



Art At Risk: copyright, fair dealings and art in a digital age

*Part Two: Background Research
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revised June 2011*

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ART AT RISK: Copyright, Fair Dealings and Art in a Digital Age.

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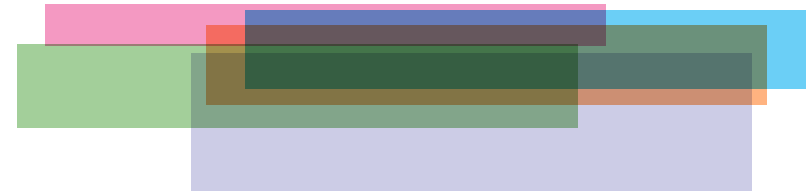
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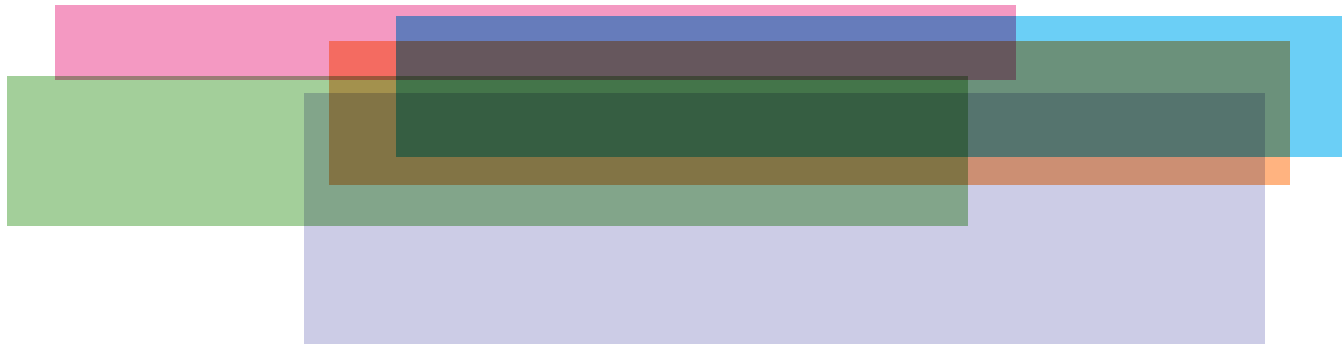
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about

background to the project

The use of digital images by artists is now widespread. In art schools students engage with cultures of remix and appropriation on a daily basis. We need to prepare our students for critical and informed engagements with these media, and as teachers we need the tools to be able to navigate metadata and data fields efficiently and with knowledge of the legal and technical specificities relevant to the digital image. The rules of copyright regarding *text* are now clear. The same clarity does not yet exist for the *digital image* and puts art practices at risk from legal and ethical challenges and negotiations.

A study by American University School of Communication, *The Cost of Copyright Confusion for Media Literacy*, 2007, Center for Social Media, found that

The fundamental goals of media literacy education - to cultivate critical thinking about media and its role in culture and society and to strengthen creative communication skills - are compromised by unnecessary copyright restrictions and lack of understanding about copyright law. ... Copyright law permits a wide range of uses of copyrighted material without permission or payment. Educational exemptions sit within a far broader landscape of fair use. However, educators today have no shared understanding of what constitutes acceptable fair use practices.¹

This project investigated uses of the digital image and the associated delivery of software and copyright information in the tertiary classroom. Through the provision of a set of resources **art at risk** presents practical information for teachers working with digital images. Based on case studies in visual art where students develop projects that push at the boundaries of copyright, appropriation, and manipulation of digital images **art at risk** documents, analyses, evaluates, considers and recommends methods for engaging with digital images whilst paying careful attention to the laws of copyright, understandings of appropriate ethical behaviours, our critical and social contexts in New Zealand Aotearoa, and movements towards open source and creative commons approaches to digital media.

Copyright myths abound. Some of the more common include: 'if it's on the internet it's in the public domain', 'if it doesn't have a copyright notice it's not copyrighted', 'my use isn't hurting anybody - in fact it's free advertising', 'copyright violation isn't a crime', 'linking is okay because then I'm not saving the file to my harddrive', 'it was fair use'.²

From Flickr to Facebook to YouTube students engage both still and moving digital images and negotiate different permissions and database resources every day. A recent study by technology giant CISCO predicted that by 2013 video will make up 90% of online communication.³ An understanding of the role of the digital image in the teaching of art is essential to the development of informed and engaged learners who use images not simply because they are there, but because they know and understand the implications of the use of images in a digital age. In this project we have developed guidelines as to how to approach the use of digital images- and answered some of the questions that students ask everyday: What can you download from YouTube? Is everything on Flickr available to use? Can I cut this image up and call it my own? What happens if I upload my project to Facebook? Being able to confidently answer these questions will raise the level of critical debate surrounding classroom engagement with the digital image and allow for deeper research in the use of digital images in tertiary environments.

The core of **art at risk** is a set of case studies drawn from a pool of current art students and recent graduates from art schools in Aotearoa New Zealand. Questions of copyright and remix arose during the development of these art projects either at their gestation or as processes *en route* to final student artworks. It is the teaching recommendations and responses to the processes of exploration and experimentation where students push at the boundaries of the complex legal nexus of copyright and privacy that are documented here.

art at risk was inspired by the Centre For Social Media's *Recut, Reframe, Recycle*, Duke Law's Centre for the study of the Public Domain, and similar projects currently being undertaken elsewhere such as the JISC (Joint Information Systems Committee) in the UK. We were keen to see if lessons can be carried over from these international studies and applied to the local situation in Aotearoa New Zealand and also to discuss those things which might be peculiar to this country.

We consider the unique bicultural situation of Aotearoa New Zealand and cross-cultural uses of traditional art forms of Iwi Maori in contemporary digital images. At times these have been collaborative or creative ventures supported by Iwi Maori. What is at issue, however, are protests over appropriation of Maori motifs for derisive send-ups of cultural identity such as in Dick Frizell's *Tiki* series or cultural stripping and re-working of Maori motifs to suit Pakeha ends. Jill Smith notes that,

Pakeha critics and commentators, applying a Western aesthetic, react with accusations that Maori contemporary artists constantly use Western images and technology - a confusion of purpose with methodology. The Western artist who borrows the forms or spirit of a dominated culture still remains in a position of dominance ... what the Pakeha art educator must recognise is that he or she who borrows or appropriates is aware of the consequences of such actions, not under the heading of artistic licence, but in the arena of cultural power and sensitivity.⁴

All tertiary organisations in Aotearoa New Zealand have different methods for engaging with things Maori, due to their location within specific communities. At Otago Polytechnic we have a Mātauranga Māori Policy which seeks to “give effect to the spirit and terms of the Memorandum of Understanding with Ngāi Tahu and Te Kura Matatini Ki Otago Māori Strategic Framework.”⁵ This includes a senior management position of kaitohutohu established by a Memorandum of Understanding between the local Runaka and the Otago Polytechnic whose role is being responsible for actualising the MOU and ensuring the accountability of the organisation to the Runaka.⁶ If there is anything of interest or significance to Iwi Māori in their work proposal students are guided through the appropriate sources for advice regarding Mātauranga Māori, and in each case the issue of personal connection and relationship to the image is carefully articulated.

At Otago Polytechnic we also have a default CC-BY policy that supports “open access as an educational imperative”.⁷ This is the complete opposite of most tertiary institutions Intellectual Property Policies where staff must obtain permissions to release their work under a license different from “all rights reserved” copyright. The Polytechnic CC-BY license relates to all student and staff work produced within the institution. This makes any discussion of copyright and remix particularly pertinent to art contexts and in many ways inspired the structure of this project.

In New Zealand art is considered a research output. The Tertiary Education Commission defines research as an,

original investigation undertaken in order to contribute to knowledge and understanding and, in the case of some disciplines, cultural innovation or aesthetic refinement. ... In some disciplines, the investigation and its results may be embodied in the form of artistic works, designs or performances. ... Original creative work is in and of itself considered to be research and it fulfils the criteria of the PBRF Definition of Research where it results in the generation of new knowledge, an enriched sense of the possibilities of the art form, or communicates in a profound or meaningful way through an artistic medium. Work in the creative and performing arts is regarded as research where it is as an aesthetic or exploratory rationale and value.⁸

1. American University School of Communication, *The Cost of Copyright Confusion for Media Literacy* (Center for Social Media, September 2007), http://www.centerforsocialmedia.org/files/pdf/Final_CSM_copyright_report.pdf

2. Brad Templeton, “10 Big Myths about copyright explained” (October 2008), <http://www.templetons.com/brad/copymyths.html>
Brad Templeton was the first owner of a “.com” company (in the world) and is a member of the EFF; See: Committee on Intellectual Property Rights and the Emerging Information Infrastructure, *The Digital Dilemma: Intellectual Property in the Information Age* (National Academy Press: Washington DC, 2000), 124-127.

3. Jon Stokes, “Cisco report: the exaflood will be televised,” *Arstechnica, Business* (10 June 2009), <http://arstechnica.com/business/news/2009/06/cisco-report-the-exaflood-will-be-televised.ars>

4. Jill Smith, “Multiculturalism and Biculturalism Art Education in New Zealand,” *ACE Papers*, Issue 8, paper 5 (January 2001), http://www.education.auckland.ac.nz/webdav/site/education/shared/about/research/docs/FOED%20Papers/Issue%208/ACE_Paper_5_Issue_8.doc

5. Otago Polytechnic Management Policy, “Mātauranga Māori 1103.01,” (2007) http://wikieduator.org/Otago_Polytechnic/Matauranga_Maori

6. Justine Camp, James Sunderland, Khyla Russell and Brendan Flack, “Simpa – A very useful toolkit,” *AKO Aotearoa* (2008), <http://ako.aotearoa.ac.nz/ako-hub/good-practice-publication-grants-e-book/resources/pages/simp%C4%81-%E2%80%93-very-useful-toolkit>

7. Jane Park, “‘Attribution Only’ as Default Policy–Otago Polytechnic on the How and Why of CC-BY,” *Creative Commons News* (22 April 2008), <http://creativecommons.org/weblog/entry/8235>

8. Tertiary Education Commission, *PBRF Guidelines* (2006), <http://www.tec.govt.nz/Documents/Publications/pbrf-full-report-2006.pdf>

project outline

Art at Risk details uses of the digital image within the legal, social, political and economic nexus of copyright and privacy. We offer suggestions, methodologies and information for teachers and learners using the digital image in tertiary art contexts.

Part One: Teacher's Resource contains the posters and case studies that make up some resources for use in the classroom. They are supported by the extensive research background contained here in part two.

Part Two: Research Background details the relationship between art and copyright. Much of this material supports the case studies, and offers further research and references for teachers interested in developing their own understandings of the legal and ethical frameworks that surround the digital image.

Introduction to the History of Copyright offers an introduction to histories and current positions regarding copyright law in New Zealand, including the “copyright bargain”: this is the trade off where authors are given the monopoly to their work for a limited time, in return their work can be used in public contexts (education, libraries, and fair use/fair dealings) in order to add to the pool of knowledge, which is the public good.

International Contexts for Copyright addresses the international legislative context and introduces some of the different global jurisdictions for copyright.

Information about Copyright Permissions outlines the commercial culture of permissions, where we are asked to pay to use material. We highlight problems where licensing potentially oversteps the public domain and restricts fair use in art contexts.

Introduction to Copyright Alternatives and Creative Commons introduces the creative commons model and outlines the myriad of alternatives to an all rights reserved approach to image distribution.

Matauranga Maori Contexts explains how traditional knowledge is not covered by current practices in copyright law. Traditional knowledge has been displaced by imperialistic cultures and their economic, and commercial laws, meaning that traditional

laws have been subsumed or in some cases obliterated. In Aotearoa we are trying to find a place, in tikanga, which addresses the intellectual, material and spiritual things around Matauranga Maori. This adds an ethical dimension to our study. In Matauranga Maori contexts, the expression or form and the idea are one, whereas in western copyright traditions these are separated for economic (commodity) purposes. This raises issues of the commodification of intellectual property.

Exhibition and Publication: which is which? looks at what it means for an art work to be defined as published, the differences it makes if it goes on the internet and when something becomes a commercial venture in legal terms.

Words: A Glossary of Useful Art and Legal Terms is a listing of words; their definitions and interpretations that unpack the legal information and languages needed to read the case studies. It also includes those words that introduce the specificities of art contexts into discussions around copyright.

Where to Next? contains references to the written material and an annotated bibliography arranged by topic for those wishing to look further into any of the areas defined.

Overall **art at risk** offers a critical context for evaluating the use of digital images in classroom situations. **The information contained in this project is not legal advice.** It is a collection of resources relevant to the use of images in a digital context. In addition, as we have noted over the term of this project, terms and conditions of use for images on sites changes rapidly often with little or no notice as does the law itself, so students and teachers need to remain vigilant.

methodology: how can digital images be used?

[Kant's] attempt to distinguish different sorts of judgement, and to circumscribe the powers and limits of each, remains crucial today. For it warns us against the totalitarianism of reason, or (to express the point more modestly) against the endeavor of scientists, philosophers, political despots, and religious fanatics to impose a unified field of assessment, in which the same fundamental critical standards would apply across all disciplines. Such an imposition could only have catastrophic consequences, for it would mean the end of any story or novelty, creativity, or invention.¹

This project has involved simultaneous processes of networking, gathering and analysing data and information about copyright. In adopting a case study approach based in the critical methods of art history we allow the data to determine the search criteria, and open up spaces for movement and shifts in the scope and focus of the project. We were concerned to heed Shaviro's warning above, and to not impose a rigid set of assessments to the data, instead we have focused on a form of triangulation where the case studies can be approached from different perspectives in an imitation of the exploration and experimentation that happens in contemporary art contexts. This has allowed us to develop a picture of the complex legal, ethical and moral nexus at which decisions around copyright, fair use and fair dealing are located.

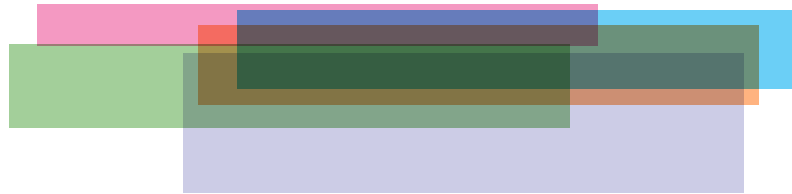
Our goal was not to theorise or make general assumptions but to take an in depth look at a range of scenarios, and ask 'how do we understand copyright?', 'what kinds of 'truths' do we tell ourselves in order to engage with contemporary media?' and, 'what fits within the legal and ethical boundaries of fair dealing?' In the case studies we do not assume conclusions, rather we filter possible answers back and forward through the open question "can I use this?" This approach leaves spaces for interpretation to the reader.

Case study is a research methodology common in social science. It is based on an in-depth investigation of a single individual, group, or event to explore causation in order to find underlying principles. However, we are not social scientists. Working within the discipline of Art History and Theory our methods overlap with those found in critical studies. Critical methods involve an in-depth, longitudinal (over a long period of time) examination of a single instance or event rather than using samples and following a rigid

protocol (strict set of rules) to examine limited number of variables. Critical methods provide a systematic way of looking at events, collecting data, analyzing information, and reporting the results. As a result the researcher may gain a sharpened understanding of why the instance happened as it did, and what might become important to look at more extensively in future research. The art historical method looks to the objects and images of study and thinks about the values, documents, historical data, and contextual meanings that surround the case. Art historical method is concerned with form and the way in which visual artifacts communicate their messages.² Nelson and Shiff write that what distinguishes contemporary art historical method is its "commitment to the processes of mediation; the ways in which knowledge is constructed, conveyed, replicated, instilled and maintained."³

This commitment finds its way unpredictable when pushed up against the real-life instances of ethics and commercial law. For example, the law clearly states that it does not want to get into discussions of art criticism. It does not wish to define art, only deal with matters of "originality" (thus many examples in law come down to a discussion of legal originality and the expression of an idea). By using the case method we have investigated the legal landscape through studying law suits or cases. In particular we have worked closely with legal advisors. This strategy has allowed us to maintain an open perspective on the case studies as well as expand the contexts for assessment of decisions that are made. Law is part of the context for these case studies, but it is not the only one. **At no point are we suggesting that we will be offering legal advice to teachers or to readers of the project, rather we are modelling methods that we have used in teaching practice.** We have looked at the application of the law and in particular at a body of actual judicial opinions which extend the law under the rule of *stare decisis*. **See words.** This clearly intersects with the contextual methods of art history.

This working method has now developed into a set of resources. A significant portion of this resource is taken up with careful and lengthy explorations of the legal and ethical frameworks we find ourselves immersed in. We have attempted to make the finer processes of rights negotiation a little more accessible. At the same time we have highlighted the often glaring contradictions between practice and theory, philosophy and practice, law and action that we have encountered.



1. Steven Shaviro, *Without Criteria*, (MIT Press: Cambridge and Massachusetts, 2009), 11.
2. Robert S. Nelson and Richard Shiff, *Critical Terms for Art History*, (2nd edition University of Chicago Press, 2003), x.
3. Nelson and Shiff, x.

research in the digital image

Here it is where the hinterland of copyright begins; you are standing at its brambled edge, looking out over a failed system of broken grids and trending byways that wander away from their source, intersect, circle endlessly, or dead-end ...¹

This project has reminded us that students should be free to explore the boundaries of their imagination and its intersections with copyright, privacy, free speech and fair dealings. We believe that the task of teachers and mentors is to minimise risk, share the historical and contemporary contexts of art, and introduce students to the work of other artists in the field.

We discovered in the course of the research that copyright is about property law. Who owns the rights to an image becomes further complicated when that image is digital. Legal approaches to the digital image have been spearheaded by desires to control not only the circulation of the image but the technologies which enable the use of the image. This is an increasingly complex area that ties image rights into reinterpretations of historic copyright frameworks and overlapping licensing regimes. As we discovered in this project these arguments have different jurisdictions and because of the tradition of *stare decisis* in case history the ground is always changing. This makes teaching and learning in these contexts fraught.

The protections and rules developed for copyright in text do not easily equate or translate to images. Our research has looked at uses of the digital image. This has led us to focus on the boundaries of physical and digital space. The rules of physical space have been transposed into digital spaces but things move in different ways. We look at real law in virtual worlds and note the inequities particularly in the area of non-commercial art practices. We discuss tensions which exist between western style copyright and existing structures of traditional knowledge which it often overlays without acknowledgement. During the study we were mentored by Ngai Tahu representatives in order to gain a better understanding of Mātauranga Māori and the cultural identity of Iwi Māori. Our understandings will inform our future teaching practices.

How has this material impacted on students? The simple answer is that the original impetus for this project was student driven. We needed a tool to answer questions and solve problems in student learning. As indicated in the methodology we only followed up a small portion of the scenarios in the final case studies included here; those projects which were most broadly illustrative of points of contention or confusion inside and outside the learning context. Some of the impacts on learning will be invisible to observers as students make decisions to **not use** material, or to not undertake projects. Others will be seen in the increasingly sophisticated way that students negotiate digital image rights and the conscious decisions that they make to engage with the legal and ethical boundaries of images. It is a given that students will make work that pushes at boundaries and the unexpected. This must not be seen as problematic for teachers, or else no-one learns anything. We can learn the most from our students as we journey with them through these intricate loops.

Our study includes a survey of teacher responses to the scenarios which was inconclusive in terms of qualitative results. While we draw no strong conclusions from these, as a body of responses we see that most teachers acknowledge the complexity of the subject in that there were very few straight answers. In addition the variety of responses illustrated that although there is a body of knowledge at law on this subject, the general or common knowledge that exists is widely varied and sometimes at variance with the law. This may be because of confusion around the subject, or it may be because of a variance between the legal and art approaches to these topics. One approach requires knowledge of existing and accepted art norms and acknowledges a historical continuum of various practices. The other requires that any form of fixed expression attracts protection as an artwork if it falls within an exhaustive list, which fails to accommodate many contemporary art works, and which is subscribed to as being 'art' as long as it is considered original under the law, regardless of its artistic merit.

Our research has looked at each scenario holistically from legal, art and ethical perspectives. Simultaneous considerations of these aspects is necessary when making decisions around these issues. For many of the student projects the guidance they needed was in reading and understanding copyright statements and *Terms of Use* agreements for web sites and licences. For many of the projects the wider ethical implications of privacy

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were addressed and for a few a closer look at public and private space issues was necessary. For the remaining few projects which re-purposed preexisting content this knowledge also came to the fore and in addition we needed to broaden our understanding of copyright law. In particular we looked at *fair dealings* and the context of where the final work would potentially be viewed, by whom and in what medium.

Copyright was designed to protect the commercial value and ownership rights in an “original” work. It was intended to do this in certain circumstances and for certain practices as set down in legislation (legislative law) which over time has been extended by the courts (case law). But copyright was also founded on the principle of a copyright bargain where certain practices called *fair dealing* are not, to cite Judge Leval, an exception to copyright’s overall objective but, rather, wholly consistent with that objective.²

One of the recurring questions is: “if an artist makes a work that repurposes preexisting content will it fall within fair dealings?” Under *purpose*, in fair dealings, the law says a single copy is allowed for research. In Aotearoa New Zealand art is recognised and valued as a research output. We have looked at when content is published and found that a work which is *exhibited* is not understood to be *published*. Published means making further *copies* widely available to the public – the technology neutral term in the legislation is *communicated* to the public. Art works still attract copyright even when they are not published but they have a different sort of copyright as “unpublished works”. The fact that art works are covered differently when they are considered to be published is crucial for the understanding of the role of visual art in digital copyright contexts. The circumstances which allow fair dealings allow for the possibility for an artist to make use of a prior work if the use is FAIR. The more transformative the use (which is seen as a productive and not just re-productive use) the more likely it is that the use would be considered fair.

Questions students need to answer are:

- At what point does value added exceed that of the original?
- Has the image been transformed?
- Has the use of the image in the new context transformed it and given it a new meaning?

Many aspects of copyright were developed along an economic model regarding distribution where “a work of intellectual production has little intrinsic value until it assumes a form that allows it to circulate through a marketplace.”³ We sought a definition of commercial use relating to art and found an exhibited work which is sold is not considered a *commercial* venture in law. In addition a transformative work very often circulates in a different market to that of the original and it is unlikely to affect the market for the original particularly as a unique object or content (and was made in the context of a research project which is not published and is non-commercial in nature).

However, while an artwork is not published by being created or exhibited or sold, it will be considered to be published, in a copyright sense, if a copy of the work is uploaded to the internet (because it has potentially been *communicated* widely to the public). In a recent study The Centre for Communication of Scholarly Research found that if a purpose was fair for research then it should follow that it was fair for publication. This also follows the logic of the copyright bargain which is the crux upon which copyright law is founded.

To put too great an emphasis on the exclusionary aspects of copyright is to undermine its fundamental public service objective. (Judge Leval)⁴

art at risk considers ways to assess and thereby minimise risk for student projects that notably engage issues to do with privacy and potential illegality, particularly by uploading to the internet. We looked at the projects within and beyond the educational contexts. Although we note that public perception of what constitutes appropriate behaviour (often expressed in community standards) doesn’t completely match with the law, we emphasise again that copyright infringement is a criminal offence and tertiary institutions should endeavour to provide due diligence to protect students from such harm. One way to easily achieve student understandings of the rights and wrongs is to integrate an understanding copyright unit into core digital literacy programmes for students. We include the **Beginners Online Guide to Copyright** as a starting point and suggest those interested also look at the Dunedin School of Art at Otago Polytechnic Digital Literacy course, to see how copyright is seamlessly integrated into student learning in this course.⁵

Copyright statements have continually changed as alternatives to all rights reserved copyright have entered the public sphere. We looked at reading and negotiating their meaning, discussed where rights holders potentially overstate their claims and pointed to current portals for freely reusable media. We offer a way of thinking through these complex frameworks for working with the digital image. This project then acts as a filter for those seeking clarification of the issues around similar scenarios. It is addressed to students, teachers and artists alike as a self-help tool and for practical guidelines in the classroom.

Learning to apply this knowledge critically in relevant situations is part of our responsibility as art educators and part of the process of preparing students “work readiness” so that they have a robust awareness of a variety of real world issues which they might encounter when they leave the tertiary environment.

what's next?

Each of the case studies and posters presented in Part One draws on relevant art examples. As sources of images these art nodes become a useful list of artworks that we hope will enable teachers to engage with this material in the classroom. This area is ripe for further investigation and developing this strand into a more structured learning media could well be the kernel of the next project.

In terms of future research possibilities it could also be providential to look at how art students view creative commons licences, how they choose to use content and how they choose to re/licence their work.

The role of the digital image in the age of copyright has implications for the way in which art teaching is delivered in schools and at tertiary level. The messages we are receiving loud and clear from corporate and law sources is that we can look at appropriation art historically from a pre-sampling period in time as historical artefacts. The irony is that some of this vigorously protected content was produced by animators and musicians at a time when they made use of others' content (freely as in without permission) and became rich off a rich public domain before they lobbied seriously to close the gate to new-comers under copyright term extensions and the erosion of fair dealings.⁶

What started as a practical enquiry into various classroom challenges has brought us to realise that the greater picture surrounding this research is the sustainability of an area of contemporary art practice. Susan Bielstein's parting comments in her book also questions this. She asks what the cost and value to society is of the current state of anxiety and ignorance which abound in the hyperbolic growth of the all consuming *permissions culture* as an economic model.⁷

If we are to be responsible teachers of art in this digital age, we need to take into account the risks that are now inherent in any engagement with images and educate our students in the best and safest ways to navigate this field. This resource is one attempt amongst many to do this.

1. Susan M. Bielstein, *Permissions: A Survival Guide: Blunt Talk about Art as Intellectual Property*, (University of Chicago Press: Chicago, 2006), 26.

2. Stephen E. Weil, "Please Leave Some Room for Robin Hood," in *Ethics and the Visual Arts*, Elaine A King and Gail Levin, eds. (Allworth Press: New York, 2006), 161.

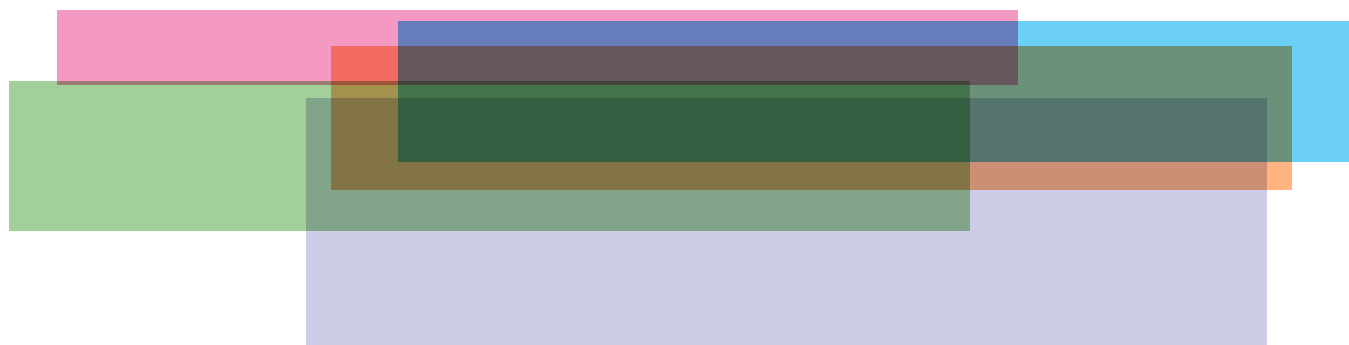
3. Bielstein, *Permissions*, 103. "Copyright in the United States has always been more deeply rooted in the growth of commerce than in the moral right of the author."

4. Weil, in *Ethics and the Visual Arts*, 163.

5. Dunedin School of Art, [Rachel Gillies] "Digital Literacy/Semester 1 Week 8; Can I do that? Copyright Issues and Ethics," *Wikieducator*, Digital Literacy/Semester 1 (2009), http://wikieducator.org/School_of_Art_Digital_Literacy/Semester_1_Weeks_7-12 (accessed 12 July 2010).

6. Siva Vaidhyanathan, *Copyright and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*, (New York University Press: New York 2003), 159-160.

7. Bielstein, *Permissions*, 150.



lie of the land

introduction to the history of copyright

history

In New Zealand our histories of engagement with copyright can be traced through UK legal history. This is the case for all commonwealth countries and is a legacy of our colonial past. In 1709 the earliest copyright statute, the Statute of Anne, outlined regulations for the control of printing and reprinting of books. In this act, the term of copyright duration was fourteen years plus fourteen years renewable. Following this act were, amongst others; an Act in 1734 to protect engraving; a 1787 Act to protect the designers of calico prints; in 1814 there was an Act to protect sculptures; and in the nineteenth century the UK developed Acts for the protection of dramatists, lecturers and musicians, recognising that their works were in the realm of public performance rather than physical reproduction. It is not until 1862 that an Act appears for the protection of “fine arts” – the Copyright (Works of Art) Act which covered painting and drawing.¹ Under current law a work has copyright as soon as it is created. In fact the act of creation is one that asserts copyright. As soon as the expression is *fixed* it is protected by copyright.

Copyright has moved from the periphery to centre stage in a very short number of years due to a huge increase in the availability of visual content and to new flexible media technologies which allow everyone to be creators and users online.² In art school environments raising students’ copyright awareness has become a core component of students’ digital literacy.³ Everytime we search, download, upload, copy, forward or save an image, we are involved in reading and making decisions about copyright information and therefore each day we undertake a certain degree of copyright risk management.

Copyright is not the only means by which copyright holders seek to protect their work or holdings. Other legal remedies include contract (licensing) and code (such as technological prevention measures). Copyright is part of the nexus of laws that form around intellectual property which also includes; layout designs, design registrations, trade marks, domain names and other issues in electronic commerce such as fair trade (passing off or misrepresentation), border protection, patents, plant variety rights, privacy and human rights.

The scope of copyright in the UK is similar but different to US and EU law. And here is where artists often get confused. Say for example you are using an American-derived image in your New Zealand-made artwork to be exhibited at the Tate Modern in

London, where does one begin? It is a question of jurisdiction. **See International Contexts for Copyright.** In general Copyright protects the “original” expression. The test for this varies. Simon Stokes explains; in France a work needs to bear the stamp of the author’s personality and be the author’s own intellectual creation to qualify as an original work. This gives rise to the French equivalent of UK copyright; *droit-d’auteur* or the right of the author. In the UK, the work must exhibit a degree of labour, skill and judgement and in US law the work must possess some minimal degree of creativity in order to be original.⁴

In regard to artworks, UK derived copyright law defers to a list of “artistic works”. Under this system works qualify for protection as “artistic works” irrespective of artistic merit. Not all forms of modern or contemporary art fit easily into these statutory categories and questions can also arise as to the validity of these works which may not be considered artistic in a legal context. **See Words** for more discussion about art works and artistic works.

Contemporary art making can no longer be separated from media cultures of appropriation and reuse. Digital technologies have shifted the ground of image reproduction and distribution. However, there is a “cognitive time lag” between law and art.⁵ Law may protect artworks refused entry by the Art world and prohibit or even criminalise others which are seen as having merit or higher in the art world. As the art world also co-exists with an art market it is not inconceivable that some concepts of art norms ought to be recognised as such by the Law. Currently students learning to be artists need to negotiate the difficult terrain of copyright, at the same time as they negotiate their entry into this art world.

There are exceptions in Copyright Law, under the Fair use doctrine in the US and Fair dealings in UK derived law which provide a defence for use of an others work without permission, on the basis that the proposed use is “fair” according to a set of prescribed exemptions and limitations. One possible exemption is transformative use. Copyright and Fair use expert and legal counsel for Google, William Patry explains this is where

use of another’s work is transformative and not in competition with the original work copied. Derivative works are understood to be transformations or adaptations of existing works bearing features of originality, creativity and individuality.⁶

However, works that incorporate someone else’s material need the consent of the author of the original work/s when they are intended for dissemination widely (as in publication). This sounds reasonable in theory, but as sources of images proliferate, Susan Bielstein points out “this activity is becoming less about the provision of actual images and more about cultivating a brisk trade in the abstract commodity of “permission.”⁷ Patry outlines the thinking behind the use of market forces at work in copyright. The rationale was

that creativity would not be stifled because the market would “control the licence price and keep it within bounds. The reality is that clearing rights has become prohibitive in terms of time and expense and particularly so for amateur use.”⁸ This has given rise to what Lawrence Lessig has dubbed a “permission culture” – where the costs of the law are swamping the benefits of technology.⁹

Many major American Universities are now questioning the erosion of Fair use and Public Domain, particularly on the internet, such as; the Stanford “Fair use Project”,



Keith Aoki, James Boyle
and Jennifer Jenkins
Tales from the Public
Domain:
BOUND BY LAW?,
Center for the Study
of the Public Domain
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American University School of Communication, Center for Social Media, Berkman Center for Internet & Society at Harvard and the Duke University Law Faculty which has a project which looks at incursions into the territories of the Public Domain. William Patry posits the current climate in the title of his book as one of *Copyright Wars and Moral Panics*,

the Copyright Wars must be understood as archetypal responses of businesses that are inherently non-innovative and that rely on the innovation of others to succeed. This fear is manifested in ... congenital marketing myopia”. He goes on to say that “litigation is not a business model but instead is reflective of the failure of a business model. ... The problems in the Copyright Wars are not caused by technologies or by consumers acting badly, and they cannot therefore be solved by laws, and certainly not by more draconian laws and ... woefully misguided view that copyright equals control and that control equals profit.”¹⁰

copyright bargain

Copyright was not intended to be a one way street whereby the authors and their publishers had all the say. It was conceived of as part of a bargain to promote progress in the arts.

In the eighteenth century the term “art” was applied to all kinds of human activities which we would now call crafts or sciences. It designated any *teche* or skill which could be learned: a skill in making products, a skill in practical performance, and a skill in theoretical activities of the mind.¹¹

The rationale was that by incentivising authors with a limited time monopoly on their work, copyright would lead to advances in knowledge through exceptions such as Fair use. Fair use and fair dealings are part of the copyright bargain. “The goal of copyright to promote science and the arts, is generally furthered by the creation of transformative works.”¹²

Each time a new technology has changed the way content gets made or distributed, the law has been adjusted to make sense of the technology and achieve a new balance. That practice of rebalancing has historically sought to promote one overriding public goal; copyright must work for the public good.

The goal of the public good is advanced by “securing” to “authors” an “exclusive right” for a “limited time.” These “exclusive rights” are copyrights but the critical point is that they are granted for the purpose of promoting progress. This is the point behind “limited” duration of the exclusive rights and also the exceptions such as “fair use” right. If the aim of the law was to benefit authors alone then there would be no limitation on rights and no exceptions and we would have a system of perpetual copyright.¹³

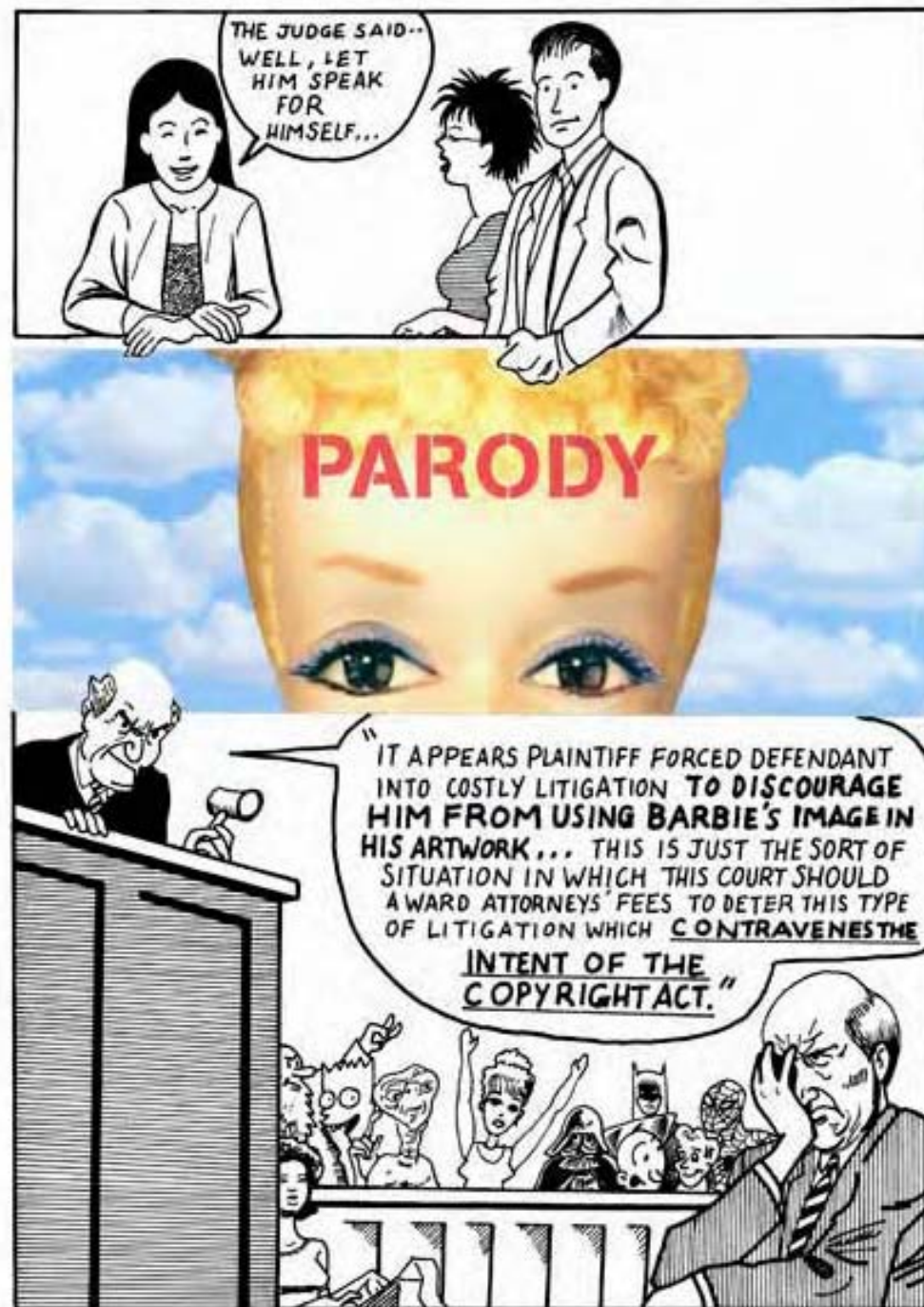
Thus, the primary purpose in granting the monopoly lies in the public good which rests on the work of authors. Public right of access to the intellectual, cultural and social record

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is as important if not the most important goal of copyright. The rewards to the author / copyright holder are secondary to the goal of public good.

Prominent commentators have long cast doubt on the universal applicability of copyright's incentive rationale, and the bloated scope and trend of increasing protections under the most recent copyright reforms. That critique has particular strength when applied to the Internet. The Internet and other digital technologies have drastically reduced the cost of disseminating and creating cultural works [via] social networking, linking and peer recommendations.¹⁴

*Keith Aoki, James Boyle
and Jennifer Jenkins' Tales
from the Public Domain:
BOUND BY LAW?,
Center for the Study of the
Public Domain (March 15,
2006) page 25 and 34.*



Art At Risk: copyright, fair dealings and art in a digital age



1. Egerton Beck, "Copyright in Artistic Works," *The Burlington Magazine for Connoisseurs*, Vol 56, No 323 (Feb, 1930): 107, <http://www.jstor.org/stable/864197>

2. Techdirt, "Could Bolivia Opt-Out Of Berne And WIPO And Forge A New Path On Copyright?," *Techdirt*, (15 July 2010), <http://www.techdirt.com/articles/20100709/03502610149.shtml>.

"One of the biggest problems we have with copyright policy today is the simple fact that it's almost entirely "faith-based," with no real evidence showing that current copyright laws benefit society. ...The Berne Convention rules have massively expanded the scope of copyright law around the globe. The WIPO Copyright Treaty more or less tried to update the century-old Berne rules for the modern age, and (of course) did so by expanding the rules even further. Nearly all the countries in the world have agreed to both of these faith-based agreements."

3. **See beginners online guide to copyright:** EFF Teaching Copyright.

4. Simon Stokes, "Can the law protect works of art and what exactly does it protect?," *The Art Newspaper*, No. 201 (April 2009): 35.

5. Dawn M. Leach, "World Thinking versus Legal Thinking" in Plagiarism in Art (and Art History), special themed issue of *Visual Resources*, Mary Vaccaro, ed., (Harwood Academic Publishers: Philadelphia, 2000): 205; **See words:** Appropriation.

6. William F. Patry, *Moral Panics and Copyright Wars*, (Oxford University Press: Oxford, 2009), 19.

7. Susan M. Bielstein, *Permissions: A Survival Guide: Blunt Talk about Art as Intellectual Property*, (University of Chicago Press: Chicago, 2006), 9.

8. Bielstein, *Permissions*, 9.

9. Stefano Basilco, *Cut: Film as Found Object in Contemporary Video* (Milwaukee Art Museum: Milwaukee, 2004), 51. Lawrence Lessig talks about the rise of "permission culture" in which he says "technically (as in technology) it has become simple to mix and remix culture but it has become technically (under the law) more difficult. The costs of the law are swamping the benefits of technology.

10. Patry, *Moral Panics*, 198.

11. Anne Barron, "Copyright Art and Objecthood," in *Dear Images: Art Copyright and Culture*, Daniel McLean and Karsten Schubert, eds. (Arts Council of England: London, 2002), 286.

12. Australia, *Fair use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age*. Issues Paper, May 2005. See in particular Justice Souter's definition of transformative adaptation.

13. Basilco, *Cut*, 52. Lawrence Lessig discusses the central concept to copyright law of the copyright bargain.

14. Neil Weinstock Netanel, *Copyright's Paradox* (Oxford University Press: Oxford, 2008), 86.

international contexts for copyright

“Fair use” and “Public Domain” are familiar concepts associated with Copyright Law but are not in fact concepts that exist in New Zealand Copyright Law. They are lifted from the pages of copyright law in the United States. Our copyright law was derived from UK law and because of this we use the corresponding body of case law to interpret it. The relevant corresponding concepts in UK derived law are “Fair Dealing” and “out of copyright”. The internet is not “in the public domain.” Things available for view on the internet may be considered as being in the “public sphere” which is something different again. **See words** for definitions of public domain and fair dealing which is similar but different in scope to fair use.

It is important to note that there are national variations in copyright law in all countries and there is no single globally recognised international Copyright Law. One example of variation is that there are differences in the “duration” of copyright in different countries. Duration is the period of time a work remains in copyright after which it is said to fall “out of copyright” and/or into the “public domain”. There are also similarities and these are set out in international treaties such as The Berne Convention.

the berne convention for the protection of literary and artistic works (the berne convention)

Berne is an international treaty which negotiated a minimum standard for reciprocal recognition of copyright in signatory countries. Whether or not something is copyright-free depends on the laws of individual countries and treaties such as Berne do not supersede local laws however, “the Berne Convention rules have massively expanded the scope of copyright law around the globe.”¹

The historical legacy of this agreement can be traced in part to nineteenth century practices where books imported from England were copied wholesale and reprinted and sold on in those countries - one of the worst offenders being America. This practice started to be revisited when America began producing notable authors of its own, such as Mark Twain, who spent much time lobbying for protection of his works in countries, other than the US. The Berne convention was first negotiated in 1886, and has been revisited many times since, but it wasn't until 1988 that the United States agreed to join other countries in this multilateral treaty. The last twenty years have seen a lot of activity around international negotiations. The most important of these are the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty which was drafted to cover

new technologies not covered by Berne, and Trade Related Intellectual Property Rights (TRIPS) where members of the World Trade Organisation (WTO) are required to observe Berne as well.

Berne also explicitly states the need for exceptions that allow quotations from works already lawfully made available to the public as long as they do not exceed the amount necessary for the purpose. Commentary of the Berne 3-step analysis for Fair use reads, “Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.”² This exception excludes material which has not been published before. **See exhibitions and publications**, and **words** for more on unpublished works.

united kingdom (uk)

The Copyright Act of 1911 provided the template for copyright in most Commonwealth countries.

*Although most former colonies and dominions have now had their own copyright legislation for a considerable number of years, for the most part this legislation has tended to follow the model developed in 1911. Some questions have arisen about following the UK approach, most recently in 1998, when Australia was negotiating its Free Trade deal with the United States and opted for the broader scope of exceptions available under a Fair use regime ditching the prescribed exhaustive list under Fair dealings.*³

See also the Gowers Review for UK Copyright Law which is part of the current review.

new zealand

New Zealand law is derived from UK law thus it is imperative that students understand the difference between Fair dealings, in New Zealand law, which is similar but different in scope to Fair use, under United States law. We also have no parody clause although case law is trending internationally to recognize satire as a form of speech. Current New Zealand laws governing copyright include; Copyright Act 1994, Copyright (New Technologies) Amendment Act 2008 and Designs Amendment Act 2010.⁴

australia

Australia copyright law is also derived from UK law but after a recent review to harmonise their laws pending a Free Trade deal with the US, they adopted a Fair use regime. Under the new legislation both Parody and Satire were included.⁵

canada

Canada also bears the imprint of UK law on its copyright law but bordering the United States means it faces pressures to adopt legislation closer to home. There has been much argument in recent times over which fair dealing legislation and jurisprudence position Canada should opt for.⁶

european union (eu)

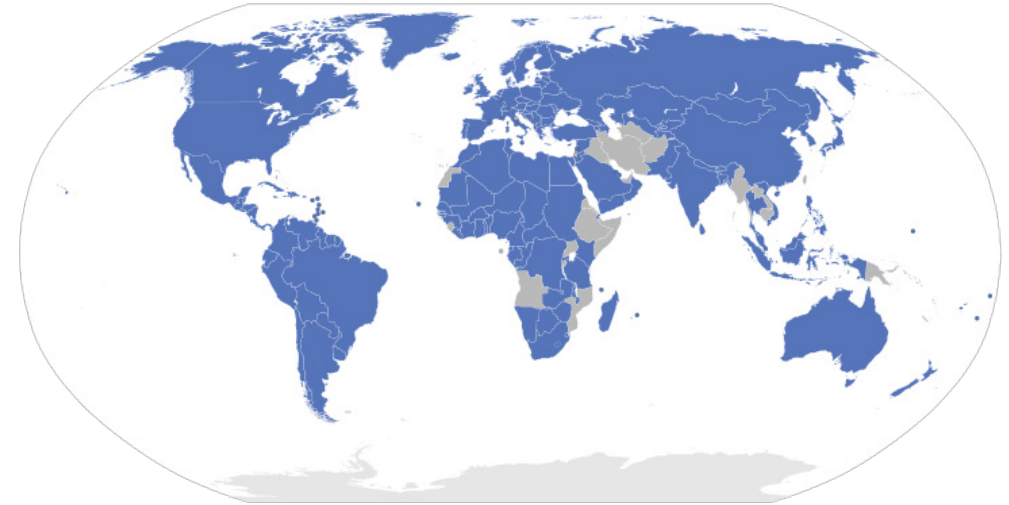
Current reform measures in the EU include The Information Society Directive which aims to harmonise aspects of Copyright law in the digital environment across EU member states. In substance it aims at increasing limitations on Fair dealings made with respect to reproduction rights in favour of the interests of rights-holders. There is also an option in the Directive which mirrors French law allowing for an exception for caricature, parody, pastiche and space to elaborate on definitions of these to allow for artistic practices.⁷

united states

The United States is home to Fair use. It has a more economic basis to its copyright law development compared to authors rights based copyright law we find in the EU and notably France. As noted before Fair dealings is similar but different in scope to Fair use. The period of duration also differs in the US and is complicated by changes in the terms of the Copyright Act of 1978. Recent US Copyright Law Reforms of note are; the Sonny Bono Copyright Term Extension Act, DMCA (Digital Millennium Copyright Act) and VARA (Visual Artists Rights Act). Some argue that the extension of the duration of copyright has created perpetual copyright for copyright holders. In many cases copyright controllers are not the authors or even the heirs of the authors.

international treaties - wipo

Along with the World Trade Organisation (WTO), Trade-Related aspects of Intellectual Property Rights (TRIPS) and The Berne Convention mentioned above, there is one Non-Governmental Organisation (NGO) we have to be aware of on the international scene. This is the World Intellectual Property Organisation or WIPO. WIPO is a specialized agency of the United Nations. It is dedicated to developing a balanced and accessible international system of intellectual property (IP) and is supposed to be the vehicle by which future discussion, negotiation and ratification occur.⁸ Although at least one current plurilateral international treaty, ACTA, is being negotiated in secret and not through conventional WIPO channels.



1. Techdirt, "Could Bolivia Opt-Out Of Berne And WIPO And Forge A New Path On Copyright?," *Techdirt* (15 July 2010), <http://www.techdirt.com/articles/20100709/03502610149.shtml>
2. Australian Copyright Council, *Fair use: Issues and Perspectives. A Discussion Paper*, B124v01, (Australian Copyright Council, February 2006), 482.
3. Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, (Cambridge University Press: Cambridge, 2005), 249.
4. New Zealand Government, *Copyright Act 1994*, <http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM345634.html> See also <http://www.legislation.govt.nz/act/public/1994/0143/latest/relateddocuments.aspx>
5. Australian Copyright Council, "Copyright Information," (1994 – 2009), <http://www.copyright.org.au/information/cit001/wp0005>, see for an overview of Australian law.
6. Dr. Giuseppina (Pina) D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair use," *Social Science Research Network*, (13 Sept 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014404 ; Visual Resources Association (VRA), "Fair use/Fair Dealing: Which Should Give You More Comfort? Plenary Session," *VRA 27 Annual Conference*, Toronto, 2009. http://www.vraweb.org/resources/ipr/fairuse_fairdealing/index.html
7. European Union, "The Information Society Directive," *EUR-LEX, Access to European Union Law*, (2010) <http://eur-lex.europa.eu/en/index.htm> (accessed 12 July 2010).
8. WIPO (World Intellectual Property Organisation), <http://www.wipo.int/portal/index.html.en> (accessed 12 June 2010).

Above right: The 164 signatories of the Berne Convention for the Protection of Literary and Artistic Works. 6 October 2009. Source: released under GFDL/CC-BY-SA-3.0. Map derived from BlankMap-World6.svg by Canuckguy (en.wp), released under PD-self: http://en.wikipedia.org/wiki/File:Berne_Convention_signatories.svg

information about copyright permissions

If a picture is worth a thousand words, then it's a good bet that at least half of those words relate to the picture's copyright status.¹

Art historians, artists, and anyone who wants to use images of others will find themselves awash in byzantine legal terms, constantly evolving copyright law, varying interpretations by museums and estates and despair over the complexity of the whole situation. ... This is a world in which the fragile distance between a belly laugh and a Munch-ian scream can dissolve in a blink.²

Licensing is the way permission is granted between known parties. It is a form of contract by which some or all of an author's exclusive rights (bundle of copyright) can be transferred to other users or copyright holders. Licences can be inclusive or exclusive and the terms of the licence may include a one-off fee or on-going royalties.³ Rights managed images are licensed for a limited time for specific uses, so they are more limited in scope. Royalty-free images are usually based on the file size you require not the intended use. Once licensed, the images may be used many times for certain uses without paying further fees, but the initial license is necessary to "protect yourself." There is also a difference between commercial and editorial use. Generally speaking, "commercial use" means a message intended to help sell a product or promote something, such as advertising. This is in contrast to editorial use such as illustrating news or events of public interest. Most licences require notification if you wish to make any modifications to the images. A typical contract will include the terms of negotiation about what rights are to be transferred, to whom (from whom), for what term and where and under what circumstances the original work can be used.⁴

There are three steps to take in seeking permission to use an image

1. work out if you need to ask for permission and what rights you will need to ask for
2. find out who owns the copyright?
3. request and obtain permission

Talking about the rise of "permission culture" Lawrence Lessig notes that **if you can identify a copyright owner in the work you wish to use, this may or may not be the current owner as these rights can change hands e.g. music and book publishers. You may have less trouble identifying the copyright owner who is a big company but it may be more difficult to get/afford permission to use the work.**⁵

Under current legal thinking if you wish to use the work of others you are beholden to ask permission but the copyright holder is not beholden to reply! This renders the process somewhat inefficient as you will not know whether the request is being ignored or if you have failed to make contact with the copyright owner. Asking is a sign of good faith. **See words:** good faith. You could use the image and hope for the best response. If the image is online or in a publication, you take the risk that perhaps the "cease and desist notice" or "take down" notice will not arrive. But this may not be the only form of notice you receive. There may be a 'please settle for this amount immediately' letter or a 'lets sort this out in court' retort.

The process of asking permission also assumes that the person/s you are asking have the right to grant permission. Recently there have been instances where copyright holders have been called into question for overstating their claims.⁶ For example many book plates and copyright notices included statements such as "no part of this book may be reproduced ... without permission". In this respect the absolute nature of these written prohibitions is an overstatement of the copyright owners rights, because some copying is allowed under fair use and fair dealings exemptions. There have also been other complaints in regard to Copyright Fraud, where works that should be falling out of copyright have been re-copyrighted.⁷

Sometimes negotiation for the use of an image is carried out by agents for the artist/author or by collection societies (for example APRA and CLL in New Zealand). Collection societies are groups set up to monitor and administer the copyrights of a group of similar rights holders, such as music or book publishing. Licensing schemes such as these seek to increase returns to their clients. In some cases the actions of Collection

Societies has been called into question where through pursuit of their licensing regimes they have circumvented Fair use provisions. There is also a view that this impacts on the publication of scholarly articles and inhibits artistic projects.⁸

Creative Commons licences are a form of licence that usually indicate which rights have been waived or reserved by the creating artist and can apply to unknown parties in a form of “pre-licensing”. **See introduction to copyright alternatives and creative commons.**

It is important to note that under the Fair dealings/Fair use exceptions one does not need to seek permission if the use is “fair”. You also do not need to get permission if the work is a “Public Domain” work or “out of copyright”, but you may need to pay for a reproduction fee. Heritage institutions control the access to the public domain objects they own or care for. “The repro fee represents a not-so-subtle claim to the right to authorise the reproduction of a work ... which is the basis of copyright and not an automatic privilege of the owner of the material object.”⁹ In these situations although the underlying image may be in the Public Domain, the source of the image and the reproduction copy that is used can still be an issue.¹⁰ For example a book may claim typographical copyright, and museum reproductions will often claim a new copyright in the reproduction. This is a misnomer and perhaps ought to be called an access fee and the reproductions be provenanced to the source of the original. The decision in *Bridgeman vs Corel* found that there was no new copyright justifiable in such reproductions and in particular copy-photography. **See casebook.**

Permissions and licencing change according to the contexts of the image. There are different rules surrounding “unpublished works” in Copyright Law. **See words.** What then is publishing? Publishing is not creation, and is not always exhibition. An artwork is not published by being exhibited, nor created or sold, only when it is reproduced. **See information about exhibitions and publications.** Wikipedia cites the U.S. Copyright law definition of “publication” as:

the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication. This is different from “Public display” which includes broadcasts and other transmissions and artworks: A work of art that exists in only one copy, such as a painting or statue, is not regarded as published when the single existing copy is sold or offered for sale in the traditional way, for example, through an art dealer, gallery, or auction house. A statue erected in a public place is not necessarily published. When the work is reproduced in multiple copies, such as reproductions of a painting or castings of a statue, the work is published when the reproductions are publicly distributed or offered to a group for further distribution or public display.¹¹

1. Susan M. Bielstein, *Permissions, a survival guide: blunt talk about art as intellectual property* (University of Chicago Press: Chicago, 2006), book jacket.

2. Bielstein, *Permissions* 1.

3. Getty Images, “Getty Copyright 101 – Copyright and Content licensing,” (2010) http://company.gettyimages.com/community.cfm?isource=usa_nav_resources_community_commInvolv See Paul Frank, “Digital Technology and Stock Photography and God Created Photoshop” in Larry Gross, John Stuart Katz and Jay Ruby eds., *Image Ethics in the Digital Age*, (University of Minnesota Press, Minneapolis, 2003), chapter 9. Frank looks at corporate players and developments in rights protection and “Royalty free” images in the stock photography industry and market.

4. Lesley Ellen Harris, *Licensing Digital Content: A Practical Guide for Librarians*, 2nd Revised edition, (American Library Association: Chicago, June 2009).

5. Stefano Basilco, *Cut: Film as Found Object in Contemporary Video*, (Milwaukee Art Museum: Milwaukee, 2004).

6. Committee on Intellectual Property Rights and the Emerging Information Infrastructure, *The Digital Dilemma: Intellectual Property in the Information Age* (National Academy Press: Washington, 2000), 128.

7. Jason Mazzone, “Copyfraud,” *New York University Law Review*, Vol. 81 (2006), 1026, Social Science Research Network, Brooklyn Law School, Legal Studies Paper No 40. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=787244#PaperDownload; Eicher, Charles, “Poisoning the Public Domain: How Web giants are stealing the future of knowledge,” *The Register*, (2009), <http://www.theregister.co.uk/2009/06/26/copyfraud/>; Eicher, Charles, “How to Copyright Michelangelo: From the Borgias to Bill Gates”, *The Register*, (2007), http://www.theregister.co.uk/2007/12/27/how_to_copyright_michelangelo/

8. Committee on Intellectual Property Rights, *The Digital Dilemma*, 136.

9. Bielstein, *Permissions*, 56. Recently The Max Plank Institute, in the name of open access, put together a set of recommendations aimed at the publication of historical digital images, which are core to Global Middle Ages Projects, <http://www.scgma.org/?tag=mpiwg>

10. Bielstein, *Permissions*, 41. Bielstein asks “If the copyright of a work in the public domain has lapsed, why should reproductions of that work qualify for protection? Copies, not auratic in their own objecthood, are now relentless in their implications, putting the entire basis of copyright at risk.”

11. A work is published when tangible copies of it are made available to the public at large. “Public Domain”, Wikipedia, http://en.wikipedia.org/wiki/Wikipedia:Public_domain

introduction to copyright alternatives and creative commons

This section introduces Creative Commons licencing by revisiting what it was intended not to be, “© all rights reserved”.

By default, everything someone creates assumes a “© all rights reserved” form of copyright. In New Zealand this is the default position under the Copyright Act. However, in reality, everything is up for negotiation, which is done by transferring rights via a process called licensing. There are also exceptions under the Act that address the public good, these are part of the copyright bargain. Public right of access to the intellectual, cultural and social record is an important goal of copyright. The rewards to the author or copyright holder are secondary to the goal of public good. “The primary object in conferring the monopoly lie[s] in the general benefits derived by the public from the labours of authors.”¹ For more about the copyright bargain **see words** and also **introduction to the history of copyright**.

Exceptions to copyright are variously called “Fair use”, “Fair dealings”, “Exemptions”, “Permitted Acts” and “alternatives to copying” in different countries. These have the same purpose, that is, for anyone to be able to use things without asking for explicit permission, but are not all the same in the detail. For example, Fair Dealing exemptions set the parameters under which some lee-way may be possible for “fair” uses under certain circumstances and sets limitations on these (which can be guaged by applying the factors of fair dealing which can be summarised as; purpose; substance; amount; market). **See words** for more on fair dealings and a discussion of transformative use.

The display and use of images from and on the internet raises philosophical questions about the sharing of visual information as it is relatively easy for sites to exclude their images from image search results and to protect them from unauthorised downloading (such as robot.txt, watermarking, transparent .gif overlays etc.).² A mantra often quoted by copyright holders of things on the internet is ‘freely available is not free to use.’³ There is scope here for further discussion around whether image uploaders also have digital responsibilities in the virtual world (as do real property owners in the real world).⁴

Creative Commons licences are a form of copyleft – a play on the word ‘copyright.’ Other examples of copyleft licensing include GNU or GPL used for software and code.

Copyleft grew out of the software sharing community at a time in the 1970s when software programmers were freely sharing their source code. Changes in the 1980s led to a business model based on proprietary software where the source code was bottled up behind nondisclosure agreements. When glitches in operating software or incompatibilities of hardware/software configurations were ignored or not dealt with in a timely fashion, an operating system was envisaged that played fair and shared nicely with everyone. Software developer Richard Stallman began work creating the first free-software operating system called GNU which means “GNU’s not Unix”. The term “free” here refers to freedom not price. In 1992 a combination of software developed by Linus Torvalds with the GNU operating system brought about the Linux system which is in use all over the world today.

However it was still possible that the new code could be locked up (again) by proprietary interests and a legal system of recognition was needed to prevent this from occurring.



This is best explained by Richard Stallman in his own words:

Copyleft uses copyright law, but flips it over to serve the opposite of its usual purpose: instead of a means for restricting a program, it becomes a means for keeping the program free. The central idea of copyleft is that we give everyone permission to run the program, copy the program, modify the program, and distribute modified versions - but not permission to add restrictions of their own.⁵

The GNU GPL licence was the first copyleft licence to be used and distributed widely. Creative Commons share-alike licences are similar.



Creative Commons licences were founded by Lawrence Lessig as a response to the default position of “all rights reserved” under copyright law. The aim of Creative Commons is some rights reserved. Creative Commons offers people choices of how they control the future use of their material. By offering various forms of licensing options they enable creators to share their content if and how they choose. The creative commons system operates under the licensing section of copyright law, so finding a CC licence on content doesn’t mean it is out of copyright. It means the creator has chosen to licence how others may make use of the work from a number of options.

Creative Commons licences range from an option where artists can put their work directly into the Public Domain from the day it is created, through to “some rights reserved” through to a lock-it-up option that is pretty close to “all rights reserved,” often referred to as the “free advertising licence.”

See appendix i: creative commons licensing guide for a copy of their pamphlet explaining licences.⁶ CC is a mechanism of pre-licensing, whereby artists express a certain level of prior approval for people to copy their work without the need for contact in order to seek permission. It offers streamlined approaches for sampling and new creation. The different licences artists can choose from have varying degrees of flexibility that allow for various re-uses, and even some which allow for none at all. They may not suit everyone, so students should find out about the pros and cons and before making the decision to licence their own work or use that of others.⁷

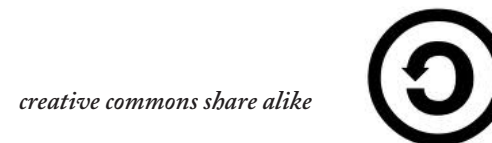
acknowledging others

Creative Commons licences have in effect provided an important stream of images for sharing, re-use, and remix.⁸ If making use of CC images students need to carefully read the permissions and restrictions of the license under which it was issued. Students also need to pay attention to information regarding attribution and if using a CC-SA type licence students must relicence their final work under similar terms to the original licence.⁹

asserting new authorship

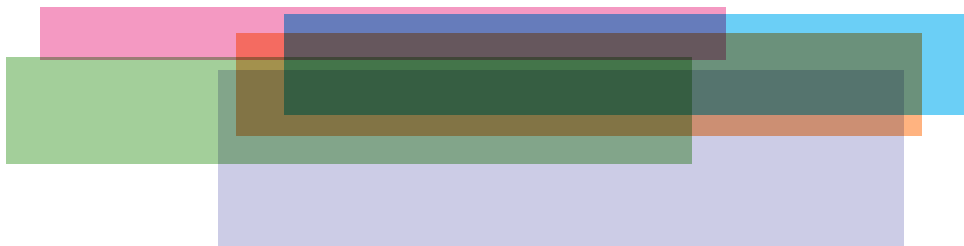
In 2009 the Arts Council of England and Open Business conducted a six month study into the use of Creative Commons and alternatives to “© all rights reserved” by UK artists. The report found that:

Creative people are reluctant to think about copyright while they are in the process of making artworks yet the media noise that has recently surrounded



the downloading or reuse of cultural content such as music or images, has left many artists fearful of sampling and remixing existing work or having their own creative work abused. Simultaneously they are nervous about employing open licences, which they fear could reduce the legal protection of their own work. The best explanation for the popularity of CC licences among many of the survey participants appears to be the clarity provided by those licences.¹⁰

Creative Commons.org has a collection of case studies for those interested in learning more about the practical implications of licensing in various creative sectors.¹¹ We recommend that in New Zealand artists use a CC-NZ licence when re/licensing.¹²



1. Committee on Intellectual Property Rights and the Emerging Information Infrastructure, *The Digital Dilemma: Intellectual Property in the Information Age*, (National Academy Press: Washington, 2000), 97.
2. William F. Patry, *Moral Panics and Copyright Wars*, (Oxford University Press: Oxford, 2009), 186. Patry writes that “in falsely asserting that free-riders are engaged in unauthorized conduct Mr Curley (from ACAP) was well aware there exists, and since 1994, a simple and effective computer protocol ... that ACAP’s members can use to either prevent search engines from crawling their site, or to control which parts should not be searchable or remain visible during search results ... This protocol is called a “robots.txt” extension.”
3. Gloria Hansen, “The Internet and Copyright,” *The Crafts Report*, Vol 32, Issue 362 (June 2006), 6-8. Hansen says not everything on the web is free for the taking. She gives advice to artists about protecting their images on-line.
4. See Dan Hunter’s talk on property rights and responsibilities in real and virtual worlds. Dan Hunter, “Dan Hunter at the Computer Games, Law, Regulation, Policy Symposium 2008,” (2008), <http://blip.tv/file/672194>
5. Richard Stallman, “The GNU Project” *GNU Operating System*, (1998), <http://www.gnu.org/gnu/thegnuproject.html>
6. Creative Commons, “About Licences,” (2010) <http://creativecommons.org/about/licenses>
Digital Curation Centre, “Creative Commons Licensing,” <http://www.dcc.ac.uk/resources/briefing-papers/legal-watch-papers/creative-commons-licensing>
The Digital Curation Centre offers a brief synopsis of the licence types.
7. Marco Fioretti, “The Case for and against Creative Commons: Is Creative Commons here to stay, or is it just a passing fad?,” *Techradar*, (1 March 2009), <http://www.techradar.com/news/internet/web/the-case-for-and-against-creative-commons-527697>
8. JISC Digital Media, “Still Images: Frequently Asked Questions about Copyright,” (2006-2009), [http://www.jiscdigitalmedia.ac.uk/stillimages/advice/frequently-asked-questions-about-copyright/Question 2 “What is Creative Commons?”](http://www.jiscdigitalmedia.ac.uk/stillimages/advice/frequently-asked-questions-about-copyright/Question%202%20What%20is%20Creative%20Commons%20?)
9. Ryan Evans, “Gardening book plagiarism claim,” *Taranaki Daily News*, (7 May 2010), <http://www.stuff.co.nz/entertainment/books/3667586/Gardening-book-plagiarism-claim>
In a recent case Penguin Books was forced to recall a gardening book which cribbed passages from Wikipedia for incorrect attribution (which in this case amounted to plagiarism).
10. The Arts Council England and OpenBusiness, “UK Artists, Copyright and Creative Commons,” *Open Business*, (November 2006), <http://www.openbusiness.cc/2006/11/28/release-of-report-on-%E2%80%98uk-artists-copyright-and-creative-commons/>, Open Business is an organisation whose prime interest is in practical tech events and workshops
11. Creative Commons, “Case Studies,” (2010) http://wiki.creativecommons.org/Case_Studies
12. Creative Commons Aotearoa New Zealand, “Choose and Apply a CC Licence,” (2009), http://www.creativecommons.org.nz/choose_and_apply_a_cc_licence

matauranga maori contexts

traditional knowledge

In this section we examine the tense relationship between copyright, ownership and traditional knowledge. In his Primitivism phase, Pablo Picasso used Punu ancestor masks from Gabon and early Iberian sculptural forms as source materials. These sketches ultimately resulted in one of his best known works *Les Femmes d'Alger*, 1907. Questions are now raised about what acknowledgment Picasso and those around him gave to the sources that they were freely integrating into to their new forms of artistic practice at the turn of the Twentieth century.

In Aotearoa New Zealand Maori intellectual property has been undermined by imposed legal frameworks that are unable to recognise different legal understandings of relationships including collective ownership, whakapapa, and the connections of individuals to a continuum of history. We live in a world where corporate constructions of identity are treated with more respect and legal protections than cultural identity. The way intellectual property law works is to grant monopolies to creators and/or rights holders for a limited period of time after which they are said to fall “out of copyright” (in this country) and/or into the “public domain” (in some others). The “Public Domain” is said to be a body of communal knowledge and creativity that anyone can use whether for commercial or non-commercial purposes and until recently was seen as ‘raw material’ within the intellectual property system.¹ For more discussion on the Public Domain **see words, information about copyright permissions and case study e.**

Finding a means to legally protect traditional knowledge such as that of Iwi Maori has reached a critical momentum because western-style intellectual property (IP) law by-passes local and traditional legal systems to appropriate previously uncommodified knowledge.² Such concerns are voiced in the Wai 262 claim filed in 1991, currently winding their way slowly through the Waitangi Tribunal process. The legal arguments against protecting traditional knowledge include; it is not considered “original” under Copyright law; fails the novelty test for the registration of Patents; and has already outlived the official copyright period (that is, the knowledge is considered to be in the Public Domain). However, knowledge of Iwi Maori is not in the “Public Domain”. Under Tikanga, knowledge (including intellectual property) was not and is not considered open to all. There has been and there remains an expectation of conditionality attached to the use of traditional knowledge.³

introduction to matauranga maori

In *Mana Tuturu*, Barry Barclay offers an enlightened recap of the cornerstones of European-style copyright law and a compelling look at the future of Tikanga as a way of addressing spiritual, intellectual and material concerns regarding traditional knowledge in Aotearoa.⁴

The Ministry of Economic Development have prepared a guide to explain western style IP law and how this affects Iwi Maori. This covers the risks, limits and benefits to the preservation, protection and promotion of Matauranga Maori. It includes information on Toi Iho, a trademark denoting the quality and authenticity of Maori art. (Students interested in Toi Iho should note that promotion of this trademark underwent some funding changes in 2009).⁵

The Western tradition of intellectual property law is a system of individual property rights and does not cover or concern itself with the idea of collective ownership. Maui Solomon summarises the differences from a Maori perspective:

one set of rights seeks to regulate and control rights of ownership and access to the means to create wealth. The other seeks to understand and harmonise human relationships ... One set of rights is recognised and protected by the modern legal system. The other set of rights, because of its collective nature, is generally unprotected and unrecognised by modern legal systems. These latter rights are nevertheless subject to well-defined customary laws that have survived despite the ravaging effects of colonisation.⁶

Western IP laws champion the romantic notion of the ‘unique genius’ model of intellectual property. Copyright law only protects the expression of the idea whereas systems of traditional knowledge argue that one cannot separate the form from the underlying idea, which is at once intellectual, spiritual and material.⁷ In traditional knowledge the form plus the idea are an inseparable whole.

The first steps for understanding these issues is to look at some international examples where music has been subject to the tensions between western copyright law and ignorance and misconceptions of the legal and historical characteristics of traditional knowledge.

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Enigma

In 1994 a traditional Taiwanese song, “Jubilant drinking song”, was used as a backing track for Enigma’s Top Ten hit record “Return to Innocence”. The singers (two octogenarian Taiwanese women) disputed the use of their song, without credit, which had been recorded in France as part of a cultural exchange performance. In the out of court settlement Enigma agreed to credit the original singers in subsequent releases and in addition they received royalties.⁸

Wimoweh

Another example is the extraordinary history of the song *Wimoweh*. The song was first recorded by Solomon Linda in 1939 and was called “Mbube” (Zulu for lion). It quickly became a hit within South Africa. After multiple recordings and re-recordings the song was renamed and reused in multiple versions. After the use of the song in Disney’s *The Lion King* it became the subject of a multimillion dollar lawsuit between the family of Solomon Linda and Disney who believed the song to be in the public domain. In the end Solomon Linda’s family received royalties from Disney.⁹

These two examples show that interpretations of traditional knowledge are still being overwritten by the Western tradition of copyright law that focuses on the ‘expression of the idea’ rather than the cultural and social location and history of the knowledge.

The following examples do not present answers to the tensions between notions and misconceptions of public domain and Mātauranga Māori, but highlight instances where the meeting of two cultural traditions and their relationships to ownership and histories of use need to be carefully thought through:

Dick Frizell

In his 1992 series of Tiki paintings Dick Frizell appropriated the image of the tiki.¹⁰ In the opinion of Warwick Brown, Frizell’s use of the tiki as a motif interpreted in a range of western art styles was humorous as well as reminding us of the influence of “so-called primitive art on modern artists.”¹¹ However, when Frizell exhibited the paintings at the Gow Langsford there were protests from some Māori representatives who viewed them as an offensive use of Māori culture. Waikato University Māori Studies professor Ngahuia Te Awekotuku has said of such uses: “I think disrespectful or manipulative or inappropriate commodifying of Māori design still needs to be challenged.”¹² Frizell’s *Mickey to Tiki Tu Meke* (1997) is simultaneously a parody on Disney’s Mickey Mouse and an instance of cultural appropriation of Iwi Māori.

Gordon Walters

The Koru Series is perhaps one of our most well known examples of a Pakeha painter using a traditional form from the culture of Iwi Māori as his leitmotif. Leonard Bell writes that: “The Koru motif provided the means for what were studies in formal

relationships using what Walters described in 1966 as a ‘deliberately limited range of forms’ [that] were not intended to have any illustrative or symbolic value.”¹³ Despite this assertion, Walters uses titles drawn from Te Reo Māori, (e.g. *Maho*, 1972), this implies that his engagement was with more than the form.

Theo Schoon

Theo Schoon’s interest in non-figurative art led him to his study of Māori art. From 1945 he was involved in recording and ‘conserving’ early rock art painting in Te Waipounamu and he studied briefly under Ngāti Porou master carver Pine Taiapa. Schoon became well known for his expertise in growing and carving gourds and was afforded the honour of being invited to exhibit alongside traditional Māori artists in an exhibition of Māori art held at Turangawaewae Marae, Ngaruawahia in 1963. From this brief resume it can be seen that perhaps Schoon’s approach and his art practice of incorporating Māori motifs, was different to both Walters and Frizell.

These next examples extend the tensions of ownership into a commercial realm, where traditional knowledge has become a commodity for exchange copyrighted and marketed by corporate entities.

Ka Mate

In recent times the haka, “Ka Mate” has become synonymous with advertisements by the Rugby Union for the All Blacks and test match rugby. Ka Mate was a haka composed by Te Rauparaha of Ngāti Toa to commemorate his narrow escape from pursuing enemies. It has been used frequently overseas as little more than a jingle with connotations of warrior-type male masculinity and its ownership has been hotly disputed by Ngāti Toa. It has also been used without permission to sell flash running shoes and soft drinks. See the Nike ‘Haka’ ad and Coke Zero commercial in Japan.¹⁴

Mark of Kri

In this Sony Play Station game there are multiple mismatched visual references to the culture of Iwi Māori, for example, the lead (male) character Kri has a moko kauae or female moko design and carries a taiaha.¹⁵

Lego Bionicles

Bionicles are another example of an international company appropriating the culture of Iwi Māori, this time using images and language to market a new range of children’s toys. The premise of the bionicles is that they are the various characters which appear in a number of legends, which correspond to annual releases of the bionicles range. The stories begin with Tahu, Lewa, Gali, Kopaka, Pohatu, and Onua arriving on the Island of Mata Nui.¹⁶

Ace Rentals

A billboard advertising campaign which featured a play on the word “Whaka” was the subject of a complaint to the Advertising Standards Authority, by the Maori language authority and removed from public view a week after it went up.¹⁷

Whanau stacking dolls

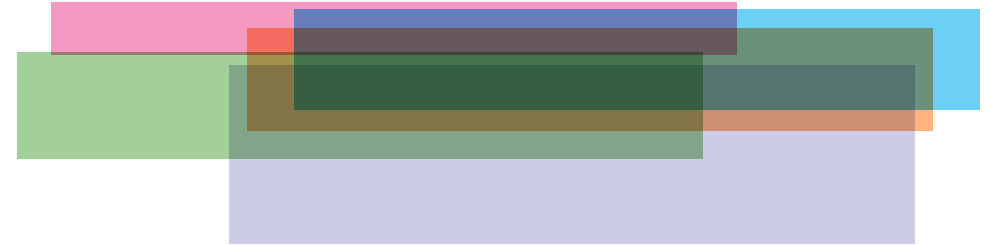
Matryoshka dolls restyled as whanau and mass produced in China were sold in tourist souvenir shops in Aotearoa New Zealand. Containing elements of traditional Maori design, these were said to be an insult to Maori culture and a reason to be wary of the Free Trade Agreement with China.¹⁸

Ta Moko

An image of Tama Iti was used without his permission in an overseas billboard. In this context the image of his tattooed face was equated with deviance, rather than the true meaning of Ta Moko (traditional tattoo). This was both a personal infringement (Privacy Rights) and also one against cultural identity.¹⁹

A comprehensive understanding of Mātauranga Māori can be read in the Wai 262 claim now before the Waitangi Tribunal. First lodged in 1991, Wai 262 is “generally known as the ‘flora and fauna claim’, but its scope is significantly wider. It covers cultural knowledge and property, such as taonga, protected by Article Two of the Treaty of Waitangi.”²³ The claim relates to the guardianship of and understandings of concepts of Te Tino Rangatirotanga that stem from whakapapa rather than concepts in crown law. Wai 262 argues that it is necessary to approach issues of guardianship and ownership from a Maori perspective. The claim questions the crown’s presumption of rights over everything Maori at the time of the signing of the Treaty of Waitangi. This has implications for relationships between crown law and traditional knowledge and discussions of copyright within New Zealand must take this into account.

In **case study k** we visit questions that need to be asked of artworks that contain content that may intersect with the traditional knowledge of Aotearoa.



As discussed above traditional knowledge is not covered under Western copyright law but there are various legal claims, international charters and reports, which outline the concerns of Iwi Maori and other indigenous peoples. In 1999 the World Intellectual Property Organizations (WIPO) conducted several Fact-finding Missions on Intellectual Property and Traditional Knowledge looking at the intellectual property needs and expectations of traditional knowledge holders.²⁰ This study heralded an important recognition of traditional knowledge and indigenous rights concerning intellectual property.

In 2007, the United Nations Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly. It has 46 articles concerning the recognition of intellectual property rights of indigenous peoples including in Article 31 (1) which states:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.²¹

Preceding this, in 1993 the Mātaatua Declaration on cultural and intellectual property rights of indigenous peoples was written by delegates from fourteen countries and calls for all forms of exploitation of Indigenous knowledge to cease.²² Convened at Whakatane the declaration was an affirmation of the benefit of indigenous knowledge and the willingness to share knowledge with key parameters that always assert indigenous rights of ownership and acknowledgement.

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1. The CopySouth Research Group, *The CopySouth Dossier* (May 2006), [http://www.copysouth.org/portal/\[pdf\],72](http://www.copysouth.org/portal/[pdf],72).
2. The New Zealand Copyright Act is a reflection of our early Colonial history. As with other Commonwealth countries our laws were imported from the United Kingdom. See Anthony Seeger, "Who got left out of the Property Grab, Again?," in Rishab Aiyer Ghosh, ed., *Code: Collaborative Ownership and the Digital Economy* (Massachusetts Institute of Technology: Massachusetts, 2005), 78 and Boatema Boateng, "Square pegs in Round holes," in Ghosh, *Code: Collaborative Ownership*, 70-71.
3. Sacha McMeeking, "Matauranga: Maori Intellectual Property", Dunedin School of Art seminar Series, at Otago Polytechnic, April 29th 2010.
4. Barry Barclay, *Mana Tūturū: Treasures & Intellectual Property Rights*, (Auckland University, and University of Hawai'i Press: Auckland and Honolulu, 2005).
5. Ministry of Economic Development/Manatū Ahunga, *Te Mana Taumarū Matauranga*, (2007). http://www.med.govt.nz/templates/MultipageDocumentTOC_28180.aspx
6. Suzy Frankel, *Intellectual Property Law in NZ*, (Butterworths: Wellington, 2002), 109; Michael Dodson, "Report on Indigenous Traditional Knowledge, UN Economic and Social Council, Permanent Forum on Indigenous Issues, Sixth session, New York, 14-25 May 2007, (Advance Unedited version) para 14. The Universal Declaration of Human Rights is also couched in the same terms.
7. Barclay, *Mana Tūturū*, 249.
8. *The CopySouth Dossier*, 145f.
9. A version of this piece was first published in *Rolling Stone* magazine. Rian Malan, "In the Jungle," *ColdType Modern Classics*, (September 2003) <http://www.coldtype.net>
10. Lydia Baxendell, "Dick Frizzell and Michael Smither: Works on Paper", *Gallery thirty-three*, (2009), http://www.gallery33.co.nz/whats_on.html?id=103
11. Warrick Brown, *100 New Zealand Paintings*, (Godwit Publishing, Auckland, 1995), 27.
12. Adam Gifford, "High risk business of cultural borrowing," *NZ Herald*, (14 Dec 2005), http://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=10359797
13. Leonard Bell, "Putting the record straight: Gordon Walters," *Art New Zealand*, Number 27 (Winter, 1983), <http://www.art-newzealand.com/Issues21to30/walters.htm>
14. Japan Probe, "Japanese commercial offends Maori group," *Japan Probe*, <http://www.japanprobe.com/2010/02/16/japanese-commercial-offends-group/>
Japan Probe writes "The Japanese commercial for Coke Zero, features popstar Namie Amuro alongside what advertising agency copy describes as "a troupe of studs from Kiwiland in the traditional Maori haka dance".
15. Higher Plain Games Channel, "Sony PS2 - Mark of Kri trailer," *YouTube* (5 April 2009), <http://www.youtube.com/watch?v=cjEXX9xQP74>
16. BBC, "Copyright laws to protect Maori heritage", *BBC Business News*, (10 August 2001), <http://news.bbc.co.uk/2/hi/business/1482203.stm>
17. Ace Rental cars, "rent a car from only \$25 a day and you can visit any Whaka," (2010), http://www.acerentalcars.co.nz/whaka_billboard.php (accessed 12 July 2010)
18. *The Dominion Post*, "Maori Russian dolls made in China, sold in NZ," *The Dominion Post*, (11 April 2008), <http://www.stuff.co.nz//361270>
19. *NZ Herald*, "Minister needs to come clean," *Herald Premium Content*, (26 Nov 2005), http://nzheraldpremiumcontent.blogspot.com/2005_11_26_archive.html (accessed 12 July 2010)
20. WIPO, *Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999), <http://www.wipo.int/tk/en/tk/fim/report/index.html> In particular see Part 2.
21. United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, (13 Sept 2007), <http://www.un.org/esa/socdev/unpfii/en/drip.html>
22. The International Research Development Center. "Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples," (1993) Appendix 7, http://www.idrc.ca/library/ev-30143-201-1-DO_TOPIC.html
23. Ministry of Economic Development, "Information Sheet: Treaty of Waitangi Claim Wai 262". *Intellectual Property Policy*, (13 Feb 2007), http://www.med.govt.nz/templates/Page_____1207.aspx
For the full text relating to Matauranga Maori see Chapter six "Traditional Kaitiakitanga Rights and Responsibilities"; Waitangi Tribunal, "Mātauranga Māori and Taonga", Waitangi Tribunal Te Rōpu Whakamana I te Tiriti o Waitangi, <http://www.waitangi-tribunal.govt.nz/inquiries/genericinquiries2/florafauna/mtaurangamoriandtaonga.asp>

exhibition and publication: which is which?

Artworks have been seen in public spaces since someone placed their inked hands on the cave walls in Lascaux. Since then artworks have become tangled in a nexus of ownership, money and power. It is important to step back and look at where legal definitions do not include the working practices and processes of artists. In New Zealand artworks are variously defined as personal research outputs within the academic PBRF framework,¹ as a form of communication, as a commercial enterprise, or as appropriation, and in certain cases as freedom of speech.² What is raised in legal cases of artists vs artists is more often a case of plagiarism or insufficient acknowledgement of contributing ideas and/or expression.

The issue of copyright often arises when an artwork is seen as published. An artwork is not published by being created, exhibited nor sold. However, when the artwork is reproduced, such as when it is uploaded to the Internet, it is legally considered to be published, because copies have been made and distributed. Prior to publication the artwork existed in one unit (or limited edition in the case of printmaking) and had not yet been distributed widely to the public. This is the reason why permission to photograph at exhibitions is sometimes denied. If you are entering private property (for example an art gallery) restrictions on taking photographs or recording can be enforced under access to property provisions as part of their due diligence.

If an artist wished to copy an ‘unpublished’ artwork in order to create a new artwork, it would depend on the country of origin of the work and the age of the work. For published works, Fair dealings will always apply in the activities listed under Permitted Exceptions in New Zealand’s 1994 Copyright Act. **See words** for more on unpublished works.

Most artworks that use appropriation are amateur non-commercial works intended as harmless fun. **See words:** ‘play’. In this case, transformative uses may apply under Fair dealings, subject to the factors where the use is “fair” under certain conditions. Copyright activist and expert Lawrence Lessig argues that recourse under the law ought to be reserved for those works that become a commercial success and that a special space operate wherein the dynamics of free-play can operate. Recently the Library of Congress

announced six classes of exemption from prohibition of access to copyrighted works controlled by Technological Protection Measures (TPMs – **See words**). The first of these referring to lawfully acquired DVDs includes an exemption:

solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances:

- (i) Educational uses by college and university professors and by college and university film and media studies students;
- (ii) Documentary filmmaking;
- (iii) Noncommercial videos.³

Many artists and amateur works are of a non-commercial nature but are always considered to be published (in a copyright sense) if they are uploaded to the internet.

publication and exhibition

For the remainder of this section we focus on the legal definitions that circulate around publication and exhibition. Context and intent have a bearing on fair dealings. There are also a number of post-creation issues that have a bearing on fair dealings.

At what point is a work considered “published”? Is exhibiting an artwork considered “publishing”?

Publishing means making copies of the artwork available to the public. The NZ Copyright Act has the following definition of “publication”:

In this Act, the term publication, in relation to a work

- (a) Means the issue of copies of the work to the public; and
- (b) Includes, in the case of a literary, dramatic, musical, or artistic work, making it available to the public by means of an electronic retrieval system;—

The following acts do not constitute publication for the purposes of this Act.

In the case of any artistic work,—

- (i) The exhibition of the work; or
- (ii) The issue to the public of copies of a film including the work; or
- (iii) the communication of the work to the public (otherwise than for the purposes of an electronic retrieval system):

In the case of an artistic work being—

- (i) A sculpture; or
- (ii) A work of architecture in the form of a building or a model for a building; or
- (iii) A work of artistic craftsmanship,—

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the issue to the public of copies of a graphic work representing, or of photographs of, the work.

This means that exhibitions are not publishing. Many of the criteria for “unpublished works” would appear to apply to “artworks”. **See words** for more on unpublished works in general in New Zealand.

The U.S. Copyright Office states in its Circular 40:

A work of art that exists in only one copy, such as a painting or statue, is not regarded as published when the single existing copy is sold or offered for sale in the traditional way, for example, through an art dealer, gallery, or auction house. A statue erected in a public place is not necessarily published. When the work is reproduced in multiple copies, such as reproductions of a painting or castings of a statue, the work is published when the reproductions are publicly distributed or offered to a group for further distribution or public display.⁴

However publishing and making available to the public are not always the same thing.

What is “making available to the public”?

What is an authorised act?

Does exhibiting an artwork constitute “making available to the public”?

Is this an authorised act?

What does “communicating the work” to the public mean?

“Making available” in the NZ Copyright Act is defined in the following way:

For the purposes of subsection (3), the circumstances in which a work may be made available to the public include,—

(a) in the case of a literary, dramatic, or musical work,—

(i) performance in public:

(ii) communication to the public:

(b) in the case of an artistic work,—

(i) exhibition in public:

(ii) the playing or showing in public of a film that includes the work:

(iii) communication to the public.

Any of the above means are considered authorised act. “Communicating” is the “technology neutral” term deemed to best cover the old terms reprographic copying, broadcasting and cable transmission. That is, it is intended to cover the Internet and

online media as well as broadcast media. The NZ Copyright act says that:

To communicate means to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system, and communication has a corresponding meaning.

Is exhibiting an artwork considered “commercial”? Is selling an artwork “commercial”?

One of the main factors affecting Fair dealings is where appropriation is deemed to be of a commercial nature. Appropriation is a neutral term but it is often used with negative connotations in discussions about copyright. **See words:** appropriation. The fear of appropriation is of the potential market formed around copies made available to the public that can turn into uncontrolled wholesale piracy of a “commercial” nature. **See words:** commercial. In some cases court decisions have also noted that a

new work’s minimal distribution in the market might be a factor in affording protection to derivative works . . . Thus, appropriation art that is produced in limited quantities and is parodic or satiric may be considered a fair use.⁵

An example of Fair use under Trademark law is the case of Andy Warhol’s famous Campbell’s Soup Cans which are generally held to be non-infringing, despite being clearly appropriated, because the public was unlikely to see the painting as sponsored by the soup company or representing a competing product. Paintings and soup cans are not in themselves competing products.

The NZ Copyright Act defines “commercial” as in the meaning of commercial publication:

In this Act, the term commercial publication, in relation to a literary, dramatic, musical, or artistic work, means the publication of the work consisting of—

(a) Issuing copies of the work to the public at a time when copies made in advance of the receipt of orders are generally available to the public; or

(b) Making the work available to the public by means of an electronic retrieval system;—

and related expressions shall be construed accordingly.

The NZ Copyright Act also says that with regard to Performers Rights:

Commercial exploitation means—

- (a) Issuing recordings or copies of recordings to the public; or
- (b) Playing recordings or copies of recordings in public; or
- (c) Showing recordings or copies of recordings in public; or
- (d) Communicating recordings or copies of recordings to the public

Are there any other copyright regulations relating to exhibitions? At what point is a work considered “published”? Is exhibiting an artwork considered “publishing”?

There are some specific regulations for photographs, this is because artworks (as we have shown above) are not considered published works, yet in some cases photographs are. Regarding the exhibition or display of photographs, the New Zealand Copyright Council says that:

The owner of copyright in an artistic work does not have a right to prevent the work being shown to the public, for example by being exhibited in a gallery or displayed on a wall. However, the copyright owner does have the right to prevent the work being put on the internet, because this would involve making a copy of the work. However the person commissioning the photos may have certain privacy rights in the photos which prevent exhibition or publishing or broadcast.⁶

See words: copy and commissioning.

1. Tertiary Education Commission, *PBRF Guidelines* (2006), www.tec.govt.nz/Documents/Publications/pbrf-full-report-2006.pdf

2. J. Siegharuto, “bush blair endless love” *You Tube* (10 November 2005), <http://www.youtube.com/user/siegharuto> (accessed 12 June 2010).

3. *US Copyright Office*, “Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works”, (28 July 2010), <http://www.copyright.gov/1201/>

4. *Wikipedia*, “Public Domain,” http://en.wikipedia.org/wiki/Wikipedia:Public_domain (accessed 12 June 2009). This is the case in US law where an “important class of possible unpublished works are artworks, in particular paintings. Because it is not published by being exhibited, and also neither by being created or sold.” Publication is the distribution of copies; “Public Domain”, *Wapedia*, http://wapedia.mobi/en/Wikipedia:Public_domain?t=6.#7, the U.S. Copyright law defines “publication” in basically the same way using different words: “Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication. “Public display” includes broadcasts and other transmissions.

5. Johnson Okpaluba, “Appropriation Art: Fair use or Foul?” in *Dear Images: Art Copyright and Culture*, Daniel McLean and Karsten Schubert, eds. (Arts Council of England: London, 2002), 210. This comment was made in relation to the Koons vs Rogers case.

6. Copyright Council of New Zealand, “Photographs Information Sheet,” (2007), <http://www.copyright.org.nz/users.php> (accessed on 16 June 2009).

Words: A Glossary of Useful Art and Legal Terms

This set of words offers definitions of words we have used throughout this project. It is by no means a complete legal or art dictionary on this subject. They are a list of words and definitions which we refer to repeatedly in the case studies and are compiled here in one place. In addition we highlight differences, and discrepancies between legal, art and everyday usage. Many words have different meanings to artists and lawyers. This glossary includes familiar words whose meanings shift in art contexts as well as quotations and unfamiliar terms that have been ascribed new meanings over time. The law says it does not want to get into discussions of art criticism. It does not wish to define art, only deal with matters of "originality". Throughout this project we use the language of artists as both method and tool to understand the legal, art and ethical decisions that surround the use of images in a digital age.

We quote at length from one of the primary sources for this project; the NZ Copyright Act 1994 (with amendments 2008). These quotes are highlighted in green boxes. Where possible we have used existing definitions and interpretations from reliable sources. The majority are drawn from dictionary and encyclopedias, as well as from legal dictionaries. The dictionary we used was the online version of the Merriam-Webster Dictionary (<http://www.merriam-webster.com/netdict/>). We also used Encyclopedia Britannica and Wikipedia. Wikipedia definitions were often superior in conveying the meaning of the concept and sometimes an entry had not yet appeared in Britannica. We assert the use of Wikipedia, as a primary source in matters to do with public domain and fair use, on the grounds that the Foundation behind Wikipedia has fought

and won one of the fiercest copyright battles in recent years. See casebook: Bridgeman vs Corel. The resulting ruling from this case has redefined the rules around public domain interpretation, and consequently Wikipedia entries around copyright are very thorough, easy to comprehend and have been reviewed by some of the finest legal experts in the world.

ABSORBATIVE LOGIC THEORY

Every artwork made is part of the environment it is in – historical, social, cultural, economic and commercial. Many people believe it is impossible to separate the artist from their context. No author is an island.

“Great works of art ‘are not the product of single and solitary births; they are the product of many years of thinking in common, of thinking by the body of the people, so that the experience of the mass is behind the single voice’” (Virginia Woolf). Spalding in *Dear Images*, McLean, ed. (2002) 226

“No great man is original. The greatest genius is the most indebted man. Genius, indeed, consists in not being original at all, but rather in being wholly *receptive*”. (Emerson) Julius in *Dear Images*, McLean, ed. (2002) 489

“No artist works in a vacuum. Every artists reflects . . . on what has come before and what is happening parallel to his or her practice”. (Lawrence Lessig quoting Candice Breitz) Harley, “Cultural Modulation” (2009)

“No matter what form it takes, the remix. . . depends on recognition of a pre-existing cultural code.” Navas, “Remix: the Bond of Repetition” (2007)

An expression of the culture in which we live which may also memorialise the forgotten fragments in collective memory via transformative acts of art. “Privileging the fragment over the whole in a persistent and sustained fashion, audio visual remixers fashion new works out of the core components of older pieces. ... They [open] up a new space for the renegotiation of their associated history and critical context.” Harley, “Cultural Modulation” (2009)

“Trademarks are a part of our world; they pervade every environment of modern life [so] that it is next to impossible to walk down a street or visit a public place or site or be in a room without being surrounded by trademarks of every sort. This means that any realistic depiction of a street scene or restaurant setting or home or office situation will include representations of the trademarks that appear in that environment. Even though the trademarks that appear in such depictions are the valuable property of the companies that own them, in a way they also belong to the rest of us [because they are a part of our lives as facts of our environment.] This means that, we have a right to “mention” the trademarks around us, either verbally or visually.” Wilson, “Other Peoples Trademarks”, 1995, 1.

See also INSPIRATION and APPROPRIATION ART

ADAPTATION

Adaptation is the evolutionary process whereby a population or individual becomes better suited to its habitat by adjustment, as a response to the intensity, frequency and quality of local stimulation; ^(Wikipedia) or modification of an organism or its parts that makes it more fit for existence under the conditions of its environment; or something that is adapted; or *specifically* : a composition rewritten into a new form. ^(Merriam-Webster)

NZ Copyright Act

(a) In relation to a literary or dramatic work, includes—

(i) A translation of the work from one language to another.

(ii) A version of a dramatic work in which it is converted into a literary work or, as the case may be, of a literary work in which it is converted into a dramatic work.

(iii) A version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine, or similar periodical.

(b) In relation to a literary work that is a computer program, includes a version of the program in which it is converted into or out of a computer language or code or into a different computer language or code, otherwise than incidentally in the course of running the program.

(c) In relation to a musical work, means an arrangement or transcription of the work.

In relation to an artwork the Copyright Act is unfortunately not very revealing.

SEE TRANSFORMATIVE USE

APPROPRIATION

The act of taking possession of or assigning purpose to properties or ideas, culture, arts, economics or sociology.

(Wikipedia) Appropriation is a neutral term but it is often used with negative connotations in discussions about copyright. Metge, "Joan Metge: Tuamaka", *Radio New Zealand*, 22 Aug (2010).

APPROPRIATION ART

"To use another's imagery (or sounds), often without permission, reusing it in a context which differs from its original context, most often in order to examine issues concerning originality or to reveal meaning not previously seen in the original." Delahunt, *ArtLex Art Dictionary*, (2009)

"Through the 20th Century artists have employed the practice of appropriation both as a means of creation and for articulating social criticism, [by enabling] artists to comment upon or react to the presence and meaning of pervasive cultural icons." Okpaluba, in *Dear Images*, McLean, ed. (2002) 198

"All cultural practice appropriates alien or exotic, peripheral or obsolete elements of discourse into its changing idioms. The motivations and criteria of selection for appropriation are intricately connected with the momentary driving forces of each culture's dynamics. They may range from the crudest motives of imperialist appropriation of foreign (cultural) wealth to the subtle procedures of historic and scientific exploration. In aesthetic practice, appropriation may result from an authentic desire to question the historical validity of a

local, contemporary code by linking it to a different set of codes, such as previous styles, heterogeneous iconic sources, or to different modes of production and reception. Appropriation of historical models may be motivated by a desire to establish continuity and tradition and a fiction of identity, as well as originating from a wish to attain universal mastery of all codification systems." Buchloh, *Appropriation: Documents of Contemporary Art*, Evans ed. (2009) 178

"Outside of artistic circles, the term 'appropriation' bears strong negative connotations, signifying essentially theft" where the fear is uncontrolled copying and wholesale piracy. Okpaluba, in *Dear Images*, McLean, ed. (2002) 197 **See also STEALING.**

"ARTISTIC WORKS"

NZ Copyright Act.

"Artistic works" means—

- (i) A graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or**
- (ii) A work of architecture, being a building or a model for a building; or**
- (iii) A work of artistic craftsmanship**

"Artistic works" as per medium specific schedule, includes:

- paintings, drawings, diagrams, maps, charts or plans;
- engravings, etchings, lithographs, woodcuts, prints;
- photographs
- sculptures
- collages
- models
- architectural works, being buildings or building models;
- works of artistic craftsmanship that do not fit into any of the above categories (such as works by silversmiths, potters, woodworkers and hand-embroiderers). Copyright Council of NZ, "Info Sheet : Visual Artists" (2007)

Note that for works to be included in the list of "artistic works" they do not have to be "artistic" they just have to be original. Leach, in *Plagiarism in Art*, Vaccaro ed.(2000), 206

"On the one hand, it has led copyright to include ordinary items which have little claim to creativity . . . on the other hand it has led copyright to exclude some art forms from its protective remit completely (which contradicts the rhetorical claim that copyright's purpose is to encourage the progress of the arts)" Barron, in *Dear Images*, McLean, ed. (2002) 305 For example, in 1927 a significant modern art work, Brancusi's *Bird in Space* was seized by US customs. They refused to accept it into the country as a work of art and demanded taxes be paid on it as imported materials, namely stone and wood! Walravens, in *Dear Images*, McLean, ed. (2002) 171

The current schedule fails to recognise contemporary artistic activities, in much the same way as it has done historically, just as the 1911 UK Copyright Act did not include Film and the 1956 Act did not include Video. Walravens, in *Dear Images*, McLean, ed. (2002) 171 It currently makes no mention of electronic art, digital media, installation art, environmental art, body art, performance art, internet art, sound art, noise, conceptual art or many other art forms of mixed media that do not conform to the above list or some art works which challenge the "assumption that art is purely and primordially visual". Okpaluba, in *Dear Images*, McLean, ed. (2002) 197 ² The existing schedule also implies that if artworks do not fit, they do not have the status (of protection).

ART WORK

Art works are not so much defined as listed in the categories of "artistic works" as above. There is no meaning in law beyond this. The list relates back to an eighteenth century theory of aesthetics where "Art" as a system was developed along the lines of five major disciplines (painting, sculpture, architecture, music and poetry). These kinds or works were classified according to the differences between them in terms of media characteristics, as much as by their commonalities. Barron, in *Dear Images*, McLean, ed. (2002) 284-5 In the twentieth century the list was redesigned along different taxonomic lines: literary, dramatic, musical and artistic. But even these demarcations fall apart in the midst of twenty-first century multi-media works.³

Art At Risk: copyright, fair dealings and art in a digital age

So do we need a definition of the word “work” then? Although copyright law tries to be neutral and avoid a definition of art it does have a concept of what constitutes “work”. Firstly a copyrighted work has a “human author who can be said to originate it”, via some intervention in the “real” world. Copyright says that it is only through an intervention where an expression is recorded or fixed in some material form and made available to others’ senses that it shall be recognised. This process of creation is the “work” but although this is more useful it still does not mesh with the usual understanding of art norms, and we can see that the legal definition of “Art” is linked to a particular theory of outdated aesthetics. For example, “A landscape or scene cannot itself constitute a copyright work, though a photograph or painting of the same landscape can.” Barron, in *Dear Images*, McLean, ed. (2002) 290

So this definition says landscapes such as the man-made sweeping views of the pleasure-grounds of the European nobility, featuring follies and ha-has, designed and created by Capability Brown would not qualify but when memorialized in paintings of the period they would. And what of monumental land art such as Robert Smithson’s *Spiral Jetty* (1970)? The rationale appears to be that it is legally considered an earthwork until ‘fixed’ in a photo or some such other representation at which point it attracts copyright (in the copy), as an artistic work.

Work is found to fall under the shadow of Property. “Copyright law is a branch of property law and the chief function of property law is to define the things which may be objects of exclusive private control and identify the persons in whom those rights” subst. Barron, in *Dear Images*, McLean, ed. (2002) 291 In this way we can see that copyright law has shifted its focus from the “work” or labour, used to create, to the creation itself instead and then seeks to assign economic value to this macro-economic entity as a commodity. Bowrey, in *Dear Images*, McLean, ed. (2002) 268

Law’s attempt at objective neutrality is a failure for the arts where a modicum of visual literacy is necessary to view art works. A corollary can be seen also in music.

Is a snippet copied from a tune, a chord progression or a **SAMPLE**? Pre-hip hop compositions used a term called **VARIATIONS**.

ATTRIBUTION

Sufficient acknowledgement, in curatorial conventions, includes; identification of the **author** (not copyright “owner” who is often different), title and date of the work. Sometimes medium, dimensions and provenance are included as well.

NZ Copyright Act

In this section, the term attribution, in relation to a literary, dramatic, musical, or artistic work or a film, means an express or implied statement as to the identity of the author of the work or the director of the film.

AUTHORSHIP

The legal author of a work is the initial owner of the copyright in it, and may exploit the work themselves or transfer some or all the rights conferred by the copyright to others.

NZ Copyright Act

Meaning of author

- (1) For the purposes of this Act, the author of a work is the person who creates it.**
- (2) For the purposes of subsection (1) of this section, the person who creates a work shall be taken to be,—**
 - (a) In the case of a literary, dramatic, musical, or artistic work that is computer-generated, the person by whom the arrangements necessary for the creation of the work are undertaken:**
 - (b) In the case of a sound recording or film, the person by whom the arrangements necessary for the making of the recording or film are undertaken:**
 - (c) in the case of a communication work, the person who makes the communication work:**
 - (d) in the case of a typographical arrangement of a published edition, the publisher.**
 - (e) [Repealed]**

Note: authorship by a body corporate is different to that by collective authorship (or collaboration).

There have been many critical debates about the nature of “authorship”, the most famous between Roland Barthes’ “The Death of the Author” and Michel Foucault’s “What is an Author?” Arthur Rimbaud also dipped his pen in these waters when he wrote *Je est un autre*, which has variously been translated as “I is another”. He wrote, “If the old fools had not found only the false significance of the Ego, we should not now be having to sweep away these millions of skeletons which, since an infinite time, have been piling up the fruits of their one-eyed intellects, proclaiming themselves to be the authors!” (excerpt from Arthur Rimbaud’s letters) ^{Miller, *Sound Unbound*. (2008), 51.}

AUTHENTICITY

The term which expresses the quality of being genuine or not corrupted from the original; it has implications of not being counterfeited, imitated, or adulterated. It also has connotations of being from a definite origin or reliable source as in *bona fide*. Authenticity is often referred to in conjunction with authorship especially in matters of connoisseurship and law courts.

AUTHORS RIGHTS

Authors’ rights is a direct translation of the French term *droit d’auteur*. Authors’ rights have two distinct components: the economic rights in the work and the moral rights of the author. ^(Wikipedia)

BANDWIDTH THEFT

This is an issue to do with **HYPERLINKS** or **HYPERTEXT**. A hyperlink of an image is when you display an image from one site on your different site by linking to it rather than uploading it from your server. Why is linking a bad idea? The BuffyGuide to web hosting explains the netiquette around linking; “For some sites, bandwidth is free. Many sites on the internet are small, and are hosted by free web hosts. These hosts do limit the amount of bandwidth the sites can use, but most sites don’t use enough bandwidth to ever exceed this limit, so they never have to pay for bandwidth. So,

your theft of their bandwidth won't cost them money, but if other sites direct link to their files, they might go over their bandwidth limit, and get kicked off their host! Moreover, large/busy sites cannot be hosted by free web hosts — these webmasters have to pay for web hosting. Generally, they pay a set amount per month which will include a set amount of bandwidth. (The more bandwidth your account allows, the more your monthly fee will be.) Plus, if a site uses more than the allowed amount of bandwidth in any given month, they have to pay extra fees, which can be very high. So, sites direct linking to their files will cause their total bandwidth to go up, and may cost them money!" Buffyguid, "Bandwidth Theft"

In addition "in certain jurisdictions it is or has been held that hyperlinks are not merely references or citations, but are devices for copying web pages" (*Wikipedia*).

BUNDLE OF RIGHTS

The word copyright doesn't, as the name suggests to many, mean the copying rights of *users*. Copyright refers only to the rights of the creator and/or owner. The owner has all the rights (bar those permitted exceptions such as fair dealing). These are often referred to as a bundle of rights. The owner has the exclusive right to copy, adapt, distribute and transfer rights. Transfer of rights can be done by licensing. There are 236 articles in the 1994 Copyright Act of NZ and most of them seek to place restraints on those who wish to copy.

"Copyright law is neither natural or universal. First formalised in England in 1709, it was still being resisted by China in the 1970s ... For a Chinese writer, If his views are copied out and passed around, he is delighted ... If they are seized upon, printed, and scattered to the furthestmost corners of the Empire, he folds his hands and dies triumphant. He has said what is in him to say, and men have listened." Schwartz, *The Culture of the Copy* (1996), 243.

The rationale of the Chinese was along the lines of the **COPYRIGHT BARGAIN** whereby what had come to be written or produced was considered indispensable to

the public good so that it overrode concerns of private ownership.

COLLAGE

Collage allows pre-made preexisting material objects to combine in new ways to create a new work of art. Collage is often the act of appropriating existing messages in such materials to make new ones. Literally anything can be considered collage fodder. In the visual realm this usually means photographs and printed material, bits of which are selected and blended together to produce a new picture or interpretation. In the worlds of audio and video the source material often isn't static and neither is the final product. Collage used to be much more difficult to make until the 1990s when technology and price converged to make it more affordable. Anderson, "Media Collage Index", (1997-2009) The issue of copyright is also much more likely to come into play when making collages from popular music, film, television programs or commercials. It is a legitimate and established artistic technique to further the interpretation of existing works by incorporation of existing elements in a new work. This is because a work of collage is more than a sum of its parts.

Walter Benjamin made two observations about what is new and creative about sample-based art works when he wrote that the selection, arrangement and juxtaposition of collage **is** the art by producing a novel arrangement of the information often drawing on cultural detritus and found objects. Benjamin's second point is that "it may be culturally productive to discover and draw attention to a fragment of text, image, or sound ... [part of the purpose and process of art] "lies in the very process of rescuing the fragment". Miller, *Sound Unbound*, (2008), 143.

COLLECTION SOCIETIES

Collection Societies are companies set up to monitor and administer the copyrights of a group of similar rights holders. They include APRA, RIAA, Screen Rights Association, CLL. They collect monies on behalf of publishers (their clients) from copyright users. They collect royalties for music, books and resale dues for

artists. See NZ Copyright Act for regulations.

COMMERCIAL

Concerned with commerce or trade.

1. Occupied with or engaged in commerce or work intended for commerce *which is* the exchange or buying and selling of commodities on a *large* scale involving transportation from place to place (distribution). (Merriam-Webster)

2. Of a lower grade, or for use in *large quantities* in industry; made, done, or operating primarily for profit. yourdictionary.com

The main concern around appropriation and making copies (available to the public) is uncontrolled wholesale piracy of a "commercial" nature. Individual art works function differently and often in different markets, where the art work as a whole does not affect the market for the original/s.

In *Koons vs Rogers* the court decision noted that a "new work's minimal distribution in the market might be a factor in affording protection to derivative works ... Thus, appropriation art that is produced in limited quantities and is parodic or satiric may be considered a fair use."

Okpaluba, in *Dear Images*, McLean, ed. (2002) 210 note xxxvi

COMMERCIAL LAW

Law that governs commercial transactions as in business transactions.

COMMERCIAL SPEECH (compared to Free Speech)

"Commercial Speech is speech done on behalf of a company or individual for the intent of making a profit. It is economic in nature and usually has the intent of convincing the audience to partake in a particular action, often purchasing a specific product". (Wikipedia)

COMMISSIONING RULE

"Where the commissioner pays or agrees to pay the artist to make the work, the commissioner is the first owner of copyrights", unless agreement to the contrary. Copyright Council

Art At Risk: copyright, fair dealings and art in a digital age

of NZ, "Information Sheet : Visual Artists" (2007)

COMMUNICATE

Transmit or make available through a communications technology, such as on a website, by e-mail or by broadcasting. Copyright Council of NZ, "Information Sheet : Visual Artists" (2007)

COMMUNICATION

"Communication is a process that allows beings - in particular humans - to exchange information by one of several methods. Communication requires that some kinds of symbols from a kind of language are exchanged." Jahsonic, "Art and Popular Culture", (2008) See SPEECH and FREEDOM OF SPEECH.

COMPILATION

A collection of things which have been collected together into one place or entity.

NZ Copyright Act

Compilation includes—

- (a) A compilation consisting wholly of works or parts of works; and
- (b) A compilation consisting partly of works or parts of works; and
- (c) A compilation of data other than works or parts of works

CONTRACT

In law, a contract is an agreement between two or more parties which, if it contains the elements of a valid legal agreement, is enforceable by law or by binding arbitration. That is to say, a contract is an exchange of promises with specific legal remedies for breach. (Wikipedia)

COPY (as in copy of artwork)

An intentional imitation, replica, reproduction, or duplication of an original work of art, usually produced in the same medium. Unlike a fake, a copy generally is intended as an emulation of a model. Delahunt, *ArtLex Art Dictionary*, (2009)

COPYFRAUD

The use of false claims of copyright to attempt to control works not under one's legal control. (Wikipedia)

COPYING (under the law)

Copying means to reproduce the work in any material form, including storing it electronically. This includes changes in artistic media and dimensions.

Copying is the duplication of information or an artifact based only on an instance of that information or artifact, and not using the process that originally generated it. (Wikipedia)

NZ Copyright Act

Copy means

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

COPYLEFT

Copyleft grew out of the software development industry and is a play on the word copyright. It describes the practice of using copyright law to offer reciprocal licences which means that the author allows a maximum number of rights be transferred rather than being reserved in perpetuity. An example in widespread use is GNU General Public Licences, as developed by Richard Stallman - one of the most common licences in Free or Open Source Software.

COPYRIGHT

An exclusive set of rights by default granted to an author of an original work. Copyright does not protect facts, ideas, information, styles or techniques used in creating an artistic work - copyright protects the "expression" or the work itself. Copyright Council of NZ, "Photographs Information Sheet" (2007) Many aspects of copyright were developed along economic constraints, particularly for distribution. "A work of intellectual production has little intrinsic value until it assumes a form that allows it to circulate through a marketplace."⁴ Copyright is a **BUNDLE OF RIGHTS** granted exclusively to the owner of the copyright and there are exceptions to this monopoly under the law, such as Fair dealings and other permitted acts for education and library uses.

In some cases where the original is not recognised as a work of art, a representation such as a photograph will be. This leads to the strange situation of the primacy of the copy as the original.

COPYRIGHT BARGAIN also known as COPYRIGHT INCENTIVE

"Fair use is not an exception to copyright's overall objective but, rather, wholly consistent with that objective." (Judge Leval) Weil, in *Ethics and the Visual Arts*, King ed. (2006)

¹⁶¹ For a use to be *fair* it must stimulate further thought or public instruction and also do so without *unduly* dampening the authors incentive for creativity (this is assumed to be financial). "To put too great an emphasis on the exclusionary aspects of copyright is to undermine its fundamental public service objective." (Judge Leval) Weil, in *Ethics and the Visual Arts*, King ed. (2006) ¹⁶³ To assume that artists create only for financial reasons is a notion at odds with observations of historical and contemporary art practices.

COPYRIGHT MANAGEMENT INFORMATION

(CMI)

NZ Copyright Act

Copyright Management Information

(a) identifies the work, and its author or copyright owner; or

(b) identifies or indicates some or all of the terms and conditions for using the work, or indicates that the use of the work is subject to terms and conditions.

CREATIVE

“Creativity (or creativeness) is a mental process involving the generation of new ideas or concepts, or new associations between existing ideas or concepts.”^{Jahsonic, “Art and Popular Culture”, (2008)}

CREATIVE COMMONS

The focus of Creative Commons is on “some rights” reserved compared to the “all rights reserved” default position of Copyright Law.

DERIVATIVE

Throughout time artists have looked to pre-existing artwork and artists for inspiration.^{Chaires, “Something Old, Something New” (2002) 8}

Initially “the exclusive right granted to copyright owners was the right to control the right to publish and republish their work ... [originally for 14 + 14 years renewable]... It did not cover “derivative” works, meaning works built out of the original work. These were originally seen as part of the “copyright bargain”. At its inception copyright law was seen as regulating “silos of creativity”. In the digital age these boundaries are less meaningful.^{Lawrence Lessig in Basilio, *Cut: Film as Found Object* (2004) 49}

No definition under NZ Law – **SEE ADAPTATION** and **TRANSFORMATIVE USE**

DESIGN

A design in New Zealand is defined as the new or original features of shape, configuration, pattern or ornament that are applied to an article by any industrial process or means.^{Ministry of Economic Development, *IPONZ*}

To paraphrase Charles Esche; art, design and architecture are part of the same spectrum of creative activities. They all have to deal with the functional realities of their field in the demands of the market and the uses which clients demand. Art has to deal with realities too but the artist has more personal control over these and their desired outcomes. Artists also have extraordinary possibilities to express themselves and not only for the pragmatic ends of particular media concerns. Art is the space where we can ask some of most pertinent questions and solve various problems addressing our societies.^{Esche, “are artists and designers two different things?” (2010).}

DIGITAL IMAGE

An image formed from electronic signals. The result can be translated into digital or binary computer code that a computer can read and produce on a screen in human readable or “viewable” form.^{Shapreau, in *Dear Images*, McLean, ed. (2002) 144}

DRM

(Digital Rights Management) **SEE**

TECHNOLOGICAL PROTECTION MEASURES (TPMs)

DURATION

Copyright exists for different periods of time or duration in different jurisdictions (the laws in different countries) at which point a work is said to fall out of copyright and/or into the **PUBLIC DOMAIN** (some countries such as New Zealand do not have a “Public Domain”). Duration in the **BUNDLE OF RIGHTS** differs with the media of expression, for example books or film. There can also be layers of copyright in a work. For example in a recording of a song, there can be copyright in the music, the lyrics and the recording. If the music has been transcribed and published there will also be copyright in the sheet

music as well. In New Zealand these last, in general, 50 years after the death of the author or artist, 25 years for typographical (as in books) renewable, 50 years in the recording for sound and film from the end of the year in which it was first made available to the public.

Eldred's case raised questions around when a limited term is “limited” for author's rights or if in fact copyright has become in practical terms “perpetual”?^{Crawford, “Copyright, the Public Domain and the internet”, (2004) 188} Lawrence Lessig who argued the case says that only those with the financial resources can even attempt to make use of existing material either through licensing or risking a Fair use adaptation, while a work is still in copyright.^{Lessig, *TED Talk* (2007)} Tad Crawford further argues that the “unlimited terms are harmful to creativity, by disincentivising transformative uses which we need to push the boundaries of the known world.”^{Crawford, “Copyright, the Public Domain and the internet”, (2004) 188}

EMPLOYEE RULE

Work for hire agreements – “If you have created an artwork in the course of your employment, your employer is the first owner of copyright, unless you have agreed otherwise. Where a work is made by a person employed by the government, the government is the first owner of the copyright in the work.”^{Copyright Council of NZ, “Information Sheet : Visual Artists”, (2007)} **SEE COMMISSIONING RULE**

FAIR DEALING

Fair dealings is similar but different to Fair use. It is one part of the **COPYRIGHT BARGAIN** (the other being authors' monopoly for a limited time). Each case of Fair dealings is unique to its situation and has to be considered on its own facts. This fluidity is both its strength and the cause for much confusion.

In NZ Law the exceptions for the public good are called “Permitted Acts” and cover Fair dealings, Educational exemptions and Library uses. They are not rights as such but defences if accused of infringement.

NZ Fair Dealing – Purposes which are allowable under the NZ Copyright Act are (from an exhaustive

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list): research, private study, criticism, review and news reporting. There are then some limitations put on these permitted acts:

NZ Copyright Act

In determining, for the purposes of subsection (1) of this section, whether copying, by means of a reprographic process or by any other means, constitutes fair dealing for the purposes of research or private study, a court shall have regard to—

- (a) The purpose of the copying; and**
 - (b) The nature of the work copied; and**
 - (c) Whether the work could have been obtained within a reasonable time at an ordinary commercial price; and**
 - (d) The effect of the copying on the potential market for, or value of, the work; and**
 - (e) Where part of a work is copied, the amount and substantiality of the part copied taken in relation to the whole work.**
- (4) This section does not authorise the making of more than 1 copy of the same work**

Further explanation of circumstances and limitations around these allowable purposes:

(a) PURPOSE – Research and study research can be either commercial or non commercial, and an output from an art research project is considered to be “research” in New Zealand (artworks are subject to the same rigorous peer review process as other research in this respect).

(b) TYPE OF WORK – the nature of the work matters. If, for example, the original work is of a confidential nature then disclosure would be unfair, and could also be covered by other areas of the law, such as unpublished works.

(c) and (d) EFFECT ON THE POTENTIAL MARKET – This clause looks at whether the work could be bought or obtained in a reasonable time at a reasonable price and asks the question; does the existence of the copy

then have an affect on the market of the original.

(e) AMOUNT & SIGNIFICANCE – The amount and substantiality of the portion used in relation to the copyrighted work as a whole is also considered. The quantitative aspect of fair dealings is problematic with image use as the norms developed for literary works (text) do not translate successfully to visual works. To assist with this various specialist bodies have grappled with what constitutes “fair” and have developed codes of fair practice within their various disciplines such as documentary film makers and others.⁵

Because NZ is signatory to international copyright treaties we also need to be mindful of copyright restrictions in other countries. The Fair Use Project at Stanford University, US, summary of fair use says a fair dealing or fair use in a work must result in a work which is transformative, but be within the normal boundaries (for comment, critique and illustrating the point), the amount needs to be proportional to purpose and attributed according to the author’s wishes, and all things being equal the market of the new work ought not to compete with the original. Judge Leval is quoted as saying, “Fair use should typically extend to uses that serve a fundamentally different expressive purpose from the original by employing the original in the creation of new information, new aesthetics, new insight and understandings”.⁶

A *Code of Fair Use for Online Video*, by the Centre for Social Media at American University School of Communication, lists six factors which might be considered fair use in the US:

- 1) commenting on or critiquing of copyrighted material
- 2) using copyrighted material for illustration or example
- 3) capturing copyrighted material incidentally or accidentally
- 4) reproducing, reposting, or quoting in order to memorialize, preserve, or rescue an experience, an event, or a cultural phenomenon

- 5) copying, reposting, and recirculating a work or part of a work for purposes of launching a discussion
- 6) quoting in order to recombine elements to make a new work that depends for its meaning on (often unlikely) relationships between the elements”

They also advise that “inevitably, considerations of good faith come into play in fair use analysis. One way to show good faith is to provide credit or attribution, where possible, to the owners of the material being used.” American University, “Code of Best Practices in Fair use for Online Video”, (2009)

FAIR USE

The US equivalent to fair dealings is fair use. “In the U.S. the Supreme Court has made it abundantly clear that fair use *is* the legal mechanism that balances intellectual property rights with freedom of expression.” Bielstein, *Permissions*, 79 (quoting Eldred et al. v. Ashcroft (01-618), 537 U.S. 186 (2003))

“In reviewing the history of fair use litigation, we find that judges return again and again to two key questions:

- Did the unlicensed use “transform” the copyrighted material by using it for a different purpose than that of the original, rather than just repeating the work for the same intent and value as the original?
- Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use? If the answers to these two questions are “yes,” a court is likely to find a use fair.

Because that is true, such a use is unlikely to be challenged in the first place.” Bielstein, *Permissions*, 79 (quoting Eldred et al. v. Ashcroft (01-618), 537 U.S. 186 (2003)).

The *Code of Best Practices in Fair use for Scholarly Research in Communication* found that if a use is fair in the course of scholarship, then it is fair in the publication and distribution of that scholarship by any means, including publishing and media distribution, and in the archiving of that scholarship.” American University “Code of Best Practices in Fair use for Scholarly Research in Communication” (2010)

FILM MONTAGE

A compilation of film sequences or stills into a new time-based media project.

Lev Kuleshov was an early Soviet filmmaker who set up a simple experiment: he showed an audience a film that showed the same footage of a man's face three times - but each time followed by a different image: a bowl of soup, a dead body and a half-naked woman. Each time, the audience interpreted the man's expression differently, showing that the meaning of an image or sequence of images is as much in the images it is surrounded by as in the image itself. Walker, "remix culture: vernacular creativity and power", (2009) An early example of film montage is Bruce Conner's *A Movie* of 1958.

FORMAT SHIFTING

When one shifts an *expression* of an idea from one medium to another, thus medium shifting. Under legal logic one is allowed to take a photograph of a 3D sculpture (permanently on display) but not to create a 3D sculpture from a 2D photograph. **See NZ Copyright Act under COPYING.**

If one was shifting from painting to photography that would not be allowable even though the physical object representing the idea in each is completely different (see also *Photo-reduction* below). In the painting the surface substrate (canvas) has a woven texture upon which is applied layers of pigment. In the case of analog photography there is a negative or transparency (plastic substrate with light sensitive layer of chemicals adhered) from which a print is made (resin coated paper with a layer of photosensitive chemicals). Painting to etching reveals similar differences in the final object resulting from vastly different artistic techniques. In the case of etching the surface texture is often suggested with hatching and cross-hatching and colour is often not present. **SEE PHOTOREDUCTION and PHOTOGRAPHS AND ORIGINALITY.**

The definition of "copying" in the 2008 Amendment to the Copyright Act is:

NZ Copyright Act

in relation to any description of work, reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means.

This refers to the wholesale translocation of the image from one format to another. Any alteration to the content is considered under the interpretation of **DERIVATIVE**.

FOUND OBJECT

Dating from France 1937, a natural or discarded object found by chance and held to have aesthetic value. (Merriam-Webster)

FOUND FOOTAGE

The original purpose of film that eventually becomes found footage varies widely but has typically included newsreels; government, industrial, medical or education films, lower-tier Hollywood features or trailers; pornographic films; amateur home movies and advertisements. Basilco, *Cut: Film as Found Object* (2004) 25 Joseph Cornell, was one of the pioneers with his movie *Rose Hobart*, re-cut from an early Hollywood movie. Its premiere coincided with the exhibition *Fantastic Art, Dada, Surrealism* at MOMA. Basilco, *Cut: Film as Found Object* (2004) 16 **See also FILM MONTAGE.**

FREEDOM OF SPEECH or FREE SPEECH

"Freedom of speech is the freedom to speak without censorship or limitation, or both. The synonymous term freedom of expression is sometimes used to indicate not only freedom of verbal speech but any act of [communication of] information or ideas, regardless of the medium used." (Wikipedia)

"Copyright' restrictions on speakers' ability to recast existing expression or incorporate it in a new context represent the most striking and poignant examples of the copyright free speech conflict." Netanel, *Copyright's Paradox* (2008) 196

There is no statute or positive rule of the common law recognising and protecting freedom of speech and expression in New Zealand. The principle is that anyone may say and publish what he or she chooses without prior licence or approval (film censorship affords an exception), but he or she is liable to be punished if he or she infringes the law. Cameron, *An Encyclopedia of New Zealand*, (1966) Laws which place limits on that freedom include the Human Rights Act 1993, Privacy, and the Defamation Act 1992. **See FREEDOM OF EXPRESSION and SPEECH.**

FREEDOM OF EXPRESSION

Freedom of expression does not normally carry with it the right to make free use of another's work unless it is a fair use such as quotation or transformative use or in parody of a work lawfully in the public realm. The Human Rights Act considers the extent to which material has been available to the public on prior occasions. Appropriating another's work is of itself not freedom of expression, but what you do with it or the ideas! Burley, "Copyright, Parody and Satire" (2006) 74 **See TRANSFORMATIVE USE.**

GOLDEN RULE

Those that have the gold, make the rules.⁷

GOOD FAITH

Under current legal thinking if you wish to use the work of others you are beholden to ask permission but it is not beholden upon the copyright holder to reply! This renders the process somewhat inefficient as you will not know whether the request is being ignored or you have failed to make contact with the copyright owner. The concept of "good faith" was discussed in *Campbell vs Acuff*. **See Casebook.** Good faith is a common *modus operandi* of Weird Al Yankovitch, who sees it as a matter of courtesy, though not strictly necessary for his parody works. Sadler, *Electronic Media LAW*, (2005) 316

HOMAGE

An expression of high regard. (Merriam-Webster) Tribute films or fan films are an example of homage. Like Parody you need to know the original to recognise what is being said. **See**

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also MORAL RIGHTS.

HUMAN RIGHTS

The Human Rights Act sets out to promote respect for and appreciation of human rights in New Zealand society; and to encourage the maintenance and development of harmonious relations between individuals and the diverse groups in society. It differs from the *Bill of Rights Act* (BORA) which includes protection of the life and the security of the person, democratic and civil rights, non-discrimination and minority rights, rights around search, arrest, and detention, rights to fair criminal procedure, right to justice. Human Rights Commission

HYPERTEXT or HYPERLINKS

“In computing, a hypertext system is one for displaying information that contains references (called hyperlinks or simply links) to other information on the system, and for easily publishing, updating and searching for the information. The most well-known hypertext system is the World Wide Web.” Jahsonic, “A Vocabulary of Culture” (2007) See

BANDWIDTH THEFT.

IMPERIAL PLAGIARISM

The history of copyright as we have discussed elsewhere is one of powerplay, source hypocrisy and often denial by those same players.

“This peculiar and specific act – the enclosure of commonwealth culture for the benefit of a sole or corporate owner – is close kin to what could be called *imperial plagiarism*.” Miller, *Sound Unbound* (2008) 37.

One of the most cited examples is the Disney Company whose catalogue has drawn from a wide legacy of visual and cultural sampling and yet whose legal division has been the vigilant watchdog over it ever since, going as far as to prohibit the use of any Disney related images to illustrate points in scholarly works, for example Holy Crawford’s monograph *Attached to the Mouse, Disney and Contemporary Art*. See NON-SUBSTITUTABLE

“INDUSTRIALLY APPLIED” ARTISTIC WORKS

The copyright in literary, dramatic, musical and artistic works generally lasts for the life of the author plus 50

years. There is no restriction in New Zealand copyright law against protection for industrially applied artistic works. However, the copyright term for industrially applied three-dimensional works is usually 16 years. Protection for industrially applied “works of artistic craftsmanship” lasts for 25 years. For other works, copyright generally lasts for 50 years. Chapman Tripp, “Doing Business in NZ” (2009) **SEE ALSO SCULPTURE.**

INFRINGEMENT

“Copyright is infringed when another person does something in relation to a work in a way that is served to the copyright owner, without permission.” This may relate to the whole or a substantial part of the work.

Artistic works on permanent display to the public are exempt from infringement by copying. Copyright Council of NZ, “Information Sheet : Visual Artists”, (2007).

INSPIRATION

This came from “that”, and “that” also had a prior model. We can see the build up of influences over the years like a patina. Modern conservation protocols for heritage items say we ought to treat the patina as a valuable part of the history of the object and not try to obliterate it or restore it to its original, or to a point where it will lose evidence of its knocks with history. **SEE ALSO ABSORBATIVE LOGIC THEORY.**

INTELLECTUAL PROPERTY

IP now encompasses **all** creativity, innovation and enterprise. IP includes a diverse range of commercially valuable assets including patents for new inventions, trade marks for marketing goods and services and copyright works like photographs, prototype drawings, literature and music. Ministry of Economic Development, IPONZ

LICENSING

Licensing is a contractual way of granting permission between known parties. It can be complicated and costly. It is a form of contract by which some or all of the author’s exclusive rights (**BUNDLE OF RIGHTS**) can be transferred to other copyright *owners* or copyright

holders. Licences can be inclusive or exclusive and the terms of the licence may include a one off fee or on-going royalties. A typical contract will include the terms of negotiation about what rights are to be transferred, to whom (from whom), for what term and where and under what circumstances the original work can be used. **CREATIVE COMMONS** licences are a form of licence notification that usually indicate which rights have been waived or reserved. They are a form of “pre-licensing”. See also **COLLECTION SOCIETIES** which are a group set up to monitor and administer the copyrights of a group of similar rights holders, such as music or book publishing.

Note that under **FAIR DEALINGS** or **FAIR USE** one does not need to seek permission if your use is “fair” nor if the work is in the **PUBLIC DOMAIN.**

LOW RES (low resolution)

Resolution describes how much detail there is in a digital image and thereby the quality of the image you will see online or in a printout. There are various ways in which this information can be conveyed but it often refers to a the number of pixels or number of dots or lines per inch.

MACHINIMA

“Machinima is filmmaking within a real-time, 3D virtual environment, often using 3D video-game technologies.” The Machinima FAQ, *Academy of Machinima Arts and Sciences* (2005).

MANIPULATION

To alter or apply a treatment to with a skillful manner.

MASH-UP

A digital media file containing any or all of text, graphics, audio, video, and animation, which recombines and modifies existing digital works to create a new work. A video that is edited from more than one source to appear as one work. (Wikipedia) **SEE TRANSFORMATIVE USE.**

MEDIA SHIFTING

SEE FORMAT SHIFTING.

MORAL RIGHTS

These relate to an author's reputation. Moral rights exist internationally.

NZ Copyright Act

the author has the right to correct attribution and against false attribution as author, rights surrounding the integrity of the work (such as objection to derogatory treatment), rights to privacy in certain photographs and films, [and the right to publish anonymously.]

Some countries recognise more of these, some less, but most recognise the first three. In certain cases Moral Rights have been seen as threatening **FAIR DEALINGS** or **FAIR USE**. That is it seeks to prevent treatments of works that misrepresent the creator's intentions to the public. The counter argument is that they not be interpreted to prevent treatments that overtly build upon, criticise, or ridicule a work (and consequently the author of the work) noting also that parody does not always misrepresent the authors message. So as not to cause confusion between the original and transformed work, "there must be a clear and reasonably prominent indication that the work has been subjected to a treatment to which the [original] creator did not consent." Burley "Copyright, Parody and Satire" (2006) 130 -131

In addition under current NZ Law Fair Dealing can also be challenged by the idea of "integrity". This can only really be determined by the viewer and does not necessarily safeguard the author's message in any case. "Reputation" (which comes from Defamation Law) is also subject to the same argument. Additionally "a court could conclude, for example, that provided any quotations are accurate there can be no infringement to the right of integrity since it will not be "the treatment" which is prejudicial to the author's honour of reputation. Burrell and Coleman, *Copyright Exceptions*, 79

Perhaps what is necessary here is to adopt the French code (*Code de la Propriete Interlectuelle*) "once a work has been disclosed, the author may not prohibit: parody, pastiche and caricature, observing the rules of the genre". Burley cites Frederic Polland-Dulian, of the Quebec Court of Appeal who says;

- a) a parody must have humourist intention and effect
- b) not create confusion with the original
- c) purpose is to be amusing at the expense of the work parodied. It is also possible that pastiche is used with a different intention, that of rendered homage to the work or parodies the author and may not intentionally aim to harm. Burley "Copyright, Parody and Satire" (2006) 142

NON-SUBSTITUTABLE

The work is so *iconic* that it has become "non-substitutable," as in the example of Disney characters, or some works convey a *special meaning* which is non-substitutable. (Non-substitutable *by itself* is not a Fair use defence, the use must be transformative). Australian Copyright Council, *Fair use: Issues and Perspectives* (2006) 29

Trademarks and their licensed offspring become facts of our environments. **SEE IMPERIAL PLAGIARISM and ABSORBATIVE LOGIC THEORY.**

ORIGINALITY

In law Copyright protects the "original" expression. Note that it is the expression and not the idea that is protected by copyright. For many artists it is the idea "that constitutes the work regardless of its execution ... the work may be the result of a simple choice." Walravens, *Dear Images*, McLean ed. (2002) 174 This is the case with **READY-MADES** and **FOUND OBJECTS**. The ideas and the recontextualisation are the crux of what make it an artwork. A classic example is Duchamp's *Fountain*, 1917.

Some hold the view that the work must be physically made by the artist to be original. If we look back into the History of Art this could well exclude many Renaissance and earlier masterpieces where paintings were made in a "master's" studio often with apprentices working on

the same works. A modern equivalent can be seen in the example of Warhol, Koons or Billy Apple who often commission other artists and artisans to render their artistic ideas in physical form. Here once again we see the dominance of the idea as the stamp of authorship, much as the case of the architect and the builder, or film director. Esche, "why does the museum copy the artwork?", (2010).

The test for legal originality varies. "In *droit-d'auteur* (Eu countries), a work needs to bear the stamp of the author's personality and be the author's own intellectual creation. In the UK, the work must exhibit a degree of labour, skill and judgement. In US law, the work must possess some minimal degree of creativity." Stokes, "Can the law protect works of art and what exactly does it protect?" (2009) 35 In all international copyright law the law clings to the notion of "originality". As we see in other sections of this study this concept of authorship devalues the creativity of traditional cultural art forms. There is also a need for the law to lift its game in terms of art or visual literacy. **See ARTWORK.**

NZ Copyright Act.

A work is not original if -

- (a) It is, or to the extent that it is, a copy of another work; or
- (b) It infringes the copyright in, or to the extent that it infringes the copyright in, another work.

See also "**PHOTOGRAPHY, TRANSFORMATIVE USE and ORIGINALITY**"

ORPHAN WORKS

These are works for whom the author or copyright owner, cannot easily be traced. A problem is posed for works where the artist or author is not necessarily attributed **on** the work, such as photographs, printed textiles etc. Current copyright law reform recommendations are considering the idea that the work can be used if the copyright owner cannot be found after a "reasonable" search. *British Journal of Photography*, "Copyright law shakeup", (2008) 6 There is also a clause under consideration that a 'rights holder who subsequently emerges to be paid the normal fee

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and remove the possibility of applying for post-statutory damages. Stella, "The Proposed new law is a nightmare for artists" (2008) 28

NZ Copyright Act.

Meaning of unknown authorship

(1) For the purposes of this Act, a work is of unknown authorship if the identity of the author is unknown or, in the case of a work of joint authorship, if the identity of none of the authors is known.

(2) For the purposes of this Act, the identity of an author shall be regarded as unknown if it is not possible for a person who wishes to ascertain the identity of the author to do so by reasonable inquiry; but if that identity is once known it shall not subsequently be regarded as unknown.

Further it is beholden upon the user to request but not upon the holder to answer. Notions of **GOOD FAITH** need to be addressed on both sides.

OUT OF COPYRIGHT

See **PUBLIC DOMAIN**

PAINTING

Painting is the practice of applying paint, pigment, color or other medium to a surface. ^(Wikipedia) It finally got copyright protection for the first time in the Fine Arts Copyright Act of 1862 (UK).

PARAPHRASE

Dating from 1548, a restatement of a text, passage, or work giving the meaning in another form. ^(Merriam-Webster)

PARODY

"While freedom of expression is essential to the arts, it is not absolute, and does not include the right to copy the creative works of others to make a point, with the possible exception of parody. To qualify for this exception, a new work incorporating all or portions of the pre-existing work must have as its purpose the parody of the pre-existing work *itself*, not broader social issues as a whole (which is called "satire")" Chaires, "Something Old, Something New" (2002) 15

In Australia parody can be viewed as a productive use

and not just a "re-productive" use. ^{Australian Copyright Council, *Fair use: Issues and Perspectives* (2006) 31} Parody has no special status under UK and NZ law, where it is judged according to the usual rules of "substance" and whether or not an exception applies, however we need to remember that Parody is by necessity both original and parasitic. Overstated rather than "dead pan" humour will sometimes be necessary to argue for parody because if people don't get the joke it could be a problem. A parody of a subject asks "do you get the joke". ^{Yonover cited in Burley, "Copyright, Parody and Satire", 6}

See also the moral rights clash. Moral Rights says "you have upset the integrity of my work". Related genres are pastiche, satire and burlesque. See also "French code" under **MORAL RIGHTS**.

PARTICIPATORY CULTURE

Opposite to consumer culture - a culture in which private persons (the public) do not act only as consumers, but also as contributors. ^(Wikipedia)

PASSING OFF

A form of misappropriation where a work is passed off as the work of someone else.

PASSIVE CONSUMER

In an article on "prosumers" *Wikipedia* differentiates between passive consumers who merely consume the digital content they are provided by distributors and prosumers on the other hand who make active choices about what they might wish to consume, including things which aren't always on the menus of the major providers or content distributors. ^(Wikipedia)

PATENT

Copyright is "distinguished from patents by reference to the essential creative activity at issue, patents involve 'discoveries' rather than creation". ^{Bowrey, *Dear Images*, McLean ed. (2002) 268} In his discussion on the development of the patent system and Statute of Monopolies, Eric Schiff (*Industrialisation without National Patents, 1971*) said that

such monopolies may lead to a "counterbalance, or even overbalance, the beneficial effects of publicising ingenuity and rewarding inventors." ^{Monbiot "Patent Nonsense", *The Guardian* (2002).} See also Buchloch in **APPROPRIATION ART**.

PHOTOGRAPHS

Photographs are protected as copyrighted works under **ARTISTIC WORKS**. There are rules concerning copyright ownership in photographs known as the **COMMISSIONING RULE**. The rules of **EMPLOYEES** or work for hire agreements may also affect ownership of copyright.

PHOTOGRAPHS AND ORIGINALITY

There are two classes of photographic **REPRODUCTIONS**, only one of which is considered original.

"Those that are themselves creative. Many photographs that document 3-D works such as sculpture or architecture qualify under this heading. Such photographs involve the photographer choosing a point of view to emphasise some element of the underlying work or employ some variation in lighting or such like to produce an image that is an original interpretive expression. The other category is that of slavish copies such as photographs that document 2-D artworks such as paintings, drawings, and prints. The aim of this class of photography is to *record* the underlying work exactly. This class of photography is not considered original." ^{Bielstein, *Permissions* (2006) 40}

PHOTOREDUCTIONS

The transparency and its progeny are not reproductions they are *photoreductions*. ^{Weil, in *Ethics and the Visual Arts*, King ed. (2006) 169} The transparency of a photograph is anything but an exact reproduction. Unlike the original (for example a painting) the transparency or negative is an amalgam of celluloid and coloured dyes, which captures the informational content of the original, but does not reflect what the painting is as a tangible object that is a canvas support with a surface encrusted with distinctive patterns of

pigment.

PLAGIARISM

Plagiarism is presenting someone else's work as if it were your own. There is no definition or interpretation under copyright law in New Zealand. Plagiarism is a moral term originally relating to the act of taking the writings of another person and passing them off as one's own. It is closely related to forgery and piracy - practices generally in violation of copyright laws. If only thoughts or ideas are duplicated, but expressed in different words, there is no breach. Also, there is no breach if it can be proved that any duplicated wordage was arrived at independently.

Encyclopedia Britannica

"So what if "Shakespeare himself were a plagiarist". Was he not both original and derivative? Both a creator and a thief. Then we need in this light to rethink our understanding of artistic merit. "The 'greatest' just might not equal "the most original". Julius, *Dear Images*, McLean ed. (2002) 488

"There is no such thing as plagiarism. We must find, I think, that by being conversant with the Intentions of others, we learn to invent ourselves. The mind is the barren soil which will produce no crop, or only one, unless it be continually fertilised and enriched with Foreign matter". (Mr Joshua Reynolds a character in Barbara Ewing's, *The Fraud*.) Ewing, *The Fraud*, 92. **SEE STEALING** and **IMPERIAL PLAGIARISM**.

PLAY

"Play" works by making associations with the familiar in which it becomes easy to make believe which is one of the cornerstones of creativity. It is often an element in **REMIX**. Things may be remixed for fun (definition - something done for enjoyment or a laugh) and sometimes it is purposeful, to make a political, ethical or moral point, as in "speech" and "freedom of expression". James, *Young People, Ethics and the New Digital Media* (2009) 79

PRIVACY RIGHTS

See NZ Legislation Privacy Act 1993 and Codes of

Privacy. Privacy Commissioner, "The Privacy Act and Codes" See also Broadcasting Standards Authority which requires "that the person be identifiable beyond their intimate friends or family before it will find that the privacy standard has been breached" (for broadcasting).

Evans, "Personal Information in New Zealand: Between a Rock and a Hard Place?" (2006)

PROPERTY

Copyright law is a branch of property law and the chief function of property law is to define the things which may be objects of exclusive private control and identify the persons in whom those rights" subsist. In addition, "work" is found to fall under the shadow of "property". Barron, *Dear Images*, McLean ed. (2002) 291

PUBLIC DOMAIN

"Works are in the public domain if they are not covered by intellectual property rights at all, if the intellectual property rights have expired, and/or if the intellectual property rights are forfeited or unclaimed." (Wikipedia) However, there is no such thing as the public domain on the Internet. There is no globally valid International Copyright Law that would take precedence over local laws. Whether or not something is copyright-free in one country or another depends on the laws of those individual countries. (Wikipedia)

See *Wikipedia* and the Public Domain Project at Duke University, Centre for the Public Domain, for more on the Public Domain.

PUBLIC SPACE

A public space refers to an area or place that is open and accessible to all, regardless of gender, race, ethnicity, age or socioeconomic level. One of the earliest examples of public spaces are commons. Absolute Astronomy (2010)

PUBLICITY RIGHTS

Sometimes known as Personality Rights. The right of publicity is generally defined as an individual's *right* to control and profit from the commercial use of his/her

name, likeness and persona. Rich, "Rights of Publicity" (2000)

QUOTATION

A passage referred to, repeated, or adduced. (Merriam-Webster) It is common in academic circles as a means of progressing the fields of science and the "arts" in written literature by using the written word. In **TEXT** when one copies a short passage from another's copyrighted work one **ATTRIBUTES** the "quotation". When using images the law says one cannot quote unless one pays first. Failure to pay, even if one attributes, risks copyright **INFRINGEMENT**. Unlike a textual work, a work of visual art is sometimes said to be incapable of being quoted, in the sense that "some small detail that might give a better sense of the whole." Weil, in *Ethics and the Visual Arts*, King ed. (2006) 163 **SEE REFERENCING**.

READYMADES

A commonplace artifact (such as a comb or bicycle rack) selected and shown as a work of art. (Merriam-Webster) for example: Duchamp's *L.H.O.O.Q.* (1919) featuring Leonardo da Vinci's, *Mona Lisa* (c1503-1506). **SEE FOUND OBJECTS**.

RECORD

To put down in writing or other physical means. (Merriam-Webster)

RE-CUT

Some remix artists reorganise the structure and insert other components into a film, some play with our "experience" of the film by tinkering with other elements such as colour or stretching time, for example Douglas Gordon, *24-Hour Psycho* (1993). Basilco, *Cut: Film as Found Object* (2004) 31

RECYCLE

"We are all postmodernists now ... our culture is one which generates and regenerates itself by reference, self-reference and recycling of existing material in new contexts." Australian Copyright Council, *Fair use: Issues and Perspectives* (2006) 33

REFERENCING

To research, verify, or organize by means of cross-reference. (Merriam-Webster)

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Referencing other art works in a new work is a **TRANSFORMATIVE** act. Newsgrist, "Why referencing isn't stealing" (2010) **SEE QUOTATION.**

REFRAME

To look at, present, or think of (beliefs, ideas, relationships, etc.) in a new or different way. thefreedictionary.com
See *Recut, Reframe, Recycle*. American University, Recut, Reframe, Recycle, (2007)

REINTERPRETATION

"Anglo-Australian law has been criticised for not dealing well or appropriately with the use of copyright material [in the contexts of transformation, recontextualisation and re-incorporation] The inability to recontextualise a work without permission can limit our understanding by preventing a work from being reinterpreted." Australian Copyright Council, Fair use Issues and Perspectives, 29. In certain instances, in certain art works, use of copyright material is non-substitutable. **See NON-SUBSTITUTABLE**

REMIX

To mix again. A remix is an alternative version of a song (or film), made from an original version. (Wikipedia)
Remix is both a research output and born of **PLAY**. Navas, "The Three Basic Forms of Remix" (2007)

REPRESENTATION

An artistic likeness or image. (Merriam-Webster) An act of substitution where one thing stands for another.

REPRODUCTION

A copy. Something made to closely resemble another. (Merriam-Webster) A surrogate copy; "... most of the art we view is not really art at all but a strange, luminous image of art reconstituted in a surrogate medium." Bielstein, Permissions, 19 A reproduction fee is usually over and above the cost of making the physical copy. **SEE PHOTOREDUCTION.**

SAMPLE

"In music, sampling is the act of taking a portion, or sample, of one sound recording and reusing it as an

instrument or element of a new recording." Jahsonic and friends, Art and Popular Culture Typically a work that uses sampling "encapsulates both the creative features of an original work and the innovative endeavors of another person, [it is an] independent work incorporating quotations" but under most international laws consent is required to publish such a derivative work. Rychlicki and Zieliński "Is Sampling always Copyright Infringement", (2009) 20 The decision from *Gilbert O'Sullivan vs Biz Markie* case was the one that begat the "thou shalt not steal" ruling in regard to sampling. *Campbell vs Acuff-Rose* (2 Live Crew vs Roy Orbison), 1989 is the next most quoted sampling case where 2 Live Crew won on a defense of Parody. **See casebook.**

In the pre-hip-hop era there were instances which today would be called sampling but were then known as musical variation. These were works which contained musical quotations which referred to a recognisable subject or motif from another work. Lawyers, Rychlicki and Zieliński, ask the question; if the author or original artist and source of the work is mentioned (but not necessarily in the title) whether this satisfies the quotation or satisfactory attribution requirements and thereby can be used without seeking costly permissions, if the use is "fair". Rychlicki and Zieliński "Is Sampling always Copyright Infringement", (2009) 20 **SEE QUOTATION and VARIATION.**

SATIRE

"Parody means using elements of a copyrighted work to make fun of that copyrighted work. Satire means using elements of a copyrighted work to make fun of something else." Lury, Dear Images, McLean ed. (2002) 319

"Parody is commonly understood to amount to a comment on, or ridicule of, an original work, produced by imitating the original work. The concept is sometimes distinguished from satire, which is typically understood as a comment on society, which may include its culture." Australian Copyright Council, Fair use: Issues and Perspectives, (2006) 30 Note that "satirical imitation" is also included in the *Macquaire Dictionary* definition of "parody". There is a trend in case law under Freedom of Speech in the US for it to

be considered a Fair use and Australia recently included **satire** in their 2006 Amendments to the Copyright Act.

SCULPTURE

"The art of forming representations in the round or in relief by chiseling stone, carving wood, modeling, clay, casing metal or similar processes – and anything which is the result of one of these processes ought to qualify as a sculpture in law." Barron, Dear Images, McLean ed. (2002) 293-294 Interestingly under the law it was accepted that a plaster cast of a sandwich made for the production of die-casting molds for the heating plates of a sandwich toaster could be a sculpture under the 1956 Copyright Act UK. Later jurisprudence has sought to require that some "artistic intent" is necessary in the process of creating an artwork compared to that for a manufacturing purpose where a functional effect is the purpose. **SEE INDUSTRIALLY APPLIED ARTISTIC WORKS.**

SECOND LIFE

"Second Life (SL) is a virtual world developed by Linden Lab that launched on June 23, 2003, and is accessible on the Internet. A free client program called the viewer enables its users, called residents, to interact with each other through avatars. Residents can explore, meet other residents, socialize, participate in individual and group activities, and create and trade virtual property and services with one another, or travel throughout the world." (Wikipedia)

SCREEN SHOTS

A screenshot, screen capture, or screen dump is an image taken by the computer to record the visible items displayed on the monitor or another visual output device. Usually this is a digital image taken by the host operating system or software running on the computer device, but it can also be a capture made by a camera or a device intercepting the video output of the computer. (Wikipedia)

SPEECH

In the US "art has the protection of the First Amendment precisely because it is regarded as having communicative

power on a par with that of the written or spoken word.... it is merely one kind of speech among other protected kinds [of speech].” Julius, *Dear Images*, McLean ed. (2002) 492 A picture is said to paint a thousand words. **SEE FREEDOM OF SPEECH** and **COMMUNICATION**.

“Through most of the nineteenth century authors were free to build on existing works so long as they made a substantial independent contribution. But today, speech that builds upon an existing work commonly runs afoul of the copyright holder’s broad proprietary rights. Copyright now includes an exclusive right to make “derivative works.” This prevents modifications, reformulations and derivative works by secondary authors and is suppressing “freedom of imagination” and thus creativity.” Netanel, *Copyright’s Paradox* (2008) 196

What is and isn’t “speech” - amassing enormous files of media is not justified as speech (as in file sharing). However, a **MASHUP** of the recording of “Endless Love” edited with images of Tony Blair and President Bush from news items and played on the eve of the invasion of Iraq may qualify as a form of “Speech”. Netanel, *Copyright’s Paradox* (2008) 196

Is art protected as speech or expression ? Kate McNeill writes “protection of art occurs under Australian law in only a narrow range of circumstances where works of artistic merit are exempted from otherwise unlawful acts” for example racial and religious intolerance and works that may otherwise fall below community standards or be considered obscene. She suggests “this appears to be based on the idea that while art may constitute a form of expression, it is a particularly benign form” and looking at cases of state censorship of the arts she concludes that artists wishing to engage politically in the public sphere “at the margins of condoned public discourse, run the risk of falling outside of those protections”. “The freedom to make, and show art of whatever nature may be better served by protecting in all forms, rather than continuing with an approach which privileges only particular forms of **ARTISTIC** expression and

implicitly denies others the status of art ... With greater recognition of the contribution that visual imagery and modes of representation make to the construction of the public sphere it seems timely to examine the fixation with speech and text as being the most privileged forms of communication”. MacNeill, “Art: A form of speech” (2002) 127

Speech is normally associated with the vocal form of human **COMMUNICATION** and its written (**TEXT**) counterpart. An artist finds their voice through their art. As a form of expression, art is a form of speech and of course the saying says it all “a picture paints a thousand words.” **FREEDOM OF SPEECH** is the freedom to speak without censorship or limitation, or both.

STARE DECIS

A basic principle of the law whereby once a decision (a precedent) on a certain set of facts has been made, another court of the same type or rank or lower, must apply that decision in cases presenting the same set of facts. Duhaime, *Legal Dictionary*

STEAL

“Immature poets imitate; mature poets steal.’ So wrote TS Eliot in *The Sacred Wood* in 1920. His epigram was probably adapted from Igor Stravinsky’s comment that ‘a good composer does not imitate; he steals’, as were sayings attributed to Picasso; ‘bad artists copy; good artists steal’ and Le Corbusier; ‘All artists steal; but the truly original artist repays a thousand-fold.’” Lydiate “Appropriation Art and Fair uses” (2010) **SEE ALSO PLAGIARISM**.

TEXT

Much of the copyright act is based on accommodating protections for textual works. . . The translation of rules protecting text over to art has not worked and is full of inequities and anomalies. Leach, in *Plagiarism in Art*, Vaccaro ed. (2000), 206 “surrogates, projected on a screen or inked on paper, serve to *document* something entirely other than themselves, whereas in literary culture, print has forever been construed as a direct embodiment of text.” Bielstein, *Permissions*, 19

“The realms of verbal and the visual are so fundamentally different that the rules developed to govern **FAIR USE** in one realm - *language-based* rules developed primarily in the context of the printed word – are not necessarily the most productive rules by which to govern fair use in the other.” Weil, in *Ethics and the Visual Arts*, King ed. (2006) 161 The idea is held, that unlike text, art cannot be summarised, paraphrased or quoted from.

TPM (TECHNOLOGY PROTECTION MEASURES)

“Legal control afforded by copyright without bearing any of its standard limitations – such as that of fair use”. Claude, *Dear Images*, McLean ed. (2002) 241

See NZ Legislation for measures covered.

NZ Copyright Act

(a) means any process, treatment, mechanism, device, or system that in the normal course of its operation prevents or inhibits the infringement of copyright in a TPM work; but
(b) for the avoidance of doubt, 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)

TRADEMARK

Trademark law sets out to protect the “marks” belonging to companies. It also seeks to prevent “confusion” about the marks in the consumers mind. Use of an established mark in a trademark parody may lead to a complaint of “dilution.” Wilson, “Other People’s Trademarks” (1995) 154 Trademarks often become facts of our environment when they become so prevalent and embedded in our minds as to become “non-substitutable” (a term used by the Australian Attorney General’s Office). **SEE ALSO REINTERPRETATION and NON-SUBSTITUTABLE**.

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TRADE SECRETS

Broadly speaking, any confidential business information which provides an enterprise a competitive edge may be considered a trade secret. Trade secrets encompass manufacturing or industrial secrets and commercial secrets. WIPO. "What is a Trade Secret" (Just what are the eleven secret herbs and spices in the Colonel's secret recipe?)

TRANSFORMATIVE USE

The legal emphasis is on altering the original and adding new or additional stylistic elements for any subsequent uses. The Australian Attorney General's Office report on this subject said "the new work must not merely 'supersede the objects of the original creation, (as in a more literal copy)' ... or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message." Okpaluba, *Dear Images*, McLean ed. (2002) 209 An example of a "transformative" use is a parody or satire of an existing work. Re-contextualisation and re-incorporation in the new work transforms the meaning and it serves a different purpose. *Australia, Fair use and other Copyright exceptions* (2005)

Not all transformative uses are adaptations in that they do not seek to adapt the original *per se* but may propose using it as an element amongst many in a different context (re-purposed). **SEE ALSO PARODY.**

The point of interest is: at what point does the value added exceed that of the original - isn't all original work when it is boiled down derivative in that it builds on some previous idea and expression of such?

SEE ABSORBATIVE LOGIC and STEALING.

"Mashups, remixes, subs, and online parodies are new and refreshing online phenomena, but they partake of an ancient tradition: the recycling of old culture to make new. In spite of our romantic clichés about the anguished lone creator, the entire history of cultural production from Aeschylus through Shakespeare to *Clueless* has shown that all creators stand, as Isaac Newton (and so many others) put it, "on the shoulders of giants." American University, *Recut, Reframe, Recycle* (2007) 4 Transformative use may fall under **Fair**

dealings. See factors and limitations under this permitted exception. **SEE ALSO ADAPTATION.**

UNPUBLISHED WORKS

The duration of copyright in unpublished works is dependent upon when and in what country the artwork was created or the artist was resident. It can get complicated (this is an understatement).

In Aotearoa New Zealand where the authorship is unknown, copyright lasts until fifty years from the end of the year in which the work was first made available to the public. Copyright Council of NZ, "Duration - How long does copyright last?" Copyright lasts indefinitely in unpublished works until the work is published. However these unpublished works can be reproduced or communicated in part or in full for educational purposes. It may also be possible to copy them for research & study under **FAIR DEALINGS.**

Under UK law for **ARTISTIC WORKS**, other than photographs and engravings and works of unknown authorship, that were created before 1 January 1996, the term of protection even for unpublished works is life of the author plus 50 years after his death, but that term of protection may have been extended or revived from 1 January 1996. For engravings and anonymous or pseudonymous artistic works of all types, other than photographs, which were created before 1 January 1996 and, if created before 1 August 1989, were unpublished at that date, the term of protection lasts at least until the end of 2039. Intellectual Property Office, "How long does copyright last in unpublished works such as manuscripts?" If you think that sounds tricky check out the US law pre-1978 and post- 1978 plus the 2002 loop hole. Gasaway, "When U.S. Works pass into the Public Domain".

VARIATIONS

"In music, variation is a formal technique where material is repeated in an altered form. Improvisation of elaborate variations on a popular theme is one of the core genres of jazz." (Wikipedia).

VLOG

Dating from 2002, a blog that contains user generated video material. (Merriam-Webster)

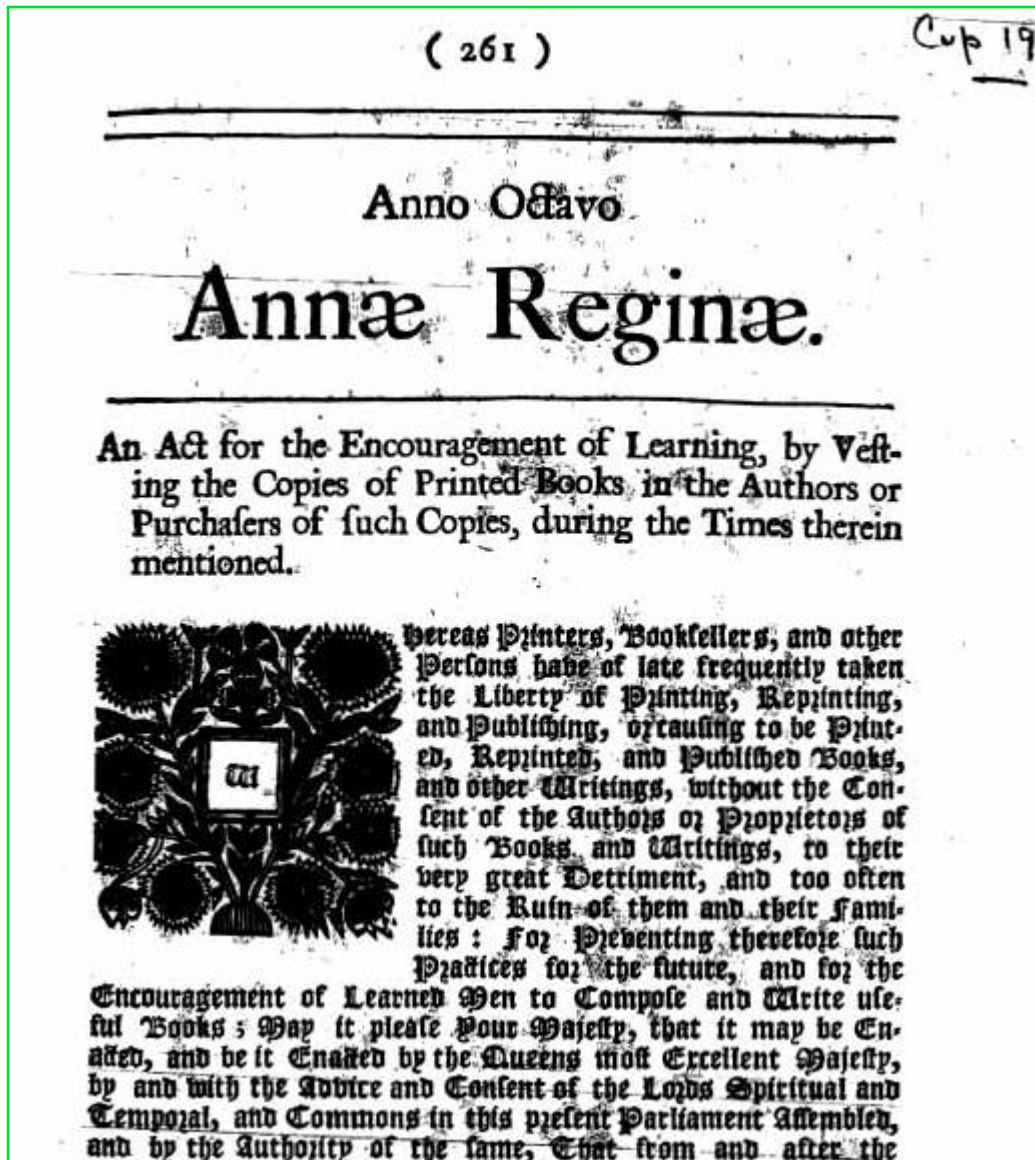
New web tools make it easy for anyone to upload a video log or personal diary type content to the internet for public consumption.

YOUTUBE

"YouTube has contributed to the culture of the clip. The specific moments a viewer wants to see can now be searched and accessed [immediately] without the hassles of ... waiting through narrative exposition and commercial breaks." Hilderbrand, *Inherent Vice* (2009) 227 See also Michael Wesh, "An anthropological introduction to YouTube".

WWW (WORLD WIDE WEB)

"The World Wide Web, abbreviated as WWW and commonly known as the Web, is a system of interlinked **HYPERTEXT** documents accessed via the Internet." (Wikipedia)



British Government, Statute of Anne, the first modern copyright law, Source: http://en.wikipedia.org/wiki/File:Statute_of_anne.jpg

1. Comic Book Legal Defense Fund, "Cartoonist Kieron Dwyer Sued By Starbucks", (30 November 2000). <http://www.cbldf.org/pr/001130-starbucks.shtml>, (accessed on 16 June 2009). See the case involving Keiran Dwyer's parody of the Star Bucks logo. (Image now deleted because of TM infringement)

2. Karen Sanig, "Protection of Copyright in Art Under the CDPA 1988" in McLean and Schubert ed. *Dear Images: Art Copyright and Culture*, (Arts Council of England: London, 2002), 49. We can look at Tracy Emin's *My Bed* (1998) as an example of a well known art work which is impossible to categorise within existing statutory definitions. Is it a collage, sculpture, or work of artistic craftsmanship? It certainly qualifies under the test of "originality" and under the European system of copyright it is an expression of the artists personality.

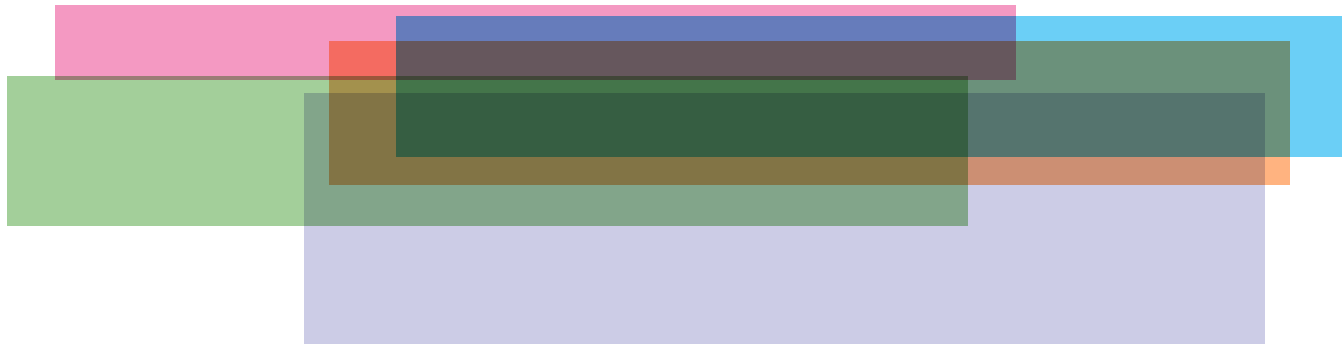
3. Note that painting did not get copyright protection for the first time until the Fine Arts Copyright Act of 1862.

4. Bielstein, *Permissions*, 103, "Copyright in the United States has always been more deeply rooted in the growth of commerce than in the moral right of the author."

5. Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, (Cambridge University Press: Cambridge, 2005), 283. The authors propose a new term "fair practice" as being a more accurate description because "fair dealing" creates a misleading impression that there is a "deal" or a "form of contractual relationship between the parties"; Bielstein, *Permissions*, 81, cites the Society for Cinema, "Fair Usage Publication for Film Stills" as an example for recommendations for time based media (e.g. movies, films) which identified "the capture and publication of individual frames as a fair-use practice"; American University School of Communication, Center for Social Media, *Code of Best Practices in Fair use for Online Video*, May 2009. <http://centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>.

6. Neil Weinstock Netanel, *Copyright's Paradox*, (Oxford University Press, 2008), 191. Weinstock cites Judge Leval from *Blanch vs Koons*, 467, F.3d 244, 253 (2d Cir.2006) and from Pierre N. Leval, *Toward a Fair Standard*, 103, HARV. L. REV. 1105, 1111, (1990).

7. Popik, Barry, "Golden Rule", *The Big Apple*, (13 June 2009) http://www.barrypopik.com/index.php/new_york_city/entry/golden_rule_he_who_has_the_gold_makes_the_rules (accessed 12 July 2010) from *Remember the Golden Rule* (1971), by Brant Parker and Johnny Hart, this was the title of a collection of 1967 *The Wizard of Id* newspaper cartoons.



where to next?

selected and annotated bibliography by topic

(compiled and with annotations by Pam McKinlay)

digital content/media management/licensing/permissions

Bielstein, Susan M. *Permissions: A Survival Guide: Blunt Talk about Art as Intellectual Property*. The University of Chicago Press, 2006.

Make a cuppa and take this book to bed with you. Not only will you become immediately enlightened but it will be a highly enjoyable experience (unusual in this field of enquiry). Lawrence Lessig liked it, I loved it - you may even laugh out loud.

Bridgeman Art Library. "Mash-up Mania". <http://www.bridgemanart.com/EN-GB/news-and-features/images-in-action/2009/august/Mashup%20mania-1.aspx> (accessed 12 July, 2010).

How to go about paying for mash-ups.

Harris, Lesley Ellen. *Licensing Digital Content: A Practical Guide for Librarians*. 2nd Revised edition. American Library Association, June 2009.

This book covers all aspects of digital licensing for librarians, educators, archivists, as well as those in museums, government, small and large companies, and vendors and publishers. It is written primarily for a North American audience, and also deals with various

aspects of global licensing. This was the main text book for the Digital Content Management distance course by copyrightlaws.com for the Special Librarians Association.

COPYRIGHT General and international

Arts and Humanities Data Service (ahda). <http://www.ahds.ac.uk/visualarts/index.htm> (accessed on 16 June, 2009).

Very good information and case studies relating to digitisation projects. FAQs page for copyright basics plus links to pages which focus on digital, internet and image copyright now hosted at JISC (Joint Information Systems Committee).

Australian Copyright Council. Blog, Podcast, Vodcast and Wiki Copyright Guide for Australia. [http://www.copyright.org.au/information/cit001/wp0005, 1994 – 2009](http://www.copyright.org.au/information/cit001/wp0005,1994-2009) (accessed on 16 June, 2009).

The ARC Centre of Excellence for Creative Industries and Innovation and Queensland University Faculty of Law have published 'Blog, Podcast, Vodcast and Wiki Copyright Guide for Australia' which looks at issues around when and how to go about obtaining permissions for use of copyrighted material and there is a section where you can browse for copyright information by occupation, see "Artists". Very good for Australian jurisdiction which until recently (before their Free Trade Deal with US and subsequent amendments to their copyright act) was very similar to New Zealand.

Ballon, Hillary and Mariet Westermann. "Copyright Ownership in Works of Art and Images". *Connexions*, 2006-2009. <http://cnx.org/content/m13912/latest/> (accessed on 16 June 2009).

This copyright module is in *Connexions*, which is a site to advance OER open source educational technology and open access educational content. This module

looks at the historical right to produce and use images of the works of others for religious, political, commercial, or decorative purposes which was rarely challenged in the past. It looks at how copyright in images is challenged by changes in laws following the evolution of new technologies.

The Center, Resource Centre. 2003-2006. <http://www.visitcenter.org/resourceCenter.cfm?task=cat&cat=3> (accessed 16 June, 2009).

The Center web site, formerly the Santa Fe Center for Photography, looks at Copyright, Media watch and online privacy issues regarding Photography.

Copyright Council of New Zealand. <http://www.copyright.org.nz/viewUserCat.php?category=221> (accessed 12 June 2009).

Lots of useful information from different angles from the NZ perspective.

CopySouth Research Group. *The CopySouth Dossier*. 2006. <http://www.copysouth.org/portal/> (accessed 9 March, 2010).

Articles examining many dimensions of issues such as access, culture, economics, libraries, education, software, the Internet, the public domain, and resistance.

Fergus, Mary Ann. *Derivative Works And Copyright: Painting from Another's Photograph*. The American Society of Portrait Artists, 2002-2009. <http://www.asopa.com/publications/2000winter/law.htm> (accessed on 16 June 2009).

Mary Ann Fergus answers questions from artists for The American Society of Portrait Artists about their right to paint from photographs which were not taken by the artists themselves. Questions involve issues around "derivative works" in copyright law.

JISC Digital Media. "Still Images: Frequently Asked Questions about Copyright". *JISC Digital Media*, 2006-2009. <http://www.jiscdigitalmedia.ac.uk/stillimages/advice/frequently-asked-questions-about-copyright/> (accessed on 16 June 2009).

JISC offers free help and advice in the UK to the Further and Higher Education community. FAQs for still images is an introductory look at questions regarding copyright definition and ownership, alteration of copies, digitisation and repositories of student work. This is possibly the final resting place of the case studies called for by TASI in 2009.

Jordan, Matt. *Be Kind Rewind: Movies in my Head*, November 2004-2009. <http://www.youaintnopicasso.com/about/> (accessed on 16 June 2009).

Be Kind Rewind is movie which handles some heavy copyright issues in a very light way. The bad guys are comical, but represent serious conflicts that people making moving films face. See also the trailer.

Nightingale, Virginia and Tim Dwyer. *New Media Worlds*. Oxford University Press, 2007.

A look at social aspects of communication and mass media including digital media.

Pioch, Nicolas. "Copyright laws around the world." *Web Museum*, 2006, <http://www.ibiblio.org/wm/about/copyright-issues.html> (accessed on 16 June 2009).

Nicolas Pioch, of the Web Museum, Paris, explains owner's copyright around the world.

Stella, Frank. "The Proposed new law is a nightmare for artists". *The Art Newspaper*. No 192; June 2008. 28.

A look at proposed "orphans" legislation.

The Federal Agency for Civic Education in collaboration with I-rights. *Urheberrecht in der Digitalen Welt (Copyright in the Digital World)*. <http://www.ights.info/> (accessed on 16 June 2009). (Translated from German)

An online dossier for debate about creating in a digital world which looks at the sticking points of working on Web 2.0. See conference papers and exhibitions held in conjunction with these events.

University of Melbourne. *Media & Arts Law Review, 1994-2009*. <http://www.law.unimelb.edu.au/cmcl/malr/index.html> (accessed on 16 June 2009).

University of Melbourne Review has resources relating to art, media, digital content and cyberlaw. The Media & Arts Law Review is a quarterly, refereed journal examining all areas of media and arts law, including: Communications, Contempt, Copyright, Cultural Heritage, Defamation Digitisation, Entertainment, Free Speech, Intellectual Property, Journalism, Privacy and Public Interest.

COPYRIGHT NZ Law

Anderson, Nate. "New Zealand copyright reform law schools US DMCA on fair use". *Ars technica*, 10 April 2008. <http://arstechnica.com/old/content/2008/04/new-zealand-copyright-reform-law-schools-us-dmca-on-fair-use.ars>, (accessed on 16 June 2009).

Ars technica summarises the New Zealand copyright reform bill passed in 2008. New Zealand allowed some format-shifting, time-shifting, and DRM circumvention when the intended use is legal. This is a brief discussion about how the NZ amendments differed from the DMCA (Digital Millennium Copyright Act 2000) in the USA.

Barclay, B. *Mana Tuturu: Treasures & Intellectual Property Rights*. Auckland University, 2005.

An enlightened recap of the cornerstones of European-style copyright law and a compelling look at the future of Tikanga as a way of addressing spiritual, intellectual and material concerns regarding traditional knowledge in Aotearoa.

Burley, Nicholas. "Copyright, Parody and Satire – finding freedom of Expression". Thesis submitted in partial fulfillment of the requirements for Master of Laws. The University of Auckland, 28 February 2006.

Very thorough look at the issues surrounding our lack of a parody clause in fair dealings, illustrated with many relevant cases. Excellent!

Copyright Council of New Zealand. "Copyright Users". Copyright Council of New Zealand, 2006-2009. <http://www.copyright.org.nz/users.php> (accessed on 16 June 2009).

Website dedicated to NZ copyright. Has pages relating to copyright owners and users, including information summary sheets on aspects of NZ copyright law.

Copyright Licensing Limited. "Copyright Licensing", 2008-2009. Copyright Licensing Limited. http://www.copyright.co.nz/index.php?view=info&load=law_what (accessed on 16 June 2009).

The revamped website of New Zealand's publishing copyright clearance centre. CLL is a collecting and licensing society. This site has a page on copyright basics and useful FAQs page which addresses questions from different perspectives for example education, libraries and publishers. The new site currently does not include some CLL or WIPO information and brochures that the old site did.

Finch, I., (ed). *James and Wells: Intellectual Property Law in New Zealand*. Brookers, 2007.

Introduction to intellectual property law in New Zealand including; patents, plant variety rights, copyright, layout designs, design registrations, trade marks, domain names and other issues in electronic commerce, passing off, fair trading, border protection. Writing is fairly dense and in arcane legalese. It's on the Harvard Law reading list but I prefer Suzy Frankel, who writes in a more human readable style.

Frankel, Suzy. *Intellectual Property Law in New Zealand*. Butterworths, 2002.

Survey of the whole subject and an overview of not just how the individual protections work but also of how the individual protections interrelate and in some cases overlap. The case studies give insight and valuable illustrations to how points of law have been interpreted in the recent and past. Includes; Copyright, Patents, Trade Marks, passing off, confidential information and Designs.

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Millett, Tony. *Copyright Information for Academic Staff and Students*. April 2009. http://docs.google.com/Edit?docid=dd2tmcm5_114gfsk3hf6, (accessed on 16 June 2009).

Tony Millett is University of Waikato and LIANZA copyright task force adviser. Question and answer style, good if you have specific questions relating to educational uses.

Ministry of Economic Development. *Digital Technology and the Copyright Act 1994*, Cabinet Paper Proposal. 2005. http://www.med.govt.nz/templates/MultipageDocumentPage_1020.aspx (accessed on 16 June 2009).

Includes Regulatory Impact statements regarding Digital Copyright review, submissions and summaries of proposal cabinet and discussion papers.

New Zealand Government. *Copyright Act 1994* No 143, 1994. <http://gpacts.knowledge-basket.co.nz/gpacts/public/text/1994/an/143.html> (accessed on 16 June 2009).

Analysis of the original Copyright Act of 1994 prior to changes made in the amendments for “new technologies”.

New Zealand Government. *Copyright, Act 1994* No 143 (as at 31 October 2008), Public Act, 2008. <http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM345634.html> (accessed on 16 June 2009).

A long-awaited E-print compiled with amendments. A very handy “Search with-in this Act” feature has been added, making my old dog-eared hard-copy with post-its happily redundant.

New Zealand Government. *New Zealand Parliament – Copyright (New Technologies and Performers’ Rights) Amendment Bill*, 2006. http://www.parliament.nz/en-NZ/PB/Legislation/Bills/b/2/a/00DBHOH_BILL7735_1-Copyright-New-Technologies-Amendment-Bill.htm (accessed on 16 June 2009).

Good for links to related documents including Hansard debates, Bills Digests, and Select Committee Reports.

NEW ZEALAND – TRADITIONAL KNOWLEDGE AND MATAURANGA MAORI

Barclay, Barry. *Mana Tuturu: Treasures & Intellectual Property Rights*. Auckland University, 2005.

An enlightened recap of the cornerstones of European-style copyright law and a compelling look at the future of Tikanga as a way of addressing spiritual, intellectual and material concerns regarding traditional knowledge in Aotearoa.

Barry Barclay. *The Neglected Miracle*. Pacific Films, 1985. (Available from the NZ Film Archive.)

A feature length documentary looking at plant Patents affecting the world’s food supplies. Shot in Peru, Nicaragua, Costa Rica, Netherlands, Italy, France, Australia and New Zealand.

Ghosh, Rishab Aiyer, ed. *Code: Collaborative Ownership and the Digital Economy*. Massachusetts Institute of Technology, 2005.

CODE looks at the collaborative model of creativity—with examples ranging from collective ownership in indigenous societies to free software. See in particular: chapter 5, Boatema Boateng, “Square pegs in Round holes? Cultural Production, Intellectual Frameworks, and Discourses of Power” and chapter 6, Anthony Seeger, “Who got left out of the Property Grab, Again Oral Traditions, Indigenous Rights, and Valuable old Knowledge”.

Martin, David and Deidre Brown. “Intellectual property of Indigenous Communities and Customary Knowledge”, *Radio NZ, National, Ideas*, 28 Feb 2010, 11am. http://static.radionz.net.nz/assets/audio_item/0020/2225126/ideas-20100228-1105-Ideas_

[for_28_February_2010-m048.asx](#). Podcast.

Martin and Brown are from the Heritable Innovation Trust.

“Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, 1993” *The International Research Development Center*. Appendix 7. http://www.idrc.ca/library/ev-30143-201-1-DO_TOPIC.html (accessed 13 October 2010).

Convened at Whakatane the declaration was written by delegates from fourteen countries and calls for all forms of exploitation of Indigenous knowledge to cease.

Ministry of Economic Development. “Information Sheet: Treaty of Waitangi Claim Wai 262”. *Intellectual Property Policy*. http://www.med.govt.nz/templates/Page_1207.aspx

Filed in 1991...watch this space.

Ministry of Economic Development/Manata Ohanga. *Te Mana Taumarua Mātauranga*. 2007. http://www.med.govt.nz/templates/MultipageDocumentTOC_28180.aspx (accessed 12 July 2010).

A guide created by the MED to explain western style IP law including risks, limits and benefits to the preservation, protection and promotion of Mātauranga Māori. Includes information on Toi Iho, a trademark denoting the quality and authenticity of Māori art.

Otago Polytechnic Management Policy. *Mātauranga Māori 1103.01*. http://wikieducator.org/Otago_Polytechnic/Mātauranga_Māori (accessed 12 July 2010).

“This policy is intended to maintain and enhance Otago Polytechnic’s commitment to upholding the Treaty of Waitangi by giving specific expression to the relationship between intellectual property and Mātauranga Māori. It seeks to give effect to the spirit and terms of the Memorandum of Understanding with Ngai Tahu and Te Kura Matatini Ki Otago Māori Strategic Framework 2007-2011.”

Shand, Peter. "Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion". *Cultural Analysis*. University of Auckland, New Zealand. Vol 3 2002. http://socrates.berkeley.edu/~caforum/volume3/vol3_article3.html

An in depth look at the "koru" in design and numerous examples of appropriation of this image in art and design with a special emphasis on examples from New Zealand.

United Nations Declaration on the Rights of Indigenous Peoples. <http://www.un.org/esa/socdev/unpfi/en/drip.html>

Waitangi Tribunal. "Matauranga Maori and Taonga", *Waitangi Tribunal Te Rōpu Whakamana I te Tiriti o Waitangi*. <http://www.waitangi-tribunal.govt.nz/inquiries/genericinquiries2/florafauna/mtaurangamoriandtaonga.asp> (accessed 12 July 2010).

Wai 262 claim. Waitangi Tribunal Te Rōpu Whakamana I te Tiriti o Waitangi. <http://www.waitangi-tribunal.govt.nz> See Chapter 6 for full text on Matauranga. http://www.waitangi-tribunal.govt.nz/doclibrary/public/wai262/matauranga_/Chapt06.pdf

Wikipedia. "Indigenous Intellectual Property". *Wikipedia*. http://en.wikipedia.org/wiki/Indigenous_intellectual_property (accessed 12 July 2010).

A one stop hub with links to declarations regarding Indigenous Intellectual Property. (Currently more reliable than WIPO)

WIPO. "Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)". *WIPO Program Activities*. <http://www.wipo.int/tk/en/tk/ffm/report/index.html>
(in particular see Part 2).

Wereta, Suzi. "Engaging with Maori Art and Identity: A Conversation with Maori Artists in Otepoti". *MAI Review*, 2007, 1. Intern Research Report 9. <http://tiny.cc/nf0pv>

COPYRIGHT – Trademark

James and Wells. "Illicit Use or Fair Trading?" *James and Wells Intellectual Property*, 2009. <http://www.jaws.co.nz/media/illicit-use-or-fair-trading> (accessed on 16 June 2009).

The Illicit Clothing vs Illicit Cola story which aired on TV 3 on 1st April 2009 is covered here. See also the *Fashion Industry of New Zealand* website for coverage of this story.

Sun Microsystems. *Sun Trademark and Logo Usage Requirements*. Sun Microsystems, 1994-2009. <http://www.sun.com/policies/trademarks/> (accessed on 16 June 2009).

A very simple and straightforward explanation about trademark law from the legal department at Sun Microsystems.

COPYRIGHT MUSEUMS

Rinehart, Richard. "Nailing Down Bits: Digital Art and Intellectual Property". Canadian Heritage Information Network, 2006-2009. http://www.chin.gc.ca/English/Intellectual_Property/Nailing_Down/index.html (accessed on 16 June 2009).

Canadian Heritage Information Network website, see Copyright subheading. See also publishing, presenting and exhibiting digital art, creating and maintaining digital content.

COPYRIGHT PUBLISHING (see also Permissions)

British Academy. "Joint Guidelines on Copyright and Academic Research. Guidelines for Researchers and Publishers in the Humanities and the Social Sciences". *British Academy*, April 2008. <http://www.britac.ac.uk/reports/copyright-guidelines/index.cfm> (accessed on 16 June 2009).

Oxford Journals. "Seeking Permission to reproduce images in Oxford Journals articles" *Oxford Journals*, 2009. http://www.oxfordjournals.org/access_purchase/image_permissions.html (accessed on 16 June 2009).

Summary of image permissions and specifications required before and for publication.

Stanford University Libraries. "Copyright & Fair use". SU LAIR, 2005-2009. http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter7/index.html (accessed on 16 June 2009).

FairUse (excerpts from NOLO, "Getting Permission" (October, 2007), "Public Domain", "Permissions", "Web Permissions", "Academic Permission", "Releases" and "Copyright Research" by Richard Stim, see below for more references to Richard Stim.

Stim, Richard. "Getting Permission: How to License and Clear Copyrighted Materials Online and Off". *Nolo*, 2007. <http://www.nolo.com/product.cfm/ObjectID/4835B5AF-0C35-4540-A4FE20738596443E/update/1/310/276/240/#summary> (accessed on 16 June 2009).

This link is to the e-book download address. The 10th edition has been updated to provide latest case law and copyright regulations and includes new information about protecting copyright including coverage of Internet works and blogs. Check out the "Free legal Information" tab.

University of California Press. "Journal Copyright Guidelines". University of California Press, July 2005. http://ucpressjournals.com/assets/Journal_Copyrt_Guidelines.pdf (accessed on 16 June 2009).

An outline of the relevant tasks needed before submitting an article manuscript for production. The author being legally responsible for complying with the copyright laws and the laws of privacy and libel.

Washington State University. "University Publishing Copyright". Washington State University, 2009. <http://www.publishing.wsu.edu/copyright/> (accessed on

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16 June 2009).

WSU Copyright Office site to educate the campus community and others about copyright law in higher education. The Copyright Office was established to assist students, faculty and staff in copyright issues that arise in the pursuit and delivery of education.

COPYRIGHT EDUCATIONAL USES and ISSUES

American University School of Communication. "Code of Best Practices in Fair use for Scholarly Research in Communication, 2010". *Center for Social Media*. <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-scholarly-research-communication>

Looking at the trend in Fair use case law, the law centre at American University takes a look at media studies and popular culture and how copyright across digital media platforms is inhibiting their research. They conclude that "if a use is fair in the course of scholarship, then it is fair in the publication and distribution of that scholarship by any means, including publishing and media distribution, and in the archiving of that scholarship. Communication scholars' fair use rights extend to the portions of copyrighted works that they need to accomplish their goals—and sometimes even to works in their entirety. By the same token, the fairness of a use depends, in part, on whether the user took only what was needed to accomplish his or her legitimate purpose."

American University School of Communication. "The Cost of Copyright Confusion for Media Literacy, September 2007". *Center for Social Media*. http://www.centerforsocialmedia.org/files/pdf/Final_CSM_copyright_report.pdf (accessed on 16 June 2009).

"The fundamental goals of media literacy education - to cultivate critical thinking about media and its role in culture and society and to strengthen creative communication skills - are compromised

by unnecessary copyright restrictions and lack of understanding about copyright law, as interviews with dozens of teachers and makers of media literacy curriculum materials showed. Copyright law permits a wide range of uses of copyrighted material without permission or payment. Educational exemptions sit within a far broader landscape of fair use. However, educators today have no shared understanding of what constitutes acceptable fair use practices."

Berkman Center for Internet and Society. "Berkman White Paper, The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age". *Berkman Center for Internet and Society*, August 2006. <http://cyber.law.harvard.edu/> (accessed on 16 June 2009).

Looks at whether innovative educational uses of digital technology are hampered by copyright restrictions.

Berkman Center for Internet and Society. "Freedom to Teach, An Educational Fair use Project, 2008." *Berkman Center for Internet and Society*. <http://cyber.law.harvard.edu/node/4376> (accessed on 16 June 2009).

The Berkman Center at Harvard University is considering a project that it hopes will culminate in the widespread circulation of a Statement of Best Practices regarding fair use for teachers and scholars in higher education.

De Priest, Greg, K.C. Green and Fred von Lohmann. "Don't Download This Panel - A Discussion of Peer-to-Peer Filesharing". *Educause*. April 2008. <http://www.educause.edu/blog/gbayne/PodcastDontDownloadThisPanelAD/167628> (accessed on 16 June 2009).

Podcast for Educause Regional Conference, 2008. The attention of and on higher education has been focused on defensive measures to curb illegal file sharing. But this is occurring in the context of a much larger national debate about the appropriate role of copyright and intellectual property in cyberspace. Looks at some of the issues in the larger copyright debate.

Visual Resources Association committee on Intellectual Property Rights. "Image Collection Guidelines: The Acquisition and Use of Images in Non-Profit Educational Visual Resources Collections". *Visual Resources Association*, May 2004. <http://www.vraweb.org/resources/ipr/guidelines.html> (accessed on 16 June 2009).

VRA is a multi-disciplinary organization dedicated to furthering research and education in the field of image management within the educational, cultural heritage, and commercial environments. While they mostly deal with image collection management, meta-data and new searching paradigms they also make a valuable contribution to the copyright and IP discussion.

COPYRIGHT - CREATIVE COMMONS

Casey, John, Jackie Proven and David Dripps. "Managing IPR in Digital Learning Materials: A Development Pack for Institutional Repositories". *Trust DR – Trust in Digital Repositories*, December 2006. <http://trustdr.ulster.ac.uk/outputs.php> (accessed on 16 June 2009).

A guidance package about IPR (Intellectual Property Rights) in e-learning from UK Higher Education funding council. Includes - Managing Intellectual Property Rights in Digital Learning Materials: A Development Pack for Institutional Repositories; The Main Legal, Educational and Technical Issues; The Pros and Cons for using Creative Commons (CC) Licences in Digital Teaching and Learning Materials; Readings List regarding IPR and flexible learning.

Chance, Tom. "Re-mix culture: Issues surrounding re-use in Creative Commons". *Free Software Magazine*, 15 August 2005. http://www.freesoftwaremagazine.com/articles/focus-music_and_remixing (accessed on 16 June 2009).

Based on the experiences of "Remix Reading" which is an artistic project (based in Reading, UK). Also good for Remix.

Hoorn, Esther. "Repositories, Copyright and Creative Commons for Scholarly Communication" *Ariadne*. Issue 45, October 2005. <http://www.ariadne.ac.uk/issue45/hoorn/> (accessed on 16 June 2009)

"Intellectual Property Rights have become increasingly powerful and far-reaching. This has grown to be the standard opening line of papers in the field of law addressing issues of copyright for scientific research and scholarly publishing. Concerns are expressed about the likelihood of preserving the public domain in the Internet era. Currently new ways to safeguard the values and the entire potential of scholarly publishing and communication are being explored within the framework of existing copyright law." A summary of copyright management for scholarly communication taking into consideration the Berlin declaration and a place for Creative Commons.

Lessig, Lawrence. TED Talk: How creativity is being strangled by the law. *TED – Ideas worth Spreading*, November 2007. http://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity.html (accessed on 16 June 2009).

"Larry Lessig, the Net's most celebrated lawyer, cites John Philip Sousa, celestial copyrights and the 'ASCAP cartel' in his argument for reviving our creative culture. Stanford professor Larry Lessig is one of the foremost authorities on copyright issues, with a vision for reconciling creative freedom with marketplace competition."

Ses00, "Dump Your Pen Friend". *Flickr*, May 2007. <http://www.flickr.com/photos/sesh00/515961023/> (accessed on 16 June 2009).

First page of links into Flickr Forum threads which discussed the Virgin Mobile billboard campaign which used Flickr photos and spawned copyright and privacy infringement cases. Various photos are discussed in various threads.

Strype, Danyl. "Arguments against 'non-commercial' licensing". *Creative Commons Aotearoa New Zealand*. August, 2008. http://www.creativecommons.org.nz/forums/creative_commons_and_commercial_art/arguments_against_non_commercial_licensing (accessed on 16 June 2009).

Summary of comments in forum topic that argue licenses which include NC (and No-Derivs - ND) are causing some of the same practical headaches as All-Rights-Reserved copyright.

TechRadar. "The case for and against Creative Commons". March 2009. *Techradar*, 1 March 2009. <http://www.techradar.com/news/internet/web/the-case-for-and-against-creative-commons-527697> (accessed on 16 June 2009).

TechRadar asks if CC is here to stay or just a passing fad and looks at the case for and against. "No system to deal with human creativity can keep everybody happy all the time, and Creative Commons is no exception. In spite of all the successes ... many people all over the world dislike it."

The Arts Council England and OpenBusiness.cc. "UK Artists, Copyright and Creative Commons" *Open Business*. November 2006. <http://www.openbusiness.cc/2006/11/28/release-of-report-on-%E2%80%98uk-artists-copyright-and-creative-commons/> (accessed on 16 June 2009).

Case Study which looks at artists' approaches to copyright and creative commons.

COPYRIGHT FREE/PUBLIC DOMAIN

Duke Law Center for the Study of the Public Domain. <http://www.law.duke.edu/cspd/> (accessed 13 July 2010).

The Center for the Study of the Public Domain at Duke Law School is the first university center in the world devoted to promoting research and scholarship on the contributions of the public domain to speech,

culture, science and innovation in an effort to redress the balance needed in our intellectual property system and to translate academic research into public policy solutions.

COPYRIGHT – VIRTUAL WORLD

Hunter, Dan. Dan Hunter at the Computer Games, Law, Regulation, Policy Symposium 2008. *Blip.tv*. (<http://blip.tv/file/672194> (accessed 13 July 2010)).

Dan Hunter talks about virtual property and real law in virtual worlds.

FAIRUSE / Fair dealings

American University School of Communication. *Code of Best Practices in Fair use for Online Video*. Center for Social Media, May 2009. http://www.centerforsocialmedia.org/resources/publications/fair_use_in_online_video/ (accessed on 16 June 2009).

This document is a Code of Best Practices that helps creators, online providers, copyright holders, and others interested in the making of online video interpret the copyright doctrine of fair use. Fair use is the right to use copyrighted material without permission or payment under some circumstances. The first page has related page links and new forum thread. Plus video.

American University School of Communication. *Recut, Reframe, Recycle*. Center for Social Media, December 2007. http://www.centerforsocialmedia.org/resources/publications/recut_reframe_recycle (accessed on 16 June 2009).

"When college kids make mash-ups of Hollywood movies, are they violating the law? Not necessarily, according to the latest study on copyright and creativity from the Center and American University's Washington College of Law. . . The study points to a wide variety of practices satire, parody, negative and positive commentary, discussion-triggers, illustration,

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diaries, archiving and of course, pastiche or collage (remixes and mash-ups) all of which could be legal in some circumstances.”

Anderson, John. “Media Collage Index”. *DIYmedia.net*. 1997-2009. <http://www.diymedia.net/about.htm> (accessed on 16 June 2009).

An archive related to appropriation and fair use, collage art and IP. Copyright and remix with lots of good links from this page.

Australian Copyright Council. *Fair use: Issues and Perspectives. A Discussion Paper*. Australian Copyright Council, February 2006.

Discussion paper relating to Australia’s copyright Act prior to their Free Trade deal with the United States.

Australian Government. *Fair use and other Copyright exceptions: an examination of Fair use, fair Dealing and other exceptions in the digital age: Issues Paper*. Attorney-General’s Department, Canberra, May 2005.

Avilla, Jim, Chris Francescani and Mary Harris. “The Home Video Prince doesn’t want you to see” *ABC, News*, 26 October 2007. <http://abcnews.go.com/TheLaw/story?id=3777651> (accessed on 16 June 2009).

A rare win for fair use. We could ask the artist formerly known as Prince – what were you thinking? Thank goodness for the Electronic Frontier Foundation who took up this case and won on behalf of mothers and dancing babies everywhere. See EFF blog for final settlement details.

Burgoyne, Patrick. “Disney : The cut and paste years” *Creative Review*, April 2009. <http://creativereview.co.uk/cr-blog/2009/april/disney-the-cut-and-paste-years> (accessed on 16 June 2009).

Creative Review Blog and Chunnel.tv bring us this clip (by Vinichou) pointing out that, when it comes to recycling, Disney Corporation was king. After they had copied lots of other peoples stories they were way ahead in recycling cartoon motion picture sequences

when they started recycling from their own media libraries.

Burrell, Robert and Allison Coleman. *Copyright Exceptions: The Digital Impact*. Cambridge University Press, 2005.

Taking the newly amended UK legislation as a case study this book examines why copyright exceptions are necessary and the forces that have been behind shaping the current UK regime.

Committee on Intellectual Property Rights and the Emerging Information Infrastructure. *The Digital Dilemma: Intellectual Property in the Information Age*. National Academy Press, Washington DC, 2000.

Organized by the National Academies of Sciences; Engineering; Medicine and National Research Council, US.

Faden, Eric. “YouTube - A Fair(y) Use Tale” *YouTube*, 18 May 2007. http://www.youtube.com/watch?v=CJn_jC4FND0 (accessed on 16 June 2009).

An explanation of Copyright Law and Fair use by Professor Eric Faden of Bucknell University. This is a video parody mash-up of numerous children’s Disney movies. It is difficult to follow unless you have a good grip of the story– that is unless you know about copyright– as the dialogue is snappy, but very clever if you do.

Ghosh, Rishab Aiyer, ed. *Code: Collaborative Ownership and the Digital Economy*. Massachusetts Institute of Technology, 2005.

IP rights were ostensibly developed to increase creativity; but today, policy decisions that treat knowledge and art as if they were physical forms of property threaten to decrease creativity.

Netanel, Neil Weinstock. *Copyright’s Paradox*. Oxford University Press, 2008.

The US Supreme Court famously labeled copyright “the engine of free expression”, yet current law appears

to seek the opposite, quashing news, commentary and artistic expression in an unacceptable manner in terms of the public good in pursuit of proprietary controls.

New York Institute for the Humanities. “Comedies of Fair Use A Search for Comity in the Intellectual Property Wars: Symposium at The New York Institute for the Humanities at NYU”. *NEWSgrist*, April 28-30, 2006. <http://newsgrist.typepad.com/comediesoffairuse/> (accessed on 16 June 2009).

Patry, William F. *Moral Panics and Copyright Wars*. Oxford University Press, 2009.

William Patry is a law professor and attorney specialising in Copyright Law (on which he has written an eight volume treatise.) This book focuses on the fair use doctrine (in the US) and takes a long hard look at its past, erosion and current business models which, he says, shore up their own inadequacies at the expense of Fair use.

Perrone, Matthew. “High tech group: Change copyright warnings”. *MSNBC: Tech and Gadgets*, 8 January 2007. <http://www.msnbc.msn.com/id/20079178/> (accessed on 16 June 2009).

Overstatement of copyright holders perceived rights. “A trade group that includes Google Inc., Microsoft Corp. and other high-tech companies has asked federal regulators to order changes in copyright warnings. Copyright statements that appear at the start of most DVDs and pro sports broadcasts and movies go too far and discourage legal use of the content, the Computer and Communications Industry Association said in a statement Wednesday. . . The complaint asks the FTC to order the companies to stop using current copyright language and launch a marketing campaign to inform consumers of their rights under fair use laws.”

Rowe, Brian. “FC2008 Remix Panel”. *Freedom for IP*, October 2008. <http://freedomforip.org/category/remix/> (accessed on 16 June 2009).

Case law and writings on IP. Examples includes

pictures of the *Koons vs Blanch* case. Panel included Anthony Falzone from the Stanford Fair use Project.

Sadler, Roger L. *Electronic Media LAW*. Sage Publications, 2005.

Although written from a US perspective it covers topics generic to all media as well as matters specific to the electronic media, (range of issues include defamation, privacy, obscenity, copyright).

Stanford Law School Center for Internet and Society Fair use Project. 2006– 2009. <http://cyberlaw.stanford.edu/taxonomy/term/374> (accessed on 16 June 2009).

“The Stanford Center for Internet and Society’s ‘Fair use Project’ was founded in 2006 to provide legal support to a range of projects designed to clarify, and extend, the boundaries of “fair use” in order to enhance creative freedom.”

Strangelove, Dr. *Watching YouTube*. 2008–2010. <http://www.strangelove.com/blog/article-indexes/subject-index/> (accessed on 16 June 2009).

Watching YouTube reports on news, research and statistics about online Video and the Tube. Includes Mark Wesch’s anthropological study of YouTube and web2.0 clips as well as fair use clip.

Gaylor, Brett. *RiP: A remix manifesto*. <http://www.opensourcecinema.org/project/rip2.0> (accessed 13 July, 2010).

RiP: A remix manifesto is an open source documentary about copyright and remix culture. Essential viewing for all! Using the framework of a remix manifesto the documentary explores the many facets of fair use including log jams in the creative industries brought about by prohibitive licensing procedures and costs.

Vaidhyanathan, S. *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*. New York University Press, 2003.

How big money is eroding fair use for the public good by proprietary practices and penalising measures.

PARODY

Comic Book Legal Defense Fund. “Cartoonist Kieron Dwyer Sued By Starbucks”. *Comic Book Legal Defense Fund*, 30 November 2000. <http://www.cbldf.org/pr/001130-starbucks.shtml> (accessed on 16 June 2009)

This webpage is now deleted because of TM infringement in the image at the centre of the *Starbucks vs Consumer Whore* parody case. When what appears to be an unlawful use of a client’s copyrighted material is discovered, attorneys typically fire off a “cease and desist” letter demanding that the offending material or product be removed. At that point, the content provider or webmaster can choose to comply with the request, negotiate a settlement, or go to court. In this case, however, Starbucks attorneys made no effort to contact Dwyer prior to serving him a lawsuit.

Rule, Chris and Nick Eckert. “Scary Mary Recut ‘trailer’.” *YouTube* 8 October 2006. http://www.youtube.com/watch?v=2T5_0AGdFic (accessed on 16 June 2009).

A parody remix of the Disney classic Mary Poppins using different sound tracks. A good example of the parody rule – if you don’t know the original you may not get the joke!

Van Buskirk, Eliot. “Copyright Vampires Delete Guitar Shred’ Videos from YouTube”. *Wired*, 5 February 2008. http://www.wired.com/listening_post/2008/02/copyright-vampi/ (accessed on 16 June 2009).

Copyright-related take-down from YouTube, of parody videos that paired video footage of famous guitarists “shredding” with expertly-done amateurish guitar buffoonery.

Wallace, Lewis. “Copyright Claim Erases Parody Video From YouTube” *Wired* 12 December 2007. <http://www.wired.com/underwire/2007/12/copyright-claim/> (accessed on 16 June 2009).

A take down hit of a YouTube video that parodied Silicon Valley’s Web 2.0 gold rush has launched a freelance photographer and an amateur choral group into an internet-fueled copyright dispute. The clip,

by San Francisco Bay Area a cappella group Richter Scales, mixed original imagery with photos found online, all set the tune of Billy Joel’s “We Didn’t Start the Fire.”

Yes Men. “Yes Men Apologize to British Petroleum”. *post.thing.net*. February 2008. <http://post.thing.net/node/1946>, (accessed on 16 June 2009).

Some of the story behind the parody website “Beyond Petrol” and BP’s reaction and if you look at both sites you will notice how the issue of Trademark was resolved.

COPYRIGHT APPROPRIATION – transformative uses

Appropriation Art. *Appropriation Art: A Coalition of Art Professionals*. 2006–2009. <http://www.appropriationart.ca/>, (accessed on 16 June 2009).

Case against the Canadian Bill–61 from a coalition of art professionals. They state that copyright is meant to nurture the rights of creators not suppress and criminalise artistic practices. Their banner implies a form of cultural cleansing or censorship by copyright means.

Appropriation Art. *51st State*. 2006–2009. <http://www.appropriationart.ca/51st-state> (accessed on 16 June 2009).

More action directed against the Canadian Bill – 61 copyright amendments. 51st State gives a face to some of the individuals and their battle to maintain Freedom of Expression and Balanced Copyright in Canada. This clickable-caption, comic-style critique is anything but comic and clearly points out the inexorable moves of the Canadian (and American) Government and lobby groups to cement Canada into one of the world’s most restrictive and draconian copyright regimes.

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Cleveland, Peter. "Collage is art, not theft" *What is Fair use*, 2008-2009. <http://whatisfairuse.blogspot.com/2008/04/collage-is-art-not-theft.html> (accessed on 16 June 2009).

Blog by Professor of Law, Peter Cleveland, titled What is Fair use? This blog has a focus on collage. It backgrounds "Que cera cera" by the KLF. Interesting plugs to related blog links at bottom of page. Also good tag cloud of links and related blog *Ruling Imagination: Law and Creativity*.

Evans, David, ed. *Appropriation: Documents of Contemporary Art*. The MIT Press, 2009.

Source book for essential essays written by influential thinkers in this field.

Harley, Ross Rudesch, "Cultural Modulation and The Zero Originality Clause of Remix Culture in Australian Contemporary Art", *The FibreCulture Journal* Issue 15, Remix, 2009. Fibreculture Publications/Open Humanities Press, Australia. http://journal.fibreculture.org/issue15/issue15_harley.htm (accessed 9 March, 2010).

Harvard Law School. "Art Law: Image Rights" *Harvard Law School*. http://www.law.harvard.edu/faculty/martin/art_law/image_rights.htm (accessed on 16 June 2009).

Very good. Very brief summary for appropriation art history and a couple of high profile modern cases.

Also has interesting Art, Copyright and the Web Bibliography compiled by Jeanette Mills and Cynthia Caci (links not updated since 2001).

McLean, Daniel and Karsten Schubert, ed. *Dear Images: Art Copyright and Culture*. Arts Council of England, 2002.

If I had to pick one of four books to have read for this project. This would have been one of them. Has it all.

Montserrat College of Art. *A New Order: Appropriation Art in the Digital Age*. MIT Communications Forum, February 2005. http://web.mit.edu/comm-forum/mit5/papers/bradbury_neworderessay.pdf, (accessed on 16 June 2009).

A multifaceted exhibition which showcased regional and national artists who incorporate/(re-) contextualization, 'found' photographs, TV and film footage.

Rosenberg, Karen. "Artist: Richard Prince". *New York Magazine Services: New York Art*, 25 April 2005. <http://nymag.com/nymetro/arts/art/11815/> (accessed on 16 June 2009).

Interview with appropriation artist Richard Prince. In the early eighties, Richard Prince started to re-photograph magazine ads featuring the Marlboro Man; since then, he's given biker chicks, Borscht Belt jokes, celebrity autographs, and pulp-fiction nurses the legitimizing stamp of "appropriation art."

Stay Free. "Illegal Art: Freedom of Expression in the Corporate Age". *Illegal Art*, 2002. <http://www.illegal-art.org/articles/index.html> (accessed on 16 June 2009).

The online Illegal Art exhibition with background notes on all the offending works. Plus links to articles, sound, video and groups working with copyright-related issues.

The Dominion Post. "Maori Russian dolls made in China, sold in NZ". *The Dominion Post*, 11 April, 2008. <http://www.stuff.co.nz//361270> (accessed on 16 June 2009).

Fair Trade agreements and exploitation of Maori culture. Cultural appropriation.

Vaccaro, Mary, ed., *Plagiarism in Art (and Art History)*, special themed issue, *Visual Resources*, (Vol. 16, No. 2, 2000), Harwood Academic Publishers.

Excellent. A + + for anything to do with images. Another of the fabulous four.

Wikipedia. "Appropriation". *Wikipedia*, May 2009. <http://en.wikipedia.org/wiki/Appropriation> (accessed on 16 June 2009).

Looks at sub-sets of appropriation. See the section on ART which gives a brief history of appropriation art and looks at copyright issues in the same. Good first encounter for appropriation art works.

COPYRIGHT/REMIX (still and moving image)

Basilco, Stefano. *Cut: Film as Found Object in Contemporary Video*. Milwaukee Art Museum, 2004.

Catalogue with essay contributions by Basilco, Lawrence Lessig and Rob Eo. Good for time-based media.

Benedict, Copyright Website, 1995-2009. <http://www.benedict.com/#> (accessed on 16 June 2009).

Introduction to "real world" digital issues. Includes case studies of high profile multimedia infringements (.wav files available). Benedict's website provides specialized information for webmasters, musicians, movie-makers, screenwriters, programmers and photographers; and general copyright information for educators, students, web-surfers, re-mixers, mash-uppers and confused citizens. Excellent.

Hilderbrand, Lucas. *Inherent Vice, Bootleg Histories of Videotape and Copyright*. Duke University Press, Durham and London, 2009.

A study of the history of video-recordings and Fair use in the US, including bootleg tapes and piracy. An intellectual and aesthetic look at the medium of video.

Patry, William F., *Frey lecture in Intellectual Property*, *Duke Law*, 2009. http://google.oit.duke.edu/search?q=Frey%20lecture&site=duke_collection&proxystylesheet=law&client=law&output=xml_no_dtd (accessed on 16 June 2009).

One of Duke Law's annual lectures on IP.

Duke Law Center for the Study of the Public Domain, "The Arts Project", *Center for the Study of the Public Domain*, 2006-2009. <http://www.law.duke.edu/cspd/artsproject/> (accessed on 16 June 2009).

Analyzes the effects of intellectual property on cultural production. Focus on moving film and documentary. Includes *Tales from the Public Domain*, *Bound by Law?* comic. A new comic on music was due out in 2010.

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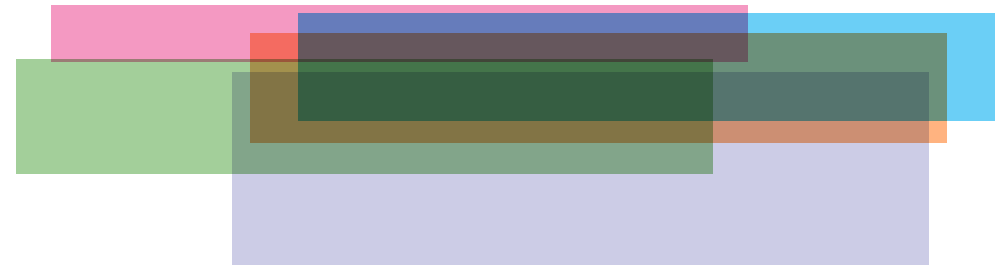
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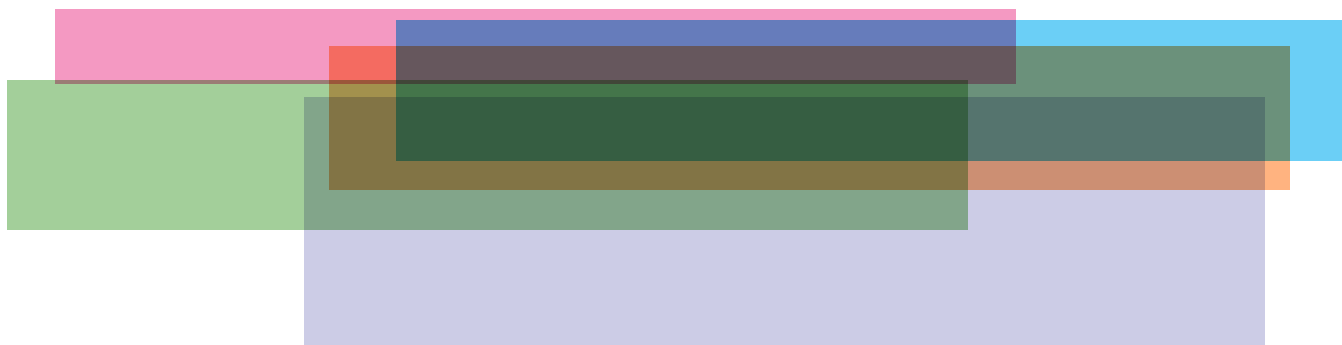
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appendices

What is it?

CC Aotearoa New Zealand is the New Zealand collaborator of Creative Commons International, which is a project of Creative Commons, the creator of the Creative Commons licences.

Creative Commons is a worldwide organisation that offers copyright alternatives (beyond the traditional 'all rights reserved') to teachers, scholars, scientists, writers, photographers, filmmakers, musicians, graphic designers, Web hobbyists, artists, and other content developers for use anywhere in the world.

The Creative Commons project in Aotearoa New Zealand is run by **Te Whāinga Aronui The Council for the Humanities**.



<http://www.creativecommons.org.nz/>

More Info

To find out more about Creative Commons, and for a full list of possible licences, see the following resources:

Creative Commons Aotearoa New Zealand

<http://www.creativecommons.org.nz/>

Creative Commons International

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Te Whāinga Aronui The Council for the Humanities

Executive Director: Dr Brian Opie

brian.opie@humanities.org.nz



Share, exchange, learn, benefit, publish.

Creative Commons aims to establish a fair middle way between the extremes of copyright control and the uncontrolled exploitation of intellectual property.

It provides a range of copyright licences, freely available for public use, which allow those creating intellectual property – including authors, artists, educators and scientists – to mark their work with the freedoms they want it to carry.



<http://www.creativecommons.org.nz/>

Why?

A Participatory Culture

Digital technologies are connecting people in ways that were never before possible. Creative Commons aims to help enable a participatory culture – a culture in which everyone can actively engage in the creativity that surrounds us, and in which access is assured to cultural, scientific, and educational content that has been pre-cleared for use by its authors.

Some Reasons to use CC

- To maximise exposure and increase distribution
- To rely on innovative business models rather than fully fledged copyright to secure a return on your creative investment
- To contribute to and participate in the public sphere



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APRA|AMCOS AND COPYRIGHT IN BRIEF



WHAT APRA HAS TO DO WITH COPYRIGHT

It's not possible or feasible for composers and songwriters to be everywhere, all the time, monitoring every use of their work or negotiating royalty payments for this use with each user.

That's why APRA|AMCOS exists

APRA can administer the **performing** right: the right to broadcast a work, perform it in public and transmit it by cable. We also administer the **mechanical** right: the right to record a song onto record, cassette or CD, through our association with AMCOS (the Australasian Mechanical Copyright Owners Society).

WHAT ABOUT OVERSEAS ROYALTIES?

There are societies similar to APRA in most countries around the world. APRA|AMCOS has reciprocal agreements with these societies and represents millions of songs from around the world.

WHAT IS COPYRIGHT?

Copyright is a number of different rights which the law grants exclusively to owners of copyright works. The New Zealand Copyright Act (1994) gives composers the right to:

- Reproduce work in material form, for example, on a CD, in a film, a photocopy, or a computer disk;
- Publish a work (make it available to the public)
- Perform a work in public
- Broadcast a work
- Transmit a work by cable
- Make an adaptation of the work, such as translating the lyrics or making an arrangement, and do any of the above in relation to the adaptation

As the copyright owner of original music and lyrics, these are the composer's exclusive rights. Nobody else can use a composer's work in these ways without getting permission first, and, if necessary, paying a royalty for this use.

DURATION OF COPYRIGHT?

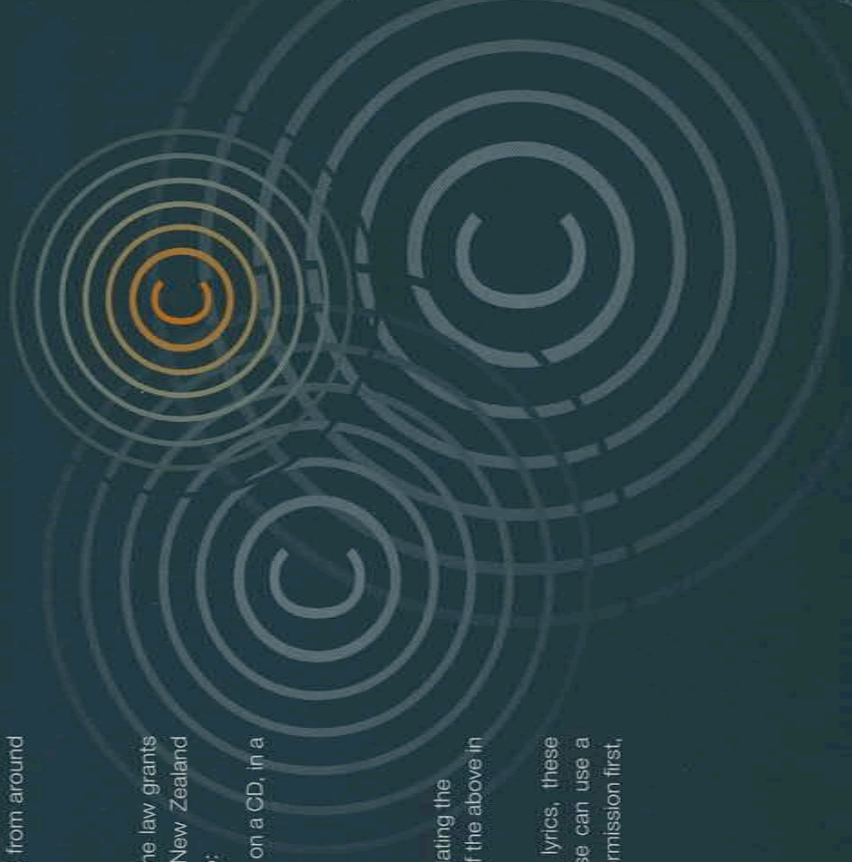
The lifetime of the composer (copyright owner) plus 50 years.

After this period the work is in the *public domain*.

Once in the public domain anyone is able to copy, adapt, broadcast or perform the work without restriction.

If the work has been used previously by someone who re-arranged or re-wrote lyrics to the work and recorded them, they then have copyright in that *arrangement* and their own *sound recording*. This means that no one can use that arrangement, those lyrics or that recording without their permission.

It does not however restrict anyone else using the original work and making their own arrangement of it. It must however be sufficiently distinct from any other arrangement. Care must be taken not to *pass off* the new work as another version or imply any connection to it in any way. This is called the law of *passing off*.



CLEARING MUSIC FOR AUDIO-VISUAL PRODUCTIONS

When making any audio-visual production you need to get music rights cleared. There are two types of music you can use: "Production" (or library) music and "Commercial" (or published) music which is anything you can buy in a record store or have in your own collection at home.

COMMERCIAL MUSIC

When using Commercial music there are **two clearances** required for each song, one is the songwriters and the other is the sound recording*.

1) We can assist with the **songwriter's clearance**. In most instances a songwriter will assign their rights to a music publisher, who will supply an estimate for the use we request. If you are happy with this estimate they then approach the writers/management for final approval. Not until this is achieved may you proceed. **There is no rate-card available as each request is handled on a case-by-case basis.**

2) The **sound recording** will be controlled by a record company and you can contact them directly. You can get the details of the major record labels by visiting the link http://www.rianz.org.nz/rianz/ppnz_copyrightclearances.asp or if the distributor of your chosen track is not listed there go to RIANZ (Recording Industry Assoc. of NZ) 09 360 5085 or email: jacque@ppnz.co.nz and request a search.

* N.B: If you are re-recording the music and not using an existing recording you will not need recording clearance.

If you would like to use commercial music please contact us and request an AMCOS form. **Please note it takes 2 – 4 weeks to finalise quotes**, (although we should have an initial ballpark fee back to you within a few days.)

HOW DO I APPLY FOR CLEARANCE?

- Email us with song title and composer and/or artist details and request and AMCOS application at least one month prior to broadcast/screening
- Fill in the form as thoroughly as possible
- Contact the record company for permission and fees
- Once you have received a ballpark fee decide whether or not you can afford it BEFORE requesting final approval
- Sign contracts and pay invoice BEFORE transmission

PRODUCTION MUSIC

Production music is music specifically written and recorded for inclusion in all forms of audio and audiovisual productions including adverts, films, DVDs, TV & radio programmes, websites, online games, music-on-hold and ringtones etc. It is available for convenient synchronisation, (or "dubbing"), and can provide an administratively simple and cost effective answer to your music needs.

For Production Music enquiries/rates contact:

Amy Bodsworth
Phone 09 623 4711
Email abodsworth@apra.com.au

SONG LYRICS

In order for you to use song lyrics in any audio-visual production, even if they are spoken or graphically represented, you will have to get permission from the publishers who own the rights to the song. You will need to liaise with the publishers directly. Most publishers operate out of Sydney and we can give you the contact details once we know which tracks you want to use.

TERTIARY EDUCATIONAL USE

If music is being used in an audio-visual production for the purposes of research or private study (such as an assignment, dissertation or thesis) then the Copyright Act will allow such use under the fair dealing provisions of Section 43.

This will not be extended to any commercial release, performance or public screening. Section 47 of the Copyright Act will, however, permit a screening or performance for students or staff only. This would not include family, friends or members of the public or any other subsequent use.



CONTACT US

If you have any questions about APRA/AMCOS contact our NZ office, APRA NZ Ltd, Unit 113, Zone 23, 21-23 Edwin St, Mt Eden, Auckland, PO Box 6315, Wellesley Street, Auckland, 1141

Rebekah Nolan, Manager Broadcast Services,
Phone 09 623 2173, Fax 09 623 2174, Email rnolan@apra.com.au
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Copyright-Remix: Fair Dealings in using Images in a Digital Age

Information Sheet

The project falls into two parts. Very briefly these can be described as the research stage and secondly the presentation of the research. Consent will be sought from participants at both stages.

Part One

This project aims to investigate the use of the digital image and issues around the use of the digital image. It will be based on case studies where art students develop projects that push at the boundaries of copyright, appropriation, and manipulation of digital images. Participants will be sourced from art classes in New Zealand Aotearoa. Through the development of an online database we wish to create a resource for good practices in fair dealings as a practical resource for teachers and students working with these types of digital images or with similar scenarios*. The database will aim to

- document actual current practices
- analyse and consider these from social and legal viewpoints paying careful attention to the copyright and privacy legal nexus pertinent to these discussions and
- recommend methods for engaging with digital images in New Zealand from an educational perspective

The project also aims to look at Remix practices and the movement towards open source and creative commons approaches to licensing digital media and the implications therein.

Should you consent to take part in the project your confidentiality and anonymity will be respected at all times.

The scope of your involvement in the first phase is to answer a few questions which will be about your artwork and consent to a copy of your artwork being available for analysis.

Part Two

The second part of the project involves your consent to the publication of your story anonymously in the online database. At this stage we will provide you with the information and format in which we wish to present our case study. *If it is appropriate to do so* we will be asking for consent to illustrate the case study with a low resolution clip/small size copy of your artwork.

*Note that in NZ, under 1994 Copyright Act, the section concerned with fair use is called Fair Dealings. Fair Dealings sets out the parameters under which it *might* be permissible to use copyrighted material without permission or payment under certain circumstances. Fair Dealings Exemptions are similar but *not the same* as Fair Use (see US legislation).



Consent Form Part 1

AKO Project. Copyright Remix – Fair Dealing in using Images in a Digital Age.
Part One – Participation in the documentation of Case Studies

I have read the information sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage

I know that:

- ☐ My participation in the project is entirely voluntary.
- ☐ Although this research is anonymous I understand that if my work is published I could possibly be identified.
- ☐ I am free to withdraw from the research at any time without any disadvantage.
- ☐ All responses will be treated with respect and confidentiality.
- ☐ Analysis of the case studies will form the basis for an on-line database to assist in future discussions and recommendations surrounding the uses of digital images.
- ☐ My anonymity will be preserved at all times.
- ☐ I understand that there are two consent parts to this project. The first relates to the collection of case studies and the second to the presentation of the case study plus analysis in the online database.

Additional information or conditions agreed to:

I agree to take part in this project under the conditions set out above and in the Information Sheet.

..... *signature of participant*
 (date)

..... *(signature of researcher)*

This project has been reviewed and approved by the Otago Polytechnic Research Ethics Committee



Consent Form Part 2

AKO Project. Copyright Remix – Fair Dealing in using Images in a Digital Age.
Part Two – Permission to use data in online database

I have read the information sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage

I know that:

- ☐ My participation in the project is entirely voluntary.
- ☐ Although this research is anonymous I understand that if my work is published I could possibly be identified.
- ☐ I understand that I can withdraw up until the veto of publishing content, after which withdrawal of data will not be possible.
- ☐ All responses will be treated with respect and confidentiality
- ☐ My anonymity will be preserved at all times.
- ☐ I have viewed the draft database site and agree to my case study being used
- ☐ I consent/do not give consent for the use of my artwork to illustrate the case study and points arising from it in the database.

Additional information or conditions agreed to:

(please see media release form attached)

I agree to take part in this project under the conditions set out above and in the Information Sheet.

..... (signature of participant)

..... (date)

..... (signature of researcher)

This project has been reviewed and approved by the Otago Polytechnic Research Ethics Committee



ART at RISK : Permission to Reproduce Image

Permission is sought **from** (Legal name of artist)

First name/s _____

Surname _____

Of (address) _____

Contact (phone and email) _____

_____ Date: _____

By (on behalf of the Otago Polytechnic) _____ Pam McKinlay

_____ Title/Postition _____ Teaching and Research Assistant _____

to use _____ (image of your artwork) **for**

(project/purpose) _____ illustrating your case study in Art at Risk Copyright Project _____

and any subsequent revisions of the publication/material in any language, medium or communication right whether now known or hereafter devised. The Dunedin School of Art at the Otago Polytechnic shall always use discretion when using the image/media and will not use it in any manner to discredit the creator.

Reproductions will not change the form, content or meaning of the work. The reproductions shall be accompanied by the title and date of work and copyright statement of the work as per the information attached. For this project the artists shall remain anonymous.

For this project the copyright licence is CC-BY-NC.

Any additional Comments:

Case Study name _____

Title:

Date:

Media/format :

Copyright licence:

Size:

Photographer:

