

Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

Name	Tom Robertson; Elena Szentivanyi
Organisation	New Zealand Institute of Patent Attorneys, Inc

Responses to Issues Paper questions

Objectives

1	<p>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?</p> <p><i>The objectives as outlined would seem to be appropriate for the NZ copyright regime, however these objectives should not hinder or lessen the purpose of copyright to protect creation and creators per se. The current copyright regime is expensive to enforce and/or defend so it could be questioned if the objectives as outlined are being effectively met, at least in respect of enforcement/defence...</i></p>
2	<p>Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?</p> <p><i>Yes any new copyright regime needs to be flexible, adaptable and resilient to future changes including technological. If that cannot be included in a new Act then perhaps the new Act should include a requirement that the Act is to be proactively reviewed periodically and if required amended to reflect any changes in the copyright scene.</i></p>
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4	<p>What weighting (if any) should be given to each objective?</p> <p><i>Using the para numbers used each objective order of importance is ranked as follows: 1st para 1, 2nd paras 2&3, 3rd para 5 and 4th para 4.</i></p>

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

5	<p>What are the problems (or advantages) with the way the Copyright Act categorises works?</p> <p><i>No problems per se, however perhaps the language of the wording of the categories could be reviewed and updated to more clearly reflect what they are intended to cover, for example “film” is rather outdated and perhaps could be replaced by “visual recording”</i></p>
6	<p>Is it clear what ‘skill, effort and judgement’ means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?</p> <p><i>Yes the ‘skill, effort and judgement’ test as interpreted by the courts is relatively sufficient for establishing originality of a work, however the test should consider ‘minimal level of creativity’ or exhibit ‘independent intellectual effort’.</i></p>
7	<p>Are there any problems with (or benefits arising from) the treatment of data and compilations in the Copyright Act? What changes (if any) should be considered?</p> <p><i>Not particularly as long as the compilation (e.g. data) constitutes intellectual creation (as per Article 2(5) and meets the ‘skill, effort and judgement’ test. Perhaps a specific definition could be included that defines what constitutes data that is able to be protected under copyright.</i></p>
8	<p>What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?</p> <p><i>Commissioning of a work is akin to acquiring rights to other forms of IP, such as acquiring rights to a patent. The current commissioning default rules would seem to be covered and enforced by contract law, however at present commissioning can be acquired with no payment for such. Why should someone not get paid for work they create? Perhaps commissioning should only occur upon payment for such or upon an explicit opt out for payment for such from the creator of the copyright work.</i></p>
9	<p>What problems (or benefits) are there with the current rules related to computer-generated works, particularly in light of the development and application of new technologies like artificial intelligence to general works? What changes, if any, should be considered?</p> <p><i>In respect of the development and application of new technologies like artificial intelligence to general works (related to computer-generated works) the author should be the person who made/created the arrangements necessary for the creation of the work.</i></p>
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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>One of the objectives of copyright is to promote the dissemination and access to knowledge and creative works, however this objective can be negated if a copyright owner does nothing or ceases dissemination and access. A possible change is for the creator or author or some other aggrieved party (i.e. someone willing to disseminate or provide access to the work) to acquire rights to the work from the copyright owner either by negotiation or court/arbitration order.</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>The Crown should make their copyright works available for anyone to freely copy, distribute and adapt, as long as the work is attributed to the Crown (or to the government agency releasing the work) unless the Crown opts that it not be made available as opposed to the current provision giving the Crown copyright by default. The opt-in approach could be limited those works that are likely or could be commercially exploited to generate a return to taxpayers.</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>Unaware of any issues considering the current 50 year term for communication works, so it would seem adequate to leave it as it is.</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>Unaware of any issues pertaining to section 117.</i></p>

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>No problems, status quo should remain.</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>No problem, status quo should remain</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>No problem per se with current authorisation liability, however the concept of authorisation in the digital environment would possibly need to be addressed by specifically including that authorisation by digital means could constitute infringement.</i></p>

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>No problems with the current way the right of communication to the public operates</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>No problems with the current wording for definition of communication works. However, if there is doubt over whether the word "public" does or does not include an individual viewer or household, then perhaps the definition of what can constitute the "public" should be included.</i></p> <p><i>Not sure if anything needs to be done in respect of unintended re-streaming as the consequences of that would normally be addressed in any contractual arrangement between the parties concerned.</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>Without an explicit definition the term 'object' could be interpreted to only refer to tangible/physical items. We suggest that a definition for the term 'object' be included which covers both tangible and intangible format/mediums.</i></p>
21	<p>Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.</p>
	<p><i>Not really as in order to establish copyright infringement there has to have been copying of an original work and in some instances digital files and/or the content therein may be considered to be an original work and thus be subject to copyright protection. Does not rely on whether digital files are considered property or not.</i></p>
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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>We would recommend that creators/authors/copyright owners have the provision to renounce copyright if they desire to do so. This would sit better with the author's ability to waive moral rights.</i></p>
24	<p>Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.</p>
	<p><i>No</i></p>

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

25	<p>What are the problems (or benefits) with the way the moral rights are formulated under the Copyright Act? What changes to the rights (if any) should be considered?</p> <p><i>We agree that moral rights are complex and not easily understood by creators. We agree that moral rights are too limited.</i></p> <p><i>However, in light of the Crown's obligations under the Treaty of Waitangi perhaps moral rights could be, in respect of derogatory treatment, amended to include culturally offensive uses.</i></p>
26	<p>What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?</p> <p>--</p>
27	<p>Will there be other problems (or benefits) with the performers' rights regime once the CPTPP changes come into effect? What changes to the performers' rights regime (if any) should be considered after those changes come into effect?</p> <p><i>Suggest that economic rights should also include the visual aspects of a performance as there seems to be no logical rationale why it is not when sound recordings are included.</i></p>
28	<p>What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?</p> <p>--</p>
29	<p>Is it clear what the TPMs regime allows and what it does not allow? Why/why not?</p> <p>--</p>

Exceptions and Limitations: Exceptions that facilitate particular desirable uses

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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>Due to the apparent lack of certainty resulting from these exceptions perhaps these exceptions need to be further defined to clearly outline what is excepted and the consequence associated with people using these exceptions principally in pursuit of a commercial outcome, rather than in pursuit of knowledge.</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>Does not seem logical for photographs to be excluded from the exception and we suggest that exclusion of photographs be removed.</i></p>
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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>Copyright exceptions should apply to cloud computing for transient reproduction</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>AI</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>Would seem that a change similar to that as currently used in the UK should be included.</i></p>
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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> <p><i>Consider that use of quotations or extracts be allowed.</i></p>

Exceptions and Limitations: Exceptions for libraries and archives

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43	<p>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?</p> <p><i>Would seem that current exceptions for libraries should be changed so as to be flexible enough to undertake digitisation of their holdings</i></p>
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45	<p>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?</p> <p><i>Would seem that current exceptions for libraries should be changed so as to be flexible enough to publish content online.</i></p>
46	<p>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?</p> <p><i>Museums and galleries also serve the function of storing and archiving works. It would be logical for museums and galleries to be included in the libraries and archives exceptions</i></p>

Exceptions and Limitations: Exceptions for education

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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>The inconsistency between the types of works to which the exceptions apply does not make sense and is confusing. Technically charities are likely to be infringing without realizing. Consistency in terms of the license or exception no matter the nature of the not for profit organization would be more appropriate from a policy point of view, and be easier to understand and administer.</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>Time has shown that the restriction of this exception has not kept up with technological developments.</i> <i>Format shifting and storage of any work legitimately owned by a person should be allowed.</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>The way people watch television programmes has evolved. Recording or downloading from on-demand services is convenient and no doubt common. The exclusion of on-demand services is nonsensical.</i></p> <p><i>Time shifting needs to be available no matter the format.</i></p> <p><i>The term “reasonably necessary” does not appear to have been judicially considered. It is probably the case that programmes that have been recorded or downloaded are retained for longer than what may have been considered “reasonably necessary” (i.e. longer than a couple of days).</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>It appears that the objective of this provision has not eventuated and is unlikely to eventuate due to technology changes and market forces.</i></p> <p><i>The section appears to be superfluous.</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>It is important to allow for making works more accessible to various categories of users without infringement.</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>We note that there is no definition of “computer programme” in the Copyright Act.</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>Section 73 should be amended to make it clear that the exception applies also to the works underlying the works specified.</i></p> <p><i>The exception need not be limited solely to copies made for personal and private use. By making a graphic work, making a photograph or film an artist is creating their own original artistic work which is entitled to protection under the Copyright Act. How they wish to deal with that work should be within their discretion.</i></p> <p><i>The author of a sculpture or a work of architecture in the form of a building has the ability to assert their moral rights and then has the right to be identified and can object to derogatory treatment (see section 97 and 98).</i></p>

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>A copyright owner should be able to set the terms of use through contract. However, current “browse wrap” and “click wrap” conditions are unlikely to be effective given the high likelihood that such conditions are not read and/or understood by users.</i></p>

Exceptions and Limitations: Internet service provider liability

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Transactions

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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>The jurisdiction of the Copyright Tribunal is limited. An expansion of its jurisdiction is likely to increase applications.</i></p>
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74	<p>What were the problems or benefits of the system of using an overseas regime for orphan works?</p>

To prevent the likelihood of infringement and to facilitate the use of what are truly orphan works, a licencing scheme along the lines of that in place in the UK with IPONZ or the Copyright Tribunal granting licenses and collecting fees would be useful.

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Other comments

There is inconsistency in the range of exceptions for different types of works which is confusing. Many exceptions are out of date. For example, exceptions may not be deadline for online platforms for publication – how long is news or current affairs “current”.

Rather than basis exception on nature of work perhaps the exceptions could be based on the intent of the use. For example the intent, morality or integrity of the use.

Anecdotally, it appears that the classification of works as orphan works is much large than the number of truly orphaned works. By analogy, we understand that the Auckland University Press as publisher of the book “Patched: the history of gangs in New Zealand” (2013) was able to trace several hundred people featuring in photographs to obtain their permission to publish their image in the book.

Enforcement of Copyright

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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?

Case law suggest that it is not difficult for copyright owners to establish that copyright exists and that they are the owner.

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

Allowing CMOs to bring legal action to enforce copyright would increase the options for enforcement for creators. The ability to do so could easily be covered by an optional term of agreement between a member and the CMO.

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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?

Any form of litigation is expensive, uncertain and time consuming.

To ensure effective access to justice alternatives need to be considered, such as a specialist adjudicator (e.g. the Copyright Tribunal or the UK’s Intellectual Property Enterprise Court and offering ADR options.

80	<p>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?</p>
	<p><i>There are definitely groundless threats, or allegations of, infringement of copyright being made. Such allegations have come from overseas attorneys directly to New Zealand citizens. Other examples of such allegations have come from collection agencies or lawyers on behalf of photographers regarding allegedly unlicensed use of a copyright work. These allegations have taken the form of a letter of demand that there has been infringement and a demand for payment of a penalty fee and costs. In the letters of demand there is no proof of copyright ownership. Such demands force the alleged infringer to stop behaviour which may or may not infringe.</i></p>
81	<p>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.</p>
	<p><i>The requirement to pay the \$5,000 bond to Customs is definitely deterring right holders from using the border protection measures. Also, the payment of the bond leads to administrative matters that both Customs and attorneys need to deal with on behalf of clients.</i></p>
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Other comments

There is a need for swift and economic efficient access to justice for determination of disputes in where the allegedly infringing activity has occurred in NZ. The high cost of court proceedings limits access to justice. There are also potential cross-border issues that complicate matters.

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>The copyright / design overlap can be problematic for New Zealand business. This regime, which is not available in many other countries, provides protection to overseas copyright owners that is not available on a reciprocal basis to New Zealanders.</i>
90	Have you experienced any problems when seeking protection for an industrial design, especially overseas?
	<i>There can be an issue with publication if NZ creator has been relying upon copyright protection rather than design registration in NZ.</i>
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92	<p>Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?</p> <p><i>Accession to the Hague Agreement is likely, in line with previous experience with the Madrid Protocol for Trade Marks, to flood the New Zealand market with filings from overseas owners. Such registered designs may or may not be used in New Zealand but would crowd the Register and potentially hinder creativity and commercialisation by New Zealand businesses.</i></p> <p><i>The high cost of protecting IP rights overseas is often a hindrance to New Zealand businesses registering designs overseas. We acknowledge that joining the Hague Agreement is likely to reduce those costs.</i></p> <p><i>However, we accept that that it may be difficult to resist joining if certain of New Zealand’s trading partners join. We are aware that Australia is currently considering whether to join and that decision process has included a study of the economic impact of joining on creators and the public.</i></p>

Other comments

Consideration should be given to a clearly defined exception to infringement for spare parts.

While outside the scope of the review of the Copyright Act, a change of name of the designs legislation would be useful. The reference to Industrial Design above illustrates a more relevant name for the right and the legislation.

Other issues: Copyright and the Wai 262 inquiry

93	<p>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.</p>
	<p><i>We agree the analysis from the WAI 262 report of the problems with the current protections provided for taonga works and mātauranga Māori has been correctly summarised.</i></p>
94	<p>Do you agree with the Waitangi Tribunal’s use of the concepts ‘taonga works’ and ‘taonga-derived works’? If not, why not?</p>
	<p><i>If the government is planning a work stream that seeks to introduce new protections for taonga works and mātauranga Māori, then providing definitions for concepts such as ‘taonga works’ and ‘taonga-derived works’ will be critical to ensure clarity and certainty in the law.</i></p> <p><i>We do not have a position on the use of the concepts of ‘taonga works’ and ‘taonga-derived works’, but suggest that the scope and definitions of these terms should be determined in consultation with Māori and the broader community.</i></p>
95	<p>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?</p>
	<p><i>We do not have a position on whether the copyright regime will conflict with any new protection of taonga works and mātauranga Māori, as any conflict will be determined by the new protection regime developed.</i></p>
96	<p>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?</p>
	<p><i>Yes, it is time for the government to respond to the issues raised in the WAI 262 claim and report, and to address the issues raised in relation to the intellectual property regime are addressed, to enable authors and creators to work within a framework that is clear and certain.</i></p>
97	<p>How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?</p>
	<p><i>We agree that MBIE should engage with Treaty partners and the broader community and we would like to be engaged (at least as part of the broader community) on any proposed work stream on taonga works.</i></p>