

Submission template

Review of the Copyright Act 1994: Issues Paper

Instructions

This is the template for those wanting to submit by Word document a response to the review of the Copyright Act 1994: Issues Paper.

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the potential issues explored in the Issues Paper by 5pm on Friday 5 April 2019. Please make your submission as follows:

1. Fill out your name and organisation in the table, “Your name and organisation”.
2. Fill out your responses to the Issues Paper questions in the table, “Responses to Issues Paper questions”. Your submission may respond to any or all of the questions in the Issues Paper. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.
3. We also encourage your input on any other relevant issues not mentioned in the Issues Paper in the “Other comments” sections.
4. When sending your submission:
 - a. Delete this first page of instructions.
 - b. Include your e-mail address and telephone number in the e-mail accompanying your submission – we may contact submitters directly if we require clarification of any matters in submissions.
 - c. If your submission contains any confidential information:
 - i. Please state this in the e-mail accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 that you believe apply. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act.
 - ii. Indicate this on the front of your submission (eg the first page header may state “In Confidence”). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).

Note that submissions are subject to the Official Information Act and may, therefore, be released in part or full. The Privacy Act 1993 also applies.

5. Send your submission as a Microsoft Word document to CopyrightActReview@mbie.govt.nz

Please direct any questions that you have in relation to the submissions process to CopyrightActReview@mbie.govt.nz.

Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

Name	Linda Blincko
Organisation	Depot Artspace

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>[Insert response here]</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>[Insert response here]</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>[Insert response here]</i>
4	What weighting (if any) should be given to each objective? <i>[Insert response here]</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>[Insert response here]</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>[Insert response here]</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>[Insert response here]</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>[Insert response here]</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>[Insert response here]</i>
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? <i>[Insert response here]</i>
12	What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered? <i>[Insert response here]</i>
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? <i>[Insert response here]</i>

14

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

[Insert response here]

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?

[Insert response here]

16

Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?

[Insert response here]

17

What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?

[Insert response here]

Other comments

[Insert response here]

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?

[Insert response here]

19

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

[Insert response here]

20	What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?
	<i>[Insert response here]</i>
21	Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.
	<i>[Insert response here]</i>
22	What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?
	<i>[Insert response here]</i>
23	What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?
	<i>[Insert response here]</i>
24	Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.
	<i>[Insert response here]</i>

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

28	<p>What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?</p> <p><i>[Insert response here]</i></p>
29	<p>Is it clear what the TPMs regime allows and what it does not allow? Why/why not?</p> <p><i>[Insert response here]</i></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>[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>

	<i>[Insert response here]</i>
37	Are there any other current or emerging technological processes we should be considering for the purposes of the review?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>
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?
	<i>[Insert response here]</i>

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.
	<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?

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

48

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

[Insert response here]

49

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

[Insert response here]

50

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

[Insert response here]

Other comments

[Insert response here]

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

51	<p>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?</p> <p><i>[Insert response here]</i></p>
52	<p>What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?</p> <p><i>[Insert response here]</i></p>
53	<p>What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?</p> <p><i>[Insert response here]</i></p>
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>
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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.
	<i>[Insert response here]</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?

[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?

[Insert response here]

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]

My submission relates to Paragraph 155.

One area where artists can feel that they are not receiving a fair return is where their works are re-sold by the person who first purchased the work from the artist. In some cases the price received by the first or subsequent purchasers is much higher than the price paid by the first purchaser to the artist. Some artists feel that, in such cases, they should receive a share of the profit made by the purchaser. Some jurisdictions have dealt with this issue by enacting an 'artist's resale right'. This gives artists the right to claim a portion of the sale price when their works are re-sold. These jurisdictions include Australia, the European Union and some Nordic countries, although details of these regimes differ. A Bill to introduce an artist resale right in New Zealand was introduced into Parliament in 2008⁶⁴ but it was never enacted.

SUPPORTING ARTISTS RE SALE ROYALTIES AOTEAROA NEW ZEALAND

It is twelve years since the Ministry of Culture and Heritage produced a discussion paper on **Artists Resale Royalties** whereby visual artists are entitled to a royalty payment each time an original art work is resold on the secondary art market.

It first became law in 1920 in France and, to date over 70 countries have such a right. When first surveyed in NZ in 2007 the concept was supported by 65% of respondents. For some reason the discussion paper languished and the issue of Resale Royalties for artists eventually disappeared.

Since NZ visited this issue in 2007 the growth in the secondary arts market has mushroomed, with an increasing number of outlets turning over millions of dollars' worth of sales. It is a cruel fact that none of this wealth accrues to the artists whose work is being sold. Given this growing phenomenon, it has never been more important to introduce the **Resale Royalty Scheme**, for a fair deal for artists, and for the sustainability of both artists and the arts in New Zealand.

Since 2010 when the scheme was introduced in Australia it has generated:

- More than \$2.28 million in royalties for more than 820 artists.
- Aboriginal or Torres Strait Islander artists have received 50% of the total royalties generated
- Of the 50 artists who have received most money under the scheme, 26 are Aboriginal or Torres Strait Islander
- Lowest royalty is \$50 while the highest royalty has been \$55,000
- Most royalties have been between \$50 and \$500

The Resale Royalty Right applies to original artworks by living artists and for a period of 70 years after an artist's death. It applies only on resales where the seller acquires an artwork after the resale royalty scheme commenced.

In NZ the paper produced by the Ministry of Culture and Heritage in 2007, included some of the following proposals: royalty obligations would extend to all auction houses, galleries, dealers and any other intermediary involved in the business of dealing in works of art. There would be joint liability for payment of a resale royalty between the art market intermediary involved in the sale and the seller. Work purchased directly from an artist would be exempt from a resale royalty on the first resale of that work, provided that resale occurred within three years of the first sale and provided the work was resold for less than a certain amount. There would be a flat 5% resale royalty rate. This would be charged on the “hammer” or “ticket” price (that is, excluding GST, a buyer’s premium and an agent’s commission). A resale royalty right would apply to the creator of an art work in which a copyright existed. This would be regardless of whether the creator had retained ownership of the copyright. A resale royalty right would be inalienable and unable to be waived or reassigned. This would prevent a change of resale royalty right ownership becoming a condition of any first sale. In line with the World Trade Organisation’s Agreement on Trade Related Aspects of Intellectual Property Rights, a resale royalty right could be offered on a reciprocal basis to nationals of countries that have similar schemes and that offer reciprocal rights to nationals of New Zealand