Introduction

We are Tohatoha Aotearoa Commons. Our purpose as an organisation is to facilitate open access to information and work towards a fair and equitable digital world and internet. We also support the Creative Commons licenses in New Zealand and the implementation of NZGOAL. We are a nonprofit incorporated society. Our work primarily supports the GLAM sector, schools, government, NGOs and emerging artists and writers to understand copyright, benefit from it, and legally share when they choose to.

Tohatoha is funded by StatsNZ and InternetNZ. Our views are our own and do not represent those of our employers, funders, or anyone else.

This submission was prepared by Mandy Henk.

Scope

As a small incorporated society we lack the resources to commission reports and studies. As such, we rely on evidence based in our experiences and those of the schools, GLAMs, and government departments that we support. We also rely on academics kind enough to share peer-reviewed literature with us and what we can access via the open web and our local public library. Where possible we have identified the likeliest source for evidence that we are not able to provide, but that we believe exists.

The current submission reflects our limited staffing and is tailored to reflect our most pressing concerns. As a small, mostly government funded NGO, we would remind MBIE that strong consultation requires resourcing. There is a very limited amount of copyright expertise in the non-commercial sector in New Zealand. Without additional resourcing throughout the copyright reform process, those voices - from across libraries, museums, universities, the civil service and schools - are unlikely to be heard clearly. We would encourage the government to resource the submission process to ensure that a wider range of voices continues to be heard.

Support of Other Submissions

Tohatoha supports the submissions of the following organisations:

- LIANZA
- Museums Aotearoa
- Te Papa
- Universities New Zealand
- InternetNZ

Context

Good copyright law strikes a balance between a range of tensions--between creators and users, between clarity and ambiguity, between the public interest and private interests, between economic and moral rights, between local needs and international obligations. It’s a complex, messy, fraught highwire act at the best of times.

Which is why, especially compared with other areas of commercial law and policy, copyright must be understood within context. There is no such thing as ‘the’ interests of a creator; there is only a particular creator and her interests over a particular work. It is the same for users. Some users want to build commercial empires on the backs of underpaid authors. Others want to make cultural heritage items available for school children. Each is a user of copyright works, each is a potential rightsholder--and each must operate within the bounds of the same law.

Underfunding of the GLAM sector

It is our view that copyright law is excessively complex and in need of clarity and simplification. That said, it is also the case that under-resourcing around copyright compliance and education is a longstanding and recurrent problem in schools, the GLAM sector, and within government. As long-practising copyright educators and practitioners, we understand the need for complexity and the benefits of ambiguity. We do not want to see the problem of underfunded libraries and cultural heritage institutions turn into a problem of bad law because the sector was underfunded in engaging with that law--both in terms of compliance and submission development.

GLAM sector underfunding also impacts the ways in which GLAM sector institutions understand risk, support their staff, and behave as market actors. With underfunding comes acute risk aversion. Combine that with a strong commitment to public service and doing good, and you end up with a sector unwilling to act in any way that might upset a rightsholder, result in a lawsuit, or even potentially generate a cease-and-desist letter. It is also the case that many within schools and the GLAM sector fail to distinguish between moral and economic rights. Copyright is an assertable right; it’s a right to sue. But many within the sector instead understand copyright as an obligation on potential users to always seek permission, even for harmless, marginal non-commercial uses.

This is further exacerbated by a lack of professional development and an unwillingness to invest scarce resources in the services of professional copyright practitioners--usually non-attorneys who specialise in compliance and risk management around copyright issues. What you end up with is a sector so risk averse that it is reluctant to use even the clearest of the exceptions and limitations available under the current Act. Which means that the public benefit Parliament envisioned when passing the existing exceptions and limitations in the current Act has not been fully realised.

For limitations and exceptions to be valuable to the bulk of the GLAM sector, what is needed are supporting interpretations, combined with strong liability protection and safe harbours against lawsuits, as long as GLAM sector workers operate in good faith. It is not reasonable to ask for a ‘plain English’ copyright law. The international nature of the law, the evolving interpretations of the Courts, and the benefits of constructive ambiguity make a plain English version out of reach. But it is reasonable to ask that MBIE note the current state of the GLAM sector’s needs around compliance support. There is a strong need for resourcing around guidance documents, copyright advice, and education.

We ask that MBIE support our efforts as an organisation without commercial interests in expanding our resource base so that we and other organisations can better support the GLAM sector and schools to both

comply with copyright and make full use of the exceptions and limitations granted by Parliament now and in the future.

Climate Change and Copyright

There is a small but growing literature focusing on how intellectual property policy can support the transition to a carbon-free future and adaptation to known climate change impacts. Tohatoha strongly encourages MBIE to review that literature and work with others in government and industry who are working towards carbon restriction and climate adaptation. Much of the focus has been on patents, but copyright in particular, as it relates to software, is very much part of the conversation.

Tohatoha urges MBIE to expand this review to include a review of copyright and climate change as part of the government's climate change mitigation and adaptation strategies.

Suggested Readings

Rimmer, Matthew, Intellectual Property and Clean Energy: The Paris Agreement and Climate Justice (October 29, 2018). Intellectual Property and Clean Energy: The Paris Agreement and Climate Justice, Singapore: Springer, 2018.

Shabalala, D. (2014). Climate change, technology transfer and intellectual property: options for action at the UNFCCC. Maastricht: Maastricht University.

Zhou, Chen. 2019. "Can Intellectual Property Rights within Climate Technology Transfer Work for the UNFCCC and the Paris Agreement?" *International Environmental Agreements: Politics, Law & Economics* 19 (1): 107–22. doi:10.1007/s10784-018-09427-2.

Azam, M. Monirul. 2011. "Climate Change Resilience and Technology Transfer: The Role of Intellectual Property." *Nordic Journal of International Law* 80 (4): 485–505. doi:10.1163/157181011X598445.

Ştefănescu, Monica, and Constantin Vică. 2012. "Climate Change, Intellectual Property, and Global Justice." *Public Reason* 4 (1/2): 197–209.

Correa, Carlos M. 2013. "Innovation and Technology Transfer of Environmentally Sound Technologies: The Need to Engage in a Substantive Debate." *Review of European Community & International Environmental Law*22 (1): 54–61. doi:10.1111/reel.12022.

Rimmer, Matthew, Mike Lloyd, George Mokdsi, Doris Spielthenner, and Ewan Driver. 2015. "Intellectual Property and Biofuels: The Energy Crisis, Food Security, and Climate Change." *Journal of World Intellectual Property*18 (6): 271–97. doi:10.1111/jwip.12043.

Ockwell, David G., Ruediger Haum, Alexandra Mallett, and Jim Watson. 2010. "Intellectual Property Rights and Low Carbon Technology Transfer: Conflicting Discourses of Diffusion and Development." *Global Environmental Change Part A: Human & Policy Dimensions* 20 (4): 729–38. doi:10.1016/j.gloenvcha.2010.04.009.

Abdel-Latif, Ahmed. 2015. “Intellectual Property Rights and the Transfer of Climate Change Technologies: Issues, Challenges, and Way Forward.” *Climate Policy (Earthscan)* 15 (1): 103–26. doi:10.1080/14693062.2014.951919.

Ockwell, David G., Jim Watson, Gordon MacKerron, Prosanto Pal, and Farhana Yamin. 2008. “Key Policy Considerations for Facilitating Low Carbon Technology Transfer to Developing Countries.” *Energy Policy* 36 (11): 4104–15. doi:10.1016/j.enpol.2008.06.019.

Sullivan, Karen. 2011. “Technology Transfer and Climate Change: Additional Considerations for Implementation under the Unfccc.” *LEAD Journal (Law, Environment & Development Journal)* 7(1):1–16.

Goeschl, Timo, and Grischa Perino. 2017. “The Climate Policy Hold-Up: Green Technologies, Intellectual Property Rights, and the Abatement Incentives of International Agreements.” *Scandinavian Journal of Economics*119 (3): 709–32. doi:10.1111/sjoe.12179.

Littleton, Matthew. 2009. “The TRIPS Agreement and Transfer of Climate-Change-Related Technologies to Developing Countries.” *Natural Resources Forum* 33 (3): 233–44. doi:10.1111/j.1477-8947.2009.01228.x.

Objectives

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?

Tohatoha’s concern about the proposed set of objectives is that the public interest objective (the second one) lacks clarity and strength. We would like to see a stronger statement about the value of open access to information, knowledge, and creative works to society as a whole. We believe the Objectives are the place to include this statement.

Providing strong guidance to the Courts on the public interest and the importance of this objective would help ameliorate the stark inequality that exists between powerful commercial interests and the GLAM sector, schools, and new and emerging artists who create transformative works.

We would also call MBIE’s attention to Article 27 of the Universal Declaration of Human Rights which reads, “*(1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*” The Right to Culture, as this Article is called, protects both the users and creators of culture and knowledge; it calls for a balance between the interests of each. To the extent that there is a power imbalance, we see this playing out not between creators and consumers, but rather between individuals and public service providers on the one side and corporate interests on the other. For this reason, we support a stronger public interest Objective.

It is our belief that the Copyright Act, as it now stands, is not achieving any of these Objectives particularly well, with the possible exception of number 4, though we note that the Marrakesh

implementation is still incomplete. We will detail these shortcomings through the rest of this submission and so only note them here.

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?

Making laws technologically neutral and adaptable is a desirable goal. It would also benefit the Courts to fully understand that technological neutrality is considered a benefit and was part of the goal of this review. That said, that value can be expressed elsewhere as part of the drafting process. The goal of technological neutrality does not rise to the level of an Objective.

What weighting (if any) should be given to each objective?

New Zealand is a nation created via Treaty between two peoples. Honouring this Treaty and living up to the promises of our ancestors and tupuna should be the first Objective of all law in New Zealand. Much as in the United States there can be no law higher than the Constitution, in New Zealand there can be no law or obligation higher than honouring Tiriti O Waitangi. For this reason, we would encourage the fifth Objective to become the first.

The first two Objectives as written lay out the key balance at the heart of all copyright legislation. The right of the copyright owner versus the right of the copyright user. Tohatoha feels that it is beyond the scope of this review to attempt to value one of these over the other. It is only in the particular facts of a particular case that weighting can be assigned to one Objective over the other, because the path of justice cannot be predicted. For this reason, we would encourage MBIE to merge these two Objectives into a single Objective focused on striking the correct balance between copyright owners and users. We would then encourage MBIE to include an Objective supporting the Public Interest.

Suggested set of Objectives[1]:

1. Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi.

2. Provide incentives for the creation and dissemination of works where copyright is the most efficient mechanism to do so, while balancing the rights of users of copyright works to use, adapt, and enjoy those works.

3. As part of that balance, support the public interest by ensuring reasonable access to works for use, adaptation and enjoyment by providing a robust set of exemptions and limitations.

[1] Tohatoha also fully endorses the changes to the Objectives proposed by InternetNZ.

4. Create and facilitate competitive markets whose bounds are widely understood. Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law.

5. Meet New Zealand's international obligations.

Rights

What are the problems (or advantages) with the way the Copyright Act categorises works?

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?

It is not clear, most particularly to GLAM sector institutions whose staff are often reticent to apply professional judgement in this area and are neither trained nor empowered to make what is effectively a legal interpretation. As a general rule, these very risk averse institutions are more likely to overapply copyright, rather than underapply it, which does mean it is more likely than not that copyright protections are overapplied.

The ambiguity of the standard combined with the impact of decades of severe under-resourcing - both generally and specifically in the area of copyright education and staff professional development - has led to a situation where GLAM sector institutions act inconsistently across the sector, while at the same time chilling projects that would serve the public interest. The impact is that "skill, effort, and judgement" has not been enacted as a standard within the sector. Instead, the standard has become, "how much risk does this use of this work present to this institution and how much risk is this institution willing to bear for this use at this time?"

In Practice
What?
GLAM sector institutions create two kinds of digital surrogates where the question of "skill, effort, and judgement" is raised: 2D scans of out-of-copyright 2D works and 3D scans of 3D objects.[2] These objects may themselves be copyright works, as in the case of a sculpture or they may be natural items, such as a skeleton. In cases where a surrogate is made from a copyright work, it is generally agreed that copyright continues to exist in the reproduction and that the reproduction can only be done under a license agreement.

The question is, does the "skill, effort, and judgement" put into the digital surrogates of out-of-copyright or natural objects rise to the level such that the digital surrogate is itself a new copyright work? [3] [4]

[2] We would draw MBIE's attention to a good summary of the issues with 3D surrogates: Andrea Wallace, "#RealTalk: 3D Digitization & Surrogate IP Rights." 30 March 2017. (accessed: 5 April 2017.) https://surrogateiprights.org/3d-digitization-and-surrogate-ip/.

[3] Note that this question has been addressed by other jurisdictions. US: *Meshwerks v. Toyota*, 528 F.3d 1258 (10th Cir. 2008); *Bridgeman Art Library v. Corel Corp.*; UK: See Intellectual Property Office.

As a further complication, the creation of 3D scans of 3D artefacts by museums involves outsourcing to companies that own the equipment needed to create the scans. It is unclear whether these 3D scans represent new original copyright works or simply factual expressions of an existing non-copyright work. The threshold of originality, in the absence of court cases or interpretive guidance, becomes a matter of judgement and willingness to take on risk.

Why?

The ambiguity around this issue has created the following problems around digital surrogates in the GLAM sector:

1. Different institutions have come down on different sides of this issue creating inconsistency and confusion across the sector. While the major heritage institutions like Te Papa and National Library are using the "no known rights" statements from NZGOAL, other institutions are not. There remains variation across the sector. There is also a problem with the "no known rights" statement itself in that it fails to make a definitive statement and is often read as a "use at your own risk" statement.
2. Without clarity on the question of whether or not a digital surrogate of an out-of-copyright or non-copyrightable object draws a new copyright, it is a matter of judgement whether or not it is possible to license these surrogates, openly or otherwise. It is also risky to create a commercial enterprise around these objects, both for the institutions themselves and for third parties.
3. It is perceived as risky for users to reuse these items, and schools, libraries and other risk averse institutions are reluctant to use them without clarity on their status. Tohatoha has fielded this question multiple times from different institutions within the sector over the past year.
4. There is a risk, if digital surrogates are copyright works, that the public domain will be permanently locked up, with no visual artworks or surrogates ever really entering the public domain. At the same time, there is a risk that if the 3D scanning process does not create marketable objects, then it will be harder for this innovation to become profitable. There is a need for balance here and almost certainly a need for different policies for 2D versus 3D surrogates.
5. The long-term chronic underfunding of the GLAM sector as a whole is creating a risk that institutions will choose to undermine the due course of copyrights timing out and works entering the public domain in favour of monetising digital surrogates. It is Tohatoha's position that the underfunding of GLAM not be solved on the back of the public domain. While we do not object to GLAM sector institutions monetising their collections, we do object to immiserating the public domain to do so.

Copyright Notice: digital images, photographs and the internet. P.3 1/2014.https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481194/c-notice-201401.pdf Germany: See English language reporting on recent case here http://ipkitten.blogspot.com/2019/02/digitized-images-of-works-in-public.html. This post includes a link to the German case, but the case is not provided in English.

[4] Note the debate surrounding surrogates, digital and otherwise, is robust. Please see the attached article's bibliography. Lara Ortega, *How to Get the Mona Lisa in Your Home Without Breaking the Law: Painting a Picture of Copyright Issues with Digitally Accessible Museum Collections*, 18 J. Intell. Prop. L. 567 (2011).
Available at: https://digitalcommons.law.uga.edu/jipl/vol18/iss2/11.

How?
This issue arises because neither international treaties nor national copyright laws foresaw the wide-scale creation of digital surrogates by museums and other institutions. Technology developed and the law has lagged behind. There is, as yet, no international consensus to fall back on.

Unlike with scans of text material - such as libraries do with out-of-copyright books - the creation of a digital surrogate for a painting, photograph, or other 2D museum object may very well require considerable skill and effort, while also not meeting the originality standard. Therefore, the question is whether or not "sweat of the brow" or "skill, judgement, and effort" top the "slavish copying" written about in the UK literature of the 19th and 20th centuries.

It is worth noting here that in 20 years of library practice and library copyright practice, I have never once heard this issue discussed in a library context. Libraries frequently make digital surrogates of books that include artistic works. Librarians do not ever question whether the text portion of an out-of-copyright work should be handled differently than the artistic works. Libraries also have not attempted to adopt a commercialisation model to profit from their digital surrogates, as museums are currently, and have been attempting for some time. The digital surrogate issue is very much a museum issue and not a whole of GLAM issue.

Who?
This issue impacts everyone because it impacts the way our cultural heritage can be used, interacted with, and shared. GLAM institutions themselves are uncertain what they can and can't monetise. Schools and libraries that have an interest in using and reusing digital surrogates are forced to make complex risk decisions and are left having to teach the controversy to students, which is hard as teachers themselves don't understand the issue.

This issue also impacts the commercial sector. There are a wide range of potentially commercially exploitable digital surrogates of New Zealand works. They could be profited from if they were in the public domain through use on coffee mugs, sofa cushions, high quality reprints, 3D models, scarves, etc. There is a huge range of commercial goods that could be recreated to both share, celebrate, and profit from New Zealand's Pākehā and manuhiri cultural heritage.

Objectives

1. Provide incentives for the creation and dissemination of works where copyright is the most efficient mechanism to do so.

Copyright is not the most efficient mechanism for encouraging the creation and dissemination of digital surrogates. Rather, the public interest mission of heritage institutions is the most efficient mechanism. Public outreach and engagement is a core part of the mission of these institutions. Copyright is currently acting as a barrier to the dissemination of these works and to the creation of new works derived from these works.

2. Permit reasonable access to works for use, adaptation, and consumption, where exceptions to exclusive rights have net benefits to New Zealand.

Copyright law already provides access via the limits on duration for each type of work. The question at hand is whether digital surrogates are themselves new works such that the clock restarts on the duration of copyright for these surrogates.

3. Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law.

The potential to create eternal copyright in what is effectively a single work, through the use of digital surrogates, presents market barriers to commercialisation, creates confusion around duration and the originality standard, and degrades respect for the law.

4. Meet New Zealand's international obligations.

There is a wide variance across countries in how digital surrogates are treated under the law. New Zealand has room to create innovative policy to meet local needs and demonstrate international leadership.

5. Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi

Tohatoha recognises and respects the need for a sui generis system to protect taonga and taonga-derived works. We encourage MBIE to consider that in the context of GLAM sector use of digital surrogates.

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?

There are three issues that we at Tohatoha encounter regularly with data.

The first is the general confusion about the line between "compilation of data" and data. If the goal is to protect data and not simply works made from data (ie. compilations) then copyright is probably not the right tool. A sui generis system for data, as found in Australia, would be a better tool. If the goal is to keep data open but protect compilations, then there should be clarity about that within the law itself. Tohatoha regularly fields data questions to which we aren't able to provide a clear answer because the law itself is outdated and unclear.[5]

The second issue is the explicit statement in NZGOAL, echoed in the Issues paper, against CC0. CC0 is particularly important for data because, though attribution can be waived under CC-BY, few understand that and so license stacking becomes a problem. New Zealand needs to offer an unambiguous way to release data and data compilations into the public domain. We will provide additional commentary on this issue in our response to question 23.

[5] For example: Is data provided via an API protected by copyright? Tohatoha suspects the answer to this is no, such data points are not protected because they lack a copyrightable underlying structure, but following consultation with multiple IP lawyers, we are unable to confidently provide guidance on this to those who ask.

The third issue is that there is confusion about data-as-fact. The nature of data, and metadata, is that it is about factual bits of information. There is consistent confusion over this across the schools, GLAM, and NGO sectors. Facts, even facts that took much time and effort to acquire, cannot be copyrighted. Nonetheless, these risk averse institutions are hesitant to make full use of datasets and to accept that the data they create--often in the form of metadata--is itself not protected by copyright.

In Practice

What?

New Zealand libraries and museums create significant amounts of bibliographic metadata. This is information about books, films, and other works held by libraries. As part of the work of ensuring that these works are findable and to ensure that the interloan system - both locally and internationally - is able to function, this metadata is uploaded into a database called WorldCat. WorldCat is “owned” by a US based not-for-profit organisation called the Online Computer Library Center (OCLC). There have been multiple lawsuits over the past 10 years over who owns this metadata and to what extent OCLC can withhold this metadata from member libraries and others to preserve their commercialisation options.

OCLC currently contracts with National Library, but also with others around New Zealand.

Why?

To the extent that the metadata itself is copyrightable then OCLC has a very valuable asset--one created by public servants whose work was done in the course of their employment and one that, for most records, were in fact created by US government employees whose work is not covered under copyright law, at least within the bounds of the US. OCLC has a strong financial motivation to claim ownership of this metadata in contracts and in terms and conditions.

How?

The bibliographic metadata in OCLC is generally divided into two categories. The first category should not attract any copyright protection at all, namely the bibliographic data itself, title, author, physical dimensions, etc. The second category is the subject heading and classification. This will generally include a Library of Congress heading and classification and a Dewey heading and classification. The Library of Congress subject headings are a US government work and so not covered by copyright and OCLC itself owns the Dewey system of library classification. This means that for most works, most of a given bibliographic record should be in the public domain.

Who?

The question of how to ensure that bibliographic metadata is treated as a dataset - at least in cases where no copyrighted system of classification is used - is one that impacts all libraries, including those in museums, and all library users. It also impacts taxpayers, as having the work of public servants commercialised by outside organisations without compensation is deeply undesirable.

Objectives

1. *Provide incentives for the creation and dissemination of works where copyright is the most efficient mechanism to do so.*
   Data is frequently being described as the "new oil." There is no need to incentivise its creation, but there is a need to enable its use by risk averse non-commercial institutions. As things stand now, GLAM institutions are generally comfortable using data they generate or create, but they are less comfortable releasing that data. They often devote considerable resources to questions of licensing, even though only the underlying structure of the data is protected. Both as users of data and as rights-holders over data, GLAM institutions tend to behave as though data were protected in the same way as other copyright works, even though that is not what the Act says.

2. *Permit reasonable access to works for use, adaptation, and consumption, where exceptions to exclusive rights have net benefits to New Zealand.*
   The current law around data creates confusion. Protecting data under a sui generis system, as is done in Australia, might end up benefiting access by removing what the GLAM sector as a whole sees as a complicated and hard-to-comply-with set of rules. That said, there is also a risk that a new system would add to the confusion. As it stands now, the Act gives good access to data, but it does so in a way that is so confusing that the potential benefits are not realised in practice.

3. *Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law.*
   The current system is neither effective or efficient, fails to provide clarity or certainly, inhibits the development of markets in negative ways, and creates so much confusion that respect for the law is lost.

4. *Meet New Zealand's international obligations.*
   Data is an area where there is considerable room for policy innovation within our international agreements.

5. *Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi*
   Data-as-taonga is a current framework being put forward by Te Mana Raraunga and others within the Māori intellectual property and WAI 262 space. Tohatoha supports this framing and encourages the government to consider data-from and data-about Māori as part of its response to WAI 262.

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

There is room for considerable simplification here by removing the list of works where the employer is the first owner and simply stating that the employer is the first owner of copyright works created in the course of an employment relationship, including for contractors. We would refer you to Te Papa's submission for examples of how this plays out in the GLAM sector. We would also add that we know this to be a problem in other sectors as well including in universities, NGOs, and schools. The exclusion of film and sound recordings from the employment rule is nonsensical given the relatively recent development of the smartphone and YouTube.

The Commissioning Rule is out of step with international law and practice and unduly burdens artists, photographers, and other small scale creators.[6] Under a clarified and expanded employment rule - one that ensures that all categories of works are included - there is no need for a Commissioning Rule.

Those who commission works are free to request that creators sell them the copyright, but there is no reason for that to be the default position--particularly given that the commissioner owns the rights even when they fail to pay the creator. With the exception of commercial photographers, whose interests are well looked after by the New Zealand Institute of Professional Photography, most creators are at a relative power disadvantage when being offered a commission. This imbalance is widened by the Commissioning Rule.

Objectives

1. *Provide incentives for the creation and dissemination of works where copyright is the most efficient mechanism to do so.*

Where intellectual property is created in the course of employment, it is reasonable for that to fall to the employer. A straightforward rule that covered all types of works would ensure that copyright remains an efficient mechanism.

International experience demonstrates that the Commissioning rule is not needed to provide incentives for the creation of copyright works. Eliminating it would simplify the Act and help to balance the power inequity between individual creators and those who commission their works.

2. *Permit reasonable access to works for use, adaptation, and consumption, where exceptions to exclusive rights have net benefits to New Zealand.*

No impact.

3. Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law.

A simplified system of assigning first copyright would help GLAM institutions and others more readily identify copyright owners.

4. Meet New Zealand's international obligations.

No impact, though the elimination of the Commissioning Rule will bring New Zealand in line with international norms.

5. Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi

This analysis did not consider the impact on taonga and taonga-derived works. MBIE should consider this by working with Iwi, Māori creators, and others.

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[6] Tohatoha expects that these groups will provide evidence on this question and would encourage MBIE to review submissions from photography groups in particular.

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?

The current rules, taken from the UK, are ambiguous, leave excessive room for interpretation, and fail to address the matter of AI created works. For works where a human is creating a work using a machine, as I am now writing on a computer, or as I do when I set up a camera at a particular spot and set it so that it captures movement, or when I fly a drone to a particular location and film--these are all computer assisted works. For these, it is clear where authorship and the creative spark rests: in the human being who initiated the work. There is room for greater clarity in terms of identifying which human in the process is the creator, particularly because this is important when determining duration.

Tohatoha would strongly suggest that there is no current work being done that doesn't fall squarely into the category of computer assisted works. AI as it now exists is about the application of increasingly complex algorithms, but these algorithms do not rise to the level of an AI entity of the sort that has the ability to claim authorship or to be the source of the creative spark in a work.

A world where a computer can imagine, create, and participate as a market actor rather than as a form of capital is world so far limited to science fiction. But this is not the first time that the question of nonhuman authors has been raised. Animal created works, photographs and painting in particular, have been a long standing site of controversy. Different jurisdictions have come to different conclusions, but it seems reasonable to apply the same set of principles to computer generated works.

In thinking through the likely challenges posed by AI created works, Tohatoha believes there are a range of issues that need resolution before a framework for managing the IP of AI entities can be designed. Much as there exists in most jurisdictions a range of laws around the treatment of animals, so too will AIs need a similar regime attending to their welfare needs. Until these legal protections are in place, it is not possible to legislate or regulate because the legal rights and protections these entities enjoy are still undefined.

But since MBIE asked, the easiest challenge we see is duration. Computer generated works, much like works by the Crown, will need to have a statute limited duration, as AIs do not seem to have any particular lifespan and could, in theory, exist forever.

There is also the question of first ownership. Under New Zealand law many different kinds of entities have the ability to own intellectual property--companies, incorporated societies, any organisation with a legal existence. The challenge is that because these entities cannot create a work, there must exist an employment relationship or other agreement that allows the transfer of the IP to the company or other legal entity. This relationship, most often an employment relationship, is governed by a range of laws and subject to regular democratic review through elections, consultation processes, and of course trade unions. In the case of AI, there is as yet no framework for understanding the rights of such an entity and no trade union representing their interests.

If an AI entity is capable of the act of creation, in such a way that is both original and demonstrates a genuine creative spark, then such an entity will require protection under the laws as well as a legal framework for managing the market around its intellectual property. Creating a class of slave AIs, creatures whose work can be economically exploited, but who have no rights under the law would be a

highly undesirable outcome, both for the AIs and for human workers forced to compete with these unprotected computer entities.

Further Reading

Denicola, Robert, Ex Machina: Copyright Protection for Computer-Generated Works (2016). 69 Rutgers University Law Review 251 (2016). Available at SSRN: https://ssrn.com/abstract=3007842

Julia Gregory, "Press Association wins Google grant to run news service written by computers", *The Guardian*, 6 July 2017, https://www.theguardian.com/technology/2017/jul/06/press-association-wins-google-grant-to-run-news-service-written-by-computers

Andres Guadamuz, "Artificial intelligence and copyright", *WIPO Magazine*, October 2017, https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html

Dr Paul Lambert, "Computer Generated Works and Copyright:
Selfies, Traps, Robots, AI and Machine Learning", *European Intellectual Property Review*, 2017, https://osf.io/preprints/lawarxiv/np2jd/download

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Do artists receive a fair share of the revenue generated from their work?

AND

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?

It is clear that copyright as it currently exists fails to meet the economic needs of most artists and authors. Those creators whose work is used as the basis for the publishing industry, the video game industry, the music industry and so on, are also those who receive the least compensation for their work.[7] Tohatoha supports policy that rebalances the power dynamic between those who create copyright works and those who broker them, ie. publishers, record labels, and game companies.

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

Government information managers have a wide range of legal and regulatory tools available without the need to rely on copyright to meet their information management goals, outside of a very few narrow exceptions. To the best of our knowledge, there are two Crown entities currently benefiting from Crown Copyright: StandardsNZ and the MetService. Tohatoha has no objections to carving out a form of Crown copyright for these two entities, but strongly encourages MBIE to eliminate Crown copyright for all other Crown entities, or to create an assertable Crown copyright but leave open as the default. Tohatoha

[7] Tohatoha would point you to the data provided by the NZ Society of Authors and other groups representing the interests of individual creators. Note that groups like WeCreate and others are industry representatives, not representatives of individual creators.

believes that an assertable Crown copyright, one that requires registration and renewal, is the simplest way to achieve the Crown's conflicting interests. Tohatoha also believes that the current 100-year term is bizarre, unhelpful, and provides no benefits at all to anyone.

NZGOAL has now been in place since 2010. There is sufficient evidence that the New Zealand government is committed to the principles of Open Government over the long-term. Much of the information released to the public is educational, informational, and intended to be shared widely among the public anyway. The Crown is not in the business of running a publishing house, a record label, or a movie studio. When it produces or commissions these works, it is almost always as part of public information campaigns, for educational purposes, or to otherwise communicate with a portion of the public. Crown copyright creates a barrier to these purposes, most particularly in schools, libraries, and other risk averse institutions.

Second, the work involved in having civil servants apply Creative Commons licenses to individual works is substantial. Tohatoha is funded to support this work and while we are committed to NZGOAL, the entire process is a bit absurd. The default position should be 'open'. Civil servants are busy people and adding an unfunded mandate like NZGOAL just to protect Crown copyright seems wasteful and unneeded. Rather, the burden should be on those agencies, like StandardsNZ, to assert copyright. It would also be useful to see an economic analysis that considered how much money is brought in through the licensing of Crown works versus how much the Crown spends on NZGOAL administration, rights clearing for Crown copyright, and training civil servants on copyright law.

Finally, there is a large collection of legacy works that should be released for reuse, preservation, and public access. Without a central Crown copyright authority, heritage institutions, schools, and other usually publicly funded institutions are unable to do their work. Digitising Crown works, sharing them with students on Learning Management Systems, and adapting existing works to meet current needs or serve new audiences is an administrative nightmare. Few institutions in New Zealand are resourced to do the detective work of figuring out which current agency has inherited the copyright and who in that agency is authorised to license the work, and then go through the considerable challenge of convincing that person that they do have the authority, teaching them enough about copyright so they understand why a license is needed, and then providing one on one NZGOAL training. The current situation is a waste of time, resources, and certainly leaves everyone involved with substantially less respect for the law.

There is a place for Crown ownership of copyright works, but that rests mostly in the procurement process for large public infrastructure projects. It is sensible for the Crown to be able to negotiate ownership over architectural and other planning documents. Crown copyright can be an asset in this process and that is one reason that we are allowing for an assertable right. There is also a need to ensure that those funded to create copyright works through Creative NZ and other artistic patronage funding are able to retain their copyrights. Tohatoha does not believe that eliminating or transitioning Crown copyright to an assertable right should impact on these projects.

Tohatoha further recommends that even if the government decides to abolish Crown copyright, it should still establish and fund a copyright administration office for the whole of government. There is a strong need for a central authority to provide licenses, advice, and education on copyright to government at all

levels. Currently, this work is being done by Tohatoha, the universities, Te Papa, LIANZA, SLANZA, CLNZ, and other groups. Tohatoha works closely with all of these groups and respects their staffs' willingness to step up and participate, and understands the commitment to copyright education and compliance these groups demonstrate.

But this is work that needs to be done or funded by central government, without conflict of interest, and with a stable staff who enjoy secure jobs and long term confidence. Tohatoha's funding for work with government will run out in 2020. Our current funder, StatsNZ, expects us to find a way to fund ourselves or identify a new non-government funder. For that reason, we have been expanding our mission and positioning ourselves away from the work of supporting NZGOAL and copyright. But this is not work that the market is going to fund and it is not work that a philanthropic organisation is going to fund. Rather, this is a core government service. If the government wants to outsource it to us or to another group that is fine, but it must be funded adequately and stably. The current situation is untenable and unsustainable.

In Practice

Tohatoha would refer you to the submissions of UniversitiesNZ, Te Papa, Auckland Libraries and others for examples and details. The problems created by Crown copyright are myriad and impact all sectors and a wide range of New Zealanders.

Objectives

1. *Provide incentives for the creation and dissemination of works where copyright is the most efficient mechanism to do so.*

The Crown does not need an economic incentive to create and release works. It also has a range of other information management tools available to meet its goals around privacy, confidentiality, and security.

2. *Permit reasonable access to works for use, adaptation, and consumption, where exceptions to exclusive rights have net benefits to New Zealand.*

Crown copyright creates barriers across all sectors to the use, adaptation, and consumption of Crown works. These barriers have limited to no corresponding benefits.

3. *Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law.*

Without a central authority managing the Crown's copyrights and securing licenses on behalf of potential users, the current system is Kafkaesque and absurd. It is unreasonable to ask a curator, librarian, or teacher to have to trace the history of a government department and then work through the labyrinthine structure of Ministries only to then have to teach the correct person the details of copyright and licensing. Yet this is what is currently required for these people to fulfill their own public service missions.

4. *Meet New Zealand's international obligations.*

Crown copyright is an area where considerable public policy innovation is possible.

5. *Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi.*

Tohatoha supports additional analysis from a Māori perspective on how Crown copyright impacts their ability to work with the Crown as a treaty partner.

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

Yes, the indefinite term possible under section 117 is a problem. Locking up these works eternally will prevent educational, archival, and other desirable public good uses. Tohatoha recognises that it may occasionally be desirable for libraries and museums to have the freedom to negotiate with donors a longer term of protection than is afforded by New Zealand's copyright legislation. However, we recommend that this should only be for a finite period. There is no benefit to be gained by locking up works into the fourth, fifth and even sixth generation following their creation.

What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?

Tohatoha supports InternetNZ's position on this and refers MBIE to their submission.

What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?

Current law is too narrow and doesn't make room for the range of human creativity on the internet--memes, fan fiction, playful homages, and so on.[8] These types of works have existed for a very long time and have long been part of education, artistic development, and the wider culture. But it is only with the rise of the internet that it became possible for these kinds of works to be widely distributed and to be distributed in a way that attracts the attention of rights-holders.

Examples of works that likely infringe under New Zealand law:
From Reddit: Painters post pictures of themselves with their paintings and then other painters paint the photograph. This one, by Reddit user seamuswray, is titled "I painted the girl who painted the guy who painted the other guy's mom who painted an egret."

and taxonomies for user generated
rate for Science, Technology and Industry,
olicy, "Participative Web: User-Created
economy/38393115.pdf

Fan fiction, such as that found on sites like FanFiction.net also likely infringes.[9] Note that students are sometimes assigned the writing of fan fiction in Creative Writing classes, English classes, and in other educational contexts.[10]

Potential infringements go beyond amateur creative works though and can include app content and other online services based on data.[11]

Why?
Under the current law, noncommercial creative expression is limited in ways that stifle innovation and creativity. Internet platforms like YouTube, Twitter, Facebook, and Reddit are part of most people's everyday lives and creating remixed content for these platforms is an important outlet for creativity and play. It's bad practice and discourages respect for the law when the law is so far out of step with people's lived experiences and community standards. It also creates opportunities for unexpected lawsuits and lawsuits that unjustly target particular forms of creative expression. Updating the law to reflect the way people actually use and re-use copyright works will both increase respect for the law and ensure the compliance work done by schools and libraries conforms to general community standards. At the same time, because creators of user-generated content are not profiting and because the works themselves are not substitutes for the original work, the onus of proving market harm for this review should be on the rights holders.

How?
The current set of limitations and exemptions is simply too narrow to fully capture the range of re-use and transformative creation that technological development has permitted since 1994. A broader exception is needed to permit this kind of noncommercial transformative re-use.

Who?
Everyone who uses the internet to create user generated content (UGC) and enjoys consuming such content is impacted by this problem. Young people in particular are fond of creating this sort of content as part of their normal developmental process as artists, writers, and creators. The scale of the problem is very large; this issue impacts the majority of internet users and all of us who value laws that take into account cultural norms and expectations.

Objectives

1. *Provide incentives for the creation and dissemination of works where copyright is the most efficient mechanism to do so.*

The creators of UGC do not have a financial motive when they create derivative and transformative works. However, the original works often are commercially valuable. The cultural space where creators and their fans play with a work is part of the two-way process of cultural consumption and creation.

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[9] Anson-Holland, James J. 2018. "Fan Fiction: A New Zealand Copyright Perspective." *New Zealand Law Review*, no. Issue 1: 1.
[10] The author of this submission has experienced this with her own children.
[11] See Scassa, Teresa. (2013). Acknowledging copyright's illegitimate offspring: User-generated content and Canadian copyright law. 431-453. In: Geist, Michael. 2013. *The copyright pentalogy: how the Supreme Court of Canada shook the foundations of Canadian copyright law*.

2. *Permit reasonable access to works for use, adaptation, and consumption, where exceptions to exclusive rights have net benefits to New Zealand.*

Culture is a conversation. UGC is a key way in which works are used, adapted, and enjoyed. The net benefit is a thriving and robust creative culture, rather than a culture where creators feel they have to hide their works, even when they are not harming the market for a work or transgressing on the moral rights of the original creator. The sheer volume of this material establishes that UGC is considered part of reasonable access for users of copyright works.

3. *Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law.*

There is no evidence that user generated content harms the market for the original work. To maintain respect for the law, creative noncommercial expression that could be infringing in a commercial context should be protected via an exception or limitation.

4. *Meet New Zealand's international obligations.*

User generated content is protected under fair use in countries that have enacted a fair use exception and is protected under fair dealing in other jurisdictions. Protecting this form of cultural expression does not conflict on our international obligations.

5. *Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi.*

Tohatoha supports MBIE seeking an analysis of this question from a Māori perspective.

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

With the rise of an economy based on the exploitation of data, the need to more clearly place works in the public domain has grown. This is partially why Creative Commons designed the CC0 waiver/license. CC0 is intended to ameliorate the problems with license stacking, unclear attribution obligations for information derived from multiple datasets, and to permit creators to give up as many of their rights as allowed under their jurisdiction.

Unfortunately, New Zealand common law creates a problem for rights holders who want to renounce copyright and release material into the public domain using CC0.[12] This extends to data and other information released under NZGOAL.[13] Tohatoha is not aware of any problems outside of those with data. As far as we are aware, the desire to renounce copyright is largely to solve problems surrounding data use and reuse.

[12] Tohatoha has consulted with a range of lawyers on this matter and this is very much contested. Some lawyers argue that because irrevocable waivers are not permitted under New Zealand common law, relying on CC0 is risky. Given that the point of a license like CC is to provide certainty, and given that NZGOAL does not permit CC0, it is clear that there is an ambiguity that needs to be resolved.

[13] Please review NZGOAL Guidance Note 4 for a more detailed discussion on data and NZGOAL. https://www.data.govt.nz/manage-data/policies/nzgoal/guidance-note-4/

While it is possible to waive attribution under a CC-BY license, this creates confusion on the part of those who wish to reuse the data. Other possible data licenses are not in widespread use in New Zealand and are therefore less useful tools than CC-BY, CC0, or a potential statutory right.

There is also unfortunate confusion within schools and the GLAM sector around the reuse of CC0 material. Some believe, incorrectly, that reusing CC0 licensed works is unlawful or risky because CC0 is not recognised under NZGOAL. Tohatoha believes that a stronger educational programme around copyright law would solve this misconception.

Tohatoha supports options that allow creators and rights holders the widest possible control over their works, including releasing material into the public domain.[14]

What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered? AND Is it clear what the TPMs regime allows and what it does not allow? Why/why not?

There is widespread confusion around the difference between TPMs that work to prevent infringement and TPMs that control access to a work. The interpretation guidance for section 226 explicitly exempts geographic TPMs from the definition of TPMs under the Act. The guidance says that a TPM "does not include a process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it only controls any access to a work for non-infringing purposes (for example, it does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market segmentation by preventing the playback in New Zealand of a non-infringing copy of a work)."

Tohatoha is not aware of any school, library, or heritage institution that has attempted to use the process outlined in the Act to circumvent TPMs. Tohatoha is aware that librarians and others regularly circumvent geographic TPMs and believe that they are doing so under the process laid out by the Act. This is another area where improved education would be beneficial.

That said, the process laid out in the Act is cumbersome and complicated. A simpler process is needed. It is also not useful to limit TPM circumvention to librarians. Universities and schools have staff who specialise in digital technology and they are better placed to perform the necessary technical tasks associated with circumvention.

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[14] Tohatoha refers MBIE to this article for a cross-jurisdictional analysis of possible options. Guadamuz, Andres, Comparative Analysis of National Approaches on Voluntary Copyright Relinquishment (June 5, 2014). WIPO Report CDIP/13/INF/10.

Exceptions and Limitations

A robust set of exceptions and limitations is necessary for schools, libraries, museums, and other public interest organisations to fulfill their missions. These organisations spend many millions of dollars each year on licensing fees and physical copies of copyright works.[15] They provide metadata to make these works discoverable, they preserve these works for future generations, and they provide programming to engage the public with both contemporary and heritage copyright works. None of these institutions have any motivation beyond serving the public, both today's public and future generations of New Zealanders.

These are also very risk averse institutions, not simply because they fear lawsuits, but also because they have a genuine commitment to doing good. Teachers, librarians, and museum workers all want to do what is right and do their best to balance the needs of creators and the public. But to do this they need very clear support from the Act. Without clarity in the Act itself and without interpretive guidance and education, exceptions intended to serve the public good will not be used due to the risk averse nature of those they are intended to support.

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?

Tohatoha regularly works with libraries and museums whose staff believe they have an obligation to police the copying of library users attempting to exercise their fair dealing rights. Tohatoha has worked with librarians who chose to police not only the photocopier, but also library users using their phones to copy portions of works for private research and study. There are also institutions within the sector who refuse to provide high quality images to users out of fear of being held liable should those users breach copyright.

It is our belief that this confusion around enforcement comes from three places. The first is a general sense of responsibility for ensuring that the law is followed and that copyright law is respected. The second is the extreme risk aversion common throughout the sector. Fear of a scandal or even a lawsuit is a strong motivator for these institutions. The third is from the CLNZ license, which does call on educational institutions to police copying done under the license. Staff regularly move between university libraries, museums, public libraries, and school libraries. Librarians and museum staff often do not realise that the obligations around enforcement are specific to CMO licenses, and not the Act itself.

That said, section 43(3) itself also has problems. There is a need to more clearly state that liability rests only with the infringer and not with institutions who provide access to physical and digital versions of works. The five factor test includes 2 factors (c&d) relating to market impact. Market impact should be

[15] Tohatoha refers MBIE to data from UniversitiesNZ, CLNZ, and others for data.

reduced to a single factor for clarity's sake. The nonmarket factors (a&b) are unclear without more context and interpretation. Given the risk aversion common in public interest institutions, more clarity, more interpretation, and more funded education is needed.

What problems (or benefits) are there with copying of works for non-expressive uses like data-mining. What changes, if any, should be considered?

Tohatoha believes that text and data mining of legally obtained works does not infringe on any of the exclusive rights reserved for rightsholders. Data mining and other non-expressive uses of text and other copyright works is a growing and significant activity due to technological developments that have occurred since the Act was last reviewed. We receive questions on this topic occasionally and see a need for greater clarity in the law.

Tohatoha has a range of concerns around current rightsholder practice and believes that an explicit limitation might be beneficial to prevent de facto barriers to this activity.

In Practice

What

Rightsholders, in particular academic publishers and database vendors like ProQuest, Ebsco, and others, are split on how they handle text and data mining. Some allow it under specific licenses, others allow it without additional permissions, and still others do not allow it at all. The Copyright Clearance Center offers a licensing product specifically aimed at this use: RightFindTM XML for Mining.

Tohatoha believes that market-based solutions are unlikely to support equitable access to text and data mining as a tool and moreover are problematic because they effectively create a new exclusive right. Small businesses, digital humanities researchers and students, and NGOs are likely to be excluded from text and data mining-based research if copyright is extended to cover this use.

Why

Libraries hold the licenses for a wide range of information resources and are likely to remain the gatekeepers for many text and data mining projects. This includes those conducted in a university context, but also small businesses and NGOs, who rely on their local public library to support their information needs. Without a clear limitation in the Act permitting this use, and without clarity in the permissibility around breaking any technological protection measures attached to this limitation, risk averse libraries and other information providers will not be empowered to support their users seeking to engage in text and data mining-based research. This will bar most New Zealanders from this type of research.

How

With all new technologies that enable new uses of copyright works there is tension between the rights of copyright owners to monetise this new use of their copyright works and the larger public's desire to innovate and engage with the new technology. However, new technologies do not create new exclusive rights; copyright law is explicit in defining the range of exclusive rights.

Who

Tohatoha believes that the potential benefits of text and data mining should be widely shared across sectors. There is no reason to restrict this activity to non-commercial actors, particularly in light of the benefits the news media could offer to the public through text and data mining projects.

Objectives

1. *Provide incentives for the creation and dissemination of works where copyright is the most efficient mechanism to do so.*

The nature of text and data mining is that it makes use of many different works. No copyright work is created for the purpose of being the subject of a text and data mining project. Ensuring that the law is clear that text and data mining is permitted should not impact the incentive structure around the creation of new works.

2. *Permit reasonable access to works for use, adaptation, and consumption, where exceptions to exclusive rights have net benefits to New Zealand.*

The right to mine works is essentially the right to perform complex database queries on works which a user has the right to access. To take it out of the digital world, this activity is analogous to creating and using a concordance. Given that making concordances has never been an exclusive right under copyright law, there is no reason to now create that right, beyond the desire on the part of large rightsholders to receive additional royalty payments, mostly from libraries, both public and university.

3. *Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law.*

Tohatoha believes that the very nature of text and data mining means that only very large rightsholders, such as the big five publishers, are able to benefit from any potential license. No creator or small rightsholder is likely to attempt to monetise text and data mining because their portfolios simply are not large enough for it to be profitable. This means that creating a competitive market, one not dominated by a few large rightsholders, is extremely difficult, if possible at all.

4. *Meet New Zealand's international obligations.*

Text and database mining exceptions are common and becoming more common across the world. Text and data mining are also generally understood to fall under fair use provisions where those exist.

5. *Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi.*

Tohatoha supports MBIE seeking an analysis of this question from a Māori perspective.

Further Reading

Dr Eleonora Rosati, "The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market - Technical Aspects", Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament

PE 604.942
http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/604942/IPOL_BRI(2018)604942_EN.pdf

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Australian Law Reform Commission, "Non-consumptive Use: Text and data mining", *Copyright and the Digital Economy (Discussion Paper 79)* , 5 June 2013, https://www.alrc.gov.au/publications/8-non-consumptive-use/text-and-data-mining

Australian Digital Alliance & the Australian Libraries Copyright Commission, "Copyright and the Digital Economy: Non-Consumptive Use" (p.26), July 2013, https://www.alrc.gov.au/sites/default/files/subs/586._org_the_australian_digital_alliance_and_australian_libraries_copyright_committee_.pdf

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What are 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?

Parody and satire are important cultural activities worthy of protection under the Copyright Act. At the moment, major media companies have "gentlemen's agreements" between themselves to not take legal action over parody and satire directed at each other's copyright works.[16] These agreements exclude emerging and small scale artists and authors. An explicit exception is needed to ensure that these creators are protected and not vulnerable to a lawsuit. Tohatoha is open to the idea of a corresponding right to dignity should MBIE feel that one is required to protect potential targets of satire and parody.

Tohatoha regularly gets questions about pastiche and caricature from the schools sector. Pastiche in particular is a key pedagogical tool used in arts education. We believe that pastiche is widespread throughout New Zealand schools and that it mostly falls below the radar and does not attract attention or concern. However as it does create a vulnerability, it needs an exception in the Act. Teachers need confidence that they are acting within the law.

What problems (or benefits) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?

A quotation exception is required under Article 10(1) of the Berne Convenvention. Under the Berne definition quotation applies to "literary and artistic works (including, for example, dramatic works, choreographic works, cinematographic works and photographic works), derivative works (including

[16] This is based on statements made their representatives in a variety of forums.

translations, adaptations and arrangements of music) and collections of works such as anthologies and encyclopaedias”

New Zealanders routinely make use of quotation in presentations, in online and email conversation, and in educational contexts. A broad quotation exception would provide wide benefits without harming existing markets. As it is, quotation is so common that the lack of an exception has only inhibited the very risk averse libraries and museums sector and few risk averse universities. These organisations have taken extensive compliance work around eliminating the use of images in presentations shared with students. A clear quotation exception would ease this administrative burden and permit these institutions to provide enhanced educational content.

Tohatoha also believes that the lack of such an exception degrades respect for the law and creates enforcement challenges for more serious infringements.

Tohatoha supports Te Papa’s submission and refers MBIE there for a rich source of examples.

Exceptions and Limitations: Exceptions for libraries and archives

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.

Tohatoha supports LIANZA’s submission on this question.

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.

Tohatoha supports LIANZA’s and the National Library’s submissions.

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?

Tohatoha supports LIANZA’s and the National Library’s submissions.

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?

Tohatoha supports LIANZA’s and the National Library’s submissions.

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?

Tohatoha supports LIANZA's and the National Library's submissions.

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?

Tohatoha supports LIANZA's and Te Papa's submissions.

Exceptions and Limitations: Exceptions for education

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?

No, the law is too limiting and relies on a dated vision of educational methods and this results in challenges around sharing materials using new technologies, both for students and for teachers.

In Practice

- Recording lectures is problematic because the definition of classroom isn't broad enough to include online environments. And yet many lectures are recorded and made available to students for further study and for those who weren't able to make the lecture. An expanded definition of classroom, one that extends to the digital environment is needed.
- Dissertations and theses must have third party material redacted (permission must be sought) before they can be shared on institutional repositories. A quotation right would go a long way toward resolving this particular challenge, but the exception must be clear enough and broad enough to be of use to risk averse educational institutions.
- Text and data mining is often forbidden in license agreements which limits the research methodologies available to students. As an example, Tohatoha knows of a history postgraduate student at the University of Auckland who wanted to analyze US newspapers for the proximity of specific phrases in the lead up to the Vietnam War. Doing this was not possible both because of technological protection measures taken by the subscribed database, but also because the license agreement the university has with the vendor forbid it. Clarity around text and data mining combined with rules against contracting out of exceptions is needed to support these projects.
- MOOCs (Massive Open Online Courses) are offered by tertiary institutes worldwide. New Zealand is particularly disadvantaged in this market compared to US MOOCs because US MOOCs can rely on fair use when incorporating third party readings or video into their courses.[17]
- Many New Zealand tertiary instructors come from overseas or have been educated overseas. They have trouble understanding the extremely restrictive copyright laws of New Zealand and are often

[17] See for example: https://openlearning.mit.edu/sites/default/files/files/fair%20use%20guidelines%20for%20MITx.pdf vs https://www.auckland.ac.nz/en/staff/learning-and-teaching/policies-guidelines-procedures/copyright-at-auckland/teaching/open-access.html

very reluctant to completely revise their presentations and lecture materials to meet our much stricter standard. Convincing them that they must remove images from lecture slides, for example, reduces respect for the law and causes those of us responsible for copyright compliance to look out of step with contemporary educational practice. This makes it much harder for us to police substantive violations of both CMO licenses and copyright law.

Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?

Yes, they are. Public libraries, museums and galleries, and other cultural heritage institutions are excluded under the definition of educational establishment laid out in the Act. These institutions all have education at the heart of their public service missions. At a time when people need access to continuing education and lifelong learning to facilitate flexibility in a changing labour market, it is more important than ever that the law recognise that education is not limited to the traditional school environment.

Tohatoha also supports LIANZA's and Te Papa's submissions.

Is copyright well understood in the education sector? What problems does this create (if any)?

Tohatoha is funded by StatsNZ to work with schools to teach Creative Commons licensing, which requires us first to provide basic copyright instruction. Over the past two years, we have served almost 100 schools by offering training via SLANZA and to individual schools. We can assure MBIE that copyright is not understood by the vast majority of teachers, school librarians, and school administrators. There is confusion around the most basic facts of copyright, such as what the exclusive rights are and to what they apply, to more complex questions, such as who owns the copyright on student work, and what is the relationship between the Act and the CMO license? Our work with them confirms that schools are in dire need of ongoing funded support.

A strong education programme supporting schools, especially one not delivered by commercial actors with an interest in selling CMO licenses, is crucial to achieving widespread compliance and ensuring that schools are able to get the most out of the limitations and exceptions within the Act. Such a programme would need to be a scaffolded mix of in-person workshops, policy consultation and development for administrators, online refresher and new staff training, and the development of communities of practice for teachers and staff who have particular responsibility for compliance, digital literacy, and other copyright issues.

The problems that arise from the current situation include a chaotic mix of under- and over-compliance. Unfortunately, the educational exceptions themselves are far too complex to be implemented or even taught effectively. Most of our work with schools is at a very basic level; we spend a good deal of time helping schools to understand things like "copyright applies on the internet" and "schools can't claim copyright ownership over student work." At the same time the confusion between the CLNZ license and the Act itself leads some schools to mistake their rights under the Act with the license terms of their CLNZ license. This is deeply problematic for both schools and CLNZ, since if schools don't understand enough about the Act to see the value of the license they are more likely to cancel it.

Finally, copyright is a law that was once niche and is now core for all of us who use the internet. Students need to understand the rules around copyright, privacy, and other rules that govern their online lives. Teachers who don't understand this can't themselves teach it to students. At the end of the day, Tohatoha is less concerned with the details of risk management and compliance and far more concerned that students are taught respect for the law and taught to value the rules based framework that governs the digital world. Teachers without that respect cannot teach it to students.

Exceptions and Limitations: Contracting out of exceptions

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?

New Zealand law recognises the need for minimum standards and restrictions on selling products that are unfit for purpose. The Consumer Guarantees Act and the Residential Tenancies Act both provide a set of minimal protections that parties cannot contract out of privately. Other jurisdictions ensure that copyright limitations and exceptions that provide public benefit and serve the public interest are protected from being contracted away. Tohatoha supports the adoption of similar guidelines here in New Zealand.

Libraries and educators in particular need the exceptions they rely on and which have been granted to them by Parliament to be protected. Large academic and educational publishers frequently only sell licenses for databases of scholarly and academic works with very restrictive license clauses in place. Common prohibitions include supplying copies of articles from such resources for interlibrary loan, and restrictions on users printing, downloading or emailing copies. Some publishers restrict the sharing of articles with multiple students, as permitted under 44A. Further, as ebooks become a larger proportion of the collection, it becomes harder and harder to rely on limitations and exceptions granted in the Act, as license terms now govern most of the material held by libraries. As libraries acquire more of their collection content through such subscription and licensing packages this issue is becoming more significant.

Objectives

1. *Provide incentives for the creation and dissemination of works where copyright is the most efficient mechanism to do so.*

Most of the works currently provided under restrictive license terms are scholarly and academic works. The creation of these works does not rely on financial incentives derived from copyright law, but rather the academic tenure and promotion process.

2. *Permit reasonable access to works for use, adaptation, and consumption, where exceptions to exclusive rights have net benefits to New Zealand.*

To permit reasonable access to works, it is necessary to ensure that the Act maintains minimal standards around exceptions and limitations. Without that, digital materials will be governed by license terms that require libraries to contract out of the exceptions granted to them by Parliament. This means that the public benefit intended will not be realised.

3. *Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law.*

A set of minimum standards will help to increase clarity and certainty for libraries. It will also help to ensure that the law is respected.

4. *Meet New Zealand's international obligations.*

Protection against contracting out is common in copyright legislation and is in line with our international obligations.

5. *Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi.*

Tohatoha supports MBIE seeking an analysis of this question from a Māori perspective.

Tohatoha recognizes that offering prohibitions on contracting out is a complex process. We provide the bibliography below to support MBIE in working through the various options for enacting protections.

Further Reading

Herbert Smith Freehills LLP, "Copyright and the Digital Economy: contracting out of fair use or fair dealing", *Lexology*, 25 February 2014, https://www.lexology.com/library/detail.aspx?g=18db42f5-61f4-42b6-8951-c57b1218220f

J Carter, E Peden, K Stammer 'Contractual Restrictions and Rights Under Copyright Legislation' (2007) 23 Journal of Contract Law.

Australian Law Reform Commission, "Contracting Out", *Copyright and the Digital Economy*. https://www.alrc.gov.au/sites/default/files/pdfs/publications/17._contracting_out.pdf

M Kretschmer, E Derclaye, F Favale and R Watt, A Review of the Relationship between Copyright and Contract Law for the UK Strategic Advisory Board for Intellectual Property Policy (2010)

D Clapperton and S Corones, 'Unfair Terms in Clickwrap and Other Electronic Contracts' (2007) 35Australian Business Law Review 152, 175.

DA and ALCC, Submission 213; Parliamentary Library, Submission 107

R Wright, 'Libraries and Licensing: the eFuture will Need Legal as well as Technical Skills' (Paper presented at VALA 2012, Melbourne, 9 February 2012).

V Moffat, 'Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking' (2007) 14(1) University of California Davis Law Review 45.

Exceptions and Limitations: Internet service provider liability

Tohatoha supports InternetNZ's and LIANZA's submissions on this issue.

The definition of ISP in the Act captures libraries, museums, and other GLAM sector organisations. These are organisations who need protection from liability, but not for the same reasons that more traditional ISPs need protection. Public service providers who work for the public benefit need their own exception, one that recognises their limited resources, differing technological capabilities, and mandate to serve the public good.

Transactions

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.

Tohatoha regularly works with small community groups, clubs, and church related organisations who hold small scale private events like regular movie nights, dance halls, and similar sorts of things. Often these are focused on the well-being of seniors, young teenagers, and new mums. The groups who make their way to us have usually had someone in their community tell them that they are "breaking the law" and that the organisers are risking a lawsuit and sometimes even jail time.

For these sorts of very small-scale noncommercial uses there isn't really a good license available. Often, they are advertised in church newsletters and on community Facebook groups, so they aren't quite private. But they also aren't quite public events either. The organisers generally don't have funds available to pay a license and any charges are usually gold coin donations for tea and biscuits.

Tohatoha believes that these kinds of small-scale noncommercial uses should be more clearly permitted by CMOs and other rightsholders. The CMOs are reasonable organisations, they are not interested in suing a group of 7-12 seniors or new mums watching a movie together in a church hall. Nor are they interested in trying to profit from these noncommercial activities. They should more clearly state that on their websites and MBIE should consider clarifying a catchall exception around these activities.

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.

Tohatoha regularly works with libraries and museums who face this challenge. We refer you to Te Papa, Auckland Libraries, and other GLAM sector submissions for a wide range of examples. LIANZA's submission as well includes data gathered from libraries on this question. This issue is extremely widespread and presents barriers across the sector to fulfilling the public interest mission of these organisations.

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?

Tohatoha refers MBIE to Te Papa, LIANZA Auckland Museum, and other submissions from across the sector.

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?

Tohatoha is aware of this having happened multiple times and refers MBIE to submissions from across the sector.

Tohatoha also notes that in the course of working with GLAM sector institutions preparing submissions it has found that there is frequently confusion around this issue. It is not uncommon for "copyright" to be cited as the problem, when in fact the complaint has been around privacy, cultural sensitivity, or something else.

Copyright is often used as the excuse for a complaint even when the complainer isn't the rightsholder or the item is out of copyright. Copyright is an idea that many people understand can be used as a valid reason to ask that an item is not shared and so overapply it when the actual complaint is something entirely different. GLAM sector institutions do not always have enough expertise to recognise when this is happening and so do pull things down citing copyright as the reason, even when the Act itself doesn't apply.

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

Tohatoha enthusiastically supports Te Papa's and LIANZA's submissions.

We also note that a GLAM Safe Harbour provision, which could be implemented as a liability limitation, is crucial to realising the public benefit these organisations provide. No GLAM institution has either the resources or the will to engage in risky activities. Moreover, these institutions have a strong commitment to serving the public good. In the digital age, serving the public requires making use of digital technologies. This should not place these institutions at risk of lawsuits which could drain the public purse and make it far harder for other organisations to engage digitally.

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?

Tohatoha receives questions relating to this issue occasionally. The problems we see are mostly related to misunderstanding around the ability to waive attribution. If a rightsholder uses a CC-BY licence and chooses to waive copyright, they need to ensure that this is communicated to future users. In a digital environment where information is sometimes dissociated from its original metadata, this can be problematic.

Tohatoha supports a clear statutory right to renunciate to resolve this problem and ensure that rightsholders have the ability to release works into the public domain.

Enforcement of Copyright

What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?

AND

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

Rightsholders and exclusive licensees must retain the exclusive right to take enforcement action. The act of creating a copyright work, something most of us do each day, should not force us to be in the business of monetising that work. Nor should we be vulnerable to a CMO deciding to act in what they believe is our best interest without our express consent.

Giving that right over to someone else, whether that be a CMO or other organisation, makes a range of assumptions around what rightsholders want and to what lengths they are willing to go to enforce their wants. Rightsholders create works for a range of reasons. Money is a common one, but since copyright applies automatically to all copyrightable works, there is no reason to assume that it is a universal one or even the most common one.

Rightsholders might also face business or reputational risks were someone permitted to act on their behalf. Rightsholders who are concerned about infringement are free to work with CMOs or other to enforce their rights as they see fit. There is no need for others to act on their behalf without their express consent.

Other issues: Copyright and the Wai 262 inquiry

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.

We believe so, but encourage MBIE to work directly with Iwi and other Māori groups.

Do you agree with the Waitangi Tribunal's use of the concepts 'taonga works' and 'taonga-derived works'? If not, why not?

Tohatoha believes this question is more appropriate for Māori to answer.

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?

Tohatoha does not believe that there would be a conflict. Copyright is one part of a more complex regulatory environment. Privacy, security, libel, confidentiality and so on are all part of what must be considered when sharing or creating new works. Adding an additional set of legal boundaries should not

create conflict at all. Particularly since schools, the GLAM sector, and others do work to meet what they see as their obligations around matauranga Māori already, having those boundaries clarified and codified will only support existing efforts, which are often done without clarity.

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?

Yes. Tohatoha believes that it is important for the Crown to develop a coherent response to WAI 262 and that this workstream is an important part of that response.

How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?

MBIE must fund this engagement for it to be genuine and for it to capture a wide range of points of view. Tohatoha has devoted well over 100 staff hours to reviewing, developing, consulting, and writing this submission. For us, this comes to about $7,500. We are a small NGO and are fortunate to have resources that allow us to engage with government. There are other organisations, groups, and individuals who are not resourced for government engagement. Those voices, ideas, and perspectives are important. They are vital if the government wants to work effectively as Treaty partners.