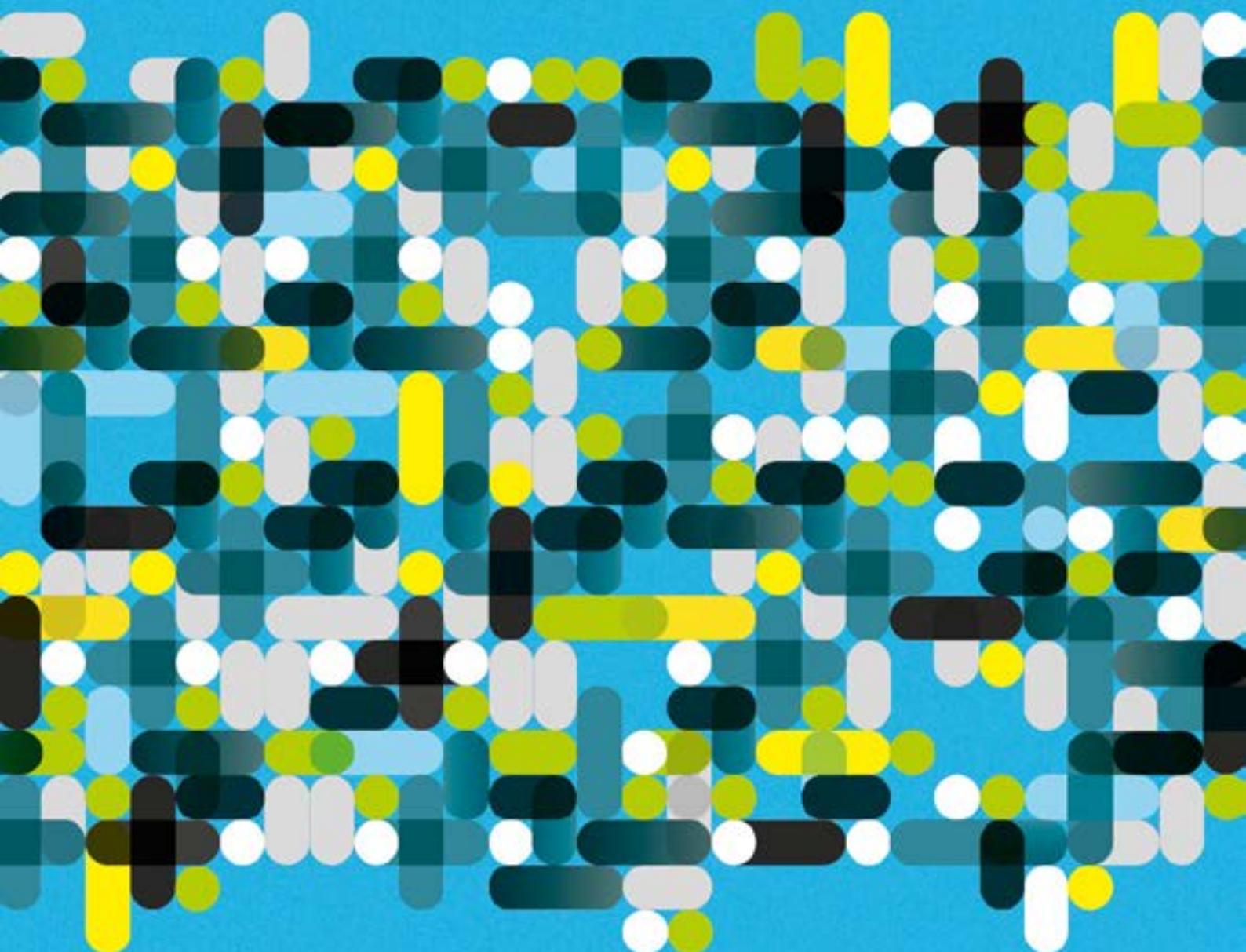




MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Copyright and the Creative Sector



STUDY OF THE ROLE OF COPYRIGHT AND REGISTERED DESIGNS
IN THE CREATIVE SECTOR IN NEW ZEALAND | DECEMBER 2016

New Zealand Government

COVER IMAGE

The main illustration represents New Zealand's creative community – individuals interacting and collaborating with one another, forming new endeavours. The cover image was designed by Jess Molloy, Senior Designer at the Ministry of Business, Innovation and Employment.



Copyright and the Creative Sector report produced by the Ministry of Business, Innovation and Employment, in consultation with the Ministry for Culture and Heritage.

MBI3689

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Minister's foreword

I am pleased to present the Ministry of Business, Innovation and Employment's report on its study of the role of copyright and registered designs in the creative sector in New Zealand. 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.

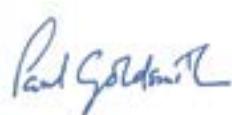
The Government's *Business Growth Agenda* sets a wider government priority of ensuring New Zealand has regulatory settings that support innovative new products and services. New Zealand's creative sector is bursting with innovation, resulting in new products, processes and designs. The Study falls within the *Building Innovation* workstream of the *Business Growth Agenda*.

No-one will be surprised to hear that technology is developing at pace – illustrated by recent developments in augmented reality, virtual reality and 3D printing and technological disruptions to traditional business models. This report highlights new distribution opportunities, new challenges with unauthorised use and new creative formats. It also highlights a diverse range of views and experiences of those in the sector.

Amongst the potential outcomes of this work is a review of the *Copyright Act*. The insights in this report, along with any feedback we receive, will inform our thinking about the role of copyright and registered designs as we move forward. Any legislative review will be consulted on widely.

This report is the culmination of information from 71 interviews, two sector workshops with over 100 attendees, a survey with over 400 responses, an online consumer focus group and wider research and discussions with domestic and international experts.

I extend my thanks to the many creative sector participants who contributed to the Study – generously giving their time and sharing their knowledge and expertise.



Hon Paul Goldsmith
Minister of Commerce and Consumer Affairs



**"I EXTEND MY
THANKS TO THE MANY
CREATIVE SECTOR
PARTICIPANTS WHO
CONTRIBUTED TO
THE STUDY"**

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What you need to know about this report

Copyright attaches to a broad range of original creative works. It attaches to feature films and novels, as well as home videos and social media posts. It even attaches to software code.

Because copyright attaches to such a broad range of creative works and does not need to be ‘registered’ anywhere, the impact of copyright is difficult to measure.

The study of the role of copyright and designs in the creative sector (the **Study**) is a first step towards better understanding how copyright is used in practice and in context.

This report summarises the information gathered throughout the Study. It does not make policy recommendations or represent a complete picture of the activities and views of the creative sector.

As well as informing government, we hope that this report helps to inform the sector and the wider public about the copyright regime and its use in New Zealand.

The report also touches on New Zealand’s registered designs regime, which has some overlaps with the copyright regime.

- The report starts with an overview of the Study, drawing attention to key insights.
- It then introduces the basic concepts of copyright law and the interaction between copyright and registered designs. The aim is to provide context for the ‘subsector landscapes’ and help to build awareness and understanding of the current regime.
- The ‘subsector landscapes’ take a closer look at how copyright applies to creative works and outlines the emerging trends and themes within each subsector. Anonymised quotes help to illustrate some of the views and experiences of those we spoke to.
- The report concludes by outlining next steps.

Because the landscape is so broad and diverse, this report has not gone into detail in any one area. It is the start of a conversation and, no doubt, there will be areas requiring further clarification or exploration.



WE WELCOME
YOUR COMMENT
AND FEEDBACK ON
THIS REPORT. EMAIL:
CREATIVESECTORSTUDY
@MBIE.GOVT.NZ

Section 1 – The Study

The Minister of Commerce and Consumer Affairs launched the Study in October 2015. The Study was led by the Ministry of Business, Innovation and Employment, in consultation with the Ministry for Culture and Heritage (see Terms of Reference).

Our aim has been to deepen government's understanding of the role of copyright and registered designs in the creative sector.

We sought to do this by talking to sector participants directly (71 interviews and over 100 workshop participants), surveying the sector (440 responses) and seeking consumer views (online focus group).

This section outlines the subsectors we have used to categorise different parts of the creative sector and the Study methodology.

SUBSECTORS OF THE CREATIVE SECTOR

To gather information in a systematic way, we divided the sector into seven broad subsectors:

What is created, produced, distributed and consumed in each subsector?

 Film & TV	Audiovisual content, including film, television and internet video formats like webseries
 Music & sound recordings	Musical compositions, lyrics, recorded music and other sound recordings (such as podcasts and sound effects)
 Interactive gaming	Video games for a variety of digital platforms, including PC, console, mobile, and in different formats, including virtual and augmented reality
 Software & web design	Software products, such as websites and mobile applications, incorporating software code and other copyright works
 Written content & print	Printed works such as books and newspapers (and their digital equivalents) as well as online-only written content like blog posts
 Product design & architecture	Designs that are translated into three-dimensional items, such as fashion garments, furniture and architecture
 Visual & performing arts	Visual arts (including photography, painting and sculpture) and performing arts (such as dance and theatre)

In dividing the subsectors, we sought to capture a range of creators, producers, distributors and users. Recognising the overlaps between subsectors, some interviewees were treated as part of more than one subsector – for example, film production companies are often music users and advertising agencies can be involved in the creation of many different types of work.

The diversity of the creative sector means that it is difficult to generalise about participants' experiences, both within subsectors and across the sector as a whole. We have used the above subsectors as a tool to understand the creative sector in greater detail.

METHODOLOGY

Stage 1: Qualitative data gathering

To better understand how the copyright and designs regimes are operating in practice, we adopted a qualitative approach.

Copyright arises through the creation of an original work. Protection does not require registration, which means that there is no single source from which data about copyright can be obtained and copyright is not always front-of-mind for creators.

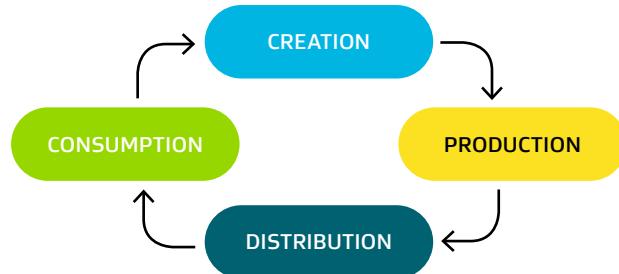
Talking to a range of creators, producers, distributors and users allowed us to gather a diverse range of perspectives.

Interviews – BETTER UNDERSTANDING WHAT IS HAPPENING IN PRACTICE

The first stage of the Study was to conduct face-to-face stakeholder interviews to gather qualitative information on the role of copyright and designs in the creative sector, including:

- a. what drives creation
- b. how the creative sector uses the copyright and designs regimes
- c. how digital technology has impacted the creative sector
- d. the opportunities and challenges facing the creative sector.

Life cycle of a creative work



Interviews were structured around the 'life cycle' of a creative work – encompassing creation, production, distribution and consumption.

We applied the following considerations to help ensure that the interviewees represented a cross-section of the sector:

- a. *Different stages of the life cycle*
- b. *Different business models* – e.g. size (from freelancers to large commercial enterprises), market focus (export or wholly domestic)
- c. *Different stages of development* – e.g. long-established individuals and businesses, new and emerging talent
- d. *Different types of organisations* – e.g. organisations that operate alongside creative sector participants, such as industry bodies and collecting societies.

We completed 71 face-to-face interviews across Auckland, Wellington and Dunedin between October 2015 and May 2016.

Workshops – TESTING WHAT WE HEARD WITH A WIDER GROUP OF SECTOR PARTICIPANTS

We held workshops (one in Auckland, one in Wellington) to test some of the themes and views that emerged from the interview process. We facilitated subsector-specific exercises based on what we had heard from interviewees. This allowed us to identify gaps and see what resonated with attendees. More than 100 people from a range of industries and organisations attended the workshops.

Stage 2: Online survey of the sector

Building on what we heard through the interviews and workshops, we commissioned MartinJenkins to develop a survey to gather quantitative data. The survey targeted copyright owners, licensees and creative contributors. We sought to better understand:

- › levels of awareness and understanding of copyright
- › ways people use their own and others' copyright works, and
- › frequency and type of infringement/enforcement actions.

The survey went live for a two week period in August 2016. We distributed the survey widely and encouraged dissemination by industry bodies and economic agencies. We received 440 completed responses.

MartinJenkins' has prepared **a report on the results of the survey**.

Stage 3: Online consumer focus group

The final stage was to gather views of consumers through a consumer focus group. The discussion topics were focused around how consumers access/use creative material and why.

The online forum was convened on Thursday, 1 September 2016. Participants were screened by Colmar Brunton to ensure that a range of life stages, genders, incomes and locations (from within New Zealand) were represented.

Colmar Brunton has prepared **a report on the results of the consumer focus group**.

Section 2 – Insights from the Study

The creative sector is diverse and copyright is important to most

The Study highlighted the diverse nature of the creative sector – the kinds of works that are created, the reasons they are produced, the way they are commercialised (if at all) and the way they are consumed or otherwise used.

Some parts of the creative sector rely principally on copyright to protect the commercial value of their works.

Some parts of the sector place emphasis on alternative mechanisms to protect the commercial value in their works, such as how they engage their fan base and continue to improve their product.

Others place emphasis on other forms of intellectual property protection, such as trade marks, patents, registered designs and trade secrets.

Although interesting trends and themes have emerged in the various subsectors, the boundaries between subsectors are not rigid. Over half of the creative sector survey respondents indicated that they created, produced, commissioned, contributed to, distributed or otherwise used more than one category of creative work.

23% 72% 90%

of survey respondents do not seek revenue for copyright works
of survey respondents identified copyright as very important (especially film & TV 88%)
of survey respondents identified copyright as fairly important or very important

Number of categories of creative work created, produced, commissioned, contributed to or otherwise used by each respondent



Categories of creative work

- > Film & TV
- > Publication & print
- > Music & sound recording
- > Interactive games
- > Design
- > Software & web design
- > Visual arts
- > Performing arts
- > Advertising

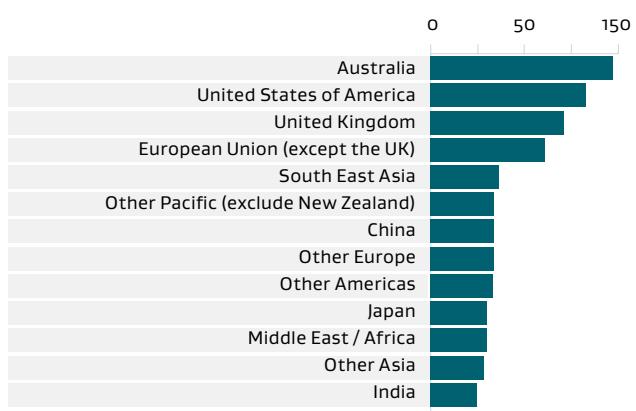
Source: MBIE survey, 2016

The drivers for creation are diverse

A common theme across the sector was the role of storytelling and exercising artistic expression in driving creation. Protecting or enhancing reputation also played a role. Many people also identified deriving an income as important. Several interviewees suggested that a key part of deriving an income was focusing on a target market or otherwise finding an audience.

Some parts of the sector are export-focused. Others target the domestic market. Those with an export focus are interested in both New Zealand copyright and designs laws and those of other countries, as well as how the different laws interact.

Overseas markets to which copyright works were exported



Source: MBIE survey, 2016

There are new opportunities and challenges in disseminating and accessing creative works



"NOWADAYS IF YOU DON'T SEE IT ONLINE,
IT MAY AS WELL NOT EXIST"
Museum

- › **New opportunities to disseminate works** – technological developments such as streaming have created opportunities for content creators to find new audiences (particularly international audiences) and reduced distribution costs.
- › **Reaching consumers in the online world poses new challenges** – new opportunities to disseminate works has resulted in more content than ever being available, increasing the importance of discoverability (e.g. building relationships with online platforms, using aggregators and connecting with a fan base).
- › **Analytics are of value to the sector** – access to data on audiences, fans and consumers (sometimes in real-time) provides valuable market information to those in the sector.
- › **New opportunities to discover and access works** – internet search engines and other tools (along with increased digitisation of works by libraries, archives and museums) have made it easier to discover and access both historical and new creative works.
- › **Challenges using the creative works of others** – while developments in digital technology have made it easier to discover works, it has not necessarily made them easier to use (for example, old licences may not address digital copies and copyright owners may be difficult to identify).
- › **Tools are available to help identify works and allow re-use** – creators can choose to proactively license others to use their work (e.g. Creative Commons and FOSS licensing) and can add metadata to help identify their works.

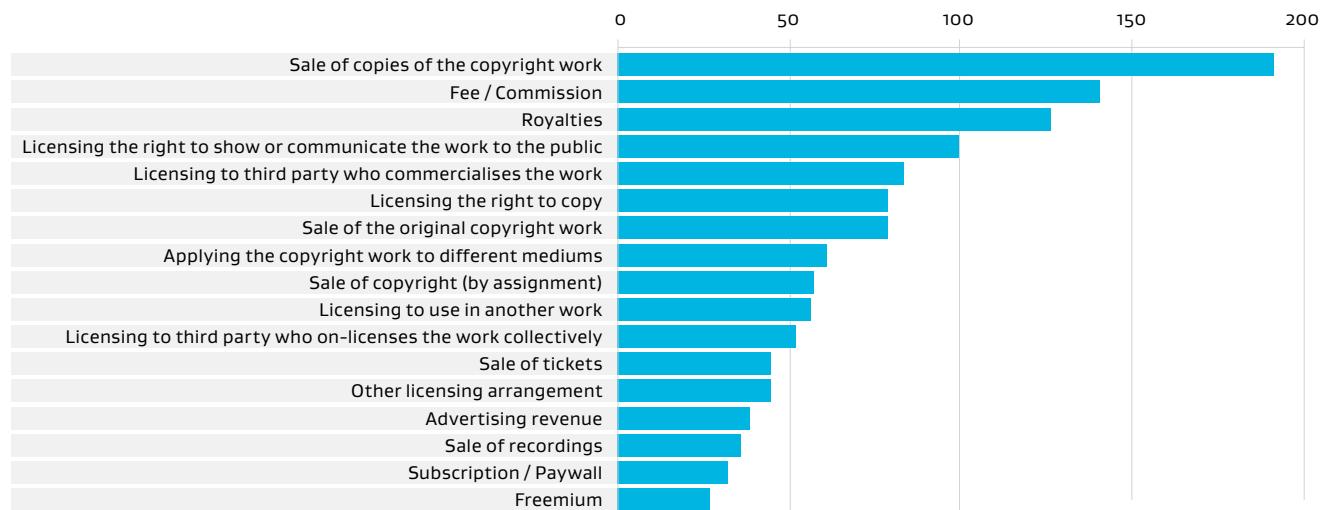
There are new opportunities and challenges in seeking revenue and enforcing copyright



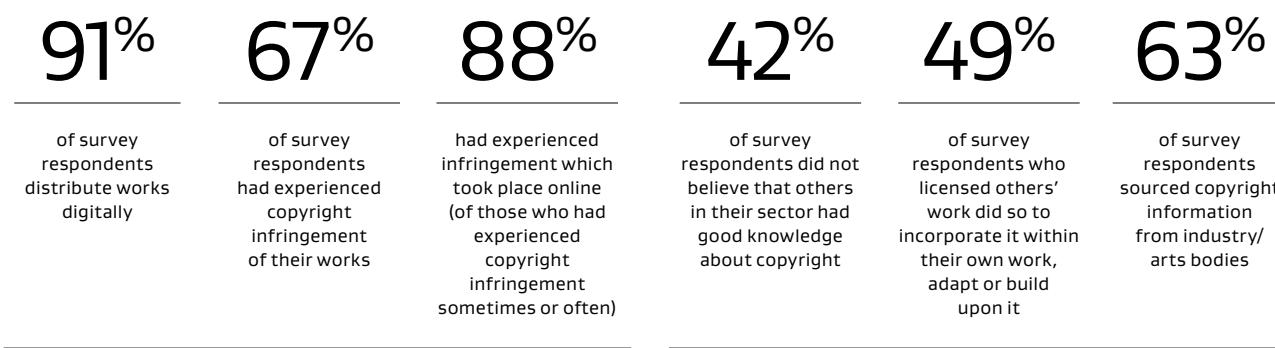
"THERE IS NO REAL FINANCIAL MODEL YET FOR HOW THESE THINGS WORK"
Publisher

- › **New ways to monetise content** – the development of the internet, cloud computing and greater levels of connectivity have had an impact on service delivery and helped to facilitate new ways to monetise content (such as freemium and subscription models).
- › **Challenges to traditional revenue streams** – new distribution methods have posed challenges to traditional revenue streams (e.g. sales of physical and digital copies of content) and new tools have enabled some consumers to avoid advertising (e.g. use of ad-blocking technologies) and to access overseas services (e.g. use of virtual private networks) which can impact revenue.
- › **New forms of unauthorised use** – technological developments have also made way for new forms of unauthorised use, such as stream-ripping (converting streamable content into a downloadable copy).
- › **Increased cross-border transactions poses challenges** – monitoring copyright infringement or taking enforcement action can be more difficult when users are offshore.
- › **Enforcing rights can be difficult** – taking copyright enforcement action can be resource-intensive (e.g. monitoring uploads and sending takedown notices), costly (e.g. court proceedings) and can also pose reputational concerns.
- › **New technologies may help to combat some unauthorised use** – some platforms hosting user-generated content have developed systems that attempt to block infringing uploads or allow copyright owners to monetise those uploads (content identification systems).

Approaches used to seek revenue for copyright works



Source: MBIE survey, 2016



New works and formats are emerging

 "JOE BLOGGS ON SAFARI CAN RECORD INCREDIBLE INTERACTIONS WITH NATURE THAT A CREW ON LOCATION MIGHT NOT EVER CAPTURE"

Film production company

- › **New opportunities to create and share works** – technological developments such as the smartphone, along with social media and other online platforms, have contributed to a proliferation of user-generated creative content available on the web (opening the door to YouTube stars and gaming streamers).
- › **New content formats are emerging** – the development of streaming and other technologies has also paved the way for new content formats, such as podcast series and webseries.
- › **New types of content are also emerging** – as augmented and virtual reality technologies develop and grow in popularity, so does augmented and virtual reality content which, like interactive games, is not specifically referred to in the *Copyright Act*.
- › **Copying 3D objects is easier than ever** – the development of 3D printing technologies means that copying and printing 3D objects on a large scale is easier than ever, and it will become much easier to industrially apply original artistic works.

There are new opportunities and challenges in development and production processes

 "YOU HAD FOUR DIFFERENT COUNTRIES WHERE THE SONG WAS COMING TOGETHER. THAT'S WHAT TECHNOLOGY HAS DONE"

Artist

- › **Increased opportunities for collaboration** – greater connectivity and new tools have made it easier for creators and producers to collaborate (locally and across borders) and operate from anywhere (e.g. make music at home in the lounge).
- › **Consumers can drive innovation in real-time** – new technologies such as cloud computing allow software developers to respond to user issues in real-time.

- › **Keeping up with high-end technology is expensive** – some creators (e.g. producers of high-end films) incur increasing and continuing technology costs to compete internationally and respond to consumer demand.
- › **Data from creative content can be used to develop new technology** – information ‘mined’ from creative content available on the web can be used to develop new knowledge, products, services and technology (e.g. artificial intelligence).

Copyright is complex

 "FOR THE MOST PART, WE DON'T LICENSE. IT GETS COMPLEX. FOR EXAMPLE, HOW DOES REVENUE-SHARING WORK?"

Established studio

- › **Copyright is sometimes misunderstood** – we heard about copyright disputes and misunderstandings within the creative sector, as well as amongst consumers.
- › **The impact of copyright settings is difficult to measure in isolation** – because protection does not require registration, there is no single source from which data about copyright (e.g. number of people using the copyright system) can be obtained.
- › **A creative output can include multiple creative works** – few complete creative outputs are made up of just one copyright work, so to avoid complexity some businesses (e.g. film production companies and game studios) seek to own copyright or obtain broad licences in as much of the content as possible.
- › **Licensing arrangements can be complex** – because there can be multiple copyright works within a single creative work and there may be multiple copyright owners of just one of those copyright works, licensing arrangements can be very complex – and collecting societies and other licensing bodies can play an important role in navigating these complexities.

Section 3 – Copyright

This section introduces the basic concepts of New Zealand copyright law (in force at the date of publication of this report).¹ It provides context for the subsector landscapes (section 4).

This section also briefly introduces the New Zealand registered designs regime and its relationship to copyright law.

Copyright protects original works

Copyright seeks to incentivise the creation and dissemination of original works. Without the ability to protect works from unauthorised copying or distribution (e.g. recorded music, fine art, digital art, movies, educational literature, software code), there would be fewer incentives to create and disseminate important social, cultural and commercial works.

However, over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and ‘follow-on’ creation — that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services. It can also inhibit important cultural activities such as educational, library and archival functions.

Copyright protects the expression of ideas

Copyright protects the expression of ideas, rather than the ideas themselves. If you discuss a concept for a new blog with a friend, copyright law will not protect that idea. Once you begin writing a blog post, the text will receive copyright protection as a literary work (provided it is original). Even if you have written several blog posts, the original idea behind the blog will not become protected. Only the work produced – the expression of the idea – will be protected.

Copyright is a set of rights given to creators of original works

Copyright is a set of rights granted under the *Copyright Act 1994*. Usually, the first owner of these rights is the author of the work. The exclusive rights of copyright owners include the right to:

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

The **author** is generally the person who creates the work. For sound recordings and films, the author is the person who makes the arrangements necessary for the making of the film or recording (e.g. the film producer).

The exclusive rights associated with copyright only apply to **original works** and only apply for a temporary period (which differs depending on the type of creative work).

¹ Amendments to the *Copyright Act 1994* required to implement the Trans-Pacific Partnership Agreement are set out in the *Trans-Pacific Partnership Agreement Amendment Act 2016*. These changes will not come into force unless and until the Trans-Pacific Partnership Agreement enters into force for New Zealand. Information on the Trans-Pacific Partnership is available online.

Copyright protects certain types of creative works for a temporary period

50 years from the end of the calendar year in which the author dies

- › **Literary works**, including novels, song lyrics, emails, blogs and computer programs
 - › **Dramatic works**, including dance, mime and scenario or script for a film
 - › **Musical works**, including sheet music and other musical compositions
 - › **Graphic works**, including drawings, paintings and maps
 - › **Artistic works**, including graphic works (described above), photographs, sculptures, models and works of architecture
-

The longer of:

- › 50 years from the end of the calendar year in which the work was made
 - › 50 years from the end of the calendar year in which the work was made available to the public
-

50 years from the end of the calendar year in which the communication work was first communicated to the public

- › **Communication works**, including the broadcast of a TV programme
-

25 years from the end of the calendar year in which the edition is first published

- › **Typographical arrangements of published editions**, including the style, composition, layout and general appearance of a page of a published work such as magazine design styling, layout of a newspaper or book cover
-

Compilations of works (which are not dramatic or musical works) that are written, spoken or sung are also protected as **literary works**.

There are some rules which change the length of copyright protection for a work. For example, if a work is **computer-generated** (i.e. there is no human author) or if the work is of **unknown authorship**, copyright expires 50 years from the end of the year that the work was made.

Separate rules apply to **industrially applied artistic works** (discussed at page 10).

For a **work of joint authorship**, the period is calculated from the date that the last of the authors dies.

Where a work is made by a person employed by the Crown (or engaged under a contract) the Crown owns any copyright in that work. A work which has **Crown copyright** will usually be protected for 100 years from the end of the calendar year in which the work was made.

A number of official documents are not protected by copyright, including statutes, regulations and court judgments.

The first owner of copyright is generally the author

Usually the **author** is the first owner of copyright.

Unlike for other intellectual property rights like **trade marks**, **patents** and **designs**, the author does not need to register their creative work for copyright to exist.

The **first owner of copyright** will not be the author in the following scenarios:

- › for literary, dramatic, musical or artistic works that are created in the course of employment, the copyright owner is the author's employer, and
- › where certain works are commissioned (such as the taking of a photograph or the making of a computer program, painting, sculpture, film or sound recording), the copyright owner of the work is the commissioner (the **commissioning rule**).

These are the default rules and can be changed by contract.

A number of copyright works can sit within a creative work

Sometimes a number of copyright works are contained within a single creative work. For example, recorded music generally involves:

- › a **literary work** (the lyrics written by the songwriter)
- › a **musical work** (the musical score written by the composer), and
- › a **sound recording** (the recording of the song).

Each copyright work may have a different owner.

The exclusive rights can be transferred or licensed

Copyright owners can transfer one or more of their exclusive rights to another person. They can also give another person permission to do one of the things only copyright owners can do (for example, to copy or distribute the works).

The permission, along with any conditions of use, is a **copyright licence**.

Copyright licensing arrangements can be complex. A copyright owner can license different rights to different licensees. For example, the copyright owner of a manuscript could issue the right to make copies to a printing company and the right to issue copies to the public to a distributor.

There are exceptions to the exclusive rights

Certain exceptions to copyright owners' exclusive rights are set out in the *Copyright Act*, such as:

- › **Fair dealing exceptions**, including for the purposes of criticism, review, news reporting or private study
- › **Educational exceptions**, including limited copying and communicating of works for certain educational purposes
- › **Libraries and archives exceptions**, including copying for preservation purposes
- › **Literary, dramatic, musical and artistic work exceptions**, including provision of braille copies for the visually impaired and special exceptions for industrially applied artistic works
- › **Exceptions relating to representations of works on public display**, including taking photographs and communicating images of buildings or sculptures on public display
- › **Computer program, sound recording, film and communication work exceptions**, including backing up, decompiling and studying computer programs; time-shifting; free public playing of works
- › **Internet service provider liability is limited**, if certain circumstances are met.

Authors and directors have moral rights

In general, authors of literary, dramatic, musical or artistic copyright works have **moral rights** under the *Copyright Act*. This includes the right to:

- › be identified as the author of the work, and
- › object to derogatory treatment of the work.

Directors of films also have these rights. Moral rights cannot be gifted or sold to another person, however they may be waived (given up).

Performers are granted rights over the recording of their performance

Performers of a song or speech are given the right to prevent the recording of their performance (other than for private and domestic use) and to prevent any copying or dissemination of any unconsented recording.

Copyright can be enforced by taking court action

Copyright is personal property and it is up to the owner to decide how to benefit from and enforce their copyright. Sometimes unauthorised use can be resolved through private negotiations.

If a copyright dispute cannot be resolved between the parties, a party can lodge court proceedings. However, there are some criminal activities that can be dealt with by the police. These activities relate to more serious dealings with infringing copyright works.

The Copyright Tribunal can address certain disputes

The Copyright Tribunal can hear and decide disputes between licensing bodies and those who hold (or seek to hold) copyright licences. It also hears applications and makes awards in respect of claims for infringement of copyright as a result of file sharing over the internet (the **three notice regime**).

Collecting societies and other licensing bodies can play an important role

Collecting societies and other licensing bodies can provide centralised copyright licensing services to copyright users and distribute licensing fees or royalties to copyright owners.

For example, **APRA AMCOS** has over 87,000 members – songwriters, composers and music publishers – across New Zealand and Australia. APRA AMCOS licenses organisations to play, perform, copy, record or make available its members' music. Because APRA AMCOS is affiliated with similar collecting societies around the world, APRA AMCOS also pays royalties to New Zealand and Australian members for use of their copyright works overseas.

People can proactively share their copyright works for re-use

Sometimes copyright owners want the public to be able to re-use their works. Copyright owners can apply a licence to their work to give everyone a range of permissions.

Creative Commons licences are an example. These licences are used by many individuals and organisations, both locally and internationally.

Creative Commons Aotearoa New Zealand refers to itself as the kaitiaki of the **six New Zealand Creative Commons licences**. There are six Creative Commons licences to choose from, as well as international versions. Each licence sets out the permissions which attach to the work.

Creative Commons Licences	Can someone use my work to make money	Can someone change my work
 ATTRIBUTION	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
 ATTRIBUTION-SHAREALIKE Must relicence BY-SA	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
 ATTRIBUTION-NONCOMMERCIAL	<input type="checkbox"/>	<input checked="" type="checkbox"/>
 ATTRIBUTION-NODERIVS	<input checked="" type="checkbox"/>	<input type="checkbox"/>
 ATTRIBUTION-NONCOMMERCIAL-NODERIVS	<input type="checkbox"/>	<input type="checkbox"/>
 ATTRIBUTION-NONCOMMERCIAL-SHAREALIKE Must relicence BY-NC-SA	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Source: Excerpt from Creative Commons Aotearoa New Zealand brochure (reformatted) licensed under CC BY 3.0 NZ

New Zealand Government Open Access and Licensing (NZGOAL) framework

The NZGOAL framework provides guidance to government agencies when releasing copyright works and non-copyright material. The framework encourages government agencies to apply Creative Commons licences to copyright works which are appropriate for release and re-use.

See the inside cover of this report for licensing information relating to this publication.

Taonga works and mātauranga Māori

Māori language (te reo Māori), artistry/motifs, performance art and concepts have been influential in New Zealand's creative sector. The use of mātauranga Māori, taonga works and taonga-derived works has also been the subject of the Waitangi Tribunal's report entitled *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (known as the **WAI 262 report**).

In the report, the Tribunal recommended that mechanisms be put in place to provide greater protection for the kaitiaki interest in mātauranga Māori, taonga works and taonga-derived works. The WAI 262 report is available on the **Waitangi Tribunal website**.

The WAI 262 claim raised a number of complex issues about the nature of intellectual property, the nature of the kaitiaki relationship with taonga works, taonga-derived works and mātauranga Māori, and how the interface between the two systems should operate. Given the complexity and importance of these issues, they should be considered, in consultation with iwi and hapū, in their own right.

The timing of this has yet to be determined.

Copyright has an international dimension

There are a number of international agreements which address copyright. These include:

- › treaties administered by the **World Intellectual Property Organization**, including the **Berne Convention for the Protection of Literary and Artistic Works 1886 (Berne Convention)**
- › treaties which bind members of the **World Trade Organization**, including the agreement on **Trade-Related Aspects of Intellectual Property Rights (TRIPS)**, and
- › trade agreements between specific nations or groups of nations.

A number of treaties, including the Berne Convention and TRIPS, require parties to apply the principle of 'national treatment' (with some exceptions). Broadly, this means that a work originating in another country that is party to the agreement must be given the same protection as a work originating in New Zealand (and vice versa). Other obligations, such as 'most favoured nation' or 'reciprocity', may also apply.

For more on the international dimension of copyright and recent developments, see **Appendix 1** for further reading.

The Copyright Act allows parallel importing of goods

The *Copyright Act* prohibits people from importing infringing copies of copyright works into New Zealand, but allows for **parallel importing** of non-infringing copies of a work into New Zealand.

This allows retailers, wholesalers and consumers to obtain goods protected by copyright directly from licensed overseas suppliers for resale in New Zealand, rather than dealing with local suppliers, licensees or agents. There is also an exception for consumers importing copyright protected works for private and domestic use.

REGISTERED DESIGNS

Under the **Designs Act 1953**, a new or original design can be registered with the **Intellectual Property Office of New Zealand**. A **design** can be features of shape, configuration, pattern or ornament applied to an article by any industrial process that appeal to and are judged solely by the eye. Its features of shape or configuration must be more than purely functional. A design is not considered new or original if it is the same as another prior registered design or has previously been published in New Zealand, or differs from an earlier design only in immaterial details or in features which are common variants used in trade.

Designs applied to certain types of articles cannot be registered. These articles include works of sculpture, wall plaques, medals and printed matter of a literary or artistic character such as calendars, certificates, dressmaking patterns, greetings cards, plans, post cards, maps, stamps and trade advertisements.

Registered designs and copyright

An owner of a registered design has a number of exclusive rights in relation to any article for which the design is registered. These exclusive rights include the right to make or import for sale, to use for the purposes of trade or business, or to sell or hire, any article in respect of which the design is registered. The initial term of protection for a registered design is five years. Protection can be renewed up to a maximum of 15 years.

Original artistic works which are **industrially applied** (i.e. produced/manufactured) can also be protected by copyright. Protection for an industrially applied design under the *Copyright Act* is effectively limited to 16 years where the work has a primarily utilitarian function. If the work is of artistic craftsmanship protection is limited to 25 years. Works of architecture and sculptures that do not have a primarily utilitarian function receive a copyright term of 50 years from the end of the calendar year in which the author dies.

In many jurisdictions where industrially applied designs are registrable, such designs are not eligible for copyright protection. Where an owner relies on the *Copyright Act* for protection in New Zealand, they may not be able to use that protection as a basis for obtaining protection overseas.

Film & TV

AUDIOVISUAL CONTENT, INCLUDING FILM, TELEVISION AND INTERNET VIDEO FORMATS LIKE WEBSERIES

Digital technology is impacting all forms of content creation – from high-end special effects allowing more immersive viewing experiences, to new ways to produce content leading to the explosion of YouTube stars, webseries and video tutorials.

Consumers have increasing choice and control over when and how they engage with content. The rapid growth of digital distribution has also brought challenges for the industry, impacting traditional revenue streams.

Photo source: Reuters Photographer/Reuters/One Shot



Film & TV

COPYRIGHT IN FILM, TV AND INTERNET

VIDEO CONTENT

Film, television and internet video content usually involves multiple kinds of copyright, and each copyright-protected work might have a different author or owner.

The *Copyright Act* recognises a **film** as a recording from which a moving image may be produced (and includes any moving images in movies, television and internet video). The accompanying recorded sound is recognised as a **sound recording**. The author of the film and sound recording is the person who makes the arrangements necessary for the making of the film or recording (generally the producer).

The film may be based on, or include parts of, existing copyright works including:

- › **literary works** (e.g. a book, or the characters, themes or plot from a book)
- › **musical works / sound recording** (e.g. a publicly released single), and
- › **films** (e.g. footage from another film).

The author of a film should seek permission from a copyright owner for the right to adapt a book or use existing music or footage. The permission, along with any conditions of use, is a **copyright licence**.

A film can also be comprised of many other copyright works that may have been created specifically for the film, such as:

- › **dramatic works**, including the scenario or script for the film
- › **musical works** (sheet music) and **literary works** (song lyrics) for any music that is composed for the film, and
- › **artistic works** including photographs, graphic works or models.

A person who writes a script or composed music for a film is usually the owner of copyright and will need to **assign** (transfer) their copyright or **license** their rights to that script or music for use in a film.

Performers of a song or speech are also given some rights under the *Copyright Act*. For example, **performers' rights** are infringed if an unconsented recording of their live performance is played in public.

The transmission of a movie, television show or internet video (e.g. a broadcast or internet transmission) is a **communication work**. The author of a communication work is the person who makes the communication work (e.g. the broadcaster).

Exceptions for personal use

There are some specific exceptions to the rules around communication works, where copies or recordings are made for personal use. For example, provided certain rules are followed a television programme can be recorded for the purpose of watching the recording at a more convenient time.

Moral rights

In general, directors of films and authors of literary, dramatic, musical and artistic works have **moral rights** under the *Copyright Act*. This includes the right to be identified as the author or director and the right to object to derogatory treatment of the work (e.g. deletions or alterations).

Directors and other creative contributors are often required to waive some or all of their moral rights (e.g. sign a contract promising not to assert their right to object to derogatory treatment). Moral rights cannot be assigned (transferred) under the *Copyright Act*.

Licensing by Screenrights

Educational institutions, such as schools, universities, polytechnics, colleges and wānanga, may choose to get a **Screenrights** licence. The licence allows the institution to use broadcast material in various ways, including making copies and making copies available on an intranet. Licence fees are distributed to copyright owners.

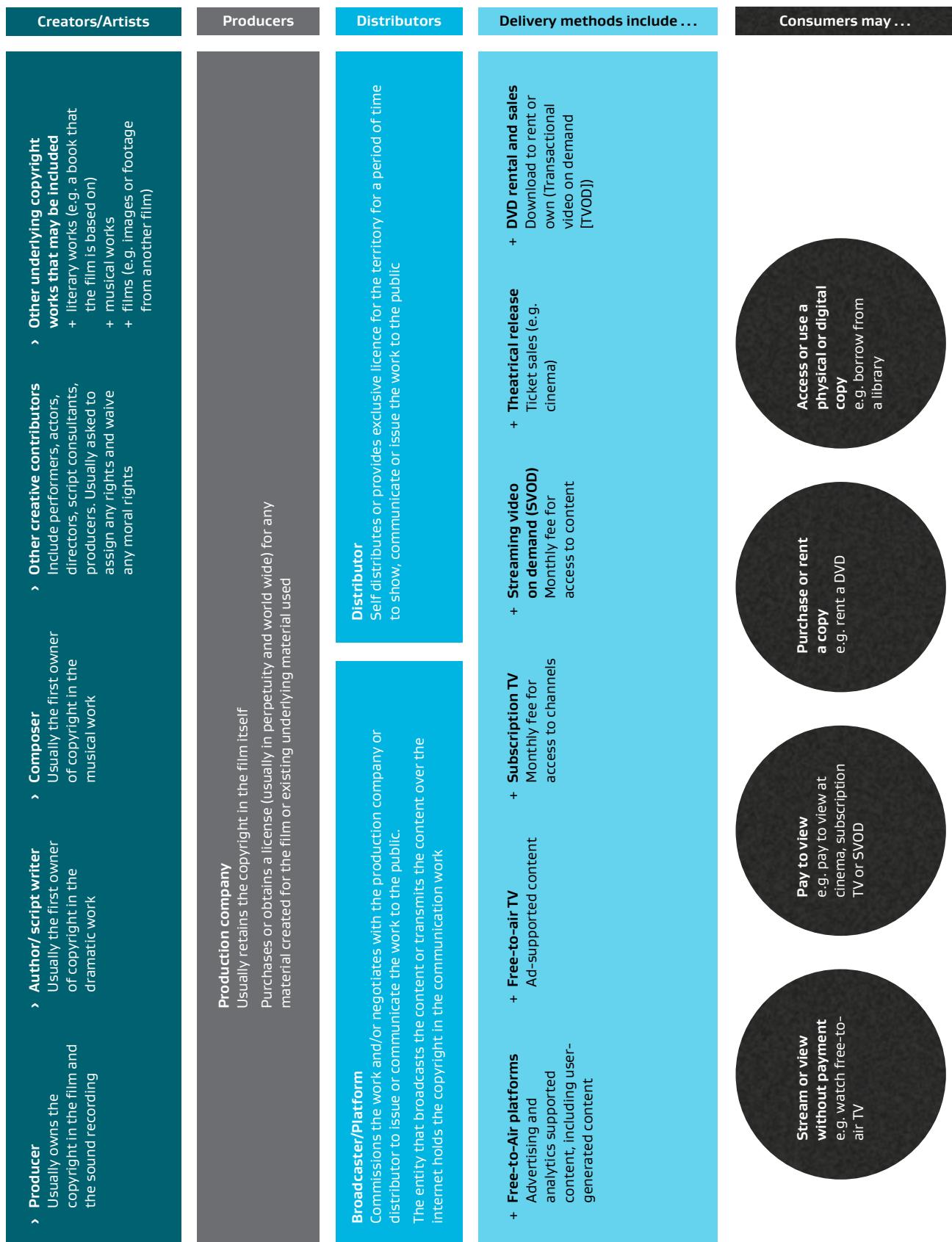
Funding and revenue

Feature films, television and some internet video content can be very costly to produce. Production of local content is generally heavily dependent on government funding from sources such as NZ On Air, the New Zealand Film Commission and the New Zealand Government Fund Screen Incentive Programme. Funding also comes from a range of other sources including distributors (pre-sale fee), broadcasters (commissioning fee), and other investors. Revenue is generated primarily by licensing content to distributors, including broadcasters, online platforms, cinemas or other distribution channels.

Chain of title

The **chain of title** is documentation of all the agreements that give the production company permission to use other people's material and contributions in the film. This documentation is usually essential to get finance and distribution deals for films and television.

This diagram shows those who are likely to own or license copyright in feature films, television and internet video content, as well as the main ways that content is disseminated and returns are generated.





CONTENT IS BEING CREATED IN NEW WAYS

INCREASING COMPETITION, FUNDING ARRANGEMENTS AND DIGITAL TECHNOLOGY ARE IMPACTING CONTENT CREATION AND GIVING RISE TO NEW FORMS OF CREATIVE CONTENT.

A range of factors are influencing early stages of content development

Connections and experience can be as important as the idea when developing concepts and scenarios.

"There are really no truly original ideas anymore. Broadcasters will say I've seen five ideas like yours, but I'll go with you because you have unique access, relationships or angle on a story" —Production company

We heard that a more competitive market had changed how ideas are pitched and picked up.

"We come up with a bit of a sizzle – a glossy couple of pages to get broadcasters' interest. If we get a bite and funding commitments we develop further. With so many production houses now, there's a much higher failure rate so we no longer do massive pitches complete with scripts" —Production company

Some talked about the value of collaborative processes, from testing ideas, right through to the editing stage.



"WE ALL COME TOGETHER – WRITER, ACTORS AND COMEDIANS TO TALK ABOUT THE SCRIPT AND STRESS-TEST CONCEPTS AND IDEAS. WRITERS ARE OFTEN CUT OUT AFTER DELIVERING THE SCRIPT, BUT WE INVOLVE THEM RIGHT THROUGH TO EDITING"
Independent writer & producer

Some had adopted a flexible approach to matching ideas to funding options.

"We look at different pockets of funding and their policies and where the idea could possibly fit the criteria for funding"
—Independent writer & producer

Others thought that the process of scriptwriting can be constrained by funding requirements.

"If you are seeking funding you tend to have to provide tight treatments and scripts which inhibit creativity. Scripting a documentary is total anathema" —Independent film maker

Digital technology has given rise to new forms of content

Digital technology has provided some creators with more flexibility and control.



"IT IS NOW POSSIBLE TO BE YOUR OWN CREATOR, PRODUCER, DISTRIBUTOR WHICH GIVES YOU GREATER CONTROL OVER YOUR IDEAS AND CONTENT"
Independent writer & producer

Visual effects technology is allowing for more immersive viewing experiences, but also requires increasingly higher levels of investment and expertise.

"There's an ever increasing effort into making things look real. Visual effects are expensive, requiring more technicians, more time for digital manipulation, and more software, camera innovation and drones" —Industry body

A number of people spoke about improvements in the viewing experience that are on the horizon (such as the development of technology to facilitate virtual reality and augmented reality content).

"Our business is about enabling content creators all over the world to create content in this new format, which will be important for virtual reality and augmented reality"
—Production company

Some production companies are preparing to adopt these new technologies.

"We have made a lot of 3D and as a company we want to be on the leading edge. We are not the innovators but we are leaders at putting innovations into practice in a best practice way" —Production company

Digital technology has also made it easier and cheaper to produce, distribute and monetise some forms of content. This has given rise to an explosion of internet video content leading to YouTube stars, web-based TV services and video tutorials on how to do just about everything. User-generated content also plays a growing role in a smartphone world.



"EVEN WITH WILDLIFE, CAMERA PHONES AND EASY ACCESS TO GOOD RECORDING DEVICES MEANS JOE BLOGGS ON SAFARI CAN RECORD INCREDIBLE INTERACTIONS WITH NATURE THAT A CREW ON LOCATION MIGHT NOT EVER CAPTURE"
Production company

Another form of emerging content is webseries, which are generally cheaper to produce and allow greater creativity.

"When you take content to a broadcaster, they are the ultimate arbiter – they tell you how content should be created and what it should look like. Webseries allow much greater creative freedom" —Industry body

Webseries can also allow creators to be more responsive and to focus on niche audiences.

"My children were watching TV online and then playing outside with American accents. I wanted to make sure they could watch content with New Zealand accents and themes – something straight to web, quick to shoot, that children could be in control of. The show is now going to be re-versioned in te reo Māori" —Independent writer & producer

Webseries and other non-traditional content were seen by some as business cards or a more cost effective method of building a portfolio.



THE CONTENT DELIVERY LANDSCAPE IS CHANGING

DIGITAL TECHNOLOGY HAS ALLOWED NEW METHODS OF CONTENT DELIVERY. THE RAPID GROWTH OF DIGITAL DISTRIBUTION HAS ALSO BROUGHT NEW CHALLENGES, IMPACTING TRADITIONAL REVENUE STREAMS.

New forms of content delivery have changed the landscape

Digital technology has reduced some costs for online video distribution services, with a dramatic rise in numbers subscribing to subscription video on demand (**SVOD**) services.

"Video distribution is no longer limited by quantity of spectrum or proprietary assets to a cable subscription. Any company can go on the internet and launch a video-on-demand or a transactional video service" —Platform

We heard that consumers enjoy the flexibility of streaming film and TV content.

"I tend to access the programmes I want to watch via the internet... There are no ads, and I can watch what I want to, as I want to watch it"

—Consumer focus group participant

SVOD services and ad-supported platforms have opened new opportunities for monetising existing content.



"TECHNOLOGY HAS OPENED A WHOLE HEAP OF DOORS FOR CREATIVES TO 'SECOND SHELF' CONTENT AND THINK ABOUT HOW WE CAN SPREAD IT ACROSS ALL THESE DIFFERENT PLATFORMS"

Independent writer & producer

Technology is impacting traditional revenue streams

Use of Virtual Private Networks (**VPNs**) was identified as an issue for the television sector. Distributors often use geoblocking to protect their territorial licences in an online world. Geoblocking is the practice of restricting access to content based upon the user's geographical location. It enables copyright owners and licensees to offer different services to consumers based on their location.

VPNs are used for a number of purposes, including privacy and security online (by providing a secure channel through the internet). They can also be used by consumers to access an overseas website and stream content. The content may be unavailable in New Zealand or a local distributor may have paid an exclusive licence to communicate the content in New Zealand.

"I mainly watch the shows as soon as they are available online usually from a foreign online viewing website. I find that if I wait for a show to get here in New Zealand it is way behind or even if a little behind I still run the risk of seeing spoilers online" —Consumer focus group participant

For the television sector, use of VPNs to access content from overseas websites can result in reduced local viewership numbers (which impacts advertising revenue) and/or a reduction in subscriptions.

"Creators cannot be properly compensated if people can use VPNs to access content unlawfully or without paying the exclusive licensee" —Broadcaster

Advertisers are also facing challenges in the online world. Advertising is a major funding mechanism for content that is free-to-air.

The use of ad-blocking technology and technology that makes ads appear below the screen were described as particular challenges.

"Consumers can choose to watch content for free and avoid the funding mechanism. Ad-blocking alone is projected to cost advertisers US\$40 billion globally in 2016"

—Industry body

While measures have been adopted and continue to be developed to combat ad-blocking, these trends are impacting decision-making in the advertising sector with a flow-on effect to the creation and delivery of content more generally.



"IF THE ADVERTISER IS NOT SEEING THE BENEFIT OF ACTIVITY IN TERMS OF CONSUMER RESPONSES, THEN THEY HAVE TO CHANGE THE MEDIA USED OR SPEND LESS"

Industry body

We heard there is a move to spend less on mainstream media and more on digital/interactive media.



SUBSECTOR 1/7

Changing methods of distribution have made it possible for independent producers to get their content onto major international platforms. However, this requires using the services of preferred aggregators (who charge a flat fee and/or a small profit share).

"You generally need to use a digital aggregator to sell content to major distributors. There are only three aggregators that we know of in the Asia-Pacific region"
—Industry body

Reinvestment is important for the creation of new content

People spoke about the importance of returns for reinvestment in new content.

"When you pay for good content, you are also paying for shows that have failed in the past. Big international producers need to achieve reasonable returns on their investment to be able to keep creating new content. A system of exclusive territorial licenses and international revenues is critical for investment in new, risky content" —Broadcaster

Some also spoke of the difficulties of attracting private investment.

"It's difficult to attract private investment. Film is a risky investment, as many films do not generate enough revenue to provide returns, and we don't have the incentives for investment that exist in the US or UK" —Industry body

Documentary makers we spoke to thought that broadcasters had become more risk averse and now appear to seek more reality-driven formats.

"Television now is quite reality-TV driven which narrows down your options in terms of documentary-making. We pitch a lot of ideas to television, most of them they say 'no' because it doesn't fit their format" —Documentary maker

We also heard how challenges in generating revenue are driving new types of content.

"Because of the nature of platforms and the way people consume content we are beginning to see more 'native advertising'. Essentially it's paid content that embeds brand messages into the story" —Industry body

Although, we heard that certain boundaries must be observed.

"The line of advertising in advertorial has to be strictly maintained. People need to know what they're seeing isn't news" —Media company

Some also spoke of the importance of retaining copyright and other intellectual property (IP) to ensure returns stay in New Zealand.

"We seek to own and control as much IP as possible. The grants provided by the New Zealand Government enables New Zealand companies to own a bigger share of IP they have produced. The returns this generates delivers revenue back into the New Zealand economy rather than more of the revenue heading offshore" —Production company



CONSUMER BEHAVIOUR AND EXPECTATIONS ARE CHANGING

TECHNOLOGY IS CREATING NEW OPPORTUNITIES FOR CREATORS TO CONNECT AND RESPOND TO CONSUMERS. IT IS ALSO ALLOWING CONSUMERS INCREASING CHOICE AND CONTROL OVER WHEN AND HOW THEY VIEW CONTENT. WE HEARD ABOUT DIFFICULTIES COMBATING UNAUTHORISED USE AND VARIOUS INDUSTRY RESPONSES.

There are new opportunities to disseminate content and connect to audiences

New distribution models and online streaming platforms are providing opportunities for New Zealand creators to reach new markets and target niche audiences.

"Broadcasters used to be content gatekeepers seeking products for the non-discriminating 80%. Now you can stay true to your vision and produce for the discerning 20% internationally and reach 100% of that audience"
—Production company

With these opportunities come new challenges reaching an audience.



"THE STRUGGLE BECOMES ONE FOR EYEBALLS AND EARS BECAUSE THERE'S SO MUCH NOISE OUT THERE"

Independent film maker

We also heard how analytics are informing decision-making.

"Some of our platforms have analytics employed on them. We can look at real-time download information and at who's accessing what content where, to inform programming decisions. There is more data than one person can digest"
—Media company

Consumer behaviours and expectations are changing

Consumers have increasing choice and control over the type of content they want to watch, and when and how they want to watch it.



"THERE IS A LOT OF AUDIENCE DEMOCRACY BECAUSE PLATFORMS ARE ALLOWING CONSUMERS TO CHOOSE WHICH CONTENT THEY WOULD LIKE TO SEE AND WHEN"

Independent writer & producer

This is driving changes in the timing of content delivery, impacting the traditional 'windowing' system. Windows are the periods of time a certain type of media is allowed to screen a certain film or television content. For example the traditional windows for a feature film include: theatrical; retail sales and rentals; pay-per-view/ subscription; and finally free-to-air television and SVOD. They are determined by the rightsholder, which may be an overseas studio.

"As entertainment consumption has moved into the home we have seen the windows for different rights to the content become smaller. This is consumer-driven" —Platform

However, many strongly felt that greater choice and control had resulted in a culture of entitlement, in which consumers expect content for free.

"Consumers have gone from 'I like that, I will buy it' to 'I like that, I will take it'" —Independent film maker

We heard that availability of content can play a role in consumers deciding to download pirated content.

"I know it is not OK to download TV programs or movies ... but I also object to having my options becoming limited to [current] programming" —Consumer focus group participant

Many in the sector felt that consumers were not aware of the impact piracy had on content creation. One consumer shared this sentiment.

"If there was a face to the crime that might make a difference to people not paying. Maybe show the cost and effort of what it takes to make a song or produce a DVD etc. All the people involved and how they need to get paid to survive might change people's minds" —Consumer focus group participant

New forms of unauthorised use are difficult to combat

People spoke about challenges with enforcement, particularly in the context of new ways to access content without payment.

"There are no tools to combat streaming – the three notice regime does not apply. The visual quality of some live stream apps is low now, but will improve and become more of a challenge over time" —Broadcaster

The cost of litigation was raised as a significant obstacle to taking enforcement action.

"The Copyright Act is an arcane and blunt instrument that does not lend itself to the challenges of modern piracy. The chances of getting caught, combined with the chances that the extremely high cost of taking action is worth it to a rightsholder are very low" —Platform

We also heard frustrations with safe harbour regimes and notice and takedown procedures. Most countries, including New Zealand, provide internet service providers (ISPs) (including online hosts) with safe harbours to limit the liability of ISPs. To fall within the safe harbours, ISPs must remove or disable access to content they host when notified that the content is infringing. The rightsholder provides the ISP with a notice and the ISP takes down the content.



"I HAVE USED TAKEDOWN NOTICES, BUT IT'S A WHACK-A-MOLE PROCESS – ONE VERSION IS TAKEN DOWN AND ANOTHER POPS UP"
Independent film maker

Consequences of unauthorised content being uploaded on to ISP platforms can be significant.

"The film was set for a theatrical run but was taken off as the movie appeared on a platform, with 44,000 views. DVD sales also dried up completely" —Independent film maker

Responses to new forms of unauthorised use have varying success

We heard about a range of responses to these challenges, including responses led by platforms hosting user-generated content.

"We developed our content identification system so that rightsholders can automatically claim their content when it is uploaded by a third party onto our platform. The rightsholder can choose to leave the content up and track viewing statistics, block the content altogether, or monetise the content through advertising" —Platform

We heard that New Zealand rightsholders generally need to use third party intermediaries to access this tool, and that it can be difficult to use.

Some considered that providing content in ways that meet consumer demand was a solution to piracy.



"THE BEST WAY TO DEAL WITH PIRACY IS TO SELL ONLINE, AND ENSURE THE CONTENT IS AVAILABLE FOR THE RIGHT PRICE"
Production company

Some studies show declining rates of piracy when better, more convenient, legitimate alternatives are provided. However, we heard from some that getting content online quickly had not helped.

"We have tried some practical measures to counter piracy such as quick turnarounds on content – airing shows a few hours after it has been aired in the US or even simulcast [broadcast at the same time]. But getting content online quickly doesn't really help" —Broadcaster

We also heard that shorter release windows and 'day-and-date' releases are aimed at combating piracy by making content available in more media formats sooner. However, most felt that New Zealand has little control over these international trends.

"New Zealand cannot affect worldwide trends – and these are the biggest factors affecting the New Zealand market" —Funding body



THERE ARE A RANGE OF VIEWS AROUND OWNERSHIP, USE AND RE-USE OF WORKS

SOME QUESTIONED WHETHER CURRENT SETTINGS AND PRACTICES ARE LEADING TO GOOD OUTCOMES IN THE USE AND RE-USE OF CONTENT.

There are questions around re-use and who should hold copyright

Producers tend to require either an assignment of copyright, or a license to use any copyright work contained in the content because showing ‘chain of title’ is critical to obtain production funding. There were concerns that some content gets ‘locked away’ by the producer.

“Local content gets locked up by those that produced or commissioned the work. We should have a ‘use it or lose it’ approach” —Platform

Some considered that where producers have accessed government funding, there should be conditions in place to incentivise making their work available after initial distribution. On the other hand, some workshop attendees were of the view that those who commission and invest in content deserve the chance to fully exploit it in their own time.

Some people spoke about the importance of receiving copyright, even if it is assigned at the outset.

“Directors are not recognised as authors of films, so directors have no negotiation tools so there is no negotiation” —Industry body

We heard that directors are integral to the process of creation and should be recognised as authors. On the other hand, a number of attendees at the Auckland workshop considered that the process of managing and clearing rights was difficult and felt that any additional rights would add to the complexity.

Some expressed concerns that low awareness of copyright laws among creators was impacting levels of unauthorised use and their ability to get returns for re-use. There was speculation that this might be due to the complexity of the regime combined with a lack of education.

“There’s a great need to educate content makers about rights, both when they use material of others and when their material is being re-used” —Archive

In some new internet video formats, the cost of production can be very low. This means that producers may not seek funding and consequently may not consider rights upfront (i.e. obtain the chain of title – discussed above). This can cause problems if the producer tries to sell the content.

Technology has made it easier to find content, but not necessarily easier to use it

We heard that new platforms and ways of accessing information are making content easier than ever to find.



“INCREASINGLY CONTENT IS MADE AVAILABLE ONLINE. IT’S EASIER TO FIND, BUT IT’S HARDER TO LOCATE THE OWNER”

Production company

Identifying rightsholders can be resource-intensive and it is often not possible to track down an owner to get permission in production timeframes. Using content often requires a risk assessment which means a lot of content, particularly older content, is locked up.

“New Zealand has very few precedents in what is fair dealing so it is more difficult to navigate the risk in this market than in other markets” —Production company

Some felt that New Zealand copyright settings put producers at a disadvantage in certain genres.

“We are unable to make use of fair use, which can lead to poorer quality inputs, particularly in documentary making. We can’t compete in an uneven environment”

— Production company

Others thought that copyright settings may be resulting in less creativity and experimentation with music inputs.

“When we use temp music to work out a score, it can be expensive or difficult to source music to try out”

—Independent film maker

We heard that exceptions for preserving heritage archival material were operating well.

“They facilitate the preservation of content, without complex licensing arrangements” —Archive

Some suggested that the exceptions do not appear to facilitate the re-use of heritage material.

“It’s crucial we make heritage content available for re-use both by making public domain works more accessible and by addressing ‘orphan works’” —Production company

Music & sound recordings

MUSICAL COMPOSITIONS, LYRICS, RECORDED MUSIC AND OTHER SOUND RECORDINGS (SUCH AS PODCASTS AND SOUND EFFECTS)

Creating music is often highly collaborative. Recording of music and sound has become easier as digital technology has reduced costs for some creators.

New ways to distribute music and other sound recordings, including online streaming, are having a significant impact on the sector – resulting in increased consumer choice, increased industry access to valuable data about target markets and new forms of authorised use.

Photo source: iStock.com/bernardbodo



Music & sound recordings

COPYRIGHT IN MUSIC & SOUND RECORDINGS

The *Copyright Act* recognises three categories of creative work relating to music and sound recordings:

- › A **musical work** is a work consisting of music (e.g. sheet music), but excludes any associated lyrics or actions.
- › A **literary work** includes song lyrics.
- › A **sound recording** is a recording of sounds from which the sounds may be reproduced. This includes recordings of literary works (e.g. audio books), musical works, sound effects and more. It also includes the recorded sound accompanying any movie or audiovisual work.

A recorded song will usually involve all three kinds of copyright and each copyright work might have a different author.

Some new copyright works may include parts of existing works. For example, a new song may use the chorus of an existing song. In this case, the author of the new song should have sought permission from the copyright owner(s) of the existing song. The permission, along with any conditions of use, is a **copyright licence**.

In general, authors of literary and musical works have **moral rights** under the *Copyright Act*. This includes the right to be identified as the author in certain circumstances.

Performers of a song or speech are also given some rights under the *Copyright Act*. For example, **performers' rights** are infringed if their live performance is recorded without their consent, and that recording is played in public.

If a piece of music is composed in the course of employment, the employer is the copyright owner of the **musical work** and any **literary work**. Outside of employment, the author of the musical work or literary work will be the owner of these works (unless there is a contract agreeing otherwise).

The author of a **sound recording** is the person who makes the arrangements necessary for the making of the sound recording. The **commissioning rule** applies to sound recordings. This means that if a person is commissioned to make a sound recording, the copyright owner is the commissioner.

The transmission of music, audio or other sounds (e.g. a radio broadcast or internet transmission) is a **communication work**. The author of a communication work is the person who makes the communication work (e.g. the broadcaster).

Exceptions for personal use

There are some specific exceptions to the rules around sound recordings and communication works, where copies or recordings are made for personal use. For example, provided certain rules are followed:

- › a radio broadcast can be recorded for the purpose of listening to the recording at a more convenient time, and
- › a copy of a legitimately acquired sound recording can be made for personal use on a different device.

Collecting societies and other licensing bodies

Collecting societies and other licensing bodies play a key role in the music subsector. The main bodies are:

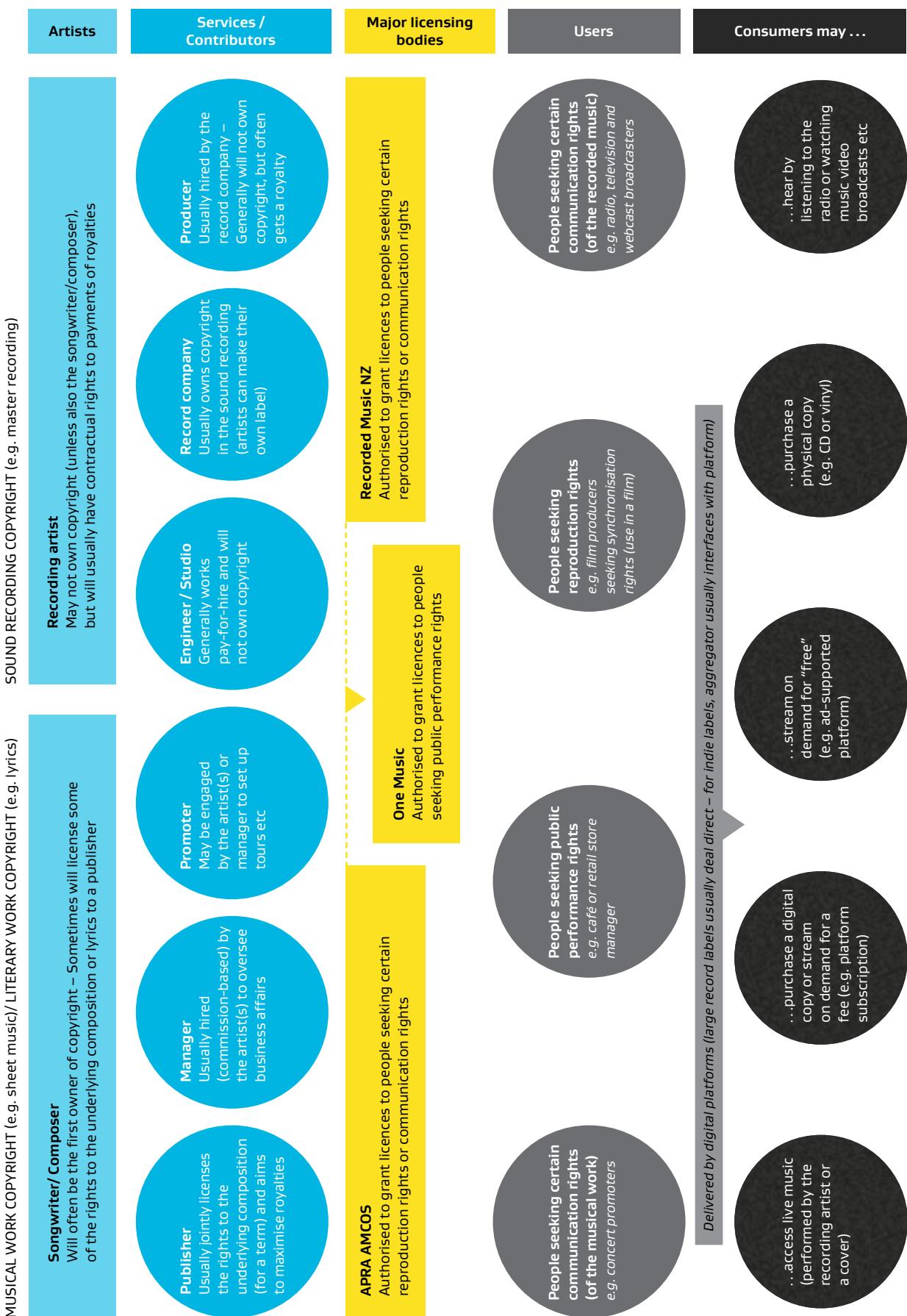
- › **APRA AMCOS** licenses organisations to play, perform, copy, record or make available its members' musical works. APRA AMCOS has over 87,000 members – songwriters, composers and music publishers – across New Zealand and Australia.
- › **Recorded Music NZ** licenses radio and television broadcasters (and some webcast services) to use members' sound recordings. It is the industry representation, advocacy and licensing organisation for recording artists and recording labels.
- › **OneMusic** is a joint initiative between APRA and Recorded Music. OneMusic offers businesses a single music licence to use members' music in public (covering the works of both Recorded Music NZ's and APRA's members).

Copyright owners authorise the relevant organisation to license the use of their work. People seeking licences could include a concert promoter, a business seeking to play music in its premises or a TV broadcaster.

Aggregators

Aggregators (or digital music distributors) also play a role in music distribution. Aggregators help to distribute and manage works through digital channels and networks, usually for smaller or 'indie' labels. Large record companies are likely to have direct agreements with the online stores and services.

This diagram shows those who are likely to own or license the copyright in music and recorded music, those who might play a role in the production or distribution of music, as well as the main ways that music is consumed.





RECORDING MUSIC IS EASIER (FOR SOME) AND OFTEN COLLABORATIVE

WE HEARD ABOUT WHAT MOTIVATES CREATORS AND THE WAY THAT DIGITAL TECHNOLOGY HAS REDUCED COSTS FOR SOME CREATORS, AS WELL AS THE DIFFERENT WAYS THAT NEW MUSIC CAN BUILD ON EXISTING MUSIC.

Many create to tell stories and connect with audiences

Creators tend to have more than one reason for creating music or other sound recordings. Creators spoke of telling stories, stirring debate and connecting with audiences.

"The basis of any great piece of art or music is empathy. Not to get rich" —Publisher

Many also sought to make a living from their creations.

"We occupy niches in a way that we can keep evolving and we can sustain ourselves" —Studio

Others, playing more of a role in producing or distributing music, spoke of the need to make enough money to reinvest in making quality content.

"There needs to be enough value to sustain the investment and development of an artist's career" —Record company

We also heard that it is important that creators 'on the fringes' are able to continue to produce music.

"The fringes have to be supported and grown. That's where new music is being created and the new music of today is the pop music of tomorrow" —Industry body

New music builds on existing music

People spoke of new music building on existing music. Existing music may be built on in a formal sense (e.g. under a licensing arrangement) or informally (e.g. as inspiration).



"MOST MUSIC IS GENERALLY ORIGINAL, IN TECHNICAL ASPECTS. IT MIGHT BE VERY DERIVATIVE, BUT THAT'S THE VOCABULARY OF POP MUSIC – CONSTANT BORROWING, REINVENTING, REINTERPRETING"

Funding body

A recorded song can involve several different copyright owners. However, rights in a recorded song do not always need to be dealt with in a bundle. We heard that some businesses get permission to use the musical work and the lyrics and make their own customised recording.

'Sampling' involves making direct copies of parts of an existing song which are built into a new song. We heard that some artists negotiate use of samples upfront, and others find themselves needing to make a deal with the copyright owner(s) of the sampled music post-release.

When it comes to recording traditional waiata, we heard that some seek the views of elders.

"I recorded a traditional waiata which is in the public domain. I know I can legally do that because it's in the 'public domain'. But I ring my relations from down the line to give me an opinion" —Artist

Recording music is easier than ever

As a result of digital technology, recording music is easier than ever before. We heard about people recording from their own homes, rather than needing to hire expensive studios and gear.

"It's amazing what you can do on a computer with all the right software" —Artist

This has resulted in a proliferation of new music. However, more music does not necessarily mean more quality music.



"MAKING GREAT CONTENT REQUIRES INVESTMENT. THERE IS A DIFFERENCE BETWEEN MAKING MUSIC AND MAKING GREAT MUSIC"

Record company

We also heard that the cost of producing music can differ depending on your target market. Some music producers need to invest in cutting edge technology in order to compete with global superstars.

Collaborative creation and production is common

Commercial music production rarely involves just one person. We heard a lot about collaboration within the industry.

"Top 40 music is rarely written singularly. Most are collaborations" —Industry body

Developments in digital technology have allowed collaboration across many countries at once.



"YOU HAD FOUR DIFFERENT COUNTRIES WHERE THE SONG WAS COMING TOGETHER. THAT'S WHAT TECHNOLOGY HAS DONE"

Artist

Creative processes in production were also raised. We heard that in recent years, there has been a trend for producers to be more involved in the song writing process. Some also mentioned that sound engineers have increasing creative input.

At some point, royalty splits and writing credits must be decided.

"Rule of thumb, which not everyone uses, is beats 50% and lyrics 50%. It's an industry with rules and no rules all at once" —Manager

We heard that many artists in New Zealand will hire a studio and manage the recording process themselves. Some had their own record labels. In these circumstances, an artist might own all categories of copyright within the final recorded work.



"THE ARTIST IS IN THE SEAT NOW.
THEY CALL THE SHOTS"
Manager



MUSIC & SOUND IS BEING DISTRIBUTED IN NEW WAYS

NEW WAYS OF DISTRIBUTING MUSIC AND SOUND RECORDINGS ARE IMPACTING THE SECTOR. NEW MEANS OF DISTRIBUTION INCLUDE ONLINE STREAMING, BOTH ADVERTISING-SUPPORTED AND SUBSCRIPTION-BASED.

New technology has stimulated new ways of doing things

Digital technology has facilitated new ways to distribute music and sound recordings. This has stimulated new ways of doing things. For example, radio personalities are connecting with their fan base both on air and off air (via social media) and bands are using virtual reality technologies to market their music.

Podcasts are an example of a creative format which did not exist in a pre-internet world. Podcasts are (generally) audio files which can be streamed or downloaded.



"PODCASTS ARE SUCH A DIGITAL THING. THE PLATFORM OR THE MEDIUM IS THE MESSAGE. WE COULDN'T BE DOING PODCASTS ANY OTHER WAY"
Podcast producer

Podcasts and sound effect recordings can, like music, be commercialised. For example, podcasts may include paid advertisements and sound effects can be sold via online libraries.

Monetising work can be difficult and revenue streams are changing

New ways of distributing music have also had an impact on money flows. In the pre-internet environment, sales of physical copies of recorded music were a key revenue stream. This is generally no longer the case.

Some suggested that this has resulted in decreased revenue for artists.

"My friends used to spend a lot of money supporting artists, around \$200 a month, now they pay a small percentage of that, around \$10, to stream music. They feel bad because artists aren't getting much money" —Studio
Others pointed out that whether artists received more or less money in the digital environment depended on the quality of the recording contract that the artist would have entered under the old model.

"Are artists earning less money? Depends on what deal they've got with a label. Some of them might be better off being an independent artist" —Manager

Some pointed to other areas of the industry which provide revenue opportunities for artists, such as synchronisation (granting the right to use the music to someone creating an audiovisual work, such as a film producer, interactive game studio or advertising firm).

"My theory is the money is still there for the artist, it's just moved into different areas of the industry. That's why synchronisation into film and TV and ads has become a real focus" —Publisher

Others spoke of a focus on live performance. Revenue can be generated from ticket sales as well as merchandise sales.



"I WOULD NEVER BOOK AN ACT THAT WOULDN'T BE PHENOMENAL LIVE"
Manager

We also heard about new ways to fund music creation and distribution, such as crowdfunding.

We heard that the new forms of distribution pose some challenges for rightsholders seeking to control revenue streams – especially for those wishing to prevent unauthorised use of their music in user-generated content hosted by online platforms. Attempting to control use of their music on these platforms can be resource-intensive, involving constant monitoring and multiple take-down notices (see page 17 for more on notice and takedown procedures).

"If you have something on a platform hosting user-generated content that you don't want up there, you send a takedown notice, and five seconds later it is up there again" —Industry body

In response, some platforms which host user-generated content have introduced content identification systems to check content uploaded by users against the content that copyright owners are seeking to protect. Some systems will allow copyright owners to choose whether to block the user content or allow it to be uploaded to gather advertising revenue.



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Some were of the view that in New Zealand content identification systems are not always accessible and effective.

"There are concerns in terms of access to content identification systems for smaller artists and recording labels, and holes in the capture of content uploaded"
—Industry body

We also heard that some online platforms which host user-generated content seek to license music on behalf of users.

Artists are protective of their creation

As well as commercial reward, artists seek to manage the way that their work is used.

"An artist is very particular about how their product is used – for example, to promote some commercial movie"
—Industry body

Connecting with fans is easier, and harder

Social media and new ways of distributing music has made it easier for artists and bands to connect directly with fans. It has allowed artists to distribute their works direct to consumers at a low cost.

"In terms of reaching an audience internationally, New Zealand has never had a better opportunity" —Publisher

As both recording music and distributing music have become easier, however, the increase in content can make it more difficult to get discovered.



"DISTRIBUTION OF MUSIC IS MUCH EASIER. ON THE FLIPSIDE, BECAUSE THERE'S MORE MUSIC, IT'S MORE DIFFICULT TO HAVE YOUR MUSIC HEARD"
Industry body

That is where curation comes in. Platforms have their own curation methods, often funnelling consumers toward music which the analytics suggest that they might like. Some platforms also have playlists curated by experts.

"Curated playlists are like the new radio programme. You need to get yourself on a playlist, that's the challenge these days" —Industry body

Curation, or recommendations, can come from all kinds of places. For example, artists and bands can be featured on blogs or in traditional magazines.



WAYS TO CONSUME MUSIC & SOUND ARE EVOLVING

CONSUMERS HAVE AN INCREASING NUMBER OF WAYS TO ACCESS MUSIC AND SOUND RECORDINGS. DIGITAL DISTRIBUTION HAS ALSO RESULTED IN VALUABLE DATA.

There is increased availability and accessibility of music and other sound recordings

Consumers can access music in a variety of ways. Consumers can buy physical or digital copies of recorded music, stream recorded music, listen to live broadcasts or webcasts and attend live gigs.

Music is also consumed inadvertently – playing in cafés, retail outlets, gym classes and other spaces open to the public. Where music is played in these settings, the business should usually have obtained a licence from OneMusic.

The widespread adoption of online streaming has been a major technological development in the past decade. It has resulted in new models of delivery, such as 'all-you-can-listen-to' music subscription.



"STREAMING IS GREAT. I STREAM NOW. YOU'RE ALWAYS BEING TOLD ABOUT NEW ARTISTS. IT'S SUCH A GOOD WAY OF CONSUMING MUSIC. EVEN MY DAD AND HIS MATES USE IT"

Manager

We heard that digital distribution has assisted niche genres to find audiences.

"Micro genres and the retro material – that's coming back into the fold. World music – there's no real radio station that'll cover world music. If you're really into Jamaican Chinese music, you can now find it legally" —Manager

In a world of digital downloads, streaming and social media, we also heard some are focused on creating experiences for consumers.

"You can't download the experience of a gig" —Publisher

Piracy is a concern for some creators, and a complex question for some consumers

Despite the increased accessibility of music online, some were sceptical that this would change the consumption habits of infringing users.

"People who pirate will still pirate. Why pay \$13 when they can get it for free?" —Studio

We also heard that a new form of piracy has emerged called 'stream ripping'. Stream ripping services enable users to input a video URL and convert it into a downloadable audio file.

"We have a massive piracy issue going on" —Industry body

Others were not concerned about piracy.

"Piracy? I never really paid any attention to it. Years ago, someone got a band to sign a burned CD, but bought 4 t-shirts. So like, sweet. Kids find a way around everything" —Manager

This sentiment was shared by a consumer.

"People have to think of another way to generate income from material other than selling it e.g. . . . heavy with advertisements in the first five minutes" —Consumer focus group participant

Some consumers felt differently about piracy depending on whether the artist was smaller/independent or widely known.

"I certainly care about it when the content has been produced by a smaller/ independent artist. But not so much when it is someone that is already widely known/ successful" —Consumer focus group participant

We heard from a consumer that they determined whether a website was infringing if it looked 'dodgy'.

"If a site looks 'dodgy' and there are lots of ads and spam, I generally determine that the site has not been authorised to share the content and viewing it would be in breach of the copyright" —Consumer focus group participant

Data on music consumption is valuable

Data can play an important role in the creation and distribution of music. With the increase in digital consumption of music, artists can access more information on listeners.

"There is so much value in all that data about where a song is being streamed. Members have told us that the data itself is as important as the royalties they receive. They want to know who's listening to their music" —Industry body

Data can help artists to determine which types of marketing are effective. Data can also assist artists to show the value in a song when negotiating licences.



"WHEN AN ADVERTISER COMES AND SAYS 'HEY, I WANT TO USE THIS SONG FOR MY CAMPAIGN'. WELL, IF IT'S GOT 3 MILLION VIEWS OR LISTENS, YOU CAN INSTANTLY SEE IT IS WORTH A LOT MORE"

Publisher

Data-mining of torrent sites (illegal downloads) can also help New Zealand artists to pinpoint suburbs which indicate a fan base.

"You can pinpoint to a suburb of where to go overseas and use travelling salesman theory. The major data flows are piracy" —Studio

Valuable information on what fans are looking for can also be gathered through social media and other platforms.

Some music users seek permission, but not all are aware when they should

People use music in many ways – from retail outlets playing recorded music in their premises to students performing songs in their school choir. Anyone who plays or performs music to the public must have permission to do so from the copyright owner, unless an exception applies.

Some rightsholders mentioned that not all small business owners will be aware of their obligations.

"Educate first, make sure they understand and give them the opportunity to understand" —Industry body

Some mentioned increased awareness of copyright amongst performers.

"If a group wants to perform one of my songs at a kapa haka competition, they contact us through the website. So people are aware that they can't just use stuff" —Artist



Interactive gaming

VIDEO GAMES FOR A VARIETY OF DIGITAL PLATFORMS, INCLUDING PC, CONSOLE AND MOBILE, AND IN DIFFERENT FORMATS, SUCH AS VIRTUAL AND AUGMENTED REALITY

Digital distribution is impacting the development processes, monetisation strategies and consumer engagement of interactive gaming studios. The multimedia nature of interactive games requires collaboration throughout the creative life cycle.

There are new opportunities for studios to connect with gamers, and generate new content. However, there are also distribution challenges relating to discoverability and piracy.



Photo source: iStock.com/Marco_Piunti

Interactive gaming

COPYRIGHT IN INTERACTIVE GAMING

Video games are generally produced for commercial sale by game development studios, for entertainment and/or information purposes.

'Video games' are not explicitly recognised under the *Copyright Act*. However, the digital, multimedia nature of video games means that they are made up of various creative works that are protected by copyright.

- › Software code underlies every interactive game. As is explored further in the Software chapter, software code receives copyright protection as ***literary works***.
- › Other ***literary works*** may include narrated or written instructions.
- › The visual depiction of game elements such as characters and landscapes, and graphical user interface components such as icons and buttons, receive protection as ***artistic works***.
- › Different components of music in a game can receive protection. Musical compositions are protected as ***musical works***, song lyrics as ***literary works*** and recordings themselves as ***sound recordings***. Other audio works, like sound effects, can also receive protection as ***sound recordings***.

- › Some games, particularly PC and console games, may feature 'cutscenes' —non-interactive videos that are interspersed within gameplay (player interaction with game). These videos can receive protection as ***films***. The scenarios or scripts for these films may receive protection as ***dramatic works***.

In general, ***literary works*** (excluding computer programs), ***musical works***, ***artistic works*** and ***films*** attract **moral rights** under the *Copyright Act*. This includes the right to be identified as the author (or director, in the case of films).

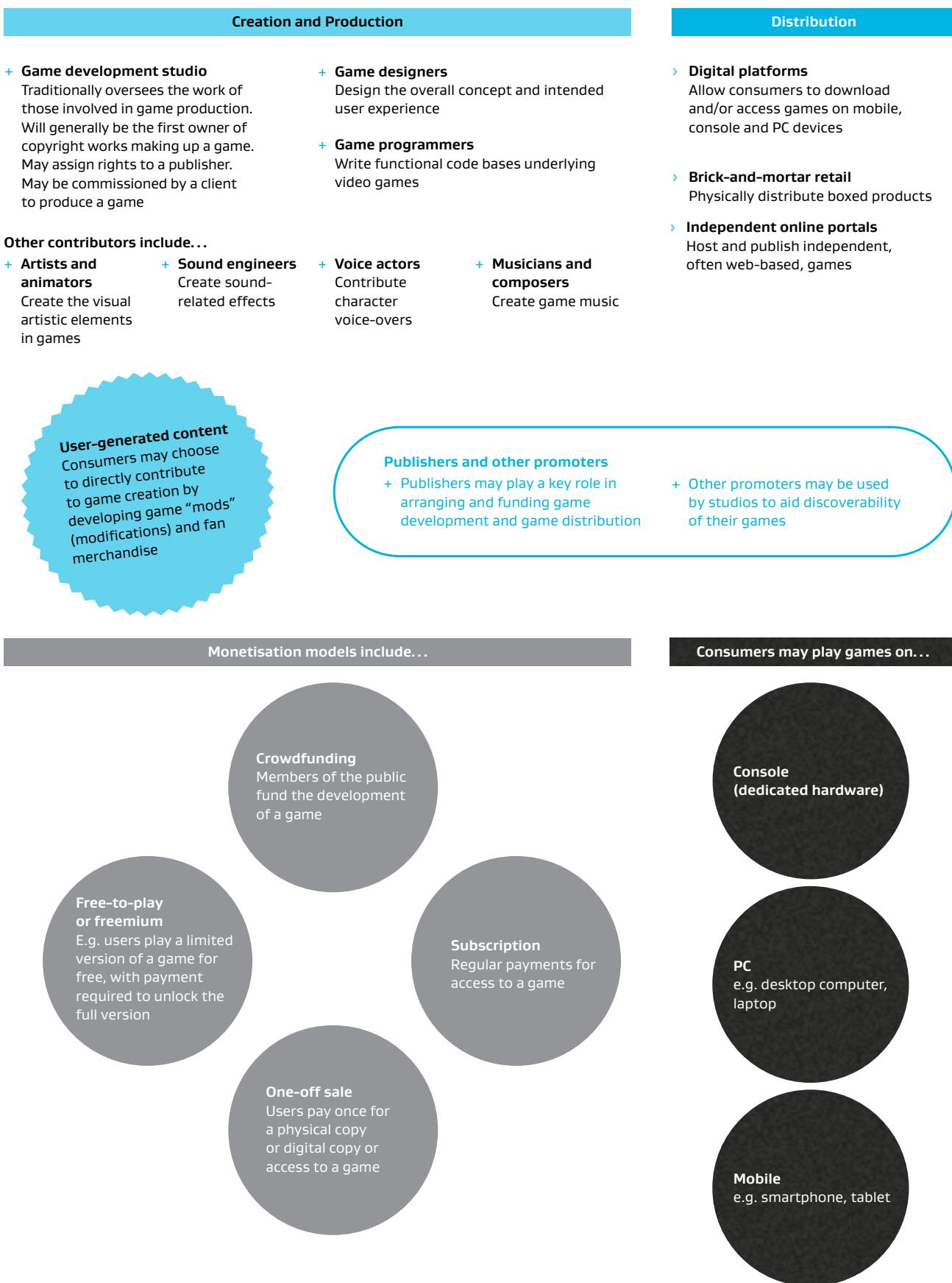
Contractual arrangements generally determine who holds copyright in each individual work that is part of a game. New works may be created specifically for a game through commissioning (work-for-hire) or in the context of employment relationships.

Works may also be licensed for use in a game. For example, popular songs may feature in video games. Generally the permission to use this music in the game is provided in a **copyright licence**, along with any conditions of use.



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This diagram shows those who are likely to own or license copyright works in interactive games, common distribution and monetisation models, as well as the kinds of devices games are played on.





COLLABORATION AND COMMISSIONING PROVIDES CHOICES AND CHALLENGES

VIDEO GAME DEVELOPMENT IS A MULTI-DISCIPLINARY PROCESS THAT LENDS ITSELF TO A HIGH LEVEL OF COLLABORATION. WE HEARD ABOUT THE COPYRIGHT CHALLENGES THIS CAN POSE AND INDUSTRY RESPONSES.

Developers collaborate creatively

From the creation of graphic art, to user interface design, to software programming, a wide range of skills are required to develop an interactive game for commercial release.

This often requires the input of people from a range of creative disciplines.



"YOU NEED COLLABORATION. VIDEO GAME-MAKING IS MORE LIKE FILM AND LESS LIKE I.T."

Independent studio

Collaboration on game development may occur within studios, across the industry and even internationally.

"Teams of three or four people can meet online and build a game together. More and more people are collaborating in teams globally" —Startup

For example, we heard about game jams, in which people working in game development come together (sometimes online) to rapidly prototype game elements in a short amount of time.

Many game development studios we spoke to recognised the importance of effective collaboration. They told us about implementing systems to promote better teamwork internally, moving away from traditional 'waterfall' methodologies to agile working styles.

Agile methods involve iterative, incremental development, providing teams with the flexibility to assess progress and adapt processes as they go. 'Scrum' is one such approach.

"The idea of Scrum is that the people who have skin in the game should have a bigger say in how things get done. From a creative perspective, we want to make sure that everyone gets involved. We share leadership around" —Independent studio

Navigating rights can be complex for new entrants

Rights management can be difficult in a collaborative creative environment. For those who are new to the interactive gaming industry, collaboration in game development often takes place on an informal basis, without discussions about rights arrangements.

In this context, collaboration can pose commercial risks.

"I'd hate to be in a position where we collaborate on the ideation for a game and then later on, our collaborators say, 'hey, we had a part in this'. I try to keep collaboration to a minimum, especially on things we'd think about commercialising" —Startup

Another startup mentioned a dispute it had had about copyright ownership in a commissioned work, with the commissioned programmer's low level of understanding of copyright law being a contributing factor.

"A game programmer agreed to develop my game. But he kept the source code. He thought the IP was his as he had written it, even though he was paid work-for-hire. My lawyer quoted the Copyright Act to him and the issue was resolved" —Startup

Established studios avoid ambiguity in copyright ownership

When collaborating, established game studios generally seek certainty about copyright (through contract) before any content is made.

Often, this involves clarifying that the studio owns the copyright in any commissioned work.

This approach helps to prevent ambiguity and disagreements around rights.

"We've never had a dispute with anyone before. It's very clear in our contracts that any work you do while we are paying you is our IP" —Established studio

If rights are not clearly delineated from the outset, it may be possible to clarify copyright ownership after content has been made.

One game developer was able to formalise his copyright ownership of game components (such as sound and art) through contractual arrangements, after informal collaboration had taken place.



"I MADE EVERYONE WHO HAD VOLUNTEERED FOR ME SIGN SOMETHING THAT SAID I OWNED EVERYTHING AND I MADE SURE I PAID FOR EVERYTHING. I WANTED TO LOCK IT ALL DOWN. LUCKILY THERE WERE NO DISPUTES"

Independent studio

Not all artists involved in the game development process are willing to give up all rights to the works they contribute to. This can cause frustration for game studios.

"Some contracted musicians and voice actors expect to earn a percentage of the video game's revenue. But very few people get a percentage in video games – generally, the designers won't. I've tended to go with voice actors and musicians who already work in the video game industry and understand that" —Independent studio



SUBSECTOR 3/7

Once studios have established copyright ownership, they recognise that taking a flexible approach to retaining copyright may be appropriate in some circumstances.

"Where people leave and want to take a particular idea or something they've been working on, we've granted requests 100% of the time so far" —Established studio



CREATORS BUILD ON THE WORKS OF OTHERS

TECHNOLOGY MAKES IT EASIER FOR STUDIOS TO BUILD ON EACH OTHER'S IDEAS AND WORKS. WE HEARD ABOUT DIFFERENT INDUSTRY APPROACHES AND PRACTICES TOWARDS THIS.

New tools lower development costs

New off-the-shelf game development tools have significantly reduced production costs for game studios entering the market.

For example, studios no longer have to develop bespoke game engines (the software providing the core functionality of a game) from scratch. Some companies now make game engines available for free or on a royalty basis. This allows new studios to develop high-quality games faster and at low-cost.

"It has really halved our costs. The new features they have been putting out have been really helpful – just the quality of work we have been able to produce" —Startup

We also heard that the accessibility of high-quality tools is having a positive impact at an industry level.



"THERE IS KNOWLEDGE-SHARING NOW THAT THERE WASN'T BEFORE, WHEN EVERYONE WAS WRITING THEIR OWN TOOLS"

Lead game designer

Even cutting-edge virtual and augmented reality technology is becoming accessible for new studios, with the release of low-cost alternatives.

"They are really good for development, making things to test stuff out" —Startup

Core features are widely utilised and built on

Developers told us about the importance of being able to adapt existing core game mechanics. These are the rules that define how a player can interact with a game world and the outcomes of their interactions.

An example of a game mechanic is the 'energy mechanic', in which the player's 'energy' gradually depletes with in-game action, requiring them to wait for it to replenish over time or purchase more energy (or 'power', or 'lives') to continue playing.

Integrating existing core game mechanics was emphasised as both a necessary creative and pragmatic commercial practice, provided that studios were also innovating.

"Our strategy is to build on things from the marketplace. Core mechanics are required so that you don't always have to teach people simple aspects of your game, but there is iteration on top, so that when you play our game, it's a completely different thing" —Established studio

Several game studios discussed how other studios' games had influenced their own, and what they considered to be acceptable industry practice for using ideas from existing games.



"IN THE GAMING SECTOR, IT'S OKAY TO START WITH THE BASE OF WHAT SOMEONE ELSE HAS DONE. BUT YOU HAVE TO BE INNOVATIVE ON TOP OF THAT. IF YOU ARE, PLAYERS WILL ENJOY A UNIQUE EXPERIENCE PLAYING YOUR GAME"

Established studio

But several studios we spoke to were critical of 'clones'. 'Cloning' is the creation of a new game (a clone) that is based on and is very similar to an existing game.

"The ability to clone is exploited on some platforms. There will be a very popular game, with some addictive hooks, and some very powerful company will come along and realise that they can come up with a better version, with better art" —Established studio

Licensing tends to be avoided

Licensing provides an avenue for game developers to integrate existing creative works, such as popular music, into their games.

However, game studios generally prefer to create or commission works for inclusion in their games and avoid licensing existing works.



"FOR THE MOST PART, WE DON'T LICENSE. IT GETS COMPLEX. FOR EXAMPLE, HOW DOES REVENUE-SHARING WORK?"

Established studio

Licensing was perceived as introducing complexity to rights arrangements.

"Originally, I used a lot of free sounds from an online library. We could have had them in our final game with licences and accreditation, but you just need to miss one person's name and then it's all a big drama" —Independent studio

One startup we spoke to was seeking to establish a relationship with a major international publisher for the release of its first game. Often, publishers require that all the intellectual property (IP) in a game is transferred to them. This meant that licensing was not an option for the startup.

"Publishers are very stringent on that kind of stuff. They take a fairly high risk every time they bring new teams and new IP on" —Startup

Some established studios do license works – for example, when they seek to integrate New Zealand cultural elements into their games.

This can involve partnering with other creatives, with the local context making licensing relationships more attractive.

"We wanted to promote a New Zealand film and bring some content within one of our games. We reached out to a film producer and did a fairly short licensing agreement where we brought four items from the film into our game"
—Established studio

Different monetisation methods have emerged in the digital marketplace. For example, instead of one-off retail sales, studios may make their games available free-to-play but provide players with opportunities to purchase additional content or access. This revenue-gathering model is known as 'microtransactions'.

"Our game is free and we sell cosmetic microtransactions. Other developers sell their games upfront, through a subscription, or sell power upgrades. We avoid all of those to ideally hit the widest possible market we can"
—Established studio

To maximise revenue in this environment, studios told us about how they continue to develop and update games long after their first release.

"One of our games, we've now spent twice as much in updating as we spent making the game in the first place. The great thing about digital distribution is that the game made more money in the last year than the previous year"
—Established studio



DIGITAL DISTRIBUTION IS TRANSFORMING THE INDUSTRY

DIGITAL DISTRIBUTION IS CONNECTING NEW ZEALAND GAME STUDIOS AND THEIR COMPETITORS DIRECTLY TO INTERNATIONAL CONSUMERS. WE HEARD ABOUT STUDIOS' RESPONSES TO THE CHALLENGES OF A CROWDED MARKET.

Digital distribution is breaking down barriers

New Zealand studios have traditionally relied on contractual relationships with major international publishers to develop games for international distribution. Typically, a publisher would fund game production and own the rights in the game. They would then market, manufacture and distribute (physically, in boxed discs) the game.

Now, New Zealand studios can publish their games themselves at low-cost via online digital platforms.

"Distribution has democratised. Now it costs around \$100 to get it on the mobile platforms and make it available"
—Independent studio

Established studios have adapted their business models to take advantage of the global markets that are now directly and immediately accessible to them online.

"Previously we would do a lot of contract work. We would build games for consoles. Those games would end up in retail all around the world. Now we distribute to every country we can via online platforms"
—Established studio

Building relationships aids discoverability

Increased ease of self-publishing has been accompanied by an increase in the number of games available to consumers. 'Discoverability' is the major distribution challenge in the digital market.



"I INITIALLY THOUGHT THAT MAKING IT WOULD BE THE HARDEST THING. IT'S NOT. IT'S LETTING PEOPLE KNOW YOU EXIST"

Educational game creator

Studios told us about the importance of relationships with platforms, publishers or the press to ensure that consumers discover their games.

"As the market's become more competitive, studios are asking, 'can we get a one-on-one relationship with somebody with some ability to promote?'"
—Independent studio

We heard that gaining the support of a major platform was one of the most effective ways to ensure discoverability.

"Being featured on a digital store front is still a major predictor of success"
—Lead game designer

Marketing and promotion helps too, but is expensive. For new entrants to the market, publishing deals remain attractive as a means of gaining the necessary capital to run promotional campaigns and drive download numbers up.

"We'd only want to release our game if there was \$40-60,000 behind it. As a startup, that's not an option for us, so we need a publisher to help us commercialise our game"
—Startup



SUBSECTOR 3/7

New parties with the capacity to promote games are also emerging – for example, ‘streamers’.

Streamers live-stream themselves playing a game, often with their own commentary, for other players and fans to watch via online platforms. They may also make their previously streamed content available on video-hosting platforms. This content creation is generally permitted via games’ terms of use.

“While our game was relatively unknown, a popular streamer pushed it hard for a year, and that was amazing because we could see the increase in our traffic” —Established studio

Streaming games online can be a highly lucrative career. Studios and streamers can work together for mutual benefit. *“Discoverability is something we have to consider. We dial in a lot with streamers. My first game got a lot of streamers their first break so they are quite sympathetic to what we are developing”* —Independent studio



THERE IS A NUANCED APPROACH TO PIRACY

STUDIOS’ APPROACHES TO PIRACY MAY DEPEND ON SEVERAL FACTORS INCLUDING THEIR STAGE OF DEVELOPMENT, WHERE THE PIRACY IS OCCURRING AND WHO IS DOING THE PIRATING.

Attitudes to piracy may be context-specific

Studios’ frustrations with piracy — the unauthorised use (including reproduction and distribution) of their games — generally arose in response to other businesses infringing on their rights.

“What we are probably more concerned with is other companies ripping off our stuff than our customers.

We’ll go after the people making money off piracy” —Independent studio

Some studios had a pragmatic perspective on piracy in certain circumstances.

One startup that had been making prototype games available online to test their viability saw piracy differently early in the development process.



“ONE OF OUR SUCCESS CRITERIA WAS ACTUALLY PEOPLE TAKING AND HOSTING OUR GAMES ON THEIR WEBSITES. WE WEREN’T WORRIED ABOUT IT BECAUSE WE JUST WANTED TO SEE WHETHER PEOPLE WANTED TO PLAY IT”

Startup

One studio told us about its rationale for choosing not to pursue consumers who infringed copyright in their game.

“The punitive approach won’t work – it’s too difficult to find the people breaching copyright. And why would we want to punish our customers when we can make it so they prefer not to pirate? Fight piracy with convenience” —Independent studio

Vulnerability of games to piracy varies

Studios told us that piracy of their games by other businesses generally occurred overseas and online.

We heard that mobile games are particularly vulnerable.

“People take our game and change aspects of the binary, take out all of our monetisation stuff, put in their own and publish it in foreign jurisdictions” —Established studio

In contrast, the online nature of server-side games can make piracy impractical. Players may connect via secure login to authorised servers that are responsible for ‘serving’ the game content to the ‘client’ players.

“Piracy is not a problem for our game because we are online. You have to have our server and we’ve been careful to protect them” —Established studio

Taking action can be difficult

We heard about the importance of third-party industry relationships for studios seeking to pursue piracy by other businesses.

Platforms may play an important intermediary role.

“We have a good relationship with online platforms. If someone is promoting how to pirate your game, you can very easily get their stuff taken down” —Independent studio

Several studios told us that they preferred to work with platforms, rather than pursuing disputes through the court system.



“ IF YOU WANT TO TAKE SOMEONE TO COURT, IT’S EXPENSIVE. WE TRY TO RELY ON THE SHOCK OF PEOPLE BEING CONTACTED BY THE PLATFORM AND OUR LAWYER AT THE SAME TIME”

Established studio

However, where businesses pirating games are operating outside of a platform ecosystem in other jurisdictions, studios can find it very difficult to enforce their rights.

“It’s almost impossible and probably not worth it” —Established studio



CONSUMPTION DRIVES CREATION

THE SHIFT IN STUDIOS' BUSINESS MODELS, AS A RESPONSE TO THE ONLINE INTERACTIVE GAMING ENVIRONMENT, IS CHANGING THE RELATIONSHIP BETWEEN STUDIOS AND GAMERS.

Analytics influence further development

Understanding consumers' interactions with games is an important driver for post-release development.



"THE MORE INFORMATION I HAVE ABOUT MY PLAYERS AND THE MORE OBJECTIVE THAT DATA IS, THE BETTER DECISIONS I CAN MAKE ABOUT WHAT EXPERIENCE I WANT THEM TO HAVE"

Lead game designer

Gathering this information is easy in the online environment, for example, through data analytics or qualitative feedback provided via social media.

We also heard that, while useful, this information is just one input into the creative decision-making process.

"We do use analytics a little, for example, to see what level people get to before they quit. But we aren't driven by it. We tend to go by the gut a bit more" —Established studio

Studios build fan followings

It is not enough for studios to make minor improvements to their games. We heard that to maintain revenue streams, active consumer engagement is needed.

"There is more to be done to manage the relationship with consumers. Half of the cost of making a game is spent on what makes money – in-game sales, advertising hooks, social media connectivity" —Established studio

Most studios' consumers live overseas.

"New Zealand's a bit small, so the advice has been to go global from day one. I sell over 75% of my games to the US"

—Educational game creator

Some studios invest in building a strong fan following around their games, establishing forums on the web and connecting with their consumers directly online.

One established studio told us about its approach of getting its gamers to have 'buy-in' to the success of the game. As part of its crowdfunding campaign, it sold fans the opportunity to help design game content (which would be studio-owned).

"It makes them feel like they have some ownership in the product. It basically makes them an evangelist, pushing the game to all their friends so more people will see their work in the game" —Established studio

Once established, a strong gamer community can be a huge advantage for a studio – potentially even functioning as a kind of protection from others who might seek to clone their work.



"SOMEONE ELSE COULD MAKE A GAME THAT'S VERY SIMILAR TO OURS, BUT OUR PLAYERS WILL KNOW IT'S A CLONE AND IT WOULD PROBABLY BE VERY UNPOPULAR DUE TO THE BACKLASH"

Established studio

Consumers are creators

Gamers may also seek to generate new or derivative creations relating to a game.

One example we heard about were game 'mods' or modifications. Modding, short for modifying, involves making changes to original game content. Studios can facilitate modding by providing consumers with specific tools. A mod may be anything from a minor add-on (for example, a new character or landscape) to a complete conversion that is, in essence, a new game. They are often made available to others free of charge.

Modding may be explicitly addressed by studios in their terms of use.

Some consumers may also seek to create physical items. One studio told us that it had granted a licence to a fan to produce (for sale) a limited number of items based on a virtual item in their game.

"Our reasoning for approving it is that it's harmless, it's clearly a fan project if it's not affiliated with us, and it's not damaging our income. And if they are amazing, we could sell them too" —Established studio

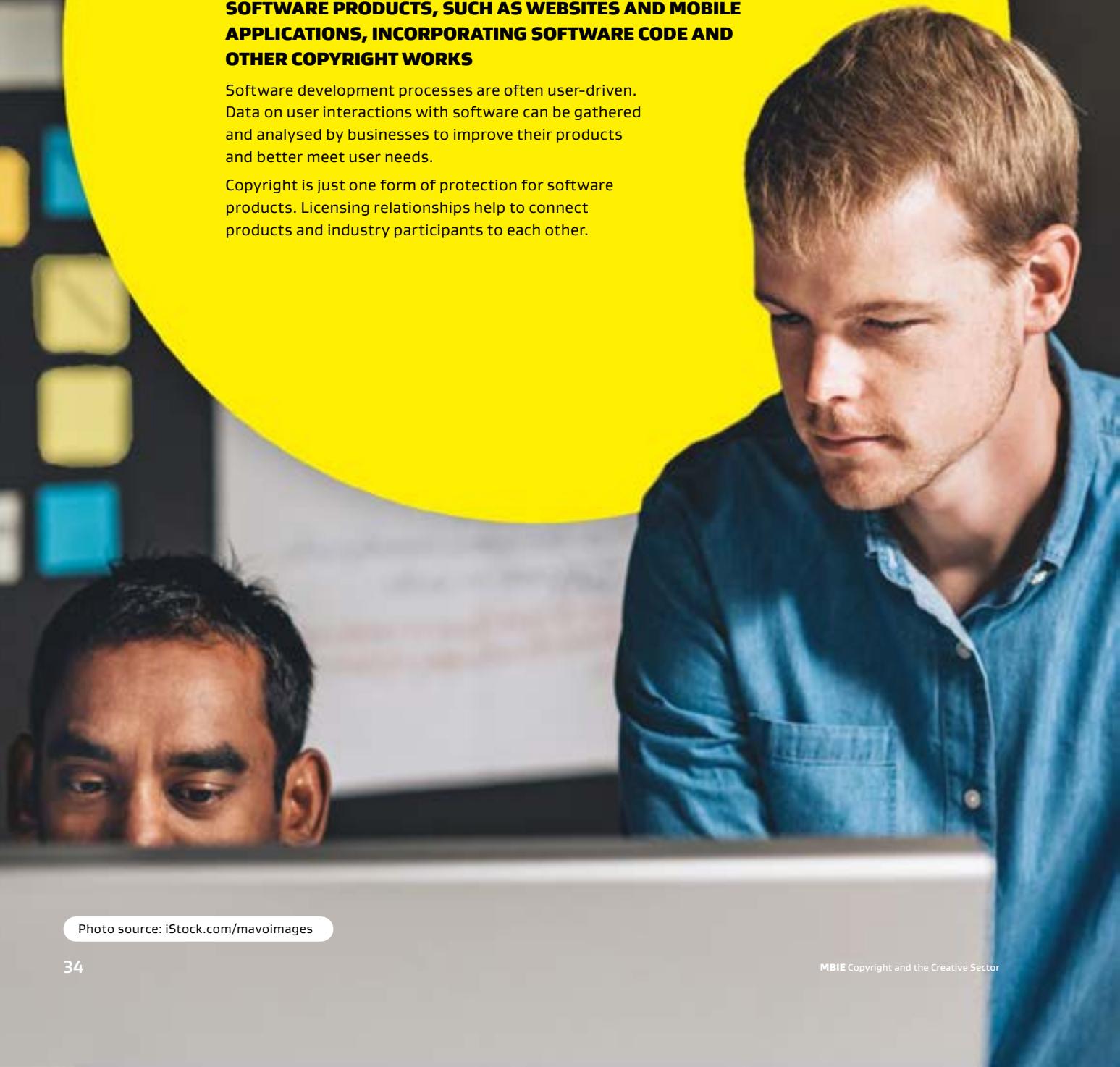


Software & web design

SOFTWARE PRODUCTS, SUCH AS WEBSITES AND MOBILE APPLICATIONS, INCORPORATING SOFTWARE CODE AND OTHER COPYRIGHT WORKS

Software development processes are often user-driven. Data on user interactions with software can be gathered and analysed by businesses to improve their products and better meet user needs.

Copyright is just one form of protection for software products. Licensing relationships help to connect products and industry participants to each other.



Software & web design

COPYRIGHT IN SOFTWARE & WEB DESIGN

'Software' is a general term to describe the programs that we use to operate computers and related electronic devices – covering everything from operating systems, smartphone applications, websites and more.

Under the *Copyright Act*, a **computer program**, in the sense that it is a collection of written, executable instructions known as code, is protected as a **literary work**. Associated non-executable written information that explains how the software operates, known as documentation, is also protected as a **literary work**.

Unlike other literary works, the **commissioning rule** applies to computer programs under the *Copyright Act*. This means that a developer who is commissioned to develop a computer program will not own copyright in that computer program (unless the developer and commissioner agree through contract that the developer will be the copyright owner).

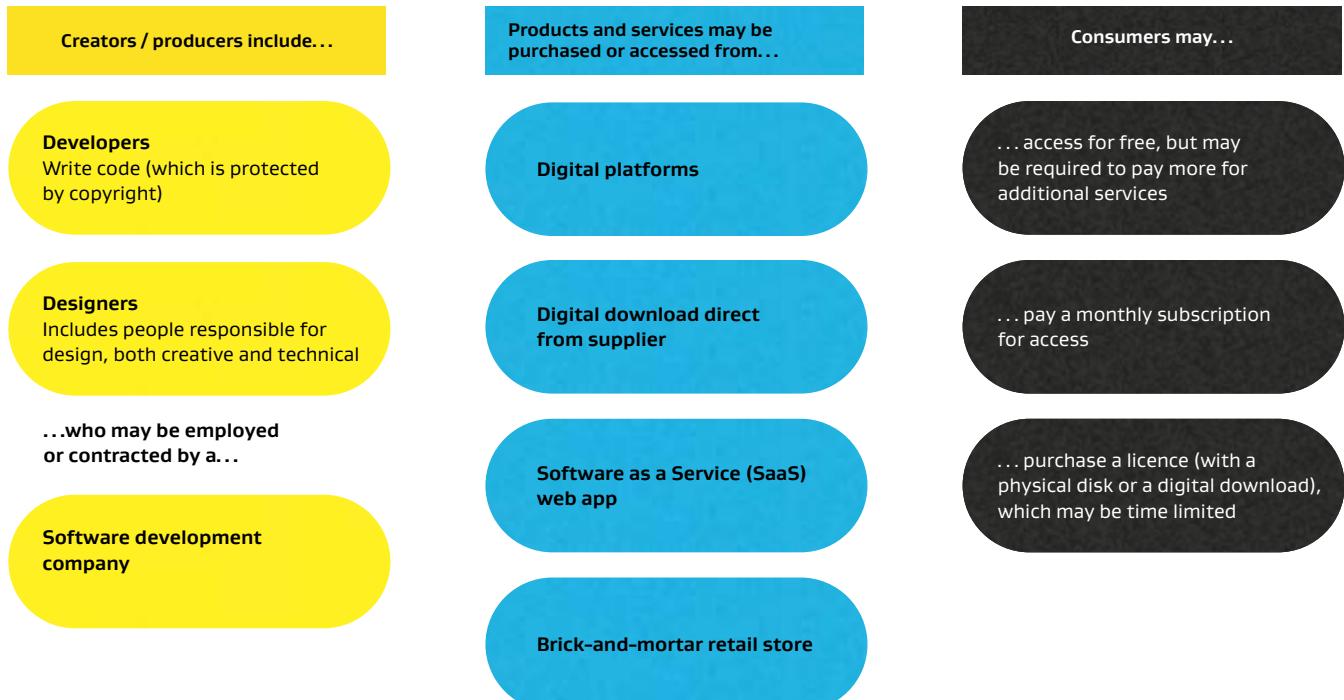
Moral rights do not attach to computer programs under the *Copyright Act*. This means that the author of a computer program does not have the right to be identified as the author.

Software products generally incorporate other kinds of protected creations in addition to code. For example, individual visual elements on a web application or website may be **artistic works** recognised under the *Copyright Act*.

Because the software code generally sits *behind* an end product, it is different to creative content which *is* the end product (such as music or film).

Creating a computer program which has the same functionality as another, but is developed using original code, will not infringe the copyright in the earlier software code (the **literary work**). However, if the user interface intentionally looks or sounds the same as an existing software product, the new software product may infringe copyright in, for example, the **artistic works** or **literary works** or **sound recordings** delivered in the original product.

This diagram shows those who are likely to be involved in the development of software products, as well as common ways that products may be accessed or purchased by consumers.





SOFTWARE DEVELOPMENT PROCESSES ARE OFTEN USER-DRIVEN

SOFTWARE DEVELOPMENT IS OFTEN USER- AND DATA-DRIVEN.

Creations are often solutions

For many of the businesses we spoke to, the software product development process begins with the identification of a problem.

To identify problems that need solving, businesses may elicit information from their users.



"WE'VE GOT A COMMUNITY FORUM. PEOPLE CAN VOTE FOR IDEAS TO BE BUILT. THAT'S REALLY HELPFUL WHEN WE'RE PLANNING PRODUCT ROADMAPS. WE CAN SEE THE DEMAND"

Multinational company

One established business told us about how it had changed its development processes recently to incorporate 'design thinking'. This is a solution-based approach, centred around gaining a deep understanding of customer behaviour to better respond to customer needs.

"What we did before was write code and put a user interface on top. People would say, 'that's not what we want.' So we would waste six weeks' code. The next time we went to that user group, we did design thinking. They actually designed a system that they wanted" —Multinational company

Businesses work to get their products out to the market quickly

As in the interactive gaming subsector, some software businesses implement agile project management methods.

"You don't need to explain yourself to someone who then has to go through three layers of management. That's benefited our company in allowing us to produce more, faster" —Established company

Condensing development processes can help software businesses to distribute their products to market as soon as possible. We heard about Lean Startup methodology, which involves the fast development and launch of a minimum viable product, allowing the business to monitor how its early customers interact with the product and develop iteratively in response.



"THE IDEA IS TO JUST GET OUT THERE AND DO IT. YOUR MARKET DECIDES YOUR VALUE, NOT YOU"

Startup

The businesses we spoke to which developed software products and services for consumers (rather than to other businesses) tended to distribute their products and services entirely online.

This makes it easy for software development businesses to gather consumer data for analysis, no matter where in the world the consumer is.

"We have a dashboard projected onto our wall. It's on at 6:30 am until the last person leaves at night, and it shows what's happened in the last 12 hours when different international markets come on, and how consumers are reaching our site" —Startup

The ability to collect real-time data about user behaviour acts as direct feedback for software businesses.

We also heard about A/B testing, an iterative product-building process. A/B testing involves providing different versions of a product (such as a website) to different customers at the same time. Businesses then compare data on different measures of customer behaviour, such as sell-through rate, and make changes in response.

"We constantly do A/B testing to ensure what we are doing works the way we want it to" —Established company

Data drives continuous development

The ease of accessing information about how users are interacting with software businesses and products allows businesses to improve their software constantly. In the online environment in particular, updates can be developed and deployed incredibly quickly.

One startup explained what it called its 'micro-deployment' process.

"Literally, it goes from an idea, code written, tested, out to server and client within about two hours and that can happen multiple times a day" —Startup

In this context, businesses told us that they did not try to make too many predictions about their future business direction.

"We're still a startup. As our markets change, the particular aspect of software we love to do will either become really important, or just underlying and no one will care about it too much" —Startup

Nor were they too concerned with what their competitors were doing.

"We avoid looking at our competitors too much, as it leads you down the wrong path. You end up with boxed-in thinking, trusting that the people you're emulating are right" —Startup

Instead, they were focused on consistently innovating to best meet identified market needs – even if that involved making their existing product obsolete.



"OUR JOB IS TO OBSOLETE OUR OWN PRODUCT. WE REALLY HAVE TO DO THAT, OR THERE ARE TEN COMPANIES IN THE US THAT WILL DO IT"
Startup



DEVELOPERS DRAW ON EACH OTHERS' WORK

WE HEARD ABOUT INTERCONNECTEDNESS ACROSS PRODUCTS AND PEOPLE IN THE SOFTWARE INDUSTRY, FACILITATED BY COPYRIGHT LICENSING RELATIONSHIPS.

Businesses seek to integrate others' software or data into their own

In developing their software products and services, businesses may seek licences to integrate other businesses' products into their own.

Some businesses we spoke to relied heavily on licensing data collected by other companies to incorporate into their products.

"There are data platforms that have a number of data sources, like social media platforms. We pay to set up a stream from them that captures all the public data, even comment data. We can use it for whatever we want. You just can't sell it to other people in the same format you're collecting it in" —Startup

Businesses may also license software to integrate into their products. They determine whether to develop new software or pay to license existing software on a case-by-case basis.



"WITH SOFTWARE ENGINEERING DECISIONS, THE FIRST THING YOU THINK OF IS 'BUILD VERSUS BUY'. WHICH IS GOING TO BE MORE COST-EFFECTIVE AND SAVE YOU TIME?"
Startup

Paying for software integration allows the licensee business to focus on their specialisation.

"We pay for seven subscriptions to other services in order for us to focus solely on ours. We want to focus on making a really world-class product on something we want to work on" —Startup

We heard that plug-in software and other services may be delivered via a pay-as-you-go subscription model. One benefit of this is that businesses can avoid being locked in to one provider.

"Someone might be inventing a better way of getting your payment system out to customers, and it's very easy to make changes. Just unclip one, clip one in" —Startup

Software licensing may be 'free'

Several businesses mentioned that they used free and open source software (**FOSS**) developed by others.

With FOSS, the author of the original source code makes their code available for use, study, copying, modification and (commercial and non-commercial) distribution.

FOSS authors may publish their source code files on a publicly available repository. Source code files will generally include the text of a standardised licence, such as the GPL or MIT licence, to clarify the rights that are granted to any prospective users of the code.

While 'free' in FOSS references freedom rather than price, FOSS source code is generally available free of charge. This was identified as a key benefit by some of the startups we spoke to.

"Pretty much all of the technology we use for software development is open source. It's more scalable. You don't have to pay for licensing, which can get very expensive"
—Startup

FOSS development may be ongoing and crowd-driven. Often, FOSS is developed as an 'open project' on the web, in which a community of developers volunteer their time to improving and contributing to the project's source code.

The continuous, collaborative nature of active FOSS projects serves as an assurance of the ongoing quality and reliability of the resulting software. We were told that this is an important consideration for the end-user of FOSS code, as well as potential buyers of the end-user's business.



"IN TERMS OF TECHNICAL DUE DILIGENCE, THE MAINTAINABILITY OF OPEN SOURCE IS DEFINITELY ATTRACTIVE"

Startup

Not everyone we spoke to was supportive of using FOSS within their business. One software company considered that FOSS licence terms could pose risks.

"We do have to be very careful with open source software. There can be fishhooks in it – for example, often under the terms of the open source licence you are required to publish the software that you write using the open source software so that everyone can use it" —Multinational company



COPYRIGHT IS ONE FORM OF PROTECTION FOR SOFTWARE PRODUCTS AND BUSINESSES

THERE ARE A RANGE OF FORMAL APPROACHES TO MANAGING AND PROTECTING RIGHTS IN SOFTWARE PRODUCTS, INCLUDING COPYRIGHT, CONTRACTUAL AGREEMENTS, PATENTS AND TRADE SECRETS. BUILDING AND MAINTAINING BRAND IS ALSO FRONT OF MIND.

Establishing copyright ownership is a priority

Businesses' concerns around copyright tended to centre on ensuring or demonstrating their ownership, particularly in the context of a global market.

While copyright in computer programs sits with employers and commissioners by default in New Zealand, we heard that some businesses make a point of confirming this in employee and contractor agreements.



"THE FIRST THING WE DID WAS MAKE SURE THAT THE COPYRIGHT IN THE CODE AND CONCEPTS IS ASSIGNED TO THE COMPANY, NOT THE CODERS. ALL THE COPYRIGHT NOTICES ARE INSIDE THE CODE FILES STATING THIS"

Startup

This ensures clarity around copyright ownership, should this be called into question in the future.

"If you go to sell the company down the track, the people that are buying the company will ask if the company owns the copyright on the code, or if the employees own the copyright on the code" —Startup

Some use non-disclosure agreements, trade secrets and patents

Software businesses also employ legal protection measures outside of copyright to protect their intellectual property (IP). Some of the businesses we spoke to relied on trade secrets, non-disclosure agreements or the patent system.

Some countries allow patent registration for software. New Zealand's **Patents Act 2013** prevents a 'computer program as such' from being an invention under the Act if the 'actual contribution' made by the alleged invention lies solely in it being a computer program. This limits the kinds of software that can qualify for patent registration in New Zealand.

Some businesses we spoke to had registered patents in the United States.

"People generally recognise US patents. Most of our business is US-based so if anyone is looking up what we're trying to patent, they're probably coming from the US" —Startup

Businesses control access to software code

Several software businesses we spoke to held the majority of their source code internally – making it inaccessible to others, and thus not able to be copied by users. This depended on the nature of the product or service they were offering.

An example is a cloud-based Software-as-a-Service (**SaaS**) product. Software and data is stored on servers (the cloud) operated by the SaaS business, and accessed by users remotely via the web.

"Our back-end code – which is most of our functional code – is not publicly available. What's in the back-end can't be accessed. Someone could hack your server but you generally set that up to be secure" —Startup

Another example is where software is integrated into physical products. There is a low risk of copyright infringement of software in these circumstances.

"Verbatim copying is less likely in products like ours because there are so many real-world things that the software interacts with. So you can't just copy the software – you've got to copy the whole physical product" —Multinational company

Where businesses held their source code internally, they tended to feel that copyright had limited relevance to them.

"I don't think we think about copyright as a tool for software protection" —Multinational company

Where source code is distributed as part of a software product, there are methods to prevent user access to the source code, such as encryption.

Businesses may choose not to enforce copyright in other works

While copyright infringement of software source code by users may be unlikely in certain circumstances, other copyright works that form part of a software product may be vulnerable.

One business told us about others extracting and using large amounts of information from its website in an unauthorised manner.

"We have what's called an Application Programming Interface or API. Our API lets other people's software talk to ours. We allow people to use the API by permission. Sometimes those people use that tool to scrape our site for content, which is not allowed. We take action as appropriate" —Established company

In addition to developing code and data, businesses may also create or commission visual and audio design that forms part of their software's user interface. This can encompass a broad range of copyright works, including written and multimedia content and photographs.

Some software businesses told us it was common to see other businesses adopting similar — but not the same — stylistic elements in their visual design. Some took the view that there was nothing they could do to prevent this under copyright law.

Others took no action even where they felt that copyright infringement had occurred. Those businesses tended to view imitation as a good indication of their position in the market. One startup explained how it thinks about its competitors copying some of the written content on its website.



"WE TAKE IT MORE AS FLATTERY. IT'S LIKE SOMEONE DRESSING THEIR CHILD THE SAME WAY AS OURS, BUT ACTUALLY OUR CHILD'S PERSONALITY IS WAY BETTER"

Startup

We also heard that businesses' emphasis on brand development can help to offset the impact of having their design features copied. As one established software company explained, while others might copy their design, their brands could not be imitated.

"Often we'll see competitors do really similar plays but I felt that the spirit of our company was something that couldn't be replicated. You sort of rely on the fact that it has taken ten years to build up and that's not something you can just 'copy and paste'" —Multinational company

Brand awareness is front of mind

Building a brand was highlighted by some new entrants as an important part of their business strategy.

"We did the brand before we did any code. We have an agency that is responsible for our brand look-and-feel. They come up with tone and manner, the way we should speak with our software, the look – logos, colours etc." —Startup

One startup told us its aspirations for its brand.

"It's not all about money. It's about the number of people using it, even if they're using it for free. You want your brand to be worth so much that your software is just elevating your brand" —Startup

An established company explained the power of a well-known brand in the market.

"Our brand is so important to the way forward for our company. People might not necessarily use our competitors' services over ours because we've got a trusted brand"

—Established company

Written content & print

PRINTED WORKS SUCH AS BOOKS AND NEWSPAPERS (AND THEIR DIGITAL EQUIVALENTS) AS WELL AS ONLINE-ONLY WRITTEN CONTENT LIKE BLOG POSTS

Digital technology allows authors to publish and distribute written works at low cost. New methods of content distribution have emerged to sit alongside traditional methods with a proliferation of new content. Ensuring financial viability in an online world remains challenging.

Technological advances and consumer demand are leading the drive to digitise content. However, difficulties obtaining permission to digitise can result in content being 'locked up'.

Photo source: plainpicture/Knigel Synnatzschke/One Shot

Written content & print

COPYRIGHT IN WRITTEN CONTENT & PRINT

As well as authors, publishers and distributors, this subsector includes entities involved in the dissemination of written content, including galleries, libraries, archives and museums (also known as the **GLAM sector**).

Published written content is typically recognised under the *Copyright Act* as a **literary work**. Literary works include a novel, blogpost or academic journal article.

The *Copyright Act* also recognises the **typographical arrangement of published editions**, which covers the style, composition, layout and general appearance in a published edition of the whole or part of a literary, dramatic or musical work.

The **commissioning rule** does not apply to literary works (other than computer programs). Unless the literary work was created in the course of employment, or a contract provides that the person commissioning the work will receive copyright, copyright will belong to the author. The typographical arrangement copyright belongs to the publisher.

Alongside written content, there are many other creative works commonly found in publications, such as illustrations or photographs. These creative works also receive copyright protection, separate from the literary work.

Authors of literary works (excluding computer programs) have **moral rights** under the *Copyright Act*. This includes the right to be identified as the author and the right to object to derogatory treatment of the work.

Orphan Works

The *Copyright Act* sets out rules for works of **unknown authorship**. The identity of an author can be treated as 'unknown' if it is not possible for the person who wishes to find out the identity of the author to do so by 'reasonable inquiry'.

'Orphan work' is not a recognised term under the *Copyright Act*. However, it is generally understood to include:

- › works of unknown authorship, and
- › works for which the author is known, but the author cannot be found or the rightsholder cannot be determined/found.

As copyright protection will often extend beyond the life of the author, successive rightsholders must be tracked through wills. Copyright ownership may also be vested in, assigned to, or owned by, a corporation.

Licensing bodies

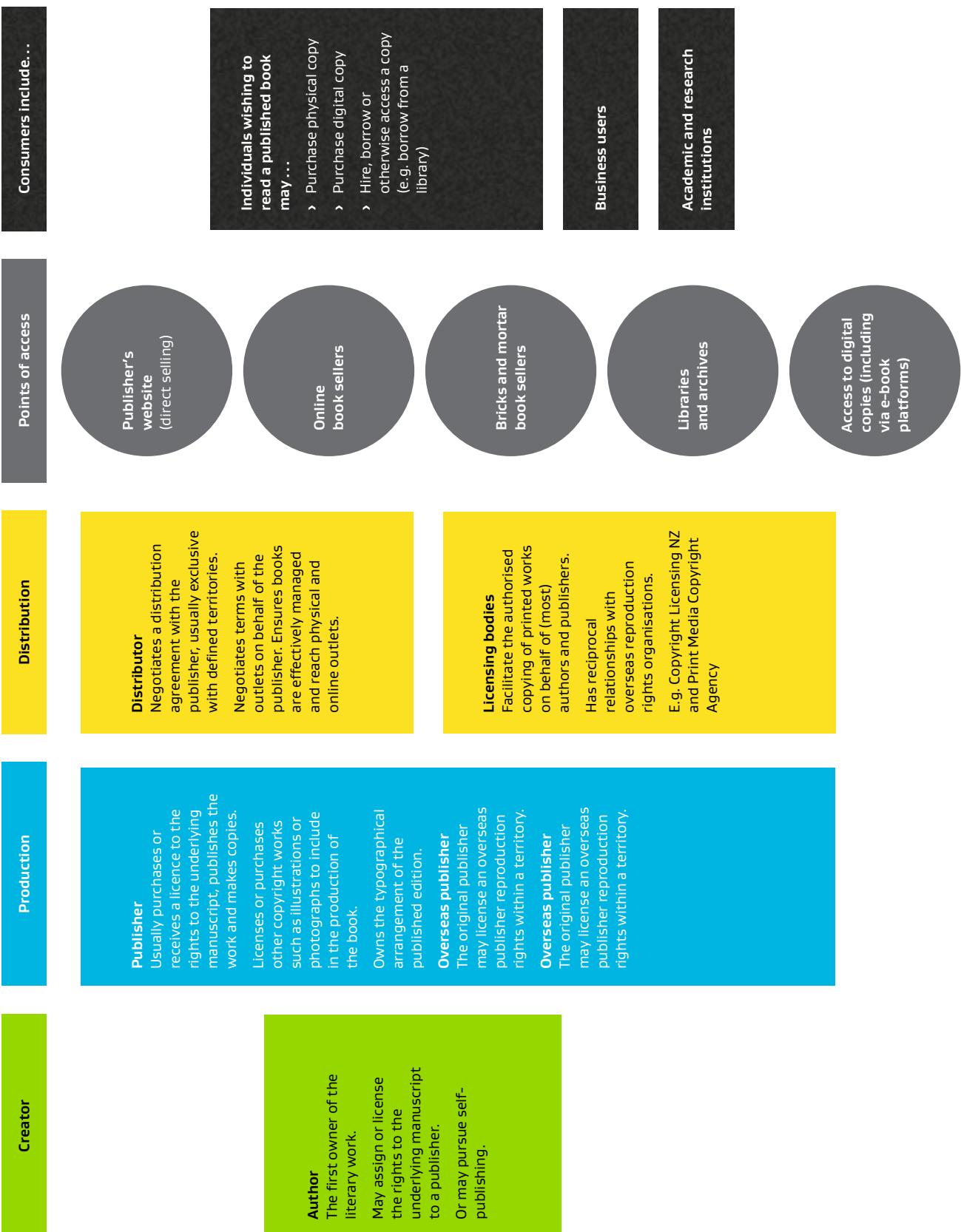
Licensing bodies help to facilitate licensing of various forms of written content. For example:

- › **Copyright Licensing New Zealand (CLNZ)** provides licences to education providers, businesses and government departments to facilitate permitted copying, scanning and sharing of printed works. CLNZ represents the interests of most New Zealand authors and publishers of books, journals and periodicals, and distributes licensing revenue to copyright owners.
- › **Print Media Copyright Agency (PMCA)** provides licences to organisations wishing to use articles appearing in newspapers and magazines (both print and electronic publications). PMCA distributes annual royalty payments to publishers.



SUBSECTOR 5/7

This diagram shows who are likely to own or license copyright in published books, those who might play a role in the production or distribution of books, as well as the main ways that books are purchased or otherwise accessed.



*SPOTLIGHT – LIBRARIES AND COPYRIGHT

Libraries

Libraries provide consumers with access to literary works (in addition to other creative works such as music, films and photographs). The *Copyright Act* allows for libraries (and others) to lend books to the public because loaning physical books is not treated as ‘issuing to the public’. However, uploading and downloading e-books involves making copies of the work and communicating those copies to the public. For e-books, libraries must either obtain a licence or rely on the exception provided under section 56A of the Act (allowing communication of digital copies in certain circumstances).

Libraries can be content creators. One example is databases, which are created so that information is correctly catalogued and can be retrieved easily. Library creations can also revolve around capturing community heritage through the digitisation of documents, photos, diaries and community memories. Libraries also digitise ‘out of copyright’ works which have entered the public domain, to ensure that they are accessible.

There are exceptions under the *Copyright Act* which help to facilitate library functions. For instance, libraries (and archives) may make a digital copy of a work if the original work is at risk of loss, damage, or destruction and the copy replaces the original, or it is not reasonably practicable to purchase a copy of the original item.

Academic libraries (e.g. libraries in tertiary education institutions) may also rely on the educational exceptions in the *Copyright Act*.

Public lending right

The **Public Lending Right for New Zealand Authors scheme** compensates New Zealand authors for the use of their books in New Zealand libraries.

The Public Lending Right fund (\$2,000,000 annually)² is divided among registered authors, based on how many copies of their works are held by libraries. There are approximately 300 libraries in New Zealand. In 2015, 1,514 authors received payment from the Public Lending Right fund.

The National Library

The **National Library of New Zealand (Te Puna Mātauranga o Aotearoa)** is responsible for collections of published and unpublished copyright works. The ***National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003*** sets out the legal deposit process.

Legal deposit covers printed documents and electronic documents, both off-line electronic documents and documents published on the internet. Under the legal deposit process, publishers of physical format works in scope for legal deposit must provide up to three copies of their works to the National Librarian. The National Librarian is authorised to make a copy of documents published on the internet and the publisher is required to provide assistance if asked.

New Zealand’s documentary heritage collections, including both published and unpublished items, are held in the Alexander Turnbull Library, part of the National Library.

Donations of unpublished material may have donor agreements which determine access and use. Sometimes the donor is not the creator, which can make copyright decisions and access arrangements complicated.

² The Public Lending Right for New Zealand Authors is funded through via central government (Vote Internal Affairs).



DIGITAL TECHNOLOGY HAS IMPACTED THE WRITING AND PUBLISHING ENVIRONMENT

THE DRIVERS FOR CREATION ARE DIVERSE. WHILE DIGITAL TECHNOLOGY HAS MADE IT EASIER TO PUBLISH AND DISTRIBUTE, IT ALSO PRESENTS NEW CHALLENGES.

People create written content for many reasons

The drivers and incentives for creating written content often reflect the author's specialist expertise and background.



"WRITERS WILL ALL HAVE A DIFFERENT REASON OR A DIFFERENT STORY ABOUT WHY THEY ARE WRITING, WHETHER THE LITERARY WORK IS FICTION, NON-FICTION, GRAPHIC NOVEL. AUTHORS WANT TO WRITE FOR PLEASURE, THEY WANT TO DOCUMENT HISTORY. THERE ARE MANY DIFFERENT REASONS"

Industry body

We heard that authors of many primary and secondary-level educational books are practising teachers. They may be motivated by professional development or a sense of contribution to, or recognition within, their field.

For authors at the tertiary-level, research output can enhance the reputation of the individual and the university and help to attract students.

Some spoke of the importance of the New Zealand publishing industry as a mechanism for New Zealanders to tell their own stories and develop and express a distinctive national identity.

"It's about developing, producing and distributing knowledge within New Zealand" —Publisher

Digital technology does not necessarily make production cheaper but can provide new opportunities

Many publishers said that digital technology has not decreased the costs of producing high quality content.



"THE MAIN COST OF PRODUCING A BOOK IS NOT THE PRINTING – IT'S THE COMMISSIONING, EDITING, EDITORIAL, PEER REVIEW, DESIGN, PROOFING. PRODUCING AN E-BOOK INVOLVES ALL THESE COSTS TOO"

Publisher

However, others said that digital technology has created new opportunities for both professional and non-professional authors to make their work available to the public at low cost. We heard that digital technology has made 'self-publishing' easier, due to cheaper production costs (e.g. no print costs) and the ease of using digital distributors to get an e-book to market.

"Digital technology has fragmented the writing and publishing industry. Writers find they can independently produce and distribute their own work. Digital distributors make it easy and cost effective. You can publish an e-book in high quality for almost no cost" —Writer

We heard that reaching consumers in the online world poses new challenges.

"It's a problem cutting through massive amounts of third-rate product that has swamped the digital market" —Writer



THERE ARE MORE WAYS TO SEEK REVENUE, BUT FINANCIAL VIABILITY CAN BE A CHALLENGE

NEW METHODS OF CONTENT DISTRIBUTION AND WAYS OF DERIVING INCOME HAVE EMERGED ALONGSIDE TRADITIONAL METHODS. ENSURING FINANCIAL VIABILITY IN A DIGITAL AND ONLINE WORLD CAN BE A CHALLENGE.

New methods of distributing content have emerged

The internet has enabled publishers to reach consumers without going through a distributor. Publishers can sell direct to consumers by selling print books on their website or building their own e-book platform.

"A lot of publishers are keen on direct selling to consumers" —Publisher

This makes it much easier for consumers to access books online.

We heard that there is a move towards open access in New Zealand universities.

"There's a big move toward open access – SSRN didn't exist 20 years ago and within years it became the norm. Most publishers will agree to research going into SSRN because they understand that the impact is much greater than any single journal publication could be" —Tertiary education body

Some spoke about their reluctance to incorporate open access works into their own creative content.

"We try not to use open access content or free font libraries. You just don't know what's written behind the terms of each one and without reading all of that detail you can get in trouble quite quickly. We just have a blanket rule in the creative department to use the licences we buy, use the font libraries we subscribe to and that's that" —Media company

For news media, the shelf life of content is shorter and often available for free online. It is important to get content out quickly and to reach a large audience.

"A key focus of our digital work is to disseminate as widely and quickly as possible. We want our links to our content shared on as many platforms, we want to connect with people, want people to retweet us. So our focus is on how do we amplify our content?" —Media company

We also heard about alternative ways of reaching consumers and creating demand.

"Digital change is very important to the business model. We have an online community based on an international company's model, where book events in bars and such led to an online community, which now generates significant sales overall" —Publisher

Analytics tools are becoming increasingly important

For some researchers and academics, analytics and access to a wider community has become more important than seeking income from royalties.

"We can now track quite detailed data about who is reading, including the number and location of downloads. It is crazy not to use SSRN because income from royalties is so modest it does not outweigh the benefits of the work being instantly available to the entire academic and wider community"

—Tertiary education body

Media organisations use analytics tools for live audience tracking.



IT'S PRETTY STANDARD PRACTICE. OUR HOMEPAGE EDITORS CAN SEE GREEN AND RED DOTS SHOWING HOW WELL THEIR STORIES ARE DOING FOR THAT SLOT – LIVE AUDIENCE TRACKING. WE CAN DO IT ACROSS MOBILE, DESKTOP AND VIDEO"

Media company

Some are using search engine optimisation.

"It's all about search engine rankings for us at the moment. We're really lucky with that, mainly because we optimise for it. We're a not-for-profit, so that helps us go up" —Museum

New revenue channels are emerging

We heard that there are new channels for deriving revenue, such as selling through online retailers or direct selling straight from the publisher. E-books can be seamlessly converted from a print book into a digital format, creating two potential revenue streams from a single work.

"For the last 5 years we were preoccupied with e-books and how they would impact the business. Now we know that in terms of producing books it's fairly seamless. We make a physical book and convert it into an e-book for consumers to purchase on a platform. The process has stabilised" —Publisher

Apps provide further opportunities for generating revenue. We heard that converting publications into apps can be viable for content that is functional or visual, such as field guides, maps and art guides.

However, for many publishers, sales from print are still the main way of generating revenue.

"For most literary writers, e-books are still a very small subset of sales. It is only really genre books selling digitally" —Industry Body

The industry also continues to generate export revenue by selling printed publications overseas, selling publishing rights to overseas publishers or working with overseas publishers to publish co-editions.

Despite the opportunities, the big question for the publishing industry is how to ensure financial viability in a digital and online world.

"There is no real financial model yet for how these things work. As the newspaper industry is currently showing, you cannot continue to produce good content if you don't have the revenue. And that is the nexus we are all working around at the moment – how do you do this so it works financially?" —Publisher

Print is not going away any time soon

Many noted that the e-book format is not suited for all genres of written content.

"E-books work best for simpler formats, such as popular fiction" —Publisher

And that some aspects of the experience of reading a physical book cannot be replicated with e-books.



"HOLDING A BOOK STILL HAS THE SAME PULL FOR CHILDREN'S BOOKS – IT'S THE CUDDLE FACTOR"

Publisher

In the education sector, we heard some have a preference for learning from print text.

"On the educational publishing side, there are e-textbooks with lots of added features but students prefer printed texts. This is potentially driven by text being pedagogically more powerful" —Publisher

We heard that scaling up production of digitised educational content is hampered by a variety of factors.

"Digital resources are being developed by our educational publishers, but at secondary school level it's early days. There is a need for alignment between platforms, schools, firewalls, devices, app versus web-based and other factors for the larger scale production of digitised books" —Publisher



THERE IS A DRIVE TO DIGITISE, BUT ACCESSING AND RE-USING WORKS CAN POSE CHALLENGES

TECHNOLOGICAL ADVANCES AND CONSUMER DEMAND ARE LEADING THE DRIVE TO DIGITISE CONTENT, BUT THERE CAN BE DIFFICULTIES OBTAINING PERMISSION TO DIGITISE.

Digitisation and online search tools have made information more accessible

The digitisation of written content has improved people's access to knowledge. Information can be accessed through a number of internet search tools.

Examples of digitisation initiatives include the Te Ara encyclopaedia, Digital NZ and work that the GLAM sector is doing.



"THE INTERNET MAKES STUFF EASIER TO FIND. WE ARE NOT RELEASING ANYTHING THE WORLD DIDN'T ALREADY KNOW OR COULDN'T THEORETICALLY OBTAIN, BUT WE ARE MAKING IT MORE ACCESSIBLE"

Government publisher

We heard that the wave of digitisation of written content has a big impact on education, particularly for the purposes of learning, research and identity. One example is the National Library's Papers Past initiative, which has digitised pages from New Zealand newspapers and periodicals published between 1839 and 1948. This is a valuable tool providing insights into the big political and social issues of the day.

Vast amounts of content are now available online. The content can be used for 'data mining' or 'text mining'. This can involve discovering patterns in large data sets derived from the content, which can be used in the development of new technologies (e.g. artificial intelligence). However, some expressed concerns about using content in this way.

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

It can be difficult to find the original owner of copyright works

When authors or owners of creative works cannot be found, it is unclear whether and how those works can be used by others. GLAM sector participants talked about the volumes of 'orphan works' they hold. Unlike libraries and archives, museums must gain the permission of copyright owners to digitise works for preservation purposes.

"With respect to preservation and communication of public collections, museums and galleries perform a very similar role to libraries and archives and it is an anomaly that they are not included in the current provisions" —Gallery

Consumer demand and changing expectations are driving the need for the GLAM sector to make content available online. We heard that it is difficult for museums to make many works available as they are often unable to gain permission to do so. Permission from the copyright owner is required to digitise work because the digitisation process involves making a copy. It can be extremely difficult or impossible to obtain permission if the original rightsholder is unknown or cannot be found. Many expressed concern over such content being 'locked up'.



"I'M LOOKING FOR AUTHORS OF WORKS AND CAN'T FIND THEM ANYWHERE, SOMETIMES CAN'T EVEN IDENTIFY THEM. OR THE COMPANY'S GONE OUT OF BUSINESS, SO THERE'S NO ONE TO ASK. I THINK IT'S GOING TO BE A PROBLEM FOR THE SECTOR AS A WHOLE BECAUSE OF WHO WE SUPPLY TO: CREATORS"

Museum

We heard that orphan works are a significant problem for libraries and archives. These organisations often deal with large volumes of non-commercial, historical material (e.g. personal letters). Many of these works were originally written or created without any expectation that people (in the future) would be interested in it or its authorship. We heard that it is impractical, and sometimes impossible, for libraries to make any determination about copyright in these works.

"For us, the orphan works problem forces us to balance what is at times a purely technical infringement risk against our countervailing statutory obligations to make available New Zealand's documentary heritage and meet New Zealander's expectation for online access to cultural heritage collections" —Library

We also heard that orphan works can be even more difficult to navigate where works are subject to Crown copyright.

"It can be extremely difficult to identify who can make a decision about copying a work with Crown copyright, as government departments have closed or undergone multiple mergers over the years. The Crown copyright term of 100 years exacerbates this problem" —Library

Some publishers talked about adopting risk-based management strategies when using orphan works in their publications (typically a photograph or image).

"We clear copyright or permissions on all images reproduced in our books. Where permission is not granted or where we cannot be sure of the rightsholder, we do not include the image. Where there is some uncertainty, we might include the image with a covering sentence outlining the context and seeking information as to the rights situation. This might occur, for example, when an image has been widely reproduced in earlier books or on the internet but there is no acknowledged rightsholder" —Publisher

We heard that some organisations did not feel that a risk-based approach was an option due to reputational concerns.

Others, in the commercial publishing sector, were less convinced that orphan works were a widespread problem.

"Orphan works are a very rare event for us. For written works, it's almost totally non-existent. New Zealand is small enough you can normally track down the owner. The protocol now is to have a crack and if you just can't find the owner, deal with the consequence. But this isn't ideal" —Publisher

When the rightsholder can be easily traced it is often a simple process. Some publishers we spoke to said that requests for permissions to use their copyright works are infrequent and, when they do occur, permission is usually granted.

"We always give permission. Fundamentally, we see IP not as something to buy and own but to buy and get out there in any way we can. And almost any use is all good – it's good advertising" —Publisher



MANAGING RIGHTS CAN BE COMPLEX

RIGHTS ARE MANAGED IN A VARIETY OF WAYS.
NEW RIGHTS MANAGEMENT TOOLS HAVE EMERGED.

Organisations manage rights in a variety of ways

The Copyright Act sets out rules for copyright ownership which can be changed by contract. Organisations and businesses manage copyright ownership with their staff, contractors, contributors and collaborators in different ways. Some retain copyright automatically as authors are employees.

"In terms of written content, it's usually created in-house by our journalists. We retain copyright as they're generally employees" —Media company

Others obtain copyright via contract.



"WITH RESPECT TO AUTHOR CONTRACTS THE LICENCE IS FOR THE LIFE OF THE COPYRIGHT WORK OR PERPETUAL. IF THE BOOK IS 'OUT OF PRINT', THE AUTHOR CAN HAVE RIGHTS REVERTED BACK TO THEM"

Publisher

Others retain no copyright.

"Universities in New Zealand generally have policies that staff retain all copyright in their research outputs" —Tertiary education body

Some seek a licence to use the copyright work.

"We have a practice of asking copyright holders of collection items for a non-commercial-use museum licence" —Museum

We heard that typographical arrangements, separate from the literary work, can be valuable. For example, the layout and design in print newspapers can be a distinguishing feature. Similarly, design features can be important for illustrated books.

Publishers we spoke to also mentioned that they have processes to manage cultural permissions. One publisher suggested that consultation with Māori, in appropriate circumstances, is standard practice.

"Within the industry it is standard to consult with Māori so that works provide cultural respect" —Publisher

Another pointed out that this is commonly done in relation to images.

"We go to iwi for permission for images when appropriate – for example, when we have particular reason to know about a relationship of taonga with an iwi, or when the museum that holds the image requests this" —Publisher

Digital formats can make managing rights complex

Publishers talked about contracts from the pre-internet era not addressing digital publishing rights adequately. Contracts often need to be renegotiated.



"WHEN WE STARTED REPUBLISHING CONTENT IN E-BOOK FORMAT, WE HAD TO RENEGLIATE RIGHTS WITH AUTHORS. CONTRACTS PRE-2010 WERE NOT CLEAR ABOUT DIGITAL RIGHTS"

Publisher

We heard that the introduction of e-books has created some complexities for libraries as there is no standard e-lending licensing agreement used by publishers.

We also heard about the importance of copyright metadata in a digital world.

"If it's worth licensing, then we need to know who owns it, whether they're still alive. If they're not alive, who owns it now, how can we get a hold of them? Once you've got the core metadata information, then you can go and do licensing and negotiations" —Museum

Digital rights management tools are sometimes used

We heard about the use of digital rights management (DRM) associated with e-books.

An e-book borrowed through a library or an online platform may have DRM. A book may 'lock' (become inaccessible) in a person's device once the rental period is over.

We heard that a lot of publishers selling through platforms add the platform's DRM to those files.

"You can find out how to break DRM pretty easily. But for the ordinary punter, it's a disincentive to putting the file on internet and making it free for all your friends" —Publisher

But DRM can also pose challenges for preservation purposes and for access more generally.



"AS FORMATS CHANGE, IF YOU BOUGHT THE WORK IN ONE FORMAT AND YOU WANT TO CONTINUE MAKING IT ACCESSIBLE, DO YOU HAVE THE RIGHT TO TWEAK THE FORMAT TO ENSURE THAT IT'S STILL ACCESSIBLE?"

Industry body



Product design & architecture

DESIGNS THAT ARE TRANSLATED INTO THREE-DIMENSIONAL PRODUCTS, SUCH AS FASHION GARMENTS, FURNITURE AND ARCHITECTURE

Technology is allowing for increased specialisation and collaboration across design disciplines and greater involvement of the consumer in the design process.

Easier access to global supply chains and markets and new technologies such as 3D printing are presenting new opportunities and challenges. There are differing attitudes and approaches to protecting products through both the copyright and designs regimes.



Product design & architecture

COPYRIGHT AND REGISTERED DESIGNS IN PRODUCT DESIGN & ARCHITECTURE

Copyright in 'design'

Elements of 'design' can be protected by copyright. The design of a product (e.g. the shape of a bottle) or of a garment (e.g. an item of clothing) might attract copyright protection in the following ways:

- › an original design sketch and/or dressmaking pattern is an **artistic work**, and
- › an initial sample of an original design could be considered an **artistic work** (as a 'model').

If there is sufficient artistic craftsmanship to the final product or garment it too may fall under the definition of an **artistic work**.

A work of architecture is also explicitly recognised as an **artistic work**.

Artistic works attract **moral rights** under the *Copyright Act*.

Copyright in industrially applied works

If an **artistic work** is applied industrially, the copyright term is reduced to 25 years where the work is considered to be a work of artistic craftsmanship. Otherwise the term of protection is 16 years for other types of industrially applied artistic works.

A work is considered 'applied industrially', for example, if more than 50 three-dimensional copies are made for the purposes of sale or hire.

In many other countries, copyright protection is not extended to industrially applied designs. Instead, registration of the design is necessary for protection to be granted.

Protection of registered designs

Under the *Designs Act 1953*, a new or original design can be registered with the Intellectual Property Office of New Zealand. A 'design' means features of shape, configuration, pattern or ornament applied to an article by any industrial process, being features which in the finished article appeal to and are judged solely by the eye. A design cannot be registered if its features of shape or configuration are purely functional or it has already been published.

Registration protects only the external appearance of a manufactured article. This is different to a patent which can protect the method of manufacture or functional features of an article. Designs may not be registered for sculptures (other than casts or models used or intended to be used as models for patterns to be multiplied by any industrial process), wall plaques, medals or printed matter of a literary or artistic character.

Protection lasts for up to 15 years, providing the registration is renewed at each 5 year term. There is a fee of \$100+GST to register a design or renew a registration.

Registration also allows the applicant to secure the New Zealand filing date for any corresponding design applications made overseas within the subsequent six months.

Comparing copyright and design registration

To establish copyright infringement in court, the copyright owner must prove originality of a qualifying work (amongst other things). If the defendant can prove that they did not copy the copyright owner's work, directly or indirectly, then there is no infringement.

On the other hand, a registered design protects against copying as well as against the production of any product considered too similar visually (even if the product was created independently). The registration grants the owner exclusive rights over the production, importation for sale, use for the purpose of business, and the hire and sale of the design (including for articles incorporating the registered design), from the date of application to the date that the registration expires or lapses.

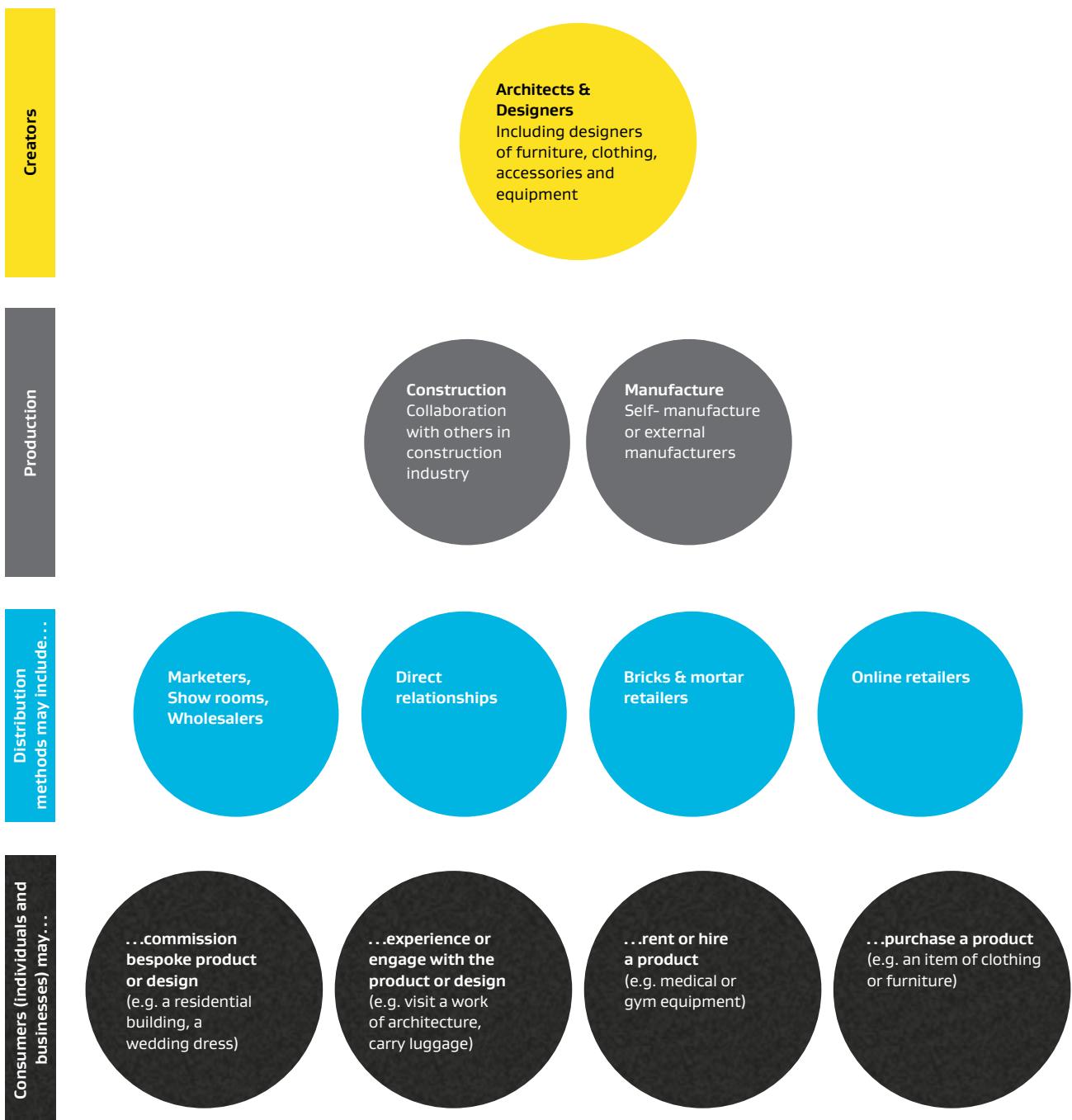
Other forms of intellectual property (IP) are also important

In addition to copyright and registered designs, many in this sector also rely on other approaches to managing and protecting rights, including patents, trade secrets, trade mark protection and contractual arrangements. Some in the sector used the term 'IP' to refer to the range of protections.



SUBSECTOR 6/7

This diagram shows those who may be involved in the development of product design and architecture, as well as common ways that works are consumed.





TECHNOLOGY IS CHANGING THE DESIGN PROCESS

TECHNOLOGY IS ALLOWING FOR GREATER SPECIALISATION AND COLLABORATION ACROSS DESIGN DISCIPLINES. IT IS ALSO ALLOWING GREATER INVOLVEMENT OF THE CONSUMER.

Technological change has led to more specialisation

Technology has allowed more elements of the designs process to be automated, shifting skills requirements within roles.

We heard how computer aided design drawing means that designers no longer need to sketch designs or make patterns, models or prototypes (although some still choose to).

"Not every designer is a dress maker these days"

—Industry body

Designers we spoke to explained that this has made the market more competitive and created a need to become more specialised, either by being boutique and charging a premium for unique qualities, or by focusing on a particular part of the creative process.

"The core of our business is ideas. You need to develop it and then find someone who has the technology to bring it out"

—Fashion designer

For some, this also involved identifying and partnering with specialist providers.

"We want to use the best manufacturers in the world"

—Fashion designer & manufacturer

We heard that specialisation and collaboration can allow for greater innovation.

"New Zealand's kind of got this jack of all trades things, but I actually think that identifying what you're good at and partnering up with companies that are good at doing something else, that's how you innovate" —Fashion designer

Greater collaboration is enabling new approaches to creation

We heard that design services are becoming more integrated to create immersive experiences. An example was a shopping complex design. Architects, interior designers, product designers and graphic artists integrated their respective design elements. Everything from the building itself, to the restaurant menu designs, were part of a cohesive whole.



"OUR COMMUNITY CREATES COLLABORATIVELY, WHICH MAKES FOR A MUCH MORE POWERFUL OUTCOME FOR THE CLIENT"

Industry body

For architects, the Building Information Modelling system was frequently cited as an example where collaboration was improving the user experience but making rights ownership more ambiguous.

"With the advent of building information modelling, the issue of ownership is quite hard. Because it is drawing information from various disciplines, you have architects and designers putting it into a model which nobody owns but they are all contributing to" —Industry body

Designers talked about connecting to the users of their products through social media, allowing consumers to input into the design process.

"You get all sorts of information about trends in the market, feedback from clients, levels of returns. Getting all that feedback about the product is really important – it feeds into what we want to change" —Fashion designer & manufacturer



THERE IS GREATER ACCESS TO GLOBAL SUPPLY CHAINS AND MARKETS

IT IS INCREASINGLY POSSIBLE TO OVERCOME GEOGRAPHICAL BARRIERS AND ACCESS GLOBAL SUPPLY CHAINS AND BIGGER MARKETS. HOWEVER THESE OPPORTUNITIES CAN ALSO POSE NEW RISKS.

Mass production is presenting opportunities and risks

Product designers we spoke to said that to be competitive at a medium to large scale it is critical to access the cheapest and most efficient forms of production.

For many this means manufacturing overseas.

"Designers looking to manufacture have to go offshore to make it viable. New Zealand is too small to have a really large business" —Industry body

Some thought that the design industry should be focused on exporting services rather than the finished goods.



"WE DON'T HAVE TO MANUFACTURE, I THINK THAT'S A HORSE THAT'S BOLTED. WE CAN SELL OUR SERVICES. DESIGN DOESN'T NEED TO BE EXPORTED ON SHIPS"

Industry body

Manufacturing overseas also comes with risks. Problems we heard about included products being smuggled out of production factories and sold on the black market, and unique features of a product (e.g. shape) being shared with competitors.

"When you see a product that looks so much like yours, then it's probably come from your factory. Your own environment is the first place you look for a leakage" —Fashion designer & manufacturer



Businesses are looking to do things in new ways

We heard about incremental innovation, including applying good ideas in new ways.

"If we see a good idea and want to try and use it, we'll apply it in a different way. That's how progress happens"
—Product designer & manufacturer

Some spoke of seeking out and building on new technology.



"WE HAVE PERSONNEL THAT ARE TASKED WITH INNOVATION SPECIFICALLY. IT IS THEIR JOB TO HUNT AROUND THE GLOBE FOR NEW TECHNOLOGIES THAT COULD LEND THEMSELVES FOR USES IN OUR GARMENTS"

Fashion designer & manufacturer

We heard that 3D printing poses new opportunities.

"We see 3D printing as an opportunity, not a challenge. We'll adopt it. We're thinking its main application will be making the tools, moulds and samples and prototypes"
—Product designer & manufacturer

Online distribution is critical, but comes with risks

Product designers produce physical works, which can present distribution challenges given New Zealand's geographic isolation and the infrastructure required for retail sales. For many we spoke to, online sales are critical in developing a presence, both locally and in global markets.

"The ones with the really good online stores are now exporting to the world quite easily on an individual basis. For many New Zealand designers, their online stores are selling a lot more than their physical stores" —Industry body

Online distribution methods increase exposure as well as the risk of being copied. They can also provide channels for easy distribution of infringing products. Fashion industry participants reported that counterfeit products (imitations that are passed off as genuine products) on social media and online auction sites were of concern.

"It's the internet that's the big thing, that's where 90% of the infringing product gets sold" —Fashion designer

Some felt that proving originality for copyright purposes was becoming increasingly difficult in an online world.

"We are awash with images and information. Everything is a mash up of ideas and sampling of other influences. Legal protection of property is gone in this environment. Legally the issue of how much your design mimics any previous design is very hard, if not impossible, to prove" —Architect



MASS PRODUCTION IS IMPACTING ARCHITECTURE

WE HEARD THAT MASS PRODUCTION TECHNOLOGIES ARE INCREASINGLY BEING USED IN ARCHITECTURE.

The use of pre-fabricated buildings and one set of designs to build multiple, identical buildings is becoming more common. These opportunities are presenting new challenges.

"With 'volume home' building that you can buy off the shelf, copyright is hard to prove when the house you designed to a site has been replicated and built en masse by someone else" —Industry body

We heard how the industry is responding to these challenges.

"We inserted clauses into the contract licensing the design to the particular 'volume home' builder. It was the first time we had really confronted the issue of how you mix originality of design with mass production, and make sure the original creator gets the benefits of their design being altered, added to, or replicated in terms of monetary pay back" —Industry body



THERE ARE DIVERSE APPROACHES TO MANAGING AND ENFORCING RIGHTS

DIFFERENT CONTRACTUAL ARRANGEMENTS ARE TAILORED TO SUIT BUSINESS MODELS AND RELATIONSHIPS. THERE ARE ALSO DIFFERING ATTITUDES AND APPROACHES TO PROTECTING COPYRIGHT AND DESIGNS.

There are differing approaches to managing rights

Contractual arrangements are sometimes used to set out the ownership of all IP rights at the outset. Non-disclosure agreements are also commonly used by more established firms, particularly in collaborative creation processes and where contractors are involved.

"Whenever we are working with third parties we make sure we understand how the relationship is going to be managed and we put a contractual agreement around that. Where an agreement on IP ownership is not workable, we walk away"
—Product designer & manufacturer

We heard about the use of a range of contractual arrangements to suit different business models and relationships. This included outright ownership.

"We generally don't like to own joint IP because it can often be difficult to manage down the track" —Product designer & manufacturer

It also included arrangements with greater flexibility.

"What is usually more commercially viable for us is to negotiate a period of exclusivity. We are conscious of the sustainability of our partners' businesses as well ours and allow them to use our IP after a certain period" —Fashion designer & manufacturer

An ongoing relationship with a client was sometimes perceived to be more valuable than IP, to the extent that some were willing to forgo the rights.

"If a customer is spending a lot of money on us to get a product made and it's important to them to have the IP, we are rewarded through big orders. It's not a high stress thing for us"—Product designer & manufacturer

Others spoke about a reluctance to formalise copyright ownership through contractual arrangements for fear of jeopardising client relationships.

"There are many creatives who don't want to put a contract in front of a client because they view it as an impediment. They will often provide initial concepts, ideas or design works to a client before they start thinking about copyright and contracts"—Lawyer

Being first to market and building a brand is important

Many we spoke to thought that IP infringements were inevitable. They tended to focus their resource on innovation and building a strong relationship with consumers.

"Our main protection is to keep innovating and to try and keep innovating faster than our competitors"—Product designer & manufacturer

Some perceived copying as a reinforcement of their products' value.



"REWARD IS REPUTATION. CONSTANT REPLICATION AND COPYING IS PART OF THE TERRITORY"

Architect

We heard that creating innovative products builds brand loyalty, which provides a form of protection.

"How we protect what we do is we are the ones who did it first and we've got an awesome brand, a fan base and an army who will only buy from us"—Fashion designer

Choosing how and whether to protect depends, to some extent, on the industry

People we spoke to in the fashion industry rely on copyright, rather than registering designs.

"We just rely on the intrinsic copyright by having created it. It would be too expensive to register our designs. It would cost a million dollars a year at \$100 a pop"—Fashion designer

Some questioned whether architecture was a good fit with copyright and designs.

"Copyright and designs don't work for architecture and I don't think they can or necessarily should"—Architect

Some we spoke to saw value in using the registered designs regime, particularly as part of a broader IP strategy.

"We see registered designs as complementary to utility patents in a portfolio sense. Registered designs are good for verbatim copies but don't always stand up on their own because the scope of rights for a design is so narrow. We have also started using shape trade marks for some products"—Product designer & manufacturer

We also heard about the importance of timing and the need to file for more than one design registration to protect the design at different stages of development.

"We file for a design registration to protect us through the early development stages and then file for a final design, too, in iterative stages"—Product designer & manufacturer

Some thought that the protection available in New Zealand for industrially applied three-dimensional works, under both the copyright and designs regimes, can be problematic because it can make ownership of the rights in the work uncertain.

"Copyright protection for 3D works is a problematic anomaly"—Product designer & manufacturer

Enforcing rights can be difficult

Some designers we spoke to talked about reluctance in the sector to engage with legal issues. Costs of seeking legal advice and of taking enforcement action were raised as barriers.

"To be honest, we don't have a lot of confidence in our ability to enforce our rights. I suppose in a way we do it to deter the honest players, rather than the ones who will flout it. It's quite prohibitive to bring an infringement action against someone – there's got to be a lot at stake"—Product designer & manufacturer

We also heard that establishing grounds for protection under the *Copyright Act* can be very difficult.



"THE HARDEST THING IS PROBABLY PROVING ORIGINALITY. THE ELEMENTS OF A BUILDING ARE COMMON. PROVING THAT YOUR IDEA IS UNIQUE IS QUITE A HARD THING TO DO"

Industry body

Establishing that a product infringed a registration under the *Designs Act* was described as challenging for different reasons. Some thought that the scope of protection was too narrow.

"Our competitors will walk in and pick up our packet and say we can do that for this much, and make an equivalent in a heartbeat. It'll be a slightly varied version to get around the design registration and just like that our new idea is gone. It's cost us an awful lot of money, but we don't have any recourse"—Product designer & manufacturer

Those who did actively enforce their rights described having to allocate large amounts of resource.

"We've basically got lawyers, all the time, on standby"—Fashion designer

Some described going to great lengths to protect against supply chain leaks.

"We have protection at the factories. It's all key card access, only three people in the design rooms – no phones, cameras, no thumb drives, no internet, no email except to approve. No IP can get out of that room"—Fashion designer



Visual & performing arts

VISUAL ARTS (INCLUDING PHOTOGRAPHY, PAINTING AND SCULPTURE) AND PERFORMING ARTS (SUCH AS DANCE AND THEATRE)

Reputation and attribution are of high importance. This feeds into strong views on the commissioning rule (relating to first ownership of copyright) and moral rights. Collaborative creation and building on the work of others is common and there are often differing approaches.

While technological developments have made distribution and collaboration easier, licensing and licensing considerations have become more complex.



Photo source: plainpicture/Julien Benhamou/One Shot

Visual & performing arts

COPYRIGHT IN VISUAL & PERFORMING ARTS

Visual arts

Visual arts are typically recognised under the *Copyright Act* as an **artistic work** (e.g. a graphic work, a photograph, or a sculpture, irrespective of artistic quality). A **graphic work** is a subset of the range of artistic works, and includes paintings and drawings.

Typically, the owner of the rights attached to artistic works is the artist (**author**). However, the author will not be considered the first owner of copyright in the following scenarios:

- › If the artistic work was created in the course of employment, the copyright owner is the author's employer.
- › If the author is commissioned to produce certain graphic works, a photograph or a sculpture, the commissioner is the owner (**commissioning rule**).

Parties can agree on a different arrangement through contract.

Performing arts

Under the *Copyright Act* certain performing arts are granted copyright protection as **dramatic works** (e.g. dance or mime).

While a dance performance is considered a dramatic work, the performance of a play is not a work in its own right. The final result of a theatrical performance is likely to involve a number of copyright works including:

- › **dramatic works** (e.g. dance or mime)
- › **literary works** (e.g. script for a play or book that the performance is based upon)
- › **musical works** (e.g. sheet music) and **literary works** (e.g. song lyrics) for any music that is composed for the performance
- › **sound recordings** (e.g. recordings of any sounds or music used in the performance), and
- › **artistic works** (e.g. props or backdrop).

In order for copyright to exist in a literary, dramatic or musical work (dance, mime, script or improvisation), the work must be recorded in some medium. The recording may be an audio recording, a video recording or written down.

A production company often holds any copyright in a performance and will license the use of contributing works. Copyright ownership in the individual works is typically retained by the author or other rightsholder.

Moral rights

Regardless of who owns copyright in a literary, dramatic, musical or artistic work, the author keeps any moral rights (e.g. the right to be identified as the author). Although these rights may be waived (given up), they cannot be assigned (transferred).

Orphan works

The *Copyright Act* sets out rules for works of **unknown authorship**. The identity of an author can be treated as 'unknown' if it is not possible for the person who wishes to find out the identity of the author to do so by 'reasonable inquiry'.

'Orphan work' is not a recognised term under the *Copyright Act*. However, it is generally understood to include:

- › works of unknown authorship, and
- › works for which the author is known, but the author cannot be found or the rightsholder cannot be determined/found.

As copyright protection will often extend beyond the life of the author, successive rightsholders must be tracked through wills. Copyright ownership may also be vested in, assigned to, or owned by, a corporation.

Licensing bodies

Many creators license their content directly to users. However, licensing bodies can help to facilitate licensing of works. For example:

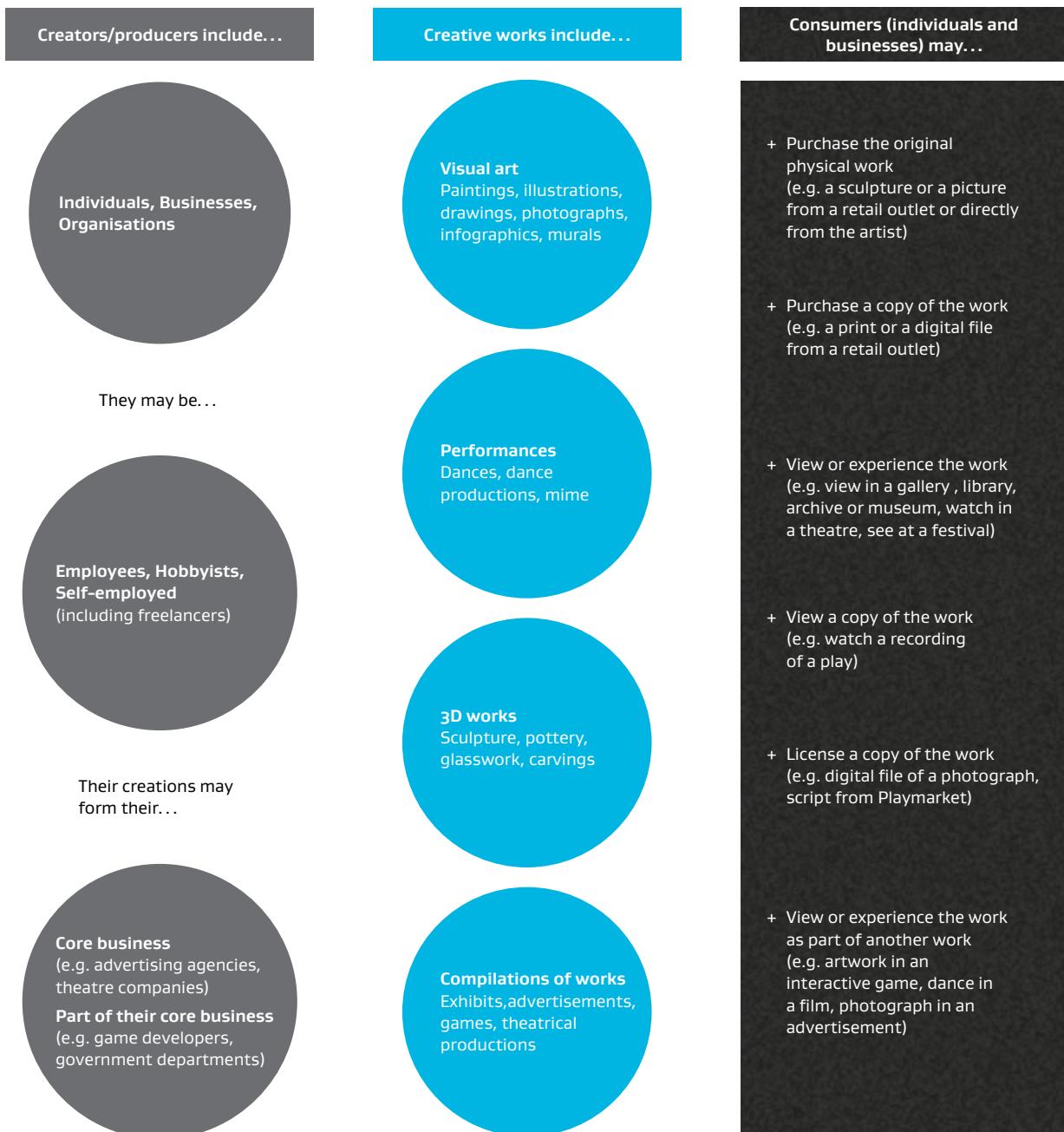
- › **Playmarket** licenses and manages the performance rights of playwrights' works (scripts).
- › **VisCopy** licenses the reproduction of visual art on behalf of artists. They represent over 11,000 visual artists across New Zealand and Australia.

In both cases the artist or creator retains the copyright in the works. Playmarket and VisCopy facilitate the transaction. People seeking licences could include a school or local group looking to put on a play, an author wanting photographs for their book or a band seeking artwork for their album cover.



SUBSECTOR 7/7

This diagram shows those who are likely to be involved in the development of visual and performing arts, as well as common ways that works are consumed.





CREATING OFTEN INVOLVES WORKING WITH OTHERS

NEW WORKS ARE OFTEN THE RESULT OF BUILDING ON THE WORKS OF OTHERS OR WORKING WITH OTHERS. COLLABORATION PRESENTS OPPORTUNITIES, AS WELL AS CHALLENGES FOR MANAGING RIGHTS.

Creation is driven by a desire to express ideas and a passion for storytelling

Artists and creators – from individual artists to large organisations – spoke of a desire to express their ideas and a passion for telling their stories.

"I create because there's no other way to express what I want to express other than creating work. Priority-wise, I'd say that there is no other way or thing that would make me happier than creating. If I didn't do that I wouldn't be fulfilled in my life" —Theatre company

Being able to derive an income from their creations is also very important to creators.



"TWO THINGS INSPIRE ME TO CREATE – INCOME, AND THE BASIC DESIRE TO SEE MY INSIDE IDEAS EXTERNALISED, TO PUBLISH MY OPINION"

Fine artist

Fine artists talked about focusing on developing a business around their creations, rather than deriving income solely from selling a single copy or limited copies of their work.

"The market is changing. The interface between arts and commerce is getting shorter. Young creative designers are art rock stars and don't have a concept of 'fine art good, commercial art bad'" —Fine artist

Some consider that this focus is due to the limitation of being able to derive income from a sale of an original work just once. While purchasers of art do not acquire the copyright with the work, they may be able to make money from reselling the work – without having to financially compensate the artist.

Collaboration brings copyright considerations to the fore

We heard that creation processes have evolved with devised works, the inclusion of digital content, cross-cultural works and works being made by international teams. As a result copyright ownership has become more complex.

"The more complex art becomes, the more complex issues around collaborative work become. A couple of decades ago everyone involved in making a work such as opera or theatre would have had clearly delineated roles to which were assigned standard royalty percentages or other entitlements" —Festival & event organisation

We also heard about the importance of establishing ownership of rights early on in the creation process.



"NO ONE REALLY TELLS YOU TO HAVE THAT CONVERSATION UNTIL IT'S TOO LATE. UNTIL YOU HAVE A FIGHT AND WANNA SPLIT UP AND YOU'RE LIKE 'UH-OH, WHO OWNS WHAT?'"

Theatre company

There are different views about creative input and copyright ownership

Artists and creators often commission work from other artists or creators.

"Sometimes a work will be commissioned as part of a final piece. Some artists might get others to make works for them. For example, an artist may commission a basket-maker to make baskets, but the end product, the artists will say, belongs to them" —Fine art industry body

Strong and divergent views about the commissioning rule came through.

Photographers we spoke to considered that the commissioning rule results in a loss of control and income. While copyright ownership can be agreed in a contract, the existence of the commissioning rule can place photographers in a weakened bargaining position.

"Photographers are increasingly being told by clients that they won't be hired unless they hand over copyright. The commissioning rule is often used to justify these demands. It says that the commissioner is entitled to claim full ownership, regardless of how much, or how little, the creator is paid. While technology means that content can be distributed more widely, freelance contributors' rates have not increased since the early 1990s" — Photography industry body

Some photographers noted that their work was often integral to the final creative work and felt that they were not compensated fairly for commercial works.

"If a work is going to be used for commercial purposes, then it's vital that all contributors are compensated fairly for their part. For independent contractors this means they retain their full intellectual property rights. We understand that publishing and distributing works is beneficial to our society – but this is not prevented by creators owning the copyright" —Photography industry body

However, businesses and organisations we spoke to who commission work from artists as part of creating new works took a very different view.

"We spend a lot of money on the creative processes for campaigns and then ask photographers to execute an idea that has been given to them. We develop the content and consider we own the creative content"

—Production company



SUBSECTOR 7/7

Creators have differing approaches to re-using or building on the work of others

Building on the work of others is a common practice.

"The appropriation, reproduction and re-use of existing imagery has been such a strong part of contemporary art practice for a century now. Artworks are forever quoting and building on the artworks that came before them, splicing in bits of film or using newspaper photographs" —Art museum

However, it is not always well received.

"A tricky thing with artists is if they're lifting and using artworks as part of a philosophical and artistic statement. It's kind of a 'hat tip' rather than stealing, but sometimes people don't feel flattered" —Art museum

Some artists are less concerned about using other people's works to make their own creations.



"THERE ARE THREE RULES. NOTHING IS SACRED. EVERYTHING IS UP FOR GRABS. NEVER ASK PERMISSION. IT'S EASIER TO ASK FOR FORGIVENESS THAN PERMISSION. ALTHOUGH SOMETIMES FORGIVENESS COSTS"

Fine artist

We heard that others, such as student artists, are more concerned.

"I have seen at some art schools that copyright is something that new artists are scared of. It can hamper their creativity if they're scared that someone's going to come and get them if they do something" —Art museum

While many survey respondents did not consider that the sector has a great understanding of copyright, some noted that established businesses were very aware of copyright considerations.

"At grassroots level, there is perhaps a lack of awareness of copyright. At the established level, they are very aware and clear on what the parameters are" —Dance company



TECHNOLOGY IS CHANGING THE WAY THAT CONTENT IS ACCESSED AND USED

TECHNOLOGICAL DEVELOPMENTS HAVE HAD AN IMPACT ON DISTRIBUTION AND WAYS TO CONNECT WITH AUDIENCES. NEW DISTRIBUTION CHANNELS ADD COMPLEXITY TO LICENSING ARRANGEMENTS FOR NEW AND EXISTING WORKS.

Content is distributed in both new and traditional ways

Traditional distribution models are still commonly used. The most common forms of revenue streams for visual and performing arts survey respondents were sales of work (copies or original) and sales of tickets.

We heard that experiencing art at a physical location adds to the enjoyment of consuming certain works.

"[For me] art is generally accessed via galleries and rarely online and likewise dance. I like the actual, virtually tactile, experience of these mediums which I find the online experience cannot provide for me" —Consumer focus group participant

In some cases the changes in technology are helping to support these traditional models, not challenge them.

"You're not seeing gallery visitation dropping as internet use goes up. There's a correlation between seeing something online and wanting to see the real thing. Putting collections online creates more interest, more inquiries, more production requests, and more correspondence. The changes in technology have created more work, not less" —Art museum

Within the galleries, libraries, archives and museums sector (**GLAM sector**), a significant number of works may be held which cannot be displayed. Digitising content can overcome physical space limitations and make works available to consumers.



"NOWADAYS IF YOU DON'T SEE IT ONLINE, IT MAY AS WELL NOT EXIST. MAY AS WELL BE INVISIBLE"

Museum

Changes in technology have enabled many works to reach a wider audience and helped to transform the underlying works. People spoke of using technology to distribute quality performance recordings to new audiences, and of new collaborations with film or documentary makers.

These changes have helped to expand the possibilities of what the industry might look like in the future.

"In the future I would like to see us being more slick and confident with online content. Possibly even pay-per-view revenue-generating projects" —Dance company

Licensing is more complex with the increase in distribution avenues

We heard that evolving distribution models add risk and complexity for producers.



"ONLINE IS CHANGING THE BUSINESS. AS PRODUCTS EVOLVE, WE NEED TO CONSIDER AND CLEAR AN INCREASING NUMBER OF RIGHTS FOR DIFFERENT PURPOSES"

Production company

A photography body mentioned that clients are now seeking licences for use across a wider range of platforms.

"With the introduction of high-speed internet and the rapid rise of social media platforms, images can now be distributed easily and instantaneously all over the world. For creators and their clients, this has resulted in a loss of control. As a result clients are now seeking broader usage rights, so they can take full advantage of the opportunity presented by these digital distribution channels" —Photography industry body

Developments in digital technology can aid discovery of work, as well as pose challenges

While technology has helped creators to distribute works, we heard that it is not always easy to connect with potential customers.

"The economics are very, very tough for digital distribution. They say the internet's free or the technology's free. Well it is, but there's so much noise. To get people to take notice is very difficult" —Dance company

On the other hand, we heard that technology can enable people to connect directly to their fan base and get real-time feedback. It means they can discover what is working, why it is working and what is likely to work in the future.

"Social media has given us direct engagement with the audience. It is a great way to have a conversation and an amazing tool that can help give a steer on why things worked or didn't work" —Dance company

New permissions are required for existing works

The process of digitising a work requires making a copy of the original work. As the GLAM sector is increasingly looking to make their collections available online, there are copyright considerations that need to be taken into account.

Given the age of many of the collections, the original agreement between a GLAM and the copyright owner typically only covered the physical display of the work. As a result, so additional permissions are required to digitise. This can be straightforward if the owner can be identified and easily contacted.

In other cases, the process is more difficult. The age of the works increases the likelihood that the relevant permissions cannot be obtained.

Copyright in artistic and dramatic works exists for 50 years after the author's death. While the author of a work may be known, determining the current copyrights owner is not always as simple. The rights may have passed down three to five generations and ownership may be difficult to trace.

"There's a significant amount of research that goes into making sure that when you go from, 'this work is unknown, as far as copyright' to 'an orphan work'. That process can take years of research to get it over the line, to what I would consider an orphan work. And even then, we do searches"
—Museum

There are a range of responses to orphan works. For some, if they cannot get the appropriate permission, they will not make the content available. Others apply a risk-based approach.



"WITH ORPHAN WORKS, YOU CAN BE BRAVE AND PUBLISH AND BE DAMNED OR YOU CAN KEEP IT LOCKED AWAY. THAT'S COSTLY TO THE PUBLIC AND DOESN'T ADD ANY VALUE. I'LL GO WITH PUBLISH AND BE DAMNED. IT'S A LOT LOWER RISK WITH ONLINE PUBLICATION. IT'S A RISK IF YOU PUBLISH A BOOK, BUT IF YOU PUBLISH ONLINE YOU CAN EASILY TAKE IT DOWN AGAIN. I'M PROBABLY AT THE PROGRESSIVE END OF THAT SPECTRUM"

Art museum



UNAUTHORISED USE BRINGS REPUTATIONAL CHALLENGES

UNAUTHORISED USE IS A PARTICULAR CONCERN IF IT DAMAGES THE CREATOR'S REPUTATION. THERE WAS A PERCEPTION THAT THE INTERNET HAS INCREASED THIS RISK.

Unauthorised use raises reputational concerns

There are a range of views on the impact that unauthorised copying has on the core business of artists. For some fine artists, unauthorised copying appears to have limited effect on the commercial value of the original work.

"People sell knock-offs at the market all the time. Some people get their knickers in a twist about it, I just move on. People who are buying a \$20 knock-off aren't going to be buying a \$1000 limited edition print" —Fine artist
However, we also heard views that the presence of enough \$20 prints in the market may eventually damage the exclusivity of the \$1000 print, and devalue the original work.

Many creators were more concerned about the negative impact of unauthorised use on their reputations.

"The first runs of a sculpture did not work out, but instead of melting it down, the foundry sold off the half-formed, sub-standard works as something else. Reputation is hard to copy but easy to damage" —Fine art industry body



SUBSECTOR 4/7

Where reputation is at stake, the artist is more likely to take action.



"ARTISTS ARE MORE LIKELY TO TAKE ACTION IF A POOR COPY IS PRODUCED THAT MIGHT DAMAGE THEIR BRAND"

Fine art industry body

However, formal enforcement action is costly and we heard that individual artists often lack the funds to enforce their rights.

The strength of the user's reputation and the potential reputational fallout on the artist can also influence whether or not they take any other action.

"Someone with more social media followers than you is going to be hard to discredit, if you claim they've stolen your material" —Theatre company

The online environment brings infringement risks and monitoring opportunities

Many commented that consumers view free online content as being free to use, free to modify and free to distribute.



"THERE'S A GOOD PROPORTION OF THE POPULATION THAT THINKS IF YOU CAN RIGHT CLICK AND SAVE IT THEN YOU CAN USE IT"

Art museum

The accessibility of content online leads to concerns about putting work on the web.

"Once it's out there it's free for people to pull things off, take an image that you've slaved over for weeks, to capture and plaster it on some booklet that they produce about dance" —Dance company

There is a perception that works that are available online are more at risk of being taken out of context and not treated with respect.

"Calling it a tribal dance – all of the wrong things that represent you in the wrong way. They use your images to convey different messages that they weren't intended for" —Dance company

While the internet has made it easier to copy works, it also assists people in monitoring infringements more effectively.

"The internet has really helped check usage and inappropriate use. The latter only happens four to five times a year and is usually by an amateur theatre group that just forgets to clear rights" —Licensing body

Quality distributors are also used to help deter infringement.

"We rely on our distributors for enforcement in each market. If a distributor is not proactive with enforcement then it will mean much higher rates of piracy" —Production company

Section 5 – What's next?

Information gathered during the Study will help to inform any advice officials provide to Ministers about the scope and timing of any review of the *Copyright Act*. If the Government decides to launch a review there will be extensive and ongoing consultation.

Any review will involve ensuring that issues are identified and well understood, options are developed and the costs and benefits to New Zealand (including to businesses, consumers and government) are considered before recommending a preferred course of action to Ministers.

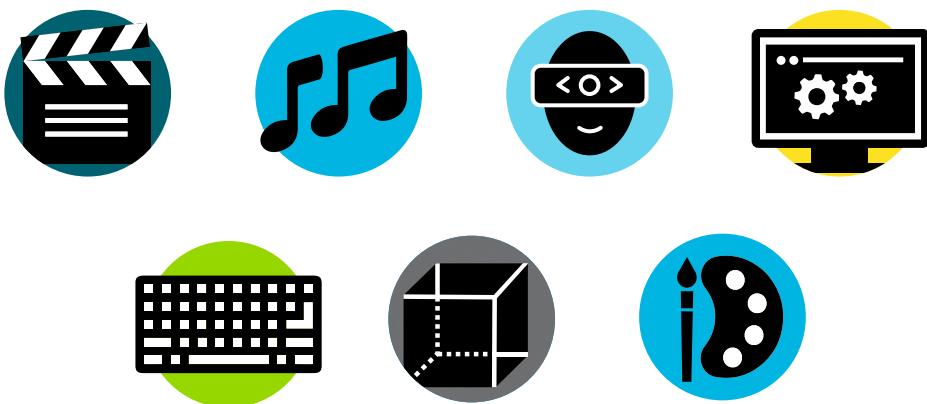
In the meantime, Ministry of Business, Innovation and Employment officials will continue to monitor local and international developments, engage with the creative sector and wider public and provide advice to Ministers.

We extend our thanks to all of the creative sector participants who gave us their time and openly shared their valuable insights and experiences.

We value the relationships that we have built with the sector throughout the Study. The Study is the beginning of the conversation.

We encourage those we have met, the wider sector and the general public to get in touch and let us know what you think of the report. Tell us what we have missed in outlining the current landscape and keep talking to us throughout the processes that follow. We need your experiences to continue to inform our thinking.

Email creativesectorstudy@mbie.govt.nz



Appendix 1: Further reading

This is a short list of resources that may be of interest to those seeking more information on the creative sector and/or copyright, including information on some recent law reform proposals in other jurisdictions.

STUDY

Study terms of reference

Ministry of Business, Innovation and Employment, *Study of the role of copyright and designs in the creative sector: Terms of Reference*, 2015

MartinJenkins report on the survey

MartinJenkins (commissioned by MBIE), *Report on a survey of creators, contributors, owners and licensees of copyright works*, 2016

Colmar Brunton report on the consumer focus group

Colmar Brunton (commissioned by MBIE), *Consumers' understanding of copyright*, 2016

NEW ZEALAND

Wellington City Council report on economy of the arts

MartinJenkins (prepared for Wellington City Council), *Economy of the arts in Wellington*, 2011

Auckland Council snapshot on the creative sector

Ross Wilson, *Industry Snapshot for Auckland: Creative creative sector*, Auckland Council technical report, 2013

WeCreate report

PwC (commissioned by various creative sector participants), *Employment and National GDP impacts of music, publishing and film and television and games in New Zealand*, 2015

WAI 262 report

Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Taumata Tuatahi (Wai 262)*, 2011

Creative Commons Aotearoa New Zealand resources

Creative Commons Aotearoa New Zealand provides information on using Creative Commons licences in New Zealand

INTERNATIONAL

World Intellectual Property Organization report

WIPO, *Guide on Surveying the Economic Contribution of the Copyright-based Industries*, 2015

Organisation for Economic Co-operation and Development report

OECD, *Enquiries into Intellectual Property's Economic Impact*, 2015

UNITED KINGDOM

Hargreaves Review

Professor Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (Hargreaves Review), 2011

Information on The Copyright Hub

The Copyright Hub is a UK initiative which aims to make licensing simpler

Creative Industries Council (UK) report

Creative Industries Council, *Create Together: A Creative Industries Council Strategy for Cross Industry Collaboration—the Next 5 Years*, 2016

National Endowment for Science, Technology and the Arts report

NESTA, *Hidden Innovation in the Creative Industries*, 2008

AUSTRALIA

Australian Productivity Commission draft report

Australian Productivity Commission, *Intellectual Property Arrangements* (Draft Report), 2016

Australian Law Reform Commission report

Australian Law Reform Commission, *Copyright and the Digital Economy* (ALRC Report 122), 2013

EUROPE

European Union proposals on copyright in the digital single market

European Commission, *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, 2016

Finnish report on a copyright methodology framework

Tina Kautio, Nathalie Lefever & Milla Määttä, Foundation for Cultural Policy Research (Cupore), *Assessing the Operation of Copyright and Related Rights Systems: Methodology Framework*, 2016

SINGAPORE

Consultation document on proposed changes to Singapore's copyright regime

Ministry of Law (Singapore) and Intellectual Property Office of Singapore, *Public Consultation on Proposed Changes to Copyright Regime in Singapore*, 2016

