

Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

Name	Kevin Glover
Organisation	Kevin Glover, barrister

The Privacy Act 1993 applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

MBIE intends to upload submissions received to MBIE’s website at www.mbie.govt.nz. If you do not want your submission to be placed on our website, please check the box and type an explanation below.

I do not want my submission placed on MBIE’s website because... [Insert text]

Please check if your submission contains confidential information:

I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

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? <i>Yes, the objectives are broadly correct. The system is achieving those objectives fairly well in my view. The major points to work on are under objective 1 (consider excluding mass-produced items from protection under copyright law so that these are covered only by registered designs/patents, for reasons developed below) and objective 2 (providing better guidance around permitted use and positive permitted use rights for users, also discussed below).</i>
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? <i>No.</i>
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.

	<i>I think that moral rights and performers' rights are adequately addressed by the general objectives.</i>
4	What weighting (if any) should be given to each objective?
	<i>Objective 2 has tended to be subordinate to objective 1, that should be more balanced.</i>

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?
	<i>Literary works suggests a higher level of originality than is actually required. Could be renamed "language-based works".</i>
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?
	<i>I wouldn't say it is "clear" but the Courts make it work. Having those as requirements makes the threshold for protection higher than simply effort.</i>
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?
	<i>It is not apparent to me that there are particular difficulties with the current law.</i>
8	What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?
	<i>Making the commissioning rule apply in the case of all works as a default position where there is a commissioning arrangement, rather than just particular named types of works.</i>
	<i>The Act should expressly deal with the situation if a party agrees to pay for a work but fails to do so. It would seem implicit that the commissioning arrangement does not apply, but I had a case last year where the commissioning party (which was insolvent) argued that it was entitled to the copyright in the work despite not having paid for it. This would have been a clear injustice so I recommend clarifying this point, e.g. The commissioning party is the first owner of copyright, but this subsection does not apply if that party fails to take all steps required of it within a reasonable time. This wording isn't perfect but the concept does need to be reflected in the Act.</i>
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?
	<i>[Insert response here]</i>
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?
	<i>None.</i>

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 am not aware of any issues. If they have “transferred” their copyright (which I assume means assigned or had copyright vested in another person in terms of s 21), I do not see any need for any rules around pre-emptive rights to purchase back. It will depend on the contractual position. The default is that there is no right of pre-emption.</i></p>
12	<p>What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?</p>
	<p><i>Section 27 should be broadened. Copyright is not necessary to encourage the Crown to create works, from a policy perspective such copyright should be limited. A single agency should deal with ownership, enforcement and clearance of remaining Crown copyright works to make it easier for licensing etc, and to avoid copyright from being used by individual Ministries/Departments to jeopardise the free flow of information.</i></p>
13	<p>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?</p>
	<p><i>As a general comment, I consider the term of copyright to be too long so I do not support anything being in excess of international obligations.</i></p>
14	<p>Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?</p>
	<p><i>I do not support this unless it operates to allow access to material which otherwise would not become available.</i></p>

Other comments

My background and experience

I make this submission as someone who has had a long-standing interest in copyright law:

- *I practise as a barrister specialising in intellectual property disputes and have worked in the field of intellectual property for 19 years.*
- *I studied IP at the University of Cambridge as part of my LLM in 2003-04 and chose to attend Cambridge specifically so that I could study under Professor Bill Cornish, one of the world’s leading intellectual property academics.*
- *I am a contributing author to the LexisNexis loose-leaf text “Intellectual Property Law” (previously “Copyright and Design” and am responsible for the sections on moral rights, registered designs*
- *I co-lectured intensive postgraduate courses on copyright law as part of the University of Auckland’s LLM program in 2011 and 2013, and co-lectured the paper “Intellectual Property and Innovation” at the University of Auckland’s Business School in 2013.*
- *I have given various guest lectures on intellectual property at the University of Auckland and the University of Waikato, and have presented seminars and conferences papers on intellectual property for Intellectual Property Society of Australia and New Zealand (including*

presenting a paper on copyright damages at the 2018 IPSANZ annual trans-Tasman conference), the New Zealand Law Society, the Auckland District Law Society, NZ Institute of Patent Attorneys and the Institute of Patent and Trade Mark Attorneys of Australia (IPTA).

- *I am currently the chair of the NZ committee of IPSANZ and have been a member of that committee since 2008, although I record that these submissions are made in a personal capacity and do not necessarily reflect the views of IPSANZ or its members.*

Process

I have a concern about the copyright law reform process.

There is necessarily a huge amount of detail required when seeking feedback on options for law reform, and a certain amount of knowledge of the law. I am aware that the Ministry has tried to make the process user friendly and has sought feedback from “ordinary” members of the public, but having such a lengthy template and large number of issues will inevitably mean that lots of people will be put off. I say this as someone with an active interest in copyright law reform who still almost put this in the “too hard” basket.

However, the parties who will be most motivated to make submissions will be those who have a vested interest in law reform taking a particular path. This might be contrary to the interests of member of the public. For example, particular groups might seek to extend the term of copyright – that has an impact on members of the public across the population, although they might not appreciate it (or know that this might be proposed).

As such, there needs to be further public consultation on any proposals for amendment/reform, in a manner which allows for individuals to participate easily by providing short-form feedback (e.g. a short series of yes/no questions), as well as more involved feedback from those who wish to make more subtle submissions. The impact of reform on members of the general public also needs to be considered.

Term

I oppose any extension for the term of copyright protection. When considered in economic terms, it will not encourage the creation of new works and it would operate as an windfall (at the expense of the general public) for owners of existing works. No person is going to choose not to create something because the term of protection is “only” 50 years after the author’s death.

I consider the term to be excessive when viewed in light of the purpose of copyright law being to encourage creativity and investment, particularly compared with the maximum term of a patent being 20 years. I accept that it would be difficult to reduce the term in light of our international obligations but I would favour this.

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 have a serious concern that copyright infringement is being interpreted too broadly in relation to designs, such that (in the case of a mechanical item which could be protected by a patent) copyright owners get stronger protection than they would from a registered design or a patent without needing to take any formal steps to register it and provide notice of their claims or any need to show novelty (apart from the very low threshold of infringement). This distorts the intellectual property system and provides a barrier to companies seeking to compete using non-novel technologies.

16	<p>Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?</p> <p><i>[Insert response here]</i></p>
17	<p>What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?</p> <p><i>[Insert response here]</i></p>

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>[Insert response here]</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> <p><i>[Insert response here]</i></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>[Insert response here]</i></p>
21	<p>Do you have any concerns about the implications of the Supreme Court's decision in <i>Dixon v R</i>? Please explain.</p> <p><i>[Insert response here]</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> <p><i>[Insert response here]</i></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>[Insert response here]</i></p>

24

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

[Insert response here]

Other comments

[Insert response here]

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 support the introduction of a resale right for artworks. The regime does not often come into play in practice but is handy for situations where it does apply, which often involve issues of artistic integrity etc which are not adequately addressed by the economic copyright rights.

26

What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?

[Insert response here]

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?

[Insert response here]

28

What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?

[Insert response here]

29

Is it clear what the TPMs regime allows and what it does not allow? Why/why not?

[Insert response here]

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>[Insert response here]</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>[Insert response here]</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>
	<p><i>[Insert response here]</i></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>
	<p><i>[Insert response here]</i></p>
35	<p>What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?</p>
	<p><i>[Insert response here]</i></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>
	<p><i>[Insert response here]</i></p>
37	<p>Are there any other current or emerging technological processes we should be considering for the purposes of the review?</p>
	<p><i>[Insert response here]</i></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>[Insert response here]</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>

I was previously of the view that a parody defence, while preferable, wasn't strictly necessary, on the basis that litigation was unlikely and so it was permitted/tolerated in practical terms.

I now think there should be a specific parody defence. The following is a quote from the creator of a burlesque show which parodies Star Wars:

The Empire Strips Back has been able to flourish owing to Australia's generous parody laws, and the production will land in the US in June – thanks to its legal similarities around fair use of copyrighted creations. "We can't go to New Zealand," Beattie says, and the UK only became a touring possibility for the show three years ago, when the country first defined copyright parody protections in legislation.

(For the full article, refer here: <https://www.theguardian.com/stage/2018/feb/24/the-empire-strips-back-how-a-star-wars-parody-took-the-burlesque-world-by-storm>)

It is important to rectify this. When considering law reform, the policy is important and we should not rely on inertia and the economics of litigation as being reason for permitting conduct which is creative of itself. As a matter of principle, parody should be protected – in its own right or, more ideally, as part of a general fair use defence.

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?

[Insert response here]

Other comments

I think there is a strong case for more detailed consideration of a fair use defence, which would replace the series of specific exceptions/defences which exist at present. Such a defence would simplify the law, be policy-based (in terms of the balance between creators/rightsholders and users) and be fairer.

The need for a general fair use defence arises from the fact that copyright law protects relatively mundane material without any formalities. Under the common law tradition, a person is free to do whatever has not been proscribed. Historically this was a source of pride amongst English legal philosophers, in contrast with Europeans who were subject to codes and needed permission to undertake activities. Gradually, however, that residual liberty has been eroded. In the copyright context, the problem is that as a general rule copyright monopolies have expanded (e.g. works protected, protection afforded, term) without any consideration for the corresponding rights of users. There have been piecemeal exceptions to this, for example an exception to allow time-shifting. Even then, however, there was massive resistance to allowing what would now be considered to be uncontroversial acts (e.g. converting a CD to MP3 so it could be played on an iPod was technically an infringing act for many years).

Although I suggest that the detail of the defence should be debated, the US defence could be an appropriate starting point. (I note that some US-based interest groups and commentators assume that we have a corresponding defence of fair use.) The factors to be considered under the US test are:

- (a) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (b) the nature of the copyrighted work;*
- (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*

(d) the effect of the use upon the potential market for or value of the copyrighted work.

I have a further comment on the process. With respect, the way in which feedback has been sought on the topic of defences/exceptions (by focusing on the specific) reflects the current law and does not really invite consideration of the broad question of whether there should be a fair use defence. This should be debated in the next phase of reviewing the Copyright Act.

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

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?
	<i>[Insert response here]</i>
48	Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	<i>[Insert response here]</i>
49	Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	<i>[Insert response here]</i>
50	Is copyright well understood in the education sector? What problems does this create (if any)?
	<i>[Insert response here]</i>

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	<p>What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?</p> <p><i>[Insert response here]</i></p>
55	<p>What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?</p> <p><i>[Insert response here]</i></p>
56	<p>Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?</p> <p><i>[Insert response here]</i></p>
57	<p>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?</p> <p><i>[Insert response here]</i></p>

Other comments

[Insert response here]

Exceptions and Limitations: Contracting out of exceptions

58	<p>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?</p> <p><i>[Insert response here]</i></p>
----	---

Exceptions and Limitations: Internet service provider liability

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

[Insert response here]

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.

[Insert response here]

62

What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?

[Insert response here]

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?

[Insert response here]

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.

[Insert response here]

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?

	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
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.
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
74	What were the problems or benefits of the system of using an overseas regime for orphan works?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>

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?
----	--

I would consider this issue from the perspective of a defendant. In order to enforce copyright, a party must first show that they own it. This should not be a difficult exercise if they have kept appropriate records, and if they have not then I do not consider that they should have the benefit of the protection of the law.

I consider the problem to be that it is too easy for copyright owners to take action in relation to original but non-novel designs, which could not be registered as designs or patents (due to lack of novelty). In addition, assessment of infringement (e.g. extent of similarity) is assessed much more generously in favour of the owner in the case of copyright when compared with registered designs or, particularly, patents.

The same applies to software, where copyright owners sometimes assert infringement by copying of features or functions rather than copying code. Such matters ought not to be protected by copyright but can sometimes be treated that way.

These matters have a chilling effect on competition, whereas copyright law should be about encouraging business.

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?

Yes. A defendant knows that it is time-consuming and expensive to defend copyright proceedings, and it can come down to a Judge's assessment of similarity despite an independent design path having occurred.

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?

[Insert response here]

83

Why do you think the infringing filing 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 filing share 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 have a major concern that copyright protection applies to material which should only be the subject of patents or registered designs.

I have recently acted as counsel for the first and second defendants in Oraka Technologies Limited v Geostel Vision Limited. That case commenced in 2005 and is still on foot. It relates to infringement of artistic works which are designs of cups used in an asparagus-grading machine. I began acting in mid-2016.

Without going into the full background of the case, the cups carry asparagus spears through the machine. The Oraka cup was designed in 1993. In 2013, the Court of Appeal found infringement on the basis that the cup was not identical but appeared that it could have been a "mark 2" version of the Oraka cup. While I disagree with that decision (although I was not acting as counsel), it shows how easy it is for a plaintiff to succeed on a copyright claim without the same rigour of registered rights.

As above, the problem is that it is too easy for copyright owners to take action in relation to original but non-novel designs, which could not be registered as designs or patents (due to lack of novelty). In addition, assessment of infringement (e.g. extent of similarity) is assessed much more generously in favour of the owner in the case of copyright when compared with registered designs or, particularly, patents. There is no need for a copyright owner to specify which aspects are novel.

New Zealand is near-unique in the world in allowing copyright protection for designs as artistic works. This should not be allowed, and parties should be required to rely on rights which require proof of novelty as a pre-requisite for registration (i.e. patents or designs).

The Designs Act has been neglected due to most people simply relying on unregistered copyright rights, so would also need to be reviewed. There would also need to be a transitional period. But it would be a much fairer and more principled approach, and one more consistent with the approach taken by the rest of the world.

90

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

[Insert response here]

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.
	<i>[Insert response here]</i>
94	Do you agree with the Waitangi Tribunal’s use of the concepts ‘taonga works’ and ‘taonga-derived works’? If not, why not?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
97	How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?
	<i>[Insert response here]</i>

Other comments