

Submission template

Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

Name	Catherine Mayo
Organisation	N/A

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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?
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	<p><i>As a published writer, I find that the second objective “Permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand “ is very vague and far too broadly worded.</i></p> <p><i>Any free access at all could be construed as having net benefits to New Zealand, if contact with creative works can be seen as beneficial. This could allow for large and unfair exceptions, particularly in the education sector, that will counteract Objective 1, unless the exceptions are clearly and tightly defined.</i></p> <p><i>For example, writers gain much-needed financial support from the purchase of class sets of books. Although students of all ages seem still to prefer reading hard copies of books, the wide-spread use of tablets and laptops in schools could make access to a creative work more easy through the purchase of one rather than multiple copies for school use. This would have a major detrimental effect on the ability for writers to gain a reasonable return for their creative work.</i></p>
2	<p>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?</p> <p><i>It is very difficult, if not impossible, to be certain or clear about technologies that are still undeveloped or unknown. Having said that, I think it would be very useful to make ongoing provision for reviews of such technologies as they might arise, and their impact or likely impact on copyright holders and users. Perhaps such reviews could be conducted every 3 years, say, given the rapidly changing nature of communication technologies.</i></p>
3	<p>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.</p> <p><i>I see that some acknowledgement of moral rights is given by our alignment with international conventions and treaties on copyright. It would be good to see this provision included more specifically in our New Zealand copyright legislation.</i></p>
4	<p>What weighting (if any) should be given to each objective?</p> <p><i>In the context of my concerns about Objective 2, I urge that Objective 1 be weighted more strongly in relation to Objective 2, and that the limits to the latter be very clearly defined.</i></p>

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

5	<p>What are the problems (or advantages) with the way the Copyright Act categorises works?</p> <p><i>The requirement that a work must be “original” is only useful if there is a robust consensus about the meaning of originality. To state this in a vague way and leave it to the courts to argue over can fail to protect the creator, or lead to unnecessary confusion by the user.</i></p> <p><i>There used to be a certain number of consecutive words or musical notes that could be used by someone other than the creator, before copyright was infringed. Does this standard still apply?</i></p> <p><i>Copying for private use and study did have a rule of thumb: one article out of a book or academic journal comprising a number of articles, or one tenth of a unified published work. Does this standard still apply?</i></p>
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6	<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><i>It would be useful to work towards a more robust definition here. When does an “idea” (without copyright) become a creative work, covered by copyright? How does copyright law define “skill”, “effort” and “judgement”? Having too loose a sense of these words can be disadvantageous for both the copyright possessor and the potential user.</i></p>
7	<p>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?</p>
8	<p>What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?</p>
	<p><i>The current rules, which give protection without having to register a creative work, seem practical and fair.</i></p>
9	<p>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?</p>
	<p><i>As a writer, I am unfamiliar with “computer generated” works, assuming that you don’t simply mean the use of a computer to record and save a creative work.</i></p>
10	<p>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?</p>
	<p><i>The replication of original artwork is made very easy by modern technologies. Protection for the artist is provided through embedded technology to prevent unauthorised reproduction, but social media use, to promote such work, can create problems for the creator. I don’t have any answers, this not being my field.</i></p>
11	<p>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?</p>
	<p><i>I have requested the copyright of two previously published novels be returned to me, once it became clear they were unlikely to be reprinted. This was dependent on the terms of my contract with the publisher, and also on their personal goodwill. Electronic copies available online long-term can muddy the waters for many writers – I was lucky that my publisher wasn’t very active in this area and didn’t feel they would have much chance of further sales.</i></p> <p><i>While I suspect this will continue to be something that lies between a creator and their publisher, it would be interesting to explore guidelines, if not regulations that can protect writers – we are all under serious financial pressure, and in the modern publishing environment, we don’t always feel we ought to rock the boat by bargaining over these sorts of details before signing a contract.</i></p> <p><i>On the other hand, publishers are also under a great deal of pressure, and as copyright holders, they also need protection.</i></p>

12	What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?
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?
14	Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?

Other comments

[Insert response here]

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?
16	Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?
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 would resist any change in this area.

I would resist any change in this area.

I think we need to extend the range of authorisation beyond New Zealand

Other comments

[Insert response here]

Rights: Specific issues with the current rights

18	<p>What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?</p>
	<p><i>Refer to my answer to Question 2.</i></p> <p><i>It is very difficult, if not impossible, to be certain or clear about technologies that are still undeveloped or unknown. Having said that, I think it would be very useful to make ongoing provision for reviews of such technologies as they might arise, and their impact or likely impact on copyright holders and users. Perhaps such reviews could be conducted every 3 years, say, given the rapidly changing nature of communication technologies.</i></p>
19	<p>What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?</p>
20	<p>What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?</p>
	<p><i>I agree that "object" should be either redefined or another word used to make it clear that copyright does not apply simply to physical objects but covers the full technological spectrum.</i></p>
21	<p>Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.</p>
	<p><i>In this instance, and others, defining copyright purely in terms of the expression rather than the content itself seems illogical.</i></p>
22	<p>What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?</p>
23	<p>What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?</p>
	<p><i>It would make sense to create some provision for people who wish their work to be in the public domain to be able to relinquish personal copyright in the broader sense, if they so wish.</i></p>
24	<p>Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.</p>

Other comments

[Insert response here]

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

25	<p>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?</p> <p><i>There needs to be a balance between protecting the integrity of a work and allowing for satire and comment. At one end, we have defamation and hate speech, at the other, valid freedom of comment and expression.</i></p> <p><i>At the moment, the differences are worked out through the court system on a case by case basis; it is hard to see what other means of resolving these problems there might be, as each instance is going to be unique.</i></p> <p><i>Perhaps the two extremes can be more clearly defined, leaving the grey area in the middle to be disputed by mediation or litigation where desired?</i></p>
26	<p>What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?</p> <p><i>I see no reason to differentiate between the two.</i></p>
27	<p>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?</p> <p><i>Visual performance should also be protected under copyright</i></p>
28	<p>What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?</p> <p><i>Access controls should also be covered by copyright law</i></p>
29	<p>Is it clear what the TPMs regime allows and what it does not allow? Why/why not?</p>

Other comments

[Insert response here]

Exceptions and Limitations: Exceptions that facilitate particular desirable uses

30	<p>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?</p>
	<p><i>[Insert response here]</i></p>

31	<p>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?</p>
	<p><i>See my answer to Question 1.</i></p> <p><i>Educational use should be limited.</i></p> <p><i>For example, writers gain much-needed financial support from the purchase of class sets of books. Although students of all ages seem still to prefer reading hard copies of books, the wide-spread use of tablets and laptops in schools could make access to a creative work more easy through the purchase of one rather than multiple copies for school use. This would have a major detrimental effect on the ability for writers to gain a reasonable return for their creative work.</i></p> <p><i>No one should be able to use these exceptions for commercial use.</i></p>
32	<p>What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?</p>
	<p><i>Photographers should be financially rewarded whenever possible.</i></p>
33	<p>What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?</p>
34	<p>What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?</p>
35	<p>What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?</p>
36	<p>What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?</p>
37	<p>Are there any other current or emerging technological processes we should be considering for the purposes of the review?</p>
38	<p>What problems (or benefits) are there with copying of works for non-expressive uses like data-mining. What changes, if any, should be considered?</p>
	<p><i>It may depend on whether information is in the public domain (eg, freely available on Google) or whether it has been accessed in some other way that protects IP.</i></p>
39	<p>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?</p>
	<p><i>It would be useful to address this in more detail</i></p>
40	<p>What problems (or benefit) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?</p>

A brief word limit (say, eight words) before copyright needs to be applied for would be useful, so long as acknowledgement of the source is made.

Other comments

[Insert response here]

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.

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?

It is useful, for research purposes, to be able to access academic and other research material in limited quantities through the library systems.

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?

I am opposed to mass digitalisation projects of copyrighted material by libraries, where it would infringe copyright in other arenas. Digital lending of ebooks should provide some financial reward to the writer or other creator, initially through standard purchasing, branch library by branch library, and then some financial reward to the writer through the Public Lending Right payment system, which doesn't happen at the moment.

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?

I question the need for making copies of copyright works "for collection management and administration" without requesting and paying for copyright. What does collection management actually mean? This looks like weasel words to me.

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?

Content published online and subject to copyright should be governed by copyright law, whether obtained by libraries or other people or institutions, to provide a parallel to the initial purchase of hard copies and the subsequent reimbursement for financial loss to the writer through the Public Lending Right fund.

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?

Libraries held in these institutions should be governed by the same law process. Other activities by these institutions should not be exempted, except to further research etc.

Other comments

[Insert response here]

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?

See my answer to Question 2. Writers need the financial benefits arising from the purchase of multiple copies, both by school libraries and through the acquisition of class sets. To use the excuse of digital technology and hardware to strip writers of this income will make a difficult financial situation for writers even harder.

48

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

Allowing multiple reprographic copies to be made is too wide.

49

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

50

Is copyright well understood in the education sector? What problems does this create (if any)?

As technologies change, in the context of an "open" internet, I suspect many lines are being crossed. A stronger role in educating the educators is needed. Teachers need to be more aware what internet sites are public domain and how to check and advise on other material.

The current love affair with internet-sourced information can also fail to train students in the value of traditionally published hard copy sources, and warn them of the unreliability of much information on the internet.

This, of course, is not the role of the Copyright Act, but making digital information uniformly available as an exemption from copyrighting in an educational context can be harmful. The peer-reviewing and publisher-reviewing processes that go into hard-copy publications give access to better-quality data and enhance training in research methods.

Other comments

[Insert response here]

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?
	<i>[Insert response here]</i>
52	What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?
	<i>[Insert response here]</i>
53	What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?
	<i>[Insert response here]</i>
54	What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?
	<i>[Insert response here]</i>
55	What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>

Other comments

[Insert response here]

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?
	<i>[Insert response here]</i>

Exceptions and Limitations: Internet service provider liability

59	What are problems (or benefits) with the ISP definition? What changes, if any should be considered?
	<i>[Insert response here]</i>
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>[Insert response here]</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>[Insert response here]</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>[Insert response here]</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>[Insert response here]</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>[Insert response here]</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.

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

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.

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

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.

[Insert response here]

72 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?

[Insert response here]

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?

[Insert response here]

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

[Insert response here]

75

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?

[Insert response here]

Other comments

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

78

Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?

[Insert response here]

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?

[Insert response here]

80

Are groundless threats of legal action for infringing copyright being made in New Zealand by copyright owners? If so, how wide spread do you think the practice is and what impact is the practice having on recipients of such threats?

[Insert response here]

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.

[Insert response here]

82

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

	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
86	Should ISPs be required to assist copyright owners enforce their rights? Why / why not?
	<i>[Insert response here]</i>
87	Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>

Other comments

[Insert response here]

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?
	<i>[Insert response here]</i>
90	Have you experienced any problems when seeking protection for an industrial design, especially overseas?
	<i>[Insert response here]</i>

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?

[Insert response here]

92

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

[Insert response here]

Other comments

[Insert response here]

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.

[Insert response here]

94

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

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

97

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

[Insert response here]

Other comments

[Insert response here]