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Business Law Team  
Building, Resources and Markets  
Ministry of Business, Innovation & Employment  
New Zealand  
*Submitted online*

### **Covering Letter**

5 April 2019

## **Submission on review of the Copyright Act 1994 – Issues Paper**

Dear Sir / Madam

### **Introduction**

Xero welcomes the opportunity to make a submission on the Issues Paper *Review of the Copyright Act 1994*, released in November 2018.

In this submission we set out:

- an introduction to Xero and an executive summary of our submission; and
- Xero's submission on the Issues Paper *Review of the Copyright Act 1994*.

### **Personal details**

This submission is from Xero Limited, 19-23 Taranaki St, Te Aro, Wellington 6011.  
We can be contacted at:

Name: Becky White, Head of Intellectual Property

Address: 19-23 Taranaki St, Te Aro, Wellington 6011

Email: [privacy@xero.com](mailto:privacy@xero.com)

Yours faithfully

**Xero**

A handwritten signature in blue ink, appearing to read "Becky White".

Becky White  
**Head of Intellectual Property**

## Review of the Copyright Act 1994 – Submissions by Xero Limited

### 1. An introduction to Xero

- 1.1. Xero is one of the fastest growing software as a service companies globally, providing beautiful online software to help change the way small business is done.
- 1.2. Founded in 2006 in New Zealand, Xero is headquartered in Wellington, and has a global reach, leading the New Zealand, Australian, and United Kingdom cloud accounting markets, while employing a world-class team of more than 2,000 people. We have 1.58 million subscribers in more than 180 countries.
- 1.3. Xero welcomes the Ministry of Business, Innovation and Employment's (**MBIE**) consideration of the Copyright Act 1994 (**Copyright Act**), which is key to the creative landscape in which we operate. The matters arising from the Issues Paper are significant and nuanced and affect many businesses and users of copyright in New Zealand, not just Xero. This is therefore a very valuable process and Xero appreciates that the views of all interested parties are being taken into consideration in reviewing the law.
- 1.4. These submissions address the issues arising from the Issues Paper which are of most interest and concern to Xero. They are not intended to be exhaustive and where any issue is left unaddressed, we note that this should not be taken as a sign of support for or disagreement with the proposals of the Issues Paper and/or MBIE on that issue.

### 2. Executive summary of submissions

- 2.1. Xero is supportive of amending the Copyright Act in New Zealand to take into account the modern developments of the digital age, as well as global trends towards copyright protection.
- 2.2. Xero considers that, as a matter of priority, the Copyright Act in New Zealand should be updated to ensure that it remains flexible, technology neutral, and continues to promote innovation and creativity in the commercial sector. In particular, Xero considers that:
  - (a) The terminology adopted in any future copyright law should remain balanced, and appropriate for content creators and content users alike, by remaining technology and platform neutral. To this end, we suggest:
    - (i) removing the use of the word 'object' from the Copyright Act; and
    - (ii) amending the education exceptions to allow for copying of a "reasonable portion" of works in all circumstances.
  - (b) The current legislation should be amended to protect works generated by artificial intelligence, where there is no readily identifiable human author.
  - (c) The current contracting out regime should be maintained, particularly if the exceptions provisions remain broad, to ensure adequate copyright protection for content developers.

Our submission in response to particular questions set out in the Issues Paper follow.

### 3. Proposed objectives (questions 1 and 2)

- 3.1. We do not believe the proposed objectives of what copyright should seek to achieve have sufficiently captured the extremely creative, yet highly technical, realm of software development. As the objectives are currently worded, there appears to be a real focus simply on 'creativity' from an artistic standpoint, rather than focusing on the broad categories of works that may be highly technical and highly creative, but may be considered less 'artistic' from a traditional point of view.
- 3.2. For example, Figure 2 of the Issues Paper specifies a 'Model of Outcomes'. The creation sector signifies the creation of original works as a key model, ie 'new creative, cultural and academic works'. In contrast to this, software and technological developments have been included in the 'use, improve and adapt' model. There appears to be no express recognition of the writing and development of software as a creative act in and of itself. We are therefore concerned that the objectives proposed by MBIE in reviewing the law do not sufficiently capture technology, or the digital realm.
- 3.3. We suggest that the proposed objectives should be expanded to expressly recognise technological developments and software include their own form of creativity that is worth protecting. For us, and many other companies of the modern digital age, the majority of the work in which we engage is highly technical, and requires certain expertise in order to ensure the smooth operation and enjoyment by our subscribers. We also

consider our work to be highly creative and unique. There is never just one way of providing a solution, one way to solve a problem, or one way to build a designed solution. The process of software development involves many creative choices throughout. We therefore suggest that this form of creativity, essential in the digital age, should be expressly recognised by the proposed copyright objectives. To that end, we would support the inclusion of an objective that seeks to:

- (a) encourage technological development, including in new and untested areas; and
- (b) encourage adaptability and resilience in relation to unforeseen future technological change.

#### 4. Efforts based test sufficient (question 6)

4.1. The New Zealand Courts tend to impose a ‘skill, judgement and labour’ (ie ‘efforts based’) test when assessing whether a work is sufficiently original so as to be protected by copyright.

4.2. In *Henkel KgaA v Holdfast New Zealand Ltd* [2006] NZSC 102, [2007] 1 NZLR 577, the Supreme Court phrased the test as follows:<sup>1</sup>

“To be original for copyright purposes the work must originate from its author and must be the product of more than minimal skill and labour...”

The threshold for originality is a low one and it can be material for other purposes how original the work is; that is, how much skill and labour has gone into its creation. In general terms the greater the originality, the wider will be the scope of the protection which copyright affords and vice versa.”

4.3. *Halsbury’s Laws of England* identify the rationale of the seemingly low threshold of originality as follows:<sup>2</sup>

“It is not requisite that the work should be the expression of original or inventive thought, for Copyright Acts **are not concerned with the originality of ideas** but with the expression of thought... The work must be original in the sense that it is the author’s own intellectual creation. It is not required that the expression should be in an original or novel form or that it should have any aesthetic merit, quality or value, but that the work should not be copied from another work...”

If no skill or labour is employed in producing the particular form in which the work is expressed, there will be no copyright in it, although it may embody an original idea or opinion...”

4.4. Similarly, The Laws of New Zealand provides that:<sup>3</sup>

“To secure copyright it is necessary that labour, skill, or independent judgement be expended to give to the product some quality or character which the raw material did not possess and which differentiates it from the raw material. When a work has been produced from an earlier work, it is a question of fact whether sufficient skill and labour have been expended to generate a new copyright work.”

4.5. This approach appropriately recognises that entities ought to be rewarded for the skill and effort they expend, and that a property right can offer the best protection for that time, expertise and financial outlay. We submit that it is essential the current efforts based ‘skill, judgement and labour’ test in assessing originality be maintained New Zealand. This is because such an approach:

- (a) is clear and workable in practice;
- (b) provides legitimate copyright protection for entities that have expended significant effort and resources creating new, valid, information based works; and
- (c) encourages innovation in a variety of business practices, including those relevant to developing critical solutions.

4.6. Xero is hesitant to support any amendments to the proposed ‘skill, judgement and labour’ test, as we are concerned that any such amendments could seriously, and negatively, affect innovation in New Zealand. In particular, implementing an additional ‘creative spark’ element to the test would likely result in a reduction of New Zealand entities expending time, effort and resources to create business solutions on the basis that such solutions may not be considered sufficiently ‘creative’ to obtain the benefit of copyright protection. Such a consequence would clearly undermine the key purpose of copyright protection – ie to incentivise the creation and dissemination of new expressions of works.

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<sup>1</sup> *Henkel KgaA v Holdfast New Zealand Ltd* [2006] NZSC 102, [2007] 1 NZLR 577 at [37] and [38].

<sup>2</sup> *Halsbury’s Laws of England* (online ed) Vol 23 Copyright at [559].

<sup>3</sup> *The Laws of New Zealand* (online ed) Intellectual Property: Copyright at [38].

4.7. We accordingly submit that the ‘skill, judgement and labour’ test should be maintained in New Zealand.

## 5. Data and copyright protection (question 7)

5.1. As above, Xero submits that the current efforts based ‘skill, judgement and labour’ approach in assessing originality should be maintained in relation to data and data compilations.

5.2. As noted in the Issues Paper, copyright protection of ‘basic data’ (ie the information in itself in raw forms) is not generally recognised. However, the *compilation* of data is recognised as a copyright work if that compilation involves the necessary skill, judgement and labour.

5.3. This approach has been recognised in both New Zealand and Australian Courts. For example, in *Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd* [2002] FCAFC 112, (2002) 119 FCR 491, 55 IPR 1, the Federal Court of Australia held that Telstra’s White Pages and Yellow Pages directories and headings books involved substantial labour and expense in their compilation and presentation, and therefore that Telstra owned copyright in all three.<sup>4</sup> This decision was cited with approval by the New Zealand Court of Appeal in *University of Waikato v Benchmarking Services Ltd* (2004) 8 NZBLC 101,561:<sup>5</sup>

“...there can be no claim to any right in the information contained in the compilation where the compiler of factual information is not the author or originator of the individual facts recorded in the compilation. So, the appellant is not entitled to copyright in the raw accounting information supplied by the client firms in the present case. The only claim can be to copyright in the compilation itself. It must be shown that a sufficient degree of labour, skill, and judgment is involved in preparing the compilation. That may arise, for example, through the manner in which the information is selected for inclusion in the publication, the format or presentation of the data or, relevantly to the present case, the selection and calculation of the relevant ratios, percentiles, averages, and other details.”

5.4. Both *University of Waikato* and *Desktop Marketing Systems* were applied in the High Court in *YPG IP Ltd v Yellowbook.com.au Pty Ltd* (2008) 8 NZBLC 102,063 (HC). In that case, the High Court awarded an interim injunction to restrain a breach of copyright in TPG’s Yellow Pages directory.

5.5. This indicates that an appropriate balance has been achieved by ensuring copyright protection is available to entities that obtain or manipulate data in a unique manner, which generally requires expenditure of significant financial and labour resources.

5.6. It is submitted that this balanced approach should be maintained, as:

- (a) any ‘basic data’ not meeting the originality threshold can be freely used;
- (b) entities are incentivised to expend resources obtaining and manipulating data to be more effective by obtaining an enforceable property right in any original works they create;
- (c) such an incentive is critical in the digital age, and should be protected;
- (d) it offers the chance to prosecute blatant copying of databases; and
- (e) innovation in a variety of business practices, including those relevant to critical business solutions, would continue to flourish across the commercial sector.

5.7. There are significant benefits arising from the current treatment of data and data compilations under the Copyright Act 1994. We accordingly submit that no change to the consideration of such works ought to be implemented.

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<sup>4</sup> *Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd* [2002] FCAFC 112, (2002) 119 FCR 491, 55 IPR 1 at [160], [180].

<sup>5</sup> *University of Waikato v Benchmarking Services Ltd* (2004) 8 NZBLC 101,561 at [36], [39].

## 6. Default rules of ownership for copyright works (question 8)

- 6.1. Xero is generally supportive of the retention of the commissioning rule, and submits that this should be extended to cover all types of copyright work. There is no reason why photographs should be subject to the rule but works of literature (apart from software) are not.
- 6.2. If a copyright work is commissioned, then it is Xero's position that the commissioning party should own the work. This is particularly the case where the idea for the work, the request to create the work and the relevant information needed to create the work originate from the commissioning party.
- 6.3. Xero submits that it should not be the role of legislation like the Copyright Act to attempt to shift bargaining power in contractual negotiations to give one category of persons more power. Change for this reason does not advance any of the aims of the copyright regime that are set out at paragraph 101 of the Issues Paper. Instead, Xero submits that the person who commissions the work should *prima facie* own the work, and it should then be left to the parties to determine whether this default position should be altered by contract, and if so, how the compensation should change.
- 6.4. As a business, Xero takes into account that ownership of copyright will belong to us when we commission a work. This is reflected in the price paid for commissioned works. If copyright were not owned by Xero, the value of the commissioned work would be materially less. In the modern world, business entities will, in practice, use commissioned works more than once, and may use such works in a variety of ways (sometimes not contemplated at the time of commissioning).
- 6.5. We therefore submit that the New Zealand copyright regime should retain the commissioning rule, and apply this globally to all classes of works.

## 7. Computer generated works (question 9)

- 7.1. The current rules relating to computer-generated works do not adequately address where authorship for copyright works should lie where such works are created as a result of the application of new technologies (including artificial intelligence (AI)), and human intervention is minimal, or non-existent.
- 7.2. Under the Copyright Act, the author of a work must be a natural (human) person, or a body corporate. A computer-generated work is one for which there is no clear human author. In such a case, the author will be the person who undertook the arrangements necessary for the creation of the work. As noted in the Issues Paper published by MBIE, this will usually be the computer programmer, or the programmer's employer.
- 7.3. AI technology is already being used globally to generate works in journalism, music and gaming, which have no identifiable human 'author'.<sup>6</sup> Currently, the author of any work created by AI will likely be the creator of the AI programme code. But, this may not always be clear-cut, as the author may be multiple people, or multiple companies. Modern software development practice teaches that software developers use the best tool available to them to create a suitable solution in each step of authoring a software product. This means that in the course of their day to day work, software developers use 'snippets' of code that have been created by a third party and licensed for commercial use as part of creating an overall larger work. This is similar to using precast bricks when building a wall rather than casting each brick as you go. We are accordingly concerned that in creating new works via AI created by multiple third parties, the ownership in such works will be unclear, and potentially pass to other entities rather than the final author setting the current arrangements to create and AI authors work.
- 7.4. Xero submits that where AI software is licensed, the copyright in any work developed from the licensed software should lie with the licensee, as the 'user' of the AI enabled software, rather than with the first programmer. This will clarify the situation, for example, where a licensee such as Xero uses a third party programme (with one or more external authors) to run an AI programme that uses licensee-provided parameters or data to create a new AI authored work.
- 7.5. We are concerned that the failure to provide adequate copyright protection for businesses who license and use AI software to create valuable content, like algorithms, is likely to have a chilling effect on the effective use of AI software in business. We perceive it likely that entities would be discouraged from using AI software in their day-to-day operations that they did not fully create themselves for fear that the property rights in works legitimately created for them using this technology would ultimately rest with someone else (to whom they have already paid a licensing fee or similar).

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<sup>6</sup> Andres Guadamuz "Artificial intelligence and copyright" (October 2017) Wipo Magazine <[https://www.wipo.int/wipo\\_magazine/en/2017/05/article\\_0003.html](https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html)>.

- 7.6. It is submitted that clarification of the distinction between circumstances where a user, rather than a programmer, will be the ‘author’ of a computer-generated work is necessary. Such a clarification would also promote the objective of ensuring copyright provides incentives for the creation and dissemination of works (ie as the licensor of the AI would be financially incentivised through the payment of licensing fees or similar).

#### **8. Digital content as an object (question 20)**

- 8.1. There are clear limitations with the use of the term “object”, currently contained in the Copyright Act. This term is used throughout the Copyright Act, particularly so in relation to the definition of an “infringing copy”. For example, under the current legislation, an infringing copy includes a copy that either is, or embodies, an object.
- 8.2. The term “object” is unfortunately not defined in the Copyright Act. The Cambridge Dictionary defines an “object” as “a thing that you can see or touch but that is not usually a living animal, plant, or person”.<sup>7</sup> Clearly, on its natural and ordinary meaning, this term cannot be understood to extend to digital versions of works.
- 8.3. We therefore submit that the use of the word “object” should be removed from the Copyright Act, on the grounds that:
- (a) the term is outdated and no longer fit for purpose; and
  - (b) the term is incapable of capturing modern works, and in particular those created and disseminated digitally.
- 8.4. Xero acknowledges that the term “copying” was amended in 2008 to be defined in broad and technologically neutral terms<sup>8</sup> in an attempt to modernise copyright protection in New Zealand. As noted in the Issues Paper, it was made clear by way of the amendment that reproducing, recording or storing work in any form, including in a digital form, would be deemed “copying” for the purposes of the Copyright Act. However, there is a clear disconnect between this definition, and (for example) the definition of “infringing copy”, which still refers to the outdated “object” term.
- 8.5. We therefore suggest that, despite the broad definition of “copying”, either:
- (a) the term “object” be removed from the Copyright Act entirely on the basis that it is outdated, irrelevant, and not technologically fluid (this would be our preferred approach); or
  - (b) a broad, technologically neutral definition of the term “object” be inserted into the Copyright Act, to ensure the statute as a whole is capable of adapting to significant, and unforeseen digital developments.

#### **9. Dixon v R – Information as property (question 21)**

- 9.1. Xero agrees with the Supreme Court in *Dixon v R* in their finding that data should be considered to be property, and accordingly if a person gains unauthorised access to a computer system and copies files, they should be liable to criminal penalties as well as civil remedies.
- 9.2. The Crimes Act 1961 defines “property” as including “real and personal property, and any estate or interest in any real or personal property, money, electricity, and any debt, and any thing in action, and any other right or interest”. The definition in the statute is wide enough to capture digital information (as was held by the Supreme Court). It is appropriate to classify digital information as property since digital information:
- (a) can be owned and transferred,
  - (b) can, and increasingly does, have economic value;
  - (c) is capable of being sold; and
  - (d) has a material presence and alters the physical state of the medium on which it is stored (illustrated by the fact that electronic storage can become fully utilised).

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<sup>7</sup> Cambridge Dictionary (online ed.) (undated) <<https://dictionary.cambridge.org/dictionary/english/object>>.

<sup>8</sup> Copying –

- (a) means, in relation to any description of work, reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means; and
- (b) [Repealed]
- (c) includes, in relation to an artistic work, the making of a copy in 3 dimensions of a two-dimensional work and the making of a copy in 2 dimensions of a three-dimensional work; and
- (d) includes, in relation to a film or communication work, the making of a photograph of the whole or any substantial part of any image forming part of the film or communication work—

and copy and copies have corresponding meanings

- 9.3. Classifying digital information as property (whether tangible or intangible) brings New Zealand into line with jurisprudence in the United States that has found that software is property in that jurisdiction. It also aligns the legal position on this issue between the real world and the digital world.
- 9.4. Xero submits that the decision in *Dixon v R* is not inconsistent with the approach taken by the Copyright Act. The purpose of the Copyright Act is to provide guidance and regulate how particular expressions of data may be used, whereas the Crimes Act (in light of the decision in *Dixon v R*) provides a right to possession and ownership of the primary information itself.
- 9.5. Accordingly Xero submits that no change to the Copyright Act is required as a result of the Supreme Court's decision in *Dixon v R*.

## 10. Renunciation of rights (question 23)

- 10.1. Currently, the Copyright Act does not contain provisions that allow creators or copyright owners to renounce all of their rights in a work. To circumvent this, creators or copyright owners instead use a variety of licences such as Open Source Software Licences (OSS) Creative Commons (CC0) licence to enable the free distribution of otherwise copyrighted work. This enables creators to give other people the right to share, use, and build upon a work that they have created. Often, CC0 licences specify that they cannot subsequently be revoked.<sup>9</sup>
- 10.2. These licences do not operate as a means of renouncing copyright in a work, rather they permit the free distribution and use of copyright works indefinitely, provided minimum terms are met.
- 10.3. We understand that MBIE is interested in whether there are any advantages or disadvantages in not being able to renounce copyright under the current regime.
- 10.4. Xero is not opposed to the inclusion of renunciation rights in the copyright regime *per se*. However, we submit that, if MBIE is minded to expressly legislate for the renunciation of works (which we assume would supplement the current licensing system, which allows for free use), then provisions should also be enacted preventing authors from subsequently revoking their renunciation. This is because:
  - (a) Entities rely on works that are in the public domain such that to 'backpedal' the use of such works by subsequently revoking a 'renunciation' would be a near impossible task; and
  - (b) The revocation of renunciation cannot, as a matter of public policy, be considered legitimate or valid so as to be protected by statute, given that the risks inherent in such an ability would seriously stifle creativity.
- 10.5. We would also support provisions being introduced in the copyright regime expressly recognising that once a work has been licensed so as to allow for public use, it is not possible for the licence to be revoked. As noted above, this is consistent with current practice (as CC0 licences may not be subsequently revoked in accordance with their terms), and would ensure greater certainty, particularly for entities that deal in open source code (such as Xero).
- 10.6. In sum, we submit that while we are not opposed to renunciation provisions *per se*, it is critical that any enactment of such provisions expressly recognises that an author is not entitled to 'take back' the renunciation of their rights. This is consistent with current licensing practices, and would ensure that creation and innovation continues to flourish in both a software context, and in relation to a wider scope of works.

## 11. Moral rights (question 25)

- 11.1. The Copyright Act currently provides for moral rights, which are distinct from the economic rights included in copyright. Moral rights are generally unassignable, meaning that even though an author does not own copyright in material, they will continue to maintain moral rights in respect of that material.
- 11.2. The Copyright Act currently provides an exception to the inherent nature of moral rights in an employment context. An employer will not infringe an employee's right to be identified as the author of a work created by that employee during the course of their employment, provided:
  - (a) the author cannot readily be identified at the time of the allegedly infringing act; or
  - (b) in the case of a literary, dramatic, musical or artistic work –
    - (i) more than 2 persons were involved in the creation of the work and it is impracticable at the time of the act to identify the respective contributions of each person; and
    - (ii) the employees have not previously been identified in or on published copies of the work.

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<sup>9</sup> CC0 4.0 International Public Licence specifies at section 2a. that the licence is "irrevocable".

- 11.3. An employee does not have the right to object to the derogatory treatment, by their employer, of a work created by that employee during the course of their employment, unless:
- (a) the employee is identified at the time of the allegedly infringing act; or
  - (b) the employee has previously been identified in or on published copies of the work.
- 11.4. Where the right to object does apply, the right will not be infringed if the employer publishes a clear and reasonably prominent indication that the work has been subjected to treatment to which the employee has not consented.
- 11.5. It is submitted that those who commission copyright works should be granted the same exceptions that are granted to employers in respect of the use that can be made of that commissioned work, without breaching the creator's moral rights.
- 11.6. There is no clear basis for drawing a distinction between employers and commissioning parties in the context of the application of an author's moral rights. A commissioning party, just like an employer, is the automatic first owner of any copyright in commissioned work. The difference between commissioned and employed ownership should be reconciled to:
- (a) ensure an author is not able to unduly demand identification for work, where that work was commissioned and paid for by another party, and where the author is not reasonably identifiable when the work is used by the commissioning party; and
  - (b) restrict an author's ability to object to allegedly derogatory treatment of a work they created pursuant to a commission, where the author is not identified when the commissioning party makes use of that work.
- 11.7. It is submitted that failure to provide for these exclusions unnecessarily restricts the ability of a commissioning party to fully exercise their economic rights in respect of commissioned works. This undermines the commercial viability of commissioning the creation of new and valuable content and is inconsistent with the position as between employees and contracting parties.

## **12. Technological protection measures (questions 28 and 29)**

- 12.1. Technological protection measures (TPMs) are critical in the digital copyright owner's battle against infringement. Xero is pleased that TPMs will be considered by MBIE in the reform of copyright law in New Zealand.
- 12.2. Xero is comfortable that the TPM regime is clear in what it allows.
- 12.3. There are some serious limitations to TPMs in New Zealand. In particular, Xero is concerned that:
- (a) the current regime is not sufficiently broad so as to capture a wide range of TPMs (for example, TPMs preventing unauthorised access to copyright content (access-control TPMs) are not currently legislated for; and
  - (b) the current regime does not prohibit the actual act of circumventing a TPM.

### Absence of provisions preventing the circumvention of access-control TPMs

- 12.4. It is submitted that the definition of a TPM should encompass a broad category of technological protection measure, including:
- (a) TPMs that control access to material that is protected by copyright; and
  - (b) TPMs that protect any copyright.
- 12.5. Several businesses routinely use TPMs that fall into one or both of these categories. It is therefore important that the definition of TPM remain broad, and capable of adapting to future, unforeseen, technological advancements.
- 12.6. As there are different types of TPMs used in the software industry, there are differing ways in which pirates circumvent them. For example, sophisticated hacking utilities such as password cracking or "copy-cracking"



tools. It follows that copyright owners need a broad definition of TPM which provides adequate protection for the many different types of TPMs used by them.

- 12.7. The implementation of strong protections for the TPMs used by copyright owners is essential for the continued success of the software development industry. Xero encourages the use of language that provides protection under the Copyright Act for all forms of technology that control access to copyright works and which protect the underlying copyright from infringement.
- 12.8. In addition, the traditional business model based on tangible copyright works has evolved with the proliferation of cloud and digital based services. New technology and high-speed internet access create new markets and support content development, but they also make unauthorised access and/or copying of material easier.
- 12.9. It is important to appreciate that in the digital environment, strategies to protect the integrity of copyright are of critical importance to copyright owners. Copyright is no less a private property right than ownership of a chattel or land. However, the ease with which copies of copyright works can be made in the digital environment has the capacity to damage the integrity of that private property right.
- 12.10. Xero submits that it is critical to recognise that the protection of a wide range of TPMs is essential, including access-control TPMs.

Absence of provisions making actual use of a TPM circumvention device actionable

- 12.11. The act of circumvention itself is not currently prohibited in the Copyright Act. In our submission this is a serious deficiency. Failing to prohibit the use (as compared with supply) of circumvention devices effectively leaves unaddressed the commercial incentive which drives manufacturers and distributors of circumvention devices to engage in their activities. The reason why TPM circumvention device manufacturers make and distribute such devices is because there is a real market for them. If use of circumvention devices itself was prohibited, this would seriously undermine that market and the incentive to produce or distribute such devices.
- 12.12. In addition, a prohibition against use would be easier to enforce and provide rights holders with a concrete means of protecting their rights, as the manufacturers and distributors of such devices are frequently located off-shore and outside the reach of New Zealand law. It could be expected that a prohibition on use of circumvention devices under the Copyright Act would then in turn make manufacturing or distributing such devices (for the New Zealand market at least) less profitable and therefore less desirable.
- 12.13. An offence against “use” of a TPM circumvention device should be enacted. This should be in line with those proposed for making, importing, selling and letting for hire a TPM circumvention device, as set out at clause 226C of the current legislation.

**13. The problems with copying works for non-expressive uses (question 38)**

- 13.1. Non-expressive use of copyright works, for example data mining, is a key issue that directly affects Xero’s operations as a software creator. We consider data mining to be central to our activities, and necessary to ensure technological development in New Zealand. At Xero, we often use both internal and external data sets to help train machine learning algorithms to provide key outputs for features we offer and plan to offer. These features form a key part of our products, and ensures our products and services stand out from those offered by our competitors. That said, we are concerned that the current regime is unclear when it comes to data mining practices, and may leave entities open to infringement actions where they engage in non-expressive uses of copyright works.
- 13.2. As noted in the Issues Paper, entities utilising data mining can either obtain permission from every copyright owner before using a data set, or rely on the exceptions for research and private study, and/or the transient reproduction exceptions, set out in the Copyright Act. At Xero, we endeavour to obtain consent from all copyright owners of a data set before that set is used in our operations. However, we are conscious that when working with large sets of works, there is an inherent risk an author may be overlooked, particularly in cases where authorship is difficult to ascertain.
- 13.3. We submit that a specific exception should be enacted to allow or facilitate data mining to ensure that:
  - (a) there is greater clarity in New Zealand in relation to the right to analyse data for both commercial and non-commercial research purposes;
  - (b) the Copyright Act does not unduly restrict the advancement of technology by limiting data mining; and
  - (c) the New Zealand copyright regime continues to drive innovation and stimulate the digital landscape.

We are also confident that such use would not legitimise unfair or unjustified copying, or otherwise improperly infringe copyright. This is because using information for data analysis *only*, for example to extract data patterns, does not detract from, or take advantage of, the value of copyright material in and of itself.<sup>10</sup>

- 13.4. In enacting such an exception, our preference would be to adopt the approach proposed by the Government in Singapore. In that jurisdiction, the Government has proposed a general data mining exception for both commercial and non-commercial use, provided the copying entity has lawful access to the copyright protected works. In our view, that approach is undoubtedly correct, and is consistent with the research exception set out at section 43 of the current regime. In addition, by imposing a requirement that users must have legitimate access to the copyright material in question, there are appropriate safeguards preventing unauthorised or illegitimate copying on a wider scale.

#### **14. The use of quotations in reliance on fair dealing (question 40)**

- 14.1. The current copyright regime permits the use of quotations or extracts for the purpose of criticism and review, without requiring permission from copyright owners, provided such use is accompanied by a sufficient acknowledgment.
- 14.2. Xero would support a specific exception for using quotations or extracts for a wider range of purposes, other than simply for the purposes of criticism or review. In particular, we would support widening the exception to cover circumstances where:
- (a) we refer to works in business presentations to support the material presented on;
  - (b) we create reports for our customers that rely on recent pieces of research and key findings; and
  - (c) we create media reports for customers which cite key articles in accordance with the above purposes.
- 14.3. In our view, such an amendment would ensure that New Zealand law is consistent with the current law that applies in the key jurisdictions with which it interacts, including the United States and the United Kingdom. This consistency would ensure greater business efficiency, across jurisdictions. This would also allow entities with an international reach to offer the same services and information to its customers on a global scale, rather than limiting what information may be provided to its New Zealand customers based on the quotation rules set out in the current copyright regime.
- 14.4. For these reasons, we would support an amendment to introduce the quotation exception in the Copyright Act in accordance with that set out at 30(1)(A) of the UK Copyrights, Designs and Patents Act 1988 (which allows for quotations to be used more widely without infringing copyright, provided the use is fair).

#### **15. Education exceptions (question 48)**

- 15.1. Xero actively supports the education of the next generation of accountants in New Zealand. We offer a product called Xero Learn, which allows high school, college and university students to use real-world accounting software to understand the fundamental principles of accounting in New Zealand. Significantly, our software provides existing sample data, or the option to upload chart of accounts and bank statement files, to complete a series of relevant exercises. Xero Learn also allows educators to create original content within a special edition of Xero. This means that students can use Xero as they would when working as accountants, improving their work-readiness, as well as allowing them to learn accountancy principles in a real-world environment.
- 15.2. We are concerned that the education exceptions set out in the Copyright Act are too broad, particularly the provisions allowing educational institutions to make unlimited copies of works for the purposes of examination. In our view, these provisions are problematic, as they allow educational institutions to copy our programs and training systems without any form of limitation or restraint imposed. This undermines the copyright protection available in these works.

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<sup>10</sup> As noted by the Global Data Review in their article “Singapore to exempt data analysis from copyright rules” (23 January 2019) <<https://globaldatareview.com/article/1179549/singapore-to-exempt-data-analysis-from-copyright-rules>>.

- 15.3. In addition, we believe the broad educational exemptions contained in the current copyright regime have had a chilling effect on the production and dissemination of works for educational purposes in New Zealand, compared with overseas jurisdictions. For example, at Xero we often engage external content producers to develop various training scenarios for the purposes of our educational software, Xero Learn. However, we have noticed that several of our content creators have been reluctant to create content for New Zealand, restricting the use of their works to Australia only. We understand the broad copying exceptions for the purpose of education may explain this reluctance to create content for the New Zealand market. To overcome this, Xero has had to agree to specific contracts with geographical restrictions with certain content creators. This disadvantages our New Zealand subscriber base, as it means New Zealand subscribers do not have access to the same amount of educational content on our software platforms that our Australian users do.
- 15.4. We accordingly submit that the education exceptions should be simplified and restricted to “a reasonable portion” in *all* cases, and should specifically exclude copyright in software, in accordance with the approach taken in Australia<sup>11</sup>. This would:
- (a) ensure legitimate protection of both software products, and the content created for such products;
  - (b) encourage more content creators to contribute materials targeted towards the education sector in New Zealand; and
  - (c) align the educational exception with the “reasonable portion” approach taken in Australian, which would likely have positive benefits for the free flow of educational materials across our jurisdictions.

## 16. Exceptions for computer programs (question 56)

- 16.1. The Copyright Act contains a number of exceptions relating to the use and copying of computer programs in New Zealand. For example, computer programs may lawfully be backed-up by users, computer programs may be copied and adapted to address errors, and computer programs may be observed, studied or tested in order to understand the program’s underlying ideas and principles.
- 16.2. Although Xero is a computer software developer, the exceptions relating to the use of computer programs under the current copyright regime are not particularly applicable to our operations. This is because most of our software is delivered using a ‘Software as a Service’, or SaaS, model. Xero software is not distributed in the same format as traditional software models, which means the copying of our software is much more limited, as it does not need to be ‘backed-up’, and any adaptations for the purposes of addressing errors are made by Xero directly. However, we do offer an open application programming interface, and control interactions with our software using this method. This means that third parties are able to freely interact with our software to understand its processing, and to develop complimentary applications and programs. We are proud of this open ecosystem, and the freedom that it gives third parties to interact with our products.
- 16.3. Despite these variations to the traditional software distribution model, we nonetheless submit that specific exceptions are required to protect content developers in New Zealand. This is because unexpected or malicious interference with our software, or ancillary software intended to be used in conjunction with our products, could seriously impact our existing subscribers and our exemplary reputation. It is imperative for us that our customers, and their data is protected. As you are no doubt aware, privacy and security of data is an issue that is regulated very specifically worldwide, so any actions that could undermine our security could potentially impact Xero severely.
- 16.4. To that end, we submit the following changes should be considered under the new copyright regime in New Zealand:
- (a) section 80D of the current Copyright Act should be amended to reflect that a term or condition in an agreement for the use of a computer program *does* have effect in so far as it prohibits or restricts any activity undertaken in accordance with s 80A(2) (relating to decompilation of programs where certain conditions are met) or 80B(1) (relating to the copying or adapting of computer programs for a lawful use);
  - (b) section 80D should be amended to remove reference to s80A(2); or
  - (c) section 80A(2) should be amended to prohibit the decompilation of software released by software entities that offer their users a robust application programming interface, or similar mechanism, by which users may understand and interact with software.

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<sup>11</sup> The Australian Copyright Act 1968 excludes software from its education exception. In particular, section 113P of that Act states (*inter alia*) that the body administering an educational institution does not infringe copyright in a work by copying or communicating the whole or a part of the work **if the work is not a computer program, or a compilation of computer programs**. Computer program is defined in the Act as a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result (and so reasonably extends to software).

- 16.5. As the copyright regime currently stands, there is a real risk that the decompilation provisions may undermine autonomy in relation to product development, and potentially jeopardise data protection and security. We submit that an amendment to the provisions regarding the use of computer programs, as set out above, is necessary to ensure that the rights of software developers are protected, particularly in relation to issues of data security, privacy, and matters of governance.

**17. Contracting out of the exceptions (question 58)**

- 17.1. Currently, there is no limitation on contracting out of the fair dealing exceptions contained in the Copyright Act. We are of the view that the current regime should be maintained, and businesses should be entitled to contract out of certain provisions of the Copyright Act. This is because the broad terms in which the exceptions are currently drafted can create real unfairness for entities that invest in, and heavily rely upon, their intellectual property to be successful. Contracting out provisions are sometimes the only way entities in New Zealand can ensure adequate copyright protection.
- 17.2. As stated above, we are particularly concerned about the broad rights of education institutions to copy large tracts of our software and programs for instruction and examination purposes. If this were to be remedied in accordance with our above submission (i.e. so as to limit the extent of copying for educational purposes), then we would not be opposed to limiting contracting out provisions per se. We are particularly concerned about what is fair for content developers, where their content is of particular use or interest to the education industry. The livelihoods of such creators should not be unfairly jeopardised simply on the basis that educational providers have a broad scope to copy works – particularly where educational institutions are charging their students a course fee and are profiting from the dissemination of copyright works. As the regime is currently worded, there is a real risk that software developers will become increasingly hesitant to develop content targeted towards the education industry. This is because, if educational providers are entitled to copy these works without any form of remuneration or recognition, there would be almost no point in developing such products (at least for the New Zealand based educational sector). In fact, we have already experienced this highly undesirable effect first hand (see our comments at 15.3 above), and are concerned that, if something is not done to remedy this, the New Zealand educational industry will be severely, and detrimentally, affected.
- 17.3. We submit that content creators (and software developers) should be permitted to contract out of the exceptions to copyright infringement in the Copyright Act, namely the provisions relating to education in New Zealand. We appreciate that the education exceptions are important for the increase in common knowledge, and to advance society as a whole, however these provisions are currently too broad in scope, and do not provide adequate protection for copyright authors.
- 17.4. We therefore submit that contracting out of such exceptions in the current copyright regime should be expressly permitted, because:
- (a) prohibiting contracting out provisions may have an undesirable effect on the creation, use and dissemination of works in New Zealand for educational purposes, for fear of excessive use by educational institutions; and
  - (b) without a provision allowing the contracting out of the exceptions, or the amendment of these exceptions to be more narrow in scope, it is likely that content creators will be unfairly disadvantaged by these exceptions moving forward.

**18. Problems in using open data released under an attribution only licence (question 75)**

- 18.1. As noted by MBIE in its Issues Paper, an issue can arise where information from multiple data sets is combined, and the contributors to those data sets all require attribution.
- 18.2. This is not an issue that Xero has previously encountered; however, we consider that it could become unduly onerous to attribute each contributor to the resulting data set. One possible method of circumventing this requirement could be to require attribution only to the centralised data set provider (where there is one), for example LINZ (Land Information New Zealand) when using geographical data. This would avoid the need to recognise each contributor, and would direct users to where the relevant information may be found (including each contributor).

**19. Groundless threats of legal action for infringing copyright (question 80)**

- 19.1. Where a person brings proceedings alleging an infringement of copyright under the current Copyright Act, a Court may, on application, make a declaration that the bringing of proceedings was unjustified, and may make an order for the payment of damages for any loss suffered by the person against whom the proceedings are brought. This protection is seriously deficient, as it offers no actual protection against groundless threats. This is problematic, as groundless threats can halt innovation, particularly if a business' resources are tied up in needless, or groundless litigation.

- 19.2. Xero would therefore be supportive of provisions prohibiting unjustified threats in the Copyright Act itself, to ensure the creative sector is not unfairly discouraged or otherwise prevented from creating and disseminating new copyrights works.