

Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

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| Name | Kerry Marshall |
| Organisation | Patterson Associates Limited |

Responses to Issues Paper questions

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

QUESTION 8

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

Introduction

Patterson Associates Limited was founded by Andrew Patterson. We employ around 25 skilled and experienced Architects, architectural graduates, technicians and support staff. Our portfolio includes a mix of residential, civic and commercial projects both within New Zealand and in other jurisdictions. Andrew Patterson was the youngest ever recipient of the NZIA Gold Medal in 2017, the highest individual honour bestowed by the Institute of Architecture.

Copyright is important to us primarily as a creator of artistic works but also as a user e.g. of commissioned photography.

We support the copyright regime in general including:

- The right of a creator to the initial copyright in his/her work
- Protection without a requirement for registration
- Moral rights – e.g. the right of an Architect to be identified as author and the right to preclude others from poor adaptation of their design (prejudicial to honour or reputation)

Our key issue is with the commissioning rule (section 21(3)) and we support its repeal.

We set out below the reasons why we believe repeal of the rule will better balance the outcomes identified in the issues paper:

- creation of original works
- use, improvement and adaptation of works created by others
- dissemination and access to knowledge and creative works.

Consistency

The commissioning rule applies to some creative works but not others e.g. a photograph but not a literary work; software but not a software user manual; a drawing of a building but not a model of a building. There is no clear policy rationale for the inconsistencies, and these frequently lead to confusion in practice.

In architecture there is also an apparent anomaly which provides for an Architect, when commissioned, to own copyright in a building or a model for a building (within the definition of 'artistic work') but not the 2dimensional drawings or plans for a building. This distinction does not make sense as the plans are the first artistic expression of the building. Further, why should ownership in plans for a building default to the commissioner but not ownership of a model for the same building?

Repealing the rule would provide appropriate consistency in the default rules for copyright ownership and facilitate clarity for creators and commissioners alike.

Incentivise creation

The requirement in the commissioning rule that a person "pays or agrees to pay for" the created work is problematic. It is often a misunderstanding in architecture that a client needs to pay for drawings before they own copyright in them. This would only be the case if provided for in contract. It is hard to see any policy rationale for the default position of granting copyright to a commissioner even when payment is not actually made.

An issue related to this can best be illustrated by example.

- A developer commissions an Architect to design a multi-residential apartment building on 1 March 2019
- The Architect's fee is \$250,000 being 5% of the construction cost (estimated at \$5million)
- The Architect invoices the developer periodically as work progress
- At the end of the initial concept design stage, the Architect presents the client with a design report that includes an artist's renders and preliminary plans,
- The developer has paid a proportion of the fee, but not the full fee
- Often the development is presold to investors based on these preliminary plans and often in reliance on the Architect's reputation
- The developer then decides s/he can take the design and save money by going to a cheaper supplier to complete the detailed construction drawings
- The client has the benefit of using the Architect's design without full or fair payment

In practice this often ends the Architect's moral rights to choose to be identified as the creator of the building or to control how his/her work is adapted.

In this situation, the commissioning rule also acts as a disincentive to creation. Retention of copyright gives the Architect a frequently needed commercial lever to ensure payment in fulfilment of the contract in line with general commercial principles.

Incentives for dissemination

The commissioning rule can also act as a disincentive for the dissemination of original works and frequently grants a commissioner more rights than the commissioner needs or will use.

For example, if an architect designs a novel detail or artistic/technical innovation in the context of a commission then the default position is that the commissioner owns the rights to that detail or innovation. Arguably, the Architect could be in breach of the commissioner's copyright if s/he uses that same detail or innovation in a subsequent design. This goes against the nature of creativity where artists / Architects tend to build on their own creative works throughout their career.

Further, there may be significant benefits to society in wider adoption of the detail or innovation. The Architect has the natural commercial incentive to facilitate this dissemination.

Alignment with like jurisdictions

Finally, repeal of the commissioning rule would align New Zealand's copyright regime with that of the UK, Canada and Australia. These jurisdictions that have all done away with the commissioning rule.