution in the digital age, reality has shown that many new costs have emerged (e.g. costs related to digital rights management, online payments, revenue shares paid to online platforms and so forth).

Third, the submissions to the *Issues Paper* from across the creative sector pointed out in concrete terms how the creative industries under existing copyright law have incorporated new digital business models for creation, dissemination and consumption (from ebooks to streaming audio, from Spotify to Netflix) into their business models in ways that give users new means of access and creators new income streams. Those submissions outlined in concrete terms the opportunities and challenges posed by the creative sector's digital transformation and the ways copyright law might need to be adjusted. The *Copyright and the Creative Sector* report articulated similar themes. The paper completely ignores that report and all those submissions.

MBIE argue that the overall goal of the copyright review is to 'ensure that copyright law remains fit for purpose in the context of technological and market developments that have changed the way we create, consume, distribute and interact with copyright works.' They claim that the aim of consulting on the issues paper was to 'improve our understanding of how the copyright regime operates in practice and the key issues and opportunities for change.' Unfortunately, they have made no attempt to draw on evidence to understand how copyright works in practice, the role of new business models, and what that all implies for policy.

**Policy by prognostication is not good enough. Authors and publishers believe in evidence-based policy making. We expect policy makers to do what they promised to do—listen to the real experience and evidence of New Zealanders and develop copyright policy to fix what doesn't work. Instead, this report's prognostications and maybes seem to represent personal views and opinions of the MBIE team.**

### **3. Attacking Copyright and New Zealand's Creative Sector**

*The report ignores completely the role of copyright in sustaining the economic and cultural contribution of the creative sector in New Zealand and the 87,000 talented men and women it employs. Ignoring the established economics of copyright, The Paper instead attacks our creative sector: arguing that it unfairly rewards only successful creators, that it produces look-a-like music and books and movies, that it is built on distributors ripping off creators.*

Standard economics says that copyright is an economic right put in place to incentivise creators and the creative sector to create new copyright goods that will then have positive effects on the wider society. As Sascha Wunsch-Vincent, the senior economist at WIPO puts it, copyright is "an instrument to stimulate the production and dissemination of creative works".

Because creative individuals direct their work, like everybody else, to where there is sufficient economic reward, copyright's economic incentives drive individual behavior. And those same incentives foster the trade in copyright that is the basis for creator income and the creative economy. Wunsch-Vincent writes: 'the copyright system allows transactions and collaborations between the authors of creative works and publishers, distributors and other players involved in the copyright value chain with IP as the main coordination vehicle . . . Copyrights are a vehicle for transaction and cooperation, as rights can be transferred and bundled. Rarely do consumers enjoy creative works directly from a 'lone creator' as is often implied in economic treatises or studies related to copyright.'

So the New Zealand copyright review began along conventional lines: looking into the role of copyright in fostering a flourishing creative sector – the world of New Zealand books, music and films that we all enjoy; a world peopled by authors and illustrators, designers and editors, publishers and sales reps, bookshops and publicists.

In the introduction to the *Copyright and the Creative Sector* report, the Commerce Minister focused on the fundamental role of copyright in providing the legal basis for a flourishing New Zealand creative sector:

*Copyright law plays an important role in protecting the intellectual property in a wide range of creative works. As well as being integral to New Zealand's cultural landscape, the creative sector plays a key role in New Zealand's economy. New Zealand is home to some of the world's leading writers, film makers, musicians, artists, fashion designers and game developers. The aim of the Study has been to better understand the life cycle of the wide variety of creative works and where copyright and registered designs fit in this picture. I believe that a better understanding of how works are created and distributed will help us understand the real world before we think about what interventions government might make.*

The *Issues Paper* similarly acknowledged copyright's role as the foundation for producing the New Zealand creative work that the country wanted.

*Copyright is intended to incentivise the creation and dissemination of creative works. Creative works are often expensive and time-intensive to create but easy to copy or use. For example, a novel can take years for a person to write but can be copied and sold by others in minutes. Without the ability to protect works from unauthorised copying or distribution, there would be fewer incentives to spend the time, energy and resources required to create and disseminate works.*

Every submission from creators and their professional bodies to the *Issues Paper* argued that copyright and the economic incentives it provided was central to the ability of creators and the creative sector to produce new work.

But now, MBIE take a fundamentally different view of economic incentives and the creative sector. *The Paper* instead:

- Spends just one sentence and one footnote to *Copyright and the Creative Sector* acknowledging copyright's role in fostering the work of New Zealand's creative sector. MBIE – the ministry responsible for growing New Zealand's economic activities – seems to have completely lost interest in copyright's role in the growth of New Zealand's creative industries and the welfare of the people in those industries.

- Removes ‘facilitating competitive markets’ from the objectives for copyright; it does not even exist as a regulatory problem (p. 25) to address. This is despite a government expectation that legislation ‘seeks to achieve [its] objectives in a least cost way, and with the least adverse impact on market competition, property rights, and individual autonomy and responsibility.’
- Sharply separates ‘creators’ who are individual authors or performers and seem to need protection, and ‘investors’ or ‘distributors’ who are publishers and others who don’t create; and who ‘typically exercise more influence over law-making than individual creators, and may have opposing interests’. *Copyright and the Creative Sector* showed the interrelated ecosystem out of which creative goods are made – authors and illustrators, designers and editors, publishers and sales reps. The unified voice of publishers and authors expressed the same. This new reports imagines a different world – a world of lone creators preyed on by investors and distributors in suits.
- Spends many pages outlining all the things that copyright *doesn’t* do (and the writer of the report seems to think it should). Some claims are obvious and no different than any other economic right in a market economy (copyright doesn’t guarantee writers an income; copyright revenue is dependent on success; copyright doesn’t guarantee a profit); some are outrageous (it’s claimed that copyright has incentivised copycat creation so all music from the Beatles to Drake actually sounds the same); all of them are assertions without real evidence (we list them below).

### **The Many Ways that MBIE Claims Copyright is a Problem**

- ‘The provision of economic rights is, however, a very indirect intervention that leaves much to market forces and does not guarantee any income in return for the creation of copyright works or ownership of copyright.’
- Copyright ‘can offer no guarantee that the revenue generated by a work, according to demand, will exceed the costs of producing it.’
- ‘Copyright is a blunt tool, not always wielded by creators. The creators’ share may be settled in advance of knowing the work’s commercial value (eg a one-off payment for copyright in a guitar riff before it is used to make another artist an overnight success). Or the creators’ share of the revenue may be returned to them indirectly, through agreements that reflect their bargaining power in relation to others in the supply chain.’
- ‘Of the copyright revenue that is returned to creators, it tends to be distributed very unevenly between them.’
- ‘In markets where a small proportion of works is responsible for the majority of income, copyright tends to reward the kinds of creativity that have already proved commercially successful, to the possible detriment of less ‘popular’ forms of creativity.’
- ‘Copyright creates access costs that may limit new entrants to creative fields or the emergence of new creative fields.’
- ‘Copyright is especially limited in its ability to support the creation and dissemination of local cultural works. This is largely because it cannot give works produced locally any market advantage as they compete with works of foreign origin’
- ‘Most of the benefits of copyright protection accrue to foreign copyright owners because we are a significant net importer/user of copyright works.’

- Despite creators' support for copyright, MBIE asserts that copyright isn't good for them: it is 'a blunt tool, not always wielded by creators'; it lets creators be ripped off in many ways – by a one-off payment; by bad contracts; by limiting access to work the creator wants to incorporate in their own work. Again, this is assertion without evidence because creators and their organisations have not made such claims.
- Spends some more pages arguing (see next point) that authors are a different breed and do not direct their work to where there is economic reward.

The MBIE report proposes that one objective for copyright law is to 'provide incentives for the creation and dissemination of works, where copyright is the most effective mechanism to do so.' But MBIE makes clear in this paper that they believe copyright is a highly ineffective mechanism for doing that. Creators disagree and so do economists. Copyright is the fundamental basis for the majority of income for creators and the wider creative sector on which they depend. It's the basis for a nearly \$2 billion industry and 20,000 jobs. MBIE should be focused on how New Zealand's copyright settings can help foster that creative sector to tell more New Zealand stories, produce more films, sing more songs, employ more people.

#### **4. Explaining why Creators Don't Need to Get Paid**

*The Paper suggests that copyright and financial incentives don't really matter to creators. It argues that because creators say they love their work and appear to accept a relatively low median-income, that means copyright and financial incentives aren't important for sustaining creative output.*

Anybody who has commissioned a book from an author with an advance, or paid an illustrator to illustrate a book, or received a bill from a book's editor would recognize the direct tie between financial incentives and creative work. Our authors tell us the same thing. When a New Zealand publisher said to Margaret Mahy, 'I'm sorry to have to mention the money' the swift reply was 'What do you mean? I love money.' Author, playwright and script writer Greg McGee says: 'My favourite form of writing is writing invoices.'

Economists recognize this fact. New Zealand's own internationally recognized economist of copyright Richard Watt from Canterbury University in 'An Empirical Analysis of the Economics of Copyright' makes clear that 'standard economic theory' assumes that creative individuals have a profit motive, that they are motivated to some degree by financial gain. Empirical economics has showed this standard economic theory to be true. So artist labour markets are characterized by multiple employment, some of it outside the arts; but there is a reservation wage below which artists will not supply their labour to the arts. Artists are willing to take risks, they often overestimate the likelihood of success, thus getting paid less than they thought they should. But the pursuit of success and a livelihood in something they love drives behavior. Ruth Towse summarises in '*Copyright and Artists: A View from Cultural Economics*' 'Research has shown that artists' labour supply is responsive to the (imputed) wage rate; the higher the rate of payment for arts work, the more hours artists spend on art work.'

Do levels of copyright protection increase and decrease creativity? The evidence is scarce but it suggests (as standard economics would assume) the answer is yes. So Watt shows that: 'for each court case that broadens copyright protection, we can expect the flow of copyright

applications to increase by 0.4%' confirming 'the logical nature of the supply side of the market for copyright goods'.

And what about the low median rates of income in the arts? Doesn't that indicate that artists are willing to work for free and/or that publishers and others are underpaying creators? Watt, an economist, has a tougher mind:

*Also surely we should consider the possibility that the majority of artists earn very little from copyright simply because there is very little demand for their work. After all, copyright provides a reward that is based on the social value of the creation, which is reflected in the demand for that creation. Where there is little or no demand, there can be little or no reward.*

Watt summarises that the economic incentives driving creator behavior are no different from any other area of society. Noting 'economists' general love of pointing out counter-intuitive results' (which prompted some theorists to make the case that supply and demand of copyright goods might not be governed by usual economic incentives), Watt writes: 'While these types of argument are compelling theoretically, they should not be taken as being more than theoretical curiosities until they can be backed-up by some stringent and serious empirical evidence. I know of no papers that provide such evidence.'

But MBIE loves such 'theoretical curiosities'. It is unconcerned with a lack of stringent and serious evidence. *The Paper*:

- Is full of excursions into obscure branches of economic theory.
- Completely ignores empirical work from economics on the questions at issue (how do financial incentives drive creator behavior?)
- Completely ignores evidence from individual authors and other creators about the importance of revenue based in copyright and the creative industries in allowing them to do their work.
- Instead, develops an argument for their own belief that creators aren't driven by financial rewards, so copyright and a creative economy aren't necessary for fostering creative output.

MBIE's argument goes like this. First, it suggests that love of the work – not money – probably really drives creators, equating professional authors and the occasional blogger:

*We are not limiting ourselves to thinking about financial incentives. Our own study of Copyright and the Creative Sector (2016) and other literature suggests creators are motivated by factors more intrinsic and diverse than just by their ability to derive an income from their work. Interviews in the Study suggest creators in New Zealand are also motivated by a desire to express themselves, tell stories and build their reputation. User-generated content, such as blogs, is an example of a creative activity that can involve significant effort, with no expectation of monetary return.*

For MBIE, the fact that there are poor artists means that artists will create for free and we don't need economics incentives for creativity like copyright. They go on:

*We know as a starting point that:*

*a. the actual income of most creators is comparatively low and often below what is necessary to enjoy an adequate standard of living "by work which one freely*

*chooses”*

*b. despite the poor promise of monetary return from creative careers, there seems to be no shortage of people pursuing them in New Zealand. \* Only two per cent of writers in 2018 Horizon Research on the income of writers in New Zealand, for example, reported that they were influenced by money to first start writing.\**

*What this suggests to us is that creators tend to need, or accept, relatively little financial motivation, and enjoy far less actual monetary return than many would consider fair, or sustainable, or that ensures they can continue to make creative contributions to society with dignity and without facing material hardship. While we are mindful of the limitations of copyright policy as a means to financially support creators (discussed in section 3), we have concluded that it would not be just or in the spirit of international human rights law to view copyright as concerned with their material interests only so far as is necessary to induce creativity that would not otherwise occur.*

Because copyright apparently doesn't give creators money in any useful way, and because they are all poor but seem to create anyway, MBIE concludes that sustaining copyright's financial incentives is unnecessary. MBIE instead says it will give authors the non-financial rewards it thinks they really want ('fair recognition for their creative effort, exercise a reasonable degree of control over the integrity of their work') and it will have the government protect them from the predatory creative industries apparently ripping them off, helping them 'obtain a fair proportion of any revenue attributable to their creative effort.'

**MBIE's arguments in this report run counter to standard economic theory and evidence. They don't reflect the evidence of the creators they purport to be helping. They fundamentally undermine the role of copyright's economic rights in sustaining the creative work of authors, publishers and the wider creative sector.**

## **5. Suggesting that New Zealanders aren't getting reasonable access to books, movies and music.**

*The Paper insists that – despite bookshops and libraries, audiobooks and ebooks, Spotify and Netflix – the creative economy doesn't actually give New Zealanders any real access to creative work. The Paper proposes that New Zealand's creative sector is instead a 'market failure' that requires government intervention to lower prices.*

Through the engagement of the creative industries with new formats and new distribution methods, New Zealanders in 2019 have unprecedented access to books, music, film and other copyright goods. In the world of books, local libraries provide print, ebooks and audio books for free or pennies. Among bookstores, local bricks and mortar stores compete on price and availability with international discounters like Amazon and Book Depository. Publishers use Nielsen BookScan to assess sales volume and average selling price to position their books competitively among thousands of competitors for the Christmas credit card spend. Most New Zealanders get most access to copyright content through the flourishing market for copyright goods.

MBIE see things differently. They argue that:

- copyright and the creative sector actually limit access to cultural goods
- that the copyright 'monopoly' unnecessarily increases the price of copyright goods.

How could this be so? Are individual books really a ‘monopoly’? Are there really authors or publishers who try to limit access to their work? MBIE argues that there is:

*a paradox at the heart of copyright because it involves incentivizing people to produce and make works available to others by giving them the means to restrict the use others can make of those works. Exclusive rights, by addressing one access problem create another access problem because legal monopolies tend to service markets inefficiently.*

MBIE, through an excursion into ‘economic theory’, suggest that the Creative Sector restrict access to books and music and films by increasing prices. Here’s MBIE’s argument on pricing in ‘a market served by a monopoly supplier’ (this is their understanding of the market for books or music.)

*Because the market price of the work (the amount producers think they need to charge for each copy in order to recover their costs) is higher than its marginal price (the additional cost of supplying one extra copy of the work), there are always potential users who are caught in between (willing to pay more than the marginal cost of supplying the work, which often approaches \$0, but less than what the seller demands). On the other hand, in a highly competitive market (without the monopoly provided by copyright), consumption may be even lower because works are less likely to have been produced in the first place. There is still a market failure (‘deadweight loss’ or social costs from foregone uses of works) somewhere between these outcomes that exceptions go some way to address.*

MBIE do not quote any empirical economics to support these assertions. And as Wunsch-Vincent writes: ‘few attempts have been made to estimate the costs of copyright to users or final consumers in terms of higher prices or reduced accessibility.’

There is one empirical study but it shows something quite the reverse of MBIE’s argument. A study cited in Richard Watt’s ‘Empirical Analysis of the Economics of Copyright’ looks at the price difference between ‘monopoly’ items (in copyright books) and items without exclusive rights (out of copyright books), is only the money due to the author: ‘the only clear difference between the two prices could be attributed to royalty payments to authors. Thus, there appears to be very little deadweight loss involved in copyright protection, and whatever such losses that do exist are justified as rewards to authors.’ This data also sheds light on contention: ‘though once produced the marginal costs of producing each additional copy are generally low or nil’. Again, prices of out of copyright books would suggest that there are costs involved in producing IP objects and reaching readers with them.

Individual ownership of copyright is called a ‘monopoly’ by MBIE in which copyright holders might set prices that leave lots of prospective buyers out of the market, but this is far from the single player in a market able to control pricing like Google: Wunsch-Vincent: ‘In reality of course, creators or artists cannot set prices while ignoring market forces. The price elasticity of demand, the availability of other competing content products, and other factors rein in the power to control prices, which is more theoretical than real.’

Anyone in the Creative Sector knows this too. Publishing 1 book among the millions of ISBNs available to readers does not give one a monopoly. It gives one a good to sell in a highly competitive market. Market incentives encourage us to create the work and sell it at a market price, giving people access to the cultural good.

But MBIE officials just don't believe that markets give people access. The report spends a whole section on: 'The limited role of exclusive rights in fulfilling this access aim'. They write: by 'permitting reasonable access', we are referring only to exceptions and other limitations on exclusive rights.' Somehow Spotify and ebooks, audible and bookstores, the market for copyright content through which most humans actually get access to content, play a very limited role in giving people 'access' to copyright works according to MBIE. 'Reasonable access' for MBIE is access for free.

### **Blind to the Market**

Because the report is unfailingly blind to the role of markets and transactions in facilitating the creation of and access to copyright goods, MBIE misunderstands creator behaviour again and again.

For example, MBIE prognosticates: 'The reluctance displayed by many creators, including some of our submitters, to make their work available online could be seen as a symptom of technologies posing a greater threat to the personal connection between creators and their work.'

Are creators actually reluctant to 'make their work available online'? In fact, almost every book and every song, every movie and every TV show is available online today – you just have to pay for it. So creators' reluctance to 'make their work available online' for MBIE is actually their reluctance to make it available for free.

Why wouldn't they do that? Blind to the economic drivers that have led almost ALL creators to make their work available online for sale, and almost none to make it available for free, MBIE suggests that creators' reluctance to post all their work online for free must be sentimental: because of the 'threat to the personal connection between creators and their work.'

Policy by personal belief, leads to some frankly bizarre prognostications.

***MBIE has no interest in a flourishing market for copyright goods. They don't believe it gives people access. They believe it raises prices. They view the creative economy as a 'market failure'. We follow the standard economics and a realistic assessment of our market economy which suggests that people have unprecedented access to creative work, and creators have access to revenue, through a flourishing competitive market in copyright goods.***

## **6. Redefining 'access' as 'free use without paying the creator'.**

*The Paper argues that real access to copyright work for New Zealanders only be achieved through a radically expanded notion of 'exceptions' to copyright. Such exceptions would allow New Zealanders (and internet companies) to get free content and avoid paying creators whenever someone thinks there's a 'net benefit' to New Zealand in doing so.*

From the United Kingdom to the United States to New Zealand, from Berne to TRIPS to WIPO, the reasons for and limits to exceptions to copyright are fundamentally accepted in economics and jurisprudence. Copyright law favours getting people access to creative work first through the market – by buying individual items or establishing some more general licensing scheme. Markets for copyright goods incentivise new creation. But there are certain particular cases where the market does not work where governments institute exceptions to copyright.

International jurisprudence has established copyright ‘exceptions’ as a key part of the copyright system, enabling the reproduction of works in ‘certain special cases provided that

### **Professor Graeme Austin on the Market and Exceptions**

Victoria University’s Graeme Austin is a world expert on copyright and in particular fair dealing and fair use. Austin recognizes the social value of access to and use of copyright goods. But he also recognizes that a government can decide to dream up new exceptions to create access; or it can allow the market to provide such access licensing to provide the access. Austin makes clear which he thinks is the right choice. In ‘This is a Complex Issue’, he writes:

*But to valorize the social benefits of the use does not in itself explain why copyright owners should subsidise these kind of ‘useful’ activities through copyright exceptions that remove opportunities for licensing those uses.*

Social utility can be found everywhere:

Education would be less expensive if license did not need to be purchased... Taken to their logical extension, privileging the public benefit of uncompensated uses would lead to the collapse of the copyright system. Austin asks in such cases: ‘who should pay for the social beneficial uses: copyright owners, or the downstream consumers and innovators who would prefer not to factor the costs of copyright licenses into their bottom line.’ For Austin, exceptions and their limits are in large part a question of social and economic justice: ‘fair use is an obvious vehicle for redistributing wealth from copyright owners to technology entrepreneurs or to other firms whose activities are founded upon

This is why ‘the continued emphasis on the importance of harm to the copyright owner’s market reflects some enduring principles of copyright’. When an issue becomes important, when the public are keen to access content, when a government can see ‘net benefit’ in a use, that is not a decent rationale for an exception in international jurisprudence. Austin writes:

*To propose that fair use be imposed whenever the ‘social value [of dissemination] . . . outweighs any detriment to the artist’ would be to propose depriving copyright owners of their rights in the property precisely when the encounter those users who could afford to pay for it.*

Austin also recognizes how, by keeping exceptions to certain special cases, you are encouraging an effective market to flourish:

*Championing the social utility of uses risks also diverting attention from the analysis of the effects of uncompensated uses on incentives for developing markets for licenses . . .*

*Because there is another kind of innovation that deserves at least some attention: the creativity involved in creating the markets that monetise creative content. . . .*

*Largely missing in the fair use debate in Australia is a concern with the extent to which property rights encourage the development of viable markets for creative content – that is, innovative solutions to market failure problems – and how that might be affected by changes to copyright laws that will make opportunities to secure licensing income less secure.*

For orthodox copyright jurisprudence, represented by leading scholars like Graeme Austin in New Zealand, copyright exceptions are to be kept to certain special cases where a market or a license cannot produce the social good in a better way—a way that gives a return to creators. To do otherwise, to expand exceptions to every case where there is a social benefit would be to transfer wealth from copyright owners to downstream consumers and tech innovators.

such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’

Those special cases are set out in national law, largely accepted by publishers and authors, and are used when the market for individual copyright goods or a more general licensing solution does not enable the sort of uses society wants. The ability to undertake research and private study; to report on news events; to reproduce a fair portion of a text for criticism and review—all of these fall naturally under such a definition and are uncontroversial.

Such uses are socially valuable, difficult to license, and do not impact the flourishing market for creative work that conventional international law and economics recognizes as essential for creators and the creative sector they depend on.

MBIE, by contrast, proposes a radical expansion of exceptions to copyright, unprecedented in international law and – as Graeme Austin suggests – a great gift of wealth to global internet companies and just the sort of ‘privileging the public benefit of uncompensated uses’ that he argues ‘would lead to the collapse of the copyright system.’

MBIE do not reference international copyright law except as a limitation on the policy options they’d really like to pursue if they could:

*We have characterised New Zealand’s international obligations earlier in this paper constraints on developing copyright policy in pursuit of our objectives. . . Whatever we might think about its merits, New Zealand is not in a position to abandon the overall approach to copyright prescribed by international copyright law. . . . [On withdrawing from TRIPS etc] These consequences would far outweigh any benefits from increased flexibility to change domestic intellectual property settings. New Zealand can, however, make the best of its domestic copyright policy within the constraints of our international obligations.*

They do not work through the fair use and fair dealing jurisprudence outlined above, with its focus on allowing exceptions only where they don’t impact the market and the rights of the creator.

Instead, MBIE propose a completely different approach: “permitting reasonable access to works for use, modification, self-expression, adaptation and consumption, where exceptions to exclusive rights are likely to have a net benefit for New Zealand.”

Dissatisfied with the original broad wording of this objective in the Issues paper, MBIE go further to emphasize all the uses they want to fall under new exceptions:

*The original wording of this objective already refers to access to works for ‘adaptation’. This concept is defined in the Copyright Act and may inadequately reflect the many secondary uses of works that technology has made possible. The words ‘modification’ and ‘self-expression’ are intended to broadly recognise the scope of secondary uses that may be seen as developing a work through the investment of further skill, judgement and labour . . .*

What is the purpose of such exceptions? It is not to solve particular special cases for which there is no market solution. Instead MBIE aims to use copyright exceptions to change the dynamics of a copyright marketplace they see as fundamentally broken:

*Copyright exceptions can be thought of as one important circuit-breaker in this Paradox [the apparent copyright paradox cited earlier], by helping to offset the consumption inefficiencies that arise from exclusive rights.*

This at last is where the report finds reasonable access for New Zealanders. ‘By ‘permitting reasonable access’, we are referring only to exceptions and other limitations on exclusive rights.’

MBIE explicitly value ‘the more direct access to works able to be provided by limitations on exclusive rights, including exceptions’ much more than the apparent difficulties of accessing a book or a song on Amazon or Spotify, which according to MBIE are neither ‘reasonable’ or ‘direct’.

So beyond the ‘certain special cases’ recognized in current NZ law (and international jurisprudence,) what does MBIE see exceptions doing?

The report is not big on details, but MBIE hypothesises what appears to be a new exception for Museums and Libraries by allowing them to compete with publishers:

*Copyright exceptions are another example of a mechanism that might in certain situations prove more effective than copyright protection for incentivising the dissemination of works. Exceptions may make creative industries more active in disseminating works to certain users by putting them in competition with other entities that have an interest in servicing those users, such as universities or GLAM organisations.*

What might this mean? It can’t refer to out of copyright work, which GLAM organisations could already disseminate. So one must assume, that for an in-copyright work (eg, a book in print), the new exception would allow a university or museum to publish the book without the author or publishers permission, without paying any royalties, competing with the publishers’ edition that pays royalties to the author. ‘Permitting reasonable access’ with ‘net benefit for New Zealand’ deprives creators of their economic rights.

What else might we hypothesize as ‘permitting reasonable access’ with ‘net benefit for New Zealand’

- As Graeme Austin argues above, education would be cheaper if a license did not need to be purchased.
- As we’ve seen, MBIE argue: ‘Most of the benefits of copyright protection accrue to foreign copyright owners because we are a significant net importer/user of copyright works.’ Surely then there will be a net benefit to New Zealand in allowing exceptions that give more New Zealanders free access to those imported goods?
- And what about Google, whose representatives welcomed the new report? Think of ‘the many secondary uses of works that technology has made possible’. Appreciate that according to MBIE the only ‘direct’ and ‘reasonable’ access to copyright content for New Zealanders is for free and delivered by a copyright exception. Surely there is therefore a net benefit in allowing Google and YouTube broad fair use exceptions that will allow more New Zealanders to access more works (they’re mostly ‘foreign copyright owners’ anyway) for free?

**Conventional international jurisprudence and economics explains why exceptions to copyright need to be limited to ‘certain special cases’ where the market can’t provide access. MBIE’s proposed radical broadening of copyright exceptions will, as Graeme Austin argues, ‘lead to the collapse of the copyright system’ and constitute a massive transfer of wealth from the creative sector to overseas tech companies.**

## **7. Citing every human right except the right of people in the creative sector to earn a living.**

*The report builds its anti-copyright agenda out of remarkably partial readings of the government’s Living Standards Framework and Human Rights Law, parroting the arguments proposed to benefit overseas-based internet giants and ignoring the rights of people in the creative sector to earn a living*

Following the request by InternetNZ, the new paper introduces Human Rights criteria and the Living Standards Framework into its rationale for copyright. This is a fundamental shift that obviously requires consultation, but pursuing human rights and LSF objectives are no actual threat to the creative sector if thought through in an even-handed fashion.

They key human rights around creative work are in Article 27, 1 and 2 of the Universal Declaration of Human Rights:

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

They are further articulated in Article 15/1/c of International Covenant on Economic, Social and Cultural rights:

1. The States Parties to the present Covenant recognize the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

As the 2005 General Comment of the Committee describes the rights provided in Article 15, the three rights are ‘at the same time mutually reinforcing and reciprocally limitative.’ That’s why they are always used together.

*Copyright and the Creative Sector* also foster freedom of expression. As Graeme Austin, quoting *Eldred v Ashcroft* notes: ‘by establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.’ Austin continues: ‘at the interface with copyright law, freedom of expression is enhanced by a flourishing cultural sector, parts of which require and respond to the economic incentives copyright provides. . . in a market economy, for speech to be free, it is as well that some speakers be paid. . . . US jurisprudence provides little support for the idea that expressive freedoms require an especially expansive approach to fair use.’

Unfortunately, in this report only half the human rights are emphasised. InternetNZ started it, encouraging the government in its submission to embed just one half of human rights in copyright, ‘a right to participate in cultural life, enjoy the arts, and share in scientific advancement and its benefits’ and forgetting to mention the ‘moral and material rights of the author’.

MBIE follows that approach. In articulating the human rights rationale for its main copyright objective:

Promote the supply of copyright works that serve the cultural, economic and social interests of New Zealand by:

- i. providing incentives for the creation and dissemination of works, where copyright is the most effective mechanism to do so
- ii. permitting reasonable access to works for use, modification, self-expression, adaptation and consumption, where exceptions to exclusive rights are likely to have a net benefit for New Zealand.

MBIE, like InternetNZ, takes just the first half of human rights ‘The right to participate in cultural life, enjoy the arts and share in the benefits of scientific progress.’ It then reads freedom of expression as also an argument for free access, not copyright: calling for ‘the free flow of ideas by word and image’, ‘equal access to art’ and ‘the possibility of all cultures to have access to the means of expression and dissemination.’ The ‘moral and material interests of the author’ never appear for InternetNZ; they finally appear near the end of MBIE’s report to justify a new right – not robust copyright legislation, but vague protections of author’s moral rights and protection from predatory publishers.

The moral and material rights of authors depend on strong copyright law. That strong copyright law incentivises authors to create the cultural goods, underwrites their freedom of expression, and provide access to those cultural goods through the market and – in certain special cases – through exceptions. These human rights are ‘mutually reinforcing and reciprocally limitative.’ Breaking them up allows MBIE to imagine radical copyright exceptions and free access on one side; and authors supported by government in their moral rights and deals with publishers on the other. This isn’t a legitimate reading of Human Rights law.

That same flawed approach comes into MBIE’s engagement with the LSF, also suggested by InternetNZ.

The LSF has four capitals. *The Paper* selectively chooses only “social capital” as being relevant and ignores “human capital” and “financial & physical capital” (expressly associated with intellectual property) which could equally have been argued as being as relevant, if not more relevant to the Review. Compounding this, *The Paper* actively disavows jobs and earnings as being relevant to the Review by ignoring this domain of ‘current wellbeing’ in its application of the LSF.

The Living Standards Framework (LSF) is predicated on officials being wide-ranging and systemic in their policy considerations. As the Secretary to the Treasury said in a recent speech on ‘What the Treasury’s Living Standards Framework means for the public sector’:

‘A wellbeing approach is about ensuring the broad range of factors that matter to New Zealanders are central to our definition of success and drive our decision making.’<sup>7</sup>

MBIE’s application of the LSF in *The Paper*, however, falls at this first elementary hurdle. Instead of embracing the obvious relevance of the ‘financial and physical’ and ‘human’ capitals, MBIE bizarrely selects but one capital – ‘social capital’ – as being ‘central to copyright’. This is despite intangibles and intellectual property being explicitly included by Treasury and other researchers within the definition of financial and physical capital.<sup>8</sup> It is also inconsistent with the approach of leading researchers who acknowledge the relative interdependence of the capitals.<sup>9</sup>

This narrow application of the LSF may run counter to Treasury guidance, but is consistent with MBIE’s silencing of commercial and creative interests throughout *The Paper*. It extends to MBIE’s selection of domains of current wellbeing that they consider ‘most relevant to copyright’. MBIE’s exclusion of the ‘Jobs and earnings’ domain is extraordinary. Treasury consistently emphasise the importance of being practical in applying the LSF to inform decision-making and yet there is nothing practical in how MBIE’s application overlooks explicit and obvious connections to copyright and the creative ecosystem.<sup>10</sup>

Treasury also emphasise that the LSF is designed to complement ‘more specialised wellbeing frameworks used in the public sector, such as those that focus on particular sectors’.<sup>11</sup> *The Paper*, however, is unclear on whether MBIE considers that there are more specialised frameworks available (or not) and whether Figure One constitutes an alternative framework.

*The Paper’s* discussion of wellbeing includes reference to a speech by the Minister of Finance. The paragraph in the speech directly before the one quoted in *The Paper* reads:

*‘I want to emphasise that a wellbeing approach means more robust financial and economic analysis, not less. It means analysing the whole system to understand how policy affects people, not just measuring impacts within agency silos.’<sup>12</sup>*

*The Paper’s* application of the LSF plainly fails to meet these aims.

**Authors and publishers are happy to engage on these new frameworks, but we would expect to do so through a consultation process and we would expect to see a fair presentation of how copyright and the creative ecosystem might play a role in furthering New Zealanders living standards and human rights. Instead, *The Paper*, cherry-picks standards and rights to suit a pre-existing agenda.**

<sup>7</sup> <https://treasury.govt.nz/publications/speech/what-treasurys-living-standards-framework-means-public-sector>

<sup>8</sup> <https://treasury.govt.nz/sites/default/files/2018-12/lfsf-background-future-work.pdf> and <https://treasury.govt.nz/sites/default/files/2018-07/dp18-07.pdf>

<sup>9</sup> <https://treasury.govt.nz/system/files/2019-06/dp19-02-culture-wellbeing-lsf.pdf>

<sup>10</sup> <https://treasury.govt.nz/publications/speech/what-treasurys-living-standards-framework-means-public-sector>

<sup>11</sup> <https://treasury.govt.nz/sites/default/files/2018-12/lfsf-background-future-work.pdf>

<sup>12</sup> [https://ipanz.org.nz/Attachment?Action=Download&Attachment\\_id=150280](https://ipanz.org.nz/Attachment?Action=Download&Attachment_id=150280)