

## **Te Hunga Rōia Māori o Aotearoa, the Māori Law Society**

### **Submissions on the Issues Paper – Review of the Copyright Act 1994**

5 April 2019

#### **Introduction**

This submission is made for and on behalf of Te Hunga Rōia Māori o Aotearoa, the Māori Law Society (THRMOA) and addresses Māori interests on the Issues Paper on the Review of the Copyright Act 1994 (the **Issues Paper**).

THRMOA considers that this review is necessary, given that the legislation has not been substantively reviewed in over 25 years. Further, THRMOA agrees that there is a need to review the Copyright Act 1994 to ensure it can deal with developments in technology that have already occurred and are yet to occur.

For Māori, there is also a need to review the impact that the Copyright Act has had on Māori. Specifically, the impact of the Copyright Act on Māori relationships, including kaitiaki relationships with traditional knowledge, mātauranga Māori, and traditional cultural expressions, including taonga works.

THRMOA also considers that this review is necessary in light of and considering the recommendations of the Waitangi Tribunal in its report, *Ko Aotearoa Tēnei* (WAI 262).<sup>1</sup>

In particular, any copyright regime must be consistent with New Zealand's obligations under Te Tiriti o Waitangi/Treaty of Waitangi (TOW) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Finally, there is a need to clarify what the government's role is in relation to traditional knowledge, mātauranga Māori, and traditional cultural expressions, including taonga works.

This submission expands on these general statements and makes specific comments on the Issues Paper below.

#### **THRMOA**

THRMOA was formally established in 1988. Since then, the Society has grown to include a significant membership of legal practitioners, judges, parliamentarians, legal academics, policy analysts, researchers and Māori law students. Our vision is *Ma te Ture, Mo te Iwi – By the Law, for the People*.

THRMOA encourages the effective networking of members, makes submissions on a range of proposed legislation, facilitates representation of its membership on selected committees, and organises regular national hui which provide opportunities for Māori to discuss and debate legal issues relevant to Māori.

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<sup>1</sup> Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (WAI 262, 2011). The WAI 262 report can be accessed here:

<https://www.waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>.

When making submissions on law reform, THRMOA does not attempt to provide a unified voice for its members, or to usurp the authorities and responsibilities of whānau, hapū, and iwi, but rather, seeks to highlight areas of concern, and suggest further reform options where appropriate.

## **General Overview**

It is THRMOA's view that the intellectual property system, and in particular, the Copyright Act 1994:

- has not and does not adequately recognise or protect traditional knowledge, mātauranga Māori, traditional cultural expressions, and taonga works, or Māori and kaitiaki relationships with traditional knowledge, mātauranga Māori, traditional cultural expressions, and taonga works;
- is not consistent with the WAI 262 report; and
- is not consistent with New Zealand's obligations under TOW and UNDRIP.

THRMOA notes this review does not include an all-of-government consideration of the government's role in relation to traditional knowledge, mātauranga Māori, and traditional cultural expressions, including taonga works and/or the government's role to protect Māori relationships, including kaitiaki relationships, with traditional knowledge, mātauranga Māori, and traditional cultural expressions, including taonga works.

Without an all-of-government review and clarification of government's role around the recognition and protection of traditional knowledge, mātauranga Māori, and traditional cultural expressions, including taonga works, it is difficult to adequately ensure the review of the Copyright Act 1994 is consistent with the WAI 262 report and consistent with New Zealand's obligations under TOW and UNDRIP.

To help achieve this, THRMOA are of the view the model of outcomes should include a fourth outcome that seeks to recognise, preserve, and protect the integrity of our cultural heritage.

THRMOA encourages the government to continue work in this area towards a fully inclusive intellectual property system including a fully inclusive copyright regime, that recognises and protects traditional knowledge, mātauranga Māori, and traditional cultural expressions, including taonga works and/or clarifies the government's role in helping to protect Māori relationships, including kaitiaki relationships, with traditional knowledge, mātauranga Māori, and traditional cultural expressions, including taonga works, and ensures that our intellectual property system that is based on a model of partnership and is TOW compliant.

## **Public domain**

One of the primary issues with the intellectual property system is the concept of public domain, which assumes (in most instances) that anything that is published, and is not subject to an intellectual property right or some other legal restriction, is free for anyone to use or exploit.

This concept is inconsistent with the responsibilities placed on kaitiaki, whose roles and responsibilities are enduring. These roles and responsibilities apply not only to the particular expression of the work, but also the underlying knowledge and mātauranga Māori, and all that that encompasses.

As most traditional knowledge is published, any intellectual property right, copyright, or legal restriction has expired, and this adversely impacts on the ability of any kaitiaki to carry out their roles and responsibilities.

If the intellectual property system and the copyright regime fail to adequately recognise and protect kaitiaki relationships and responsibilities, then the integrity of our cultural heritage is at risk.

THRMOA recommends that this review introduce a legal restriction over traditional knowledge, mātauranga Māori, and traditional cultural expressions, including taonga works, and keep that legal restriction in place until our intellectual property system is reviewed, and a new model is developed that is TOW compliant.

### **Resale rights**

THRMOA support the introduction of a resale rights regime, particularly for painters and sculptors, and in particular, artistic works based on traditional knowledge, mātauranga Māori, traditional cultural expressions, and taonga works, and including two-dimensional works that may incorporate these works.

### **Duration of copyright**

THRMOA recommend the review consider a protection regime that reflects tikanga and therefore, grants an enduring right of protection to traditional knowledge, mātauranga Māori, traditional cultural expressions, and taonga works.

The preservation of the integrity and longevity of our cultural heritage is critical to ensuring our intellectual property regime and the copyright regime is compliant with TOW.

This is not inconsistent with the current copyright regime given the duration for some copyright works is different, eg Crown copyright.

### **Reversion of rights**

THRMOA recommend that any reversion of rights policy for older published or recorded works that include traditional knowledge, mātauranga Māori, traditional cultural expressions, or taonga works are protected and preserved, and consultation is carried out with the relevant whānau, hapū, or iwi, before making these works freely accessible.

A framework consistent with the recommendations in Chapter 6<sup>2</sup> of the WAI 262 report would be appropriate.

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<sup>2</sup> Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Te Taumata Tuatahi* (Wai 262, 2011) vol 1 at 183-205.

## **Digitisation, collection management issues, and orphan works**

As mentioned above, the WAI 262 report also considered and made recommendations around when the Crown controls mātauranga Māori. We recommend this review consider how those recommendations could be reflected in the digitisation and collection management issues raised in this issues paper.

Considering these recommendations as part of the review of the Copyright Act will ensure the Act and our intellectual property system are consistent with tikanga and TOW compliant.

## **Public photographs or videos**

Under our current copyright regime, a person may take a photograph or video in a public setting, and the photographer will own the copyright work, and is able to copy the work, issue copies, communicate to the public, adapt the work, and authorise others to do so. These activities can all be done without consent of the persons or subjects in the photograph and are inconsistent with tikanga, and therefore, are not TOW compliant.

If the photograph or video is taken of an artistic work that is based on traditional knowledge or mātauranga Māori, then these activities will be undertaken without the consent of the kaitiaki. This is also inconsistent with tikanga and is not TOW compliant.

THRMOA encourages the review to consider whether it is appropriate

## **Moral rights**

THRMOA are of the view that moral rights in relation to traditional knowledge, mātauranga Māori, traditional cultural expressions, and taonga works should also be enduring to better reflect tikanga and be TOW compliant.

## **Performers rights**

THRMOA are of the view that the protection granted to performers and performances in the copyright regime does not adequately protect kapa haka performers or kapa haka performances.

THRMOA is happy to see that Aotearoa/New Zealand is now a party to the WIPO Performances and Phonograms Treaty (WPPT), but encourages this review to consider extending those rights to provide enduring rights to the authors of kapa haka performances. Enduring rights, including moral rights, to these works, including any photographs, videos, or recordings of performances would better reflect tikanga and be TOW compliant.

## **Collective management organisations and enforcement**

Given the time and cost associated with maintaining and enforcing copyright works, establishing an agency outside of government to assist Māori with the identification, recognition, and protection of traditional knowledge, mātauranga Māori, traditional cultural expressions, and taonga works would go some way to ensuring that our cultural heritage is preserved.

At the same time, if Māori can be assured that their traditional knowledge, mātauranga Māori, traditional cultural expressions, and taonga works are protected, then Māori would be more inclined to share traditional knowledge, mātauranga Māori, traditional cultural expressions, and taonga works for the betterment of all.

## **WAI 262**

THRMOA supports MBIE developing a workstream that focuses on the protection of taonga works alongside the Copyright Act Review, that includes specific engagement with Māori and wider engagement with the broader community.

It will be important to get clarification on what taonga works may cover as part of this workstream, and whether MBIE will adopt the definitions given in the Wai 262 report.

THRMOA agrees with your summary of the recommendations in the WAI 262 report.

THRMOA does not agree the recommendations in the WAI 262 report adequately protects and preserves our cultural heritage or that the terms taonga works and taonga-derived works would result in a copyright regime that was TOW compliant.

As discussed above, adequate protection for our traditional knowledge, mātauranga Māori, traditional cultural expressions, and taonga works requires many steps including:

- an all-of-government consideration of the government's role in relation to traditional knowledge, mātauranga Māori, and traditional cultural expressions, including taonga works
- consideration of the government's role in protecting Māori relationships, including kaitiaki relationships, with traditional knowledge, mātauranga Māori, and traditional cultural expressions, including taonga works
- introducing a fourth outcome for our copyright regime that seeks to recognise, preserve, and protect the integrity of our cultural heritage
- an examination of the concept of the public domain
- a review of resale rights, reversion of rights, duration of copyright, digitisation, collection management issues, orphan works, when public photographs and videos are appropriate, moral rights, performers rights, collection management issues, and enforcement
- consideration of the recommendations in Chapter 6 of the WAI 262 report alongside this review to deal with the many issues that arise when the Crown holds mātauranga Māori.

## **In Closing**

Te Hunga Rōia Māori o Aotearoa are grateful for the opportunity to comment on this kaupapa and we hope our submissions assist with the important mahi MBIE is tasked with undertaking. Should you have any pātai or wish to discuss any aspect of our submissions, please feel free to contact Lynell Tuffery Huria at [Lynell.TufferyHuria@ajpark.com](mailto:Lynell.TufferyHuria@ajpark.com).

Ngā mihi nui ki a koutou

A handwritten signature in black ink, appearing to read 'Lynell Tuffery Huria', with a stylized flourish at the end.

Lynell Tuffery Huria  
On behalf of THRMOA