

Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

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Responses to Issues Paper questions

Objectives

1

Are the above objectives the right ones for New Zealand's copyright regime?
How well do you think the copyright system is achieving these objectives?

In principle, Auckland Museum supports the objectives.

The objectives or purpose of copyright should be clearly stated in the Act.

· The outcomes outlined (para 101 in the Issues paper) have set out some very clear objectives for a copyright regime:

*“In our view the copyright regime should seek to **balance** the following outcomes:*

- creation of original works*
- use, **improvement** and adaptation of works created by others*
- dissemination and access to **knowledge** and creative works.”*

However, it is our position that some important concepts have been lost when these objectives are translated into the proposed objectives.

The omissions are:

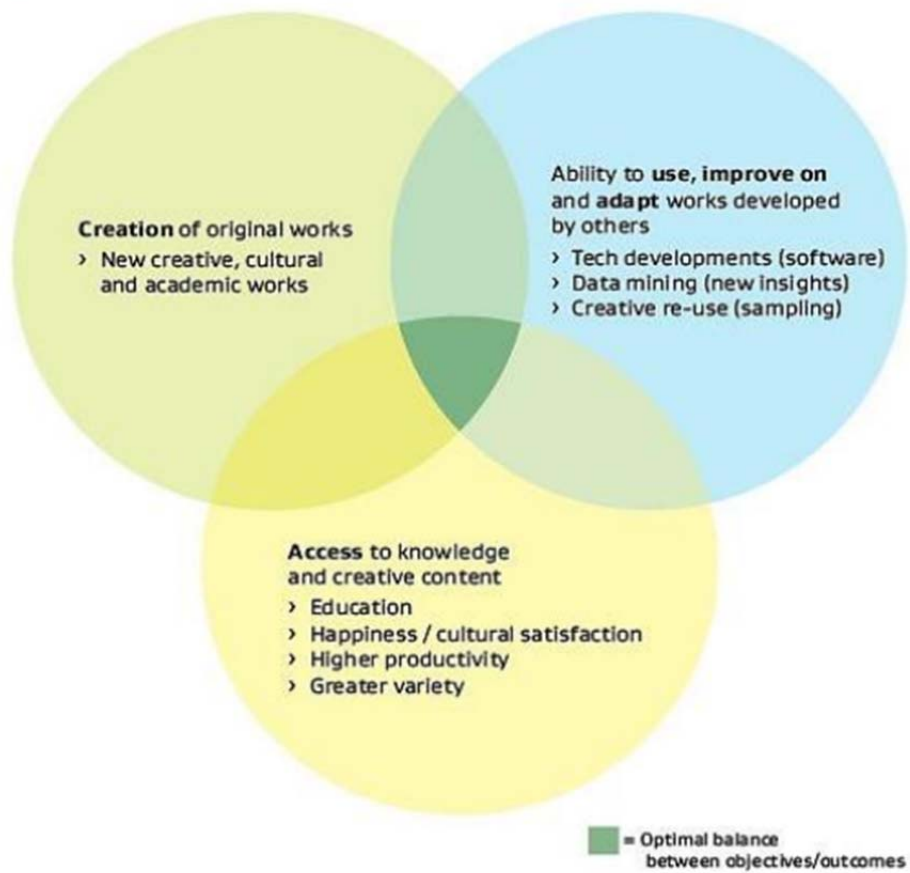
- the importance of ‘balance’*
- ‘improvement’ as well as use and adaptation*
- ‘access to knowledge’ not just access to the works.*

The understanding of balance cannot be taken for granted. It is a key outcome which is often disputed or misunderstood. The copyright regime must accommodate (balance) property rights at one end of a continuum and human rights at the other end.

The model of outcomes in the issues paper (Figure 2, below) acknowledges that creation of content can overlap with access to knowledge and use/improvement of others’ content i.e. creators simultaneously access, use and improve on the works of others. This overlap is generally understood in science, technology and medicine (standing on the shoulders of giants). Unfortunately, most of the examples given in the Issues paper (e.g. a novel, blog, lyrics, film script. Table 3. p.26) relate more to the humanities where the role-overlap may be less obvious although nevertheless still a reality.

A broader understanding of the scope (text boxes added) would alter the nature of the conversation and the impact of the law for everyone.

Figure 2: Model of outcomes



2

Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?

Auckland Museum favours a technology neutral copyright framework to accommodate the rapidly advancing digital and technology space. Adaptability and resilience are critical to the effectiveness of, and compliance with, the copyright regime. These would be assisted by clear objectives stated within the Act against which implications of future and unknown technological change could be assessed.

One of the limitations of fair dealing exceptions, compared with fair use principles, is the lack of adaptability and resilience to future technological change.

Objective 2 should more explicitly identify the outcome for innovation and future development of new knowledge, not just the more immediate activity of use. The former tends towards a societal benefit or advancement whereas the latter can be largely an individual benefit.

The Australian Digital Alliance (ADA) expresses this as:

- *Copyright should strike a balance between the interests of the creator and public interest in access to knowledge, culture and education*
- *Balanced copyright laws encourage community participation*
- *Balanced copyright laws facilitate economic growth*

<http://www.digital.org.au/>

The objectives would be strengthened by including something similar to ADA's support for:

- *Flexible copyright exceptions that enable innovation*
- *Fair and proportionate liability for copyright infringement*
- *Equitable access to information for educators, libraries, cultural institutions and the wider community*
- *Fair and proportionate incentives for creators*

3

Should sub-objectives or different objectives for any parts of the Act be considered (eg for moral rights or performers' rights)? Please be specific in your answer.

No response.

4

What weighting (if any) should be given to each objective?

It is Auckland Museum's position that the objectives should be given equal weighting to ensure balance.

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

5

What are the problems (or advantages) with the way the Copyright Act categorises works?

Although the term 'literary work' is intended to be interpreted widely, covering the breadth of human knowledge, it is often understood by the narrow interpretation of 'literature'. This distorts the understanding of the impact, especially when most of the examples reinforce this narrow use.

In libraries, there is confusion around categorisation e.g. Published works that come with a CD Rom or CD with sound recordings. Are these part of the publication? Or a separate audio-visual or sound recording work. If these are considered to be separate works from the publication, they cannot be copied under library and archives exceptions.

Podcasts are a relatively new medium, with considerable opportunities for the communication of research and ideas for the GLAM sector. Clarification as to whether this format is a communication work would reduce confusion.

6

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?

It is not clear what “skill, judgement and labour” means as a test. Uncertainty around digital surrogates are an issue facing GLAM institutions; does the act of digitising works and making them available either internally or to the public equate to republishing/ copying the work. The low originality threshold is a concern when reproducing works from our collections.

3-Dimensional Works:

A way that museums are making their 3D collections accessible is to photograph them and make photographs accessible online. This facilitates access to audiences who would never visit the physical museum and access to collections which are not display.

The definition ‘copying’ in Section 2 of the Act includes “the making of a copy in 2 dimensions of a three-dimensional work”. The skill and judgement required to make a 3D work are quite different from the skill and judgement required to photograph it in 2D and publish an image in an online collections database.

We have examples of confusion from artists, whom the Museum is obliged to contact for a licence to put an image of their three-dimensional works in Collections Online. For example, a potter whom Auckland Museum contacted for a licence replied:

“I think there may be a problem with the wording i.e. ‘Making copies of the works’ I think what is meant is ‘Making photographic copies of the works’...because no one could possibly copy the actual ‘works’ i.e. the original objects made by me held by the museum”. We had to explain that contrary to common sense, the photograph of the pot was indeed regarded as a copy under law.

The museum supports copyright protection with regards to 3D scans of in-copyright works. There is also some ambiguity as to whether there is copyright created when scanning material with no copyright restrictions (out of copyright works or natural sciences collections). Currently we consider there to be skill and judgement in these scans and have released them under CC-BY licenses. However, we are aware that we could be claiming copyright where there is none. Considering the future implications of increasingly democratisation of 3D scanning equipment and the reduced skill and judgement involved in creating quality 3D scans, clarification on this issue is needed.

2-Dimensional Works:

There is uncertainty around the copying of 2-dimensional works. Digitisation of photographs (both prints and negatives), paintings, drawings, ephemera, maps, plans, charts, unpublished manuscript material, fabric, wall paper, tapa cloth, embroideries and other two-dimensional collections is now standard practise in most libraries and museums. This digitisation may be for internal collection management purposes but may also include publishing onto online collection catalogues.

It is our opinion that a 1:1 faithful reproduction of a two-dimensional work in two dimensions does not create a new copyright work. While there is skill, effort and

judgement to create a digital surrogate of the physical object, is it not a new and novel work. Along with The National Library of New Zealand and Te Papa, Auckland Museum uses the “No known copyright restrictions rights statement” for faithful reproductions of out of copyright two-dimensional works. This is not to understate the skill required in this work, but it is our stance that is it not a new work. The impact of this ambiguity is a tension between GLAM institutions who have the funding, resources, and inclination to make their collections freely and openly available for download by the public and smaller institutions who use this uncertainty to retain control of images (claim copyright in out of copyright two-dimensional works) in order to generate income from requests. This has resulted in inconsistent practice and rights statements across the sector which adds to confusion for users.

Low threshold of Originality:

There is no measure of originality in the New Zealand Copyright Act. In practice, the low threshold for originality makes it difficult for a museum to, for example, reproduce a log book of an expedition without getting permission for each individual entry from different authors. This is especially the case when considering log books that are more often filled with facts and data that require little labour and a minimal level of creativity.

7

Are there any problems with (or benefits arising from) the treatment of data and compilations in the Copyright Act? What changes (if any) should be considered?

There confusion as to whether certain data is a creative work or can be considered a collection of facts with no creative component. It is our position that data with no creative or interpretive input (scientific and research data) should be freely accessible and not be constrained by copyright. There is also confusion about whether meta-data is copyrightable and we would like some clarity in this space.

It is Auckland Museum’s position that copyright regime should align with the New Zealand Research Information System (NZRIS) data principles:

- 1. Provide a system-wide view of research, science and innovation information.
- 2. Ensure open data which is easily accessible and widely used.
- 3. Protect personal and commercially sensitive data.
- 4. Enable the re-use of data.
- 5. Reduce collection and reporting burden.
- 6. Ensure data is trusted, authoritative and well-managed.
- 7. Enable easy and automatic movement of data between systems.

<https://www.mbie.govt.nz/science-and-technology/science-and-innovation/research-and-data/nzris/>

The attribution requirement is an issue for compilations of data from many sources. The ability to waive attribution requirements for data should be available.

8

What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?

Commissioned works:

Retention of the current commissioning rule is important for cultural institutions to continue to fulfil their mission. Auckland Museum often commissions material for exhibitions, public programming, acquisitions to the collection and marketing and communications. This may include photography but also other creative works including art, sculpture and props for display.

While our right to the intellectual property is confirmed and asserted in contracts, retention of rights is essential in ensuring we can reuse and publish works funded by the museum. It should be noted that contracts would not exclude the commissioned artist or maker from using the work to market or promote their art. It is our position that if there is an exchange of money to create a work, then the rights to that work should reside with the commissioning body rather than the artist. If the commissioning rule is removed from the act, we would contract it back in when commissioning works.

Sound recordings and video:

Currently under section 21(2) films, sound recordings and computer-generated works are excluded from the list of works where the employer is the first owner of copyright. These kinds of works make up a significant proportion of the creative content created in our museum from social media, marketing and exhibitions activities. While many large companies and institutions have this section of the law contracted out in employment contracts, this may not be the case for small cultural institutions without in depth knowledge of copyright. We believe that these works should be included to provide consistency and ensure that the employer is the first owner of all creative works created by staff in the course of their employment.

9

What problems (or benefits) are there with the current rules related to computer-generated works, particularly in light of the development and application of new technologies like artificial intelligence to general works? What changes, if any, should be considered?

No response.

10

What are the problems (or benefits) with the rights the Copyright Act gives visual artists (including painting, drawings, prints, sculptures etc)? What changes (if any) should be considered?

We understand that Artist Resale rights are an issue within the community but believe it is best dealt with outside of the Copyright Act, since like parallel importing, it is a distribution issue not a 'right to copy' issue.

11

What are the problems creators and authors, who have previously transferred their copyright in a work to another person, experience in seeking to have the copyright in that work reassigned back to them? What changes (if any) should be considered?

No response.

12

What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?

We believe that the copyright term duration of 100 years for works created by the Crown is at odds with the intentions of NZGOAL and The Declaration on Open and Transparent Government that was approved by Cabinet on 8 August 2011.

The benefits of releasing open government data are stated as:

- **Improving government** - Open data is improving government, primarily by tackling corruption and increasing transparency, and enhancing public services and resource allocation.*
- **Empowering citizens** - Open data is empowering citizens to take control of their lives and demand change by enabling more informed decision making and new forms of social mobilization, both in turn facilitated by new ways of communicating and accessing information.*
- **Creating opportunity** - Open data is creating new opportunities for citizens and organizations, by fostering innovation and promoting economic growth and job creation.*
- **Solving public problems** - Open data is playing an increasingly important role in solving big public problems, primarily by allowing citizens and policymakers access to new forms of data-driven assessment of the problems at hand. It also enables data-driven engagement producing more targeted interventions and enhanced collaboration.”*
<https://www.data.govt.nz/manage-data/policies/declaration-on-open-and-transparent-government/>

A copyright term of 100 years limits these benefits due to difficulties in identifying the copyright owner of long defunct government departments and no single agency assigned to dealing with requests to copy. If historic crown copyright is to be retained, it is imperative that there be a centralised body that the users of material can seek permission and consult on the status of government created content.

Auckland Museum holds a large collection of photographic material taken by Trevor Penman of the Construction of Auckland Airport commissioned by the Ministry of Works. The material dates from the 1959-1970. Penman died in 1998, his wife claimed no copyright and confirmed all works were commissioned by the Ministry of Works. When the Ministry was disestablished in 1996 the subsidiaries were sold to a private company, Opus International Consultants, who are now the rights holders. Auckland Museum have been given a license to put images of this material online and in our collection management system, but all external requests require permission from Opus. This is an

example of Crown Copyright being passed into private hands and the material not being available to the public freely. The term of copyright held by this private company is twice as long as for other works simply due to its Crown origins.

There is also some uncertainty due to the changing names and responsibility of various ministries as to which Ministry of the Crown owns the rights to some material.

In 2015 Auckland Museum began investigating the possibility of digitising the Nominal Rolls: Second New Zealand Expeditionary Force, 1941-1950 for use on the Online Cenotaph database. The 16 volumes were digitised and then transcribed. The primary goal was to then insert this information into the individual profiles in Online Cenotaph, to create the core records for the WWII NZ Army veterans in the first instance. Based on our previous experience of the WWI commemoration and public demand, we could see this being of huge public benefit. We knew that pre-1944 material had “No Known Copyright Restrictions” (Subject to previous Crown Copyright duration of 50 years). In trying to determine the Crown agency who held the rights to the post 1944 material, we sought permission from the Ministry for Culture and Heritage, NZ Defence Force, and Archives NZ who could not confirm the publishing agency nor copyright holder. Given the lack of clarity and no objection from NZDF, National Library nor Archives NZ we proceeded but without explicit permission. The National Archivist and National Librarian agreed it was in the public interest to make this material available and the public good outweighed the ambiguous rights status. Attribution was made in the Sources field for each serviceperson and under the objectives of NZGOAL it was released under a CC-BY license.

13

Are there any problems (or benefits) in providing a copyright term for communication works that is longer than the minimum required by New Zealand’s international obligations?

It is our position that a copyright term that is longer than that required by the TRIPS Agreement of 20 years for broadcast (communication) works limits the “dissemination and access to knowledge and creative works” outcome by an additional 30 years, without a clear justification that incentives for creation of these works would be reduced.

14

Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?

We do not support indefinite copyright duration. However, limitations or restrictions on bequests are best dealt with by contract at the time of acquisition rather than the radical step of extending copyright indefinitely. The museum holds numerous collections with such agreements (many historic). While some are complicated, they are managed through contract law rather than copyright.

Other comments

No response.

Rights: What actions does copyright reserve for copyright owners?

15	Do you think there are any problems with (or benefits arising from) the exclusive rights or how they are expressed? What changes (if any) should be considered?
	<i>No response.</i>
16	Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?
	<i>No response.</i>
17	What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?
	<i>No response.</i>

Other comments

No response.

Rights: Specific issues with the current rights

18	What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?
	<i>No response.</i>

19

What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?

No response.

20

What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?

No response.

21

Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.

No response.

22

What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?

Museums face various issues regarding user generated content. The issues paper categorises UGC as coming from “non-professionals” and have a “low level of investment” - this is, from our experience, both inaccurate and counterproductive when discussing material of this nature. While there is variation in the quality and importance of UGC this is true of all creative works.

Museums collaborate with their stakeholders to increase knowledge of their collections for the benefit of all. An example for Auckland Museum is Online Cenotaph a “digital social space where enthusiasts, families, and researchers can share and contribute to the records of those who served for Aotearoa New Zealand” <http://www.aucklandmuseum.com/war-memorial/online-cenotaph>

This type of activity is important for the development of new knowledge but should not put the Museum at risk. Currently the Museum advises users that:

By contributing any material via this website, you are confirming that:

- 1. your contribution is your own original work and that you are fully entitled to grant to the Museum the rights in paragraph (2) and (3) below;*
- 2. you grant the Museum a worldwide, royalty-free, non-exclusive, license to reproduce, modify or use that material or otherwise exercise any right that any holder of the copyright in that material may hold for the duration of the applicable copyright; and*
- 3. the Museum may license that material to any third party under a Creative Commons licence. For information on a Creative Commons licence and its terms, please visit creativecommons.org. Contributed material must not include material that infringes any intellectual property or privacy rights, breaches any suppression order or any other law, or be purposefully inflammatory. The Museum has the right to modify or remove user-contributed material at its sole discretion and without notification.*

The copyright regime should encourage this increasingly important form of creation and dissemination of knowledge. A great deal of content comes from professionals and community knowledge holders which adds to its depth, accuracy, and value.

23

What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?

The ability to renounce copyright on data with the use of a CC0 licence would allow the Museum’s data to be used by others for research purposes. CC0 allows people to put works into a “No Rights Reserved” public domain way.

According to the issues paper, CC0 licenses have no legal standing and can be revoked which is in direct opposition to the wording of the license. We need clarification to whether these licenses can hold up to legal rigour.

24

Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.

No response.

Other comments

No response.

Rights: Moral rights, performers' rights and technological protection measures

25	What are the problems (or benefits) with the way the moral rights are formulated under the Copyright Act? What changes to the rights (if any) should be considered?
	<i>No response.</i>
26	What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?
	<i>No response.</i>
27	Will there be other problems (or benefits) with the performers' rights regime once the CPTPP changes come into effect? What changes to the performers' rights regime (if any) should be considered after those changes come into effect?
	<i>No response.</i>
28	What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?
	<i>As a general principle it should not be legal to use TPM to override rights to out-of-copyright material that are permitted under the Act.</i>
29	Is it clear what the TPMs regime allows and what it does not allow? Why/why not?
	<i>No response.</i>

Other comments

No response.

Exceptions and Limitations: Exceptions that facilitate particular desirable uses

30

Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use? Have you ever been threatened with, or involved in, legal action? Are there any other barriers?

Many of our exhibition, public programming, research include criticism and review. The ambiguity of fair dealing with regards to this mean that we often seek permission and licenses when they might not be required.

In July 2018 Auckland Museum opened the Exhibition "Are We There Yet?" looking at Women and Equality in Aotearoa. In a section about representation in media, staff wished to include a controversial cartoon by Al Nisbit "Witch Hunt" which aimed to silence women speaking out through the #MeToo movement. It was included in the exhibition and under fair dealing it may have been eligible under s 42 to be included without permission. However, while the entry into exhibition was free with museum entry, international visitors do incur entry fees. The ambiguity of whether this exhibition was revenue gathering and considered commercial meant that we sought a license from the NZ Herald to ensure its use was covered. The license fee was NZD\$100.00 but more importantly the significant staff time incurred seeking and administering the licence.

31

What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?

No response.

32

What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?

This exception has allowed GLAM institutions to have some control over how their collections are used in the media. Museums and Libraries hold contemporary collections of living artists, photographers and writers. Should the inclusion of photographs in this section of the law be passed there is a risk that creators would withhold permission and may result in GLAM institutions being more cautious when making collections available online. Especially as there is case law to include "citizen journalism" as reporting of current events (blogs, podcasts etc) operating outside of traditional media companies with editorial moderation.

There is also concern that images of accidents, acts of terror and victims of crime

would then be able to be taken from social media or image repositories (institutional or otherwise) and then used in news media without any control and protection from harm. Journalistic standards and moderation have changed with the rise of social media. There is concern that the inclusion of photographs in this exception would tip the balance in favour of media companies without due consideration for the creator and/or the subjects of those photographs. It should also be stated that images of cultural significance (taonga Māori or other) would also be openly available for use should photographs be included in this exception which conflicts with Te Tiriti o Waitangi (Article 2). This issue is an example where the copyright act should intersect with the rights of the creators, ethics and human rights.

There is a tension between our desire to make collections openly available for the public, the right of society to have accurate and up to date news reporting and our obligation to protect the copyright status collections. It raises public good and ethical concerns given the global online nature of media. We need further consideration of the implications of this proposed change.

33 **What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?**

Our digitised collection has been exempt from this exception which has allowed us to protect our images from media use without permission. We have been able to ensure sensitive and significant collections in our care have been used ethically in the media.

34 **What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?**

Auckland Museum supports the retention of Section 41. It has benefits in the publicity and marketing of exhibition and gallery spaces.

35 **What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?**

No response.

36 **What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?**

When the Copyright Act was last reviewed, cloud storage as a service did not exist. Internet NZ states that the current copyright law is incompatible with cloud computing. It is unclear as to whether a user of cloud computing is infringing copyright. It is good practise to backup data against a range of risks (which could include copies on offshore servers to protect against threats such as ransomware) but there is uncertainty about the copyright status and possible infringement. We believe that good

backup practices should be enabled without infringing copyright.

There is a need for clarification on the impact of the use of foreign servers and which copyright jurisdiction applies to the material stored. This is complicated by differing terms of duration and exceptions.

This also has implications on the storage of Māori material and taonga works in offshore servers - there is concern that these works would no longer be protected by the Treaty of Waitangi and NZ Law. The UN Declaration of the Rights of Indigenous Peoples (2007) article 31 states that “Indigenous peoples have the right to maintain, control and develop their cultural heritage, traditional knowledge and traditional cultural expressions”. Retaining the governance of culturally significant material in Aotearoa is essential to uphold our responsibilities in a bicultural society.

37 Are there any other current or emerging technological processes we should be considering for the purposes of the review?

No response.

38 What problems (or benefits) are there with copying of works for non-expressive uses like data-mining. What changes, if any, should be considered?

Currently data mining is more safely outsourced to countries with fair use regimes (Singapore, Israel, USA). This limits New Zealand’s ability to contribute to collaborative research projects.

*The UK Hargreaves report noted that “This is not about overriding the aim of copyright – these uses do not compete with the normal exploitation of the work itself – indeed, they may facilitate it. Nor is copyright intended to restrict use of facts. That these new uses happen to fall within the scope of copyright regulation is essentially a side effect of how copyright has been defined, rather than **being directly relevant to what copyright is supposed to protect.**” Hargreaves, I. (2011). *Digital opportunity: a review of intellectual property and growth: an independent report.**

<https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth>

The principle of “being directly relevant to what copyright is supposed to protect” should be applied to data mining. For example - we might have data in our Natural Science collections that could be used to track climate change. There is potential for data mining to contribute to the development of new knowledge and in turn innovation with associated economic benefits. Enabling the combination of metadata from our collections with that of other museums will enrich everyone's knowledge of those collections.

39 **What do problems (or benefits) arising from the Copyright Act not having an express exception for parody and satire? What about the absence of an exception for caricature and pastiche?**

No response.

40 **What problems (or benefit) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?**

Auckland Museum believes there should be an exception which allows the “right to quote”. Like Te Papa, we see this as a restriction to freedom of expression. The Berne Convention states it should be permissible to make quotations from work which has already been lawfully made available to the public provided it is compatible with fair practice. Currently there is no explicit exception to allow quotation under the NZ Copyright Act although certain uses it can be covered under other exceptions.

Museums use quotes for exhibitions, educational programmes, scholarly research, in-house publications, and on collection management systems (for object files and research about specific collection items). We would benefit from specific exceptions to allow the use of quotes with appropriate attribution for non-commercial uses.

Other comments

No response.

Exceptions and Limitations: Exceptions for libraries and archives

41 **Do you have any specific examples of where the uncertainty about the exceptions for libraries and archives has resulted in undesirable outcomes? Please be specific about the situation, why this caused a problem and who it caused a problem for.**

There is no definition in the act of what a “reasonable proportion” means which adds to confusion. If this is to be retained in the act, there needs to be a clear definition with examples. In practice this has been practically applied as 10% of a work for research and study. However, this is not prescribed by law and is more of a rule of thumb. As we are unsure of what is permissible, we often err on the side of caution when we receive requests for copies of in copyright material and are likely to be supplying less than what is allowed by law. Under s 52(2), Periodicals are still a source of confusion. There is confusion regarding what can be copied when specialist periodicals have the same subject matter versus those which have a variety of content.

It is not practical or a good use of limited resources to comply with s56B(b) which states

that the librarian or archivist must destroy copies of digitised material after they have been supplied under the exceptions. Retention of digital copies is an efficient use of resources for materials that are frequently requested and reduces handling of the original material.

The issue with libraries and archives (and Galleries and Museums) is that there is little resource to provide practical copyright education and training to staff. We are not sufficiently resourced to get legal advice for copyright on a case by case basis where there is uncertainty or ambiguity as to what is allowed.

42 **Does the Copyright Act provide enough flexibility for libraries and archives to copy, archive and make available to the public digital content published over the internet? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?**

Auckland Museum has a prescribed library within the institution. We are, in general, making good use of the exceptions that are afforded to us in the act. The most common exceptions we utilise are the ability to make a copy for the collections or users of other libraries (interloans), copying for replacement or preservation and making backup copies.

The National Library of New Zealand is the only library in NZ able to copy, archive and make available copyright material. This is laid out in the National Library statute, not the Copyright Act. Many of the functions of Libraries across NZ are providing that same function for their users. It has been suggested that while these exceptions are specific to these institutions as national repositories, some of those functions are shared with other GLAMs across Aotearoa and could be widened to facilitate their work and reduce the burden on one institution. A compromise to include GLAM institutions which contribute to the broader national collection and which respects the rights of creators should be investigated.

43 **Does the Copyright Act provide enough flexibility for libraries and archives to facilitate mass digitisation projects and make copies of physical works in digital format more widely available to the public? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?**

**There is considerable overlap here to Questions 71 to 73 dealing with Orphaned works.*

We support the work and stance of LIANZA on this question following the LIANZA standing committee's survey of Librarians from 2017.

The issues stated in that survey included numerous projects being abandoned, restricted or changed because of copyright concerns. The time, money and skills needed to locate rights holders is a burden to libraries so projects that include copyright clearances are often shelved in favour of easier projects.

This is true of mass digitisation projects undertaken by Auckland Museum. In 2014 we began our Collections Readiness Project and have over that period had 7 photographers photograph thousands of collection items with a parallel stream of cataloguing works. In

March 2019 this has reached 250,000 images created. While this project included a Rights Specialist, the nature and scale of the project has prioritised collections without copyright restrictions e.g. natural science specimens. This project included both library and archive collections but there was a focus on our 3D object collections which are not covered under the exceptions afforded to our prescribed library status.

For our library collections, this means that 19th Century material has been favoured for digitisation over more recent collections. It has also meant that collections with difficult or complex copyright status have remained un-imaged including heavily requested recent publications (some out of print) and much of our industrial photography collections (see Q71-72). This distorts the material that is available online, available via interloans and to our staff. What is more concerning is this skews public perception of what we hold and value in our collections. Essentially 20th Century collections remain largely invisible.

44

Does the Copyright Act provide enough flexibility for libraries and archives to make copies of copyright works within their collections for collection management and administration without the copyright holder's permission? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?

Preservation under section 55 should not be used only to protect against loss and degradation. Libraries and Museums should be empowered to make proactive copies of material before they degrade. There should be no distinction between copying for preservation, access and reuse. It is also more sensible, where resource allows, to make copies at the point of acquisition when the material is in optimal condition.

Book and magazine covers for use on catalogue records is another point of inflexibility - under US Fair use the use of book covers for online databases and on records is allowed. There is ambiguity around this as some publishers give libraries an image file of the book cover at the point of sale or with the catalogue record as they see the benefit in the promotion and free advertising of the book. In these cases, there is no legally binding licence or contractual agreement. We support an exception to allow the non-commercial use of book covers for online catalogues.

Section 54 enables copying of material where it has not been able to be legally acquired at an ordinary price within the previous 6 months. This complicates this exception. It is our position that regardless of format material that is not commercially available should be able to be copied for the collections of other libraries. Delaying the copying by 6 months for unavailable material is onerous. This should also extend to all material, regardless of format.

All of these exceptions, as discussed in Q46 would be of great benefit to Museums and Galleries in the same way they currently support the mahi of Libraries and Archives.

45

What are the problems with (or benefits arising from) the flexibility given to libraries and archives to copy and make available content published online? What changes (if any) should be considered?

Auckland Museum supports the position of LIANZA and National Library on this question with regards to making collections accessible for the public who cannot visit libraries in person.

46

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?

Museums and galleries, like libraries and archives, are memory institutions.

Auckland Museum and many other Museums across Aotearoa have a prescribed library within the Museum. Copyright works held our library and archives collections are covered by these exceptions but not the copyright works held in the rest of the museum's collections (e.g. art and design objects, human history objects etc.). This means that Museums would be infringing copyright if they were to carry out their functions to collect, preserve and provide access to collections. It can be a matter of historical accident or deliberate management decision to include a photograph or document in the museum's history collection or its library which leads to different legal treatment under the current act. This distinction should be removed by including museums.

The distinction in the copyright act artificially distorts the ability to exhibit, display and publish the full range collections and to meet our mission as "a non-profit, 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." <https://icom.museum/en/activities/standards-guidelines/museum-definition/>

It is our position that the inclusion of Museums and Galleries would provide some consistency across the sector.

The prescribed library status within the Museum means that collection managers within that library and archive have more rights than those tasked with managing other creative works which creates an inconsistency of rights across the various departments.

Under Section 11 of the Auckland War Memorial Museum Act 1996 the objectives of our institution states:

In carrying out its functions under [section 12](#), the Board shall recognise and provide for, in such manner as it considers appropriate, the following:

- *(a)the recording and presentation of the history and environment of the Auckland Region, New Zealand, the South Pacific and, in more general terms, the rest of the world:*
- *(b)conservation of the heritage of the Museum, and of global resources:*
- *(c)the role of the Museum as a war memorial:*

- *(d)celebration of the rich cultural diversity of the Auckland Region and its people:*
- *(e)education which involves and entertains people to enrich their lives and promote the well-being of society:*
- *(f)the advancement and promotion of cultural and scientific scholarship and research:*
- *(g)achievement of customer satisfaction by consultation, responsiveness, and continuous improvement:*
- *(h)leadership through professionalism, innovation, and coordination of effort with relevant organisations:*
- *(i)greater financial self-sufficiency through the prudent operation of compatible revenue-producing and fund-raising activities which supplement public funding:*
- *(j)providing maximum community benefit from the resources available.*

The objectives of collecting, recording, preserving and conserving, scholarship and research, and providing maximum community benefit resemble the overarching objectives and functions of the National Library of NZ, Archives NZ, and Te Papa in their respective Acts. These functions are central to GLAM institutions across Aotearoa. It seems counterproductive to the shared mission and inherent public good provided by these institutions to give rights to some of the sector and not to others. Here are some situations where Library and Archive exceptions could assist the museum in carrying out our functions:

- *Using 3D scans of objects to make custom packing for storage and transport.*
- *Photography of in copyright works for identification, condition assessment, conservation and collection management functions.*
- *Creation of digital surrogates where there is a risk to the physical collection item e.g. photography or scanning of negatives*
- *Making digital copies of collections available for research, study*
- *Use in digital exhibitions*
- *Providing access to collections in an increasingly digital environment*

Auckland Museum supports the International Council of Museums draft proposal for the adoption of the fair dealing and limited exceptions (Legal Affairs Committee on the International Council of Museums, 2015) to facilitate museums in their missions both onsite and online. This includes, collection management, scholarly research, educational functions and exhibition related activities. The proposed online exceptions have limitations and do not include commercial functions or the production or distribution of merchandise or products. The proposal would include Libraries, Archives, Museums and Galleries and has reasonable restrictions to reduce the impact to rights holders (lower resolution files where possible, non-commercial uses only). The exceptions apply to both electronic and analogue material and importantly facilitate access to material online.

Other comments

No response.

Exceptions and Limitations: Exceptions for education

47	Does the Copyright Act provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?
	<p><i>Section 11e of the Auckland War Memorial Museum Act 1996 states that the institution's function includes education, which involves and entertains people to enrich their lives and promote the well-being of society. Currently, it is our understanding that the education exceptions afforded in the Copyright Act do not extend to Auckland Museum. Auckland Museum provides classes to school groups, directly contributing to the school curriculum and delivered by qualified teachers but does not enjoy the same exemptions.</i></p> <p><i>Museums should be explicitly included as educational establishments.</i></p>
48	Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	<p><i>Auckland Museum supports the submission on this issue from Universities New Zealand for the retention of education exceptions. Museum staff and associated researchers work closely and collaboratively with university research staff and projects.</i></p>
49	Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	<p><i>No response.</i></p>
50	Is copyright well understood in the education sector? What problems does this create (if any)?
	<p><i>No response.</i></p>

Other comments

No response.

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

51 **What are the problems (or advantages) with the free public playing exceptions in sections 81, 87 and 87 A of the Copyright Act? What changes (if any) should be considered?**

No response.

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

Under section 81A format shifting is not permitted for libraries or museums. Section 55(3) does allow copying but only if the original is at risk of loss, damage or destruction. This section also states that the original must be made inaccessible and the digital copy must replace the original.

Our copyright framework needs to be technology and format neutral. This is essential to allow memory institutions to fulfil their purpose of preserving cultural collections and making them available to the public. Our sector is struggling with material in obsolete formats and only readable on obsolete equipment and the inability of Libraries and Archives to shift formats has led to deaccession of material that cannot be legally format shifted.

Auckland Museum has recently deaccessioned VHS material where it is held at other institutions across Aotearoa and Auckland because of uncertainty and resourcing required to format shift VHS tapes and we no longer have equipment to make them available.

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

No response.

54 **What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?**

No response.

55

What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?

No response.

56

Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?

No response.

57

Do you think that section 73 should be amended to make it clear that the exception applies to the works underlying the works specified in section 73(1)? And should the exception be limited to copies made for personal and private use, with copies made for commercial gain being excluded? Why?

No response.

Other comments

No response.

Exceptions and Limitations: Contracting out of exceptions

58

What problems (or benefits) are there in allowing copyright owners to limit or modify a person's ability to use the existing exceptions through contract? What changes (if any) should be considered?

Contracting out an action that is legally permitted is unacceptable and probably unenforceable.

The UK Copyright Designs and Patents Act notes that “To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.”

https://www.communications.gov.au/sites/default/files/submissions/universities_australia_1.pdf

Changes that would introduce this type of ambiguity should not be considered.

The Museum subscribes to a number of online databases rather than purchasing individual articles or journals. As our library is a special library, this service is only provided to staff and not to the general public. It has been noted by LIANZA that many libraries across Aotearoa are being offered contracts with durations that are longer and more restrictive than the current copyright law. This means that there is ambiguity as to whether the license overrides the legislative rights afforded to libraries.

Exceptions and Limitations: Internet service provider liability

59

What are problems (or benefits) with the ISP definition? What changes, if any should be considered?

The definition of an internet service provider in the New Zealand Act (s. 2) to include a person who “hosts material on websites or other electronic retrieval systems that can be accessed by a user” seems to be appropriately broad enough to include Auckland Museum under the Internet service provider liability provisions (s. 92) i.e. to provide a ‘safe harbour’. If that is not the intention of the ISP definition, Auckland Museum would advocate for a safe harbour provision to be explicitly applied to museums and other cultural institutions to protect them against potential infringement of copyright by users, where they have made reasonable efforts to safeguard copyright holder’s interests while in the pursuit of the museum’s public good objectives.

60

Are there any problems (or benefit) with the absence of an explicit exception for linking to copyright material and not having a safe harbour for providers of search tools (eg search engines)? What changes (if any) should be considered?

	<i>No response.</i>
61	Do the safe harbour provisions in the Copyright Act affect the commercial relationship between online platforms and copyright owners? Please be specific about who is, and how they are, affected.
	<i>No response.</i>
62	What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?
	<i>The museum would find it helpful to have more certainty about the adequacy of a take-down notice following the identification of infringing works.</i>

Transactions

63	Is there a sufficient number and variety of CMOs in New Zealand? If not, which type copyright works do you think would benefit from the formation of CMOs in New Zealand?
	<i>No response.</i>
64	If you are a member of a CMO, have you experienced problems with the way they operate in New Zealand? Please give examples of any problems experienced.
	<i>No response.</i>
65	If you are a user of copyright works, have you experienced problems trying to obtain a licence from a CMO? Please give examples of any problems experienced.
	<i>No response.</i>

66

What are the problems (or advantages) with the way the Copyright Tribunal operates? Why do you think so few applications are being made to the Copyright Tribunal? What changes (if any) to the way the Copyright Tribunal regime should be considered?

No response.

67

Which CMOs offer an alternative dispute resolution service? How frequently are they used? What are the benefits (or disadvantages) with these services when compared to the Copyright Tribunal?

No response.

68

Has a social media platform or other communication tool that you have used to upload, modify or create content undermined your ability to monetise that content? Please provide details.

No response.

69

What are the advantages of social media platforms or other communication tools to disseminate and monetise their works? What are the disadvantages? What changes to the Copyright Act (if any) should be considered?

No response.

70

Do the transactions provisions of the Copyright Act support the development of new technologies like blockchain technology and other technologies that could provide new ways to disseminate and monetise copyright works? If not, in what way do the provisions hinder the development and use of new technologies?

No response.

71

Have you ever been impeded using, preserving or making available copies of old works because you could not identify or contact the copyright? Please provide as much detail as you can about what the problem was and its impact.

Orphaned works are a considerable issue and cost for the museum.

To deal with the complexity of copyright in museum collections we implemented the Copyright Framework in 2015 to assist staff in assigning rights and reuse of works. Auckland Museum launched its Collections Online in 2015. At that time, it estimated that there were 24,000 applied arts records and 22,000 history records for objects in its collection, with images for 74% of applied arts records and 51% of history records in its collection of more than 7 million objects and documents.

Since then it has significantly increased the number of images for objects in its collection and the total number of items.

- *Before the images could be made public online the copyright status of each had to be established. The process was to:*

- *Identify those clearly out of copyright based on age and publish the image*
- *Identify those with a known creator and begin a programme of tracing rights owners, requesting licences to display images of their works*
- *Carry out due diligence searches where the rights owner could not be traced or was unknown (orphan works)*

- *The rights owners are often puzzled as to why they are being contacted, occasionally refusing to sign licences because they don't want to be bothered by this paperwork at the expense of their time as artists and creators*

The staff time and resource put into orphaned works remains a burden for Auckland Museum...

Many of our orphaned works have been made available to view through our Collections Online but are not freely and openly available for the public to reuse. When we receive a reproduction request for one of these works we will often have to repeat the due diligence search to ensure a rights holder can still not be identified. There are no specific requirements in the act which constitute a "due diligence search" so museums and libraries have worked together to determine standard practice for such works. When these materials are requested the Image Orders and Permissions team will explain the issues to the requestor and then state the risk associated with the reproduction of works with uncertain copyright status lies with them. This is discussed further in Question 72.

This becomes more complicated when internal staff wish to use these works for museum business (e.g. exhibitions and marketing). We then have to make calculated risk assessments taking into account the profile of the work in question, the intended use, if there is any financial gain and precedent. Ambiguity has meant that preferred material is frequently substituted with "easier" collections with more certain rights status. Again, this skews the material that can be made available and in turn the public perception of what the Museum holds.

Documentary Heritage Collections:

The museum holds nationally and internationally significant Documentary Heritage collections of Photographs, Paintings and Drawings, Book plates, Manuscripts, Archives, Ephemera, Publications and Maps. The scale of orphaned works in our Documentary Heritage collections is currently unknown but it is anticipated to be significant. Due to the complex and uncertain nature of these works we haven't been able to assess material on an item level as there are

often multiple authors or creators, multiple jurisdictions and multiple formats within a single work. New acquisitions have a copyright assessment at the point of being brought into the collection, but resourcing may only allow that to be done at a whole collection level. For example, a simple collection of letters may contain writing from many individuals, each of whom own copyright as distinct from the single donor who has gifted the collection. There is usually an agreement in place transferring ownership of collections, but copyright can remain with dozens if not hundreds of other individuals which presents difficulty when wanting to copy or publish items. This is exasperated over time. Often copyright assessment and research is only done when a collection is requested for reuse rather than proactively.

Auckland Museum holds numerous industrial photography collections. Due to their scale, they have not been fully catalogued and researched. Many of these collections came into the museum without the associated business records so there is great uncertainty as to who commissioned these works and under what circumstances they were taken. Auckland Museum have hundreds of thousands of photographs for which cataloguing, and digitisation cannot proceed under the current law without significant staff resource to investigate and locate thousands of rights holders.

Auckland Museum has a collection of approximately 30,000 ephemeral items in our collections consisting of posters, flyers, packaging, postcards and other printed material. While a large fraction of this collection has known rights holders, the nature of how the museum has collected it (explanation of collection methods) means that there is often no way of knowing the maker or rights holder. Just over 50% of the collection is currently assigned an "All Rights Reserved" or "Copyright Undetermined - Untraced Rights Holder" status in our collection management system as we do not have the resource to locate rights holders. Use of the "All Rights Reserved" rights status in this case means we have either not yet undertaken the due diligence search or have sought a museum license which restricts use by the public.

There is considerable concern in the sector that proposed term extension will add to the burden of orphaned works. Practically this will mean that staff will need to seek out great-great grandchildren/ nieces/nephews and add further uncertainty when dealing with orphaned works.

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?

Auckland Museum has benefited from significant work in this space undertaken by Te Papa. We hold similar types of collections with similar rights issues. There are many steps that the museum must take before we undertake a risk assessment for orphaned works. We use the Copyright Duration flowchart developed by Te Papa which is tailored to Museum collections. Determination of copyright duration and status requires experience and cannot be done by all museum staff as it is a specialist skill that comes with legal liability to the organisation.

Steps:

- Determine the copyright status of the work
 - Use of the copyright flowchart. Determination of format and any format specific considerations.
- Determine the duration and when the work falls out of copyright
- Determine copyright holder and make contact for license This has been a hugely time-consuming process, particularly for orphan works, only made possible with the help of volunteers.

Due Diligence searches include searches of the White Pages, Ancestry, searchable cemeteries databases, Companies Offices, Archway (Archives NZ), Other GLAM institutions across Aotearoa and Internationally, Births Deaths and Marriages, FindArtistsNZ.org.nz and simple google searches. This is recorded in collection records and takes significant staff time to complete.

As mentioned in Question 43, there is significant uncertainty and general risk aversion with regards to Orphaned works in the museum sector. Auckland Museum uses a takedown notice on our website which states:

*“Where the copyright in any material belongs to a third-party reasonable effort has been taken to identify the copyright owner.
If you are the owner of copyright material which you believe is available on this website in a way that constitutes an infringement of that copyright, or a breach of an agreed license or contract, please notify the webmaster@aucklandmuseum.com.”*

While we use this license, this does not provide any protection from legal action from rights holders. This is because copyright orphaned works hold a real risk to GLAM institutions and the publishing of them online forces us to operate knowingly outside the law.

As part of a large digitisation and cataloguing project the museum employed a full time Rights Specialist to clear works as they were photographed. This role was assisted by 3 trained volunteers (providing 2,800 hours of work over 2.5 years) who did a lot of due diligence and researching of rights holders. Over this period, over 200 licenses were sent to rights holders but only approx. 100 were signed and returned (NB: only a small fraction were the result of due diligence searches)

In cases where we cannot identify or locate a rights holder and obtain a license, we use the “Copyright Undetermined - Untraced Rights Holder” rights statement. This was implemented after looking to the National Library for guidance. Under principle 6 of their Use and Reuse

Policy they use this statement for works where copyright is likely to apply, but the rights owner is unable to be identified or traced after a reasonable search after careful consideration of cultural and ethical issues relating to the items. They implemented this statement following recommendation from the National and State Libraries of Australasia Procedural guidelines for reasonable search for orphaned works, 2010.

73

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?

Yes, we have had 1 case of this. In 2015 the museum in conjunction an external party published a World War One Calendar. One of the artistic works included was deemed to be in copyright, we did not have a license nor the rights holder's contact details. After a due diligence search to locate the artist's children it was deemed low risk and was included. In early 2019, 4 years later, the daughter of the artist came forward. While she was displeased at not being contacted, as other institutions with her father's works had subsequently tracked her down for permissions, no retrospective licensing fees were imposed. She only wanted a copy of the calendar for her family records.

We have no other recorded instances of rights holders coming forward after putting material online or reusing material without their consent.

74

What were the problems or benefits of the system of using an overseas regime for orphan works?

Any scheme which includes licensing for liability protection would ultimately hurt taxpayers in NZ given the way our GLAM sectors are funded (local and central government). We would support a non-commercial exception to facilitate the public good purpose and function of GLAM institutions.

Auckland Museum support Te Papa in that we strongly encourage the committee to investigate a safe harbour or fair dealing exception to allow the reproduction and publication online of orphan works. See ICOM proposal in Question 46.

There may be some benefit in having an orphaned works licensing scheme for commercial uses of material. However, this would require further definitions of Commercial vs. Non-commercial use. E.g. Use of images in academic conferences can be considered commercial if there is a registration fee. Any scheme which includes collective licensing (and associated fees) is likely to have limited uptake in Aotearoa. The GLAM sector is not sufficiently resourced (both in staff time and funds for licenses).

There has been low uptake on the UK scheme which is still very time intensive and can be costly to cultural institutions which are largely funded by taxpayer money. There are many restrictions associated with this including a rigorous due diligence. There is a similar scheme in India which involves applications to the Copyright Board for reuse of orphaned works.

Submissions are published publicly and if approved by the board there is significant royalties and administration fees which are retained in the event a rights holder comes forward.

Singapore has recently reviewed their Copyright Act - and decided not to establish an orphaned works scheme due to the limited uptake in the UK and Canada. The proposal does however look to expand the exceptions available to the GLAM sector but there is concern that this will not alleviate the burden of orphaned works and it is anticipated that a further reform specific to orphaned works would be required.

The EU scheme is more beneficial to the GLAM sector. The exceptions are focussed on written text, film and sound recording. While this has been used successfully by the British Museum to make the Feminist Magazine "Spare Rib" available, it has yet to be shown the benefit of such a scheme to Museums and Galleries given its format restrictions.

There are numerous potential benefits associated with a practical and reasonable orphaned works scheme which would allow considered access to material with uncertain status by GLAM institutions;

- *Additional opportunities for rights holders to be identified and come forward.*
- *Additional information about collections where little is known about them when made accessible.*
- *Reduced resource from institutions required to carry out repeated and rigorous due diligence searches.*
- *Increased supply of materials online and to the public - access to knowledge and supporting the generation of new knowledge.*
- *More representative online collections - allowing the public to see the full breadth and depth of collections in memory institutions.*

What problems do you or your organisation face when using open data released under an attribution only Creative Commons Licences? What changes to the Copyright Act should be considered?

Auckland Museum has provided records, images and data to 21 external platforms. These include Ancestry, Archives NZ, Atlas of Living Australia, Biodiversity Heritage Library, Community Archive, Digital NZ, Europeana, FamNet, GBIF, Google Arts and Culture, Graph Commons, Internet Archive, NZ Virtual Herbarium, NZ War Graves Trust, Online Cenotaph, Pinterest, Sketchfab, Watercolour World, Wikidata, Wikimedia Commons, Wikipedia and WoRMS. This is released under a variety of licenses including creative commons licensing.

On the issue of CC-0, our Copyright Framework from 2015 states:

“An issue arises in relation to data, particularly scientific data that is being shared with an aggregator (e.g. Virtual Herbarium) and the problems of ‘attribution stacking’ if each contributor has to be attributed. NZGOAL[1] suggests:

“90 Since the release of version 1 of NZGOAL in 2010, some agencies and others have asked why State Services agencies don’t just waive copyright by using the Creative Commons Zero, or CC0, tool. CC0 is a tool that seeks to enable an owner of copyright in a work to waive the copyright in that work, thereby relinquishing the work into the public domain. It also states that, if the waiver is legally ineffective, an extremely broad and obligation-free licence is granted instead.

91 There are legal, policy and operational aspects to governmental use of CC0, each of which provides sufficient reason not to adopt a waiver/CC0 approach.

92 Legally, there are questions as to whether and the extent to which the Crown and other State Services agencies can, in fact, waive (or abandon) copyright under the Copyright Act 1994 and potential inconsistencies with the moral rights regime in that Act.

93 At a policy level, guidance which advocated all-of-government or even selective waiving of Crown copyright (for departments) and copyright (for other State Services agencies) would be a substantial move and one which is considered more appropriate for consideration in the context of any future reform of the Copyright Act, which is primarily a matter for the Ministry of Business, Innovation & Employment (MBIE). It could raise a range of issues which are more appropriately dealt with as a matter of law reform.

94 At the operational level, using CC0 would have the effect of removing attribution requirements, despite correct attribution to and integrity of certain categories of copyright works being important to many government agencies.

95 An individual agency is not necessarily precluded from deciding to use CC0 if it wishes (that is a question for the agency) but, for the reasons above, NZGOAL does not support it.”

The use CC0 by other agencies in New Zealand will be monitored by Auckland Museum. It may be considered, particularly in circumstances where AM wishes to contribute to a data set which requires this option.” [1] Crown copyright ©. The New Zealand Government Open Access and Licensing framework (NZGOAL) by the State Services Commission is licensed under a Creative Commons Attribution 3.0 New Zealand Licence.

Other comments

No response.

Enforcement of Copyright

76	How difficult is it for copyright owners to establish before the courts that copyright exists in a work and they are the copyright owners? What changes (if any) should be considered to help copyright owners take legal action to enforce their copyright?
	<i>We would welcome a voluntary registration system to assist in the efficient and correct identification of rights holders.</i>
77	What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?
	<i>No response.</i>
78	Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?
	<i>No response.</i>
79	Does the cost of enforcement have an impact on copyright owners' enforcement decisions? Please be specific about how decisions are affected and the impact of those decisions. What changes (if any) should be considered?
	<i>No response.</i>
80	Are groundless threats of legal action for infringing copyright being made in New Zealand by copyright owners? If so, how widespread do you think the practice is and what impact is the practice having on recipients of such threats?
	<i>No response.</i>

81 **Is the requirement to pay the \$5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are there any issues with the border protection measures that should be addressed? Please describe these issues and their impact.**

No response.

82 **Are peer-to-peer file sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?**

No response.

83 **Why do you think the infringing file sharing regime is not being used to address copyright infringements that occur over peer-to-peer file sharing technologies?**

No response.

84 **What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing file sharing regime (if any) should be considered?**

No response.

85 **What are the problems (or advantages) with the existing measures copyright owners have to address online infringements? What changes (if any) should be considered?**

No response.

86 **Should ISPs be required to assist copyright owners enforce their rights? Why / why not?**

No response.

87 **Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?**

No response.

88

Are there any problems with the types of criminal offences or the size of the penalties under the Copyright Act? What changes (if any) should be considered?

No response.

Other comments

No response.

Other issues: Relationship between copyright and registered design protection

89

Do you think there are any problems with (or benefits from) having an overlap between copyright and industrial design protection? What changes (if any) should be considered?

No response.

90

Have you experienced any problems when seeking protection for an industrial design, especially overseas?

No response.

91

We are interested in further information on the use of digital 3-D printer files to distribute industrial designs. For those that produce such files, how do you protect your designs? Have you faced any issues with the current provisions of the Copyright Act?

No response.

92

Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?

No response.

Other comments

No response.

Other issues: Copyright and the Wai 262 inquiry

93

Have we accurately characterised the Waitangi Tribunal’s analysis of the problems with the current protections provided for taonga works and mātauranga Māori? If not, please explain the inaccuracies.

Yes, Auckland Museum agrees with the expression of the Waitangi Tribunal’s analysis of the current issues with the Copyright Act. We agree a standalone regime is required.

94

Do you agree with the Waitangi Tribunal’s use of the concepts ‘taonga works’ and ‘taonga-derived works’? If not, why not?

Yes, as it has been put forward in the Wai262 report from the Waitangi Tribunal.

However, these concepts need to be fully endorsed by Māori through consultation and wananga with iwi and hapu across Aotearoa. We are conscious that the changing landscape of international intellectual property it is important to ensure these terms are still relevant and endorsed by communities throughout the process.

95

The Waitangi Tribunal did not recommend any changes to the copyright regime, and instead recommended a new legal regime for taonga works and mātauranga Māori. Are there ways in which the copyright regime might conflict with any new protection of taonga works and mātauranga Māori?

We support this position and the parallel work stream that would be required to enact it. We cannot comment on any conflicts that may result from a new regime with any certainty until the Ministry put forward options for consultation.

Possible conflicts:

Copyright is a western construct of ownership with expiry dates and the concept of the Public Domain. Protection of mātauranga Māori and expressions of indigenous knowledge should not have an expiry date and the public domain is not a concept in Te Ao Māori.

Under Article 2 of the Treaty of Waitangi there is a guarantee “Te tino Rangatiratanga o rātou kainga me o rātou katoa” (tino rangatiratanga over all taonga or treasured things). The right to self-govern and sovereignty over their taonga was never surrendered in

1840. The current copyright legislation does not uphold the Crown's obligations to Māori. Given Wai262 was submitted in 1991 and the Waitangi Tribunal Report was released in 2011, it is time for wide sweeping and restorative legislation to protect all mātauranga Māori.

Photographs taken by non-Māori of Māori subject matter. Clarification needed. E.g. Auckland Museum holds the photographic archive of Gil Hanly, which contains hundreds of thousands of images she took at Waitangi over many decades. These are an amazing record of people, events and places which have deemed significant to Aotearoa but particularly in Te Ao Māori. Gil is pākehā, but we consider her works to be taonga. There is also the possible conflict between rights holders exercising their control of material and the wishes of subjects or whānau related to the material.

As a result of inaction on this issue, there are numerous individuals both within Aotearoa and internationally profiting from and appropriating mātauranga Māori. This ranges from the manufacture of crockery with Kowhaiwhai patterns in China with no acknowledgement of the mātauranga associated with the design to the sale of craft beer in the UK using Māori imagery. We are also conscious that there is no legal protection for out of copyright indigenous works.

Data sovereignty is another area which needs to be considered. We recommend that consultation with Te Mana Raraunga, the Māori Data Sovereignty Network to ensure any regime is compatible with data considerations.

At Auckland Museum we have put in place two processes to protect our taonga Māori and Moana Pacific collections where the copyright act fails to do so.

The Māori cultural permissions process, initiated in 2014, protects taonga in our care from misappropriation and places considerable weight on the wishes of the iwi or hapu from which the taonga originates. We have implemented a principles-based framework for managing requests for reuse of Māori images where the copyright act does not protect them. This process is based on principles of Open Access, Manaakitanga, Kaitiakitanga, Mana Taonga, and Mana Whenua. Requests are taken by our Image Orders and Permissions team who then feed requests for consideration by Māori staff and often iwi/whanau consultation. This process is used for both internal and external requests and we hold our staff to the same standard and all internal use of taonga is interrogated under the same values. Consultation and the wishes of iwi Māori are central to this process to ensure the mana of taonga and Māori communities are upheld. We have a parallel process for managing our significant Pacific collections.

We do not differentiate taonga Māori objects from documentary heritage collections (largely two-dimensional works: photographs, paintings, manuscript and other unpublished works). Regardless of copyright status, we have a process of consultation to ensure any requests of use (both internal museum use and external requests from the public) are appropriate and in line with the mātauranga of the taonga and the tikanga that surrounds it.

This could be opportunity for Aotearoa to protect Mātauranga Māori and Māori culture from foreign exploitation while also providing opportunities for innovation, business and economic gain. Currently there is no protection afforded to ensure indigenous intellectual property rights can be asserted and the benefits remaining with those communities. The Crown now 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.

96

Do you agree with our proposed process to launch a new work stream on taonga works alongside the Copyright Act review? Are there any other Treaty of Waitangi considerations we should be aware of in the Copyright Act review?

Yes, we recommend a cross ministry stream of work to be undertaken by Te Puni Kōkiri, the Ministry for Māori Development and MBIE.

97

How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?

There needs to be an acknowledgement that the creative and cultural sectors have been given extensive consultation and engagement on copyright and intellectual property issues over many decades. The same cannot be said for Māori. Consultation with Māori needs to be broad, resourced and in a wananga format in line with tikanga Māori.

Other comments

No response.