

A POLICY POSITION FOR WRITING AND PUBLISHING

Preface

This report has been prepared for Copyright Licensing Limited by Philippa Bowron from MartinJenkins (Martin, Jenkins & Associates Limited).

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Basis

The position detailed in this report is based on interviews, research and analysis of the writing and publishing sectors and is a suggested approach to maximise the benefits associated with those sectors. It is not a general policy analysis accounting for all the impacts and benefits of various copyright positions and outcomes.



Why writing and publishing matters

In general

There are many reasons why the creation and publication of original written material is important and needs the protection of robust copyright legislation.

Writing and publication of original content is the creation of artefacts that describe our ideas, experiences and philosophies. It contributes to basic literacy, general education, overall communication, our ability to exercise freedom of speech and the development of inquiry and curiosity. It supports us to extend our knowledge, to undertake research, attain academic achievement and it allows us to share knowledge. It is a medium for discourse, which allows us to challenge each other's ideas, understanding and beliefs.

Research also shows that reading fiction at a young age develops a child's ability to imagine life from different perspectives, resulting in a measurable improvement in empathy and emotional intelligence¹.

In New Zealand

Content written and published in New Zealand, contributes to our collective wellbeing and our national identity. It is vital for education, our history and our legacy for future generations. We can't pick and choose. In order to have strong, vibrant writing and publishing sectors, we need a regulatory environment that supports creation and publication of every type of written work and protects the right of our writers and publishers to be fairly remunerated for their work.

For education

New Zealand has some challenging social inequalities. It also has opportunities to correct them. The ability for our challenged readers and writers to access both educational and entertainment material that they can contextualise with their own surroundings and experiences is critical to ensuring that the social inequalities do not increase, and assists in remedying them.

Having education material that works for our own education system and provides the context of our own experiences is vital to the success of our education system. It also means that the proposed context for the review of 'net importer' is irrelevant, as the continued ability to produce local content is more important than the numbers of imports vs exports.

For te reo

Increasingly we are a nation seeking to be bilingual. Many people, including our Prime Minister, are choosing to raise bilingual tamariki, speaking both English and te reo. Government and Māori, in partnership, have invested time, money and social capital in the development of the Maihi Māori and the Maihi Karauna, respectively the Māori and Crown te reo strategies. The principles of these are

¹ Psychologists David Comer Kidd and Emanuele Castano, at the [New School for Social Research](#) in New York report "Reading Literary Fiction Improves Theory of Mind".



rooted in Te Ture mō te Reo Māori 2016 (the Māori Language Act 2016) and in Article 2 of the Treaty of Waitangi which protects te reo as a taonga.

A strong, healthy regulatory system that supports the creation of original New Zealand written content, will mean adequate material will be produced to support the realisation of New Zealand's te reo ambitions.

For our national Identity

It is as recent as the early 1980's that New Zealand was a nation that suffered from 'cultural cringe'. We were not used to, or not comfortable with hearing, watching and reading our own stories. Our news readers spoke with British accents and we watched American and British programming almost exclusively.

During the 1980's, government increased efforts to ensure educational material was increasingly by New Zealanders, for New Zealand learners, with New Zealand context. What followed was a corresponding change in our radio, television and film content as we learned to tell, read, hear and watch our own stories. Sharing our own stories and knowledge is important if we want to maintain our national identity as well as our understanding and kaitiaki of our own culture and environment.

Horizon Research, in its 2018 survey for the New Zealand Book Council, reports that 75% of children under 10 years of age have read a book by a New Zealand author or poet in the last year². Our children and parents are responding to New Zealand stories and we need to ensure the legislative systems are in place to support this important building block for cultural awareness and national context.

Having books written and published by New Zealanders in English, te reo and other languages, allows us to teach our children our own stories, share traditions and cultural perspectives, invent recipes and cooking methods that suit our local produce and environment, produce screen content that reflects our surroundings and experiences and connect and learn about each other. This gives context to our unique nation.

For our media and democratic health

With the rapid increase of international media availability through social media channels, the New Zealand media environment faces risk of global 'swamping' – we are losing our voice. Our democracy is not only supported by journalism, but by books and publications of in-depth analysis and historical recitation that allows New Zealand to reflect and learn from our past.

Civic journalism allows people to be informed and to react, but books are more likely to inspire people to think and plan. We need both to be a healthy, independent, democratic society.

For economic growth

Our economic wellbeing depends on our ability to inspire curiosity.

With the distance issues we face in New Zealand, , our future is in becoming a knowledge economy, reducing our reliance on primary industries and moving to a low emissions economy . Imagination and curiosity are two key elements of knowledge-economy entrepreneurial behaviour.

² Page 27, Horizon Research Limited Book Reading in New Zealand for the New Zealand Book Council, August 2018
<https://www.bookcouncil.org.nz/advocacy/research/>



We are not currently realising the full export potential of our literature. There is untapped potential and it's important that we protect the copyright of our stories so that authors and publishers, and by extension the New Zealand economy, can benefit as the sector grows.

Intellectual property is a wealth creator. Developing New Zealand stories that are attractive to consumers and can also be transformed into television or film, increase the return all the way through the value chain. While the filming of the Lord of the Rings trilogy created economic value for New Zealand, much more of that value would have been retained if it had been a book written and published here.

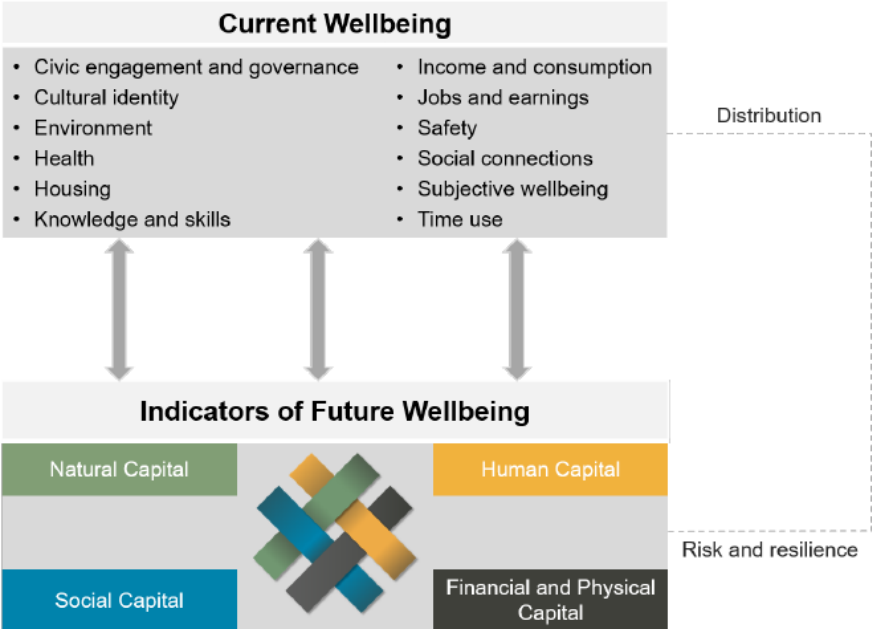
Assigning a value

The Living Standards Framework

The Living Standards Framework (LSF) developed by New Zealand's Treasury to inform advice to government on policy choices, is a reflection that New Zealanders value more than just economic benefit, and that in addition to financial and physical capital, we need to consider natural, human and social capitals.

It also details 12 current wellbeing domains, to be measured and monitored to provide evidence over time of the changes in wellbeing domains that are important to New Zealanders.

Figure 1 - Living Standards Framework



As well as the four capitals, the LSF considers inter-generational wellbeing as central to all policy choices.



Cultural wellbeing value

The current measure of impact for cultural wellbeing in the Treasury Cost Benefit Analysis model spreadsheet is “Being able to express cultural identity”³. This shows a 2019 impact value of \$9,563 per person for every 1 point change (0- 4 scale) attributed to it.

We do not have access to sufficient data to undertake a full Cost Benefit Analysis, but it isn’t hard to imagine how a more vibrant writing and publishing sector could improve cultural identity, adding significant, measurable value to cultural wellbeing. For example, an increase of 1 point across our school population, by this measure, could produce an increase in benefit with a value of \$77b⁴.

What does robust NZ copyright law deliver

Economic growth

Incentivise growth of creative economy

Copyright legislation is an intellectual property law and as such is the basis for innovation. Our national ambitions to be able to innovate and exploit innovation for national wellbeing rely on having appropriate intellectual property laws to protect the right to own the creation of original creative works.

Facilitate an efficient IP market place

Locally

Facilitation mechanisms like collective licencing and accessible enforcement support lower transaction costs and increased access to material. This benefits writers, publishers and consumers, supporting a more active market for written material in New Zealand and internationally.

Internationally

Our writers and publishers compete in a global market where other countries have stronger copyright parity and protections, particularly with respect to remuneration for exemptions and territorial rights. Strengthening our legislation with respect to these two issues would allow New Zealand to compete more effectively internationally.

Prevent internet platforms from taking content

Robust legislation to support fair remuneration for content creators and reducing the current exploitation of content by global platform providers will deliver increased economic contribution by the writing and publishing sectors.

³ Treasury CBAX spreadsheet model <https://treasury.govt.nz/publications/guide/cbax-spreadsheet-model-0>

⁴ Based on 2018 total roll for primary, secondary and special education of 808,439 students



Legal certainty and fairness

Certainty of return on investment

Robust protection under New Zealand law for written material, provides the confidence writers and publishers need to invest in creative work. Professional writing and publishing, like any other business, requires a legislative framework that allows the investor to forecast likely return. The more certain the framework, the greater the ability to make sound investment decisions around money, time and effort.

Provide effective enforcement mechanisms

Providing a low cost enforcement mechanism in an industry where there can be quite significant imbalance of power between the right holder and the people or organisations in breach, is critical to the fair treatment of the creative sector and the certainty it needs to be successful.

Be format neutral

The ability for different platforms to allow for easier access to, and dissemination of work should never be a reason to reduce copyright protection. It's important that copyright legislation is as technology neutral as possible, and its enforcement mechanisms exist to protect against breach regardless of how that happens. The investment into writing and publishing should be protected equally for physical or digital format.

Social equity and connectivity

Incentivise creation and distribution of NZ stories

There is a certain amount of creativity in writing that will happen regardless of protection, but robust legislation supports professional creative writers and access to a professional publication industry, that is essential to ensuring every New Zealander can access New Zealand stories, factual content and education material. This writing assists us in connecting to each other as a nation and as distinct communities within that.

Enable easy access to IP

The implementation of fair and reasonable remuneration through collective licensing will have the effect of lowering transaction costs and facilitating greater, more affordable access to written works. In particular, extension of the public lending right to include digital works and private libraries and a requirement for a collective education licence will provide increased, equitable access.

Context for review

A fair basis for decision making

There are a number of factors that need to be taken into consideration in establishing a fair context for copyright legislation review:



- 1 Writing and publication of original New Zealand content, cannot be assessed by financial analysis as its value lies in more than its GDP contribution. Books and e- books have value to New Zealand as cultural and societal artefacts and are not merely tradable commodities.
- 2 The growth of global “tech giants” that operate business models not based on creating content, but on making others’ content available, means that copyright protections need to be more effective to allow fair remuneration for creative work.
- 3 Copyright law in New Zealand should unashamedly incentivise creation of New Zealand content.
- 4 Legislation and policy on copyright needs to use the Treasury Living Standard Framework as context for decision making.
- 5 International treaties need to be considered, and so does international copyright law. Our writers and publishers are currently competing in a global market where our existing laws create disadvantage for our own works.

What we need from a review of Copyright legislation

No transfer of value through further exemptions

The time, talent and work needed to create and disseminate content does not reduce because of exemptions, but the return on that outlay does.

Exemptions are a government decision to transfer value from the content creator (in the case of writers, some of the most poorly remunerated people in New Zealand) to the societal group gaining the exemption. Any **exemptions should be covered by an equivalent funding contribution** to restore balance and ensure writers and publishers can continue to receive fair remuneration for their work.

A requirement to fund collective licensing for government use

Writers are not currently fully compensated for existing exemptions.

There is no current funding from the Ministry of Education for copyright across schools. It’s left to the individual schools to procure licences and while some do, others consistently breach copyright law. **We would like to see a requirement for the Ministry of Education to procure a collective copyright licence for schools**, in the same way it purchases collective software licences.

There is also a need to **increase the Public Lending Right funding** that covers library lending to **include digital lending, lending from private libraries and lending by educational institutes** to allow for fair remuneration. The Public Lending Right fund has not increased since 2008, meaning that the average pay out has decreased in real terms as it has not been updated to account for inflation, or to include digital or private lending.

The provision of proper, fair collective licensing in these areas will have the effect of lowering transaction costs, allowing for more distribution of works and the innovation that goes with that, without penalising writers and publishers.



It is our view that current exemptions are not compliant with the Berne Convention. Article 9 states that countries may legislate to permit reproduction of works provided that it “does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”.

An accessible enforcement mechanism

There is an imbalance of power between those whose rights copyright is meant to protect and those who seek access to those rights. This is compounded by lack of a simple, cost-effective enforcement mechanism.

The current system allows global internet organisations, contributing little to our economy and paying little or no tax, to take content and monetise it, while taking no responsibility for the copyright breaches that are supporting their revenue streams. The simple truth is that a typical New Zealand author is powerless to enforce copyright on a multi-national corporate if they choose to ignore breaches, while the work itself continues to be devalued through illegal sharing.

Companies operating social media platforms, search engines and websites need to be held to account for content, and links to content that breach copyright. Law could be changed in line with UK and allow the global organisations that aren't exercising due care for copyright to be held to account in New Zealand. This would enable accountability of companies that are operating, and importantly, selling advertising and profiting from content that breaches copyright in New Zealand.

It is our view that an obligation for hosting or linking organisations to be accountable for content that breaches copyright and links to such content would see rapid development and deployment of the capability needed to identify it.

Revision of the law itself however, will be pointless without a simple, inexpensive mechanism for enforcement.

The existing tribunal system requires technical evidence that is costly to provide and not recognised in its judgements. The cost to procure the data required to submit a complaint is far in excess of the remedies decided by the tribunal and its average time of 193 days to deliver a decision means it is not an effective mechanism for preventing loss of value to copyright material. Breach of copyright through the internet happens quickly and the damage it does escalates quickly, meaning that enforcement also needs to happen quickly to be effective.

An enforcement body that can act fast, be inexpensive to use and have the ability to compensate cost and financial loss is required.

A commitment to educate

There is no current mandate for education about copyright from government. The government organisation ***responsible for public understanding of copyright obligations needs to do more.*** The Act is an important one and does require some effort in public education.

The government body with enforcement responsibility also needs to be resourced to build and promote understanding of copyright, similar to the mandate of the Privacy Commission in respect to privacy principles.



Re-introduction of territorial rights with ‘use or lose’ rule

In 1998 the Copyright Act was amended to end territorial copyright protection in New Zealand and allow parallel importing. This has not been the case in any other English speaking countries. Without this right, our writers and publishers are competing in a global market with their hands tied. It contributed to the rapid reduction of publishing business in New Zealand, with the New Zealand offices of multi-national publishers either closing or downsizing and it has reduced the ability of New Zealand writers to earn money from international sales.

We propose a re-introduction similar to the Australian copyright law, which allows for **territorial rights but with a 30 day ‘use it or lose it’ rule** that allows for freedom to import if a publisher has not published their edition within 30 days of international publication dates.

Simultaneous publication results in the ability to retain territorial copyright and therefore supports the investment in companies promoting those books and reading. This law in NZ has reduced the visibility of the literature sector as the larger companies no longer invest in local book marketing and promotion when the books can be sourced elsewhere.

The Counterfactual

No change to Copyright Legislation

The current legislation provides sufficient protection to support a reasonable amount of original written, published material in New Zealand, but it is not well positioned to support continued protection of, or remuneration for digital work.

As digital format becomes more standard, there is likely to be a gradual erosion of value across New Zealand’s writing and publishing, meaning less available content and increased transaction costs. This is at a time where there is increasing demand for New Zealand content.

What this means economically

While it is difficult to predict exact numbers, status quo will support a gradual decline of publishing and writing in New Zealand. Our writers and publishers will reduce contribution to GDP and the associated indirect economic benefits like retail sales and New Zealand television and film production and sales will also decline.

New Zealand writing and publishing will become more expensive and less accessible.

New Zealand as a ‘net importer’ of copyright materials is not something to be proud of, and the level of import in comparison to export will increase in this scenario. We will become increasingly dependent on intellectual property created overseas and be impacted by the associated erosion of our culture

Because of the increasing difficulty to be remunerated for written work, we will host fewer professional writers and publishers and will rely more on those that do it as a hobby. This is likely to result in a reduction of quality, creating more economic disadvantage.

What this means culturally

New Zealanders are embracing their culture now more than ever. Without more robust protection, written copyright works will fail to meet demand.



Our current cultural identity has been hard fought and written work has been a strong contributor. Failure to strengthen our copyright protection will see a decline in New Zealand written content, with likely cultural impact where it matters most, in education. This is not an immediate impact and there is a risk that it happens slowly and imperceptibly, causing us to lose cultural value without having made any deliberate choices.

Our ambitions to revitalise te reo are also at risk without a legislative system that remains relevant to support writing and publishing of increasing amounts of te reo and English/te reo material.

What this means socially

The aspects of social value that are at risk over time with our current copyright legislation include:

- the robust nature of our democratic system and our ability to reflect, debate and learn from our progress within it
- the ability for our written education to support attempts to address social inequity through education
- the ability for our future generations to connect with other through reading about each other's philosophies and experiences as well as learning to empathise through reading relatable stories at an early age

The value erosion of these social indicators, in this scenario, is also likely to be slow and extremely difficult to reverse.

Reduction of protection

Any reduction of protection (or extension of exemption without fair remuneration) is likely to increase the pace of value erosion. This will lead to our local perspectives and experiences being lost within the globalisation of creative markets within a shorter timeframe than described above.

The economic, cultural and social impact will be quicker and more noticeable. Similar to the status quo scenario above, it would be very difficult to reverse.

In addition, the reduction of protection would put us further in breach of the intent of the Berne Convention and the TRIPS agreement. It would put us at a disadvantage to countries like the UK and France, who have recognised these risks and are strengthening their legislation to protect their copyright material.

The arguments that reducing protections will increase innovation have not shown to have any economic validity. This scenario would not produce economic gains in other areas equivalent to the loss of economic contribution in writing and publishing. In addition innovation is unlikely to contribute anything to compensate for the cultural and social value erosion.

Summary

Copyright is important in New Zealand to protect our national identity, our cultural wellbeing and our te reo revitalisation as well as supporting our democracy and our ability to leverage our intellectual property for economic benefit. Our current legislation is not robust enough to provide adequate protection in the future.



Protection of copyright in a digital environment is more difficult than in the physical. Our copyright legislation needs to be reviewed in light of today's world. It needs to provide the ability for protection in the context of the power imbalances that exist, in the context of the Berne Convention and the TRIPS agreement and in the context of our Living Standards Framework.

Our legislation needs to be improved by:

- Introducing fair remuneration for exemptions
- Establishing a basis for remuneration for any future exemptions
- Introducing an accessible enforcement mechanism
- Providing a body with resource and mandate for copyright education
- Re-introducing territorial rights

This will enable:

- Economic growth
- Legal certainty and fairness
- Social equity and connectivity

The overall value of improving our access to New Zealand written and published work could be immense, and it deserves attention. Failure to provide adequate protection will reduce value to New Zealand, economically, socially and culturally.

