

Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

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| Name | |
| Organisation | Auckland Art Gallery Toi o Tāmaki |

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Responses to Issues Paper questions

Rights: What does copyright protect and who gets the rights?

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| 5 | <p>What are the problems (or advantages) with the way the Copyright Act categorises works?</p> <p>One of the problems with the way the Copyright Act categorises works is the disparity between the treatment of traditional and new media artworks. The act currently defines an artistic work as:</p> <ul style="list-style-type: none"><i>(i) a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or</i><i>(ii) a work of architecture, being a building or a model for a building; or</i><i>(iii) a work of artistic craftsmanship, not falling within subparagraph (i) or subparagraph (ii); but</i> <p><i>(b) does not include a layout design or an integrated circuit within the meaning of section 2 of the Layout Designs Act 1994</i></p> <p>‘Graphic work’ being defined as:</p> <ul style="list-style-type: none"><i>(a) any painting, drawing, diagram, map, chart, or plan; and</i><i>(b) any engraving, etching, lithograph, woodcut, print, or similar work</i> <p>This definition is too narrow and does not take into account time-based media artworks, such as video, sound and software-based art.</p> <p>According to the current categorisations, the copyright in a video or sound artwork would expire 50 years from the end of the calendar year in which the work was made, whereas the copyright</p> |
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| | <p>duration for ‘artistic works’, as defined by the act, is 50 years from the end of the calendar year in which the creator dies. This distinction lacks consistency and disadvantages artists working in non-traditional mediums.</p> |
| <p>6</p> | <p>Is it clear what ‘skill, effort and judgement’ means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?</p> <p>It is not clear what skill, effort and judgement means as a test for establishing whether a work is subject to copyright.</p> <p>The Gallery’s photography department is tasked with taking photographs of artworks (both in and out of copyright) for use online and in print. In order to produce images which are accurate representations of the artworks they depict, our photographers make a variety of informed decisions about factors such as equipment and lighting, and judiciously employ digital manipulation, when necessary, for colour and lens corrections. There is a great deal of skill, effort and judgement employed by the photographers in the creation of these high-quality reproductions. However, in line with current museum practice in New Zealand, the Gallery does not consider reproductions of two-dimensional artworks to be subject to copyright protection. As faithful reproductions of an artwork, these images do not demonstrate ‘originality’. This means that reproductions of out-of-copyright two-dimensional artworks are made available for re-use via the gallery’s online collection and are clearly marked with the copyright statement ‘No known copyright restrictions’.</p> <p>The Gallery is also guided by New Zealand’s museum sector in its approach to three-dimensional artworks. As a photograph of a three-dimensional artwork demonstrates originality in composition, the Gallery maintains that there is copyright inherent in these photographs. Images of out-of-copyright three-dimensional artworks are therefore published to the Gallery’s website with the copyright statement “Copying Restrictions Apply”.</p> <p>This approach to copyright in images of artworks has become standard practice for the Gallery in recent years, however, as the Copyright Act does not provide clarity around this matter, this has largely been due to the guidance of industry leaders such as Museum of New Zealand Te Papa Tongarewa and Auckland War Memorial Museum Tāmaki Paenga Hira. There are several museums and galleries in New Zealand that continue to publish images of two-dimensional out of copyright works under an All Rights Reserved licence. This inconsistency must be confusing for the public who wish to access and use these images. The museum sector would benefit from clearer guidelines for establishing when a work is subject to copyright protection. This would also be of benefit to the public by improving access to out-of-copyright works for use, adaption and consumption.</p> |

Exceptions and Limitations: Exceptions that facilitate particular desirable uses

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| <p>37</p> | <p>Are there any other current or emerging technological processes we should be considering for the purposes of the review?</p> |
| | <p>The Gallery’s collection database is stored on a server which is managed by council Information Services and is regularly backed up in a manner consistent with best practice.</p> <p>It is my understanding that this copying is permitted under Section 80 of the current Copyright Act, however it is not clear whether this extends to the associated media files stored in the database. Given the council’s backup schedule, at any one time, multiple reproductions of an artwork will</p> |

exist. These reproductions may be digital surrogates of physical works, such as an image of a painting, or, as is the case with some audio-visual material, these may be exact duplicate copies of an artwork.

The gallery takes a proactive approach to protecting and conserving the artworks in its care. Physical works, such as paintings and sculpture, are stored in secure, environmentally controlled conditions to mitigate the risk of damage from light exposure and temperature and humidity fluctuations. Backups of the Gallery's database and associated media files help to guard against some of the greatest risks to the longevity of audio-visual artworks: data corruption and loss. Under the current copyright regime, it is not clear whether these backup copies would be considered a copyright infringement.

Exceptions and Limitations: Exceptions for libraries and archives

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What are the problems with (or benefits arising from) excluding museums and galleries from the libraries and archives exceptions? What changes (if any) should be considered?

The exceptions for libraries and archives should be extended to museums and galleries to support preservation of works, and to enable a higher degree of public access.

The Gallery, as a member of the International Council of Museums (ICOM) and Museums Aotearoa, accepts and abides by the ICOM 2007 definition of a museum as:

... a non-profit making, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.

International Council of Museums. (2007). *Museum Definition*. Retrieved March 30, 2019, from <https://icom.museum/en/activities/standards-guidelines/museum-definition/>

This is comparable to the core values of libraries and archives:

The role of the public library is to collect, organise, preserve and provide access to resources in a range of print, audiovisual and/or electronic formats for information, lifelong education and recreation.

Library and Information Association of New Zealand Aotearoa. (2004). Standards for New Zealand Public Libraries. Retrieved from <https://lianza.org.nz/standards-new-zealand-public-libraries>

[Archives] play an essential role in the development of societies by safeguarding and contributing to individual and community memory. Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens' rights and enhances the quality of life.

International Council on Archives. (2012). *Universal Declaration on Archives*. Retrieved from https://www.ica.org/sites/default/files/UDA_June%202012_web_EN.pdf

Excluding museums and galleries from the libraries and archives exceptions does not facilitate reasonable access to works for use, adaption and consumption.

In the case of legitimately acquired audio-visual artworks, galleries and museums should be

explicitly permitted to create copies for preservation and exhibition purposes in line with current best practice, and to publicly perform/exhibit these legitimately owned works. Requiring the copyright holder's permission to preserve and exhibit an audio-visual artwork would unnecessarily hamper public access to the work. It may also complicate the acquisition and preservation of the work to the point where the administration associated with audio-visual artworks becomes a deterrent to their acquisition.

Exceptions and Limitations: Exceptions for education

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Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?

The education exceptions are too narrow. Currently only "educational establishments" are able to copy and communicate in-copyright works within a limited set of parameters.

Learning Experiences Outside the Classroom (LEOTC) programmes are closely aligned with the National Curriculum and, as Ministry of Education providers, they should have the same exceptions as recognised educational establishments.

Exceptions and Limitations: Exceptions relating to the use of particular categories of works

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What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?

The format shifting exception should be extended from sound recordings to all digital media. If the rationale behind this exception is that a person, who has legitimately purchased a sound recording, should then be able to migrate that recording to another device without having to re-purchase it, then it follows that this should also be a permissible act for other digital media.

This is particularly pertinent for audio-visual artworks. As technology changes, media players and file formats will become obsolete and audio-visual artworks may need to be format-shifted in order to remain playable. Galleries and private collectors, having legitimately acquired AV artworks, should be permitted to format-shift in order to maintain the work.

Transactions

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How do you or your organisation deal with orphan works (general approaches, specific policies etc.)? And can you describe the time and resources you routinely spend on identifying and contacting the copyright owners of orphan works?

If a copyright owner of an artwork is not locatable, the Gallery will flag this with a ‘Copyright holder untraceable’ statement on the record for the artwork in the collection database. When the gallery selects artworks for publications, social media posts and promotional material, artworks flagged with ‘Copyright holder untraceable’ will generally not be considered for use. This skews the representation of the Gallery’s collection, as reproductions of out-of-copyright works are the least problematic to use, they tend to be over-represented in the Gallery’s published material.

Although they are not generally used for other purposes, images of ‘Copyright holder untraceable’ artworks are published to the online collection on the Gallery’s website. These images are always accompanied by the statement “We are actively seeking the authoritative copyright holder for this work” and a request that anyone with further information get in touch.

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Has a copyright owner of an orphan work ever come forward to claim copyright after it had been used without authorisation? If so, what was the outcome?

The Gallery has a take-down policy, and if requested would remove an image from the website if asked to do so by the copyright owner, however in my experience, there has never been such a request. Publishing ‘orphan works’ to the Gallery’s website has, in fact assisted the Gallery in establishing new relationships with copyright owners.

There have been several instances where a previously untraceable copyright owner has come forward after seeing a work on the Gallery’s website. In each instance the copyright owner has granted permission for use on the website, along with further permissions for use on social media and in gallery publications. In some instances, the copyright owner has also been able to provide new information on the artist and their work which the Gallery can then communicate or make accessible to the public.