Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

Name	Tony Millett
Organisation	Retired Librarian

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Note:

In the main, these responses relate to libraries and librarians. Comment is also included on a few copyright issues relating to libraries not included in the* Issues Paper*. Links are made to the Proposed Objectives (*Issues Paper *para 103).

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 consider that the stated objectives are the right ones for New Zealand's copyright regime. Critical to their success is the maintenance of the balance between encouraging the creativity and protecting the rights of authors and publishers, and providing for the needs of society to benefit from and make use of the ideas and knowledge incorporated within publications. The present copyright system in my view tends to favour the rights of authors and publishers, at the expense of users of copyright works. This is compounded by the often unclear and imprecise language used in the Copyright Act 1994.

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?
	There seems no need to add other objectives. Adaptability and resilience to future technological change, as well as clarity, should be incorporated within the Act, but do not need to be included in the objectives.
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.
	There seems no need to add sub-objectives.
4	What weighting (if any) should be given to each objective?
	The five objectives should be given equal weighting.

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

	COPYRIGHT OWNERSHIP ***(Proposed Objective 3)*** In my view the so-called "commissioning rule" should be removed, because it results in inconsistent treatment of similar types of works (for example photographs and paintings on the one hand, as compared with literary and musical works on the other). It is ridiculous that a person who commissions and purchases a certain type of work (such as a painting) should own copyright in that work – a person who purchases a book does not own copyright in that book – and the problem is compounded if / when the commissioned work is subsequently sold. **OWNERSHIP OF WORKS OF UNKNOWN AUTHORSHIP** ***(Proposed Objective 3)*** The Copyright Act section 7 refers to works of unknown authorship, but section 21 makes no mention of who owns copyright in such a work (although section 22(3) specifies the duration of copyright in a work of unknown authorship). Ownership of copyright in a work of unknown authorship should be specified.
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?
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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?
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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?
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12	What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?
	CROWN COPYRIGHT ***(Proposed Objectives 2 and 3)*** For the reasons given in the *Issues Paper*, there seems little justification for continuation of Crown copyright – certainly Objective 1 in para 103 does not apply. And the present system of some Crown publications being specifically excluded while other Crown publications are included is very confusing for users. Whatever decision is reached about this, there is absolutely no justification for the duration of any Crown copyright to be longer than for equivalent non-Crown publications.
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?

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14	Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?
	COPYRIGHT DURATION IN CERTAIN UNPUBLISHED WORKS *(Proposed Objective 3)* In my view copyright duration should be the same for both published and unpublished works, and for works transferred or bequeathed whether to an institution or to any other person or body. Section 117 of the Copyright Act should be amended accordingly or deleted.

Other comments

COPYRIGHT DURATION *(Proposed Objective 2)*

The opposition expressed in paras 169-170 of the *Issues Paper* to any extension of copyright duration is strongly supported. Any extension of copyright duration will not benefit the authors or creators of literary, dramatic, musical, artistic or scientific works – they are long dead. Rather, it will benefit only their heirs and successors, and more particularly large corporate organisations that claim copyright ownership of the original works to an extent that is well beyond what is reasonable.

COPYRIGHT DURATION IN WORKS BY CORPORATE BODIES *(Proposed Objective 3)*

One issue not referred to in the *Issues Paper* relates to copyright duration for works where the author is a corporate body such as an organisation or institution. The Copyright Act (e.g. sections 5(3), 18(1)(c), 21(2) etc) clearly accepts that corporate bodies may be authors and therefore copyright owners. However, section 22 is silent as to the duration of copyright where the author is a corporate body. Presumably the duration of copyright in such a work is 50 years from the end of the calendar year in which the work was first made available to the public, but this should be clarified.

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?
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16	Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?
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17	What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?
	See under Q 30-31 *(below).*

Other comments

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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?
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19	What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?
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20	What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?
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21	Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.
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22	What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?
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23	What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?
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24	Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.
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Other comments

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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?
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26	What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?
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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?
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28	What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?
	TPM CIRCUMVENTION ***(Proposed Objective 2)*** It is not at all clear (at least to me) why librarians are included in the definition of "qualified persons" in section 226D(3)(a). In general, librarians do not have any particular expertise in the use of TPM circumvention devices, and did not ask for this legislative authority. As far as I know, no librarian has ever been asked to exercise this authority since it was introduced in 2008. There is however one area where librarians would like to exercise TPM circumvention – but for their libraries, not for other people. This relates to geographic market segmentation (i.e. zone control). It is frequently the case that libraries are able to purchase DVDs only in zone 1 format, but have equipment capable of playing only zone 4 format. Unfortunately, section 226 of the Copyright Act specifically excludes controls on geographic market segmentation from the TPM circumvention regime. Librarians of prescribed libraries should be permitted to circumvent geographic market segmentation restrictions where these prevent them adding items to their collections.
29	Is it clear what the TPMs regime allows and what it does not allow? Why/why not?
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Other comments

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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?
	COPYING FOR RESEARCH OR PRIVATE STUDY ***(Proposed Objective 3)*** **Q 30-Q 31:** (1) The major problem faced by libraries, in regard to section 43, relates to copying by library users using self-service photocopiers or printers provided by libraries for their users. Libraries do provide advice on what may be copied under section 43 (for example, in the form of notices giving guidelines), but because of the imprecise wording used in the Copyright Act, this advice is perforce very generalised, and is very frequently ignored by library users. Footnote 89 of the *Issues Paper* implies that libraries providing access to self-service copiers or printers are not responsible for any breaches of copyright by their users. If this is in fact so, it should be explicitly stated in the Act, and not be reliant on a little-known court case from an overseas jurisdiction. (2) The inclusion in section 43(3) of five criteria that a court shall have regard to in determining what constitutes fair dealing for the purposes of research or private study raises the question as to whether good law should state that the only way a citizen can ascertain what the law means is to go to court. But even apart from this, the criteria in section 43(3) are not very helpful, particularly clause (e) which in its opening phrase ("where part of a work is copied") implies that there are instances where all of a work may be copied under this provision – although no guidance is given as to what those instances are. The law would be much clearer, and much fairer to both copyright owners and to users of copyright works, if some quantitative guideline was provided (as is done for example in section 44(3)(f)) – although the guideline should be expressed as a percentage only (for example "no more than 10 percent") rather than stating the number of pages that may be copied. Such a change would result in much greater compliance with the law than is the case with the present guidelines on copying for research or private study in section 43.
31	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?
	See Q 30 *(above).*
32	What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?
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33	What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?
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34	What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?

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35	What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?
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36	What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?
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37	Are there any other current or emerging technological processes we should be considering for the purposes of the review?
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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?
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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?
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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?
	USE OF QUOTATIONS OR EXTRACTS *(Proposed Objective 3)* Para 321 of the *Issues Paper* refers to the use of quotations or extracts for the purpose of criticism and review under section 42, but ignores the (far more extensive) use of quotations or extracts in new works such as books, theses and periodical articles. It is generally accepted that such use is permitted under the fair dealing provisions of section 43. But this needs to be clarified: if such use is permitted under section 43 without requiring separate authorisation from copyright owners, then a phrase such as "provided that such fair dealing is accompanied by a sufficient acknowledgment" (as in section 42(1)) should be added. If such use is not permitted by section 43, this should be clearly stated.

Other comments

COPYING FOR PERSONS WITH A PRINT DISABILITY *(Proposed Objective 2)*

The present Section 69 of the Copyright Act 1994 limits the provision of services to those with a print disability only to making copies that are in Braille, and only to a very limited number of organisations. Libraries need the right to make copies for the visually impaired in any format, and this right should include format shifting. (It is not clear whether format shifting on behalf of those with a print disability is covered by the phrase "or otherwise modified for their special needs" in section 69(1) – if this is what is intended, the wording should be clarified. But even if it is, section 69 does not apply to libraries). Libraries therefore strongly welcome the replacement of section 69 with the provisions included in the Copyright (Marrakesh Treaty Implementation) Amendment Bill.

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.
	EXCEPTIONS FOR LIBRARIES AND ARCHIVES There are a number of issues arising from the wording used in the sections of the Copyright Act 1994 relating to libraries: (1) **Copying of parts of published works (s.51)** ***(Proposed Objective 3)*** Section 51(1) allows supply to any person of "a copy of a reasonable proportion" of a work. Unfortunately "reasonable proportion" is not defined, and while guidance may perhaps be obtained from s.43 (fair dealing for research or private study) and s.44 (copying for educational purposes), these sections are themselves not very clear or helpful. While it is appreciated that it is the significance of what is copied that impacts on "reasonable proportion", not simply the amount that is copied, the law would be much clearer if some quantitative guideline was provided, for example "no more than 10 percent". (2) **Copying for users of other libraries (s.53)** ***(Proposed Objective 3)*** The same comments about "reasonable proportion" apply. (3) **Copying for collections of other libraries (s.54)** ***(Proposed Objectives 2 and 4)*** Section 54 ("Copying by librarians for collections of other libraries") is restricted to books only, which creates problems for libraries that may need to add individual periodical articles, or music scores, or other types of library materials to their collections. There is no logical reason for this restriction, which among other consequences seriously affects the work of research teams and the libraries that endeavour to provide the resources needed by those research teams. The restriction also prevents libraries from complying with international agreements (an example is the Kyoto Protcol section 17). Section 54 needs to be extended to include articles in periodicals and other types of library materials as well, by deletion altogether of section 54(1)(a). See also under Other comments *(below).*
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?
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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?

	DIGITISATION PROJECTS ***(Proposed Objective 2)*** The main impediment for libraries wishing to undertake digitisation projects is tracing the copyright owners of the works. This is chiefly because of the length of copyright duration. Consider for example a work written by someone aged 25 who does not die until the age of 85: the copyright duration for such a work is 110 years, and it is almost always quite impossible to find the copyright owner – the author is long dead, any inheritors of the copyright are unknown, and frequently the publisher no longer exists. There needs to be provision in the Copyright Act for the librarian of a prescribed library to make a copy of an in-copyright work for library or educational purposes without permission, provided that it is not possible to identify the copyright owner "by reasonable inquiry" (the wording used in section 7(2) in respect of works of unknown authorship). *(See also under Q 71 (below))*.
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?
	See Copying for preservation or replacement (s.55) under Other comments (below).
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?
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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?
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Other comments

Copying for preservation or replacement (s.55) ***(Proposed Objective 2)***

(1) Section 55(2) states that section 55(1) applies only where "it is not reasonably practicable to purchase a copy of the item in question to fulfil the purpose". However, section 55(3)(d) and section 55(4)(b) unfortunately and for no apparent reason omit these last four words. If these words were included, libraries would be able to use the provisions of section 55(3)(d) to copy a work such as a zone 4 format DVD in their collections which is available for purchase only in zone 1 format. Section 55(3)(d) and section 55(4)(b) should be changed to read "it is not reasonably practicable to purchase a copy of the original item to fulfil the purpose".

(2) Section 55(1-2) permits the librarian of a prescribed library to make a copy (other than a digital copy) of any item in its collection for the purposes of "(a) preserving or replacing that item by placing the copy in the collection of the library or archive in addition to or in place of the item". However, section 55(3) permits the librarian of a prescribed library to make a digital copy of any item in its collection only if "(a) the original item is at risk of loss, damage, or destruction" – section 55(3) does not permit replacement of an item, as section 55((1)(a) does. Librarians of prescribed libraries need the right to make, for the purposes of either preservation or replacement in their collections, digital

copies as well as non-digital copies. In the case of digital copies, the requirements of section 55(3)(b-d) would continue to apply. Section 55(3) should therefore be changed to read:

> (3) The librarian of a prescribed library or the archivist of an archive may make a digital copy of any item (the **original item**) in the collection of the library or archive, without infringing copyright in any work included in the item, for preservation or replacement purposes or if the original item is at risk of loss, damage, or destruction if –
>
> (a) the digital copy replaces the original item; and
>
> (b) the original item is not accessible by members of the public after replacement by the digital copy except for purposes of research the nature of which requires or may benefit from access to the original item; and
>
> (c) it is not reasonably practicable to purchase a copy of the original item to fulfil the purpose.

(See also Format Shifting under Q 52 (below)).

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?
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48	Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
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49	Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
	COPYING OF FILMS AND SOUND RECORDINGS *(Proposed Objective 2)* (1) Copying of films for educational purposes is unreasonably restrictive, being limited under section 45(2)(a) to "where the lesson is on how to make films or film sound-tracks". This clause should be deleted from section 45(2)(a). (2) Likewise, copying of sound recordings for educational purposes is unreasonably restrictive, being limited under section 45(4)(a) to "where the lesson – (v) relates to the learning of a language; or (vi) is conducted by correspondence". These two clauses should be deleted from section 45(4)(a). However, if sub-clause (vi) of section 45(4)(a) is not deleted, the phrase "conducted by correspondence" should be defined, and the definition should include courses conducted online or by distance education.
50	Is copyright well understood in the education sector? What problems does this create (if any)?
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Other comments

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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?
	PLAYING OR SHOWING WORKS ***(Proposed Objective 2)*** Under section 16(1)(d-e) and section 32(2), playing or showing a work in public is a restricted act, and unfortunately none of the exceptions in the Act (e.g. sections 47, 57, 81, 87 or 87A) allow a public library to show a film, video or DVD to library users, for example as part of a school holiday programme for school children. The Act should be amended to permit the librarian of a prescribed library to play such works as films, videos or DVDs in the library for library purposes.
52	What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?
	FORMAT SHIFTING ***(Proposed Objective 2)*** Format shifting (for example, copying from a superseded format to a current format) is not permitted, other than sound recordings for personal use under section 81A (which in any case does not apply to libraries), or where the item is at risk of loss, damage, or destruction under section 55(3). This creates particular problems for libraries, which may hold in their collections works in superseded formats for which play-back equipment is no longer available. Format shifting by the librarian of a prescribed library should be permitted, and should include any format (e.g. sound recordings, films, videos, DVDs, CDs etc) to any other format.
53	What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?
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54	What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?
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55	What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?
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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?

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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?
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Other comments

PUBLIC READING *(Proposed Objective 3)*

Section 70(2) is completely unintelligible, and needs to be re-written so that it is clear what is intended.

BACK-UP COPIES *((Proposed Objective 2)*

Section 80 permits a back-up copy of a computer program to be made. A similar section should be added to the Copyright Act, allowing back-up copies of audio-tapes, video tapes and other easily-mangled works to be made. The provision permitting back-up copies to be made should not be limited only to computer programs.

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?
	EXERCISE OF PERMITTED ACTS *(Proposed Objective 2)* Section 226D(1) states that "The rights that the issuer of a TPM work has under section 226B do not prevent or restrict the exercise of a permitted act". This very enlightened principle unfortunately does not apply elsewhere in the Copyright Act. The Act should be amended to state clearly that licence agreements and contracts issued by copyright holders should not override the legislative rights given to copyright users by copyright law, and in particular do not prevent or restrict the exercise of permitted acts. This could be done by adding a new section 40A (analogous to section 112B) to read: **40A Provisions of Part 3 to have effect no matter what licence says** The provisions of Part 3 have effect no matter what any licence may say, and extend to all licences whether granted before or after the commencement of this Act.

Exceptions and Limitations: Internet service provider liability

59	What are problems (or benefits) with the ISP definition? What changes, if any should be considered?
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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?
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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.
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62	What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?
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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?
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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.
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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.
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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?
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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?
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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.
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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?
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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?
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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.
	ORPHAN WORKS ***(Proposed Objective 2)*** The Copyright Act (e.g. section 21) is silent as to what is the position regarding obtaining permission to copy from the copyright owner where the copyright owner cannot be traced – for example is an organisation or publisher that is no longer in existence, or is a person now dead whose heirs are unknown or cannot be traced. There needs to be provision in the Act for the librarian of a prescribed library to make a copy of an in-copyright work for library or educational purposes without permission, provided that it is not possible to identify the copyright owner "by reasonable inquiry" (the wording used in section 7(2) in respect of works of unknown authorship). *(See also under Q 43 (above))*.
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?
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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?

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74	What were the problems or benefits of the system of using an overseas regime for orphan works?
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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?
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Other comments

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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?
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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?
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78	Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?
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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?
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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?
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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 the any issues with the border protection measures that should be addressed? Please describe these issues and their impact.
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82	Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?
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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?
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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?
	INFRINGING FILE SHARING REGIME ***(Proposed Objective 3)*** Footnote 220 of the *Issues Paper* indicates that the infringing file sharing regime has not been used by copyright owners since 2015. However, it is still in force and could be used again at any time. Libraries are affected by the infringing file sharing regime as IPAP account holders (section 122A(1)). Libraries or their parent organisations could receive infringement notices from their IPAP, and if so are required to take action – to challenge the infringement notices, and to investigate and attempt to stop any substantiated copyright infringement. The infringing file sharing regime raises a number of problems for organisations such as libraries: • An account holder (an organisation that has an account with an IPAP) is not the same as a user (a person who uses the Internet services made available by an account holder). An account holder such as a library, university or school may have many thousands of users. • In a library situation, alleged repeat infringements may apply, not to multiple instances by one user, but to single instances by a number of different users. • Account holders such as libraries may not be able to identify alleged copyright infringers, particularly if the alleged repeat infringements took place on public-access Internet computers, either because the library does not require users to authenticate, or because records of use are kept for only a very short time or not at all. While libraries have an obligation to take all reasonable and practicable steps to minimise copyright infringement in their institutions, whether by their own staff or by library users, and whether on staff computers or on public Internet-access computers, and while libraries would like to be able, if required, to demonstrate to copyright owners, the Copyright Tribunal or District Court that they have done so, in practice it may not be possible for libraries to do this.
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?
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86	Should ISPs be required to assist copyright owners enforce their rights? Why / why not?
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87	Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?
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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?
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Other comments

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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?
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90	Have you experienced any problems when seeking protection for an industrial design, especially overseas?
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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?
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92	Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?
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Other comments

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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.
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94	Do you agree with the Waitangi Tribunal's use of the concepts 'taonga works' and 'taonga-derived works'? If not, why not?
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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?
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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?
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97	How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?
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Other comments

ABSTRACTS *(Proposed Objective 2)*

Section 71 permits the abstract of a periodical article on a scientific or technical subject to be copied without breaching copyright. There is no logical reason why this provision applies only to abstracts on a scientific or technical subject – periodical articles in other subject areas such as education, humanities, law, management, social sciences etc include abstracts. The words "on a scientific or technical subject" should be deleted. Further, there is no logical reason why section 71 applies only to abstracts of periodical articles – other types of works such as theses and books often include abstracts. Section 71 should be changed to read:

> **71 Abstracts**
> Where a work is accompanied by an abstract indicating the contents of the work, it is not an infringement of copyright in the abstract, or in the work, to copy or communicate the abstract or issue copies of the abstract to the public.

MEANING OF "WORK" ***(Proposed Objective 3)***

With one exception, the word "work" is not defined in the Copyright Act, which is unfortunate, given how often the word is used. The exception is section 44(7), which states that "work, in relation to a collective work, means each of the works or parts of works in the collective work". But this definition relates only to section 44 (Copying for educational purposes) sub-sections (3) to (6), and not to other sections of the Act (for example, Copying by librarians) where the word "work" is used. In these other sections, for multi-volume books, does "work" refer to each volume, or to the multi-volume work as a whole? For periodicals, does "work" mean a single article, an issue containing a number of articles, a volume containing a number of issues, or a run of a number of volumes? The word "work" should be defined in section 2, and apply to the entire Act, not just to section 44.

WORDING USED IN THE COPYRIGHT ACT ***(Proposed Objective 3)***

It is not clear why section 55(1)(b) refers to an item that has been "lost, destroyed, or damaged", whereas section 55(3)(a) refers to an item that is at risk of "loss, damage, or destruction", section 55(4)(a) to an item that has been "lost, damaged, or destroyed", and sections 80(1(b) and 80(2) to an item that is "lost, destroyed, or rendered unusable".

Unless there is a meaningful distinction between the wording and word order used in these phrases (in which case that distinction should be clarified), the same wording for the same concept should be used throughout the Act.

Biographical note

Tony Millett retired from senior positions in the University of Waikato Library in December 2005 after 38 years' service. For a number of years he was the University's Copyright Officer, and is an Honorary Fellow of the University. He is a Fellow and Honorary Life Member of the New Zealand Library Association / Library and Information Association of New Zealand Aotearoa, and was a member of LIANZA's Standing Committee on Copyright from 1994-2014 (Chair from 2009-2014). He has published widely on copyright issues relating to libraries and educational institutions, including *The Copyright Act 1994 and amendments: guidelines for librarians* (2013, 64 p.), *Questions and answers on copyright for librarians* (2013, 131 p.), and *Copyright guidelines for research students* (2012, 23 p.).

Tony Millett

1 March 2019