MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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Copyright and the Wai 262 Inquiry: summary of written submissions on this part of the Review of the Copyright Act 1994: Issues Paper

1 Background to this summary

On 23 November 2018, we released an issues paper as the first stage of public consultation in the review of the Copyright Act 1994. The Issues Paper was a long document aimed at soliciting information about problems with current copyright law and areas where it is working well.

The paper recognised that the Waitangi Tribunal, in its report on the Wai 262 inquiry *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, identified issues with the limited protection copyright law offers for Māori rights and interests in taonga works and mātauranga Māori. Rather than recommending changes to copyright law, the Waitangi Tribunal recommended that the Crown establish a new, unique regime to provide new protections. We used a section in our Issues Paper to generate dialogue on the Waitangi Tribunal's recommendations and ways the Crown might work with Māori to develop a new system for protecting interests in taonga works and mātauranga Māori.

One of the ways we got feedback on this was through written submissions on the questions we asked in this section of the Issues Paper. This document provides a summary of those submissions. You can find the full submissions summarised in this document on our website.

This summary is part of the full summary of submissions on the Issues Paper which includes more information about other issues that we consulted on in the review of the Copyright Act 1994: Issues Paper. You can find this summary and all of the other submissions we received on the Review of the Copyright Act 1994: Issues Paper webpage.

2 Summary of written submissions on taonga works

Copyright and the Wai 262 Inquiry ('taonga works')

Part 8, Section 2 of the Review of the Copyright Act 1994: Issues Paper (pages 109-117) looked at the Waitangi Tribunal's Wai 262 inquiry in relation to expressions of Māori traditional knowledge ('taonga works'). After discussing the key concepts used by the Tribunal, its findings on taonga works and recommendations for reform, it asked:

- whether we accurately characterised the Tribunal's analysis of problems with the current protections provided for taonga works and mātauranga Māori (**question 93**)
- whether people agree with its use of the concepts 'taonga works' and 'taonga-derived works' (**question 94**)
- whether there are ways the copyright system might conflict with the kind of new legal regime for the protection of taonga works and mātauranga Māori that the Tribunal recommended (**question 95**).

The Issues Paper then sought feedback on the proposal of setting up a separate work stream (alongside the Copyright Act review) dedicated to considering Chapter 1 of the Wai 262 report, with a view to developing a new system for protecting the kaitiaki interest in taonga works and mātauranga Māori (**question 96**). It also asked whether there are any other Treaty of Waitangi considerations we should be aware of in the Copyright Act review (**question 96**). Finally, the paper asked how MBIE should engage with Treaty partners and the broader community on the proposed work stream (**question 97**).

We received 36 submissions responding to at least one of these questions.

High-level themes

Some of the strong messages coming through in these submissions are that:

- IP legislation and, in particular, the Copyright Act fails to protect traditional knowledge (21 submissions):
    - the Act has not and does not adequately recognise or protect traditional knowledge, mātauranga Māori, traditional cultural expressions, and taonga works, or Māori and kaitiaki relationships with traditional knowledge, mātauranga Māori, traditional cultural expressions, and taonga works
    - the concept of public domain is especially problematic, as it often implies that anything that is published, and is not subject to an intellectual property right or some other legal restriction, is free for anyone to use or exploit
    - the Act is not consistent with the WAI 262 report
    - the Act is not consistent with New Zealand's obligations under TOW and UNDRIP.
- Despite these problems with IP law, heritage organisations (eg National Library and the Alexander Turnbull Library) have developed policies to care for mātauranga Māori in respectful and Treaty-compliant ways. The National Library, for example, discusses how it uses *Te Mauri o Te Matauranga: Purihia, Tiakina!* to approach the care and preservation of 'Māori materials'. This follows four principles: kaitiakitanga (guardianship), te mahi tahitanga (relationships), attribution and staff cultural development.
- New Zealand needs a stand-alone and Treaty of Waitangi-compliant regime to protect taonga works, mātauranga Māori and facilitate kaitiakitanga.
- This work requires meaningful engagement with Māori. There needs to be an opportunity to participate in a wananga with other Māori individuals and organisations, facilitated by Māori experts and advisors with specialist knowledge in this area, to enable informed participation by Māori.

How we characterised the Wai 262 analysis of problems with current protections for taonga works

Twelve submissions responding to this question believe that the analysis of the issues with taonga works and mātauranga Māori has been correctly summarised in the Copyright Act Review Issues Paper.

Of these submissions, a few discuss considerations they think may be missing from the Tribunal's analysis or the Issues Paper. In particular:

- One submitter agrees with our summary of the issues but notes that the breadth of Māori considerations required for the purposes of the review are not adequately covered in the Waitangi Tribunal's analysis. The submission also highlights that there is a wider scope of Māori cultural and intellectual property considerations that need further exploration.
- National Library, although agreeing in general with our summary of the analysis, notes that the discussion in Chapter 6 of *Ko Aotearoa Tēnei* relating to how mātauranga Māori agencies (such as the National Library) should make mātauranga Māori available is not referenced. For the National Library, this discussion is important because it argues that where collections are made available (for example, through digitisation), communities who have a whakapapa relationship with the National Library's collections have an opportunity to establish a kaitiaki relationship with their taonga.
- In addition, two submitters (Universities NZ and University of Canterbury Library) note that in our summary of Tribunal's analysis we did not include a paragraph that clearly defines the relationship between mātauranga Māori and the kaitiakitanga of traditional communities, and places a conceptual limit on the definition of taonga works. Both these submissions say:

> *"We do not recommend that all mātauranga Māori should be protected, but only those aspects of it so personally held by traditional Māori communities that a kaitiakitanga relationship arises in respect of it. Thus, it is the proximity of the mātauranga and the community that is the core defining factor, not the broad category of mātauranga Māori itself."*

The submission from Waikato Museum is the one we could find that views our characterisation of the problems as inaccurate. The submission includes a comment from a Tangata Whenua Curator that appears to take issue with the language used (either by the Waitangi Tribunal or in our Issues Paper) as understanding mātauranga Māori through 'a Pakeha lens'.

Use of 'taonga works' and 'taonga-derived works'

MBIE received 18 submissions on the Waitangi Tribunal's use of the concepts 'taonga works' and 'taonga-derived works'. A number of submitters either agree or disagree with the proposed concept definitions, or provide further comments. Most submitters are supportive of the concepts and definitions, at least as a starting point for this work. Of those submitters, many emphasise the importance of the Government working with Māori to further clarify these concepts and seek their endorsement. For example, Te Rūnanga o Ngāi Tahu, noting the Tribunal's inclusion of te ao Māori concepts in its definition of 'taonga works', suggests

extensive engagement with appropriate iwi experts would be required – particularly in advance of these terms potentially being included in a legislative framework.

Submissions agreeing with the use of these concepts

Six submissions agree with the definitions of 'taonga' and 'taonga-derived' works the Waitangi Tribunal proposed in its Wai 262 report. However, three of these note that although they accept the proposed definitions, the scope of definitions should be further developed, and that the proposed definitions need to be endorsed by Māori. One submission also noted that mātauranga Māori and its uses can be interpreted in many ways but only be clearly understood by those who use mātauranga Māori.

Another submitter agrees with the definitions of the concepts but adds that protections for digitally archived taonga and digital copies of taonga should be considered. The submission claims that a number of organisations upload photos of original taonga and taonga-derived works where copyright has expired or does not apply. The physical form of these taonga and taonga-derived works are often already protected by the *Protected Objects Act 1975*. The submission argues that there should be established some form of protection from commercial exploitation and misuse.

Submissions viewing the concepts as problematic

Six submitters consider the concepts 'taonga works' and 'taonga-derived works' problematic. Waikato Museum suggests a Tuakana-Teina model would be a more appropriate framework, allowing 'taonga works' and works inspired by taonga works to be seen as 'big brother' and 'little brother'. The museum offers the following example to support its submission: if an artist was told to take influence from a carving off their marae, the work that the artist had created would not be considered less than the original and would become a taonga in its own right.

The National Library anticipates difficulty using the definitions of taonga works and taonga-derived works to distinguish cases of each. In particular, the Library points out that:

- it can be hard to tell whether a new work invokes ancestors or has a living kaitiaki or mauri
- the status of taonga is not clear if taonga does not have kaitiaki
- the relationship may not be known or may become known later
- the status of taonga works is not clear when taonga works do not have a kaitiaki, but still have mauri
- the status of works created by non-Māori featuring Māori ancestors is not clear.

National Library also queries the distinction between 'taonga works' and 'taonga-derived works', and point out areas of ambiguity arising from the definitions. Examples include situations where taonga works have mauri but no known kaitiaki, or items not created by Māori that feature Māori tūpuna, such as photographs and portraits of Māori. Karl Wixon argued that the definitions suggest a focus on taonga tuku iho, and do not value the evolution of mātauranga Māori as expressed in contemporary creative practice.

Another submission notes that the Waitangi Tribunal's definitions are defined by reference to the Māori concepts of "mauri" and "kaitiakitanga". These are both very significant concepts of the Māori world and pertain a spiritual aspect. There is also likely to be variation according to

iwi and region as to what these consist of. It is argued that any definition of taonga works and taonga-derived works which refers to underlying Te Ao Māori concepts will require consultation with iwi experts to ensure these are appropriate.

NZIPA and AJ Park do not take a position, but emphasise the importance of defining these concepts, if used in legislation, to ensure legal clarity and certainty.

Other comments

A few submitters raised the following points regarding the use of 'taonga works' and 'taonga-derived works':

- One submission argues that these concepts need to be fully endorsed by Māori through consultation and wananga with iwi and hapu across the country. The submitter notes that it is important to ensure these concepts are still relevant and endorsed by communities throughout the process of the changing landscape of international intellectual property.
- Finally, Tohatoha and New Zealand Institute of Patent Attorneys believe that this question is more appropriate for Māori to answer.

A new legal regime for taonga works and ways copyright might conflict with it

We received 24 submissions on the introduction of a standalone legal regime which was recommended by the Waitangi Tribunal. Submissions generally support this. A number of submitters emphasise the importance of any new regime to be co-designed by Māori according with the principles of partnership and rangatiratanga. A few submissions, while supporting the introduction of a new legal regime, note that there are likely to be areas where a new legal regime may conflict with the existing copyright legislation.

Submissions expressing their support for a new legal regime for taonga works and mātauranga Māori

13 submitters conveyed their support (unsolicited by the Issues Paper) for the development of a new legal regime to protect taonga works and mātauranga Māori. Of these, six submissions express general support for a new legal regime, offering the following views on potential interaction of the current copyright legislation and a new regime, data sovereignty and foreign exploitation of matauranga Māori:

There does not appear to be a conflict between a new legal regime and the current IP settings

- Tohatoha does not believe the two legal regimes would be in conflict. Tohatoha views copyright as one part of a more complex regulatory environment (that also includes privacy, security and confidentiality) that must be considered when sharing or creating works. Adding an additional set of legal boundaries should not create conflict. Particularly since schools, GLAM organisations and others do work to meet what they see as their obligations around matauranga Māori already, having those boundaries clarified and codified will only support existing efforts which are often done without clarity.

Unable to comment on any conflict between a new legal regime and the current IP settings	• The Library and Information Advisory Commission notes that copyright is a western construct of largely individual ownership with expiry dates and the concept of the public domain. The submission argues that protection of matauranga Māori and expressions of indigenous knowledge should not have an expiry date, and the concept of the public domain does not translate directly to Te Ao Māori. • In addition, National Library notes that the time-bound nature of copyright clashes with the concept of descendants having an ongoing, inter-generational responsibility to protect taonga. The library believes that a new legal regime is important because of the inherent limitations in the protection for cultural property which is possible via copyright.
Data sovereignty & foreign exploitation	• The Library and Information Advisory Commission believe that this is another area that deserves consideration. The submission emphasises the importance of consultation with Te Mana Raraunga, the Māori Data Sovereignty Network to ensure any regime is compatible with data considerations. • Another submission sees a new regime as an opportunity for Aotearoa to protect mātauranga Māori and Māori culture from foreign exploitation while also providing opportunities for innovation, business and economic gain. The submitter argues that the Crown needs to look beyond the Ko Aotearoa Tēnei report which does not include the changing digital space and the realities of a globalisation to protect this intellectual property.

Submissions areas of conflict between a new legal regime and the current Copyright Regime

Three submissions discuss potential clashes between a new legal regime and existing copyright law. In particular, one submission notes that the exceptions currently available for GLAM organisations may require explicit reference to a new legal regime, which will impact the GLAM sector's ability to distribute copies of works.

In addition, International Association of Music Libraries is concerned with the fact that music works are widely available now because they are considered out of copyright (eg, the Pokarekare Ana or other works published in Ngā Mōteatea). It argues that it will be difficult to change the status of these works post hoc. Another difficulty which the Association envisages is agreeing on what are taonga Māori. For example, classic songs written in Māori which may have been composed by Pākehā musicians, or where kupu have been set to a pre-existing melody.

Finally, one submission anticipates areas of tension or conflict between the two regimes, but suggests it is premature to identify them in advance.

Other themes

Eight submitters raised the following points in regard to the introduction of a new legal regime:

Fundamentally different approach to protection required	• Ngā Taonga Sound & Vision encourages MBIE to address the way in which the current western and colonial legislative copyright framework, based on property law and commercial imperatives, intersects with kaupapa Māori and indigenous forms of knowledge, kaitiakitanga and Māori aspirations. • Waikato Museum questions how mātauranga Māori and creative commons interact with each other. • Auckland Libraries recommends a greater recognition of indigenous people's rights to protect their taonga works and mātauranga Māori and notes that knowledge and kaitiaki responsibility is not owned by a single person or entity. The submitter also expresses some concern about material which contains mātauranga Māori (literature, research, data, images, art) for which the maker is non-Māori
Need to acknowledge the right to maintain district and regional council "silent file" information on sites of cultural significance.	• Heritage NZ believes that any new regime would need to acknowledge the right to maintain district and regional council "silent file" information on sites of cultural significance.
No position	• Three submissions have no position on how a new legal regime may interact with the copyright legislation. For example, the only conflict Te Papa can anticipate is when copyright holders wish to commercially benefit from more recent images and footage of tūpuna and taonga works and their desires clash with the wishes of descendants of those depicted and the kaitiaki of those taonga works.

Feedback on the proposed new workstream on taonga works to run alongside the Copyright Act review

We received 25 submissions that generally support the proposed process to launch a new workstream on taonga works and mātauranga Māori. Of these, 21 submissions fully support the establishment of a new workstream alongside the Copyright Act review.

Auckland Libraries note that the new workstream should run collaboratively with other agencies, including Te Puni Kōkiri.

Waikato Museum emphasises the importance of getting proper engagement with Māori. The submission notes that there are two distinct ideologies in regard to Te Ao Māori and GLAM organisations. Often there are differences between what GLAM organisations and Māori consider best practice.

Another submission suggests that the late addition of a new workstream exposes it to a range of issues, including limited community engagement with the review due to lack of communication with the community and lack of time for kaitiaki to consider and respond to the Issues Paper.

Views on how government should engage with Treaty partners and others on this work

We received 21 submissions on how to engage with Treaty partners and the broader community on the proposed workstream on taonga works. All submissions highlighted the importance of further, genuine engagement with Māori, other government agencies and organisations representing the interests of Māori, including, but not limited to: Te Arawhiti, Te Puni Kōkiri, Iwi Trust Boards, Marae working groups, Iwi Chairs Forum and Te Mana Raraunga.

Submissions also provide views on what process is appropriate for genuine engagement with Māori in this workstream.

Feedback from these submissions is summarised in the following table.

Themes	Suggestions
Suggestions on who we should engage with	• Some submitters suggest engagement with specific stakeholders, including AJ PARK, Te Rōpū Whakahau, Karl Wixon, Ngā Aho Inc, the Māori Design Society, Te Rūnanga o Ngāi Tahu, Maori researchers, all prior contributors who worked on Wai 262 for the last six years, Treaty partners and the broader community, and New Zealand Institute of Patent Attorneys. They suggest we engage with stakeholders through hui and use of online feedback channels, connecting with Māori organisations such as the Iwi Chairs Forum and Te Mana Raraunga.
Suggestions on how to engage	• Through a series of wananga for Māori individuals and organisations, facilitated by Māori experts and advisors with specialist knowledge in this area. • By talking to and engaging with kaitiaki in forums such as hui and workshops which best suit them. • With the Crown bearer a greater part of the burden for engaging with and hearing from Treaty partner groups. This should include but not be limited to establishing a rolling programme of visits and presentations to kaitiaki groups such as Iwi Trust Boards, Marae working groups, and organising and running numerous hui at times convenient to the groups the Crown wishes to consult with. • By engaging with Māori at least on an iwi level - so with tribal historians, trust boards, as well as teachers or kahautui in the creative education sectors. • Using kaupapa methodology. • Broad and well-resourced consultation with Māori and in a wananga format in line with tikanga Māori. • With the government funding this engagement, in order for it to be genuine and capture a wide range of points of view. • With additional workshops or hui for the wider community on the proposed work stream on taonga works. • With hui, consultation, and staff who are Māori, who speak Māori and can work with Māori on the terms of the new regime. • Through a co-decision model between Treaty partners (rather than a consultation model), in which tangata whenua are joint creators and decision-makers on the policy and process of the workstream: o in the context of sui generis legislative innovations, it is even more

important for Treaty partners to play a driving role in the co-design and development of any work stream seeking to encapsulate kaitiakitanga in relation to taonga.

- Using this workstream as an opportunity to upskill and further educate the public on the differences and limits of the Copyright Act and the proposed new regime.