

Our current 'closed' approach to exceptions

Exceptions to copyright infringement are restricted in New Zealand to specified 'permitted acts'. This approach means that any use of a work infringes copyright unless/until Parliament has made it legal (by clearly excepting it). This is a chance to discuss the advantages and disadvantages of prescribing exceptions in this closed way and consider to what extent the approach meets the objectives proposed in Part 3 of the Issues Paper.

Conversation-starters:

When compared with a more flexible approach to exceptions:

- › What are the advantages of the current approach? Which of the proposed objectives does it serve well?
- › What are the disadvantages of the current approach? Which of the objectives are not well served by it?

To illustrate, participants were offered the following hypothetical scenario:

Suppose we want to create an exception for the copying of legitimately acquired files for cloud storage (to free up space on our personal devices). The closed approach would be to create a detailed exception that precisely describes this kind of copying and is limited to this kind of copying.

Notes recorded by workshop groups

Theme/sub-topic	Comments recorded
Advantages of the current approach	<ul style="list-style-type: none"> › Current exceptions are detailed and clear at present. › Saves legal fees necessary to get clarity. › Exceptions carry some certainty › Certainty with explicit exceptions. The organisations they cover know they're covered. › Provides a basis for agreement between the copyright owner and user › The status quo leads the right holders to having to choose to either litigate or negotiate use



Theme/sub-topic	Comments recorded
	<ul style="list-style-type: none">› Commercial certainty for copyright owners› Allows copyright owners to retain control and value.› It's working. Do we really need to change?<ul style="list-style-type: none">› People will enforce their rights if value requires.› Or licence what they need.› Licensing is working (Vodafone TV example – personal video recording rights).› NZ is about protecting original work and the current approach is the most restrictive.
Disadvantages of having closed exceptions	<ul style="list-style-type: none">› They fail to keep up with changing technology (undermines credibility/respect for the law)<ul style="list-style-type: none">› Approach here is to continue adding exceptions (like in UK)› Anything not covered is automatically out› If keeping exceptions 'closed' we need a longer list. Law needs to expand?› Closed exceptions means expansive statute books that are not flexible enough to keep up with changing technological environment› Permitted acts = if it's not in the Act, it's not permitted. Means the law is constantly playing catch-up (eg MP3 players) and new tech unusable legally because no exception allows.› Not future-proofed – always reflecting the day they were enacted.› We live in a different world – digital developments.› Can we conceive what the next technological change will look like (e.g. file sharing (Napster) was a threat, now streaming is normal).› Technology changes can rapidly overtake legislation:<ul style="list-style-type: none">› Closed exceptions can fail very easily› Too-specific or too-flexible legislation are both problematic – balance please.› Means our exceptions either inhibit activity or make everyone lawbreakers (are the exceptions enforced? If not, what's the point?)› When the law is too slow to keep up we operate with uncertainty – could stifle innovation or entering new markets. Could also create a market advantage for larger organisations (but could also be a bigger target).› What if you sit outside the exceptions? Eg museums not explicitly educational institutions, offer non-profit lecture to the public. Orphan works? Process?› If law prohibits common practices, it's unlikely to be respected.› Not aligning with proposed objectives 2 and 3. E.g. want to rip DVDs, but technological restrictions of format-shifting. New Zealanders don't understand the rules / doesn't seem practicable.› Impact on start-ups/innovation, as innovations can't get off the ground without freedom of use (international competition – NZ needs to keep up).



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	<ul style="list-style-type: none">› People expect access to archives but copyright prevents digital engagement.› Need exception for cloud computing to be very prescriptive, but then likely to be overtaken by new technology.› The process of updating limitations and exceptions is lengthy and difficult.› Cumbersome to get changes through Parliament.› Do they provide clarity and certainty?<ul style="list-style-type: none">› Exceptions as they stand are very wordy. Are they workable? Usable? Is simplification needed?› How well drafted?› Closed exceptions hard for [international stakeholders] to understand and cumbersome to explain. Does this disadvantage NZ?› How well-known are the exceptions? E.g. libraries with different levels of understanding.› Exceptions allow creators to know their rights – clarity› Need for clarity› Not enough clarity and detail› There are anomalies, e.g. photographer’s rights are different to other creators› Public education about the principles of the Act.› Current exceptions don’t permit innovative or ‘transformative’ uses.<ul style="list-style-type: none">› Does certainty limit or create barriers to creativity?› The current rules may be stifling the making of new works.› Artists don’t fit in to the current approach.› Use of works for further creativity: disconnect between perception of current law (what the public thinks is permissible) and what actually is permissible.› No parody or satire exception in NZ› Paying fees is not a problem but not being able to access the content at all is the issue.› Balance needed. If transformation, innovation comes at the cost of creators being able to make a living. How will we be able to encourage unique NZ work?› When is it a ‘copy’ and when is it a ‘transformation’? Clarity needed to encourage creators to better [blank – MBIE unable to complete].› Text mining as a transformative use› Google translate is an example of innovative use. But: seek permission/licence› Developing/creating science/technology example of importance of being able to build on existing work (academic/scientific papers).› Other examples of what we can’t currently do without copyright owner’s permission:<ul style="list-style-type: none">› Use small quotes in video blogs



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	<ul style="list-style-type: none">› Internet storage and use:<ul style="list-style-type: none">› Build a search engine› Data mining (e.g. harry potter lexicon) – “you can’t use individual licences” (rights holder). Which uses are okay, commercial threshold.› You cannot make a cloud backup, or blog post (because it’s a third party)› Group didn’t see difference between copying (back-up) on-premise or off-premise (i.e. the cloud).› No sync rights (video – music).› We do not know what new uses are coming.
More neutral comments on current approach	<ul style="list-style-type: none">› Internet – explosion in creativity and access.› Streaming took over from iPods.› It is much easier to copy and format shift than it was 10 years ago.› ‘Technology allows me to do it – so I can’ attitude. The Copyright Act is there to regulate private rights as well as protecting the more ‘published authors’.› Users’ sense of entitlement due to availability of online content.› Younger generations think they’re entitled to free use.› University libraries think they can photocopy a whole book.› No one thinks they’re breaking the law.› Digital environment makes US norms of ‘fair use’ more accepted in NZ by the public: ‘contamination’ effect.› Challenge for educators to talk to someone under different laws (eg fair use).<ul style="list-style-type: none">› Creative commons as a way around this<ul style="list-style-type: none">› Does this reflect a shortcoming in the Act?› Knowledge gap and lack of understanding on the side of users.› Correlation between cost of use and infringement.› Who are the rules for? To address the minority who will infringe?› There is a balance that must be protected, and it’s not always clear what uses are acceptable.



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Comments on possibility of a more flexible approach to exceptions	<ul style="list-style-type: none">› Open/flexible versus closed – is this description fair?› How broad?<ul style="list-style-type: none">› What purpose?› What activity?› Who (e.g. MCH, Museum, Genealogy, Screen, Music, TV, MBIE, Research)?› “Easier and more durable to think in terms of purposes than activities”. Tend to stay more understandable over time:<ul style="list-style-type: none">› Education› Research› Parody/Satire. Blurred lines – parody would infringe in NZ. Versus value/reputation of a work (e.g. you can’t use a government logo for political commentary).› Criticism and review.› Enabling new tech. A way for the law to enable new uses e.g. photographing a passport.› Healthy when clear purposes can be used to interpret exceptions.› We have some flexible exceptions already:<ul style="list-style-type: none">› Exception for news reporting working well.› But boundaries are hard sometimes hard to ascertain, e.g. what is “news”?› “Current affairs” is strange / too prescriptive› Clarity and certainty re meaning of concepts (e.g. “news” which could be positive or negative)› How long is news “news” or current affairs [“current”] for?<ul style="list-style-type: none">› When is an event no longer current?› How long can you publish things for?› Is there a time limit? Or more of a continuum?› E.g. music included in news report but year later told to take down by music body.› This stops news organisations from doing things because they want to be morally responsible.› Risk and cost for legal advice to keep material accessible are factors. Going to court may be the only avenue for a definitive answer.› Very little case law on these flexible exceptions (section 42). Things not getting to court to provide more certainty.



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	<ul style="list-style-type: none">› What if we made the news and current affairs exception more prescriptive/less flexible?<ul style="list-style-type: none">› Time-based rule for when something ceases to be current would one-size fits all. Would ignore circumstances e.g. back-end website and RNZ charter.› Time limit could also impact on interests of creators who get good exposure from media coverage› Flexibility is key to durability (but hard to balance risk).› Section 48 AV exception for educational establishments facilitates licensing (broad use within 'closed' exception)› Issues with educational use. Is restrictive in NZ.› "Review" exception works and there is certainty.› Fair dealing is working well in the music industry.› Fair dealing very vague for book publishers. Too risky to rely on. Whereas new UK law is very specific (eg on quotation).› Not enough case law for current exceptions.› Is it for the Government to predict/determine what the future use/consumption of copyright material will look like through developing principals based exceptions?
Comments specifically on the 'fair use' model	<ul style="list-style-type: none">› What if we made the news and current affairs exception more prescriptive/less flexible?<ul style="list-style-type: none">› Time-based rule for when something ceases to be current would one-size fits all. Would ignore circumstances e.g. back-end website and RNZ charter.› Time limit could also impact on interests of creators who get good exposure from media coverage› Flexibility is key to durability (but hard to balance risk).› Section 48 AV exception for educational establishments facilitates licensing (broad use within 'closed' exception)› Issues with educational use. Is restrictive in NZ.› "Review" exception works and there is certainty.› Fair dealing is working well in the music industry.› Fair dealing very vague for book publishers. Too risky to rely on. Whereas new UK law is very specific (eg on quotation).› Not enough case law for current exceptions.› Is it for the Government to predict/determine what the future use/consumption of copyright material will look like through developing principals based exceptions?



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	<ul style="list-style-type: none">› Creators rely on fair use too for creation.› Fair use incentivises creativity.<ul style="list-style-type: none">› Remix› Appropriation› Broad for future technological change.› C.f. flag referendum – silver fern / NZRU.› Is it transformative?› Aspects of video game design rely on fair use to allow for new elements to be taken from existing content (e.g. NBA players’ tattoos)› Fair use enables process that allows ADAPTATION to accommodate new technology, but. . .› Effects of fair use:<ul style="list-style-type: none">› Doesn’t provide certainty:<ul style="list-style-type: none">› In USA precedents give guidance› But takes years to get precedents› Very uncertain. US has copyright insurance.› The line of what is “fair use” and what isn’t is very difficult to determine – the US has had huge problems as well as the benefits.› Creates litigation / higher legal costs› The wider the definitions, the more litigation› Who is making the decision about what is allowed – the courts or law-makers?› Litigation-heavy approach favours large organisations› Disadvantages those with limited funds for legal fees:› Mitigation: guidance? More certainty outside of courts?<ul style="list-style-type: none">› Concerns regarding ‘need for innovation’ opens door to taking rights away from authors.› Does it encourage piracy, does it impact on creation?› Why make if you don’t know it’s safe?› Market tends to sort itself out through licensing when new technologies emerge? Is there still an incentive to correct these developments if broader fair use law is implemented?› Fair use needs to not affect work on commercial level.› Fair use open, but impossible to implement.



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	<ul style="list-style-type: none">› Would need to develop case law to determine application of fair use.› We can't be relying on case law to tell us what is okay.› Fair use is not the right way to solve innovation protection issue – where's the evidence that it works for NZ?› Important to understand that "fair use" doesn't mean copying the USA.› US not a good standard for this. Māori/indigenous. 'Fair' has to be bicultural.› Is there a middle ground from USA e.g. Singapore?<ul style="list-style-type: none">› Think of as a scale . . . i.e. exceptions leaning towards fair use (but not as far?)› What's right for NZ?› Conclusion: flexibility BUT with certainty and predictability.› Important that we have some level of harmonisation with the world, especially those copyright owners operating outside of New Zealand.
Other options for more flexible exceptions	<ul style="list-style-type: none">› Principles for exceptions within a framework, but not the specific detail of current legislation – principles illustrated with examples in the law.› A principles-based approach manifest in the form of exceptions would work better than fair use.› It's a hard task to draft things in such a way as to allow cutting-edge industries to grow but also to tell everyone what they can and cannot do.› The challenge is to future-proof changes we make. Question of intent: should it be okay to copy a work if there is a greater purpose behind it? At what point does the copying become a problem? (When a commercial transactions is made?)› Opportunity to look outside common law approach.› Can we legislate a body to lead [application of] copyright legislation?› Would it have to be a court regulating the boundaries of fair use, or could you have a new tribunal or extend the Copyright Tribunal's jurisdiction? (Wouldn't be as expensive as courts.)› You could have a better philosophical discussion about fair use if you remove the cost of court proceedings from the equation by having something like a new tribunal. It's frustrating when the conversation ends there.› Need a solution that doesn't involve legal proceedings but that still lays out what you can and can't do clearly.› Government guidance, rather than litigation.› Could have guidelines issued, but wouldn't be determinative for courts.› Flexibility with guidance based in creator communities – helps facilitate licences (like section 48 does).› Could move some exceptions into regulations, but limited by requirement to consult – more expedient, more agile to change.› We need more nuance in our arrangements to account for size of individuals versus large companies.



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	<ul style="list-style-type: none">› Could extend the exceptions to include a more principled approach that protects value of creation – with guidance (but not legally binding).› More flexibility could be introduced while maintaining current approach.› Exceptions could be retained with a ‘catch-all’ fair use exception that could satisfy the outliers.› Allow reasonable use that doesn’t impact a work’s market.› We could continue to have closed exceptions but broader ones.› Value in providing a private right to copy a work legitimately held.› Could have general exception for works of ‘no commercial value’:<ul style="list-style-type: none">› “It’s commercial use that people worry about” (not so worried about individuals or libraries).› Allow reasonable use that doesn’t impact a work’s market.› Distinction between commercial and non-commercial uses can be messy, not clear.› What about a diligent search-type provision saying you need to try to find the copyright holder and if the owner comes along after the due diligence then you share some of the profits with them (but they can’t sue you)?› Creative commons is under-utilised and may be a solution for creative industries. May provide opportunities for distribution that don’t exist now.› Artists want to use portions of existing works to make new works. How much do we want to allow them to take?› Overall aim: how do we allow the most potential out of our existing works?› Taking of works is okay as long as someone is making a new thing and applying their creativity.› Exception for ‘transformative’ work too difficult to define.› Sampling issue for composers. Don’t want to see another artist profit without acknowledgement and/or return.› Reasonable discoverability test when current rights holder untraceable.› Technology makes copying easier, so user education is more important than whether exceptions are prescriptive or not.› Copyright is complex and that won’t change by creating new exceptions.
Other comments on our current exceptions	<ul style="list-style-type: none">› Need a quotation exception, but clearly worded so as to protect author’s and publisher’s income. Makes it easier for publishers and removes transaction costs. Costs on students too for current quotation use.› Would like a specific quotation exception. Impact on universities.› Private research exception too restrictive for universities and others?› We should enshrine in law what we already do i.e. we don’t prosecute for parody – people have been taken to court over parody.



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	<ul style="list-style-type: none">› New exception for parody and satire.› Parody exception with parameters could be a good idea.› Complications can arise when exception 'expires' (or no longer applies), but the work is still exploited as if it was available to use under an exception, e.g. students' material created using copyright works produced under education exception and multiplicity of creators.› Incidental inclusion. For example, problem when the work relying on an exception is exported to another jurisdiction. Still have to get clearance anyway. Educational publishers. Book publishers worried about extension to allow more photocopying.› Ripping music off the internet – often people don't know it's illegal.› Characters from video games or books are being taken and used for sometimes objectionable uses – there are ineffective mechanisms for dealing with this.› NZ GOAL versus Crown copyright (in conflict). Make Crown copyright opt in rather than opt out?<ul style="list-style-type: none">› Self-interest: c.f. filming in Parliament.› Good to have [things excluded from Crown copyright]: access to Hansard and Bills. Easier to enforce when explicitly prescribed.› What else is in the public interest to explicitly exclude from [Crown] copyright (i.e. produced with public money)?› Publicly-funded research should be available to the funders (i.e. the public). E.g. commercialisation of back [old] issues of newspapers – prescribe [this] too› IP strategy in government required (needed at core of government) e.g. keeping and publishing data on piracy.<ul style="list-style-type: none">› CPTPP – educational role for public on copyright› People want guidance, including on how to do the right thing› People get confused easily and don't understand risk assessment.