

# Submission on review of the Copyright Act 1994: Issues Paper

## Your name and organisation

Name	
Organisation	Heritage New Zealand Pouhere Taonga

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## Responses to Issues Paper questions

### Objectives

Qn 1	<p>Are the above objectives the right ones for New Zealand’s copyright regime? How well do you think the copyright system is achieving these objectives?</p> <hr/> <p><i>The objectives stated cover most aspects of the copyright regime. However, the current regime, and the proposed objectives, do not take account of the many commissioned technical and other reports, which are produced only because the commissioner pays for the work. More often than not, contract provisions are used to “get around” the provisions of the Act, particularly that the commissioning rule does not apply to commissioned technical reports. This is discussed in more detail below.</i></p> <p><i>Issues also arise from lack of clarity of provisions of the Act, where a lack of user understanding of the requirements may lead to accidental contravention of the Act. It would be useful to have providing clarity and certainty as a separate objective, rather than included in a catch-all objective.</i></p>
Qn 2	<p>Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?</p>

	<i>As above, the current Act does not deal well with commissioned technical reports. It would be useful to have an objective to consider the most appropriate provisions for the range of works covered by the legislation, now and in the future. This objective would also cover future technologies. The review also needs to consider the balance between copyright provisions incentivising the production of creative works, and the role of public agencies and the GLAM sector in making information available to the public and increasing the publicly available knowledge base.</i>
<b>Qn 3</b>	Should sub-objectives or different objectives for any parts of the Act be considered (eg for moral rights or performers' rights)? Please be specific in your answer.
	<i>As discussed below, the review should consider whether the provisions for Crown copyright should apply to Crown entities.</i>
<b>Qn 4</b>	What weighting (if any) should be given to each objective?
	<i>Objective 2 is critical to the work of public agencies like Heritage New Zealand.</i>

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

<b>Qn 5</b>	What are the problems (or advantages) with the way the Copyright Act categorises works?
	<i>The current classification does not adequately consider technical reports, produced solely because they are commissioned. The Act treats technical reports, research reports etc in the same way as artistic creative works, which may have been produced even if there is no immediate client. See question 8</i>
<b>Qn7</b>	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?
	<i>See question 8. As with technical reports, contract provisions are often used to overcome the copyright assignment for commissioned databases. The current provisions are not clear.</i> <i>The underlying data, if not copyright, will be covered by the Privacy Act and the Official Information Act or Official Information and Meetings Act if held by a central or local government agency. It is not clear how these Acts work together with the Copyright Act. For example, while Heritage New Zealand seeks to make heritage assessments and other information on places and areas on the New Zealand Heritage List/Rārangī Kōrero publicly available, owner details are not publicly released. Information identifying the exact location of wāhi tapu sites is not usually made publicly available.</i>
<b>Qn 8</b>	What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?

*The current classification does not adequately consider technical reports, produced solely because they are commissioned. The assignment of copyright to the author rather than the commissioner for these reports is problematic, as discussed below. It requires the commissioner to use contract provisions to overcome this provision of the Act. The same applies to data compilations and computer programs that are commissioned. If organisations are constantly using contract provisions to overcome the Act, it seems that the Act needs to take better account of the requirements of the commissioner to use and update reports.*

*Heritage New Zealand commissions conservation plans for properties we own or manage. These plans for the management of heritage places need to be kept up to date as circumstances change and should be reviewed every ten years. There have been instances where the commissioned author of the original report was not available to revise the report and would not permit another contractor to update the original report. A new conservation plan had to be prepared, without using the original plan, at greater cost and resulting in an inferior product. Copyright for the photographs and diagrams used in the original conservation plan may have in fact allowed Heritage New Zealand to use them in the revised conservation plan, but due to the complexity of the Act, this possibility may have been overlooked when the new report was commissioned.*

*In a further example, a Crown agency commissioned, via a contractor and subcontractor, a conservation plan for a place to be affected by a development proposal. The author of the conservation plan retained copyright, and would not make the plan available to the owner of the heritage place, significantly reducing the value of the report to the Crown agency and the owner.*

*Heritage New Zealand often requires applicants for archaeological authorities to commission archaeological assessments as a condition of the granting of an authority. These reports are collated in a library, with the intention of increasing knowledge of New Zealand's archaeology. Depending on the way the report is commissioned, the copyright holder is either a consultant or the applicant. There have been problems with making this important information available to users, if the copyright holder is not willing to share the report or HNZPT is unable to contact the copyright holder.*

**Qn 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?

*If a publication needed for research is out of print (and unlikely that further print copies will be produced), there should be some exemption for providing an electronic copy.*

**Qn 12**

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

*As a Crown entity, Heritage New Zealand does not benefit from the provisions of the Act relating to Crown retaining copyright of commissioned works. The work that Heritage New Zealand commissions is intended for the public good, and is made available free of charge (other than the Heritage magazine). It increases the cost to the taxpayer to have to contract out of the current provisions of the Act, and we often cannot afford to “buy” the copyright.*

*Information produced by the Crown should where possible be made publicly available for the benefit of all New Zealanders, and Crown copyright can stop private authors locking up information that should be in the public domain. It is odd to have a code of practice more or less over-riding a provision of an Act. This presumption should be part of the Crown copyright provisions, as it is under the Official Information Act. Some government departments make reports available under Creative Commons licence. The review should consider whether the Copyright Act should make specific provision for this type of relinquishing copyright rights and setting conditions for use of the document/information.*

*Where Crown entities are only partly funded and rely on sales of documents to generate income (e.g. Standards New Zealand) making documents available free of charge (largely to commercial users) would require significant additional taxpayer funding.*

**Qn 14**

Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?

*Indefinite copyright has the potential to restrict access for research purposes, such as historical research.*

## **Rights: What actions does copyright reserve for copyright owners?**

### **Rights: Specific issues with the current rights**

**Qn 23**

What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?

*Inability to renounce copyright could reduce access opportunities for researchers.*

**Qn 24**

Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.

*See examples under question 8.*

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

**Qn 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?

*Where a technical report is commissioned and through contract the copyright rests with the commissioner, the author will have concerns about the effect of subsequent use of the work damaging their professional reputation (see example of conservation plans above). The review needs to examine whether the moral rights of the author can be clarified to resolve this concern.*

## Exceptions and Limitations: Exceptions that facilitate particular desirable uses

Qn 30	<p>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?</p>
	<p><i>See earlier comments regarding archaeological reports submitted to the digital library but unable to be shared with the public to increase our knowledge of New Zealand's archaeology.</i></p>
Qn 31	<p>What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?</p>
	<p><i>An advantage of exceptions applied to research use (whether for commercial purposes ) is not just encouraging creativity but increasing technical knowledge, fostering research, e.g. on the histories of places, in support of retaining heritage</i></p>
Qn 37	<p>Are there any other current or emerging technological processes we should be considering for the purposes of the review?</p>
	<p><i>Increasingly, museums are using 3D imaging, virtual tours, and virtual reality applications to provide remote users with an experience of the museum/gallery and collections. See further comments on the GLAM sector.</i></p>

## Exceptions and Limitations: Exceptions for libraries and archives

Qn 41	<p>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.</p>
	<p><i>Heritage New Zealand supports enhancing clarity of exceptions for libraries and archives.</i></p>
Qn 43	<p>Does the Copyright Act provide enough flexibility for libraries and archives to facilitate mass digitisation projects and make copies of physical works in digital format more widely available to the public? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?</p>

HNZPT would welcome more flexibility in the legislation around mass digitisation and making digital works **more readily available where works are created as a part of a legislative process for a public good**. We consider it should be easier for HNZPT to make these works more accessible as the body required to hold the works. (Note that we continue to support the right of authors to have their work protected from being reused in part or in whole by others for commercial gain and to have their authorship of their work fully acknowledged and recognised.)

*Example: under the Heritage New Zealand Pouhere Taonga Act 2014, there is a legal requirement for reports are prepared when archaeological sites are destroyed. These reports commissioned by applicants (rather than by HNZPT) and prepared for the applicants by technical experts. Copies are provided to HNZPT as a requirement of the legal process. The purpose of the legislation is to ensure that when sites are destroyed, information about them is preserved.*

*There has been strong demand by archaeologists and iwi and others for HNZPT to improve access to these reports. HNZPT is a prescribed library and wishes to digitise its archaeological reports and making them accessible as a digital library for research and private study purposes with suitable terms of use and disclaimers. The legal requirements around creating digitised copies and the conditions of use pose a reasonably high barrier for HNZPT. The requirements seem overly inflexible when reports are created as part of a legal requirement and that the purpose of the requirement is to ensure information is preserved. We would therefore welcome some simplification and clarification around the role of organisations like HNZPT where there is a requirement to collect data of this kind and where the purpose of collecting that data is to ensure information is preserved. We would welcome an easing or clarification of requirements around providing access to reports of this kind to the public.*

Qn 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?

*As discussed above, museums and galleries increasingly are making their collections available on line. Some of the items in collections – text, visual, or objects - will be under copyright. Technology makes it possible (and increasingly more affordable) to back up valuable documents, to provide users with a virtual tour of the establishment (including copyrighted works of art), and to provide 3D scans of objects which can be rotated and examined in intricate detail. Heritage New Zealand supports extending the exemptions for libraries to museums and galleries.*

*It is not only museums and galleries that need exceptions: Heritage New Zealand owns or manages 43 properties, which are mostly not museums or galleries, but contain collections, including copyright items. We also have extensive document collections, and there are limitations on making digital copies to preserve these documents. There is potential for the Copyright Act reducing our ability to make this information available to the public to increase their appreciation of historic heritage, enhance sense of place and nationhood, and provide cultural experiences. Exemptions provided to us as a Crown Entity library only provide limited opportunities for making information available.*

## Exceptions and Limitations: Exceptions for education

## Exceptions and Limitations: Exceptions relating to the use of particular categories of works

## Exceptions and Limitations: Contracting out of exceptions

<b>Qn 58</b>	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?
	<i>As discussed above, our organisation is forced to use contract provisions to ensure that we retain copyright of documents we have commissioned. Section 41 reads as if you can't use a contract to assign copyright to the commissioner, but other sections of the Act suggest that you can.</i>

## Exceptions and Limitations: Internet service provider liability

### Transactions

<b>Qn 71</b>	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.
	<i>Yes – HNZPT holds collections of images collated over many decades that have been supplied to us without terms of use or information identifying the photographer. This means HNZPT is unable to reuse these images (for instance by displaying them on the website). Recently we were unable to use a specific image in a public guidance document because we could not determine the copyright holder. We also hold an extensive collection of archival documents, and if the copyright holder cannot be determined, our librarian cannot provide copies of the document to the public on request. It is not clear if orphan material could be supplied with a caveat that it can only be used for private study and research and not further distributed or copied.</i>
<b>Qn 72</b>	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?
	<i>If there is doubt we do not use/distribute the work. This could inhibit the free flow of information.</i>
<b>Qn 73</b>	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?
	<i>See above, we err on the side of caution.</i>
<b>Qn 75</b>	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?
	<i>These licences are being used routinely to allow the public full access to information in government publications. As above, if this is common practice, the review could consider whether to include appropriate creative commons provisions in a review of the Act. We routinely use photos posted on the internet under creative commons licence and have not had any problems to date.</i>

## Enforcement of Copyright

## Other issues: Relationship between copyright and registered design protection

### Other issues: Copyright and the Wai 262 inquiry

Qn 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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*Heritage New Zealand undertakes research, prepares detailed heritage assessment reports on wāhi tapu sites and areas and wāhi tūpuna, and enters the sites/areas onto the New Zealand Heritage List/Rārangi Kōrero. The heritage assessment reports and accompanying photographs are not generally made available on the Heritage New Zealand List on Line but are available on request.*

*Any new regime would need to acknowledge the right to maintain district and regional council “silent file” information on sites of cultural significance.*

Qn 96

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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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*We support further investigations of the issues raised into the findings of Wai 262*