

Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

Name	Elizabeth Charlton
Organisation	Marist Archives

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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? <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?

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

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

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

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

[Insert response here]

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?

	<p><i>New Zealand should always seek to provide the minimum term of protection permitted by its international obligations. For any net copyright-importing nation, maximising the public domain of available works supports the most socially beneficial outcome.</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>An unlimited term restricting what is considered access in the archival environment goes against accepted archival principles. See point C17, Principles of Access to Archives, published by the International Council on Archives in 2014, https://www.ica.org/sites/default/files/2014-02_standards_tech-guidelines-draft_EN.pdf</i></p> <p><i>An indefinite copyright term denies opportunities for use and reuse, which would benefit society.</i></p>

Other comments

Re paragraph 123. It is stated the bar may be set too low re originality. Then I ask are the contents of these submissions to be considered original? If so, nowhere on this submission template has permission been requested for the contents of any submission to be copied, as they will automatically be within MBIE's information management systems!

The systematic copying of items (for back-up, for preservation) entering an organisation electronically and the scanning of paper documents into recordkeeping systems are nothing more than good business practice in information management terms. Such behaviour is encouraged for government agencies at least by GCIO and Archives New Zealand.

Rights: What actions does copyright reserve for copyright owners?

15	<p>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?</p>
	<p><i>[Insert response here]</i></p>
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	What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?
	<i>[Insert response here]</i>
19	What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?
	<i>[Insert response here]</i>
20	What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?
	<i>The term 'digital object' is already in use (e.g. see https://natlib.govt.nz/publishers-and-authors/legal-deposit/preserving-digital-objects), so within a part of NZ society the noun 'object' is already viewed as intangible.</i>
	<i>Internationally, 'digital object' is a term used within Open Archival Information System Reference Model. Anyone working within the digital preservation sphere is familiar with the term.</i>
	<i>Since terms can be defined within the Interpretation section of an act, the meaning of the noun 'object', including an intangible form, could be specified 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	What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?
	<i>Please see the International Council on Archives statement on TPM with regard to archives</i> https://www.ica.org/en/ica-statement-on-technological-protection-measures-at-wipo-standing-committee-sccr33
29	Is it clear what the TPMs regime allows and what it does not allow? Why/why not?
	<i>[Insert response here]</i>

Other comments

[Insert response here]

Exceptions and Limitations: Exceptions that facilitate particular desirable uses

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

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>A better term than 'cloud' is to say 'off-premise'. The same types of procedures and actions are done whether on one's own servers or in the cloud. The only difference between the two is that one does not have control over how the data uploaded to a cloud provider is managed – trust is put into a third party to do what is right, including the destruction of hardware when data is removed from it. See research conducted by the InterPARES Trust, https://interparestrust.org/</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>
	<p><i>[Insert response here]</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>

The benefit is the exposure to content, which one may not come across on one's own. This can increase knowledge, arouse curiosity and provide an impetus to acquire the actual copyright work and lead to other indirect economic benefits.

For example, extracts used in a university course provided through an education exception led my purchasing of some of the works. For one of the authors I went on to purchase further works and visited locations to experience some of the things described in his books.

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.

[Insert response here]

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?

[Insert response here]

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?

s.56B(b) does not recognise that the bulk of the cost to create a digital copy of a physical item is in the preparation required before scanning. Most archives in NZ do not have multiple staff members so to expect them to destroy any additional copy does not acknowledge this cost nor the impact it can have on an archives' operation if there are multiple requests for the same material, removing the staff member's attention from other duties.

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]

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

Museums and galleries can also have constituent libraries and archives. In this context, they function no differently from libraries and archives that are party to the exceptions and should be included in the definitions.

Other comments

The exceptions for archives and libraries do not differentiate between copying for preservation, collection management and access. As alluded to above in my response to Q.43, a digitisation project of whatever size for whichever purpose is made up of many steps before the actual copy is made. For all three purposes an item need be copied only once – to create the master preservation copy. Derivative copies would then be made for collection management and access, when and as required (see <http://www.digitizationguidelines.gov/term.php?term=archivalmasterfile> for explanation of terms used in this context).

Jane Monson. (2017). Getting Started with Digital Collections: Scaling to Fit Your Organization, available at the National Library is a handy resource to understand the issues surrounding digitisation for small institutions for which the majority of New Zealand archivists work.

The position statements from the International Council on Archives presented to the WIPO need to be taken into account. These represent the best outcomes with regard to copyright for the important functions archives undertake to ensure material of enduring value is available to users.

<https://www.ica.org/en/copyright-exceptions-for-archives-a-checklist>

<https://www.ica.org/en/ica-statement-on-limitations-exceptions-at-wipo-standing-committee-sccr-36>

<https://www.ica.org/en/ica-statement-on-limitations-on-liability-for-libraries-archives-and-museums-at-wipo-standing>

<https://www.ica.org/en/ica-statement-on-contractual-override-of-statutory-exceptions-at-wipo-standing-committee-sccr33>

<https://www.ica.org/en/ica-statement-on-broadcasting-sccr36-0>

I would hope that documentation prepared by the WIPO Standing Committee on Copyright and Related Rights, https://www.wipo.int/meetings/en/topic_bodies.jsp?group_id=62 as well as submissions provided by representatives for libraries, archives and museums are also analysed. Exceptions for libraries, archives and museums are currently under consideration.

Exceptions and Limitations: Exceptions for education

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?
	<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	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?

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

Exceptions and Limitations: Internet service provider liability

59

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

[Insert response here]

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?

[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	<p>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?</p>
	<p><i>[Insert response here]</i></p>
64	<p>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.</p>
	<p><i>[Insert response here]</i></p>
65	<p>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.</p>
	<p><i>[Insert response here]</i></p>
66	<p>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?</p>
	<p><i>[Insert response here]</i></p>
67	<p>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?</p>
	<p><i>[Insert response here]</i></p>
68	<p>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.</p>
	<p><i>[Insert response here]</i></p>
69	<p>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?</p>
	<p><i>[Insert response here]</i></p>
70	<p>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?</p>
	<p><i>[Insert response here]</i></p>
71	<p>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.</p>

This is not something I have experienced; however, I agree with this report on the issue of orphan works in NZ

<https://www.victoria.ac.nz/sacl/about/staff/publications/LawFoundationFinalReport.pdf>

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

I suggest you contact Susan Corbett at Victoria University of Wellington

<https://www.victoria.ac.nz/sacl/about/staff/susan-corbett> regarding her research into NZ copyright law and its impact on the cultural heritage sector.

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 file 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?

[Insert response here]

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?

[Insert response here]

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?

[Insert response here]

86

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

[Insert response here]

87

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

[Insert response here]

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?

[Insert response here]

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?
	<i>[Insert response here]</i>
92	Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?
	<i>[Insert response here]</i>

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?

[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]