

# Submission on the Copyright Issues Paper

Ministry of Business, Innovation, and Employment

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## 1. Introduction

1.1 Thank you for this opportunity to submit on the Copyright Issues Paper.

### About InternetNZ

1.2 InternetNZ is the home and guardian of .nz. It is a non-profit organisation, and the home and guardian of .nz – providing the infrastructure, security and support to keep it humming. We use the funding from the sale of .nz domain names to support the development of New Zealand's Internet through policy, community grants, research and events. Our mission is an Internet that is open, secure, and for all New Zealanders.

1.3 The Internet is now a key communication tool for New Zealanders in business, education, and in personal and social life, with 97% of us going online more than once per week.<sup>1</sup> InternetNZ works to harness the benefits of the Internet to New Zealand for good, engaging on policy issues that are important to those benefits.

### We support the Issues Paper and the broader review

1.4 We support the copyright review and look forward to working with MBIE through a process to develop law that works for New Zealanders in the digital era. Copyright affects all of us and needs to be updated to meet New Zealanders' needs and expectations now and in the future.

1.5 All New Zealanders use and benefit from creative works, and many of us participate in the broader cultural ecosystem which supports New Zealand's most successful creative voices.

1.6 We support the Issues Paper's desired outcomes: copyright should seek to balance benefits from the **creation of original works**, the **use of works by others**, and **access to knowledge and creative content**.<sup>2</sup>

### We ask that New Zealand get options for Internet-ready law

1.7 We want copyright law to work better for New Zealanders. Through this submission, we make 47 recommendations. These recommendations are based around what we think should be included in the options paper – the next phase of public discussion about copyright reform. A summary of our recommendations is set out at the end of this document.

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1 InternetNZ, *Internet Research 2019*, <[internetnz.nz](http://internetnz.nz)> p 34.

2 MBIE, *Issues Paper: Review of the Copyright Act 1994*, p 22 ("Issues Paper").

- 1.8 We welcome the approach you have taken to consultation. Developing fair and effective copyright law requires input from a range of perspectives, to identify the issues and develop the options for responding. We look forward to working with you over the coming review process, and would welcome the opportunity for further conversations, to help develop law that works for New Zealanders both when it is implemented, and over decades to come.

## 2. Executive summary

- 2.1 This submission is focussed on providing practical, evidence-based analysis to support your policy work as you prepare an options paper, to support further discussions with New Zealanders on the shape of copyright law for the next 25 years.
- 2.2 Copyright matters for the Internet's benefits to New Zealanders. The Internet is important to New Zealanders, opening new opportunities for us to connect, learn, work, and play. Copyright law regulates the ways New Zealanders share information, and has a big impact on the benefits of the Internet in New Zealand.
- 2.3 In this submission we address Internet related aspects of copyright according to the chapters of the Issues Paper, setting out our thinking, analysis, and answers to consultation questions under the respective chapter headings. Our main points are summarised below.

### Part 3: Objectives

- 2.4 We are supportive of the development of objectives for copyright, and those proposed reasonably reflect the economic and commercial aspects and impacts of copyright law.
- 2.5 We recommend changes focussed on using the Government's Living Standards Framework to ensure the consideration of personal, social, and noncommercial aspects of New Zealanders' wellbeing, recognising that copyright has a range of impacts on cultural participation particularly on the Internet. We also propose some minor changes, so the objectives explicitly consider New Zealanders' human rights, making the law usable, and seeking predictability instead of certainty.

### Part 4: Rights

- 2.6 We support the important rights given by copyright, which encourage and protect new efforts at making and sharing works to benefit New Zealanders. We emphasise the importance of flexibility and contextual decisions to adapt to changing markets, and the need for TPM rules that protect "digital locks" on works to enable security research that protects New Zealanders online. We recommend:
- a) explicit exceptions in TPM rules, to enable good faith security research
  - b) TPM rules that focus on preventing infringement, with tests of knowledge and intention that are adaptable across contexts
  - c) an open-ended approach to the purposes for which TPMs can be bypassed.

### Part 5: Exceptions and limitations

- 2.7 New Zealand's current approach to exceptions and limitations does not work in the digital era. New Zealanders need a new approach that restores a fair and efficient balance and maintains it against a background of continuing technological change, offering better ways to adapt as new uses of works, new distribution models, and new challenges emerge over time.
- 2.8 There are a range of options for law that delivers that flexibility. We highlight lessons from best-practice guidance for writing modern legislation, and from New Zealand's privacy and consumer laws, which create frameworks that have remained relatively resilient and usable over time. One option highlighted in the Issues Paper is an exception which is open to any purpose, and which applies a test of fairness and market impact in context, like the approach taken in the United States, Israel, and Singapore. Regardless of the approach taken to allow

the law to adapt to change, we think there is a need for much better guidance to help New Zealanders understand exceptions and make responsible decisions.

- 2.9 We recommend that the options paper contain a range of alternative approaches to exceptions, from purpose-based fair dealing exceptions with details set out in regulations that are regularly updated, through to exceptions which are open to any purpose and use but apply fairness considerations including market impact.

## Part 6: Transactions

- 2.10 Transactions, and particularly licenses, are important to the ways New Zealanders get to use and access copyright works. We want New Zealanders to have meaningful and informed choices about how they share works, through online tools, through open or commercial licenses, and through renouncing copyright. Alongside options to help inform and guide those choices, we support moves that will allow reasonable access to and use of works where there is no reasonable way to efficiently seek permission. We recommend:

- a) considering guidance on the choices available to share works
- b) efficient and workable options to allow reasonable use of orphan works, including an exception for use that reasonably rely on a diligent search
- c) allowing people to renounce copyright in a way that is recognised.

## Part 7: Enforcement

- 2.11 We support copyright adopting a modern regulatory framework for guiding behaviour, supporting fair and efficient enforcement with guidance that helps New Zealanders to understand, respect, and comply with the law. Measures for online enforcement need to be crafted in ways that recognise the different roles of users, content providers, and service providers, and that respect the value of open Internet services, that support new innovations and opportunities, to human rights and economic activity in New Zealand.
- 2.12 **InternetNZ does not support content blocking as part of the copyright enforcement toolkit in New Zealand.** Content blocking measures would involve financial costs, technical compromises, and would fail to ensure that New Zealanders have the protections and benefits of their basic human rights. Without both robust evidence that they shift user behaviour in the market, which we believe is lacking, and rigorous processes to assess and mitigate their harm to New Zealanders, we do not think content blocking measures can be justified in copyright law, and strongly oppose them.
- 2.13 Driven by privacy and security concerns, encryption is increasingly a default setting for Internet users and services. This shift will further limit the practical ability Internet services to monitor or control the way people use their services. Settings for online copyright enforcement will need to consider this shift. Our recommendations are focused around the following themes.
- a) Options for enforcement are designed in ways that reasonably allocate responsibility based on activity, knowledge, and technical concerns.
  - b) Options for enforcing online consider human rights impacts and offer tools to manage risks and mitigate costs and harms to New Zealanders.
  - c) We consider that options involving mandatory content blocking should not be considered without robust evidence they cause behavioural shifts, and require rigorous analysis of costs, human rights impacts, and measures to mitigate these.

### 3. Objectives for copyright

- 3.1 We welcome the development of objectives for copyright.
- 3.2 As the Issues Paper states, having clear and agreed objectives for New Zealand’s copyright regime is important, to give New Zealanders a shared understanding of the framework and its purpose.<sup>3</sup>
- 3.3 The proposed objectives began as the Terms of Reference for the Creative Sector Study, which focused on users of copyright in creative industries. Overall, we think the proposed objectives identify many of the policy considerations which should guide us in understanding and updating copyright law. However, we think these are additional vital concerns for the ways New Zealanders interact with copyright within and beyond the creative industries. As set out below, we propose that these considerations are incorporated into the objectives, including non-commercial value, human rights, resilience over time, and ease of use.
- 3.4 Additionally, we recommend the addition of a purpose statement to put the Copyright Act in step with best practices for modern legislation.<sup>4</sup> We suggest the addition of a purpose statement as part of a view that there should be a broad reconsideration of the content and form of copyright law. A purpose statement would be helpful addition to guide the application of the law over time as new technologies and situations emerge.

**R1** We recommend that copyright law include a purpose statement, to be developed based on the objectives for copyright.

#### Objectives should support sustainable wellbeing

- 3.5 Copyright aims to support commercial incentives, but also applies to non-commercial uses of works. New Zealanders use the Internet, including to use or share works, for a broad range of personal, social, or cultural reasons and gain value in ways that are not primarily commercial or economic, but which are important to consider in assessing the copyright framework.
- 3.6 To better recognise non-economic concerns in policy the New Zealand Government has adopted a Living Standards Framework. This framework aims “to put sustainable, or intergenerational, wellbeing at the core of policy development and evaluation”.<sup>5</sup> Adapting the framework for New Zealand has meant particular reference to cultural identity as a domain of wellbeing:<sup>6,7</sup>

“A persistent message from feedback was that a critical element supporting New Zealanders' living standards and wellbeing is expression of various aspects of New Zealand's cultural identity. ... At a high-level, culture refers to the ways [New Zealanders] see and represent ourselves in relation to others, including both our sense of commonality and our sense of difference.”
- 3.7 We recommend that the Living Standards Framework be used as a tool for developing and considering policy options in copyright. Copyright involves a range of activities and interests and copyright rules should be assessed not only on economic efficiencies and gains, but across all four capitals (natural, social, human, financial and physical).

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3 MBIE, *Issues Paper*, paras [99 - 100].

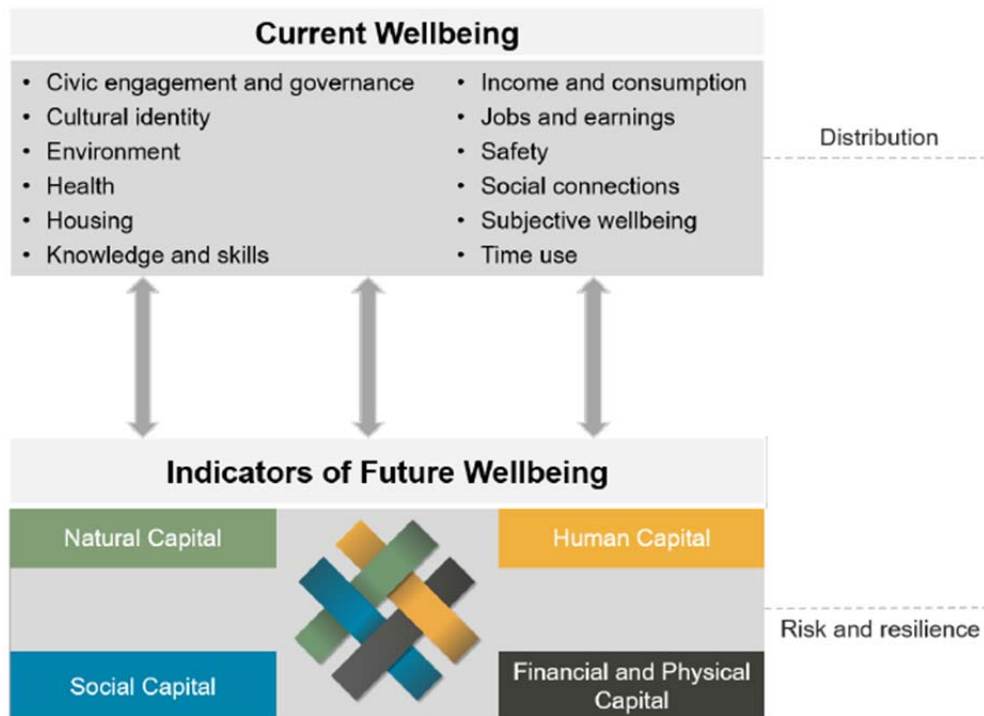
4 Legislation Design and Advisory Committee, *Legislation Guidelines: 2018 edition*, (March 2018), <[lac.org.nz](http://lac.org.nz)> p61.

5 Treasury, *Our People, Our Country, Our Future: Living Standards Framework, Background and Future Work* <[treasury.govt.nz](http://treasury.govt.nz)> (“Living Standards Framework”).

6 Treasury, *Living Standards Framework*, p 4.

7 *Note on Future Work on the Role of Culture in the Treasury’s Living Standards Framework (DP 18/08)* <[treasury.govt.nz](http://treasury.govt.nz)>.

**Figure One: Treasury's Summary of Living Standards Considerations<sup>8</sup>**



3.8 Copyright is complicated and contested. There are likely to be disagreements about the purpose of copyright, and about where to set the balance between giving rights and control to copyright holders, versus enabling broader access to recognise other social interests and policy concerns. However, we believe the use of the Living Standards Framework as a tool in this process can provide a clear and consistent approach for discussion and analysis of copyright options.

**R2** We recommend that MBIE apply the Living Standards Framework to assess policy impacts and options for copyright.

### Explicitly consider New Zealanders' human rights in the Internet era

3.9 The interaction of copyright law with the Internet has important implications for human rights.<sup>9</sup> As affirmed in international agreements and domestic law, New Zealanders have a right to free expression,<sup>10</sup> a right to education,<sup>11</sup> and a right to participate in cultural life, enjoy the arts, and share in scientific advancement and its benefits.<sup>12</sup> Alongside its core economic incentives, copyright should recognise that cultural participation serves human dignity.<sup>13</sup> Proposals affecting copyright online trigger important human rights interests.

3.10 The main reason New Zealanders go online is to “seek, receive, and impart information”.<sup>14</sup> By enabling free expression, the Internet enables people to exercise other rights.<sup>15</sup> Where copyright encourages new creation and sharing, it supports free expression. But some

<sup>8</sup> Diagram (CC-BY Int 4.0), from Treasury, *Living Standards Framework*, p 4.

<sup>9</sup> Geiger, C (ed), *Research Handbook on Human Rights and Intellectual Property*, p 455.

<sup>10</sup> Affirmed in UDHR Art 19, ICCPR Art 19, New Zealand Bill of Rights Act 1990, s 14.

<sup>11</sup> UDHR, Art 26.

<sup>12</sup> UDHR, Art 27.

<sup>13</sup> Fareeda Shaheed (UN Special Rapporteur in the Field of Cultural Rights), *Copyright policy and the right to science and culture*, [A/HRC/28/57](https://www.hrcr.org/docs/default-source/2017-2018-reports/2017-2018-report-annex-1-10-copyright-policy-and-the-right-to-science-and-culture.pdf).

<sup>14</sup> InternetNZ, *Internet research 2019*, <[internetnz.nz/2019-research](https://internetnz.nz/2019-research)>.

<sup>15</sup> Geiger, C (ed), *Research Handbook on Human Rights and Intellectual Property*, pp 457-458.

copyright measures will trigger human rights concerns. For example, “website blocking, content filtering and other limits on access to content subject to copyright, as well as the liability imposed on intermediaries for infringing content disseminated by users”, will negatively affect the right to free expression and the right to science and culture.<sup>16</sup>

**R3** We recommend that the options paper present a clear commitment to considering human rights in all aspects of copyright law.

### Copyright law should be resilient to changes over time

- 3.11 Copyright has not kept up with changing technology over time.<sup>17</sup> Updates to the law have been slow and have failed to anticipate big shifts in technology. In 2008, a year after the iPhone launched, New Zealand’s copyright law was updated to allow format shifting of music from CDs to mp3 players like the iPod.
- 3.12 Technology shifts, like the adoption of smartphones, can open up new business models, as with subscription services for streaming audio. From buying CDs, to buying songs online, to streaming on-demand, each different medium shifts the balance of what is efficient, and where the transaction costs lie. On the other hand, the shift to digital media means more activities trigger copyright. This can include situations where the incentives and transaction costs of copyright do not make sense. Using or sharing a digital work can trigger copyright, though the same activities would not with a physical work would not.
- 3.13 Ongoing shifts in technology mean New Zealand cannot set and forget the balance of copyright. The path to efficient markets, minimising transaction costs, and fair access to works will continue to shift over time. The objectives for copyright should recognise that these shifts will continue, and include consideration of resilience and adaptability over time. Later in our submission, we address ways the law could better allow for these shifts, in line with best practice guidance for modern legislation.
- 3.14 We propose rethinking the approach to exceptions and limitations, to make it more open to new activities and technologies over time. We put forward different options that could deliver the flexibility needed, while giving New Zealanders better guidance in context, for example, combining exceptions that are more open to new uses or new purposes with guidance by relevant professional communities, or by regulations. We are equally open to other approaches to resilient law, but think the goal of resilience to change is vital to deliver law that works for New Zealanders over time.

**R4** We recommend that the objectives include resilience to change over time, and that the options paper consider new approaches to the design of copyright law which serve that objective, such as more open-ended exceptions.

### Make copyright more understandable for New Zealanders

- 3.15 As copyright affects more people and more activities, it is important to make it easier to understand and use. Copyright is complicated and is poorly understood even by many people who make money from commercial copyright works.<sup>18</sup> Uptake of digital technologies offers new tools for creating and distributing works,<sup>19</sup> but also means that more New Zealanders’ daily activities involve regulated copying and sharing. Handing someone a printed copy of an article to read is not affected by copyright but emailing a PDF is.

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<sup>16</sup> Fareeda Shaheed (UN Special Rapporteur in the Field of Cultural Rights), *Copyright policy and the right to science and culture*, [A/HRC/28/57](#), p 11.

<sup>17</sup> Australian Productivity Commission & New Zealand Productivity Commission, *Growing the Digital Economy in Australia and New Zealand*, (January 2019) <[productivity.govt.nz](#)>, pp 50-51.

<sup>18</sup> MBIE, *Copyright and the Creative Sector*, (Wellington, 2016), p 7 (“Creative Sector Study”).

<sup>19</sup> MBIE, *Creative Sector Study*, p 7.

- 3.16 Well-designed regulations recognise that most people want to do the right thing, matching rules that may apply broadly with guidance and assistance to comply. We think copyright law could adopt this aspect of responsive regulation, as set out in the guide *Achieving Compliance: a guide for compliance agencies in New Zealand*.<sup>20</sup>
- 3.17 Other widely applied statutes may hold lessons for making copyright law understandable and resilient to change in the digital era. The Consumer Guarantees Act 1993, Privacy Act 1993, and s 9 of the Fair Trading Act 1986 establish principles or open-ended standards for conduct. Simple explanations and expert guidance are available to help people use the rules in particular contexts.

### Getting the right objectives for copyright

1	Are the above objectives the right ones for New Zealand’s copyright regime? How well do you think the copyright system is achieving these objectives?
2	Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?

#### Objective 1

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

- 3.18 We support Objective 1. This objective recognises that copyright has a core policy role of benefitting New Zealanders by encouraging people to make and share works. It also recognises that copyright may not be the best legal tool to apply, and that there are situations where it can be inefficient. As we discuss in relation to other objectives, copyright has effects on non-economic aspects of New Zealanders’ wellbeing which also deserve consideration.
- 3.19 Objectives 1 and 3 set out efficiency concerns. Giving these concerns practical effect will require proactive measures in copyright law. Copyright arises automatically in respect of qualifying works and is a property right exchanged through private transactions. In practice, there is no scope for after-the-fact assessments of whether copyright efficiently applies to a given work or transaction. Given treaty constraints, limitations and exceptions may be the best option for ensuring copyright applies only where it is the most efficient incentive mechanism.
- 3.20 We recognise that others may see other roles for copyright, for example a role of recognising and rewarding creators, beyond the level of economically efficient incentive required to motivate creation and distribution of works.<sup>21</sup> If so, this concern should result in rewarding creators rather than distributors, for example, through rights reversions to creators after a period of time.

#### Objective Two

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

- 3.21 We support the objective of reasonable access. As drafted, Objective 2 reflects concerns of economic efficiency, and assesses any exceptions to exclusive rights against a test of “net benefit to New Zealand”. For a range of reasons, we think a broader approach to enabling access makes sense.

<sup>20</sup> Department of Internal Affairs, *Achieving Compliance* (2011), <[dia.govt.nz](http://dia.govt.nz)>

<sup>21</sup> See Gibling R, “Reimagining copyright’s duration”, in Gibling R and Weatherall K (eds), *What if we could reimagine copyright?*, (January 2017), <[press.anu.edu.au](http://press.anu.edu.au)>, p 192.



- 3.22 New Zealanders have human rights to free expression, education, access to culture, and to participate in the benefits of science. Copyright should allow New Zealanders to exercise their human rights, without consideration of a “net benefit” test. If a benefit test is applied, it should explicitly consider non-economic benefits to wellbeing under the Government’s Living Standards Framework. Finally, it is important that access to works remains reasonable over time, as shifts in technology continue to change the modes of creation and distribution for both commercial works and the broader ecosystem.

### **Objective Three**

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

- 3.23 We support the main considerations in Objective 3. Copyright should deliver efficient incentives to making and sharing works, and must do so through a workable and usable framework. Minimising transaction costs is good for everyone - no-one wants wasted time, money, or effort in the process of making or using works.
- 3.24 We support clarity, and ease of use. However, providing **certainty** is not realistic or beneficial in an environment of changing technology and business models. The economic value of copyright is also inherently uncertain, because for most works it is based on how long a person lives.<sup>22</sup> Instead, we support the aim of **predictability** in copyright law, which should allow change over time, but give people the tools they need to respond to it.
- 3.25 Ongoing shifts in technology mean we cannot set and forget the efficient balance of copyright. Over time, the best path to efficient markets, minimising transaction costs, and fair access to works, will continue to shift. Objectives for copyright should recognise that these shifts will continue, and include consideration of resilience to change over time.

### **Objective Four**

#### **Meet New Zealand’s international obligations**

- 3.26 As set out in the Issues Paper, New Zealand is committed to core aspects of copyright law by international agreements. We are concerned that this objective could be read narrowly, applying New Zealand’s international obligations through membership in intellectual property treaties and organisations, neglecting vital human rights obligations.
- 3.27 International treaties commit New Zealand to protect human rights which interact with copyright law, including rights of free expression, education, and access to culture and science. Recognising human rights interests is important in itself, and will help to account for non-economic interests, such as cultural participation, which support sustainable wellbeing under the Living Standards Framework. One way to make that commitment clear would be to explicitly refer to human rights obligations in Objective 4.

### **Objective Five**

#### **Ensure the copyright system is consistent with the Crown’s obligations under the Treaty of Waitangi**

- 3.28 We support consideration of the Crown’s obligations under the Treaty of Waitangi. We support moves to scope further engagements, and to adequately resource these, in consultation with iwi and hapū as Treaty partners.

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<sup>22</sup> Richard Watt, *Handbook on the Economics of Copyright: A Guide for Students and Teachers* (Edward Elgar Publishing, 2014). p 14.

## Sub-objectives and weighting of objectives

3	Should sub-objectives or different objectives for any parts of the Act be considered (eg for moral rights or performers' rights)? Please be specific in your answer.
4	What weighting (if any) should be given to each objective?

- 3.29 We view the proposed objectives as a set which works best in combination, and as part of an overall balance for copyright. This reflects the Issues Paper's model of outcomes,<sup>23</sup> representing a balance between **creation** of new works, **access** to knowledge and creative content, and ability to **use, improve on, and adapt** works developed by others.
- 3.30 The first three objectives address economic concerns, aiming to provide efficient incentives to make and share works (Objective 1). They also recognise that, because of transaction costs and opportunity costs, it would be inefficient to require a licence for all copying or sharing of works (Objective 3), and that an efficient balance allows reasonable use of works without a licence (Objective 2). Objective 4 recognises international agreements as the key constraint on New Zealand's copyright law, and Objective 5 the place of the Treaty of Waitangi in New Zealand's constitution and culture.
- 3.31 We have proposed adding considerations to address **ease of use, resilience over time, and human rights**. In our view, these considerations do not require changes to Objective 1, and would have only limited effects on commercial copyright distribution and licensing as it currently operates. Our recommendation to consider human rights is consistent with Obligation 3, and will mean a somewhat broader role for access under Objective 2.

**R5** We recommend that the options paper put forward objectives for copyright which respect concerns of human rights, sustainable wellbeing, and resilience to changing technology.

**R6** We recommend that the options paper present a range of options for objectives, including options with different weightings on objectives, to serve constructive debate.

**R7** We recommend that the objectives for copyright be modified to read as below:

### InternetNZ's proposed objectives for copyright

1. Provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so
2. Permit reasonable access to works for use, adaptation and consumption, **enabling New Zealanders to benefit from human rights, cultural participation, and changing technologies, and ensuring human rights are upheld** ~~where exceptions to exclusive rights are likely to have net benefits for New Zealand~~
3. Ensure that the copyright system is effective, ~~and~~ efficient, **and understandable**, including providing clarity and **predictability** ~~certainty~~, facilitating competitive markets, minimising transaction costs, and maintaining integrity, ~~and~~ respect for the law, **and resilience to change over time**

<sup>23</sup> MBIE, *Issues Paper*, p 22.

4. Meet New Zealand's international **and human rights** obligations
5. Ensure the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi

## 4. Rights

### Copyright should serve the public good

- 4.1 Though copyright creates private rights, the purpose of these rights is to serve the public good, by encouraging new efforts to make and share works. The low originality threshold applies copyright to a huge scope of activities. This scope has increased as New Zealanders take up digital media, which can require or enable copying in situations where physical media would not, such as sharing a document by email rather than sending it as a letter.

### Changing markets need flexibility, not certainty

- 4.2 New Zealand's Creative Sector Study showed a diverse creative ecosystem which evolves over time and involves many different business models.<sup>24</sup> As well as being diverse, the business of making and distributing works is uncertain. The market value of works is hard to predict, changes over time, and often has a duration depending on the uncertain factor of an author's eventual lifespan. Copyright manages this uncertainty by being open-ended and allowing a response in a particular context. It covers all works, applies automatically, and gives a property right that can be traded. In this way, copyright gives its owners flexibility to take on and manage business risks, responding to uncertainty by making or investing in a portfolio of works, by innovating, and by entering contracts to manage risk.
- 4.3 Despite short-run disruptions and challenges, history shows that the business of making and sharing works can adapt and thrive as technologies change. In the 1980s, US movie studios saw home recording on VCRs as a threat, suing technology companies and ultimately losing, with the Supreme Court's 1984 decision to allow personal recording on video cassettes.<sup>25</sup> By 1985, sales of pre-recorded cassettes made up half of Hollywood revenues.<sup>26</sup> More recently, uptake of Internet-based distribution has become a substantial source of revenue for games (\$299 million in 2016),<sup>27</sup> recorded music (\$98.8 million in 2017 and \$107.9 million in 2018)<sup>28</sup>, and video media (eg Netflix numbers over 1 million subscribers in 2016)<sup>29</sup> in New Zealand. As these shifts show, copyright offers incentives, not certainty.
- 4.4 Empirical evidence confirms behaviours related to copyright cannot always be understood through simple economic assumptions. Writing for the World Intellectual Property Organisation (WIPO), Richard Watt summarises the state of empirical evidence on a range of issues.<sup>30</sup> A key point is that evidence varies in availability and quality. People interact with

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24 MBIE, *Creative Sector Study*, p 4-5.

25 *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

26 Advokat, Stephen (1985-12-26). "[Small screen begins to dominate Hollywood thinking](#)". *St. Petersburg Evening Independent*. Knight-Ridder Newspapers. pp. 3B. Retrieved May 23, 2011.

27 Interactive Games and Entertainment Association, *Digital New Zealand Report 2018*, (August 2018) <[igee.net](#)>

28 Recorded Music NZ, "NZ RECORDED MUSIC REVENUES TOP \$100 MILLION IN 2018", (March 2019), <[recordedmusic.co.nz](#)>.

29 Roy Morgan, "Nearly 2 in 5 Kiwis now have Subscription Video on Demand in the home – and 1 in 10 already have at least TWO services", (March 2017), <[roymorgan.com](#)>.

30 Watt, Richard "An Empirical Analysis of the Economics of Copyright: How Valid are the Results of Studies in Developed Countries for Developing Countries?" in Watt, R (editor) *The Economics of Intellectual Property* (January 2009), pp. 65-99 ("An Empirical Analysis").

works in a range of ways, and online research or access often complements purchases of cultural outputs such as tickets for an event or concert.<sup>31</sup>

**R8** We recommend that copyright recognise and allow for continuing shifts in technology and distribution models.

## Longer duration will not serve New Zealanders

- 4.5 We agree with the Issues Paper position that New Zealand should not extend the duration of copyright as part of this review. Empirical work suggests that extending the duration of copyright does not result in a measurable increase in new creative output.<sup>32</sup> Because New Zealand is a net importer of commercial works, MFAT analysis throughout the TPP and CPTPP negotiations treated longer copyright terms as a potential concession by New Zealand, resulting in higher costs and limited upsides for creative outputs or exports.<sup>33</sup> Finally, recent empirical research by Rebecca Giblin suggests that New Zealand's shorter copyright term is allowing for more creative output by comparison with Australia.<sup>34</sup> If duration were extended, then the potential role of rights reversions to benefit original creators, rather than current distributors, would need careful consideration.

**R9** We recommend that longer duration is not put forward in the options paper.

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

- 4.6 Copyright in New Zealand applies a very low threshold for originality, allowing even a telephone book to qualify for copyright protection, though the underlying facts about phone numbers would not. Historically this was less of a problem, because commercially significant copying was in practice limited to people operating printing presses, record presses, or other industrial scale machinery. With digital devices and the Internet, most New Zealanders engage in activities every day that require copying of works. The low threshold for copyright can create uncertainty and transaction costs, in situations where there is no need for a commercial incentive to copy. Many everyday activities involve works with no commercial market or uses where a requirement for permission would be inefficient for everyone involved, imposing transaction costs with no benefit.

**R10** We recommend that options are put forward to reduce transaction costs from a low originality threshold, including consideration of exceptions and limitations which contribute to the overall balance and efficiency of copyright regulation.

**9** What problems (or benefits) are there with the current rules related to computer-generated works, particularly in light of the development and application of new technologies like artificial intelligence to general works? What changes, if any, should be considered?

- 4.7 Copyright creates legal obligations and economic incentives, which have important impacts on the ways people behave. We are at an early stage in the development and uptake of software automation, and it is not clear that copyright law can work in practice if it applies directly to the activities of computer systems. As discussed further below, automated tools can be applied in different ways, which may need to be treated differently in law based on the context. In some cases the maker of a tool should be the author of works it creates, in others, the user of a tool, for example with partly automated sound or video editing tools.

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31 CreativeNZ, *New Zealand Audience Atlas 2017*, p 84.

32 Watt, ("An Empirical Analysis").

33 Ministry of Foreign Affairs and Trade, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership: National Interest Analysis*, (March 2018), <[mfat.govt.nz](http://mfat.govt.nz)>

34 This is new research, and we understand that the lead researcher will be presenting early evidence to MBIE as part of this consultation process.

4.8 We think that at the present time, a broad and open-ended approach makes sense. We favour retaining the test that gives ownership of computer-generated works to the person who makes arrangements for creation of the work. This allows people to use contracts and the legal system to resolve emerging issues in context, as uses of automation evolve over time.

**R11** We recommend that for a computer-generated work, first ownership of copyright continues to go to the person who has made arrangements for its creation.

<b>12</b>	What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?
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4.9 Crown copyright is not working. Copyright exists to encourage making and sharing of works by allowing a monopoly right that gives economic incentives. That approach is designed for commercial incentives, distribution models, and risks. Outside that context it does not work well. Copyright creates transaction costs on the use of works, requiring permission for many uses. In practice, it is difficult for New Zealanders to get permission even for reasonable uses of Crown works. Most Crown agencies are not resourced to handle copyright permissions, and the risk of getting it wrong bars beneficial uses of works. Recognising these transaction costs, the Auditor General has said “it would be helpful if one particular government agency were responsible for managing Crown copyright”.<sup>35</sup>

4.10 The NZGOAL arrangements help to reduce transaction costs, but require active application by agencies, and so their coverage is limited. We also recognise that there are Government agencies such as Standards New Zealand, and MetService, who may have important uses for copyright protection of works.

**R12** We recommend that Crown copyright is fundamentally reconsidered to avoid transaction costs.

**R13** We recommend that the options paper include the following options for addressing Crown copyright.

- a) Removing Crown copyright entirely.
- b) Allowing opt-in use of Crown copyright by agencies, requiring that permissions are resourced and with durations aligned to other works.
- c) Establishing a Government agency to guide and manage Crown copyright requests.
- d) Requiring all State Sector agencies to have a Copyright Officer, similar to the requirements of agencies to have a Privacy Officer in the Privacy Act.

<b>16</b>	Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?
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<b>17</b>	What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?
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4.11 We focus on the application of secondary liability and authorisation liability to the Internet. In that context, the current law has created substantial unpredictability, notably in the context of geo-unblocking services offered by ISPs, through which New Zealanders could access and pay

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<sup>35</sup> Office of the Auditor-General, “Digital access to information and services: Learning from examples” (June 2018) <[oag.govt.nz](http://oag.govt.nz)>.

for overseas online content. Unfortunately, the dispute between ISPs and local holders of exclusive distribution rights did not result in a judicial decision to clarify the application of the law.<sup>36</sup>

- 4.12 There is a risk that applied too broadly, rules for secondary liability or authorisation of infringement would impede normal and beneficial uses of the Internet. A key example is the use of linking, which is a core aspect of online communication. In our view, linking has substantial benefits for New Zealanders, by enabling sharing of information and responsible attribution. If linking in itself counted as authorisation of underlying content, New Zealanders would in effect be required to do a due diligence search each time they shared an article or website on social media. Most providers of online articles want links to be widely shared, to attract an audience, particularly if there is potential advertising or subscription revenue. The ability to link is beneficial, and most uses of it pose no harm to copyright interests.
- 4.13 We think authorisation and secondary liability should require knowledge or intent. Those elements were present in the Australian case of *Universal Music v Cooper*,<sup>37</sup> which decided linking could count as authorisation. Regardless of that decision, tests of knowledge or intent are part of the right balance for assigning liability, as they are adaptable across contexts, and resilient to change over time.

**R14** We recommend that options on secondary liability and authorisation continue to require an element of subjective guilt, through a knowledge or intent requirement.

**21** Do you have any concerns about the implications of the Supreme Court's decision in *Dixon v R*? Please explain.

- 4.14 The Supreme Court's ruling in *Dixon v R*, that computer files can be treated as property in some situations, applies property law concepts to digital information in ways that go beyond the scope of this copyright review. We do not think the present review can do justice to these concerns, and that they may be better addressed through consideration by agencies such as the Law Commission.

**R15** We recommend that the issue of computer files being property in some situations is assessed separately from the present review, in a process that allows for detailed analysis and consultation with legal experts and the New Zealand technology sector.

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

- 4.15 User-generated content is an important aspect of free expression for New Zealanders in the digital era. New Zealanders acting personally or for non-commercial purposes routinely share and enjoy memes, animations, and dance videos with musical backing, with no expectation of commercial gain or facing copyright restrictions. Uses for a commercial purpose may require a different assessment. Much, but not all, of this sharing takes place on overseas platforms governed by overseas copyright laws that allow open-ended noncommercial reuse of existing works.
- 4.16 It would be desirable for New Zealand law to explicitly allow for reasonable uses in this context, to better align with the expectations of New Zealanders.

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<sup>36</sup> RadioNZ, "Global Mode dropped after legal action", (24 June 2015), <[radionz.co.nz](http://radionz.co.nz)>.

<sup>37</sup> *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187.

**R16** We recommend that options for exceptions and limitations consider the role and benefits of user-generated content for New Zealanders, including free expression implications. Options should include:

- a) a specific exception allowing use for non-commercial purposes, comparable to the Canadian approach
- b) a broader open-ended exception which would allow beneficial uses, based on tests of purpose, nature of use, and potential harm to the market for a work used.

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

4.17 Copyright arises automatically and creates transaction costs which may or may not be justified by the uses and commercial value of a particular work. As an automatic right, it should be possible to renounce copyright. Options should consider the Creative Commons CC0 model, as well as other ways to indicate that copyright in a work has been renounced.

**R17** We recommend options to allow for copyright to be renounced, including an option that would clearly allow the use of CC0 under New Zealand law

### Technological Protection Measures

**28** What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?

4.18 Suppliers of copyright works can try to control the ways people use those works in ways that go beyond copyright, for example through contractual terms or technologies that limit access or use. Where rules on Technological Protection Measures (TPMs) apply, those technical limits are backed up with legal restrictions. It may be an offence to bypass the technical control or provide tools that help others to do so. This can extend to restricting free expression, for example, s 226A(3) currently stops a person from publishing information relating to a TPM. Restrictions under TPM rules create severe risks of harming New Zealanders through supplier lock-in and anti-competitive behaviour, and through limiting legitimate and needed steps to enhance security on the modern Internet.

4.19 There are many legitimate reasons why New Zealanders use tools that have the effect of bypassing a TPM. For example, an access-control technology might be applied to websites to require that users view online advertisements. Online advertising can involve tracking individuals, and advertisements have been used as a way to infect people's devices with malicious software. To protect their privacy and security online, New Zealanders might reasonably use security tools that block advertising or hide personal information from third parties. Over-broad rules on TPMs could create legal barriers to protecting ourselves online, as well as barriers to important security research more broadly. We have discussed these matters in previous work on proposed reforms to TPM rules,<sup>38</sup> the CPTPP,<sup>39</sup> and in InternetNZ's copyright position paper.<sup>40</sup>

4.20 The best aspect of current TPM rules is that they relate closely to limiting infringement of works. Access control measures are not included. The rules apply tests of knowledge and

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38 InternetNZ, *Implementation of the Trans-Pacific Partnership Intellectual Property Chapter: Submission to MBIE*, (30 March 2016), <[internetnz.nz](http://internetnz.nz)>.

39 New Zealand Law Foundation, "TPPA: INTELLECTUAL PROPERTY AND INFORMATION TECHNOLOGY" <[internetnz.nz](http://internetnz.nz)>

40 InternetNZ, *Getting Copyright right in the Information Age*, (2018), <[internetnz.nz](http://internetnz.nz)>



intention to assess a person's liability. Those tests apply well across contexts and are resilient to change over time.

- 4.21 Rules which allow bypassing a TPM are prescriptive, poorly understood, and impractical. For example, the rules for a qualified person do not clearly allow bypassing TPMs by independent researchers into online security.

### **New Zealanders rely on security research to be safe online**

- 4.22 Legal rules on TPMs block New Zealanders from investigating and sharing what they learn about software and computer systems. New Zealanders are using the Internet more often, for more sensitive data, and increasingly rely on computers and software. Software relevant to copyright is now in most homes and present in almost every network in the country. It is vital to the security of New Zealand's Internet that TPM rules in copyright law contain explicit exceptions for security research.

**R18** We recommend that copyright law contain explicit exceptions to TPMs for security research.

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Is it clear what the TPMs regime allows and what it does not allow? Why/why not?

- 4.23 Our TPM rules do create problems, because they are complex and poorly understood. Substantively, the most significant problem with the rules is the framework for bypassing TPMs, which is narrow, prescriptive, and hard to use. People working in libraries, accessibility organisations, and legitimate security research need broader permissions to serve important public purposes.
- 4.24 More broadly, though most New Zealanders use digital technologies, few are aware of the TPM rules, and those who are aware are likely to misunderstand the scope of activity allowed or prohibited. Much more flexibility and guidance are needed. The exceptions may fit better in regulations, owned by a guiding Government agency, rather than in prescriptive primary legislation.

**R19** We recommend that options for TPM rules:

- a) retain a focus on preventing infringement, with tests of knowledge and intention that are adaptable across contexts
- b) offer an open-ended approach to the purposes for which TPMs can be bypassed
- c) are complemented by guidance on their use, which will empower conscientious New Zealanders to benefit from these permissions.

## **5. Exceptions and Limitations**

### **Balanced copyright needs usable, resilient exceptions**

- 5.1 The purpose of copyright law is to benefit New Zealanders, by regulating the making, sharing, and use of works. To deliver an overall balance of interests, copyright includes limitations and exceptions, recognising that an owner should not have a total monopoly, and that it might be harmful or inefficient to require an owner's permission for some uses of works. Exceptions help New Zealanders to benefit from free expression, cultural participation, and modern ways of learning, and reduce the burden of inefficient transaction costs that can result from copyright that includes non-commercial works, and non-commercial activities.
- 5.2 Our current approach to exceptions and limitations does not work in the digital era. The shift to digital media means that more personal and noncommercial uses of works involve copying. This shift has expanded the scope of copyright rules far beyond the activities and industries it



is meant to enable and protect. Exceptions primarily apply to responsible New Zealanders, who want to do the right thing. A lack of clear permission, or a risk of doing something unlawful, is often enough to deter conscientious people from uses of works that have benefits, and that pose no harm to copyright owners. The result is that responsible New Zealanders miss out on the chance to share, innovate, and participate in cultural life, and the rest of us miss out on resulting benefits to sustainable wellbeing over time.

- 5.3 We need a new approach to exceptions that restores a fair and efficient balance, and maintains it over time, against a background of continuing change in technologies that New Zealanders legitimately expect to benefit from.

**R20** We recommend options for exceptions and limitations that support balance in copyright and better accommodate change over time.

### Rethinking exceptions is the best path to resilient law

- 5.4 Rethinking exceptions and limitations is the best path to resilient copyright law. New Zealand’s copyright law has failed to keep up with changing technology.<sup>41</sup> Current permitted acts do recognise important purposes, but are narrow and prescriptive, restricting both the allowed activities and who can perform them. The result is that normal activities for the digital era, such as sending email attachments or making backups online are unreasonably excluded even when the purpose is recognised.

- 5.5 Beyond these needed updates, New Zealanders need a much broader rethink of exceptions. This Issues Paper will inform an Options Paper, to guide a Policy Paper and then a Bill to be put through a Select Committee process. This means any law reforms are years away from enactment. Writing specific exceptions now will result in copyright law that is out of date from day one. After extensive debates, New Zealand’s 2008 law reforms let us copy music CDs in a world changed by smartphones. Enabling reasonable access over time requires resilience to change, allowing for new activities which serve a recognised purpose, and for new purposes to be recognised.

**R21** We recommend options for exceptions and limitations that allow new ways to serve a recognised purpose, and options that allow for new purposes to be recognised over time.

### Treaties allow us to innovate in exceptions

- 5.6 Our international obligations require balance in New Zealand’s copyright law. New Zealand is committed under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) to intellectual property rules which promote innovation and creativity,<sup>42</sup> contribute to the promotion of technological innovation,<sup>43</sup> and support a balance of rights and obligations.<sup>44</sup> Recognising that treaties constrain domestic law on qualifying works and scope of rights, Article 18.66 of CPTPP points to limitations and exceptions, including those for the digital environment, as a way to support this balance.<sup>45</sup> It requires consideration of legitimate purposes “such as, but not limited to: criticism; comment; news reporting; teaching; scholarship; research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.” Importantly, a legitimate purpose can include use with a commercial aspect, as with commercial news reporting.<sup>46</sup>

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41 Productivity Commission, Growing the Digital Economy.

42 CPTPP, Art 18.4 <[mfat.govt.nz](http://mfat.govt.nz)>.

43 CPTPP, Art 18.2.

44 CPTPP, Art 18.66.

45 CPTPP, Art 18.66.

46 CPTPP, Chapter 18, footnote 79.

- 5.7 New Zealand has substantial flexibility to craft domestic copyright exceptions, while complying with the Berne three-step test.<sup>47</sup> New Zealand is now a party to the WIPO Copyright Treaty (WCT), whose Article 10 permits parties to “carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention” and to “devise new exceptions and limitations that are appropriate in the digital network environment”.<sup>48</sup> From overseas precedent and WCT negotiations at WIPO,<sup>49</sup> it is clear the three-step test allows open-ended and evolving copyright exceptions which apply in the digital environment.<sup>50</sup>

**R22** We recommend that options consider how to apply provisions of international trade agreements which allow and require flexibility for balanced copyright law in the digital era.

### Open exceptions can support responsible guidance

- 5.8 Personal and noncommercial uses of works are regulated by copyright and require an owner’s permission unless a legal exception applies to the use. To balance shifts in the digital era, modern copyright law needs exceptions which are open to a broad range of uses, and which allow for changing uses over time. As we set out above, when New Zealanders make or distribute works, copyright law respects their ability to apply rules and rights in context, and to make decisions that manage benefits and risks over time. We think copyright exceptions should offer us the same respect, allowing flexibility for New Zealanders to make responsible decisions in context, and to develop best practice guidance over time.
- 5.9 New Zealand legislative guidance supports future proof law that is “flexible enough to properly address foreseeable developments in technology or society generally”.<sup>51</sup> Legislation can offer this flexibility in a range of ways, illustrated by particularly well-constructed and resilient examples in New Zealand law. Consumer protection rules center on open-ended tests which people apply in context.<sup>52</sup> Privacy law provides a set of principles which are applied to evaluate specific actions and harms, supported by guidance from the Privacy Commissioner.<sup>53</sup> Other frameworks specify open-ended tests in statute law, and use delegated legislation to make details clear in a way that is more readily updated over time. Whatever approach is preferred, we support more guidance on the how to use copyright, particularly guidance on the scope and effective use of exceptions.
- 5.10 Combined with good guidance, flexible exceptions allow more effective responses to policy concerns over time and varied circumstances. Overseas, professional communities have produced guidance applying flexible exceptions, accounting for both copyright concerns and their respective contexts, ethical obligations, and community norms. The result is best practice guidelines for journalism,<sup>54</sup> scholarly research,<sup>55</sup> online video,<sup>56</sup> sound recordings,<sup>57</sup> media

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47 See Geiger et al, “Understanding the ‘three-step test’”, Chapter 5 in Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing, 2015).

48 WCT, Agreed Statement concerning Article 10.

49 See WIPO, [CRNR/DC/102](#), p 70, where to allow the evolving ‘fair use’ doctrine of the USA to apply, including to the digital environment, the eventual wording of Article 10 is proposed.

50 Geiger, Christophe, Daniel Gervais and Martin Senftleben, ‘THE THREE-STEP TEST REVISITED: HOW TO USE THE TEST’S FLEXIBILITY IN NATIONAL COPYRIGHT LAW’, *American University International Law Review*, Vol. 29, No. 3 (2014), pp. 581-626.

51 LDAC <http://ldac.org.nz/assets/Uploads/4016e0adf9/Legislation-Guidelines-2018-edition.pdf> p 61.

52 For example, the Consumer Guarantees Act 1993, and s 9 of the Fair Trading Act 1986.

53 Privacy Act 1993, s 6.

54 Society for Professional Journalists et al, “SET OF PRINCIPLES IN FAIR USE FOR JOURNALISM” (2013) <[cmsimpact.org](http://cmsimpact.org)>

55 International Communication Association “CODE OF BEST PRACTICES IN FAIR USE FOR SCHOLARLY RESEARCH IN COMMUNICATION” (2016) <[http://cmsimpact.org/wp-content/uploads/2016/01/WEB\\_ICA\\_CODE.pdf](http://cmsimpact.org/wp-content/uploads/2016/01/WEB_ICA_CODE.pdf)>

studies publishing,<sup>58</sup> orphan works,<sup>59</sup> use of images in education,<sup>60</sup> software preservation,<sup>61</sup> and other areas.<sup>62</sup>

**Figure two: Benefits of flexible law with community-based guidance**

Predictability	Guidance can be efficiently developed and updated as issues arise for professions or communities in New Zealand. This should mitigate concerns about unpredictability in the law.
Efficient dispute resolution	New Zealand copyright law is seldom litigated, and so New Zealanders lack guidance on how the law applies in context. Guidance should help to manage disputes without litigation.  Where litigation addresses guidelines, judicial rulings will be useful for a broader profession or community.
Concerns beyond copyright	Guidance can address other concerns a profession or community faces alongside copyright, such as academic research ethics, privacy best practices, or tikanga in relation to tāonga works
Social licence can support desired behaviour	Guidance developed by New Zealanders within a profession or community will have social licence, and may be more persuasive to some people than copyright law itself
Resilience to change	Open-ended legislation is more resilient to change over time, exemplified by privacy and consumer protection laws.

**R23** We recommend that options include the use of open-ended legislative frameworks combined with contextual best-practice guidance.

56 Center for Media & Social Impact “Code of Best Practices in Fair Use for Online Video”

<<http://cmsimpact.org/code/code-best-practices-fair-use-online-video/>>

57 Center for Media & Social Impact “Fair Use and Sound Recordings: Lessons from Community Practice”

<<http://cmsimpact.org/code/fair-use-sound-recordings/>>

58 Society for Cinema in Media Studies, “Society for Cinema and Media Studies’ Statement of Fair Use Best Practices for Media Studies Publishing”

59 P Aufderheide et al, “STATEMENT OF BEST PRACTICES IN FAIR USE OF COLLECTIONS CONTAINING ORPHAN WORKS FOR LIBRARIES, ARCHIVES, AND OTHER MEMORY INSTITUTIONS” (2014) <[cmsimpact.org](http://cmsimpact.org)>

60 Visual Resources Association “STATEMENT ON THE FAIR USE OF IMAGES FOR TEACHING, RESEARCH, AND STUDY” <[cmsimpact.org](http://cmsimpact.org)>

61 Center for Media & Social Impact “CODE OF BEST PRACTICES IN FAIR USE FOR SOFTWARE PRESERVATION” (September 2018) <[cmsimpact.org](http://cmsimpact.org)>

62 Center for Media & Social Impact “Codes of Best Practices” <<http://cmsimpact.org/codes-of-best-practices/>>

### Overseas experience supports open-ended exceptions

- 5.11 A key challenge for this review is to deliver a copyright law that can remain fit for purpose over time, in a period of rapid change in technologies, business models, and creative opportunities. We recommend consideration of a range of models that deliver the required flexibility, including the potential for an exception which is open to new purposes.
- 5.12 Overseas experience suggests exceptions that are open in this way are compatible with both technological innovation and flourishing creative industries. Exceptions that are open to purpose apply in the respective national laws of the United States of America (since 1831), Israel (since 2007), and Singapore (since 2004). Assessments by Australia’s Law Reform Commission and Productivity Commission have recommended the adoption of a similar open exception, based on net benefits to Australia’s economy.<sup>63</sup>
- 5.13 Overseas models for open-ended exceptions do vary, but there is an emerging standard which balances flexibility with protection for core copyright interests. In Israel, an open-ended exception is combined with the ability for a Minister to clarify the conditions of lawful use.<sup>64</sup> In Singapore, the open-ended exception is soon to be more closely aligned with versions in US and Israeli law, by removing a test of market availability, and replacing the term “fair dealing” with “fair use”, to help with public understanding of the law.<sup>65</sup> All of these exceptions apply a test of market impact, to protect the interests and incentives of copyright owners against unfair uses of an open-ended exception.
- 5.14 Countries which have adopted open-ended copyright exceptions value and benefit from both technological innovation, and strong creative sectors. Economic analyses we are aware of have found that open exceptions of this type can have benefits to technology industries, without measurable cost to the efforts or outputs of core creative industries.<sup>66</sup> As set out above, we think the best model for New Zealand is to combine flexibility in legislation, with guidance that can be developed and updated more frequently, and can apply contextual factors that matter to communities that engage in creation, research, preservation, and other activities relevant to the impacts of copyright on sustainable wellbeing.

### New Zealanders benefit from transformative use online

- 5.15 Encouraging new effort to create new value is the reason we have copyright law. That includes enabling the beneficial use of existing works in new ways, as recognised by the outcomes this review seeks to deliver. The Internet offers New Zealanders new tools for adapting and reusing works and encourages new efforts by allowing people to reach an audience and join cultural conversations online. In 2013, Auckland law students parodied a controversial music video to convey a feminist message in a memorable and effective way, gaining millions of views within days.<sup>67</sup> Both the NZ Police,<sup>68</sup> and Manurewa High School students,<sup>69</sup> have choreographed dance videos widely shared online. All of these examples involve new effort to transform an existing work, in ways that add new value for New Zealanders. In context, there may be further questions that affect whether use of this type should be allowed, including whether it is commercially motivated, or harms the interests of owners in relation to the existing works used. We think the law should address those questions, but that a definite no by default,

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63 Australian Productivity Commission, *Report 78 Intellectual Property Arrangements: Overview and Recommendations*, (September 2016) <[pc.gov.au](http://pc.gov.au)>

64 Z Efronie, “ISRAEL’S FAIR USE” <[cyberlaw.stanford.edu/blog/](http://cyberlaw.stanford.edu/blog/)>

65 Singapore Ministry of Law, *Singapore Copyright Review – Enhancing Creators’ Rights and Users’ Access to Copyrighted Works* (January 2019) <[mlaw.gov.sg](http://mlaw.gov.sg)>

66 See Ghafele and Gilbert, “A Counterfactual Impact Analysis of Fair Use Policy on Copyright Related Industries in Singapore”, *Laws* 2014, 3, 327–352; doi:10.3390/laws3020327

67 Kirsty Johnston, “Blurred Lines parody wins smart praise”, (8 September 2013), <[stuff.co.nz](http://stuff.co.nz)>

68 Stuff, “New Zealand Police show off their hip hop dancing”, (3 July 2016) <[stuff.co.nz](http://stuff.co.nz)>

69 RadioNZ, “The Fresh Prince-approved teen dance crew from Manurewa”, (24 June 2018) <[radionz.co.nz](http://radionz.co.nz)>

which is the current position, fails to serve the outcome of enabling beneficial reuse of existing works in the Internet era.

### Give options that allow beneficial change over time

- 5.16 As set out above, we think that resilient law which balances the interests relevant to copyright and aligns with the expectations of New Zealanders over time, needs exceptions that are open-ended enough to respond to new uses and contexts. To support a productive policy discussion at the next phase of this review, we ask that the Options Paper address the need for the law to accommodate changes over time, and put forward a range of different options that would do so.

**R24** We recommend that the options paper address the need for exceptions that allow new uses over time, and include the following as potential approaches.

- a) Purpose-based exceptions which are open to activity, with factors that consider whether use is reasonable, such as market impact.
- b) A new exception open to any purpose, with consideration of factors that would make use of the work reasonable in context, such as market impact.
- c) Using tertiary law to specify permitted acts in context, within broader exceptions established in primary legislation.
- d) Options that allow a broad role for use of exceptions to be guided by New Zealanders in professions and communities.

### Addressing specific questions on exceptions

<b>30</b>	Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use? Have you ever been threatened with, or involved in, legal action? Are there any other barriers?
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- 5.17 Overall, current permitted acts are prescriptive and narrowly framed, in ways that limit beneficial uses of works and new technologies. The most open exception is for reporting current events under section 42. We have heard this works well because “fair dealing” is not prescriptively defined in the case of reporting current events.
- 5.18 Some of the current exceptions include very confined open-ended tests, which create uncertainty while failing to deliver the flexibility that would make the law resilient over time. For example, s 43(3) sets out a list of factors to consider in deciding whether a use is fair dealing for the purpose of research and private study:<sup>70</sup>

*In determining, for the purposes of subsection (1), 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*

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<sup>70</sup> Copyright Act 1994, s 43(3)

e) *where part of a work is copied, the amount and substantiality of the part copied taken in relation to the whole work.*

- 5.19 We think that similar tests would be more beneficial if applied and considered more broadly, and particularly if supported by guidance in the context where use would occur.

**R25** We recommend a different and less prescriptive approach to exceptions and limitations to better allow for change over time.

**31** What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?

## News reporting

- 5.20 The news reporting exception recognises the value and importance of public access to information about current events. Though it serves a public purpose, this exception is used extensively by commercial organisations, who earn advertising and subscription revenue from reporting. It is a relatively broad and flexible exception, which is routinely applied by news media in New Zealand. Experience with this exception suggests that New Zealand organisations can apply a relatively open-ended exception, which nonetheless supports workable business decisions and risk assessments.
- 5.21 In the digital era, reporting of current events often stays online long after the events are current, but remains a valuable source of information for New Zealanders. It may be worth considering a broader exception that explicitly allows for access to historic reporting, and for media such as podcasts which may focus on review of events after the fact rather than on immediate reporting.
- 5.22 This exception enables news reporting, but like other aspects of copyright does not guarantee a revenue stream. Policy issues with the funding of beneficial journalism and reporting are probably best addressed outside copyright law.

## Other exceptions

- 5.23 Permitted acts recognise that reasonable uses of works for the purposes of criticism and review, or for research and private study, should be allowed. However, the current approach to these permitted acts is narrow and prescriptive, in ways that do not deliver the intended benefits in the digital era. For example, as discussed below, it is not clear that New Zealanders can exercise a permitted act that requires the assistance of a third-party cloud provider, for example storing, analysing, or hosting gathered research articles for future access. To cope with change over time, the law must allow for these and other new ways to serve recognised purposes.

**R26** We recommend that the relatively open-ended news reporting permitted acts are considered as models for other exceptions and limitations in the law.

**34** What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?

- 5.24 Allowing incidental copying is important for free expression and to reduce transaction costs of copyright. Online communication is now a central aspect of life for New Zealanders, including the use of smartphones to share photographs, video, and audio. These everyday communications will often include third party copyright works. In most cases, treating these communications as infringing would be out of step with people's expectations, and would involve inefficient transaction costs for everyone involved.
- 5.25 Online sharing that includes more than incidental copying can also have an important role in free expression and access to culture, for example, videos of dancing shared online by NZ Police or the Manurewa All Stars which include music. Obtaining a licence might be reasonable

when a video goes viral and has millions of views, but might not be reasonable for every dance video made and shared online by a New Zealander.

**R27** We recommend that exceptions for incidental copying are retained.

**35** What are the problems (or benefits) with the exception transient reproduction of works? What changes (if any) should be considered?

5.26 Allowing transient reproduction is important to enable the functioning of computers and the Internet. Copies that are more than transient are also important to the effective provision and use of technologies, for example through Content Delivery Networks (CDNs) and other online services which have important benefits to New Zealanders. The scope of transient reproduction should be considered alongside provisions on the liability of ISPs.

**R28** We recommend that exceptions for transient reproduction are retained.

**36** What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?

5.27 Cloud computing involves a third party providing digital storage or processing of information in a way that can scale to meet demand. Government experts support the use of cloud services, recognising that this can have substantial benefits for security, resilience, and availability of digital information. Official experts (CERT) also strongly recommend cloud backups to protect against data loss. Use of online storage is now commonplace, and everyday activities like forwarding an email attachment involve third parties copying works.

5.28 Currently, reasonable assistance by third parties is not a part of exceptions. The problem is that people with a licensed copy of a work, and a legitimate purpose, reasonably expect that they can make, access, and possibly share persistent copies online to serve that purpose. People send email attachments without considering the need for a licence. Most such uses will not harm the copyright owner but are prohibited by current exceptions.

5.29 Provisions on ISP liability do allow innocent third parties to host copies of works at a user's request, but only if the third party is not aware copies may infringe.<sup>71</sup> A content host may know that exceptions do not allow the copying, or notice that the work may infringe, but most people would be surprised to find their email attachments deleted as s 92C requires. This would disrupt a lot of mundane activity in New Zealand.

5.30 While the specific problem is that exceptions do not allow third party assistance, the broader problem is prescriptive and narrow exceptions. The recognised purposes of criticism, review, news reporting, research, and private study remain relevant, but are no longer effectively served as a result of shifts to digital formats. Ten years ago, shifts of this type and scale were difficult to anticipate. We think the most important lesson from cloud computing is a need for flexible law which is resilient to changes from emerging technologies.

**R29** We recommend that options for cloud computing include broad exceptions that are based on the purpose of use, rather than specific actions or specific technologies, and allow for reasonable assistance by third parties.

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<sup>71</sup> Copyright Act 1994, s 92C(1)(b)



37 Are there any other current or emerging technological processes we should be considering for the purposes of the review?

- 5.31 A range of technologies will affect the way works are created, shared, used, and accessed. Uptake of distribution modes enabled by the Internet will continue, as illustrated by Spark’s bid to live stream the 2019 Rugby World Cup. Digital distribution through online platforms will grow, and will continue to be the main revenue source for New Zealand’s recorded music and games industries.<sup>72</sup>
- 5.32 Automation will increasingly be involved in aspects of making works. Computer systems can now compose stylistically appropriate texts based on a starting prompt, for example OpenAI’s GPT-2 model which “adapts to the style and content of the conditioning text” chosen by a user.<sup>73</sup> A company which generates soundscapes on-demand, based on a user’s heartbeat or sleep cycle, has signed a recording deal with Warner Music.<sup>74</sup> Automated drones can track and film moving subjects, making it easier to record video content. Tools can automate aspects of video and sound editing, from selecting, cutting, and joining elements,<sup>75</sup> to complex film editing driven by character and dialogue features in a script.<sup>76</sup> These types of tool will reduce the technical and production costs of movies and other works, perhaps enabling more production of works by individuals and small teams.
- 5.33 Tools for transforming information between representations will continue to improve. Current technologies enable smartphone apps to transcribe speech to text, or read text aloud.<sup>77</sup> This has benefits for people with a print disability, or others who prefer audio formats and want to access the much larger variety of works released only in text formats. It also creates the potential for technical infringements. For example, a transcribed speech may be a literary work which is substantially similar to the speaker’s written notes.
- 5.34 We think that in general, the law should clearly allow people to use on-demand transformations of works. These transformations are actions a person could perform, and give New Zealanders better access to works in the format they prefer, without undermining the need for legitimate access to the work in the first place. This access is particularly important for people with a print disability, for example consider the recent work of the Blind Foundation enabling voice-driven use of the Internet.<sup>78</sup> The only policy reason to restrict the use of tools for on-demand transformation of works would be if their impact on commercial markets creates a harm greater than the benefit to users. That market impact may be illustrated by considering audiobooks.
- 5.35 Internationally, publishers see audiobooks as a growing revenue source.<sup>79</sup> The shift to digital media has made audiobooks about ten times cheaper to record,<sup>80</sup> while the landscape of

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72 See NZGDA, “NZ Game Studio revenues grow 43% to a record \$143M, but new startups are missing out”, (August 2018) <[nzgda.com/news/survey2018/](http://nzgda.com/news/survey2018/)>

73 OpenAI, “Better Language Models and Their Implications”, (2019) <<https://openai.com/blog/better-language-models/>>

74 Ben Kaye, “The end is nigh: An algorithm just signed with a major record label” (22 March 2019), <<https://consequenceofsound.net/2019/03/endeal-algorithm-major-label-deal/>>.

75 Adobe Blog, “#ProjectSmoothOperator Brings Intelligent, Automated Cropping to Video Publishing” (November 2018) <[theblog.adobe.com](http://theblog.adobe.com)>

76 Alex4D, “Automated video editing will very soon be ‘good enough’”, (May 2017), <<http://alex4d.com/notes/item/automated-video-editing-is-now-good-enough>>

77 Schwab, K, Fast Company, “Pocket will now read the Internet aloud to you”, (October 2018) <[fastcompany.com](http://fastcompany.com)>

78 Blind Foundation, “Blind Foundation to develop a new voice platform for the internet”, (20 February 2018) <[blindfoundation.org.nz](http://blindfoundation.org.nz)>

79 Michael Kozlowski, “Global Audiobook Trends for 2018” <<https://goodereader.com/blog/audiobooks/global-audiobook-trends-and-statistics-for-2018>> (“Global Audiobook Trends”)



connectivity, smartphones, home speakers, and free podcasts complements the commercial distribution of audiobooks.<sup>81</sup> Commercially successful audiobooks involve investments in quality, for example through the services of famous voice actors.<sup>82</sup> These investments in quality are likely to retain a distinct appeal. Finally, most written works, including news stories and online posts are not made available in audio at all.

- 5.36 Use of computer-generated tools to simulate actors and other people raises policy concerns relating to misinformation and the integrity of personal identity.<sup>83</sup> Copyright is not the best tool for addressing these concerns, as the copyright owner may not be the affected individual. Better responses could involve changes to privacy law, or a right of publicity separate from copyright.<sup>84</sup>

**R30** We recommend that options for exceptions consider and support the benefits New Zealanders derive from on-demand and other transformations of works that do not interfere with the primary market for a work.

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

- 5.37 To learn, people need access to experiences and information. The development of modern technologies, from current systems that effectively respond to speech, interpret handwriting, or navigate physical space, to future systems that will improve and expand on these capacities, also depends on access to usable information in the form of training data.<sup>85</sup> The AI Forum has highlighted the lack of permission for data mining in New Zealand’s copyright law as a barrier to local research and innovation.<sup>86</sup>
- 5.38 Data mining primarily involves uses of works which are non-consumptive, meaning they do not substitute for a person enjoying a work, and non-expressive, meaning their outputs do not compete with works accessed.
- 5.39 These systems are based on reading and synthesising information from a large number of sources, and could be compared to a writer learning from a genre.
- 5.40 For example, a tool which teaches good pronunciation in Te Reo would not compete with the existing audio works which might be used to train it. Data mining has particular benefits for finding information and patterns across a very large number of works, for example in the scientific literature, where a new paper is published every 30 seconds.<sup>87</sup> Data mining of online works makes it possible to find patterns across thousands or millions of papers, but at this scale the transaction costs of licensing each work would be prohibitive.
- 5.41 Enabling non-expressive uses of works supports the objectives of copyright. Allowing uses which do not compete with existing works is consistent with efficient incentives, supports

80 Costs of recording are estimated to be \$2-3000 per day rather than \$24,000 per day in the 1990s based on *The Economist*, “From Papyrus to Pixels” <https://www.economist.com/essay/2014/10/11/from-papyrus-to-pixels>

81 Michael Kozlowski, “Global Audiobook Trends”.

82 F Catalano “Listen up: Digital audiobooks now the ‘fastest growing format’ as tech and titles improve” (August 2018) <<https://www.geekwire.com/2018/listen-digital-audiobooks-now-fastest-growing-format-tech-titles-improve/>>

83 J Lempel, “Combatting Deep Fakes Through the Right of Publicity” *LawFare* (30 March 2018) <<https://www.lawfareblog.com/combatting-deep-fakes-through-right-publicity>>

84 See for example Rothman, Jennifer E, ‘The Inalienable Right of Publicity’ (SSRN Scholarly Paper ID 2174646, Social Science Research Network, 12 November 2012) <<https://papers.ssrn.com/abstract=2174646>>

85 AI Forum, *AI Shaping a Future New Zealand* (May 2018), <[aiforum.org.nz/our-work/research/](http://aiforum.org.nz/our-work/research/)>, p 93.

86 AI Forum, *AI Shaping a Future New Zealand*, p 71.

87 S Spangler et al, “Automated Hypothesis Generation Based on Mining Scientific Literature ” <<http://scholar.harvard.edu/files/alacoste/files/p1877-spangler.pdf>>

reasonable access, and facilitates the human right to benefit from science. Copyright can reasonably restrict distribution of works, but should not restrict the use of underlying ideas or facts.

- 5.42 Use of works in data mining creates substantial opportunities for research and innovation, while having only limited impacts on copyright protection. Limits on this use may be needed to ensure it is fair, for example requiring that use involves lawful access to works, and does not harm the market for works used.
- 5.43 The purpose of an exception in this area is to enable benefits from research. We think the best approach is a purpose-based exception, open to anyone, similar to Option 4 from the European Commission’s Impact Assessment.<sup>88</sup>
- 5.44 As with the news reporting exception, it may be through commercial use that an exception for non-expressive uses delivers much of its benefit. A narrow exception excluding use by commercial organisations will be less beneficial.
- 5.45 Data-mining raises important issues for online privacy, and for the safe and ethical uses of New Zealanders’ information online. We have focused on copyright concerns, here, but recognise those broader concerns are important. InternetNZ has advocated for updates to privacy law, which would extend its protections in ways needed for the digital era, while retaining the current resilient, principles-based legal framework.
- 5.46 We think privacy and other concerns beyond copyright are best addressed outside copyright law. We think the best way for copyright law to accommodate these and other concerns is to offer more flexibility for guidance in context, as discussed above.

**R31** We recommend that options for data mining:

- a) include an open-ended, purpose-based exception to enable data mining for research purposes
- b) frame limits on any exception in terms of market impact rather than specific uses or types of user
- c) consider and allow the benefits of commercial use. Any options restricting use to noncommercial purposes should allow for use by commercial organisations, as the current news reporting rules do.

**39** What do problems (or benefits) arising from the Copyright Act not having an express exception for parody and satire? What about the absence of an exception for caricature and pastiche?

- 5.47 Participation in cultural life requires the ability to reference and reuse ideas in new ways. Permission to create parody, satire, pastiche, and caricature may be particularly important in New Zealand, where most commercial copyright works are imported.

**R32** We recommend that copyright rules have an exception for parody, satire, caricature and pastiche.

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

<sup>88</sup> European Commission, *Impact Assessment on the modernisation of EU copyright rules*, <[ec.europa.eu](http://ec.europa.eu)>, p 109.

- 5.48 The current law does not provide permitted acts for the purpose of quotation. Quotation is a right required by Article 10(1) of the Berne Convention, which includes quotation of “literary and artistic works (including, for example, dramatic works, choreographic works, cinematographic works and photographic works), derivative works (including translations, adaptations and arrangements of music) and collections of works such as anthologies and encyclopaedias”.<sup>89</sup>
- 5.49 Quotation is important for free expression in the Internet era. New Zealanders’ online communications routinely involve quotation of text, images, or video. The closest permitted acts in the current law are limited to news reporting, or to critical comment directly about the work quoted. Technology has opened up alternatives to the broadcast model, allowing broader public discussion. Allowing reasonable use of works for the purpose of quotation will help to realise benefits from this change, and from continuing change over time.
- 5.50 A broad quotation right could streamline a number of issues by:
- allowing reasonable uses of excerpts from text, visual works, and recordings for online communications
  - allowing appropriate uses of photographs in reporting, while maintaining the news reporting market for photography in general
  - complementing or replacing the s 83 permitted act of recording for the purpose of complaining.

**R33** We recommend that the options paper include a broad permitted act allowing use for the purpose of quotation, which is not confined to particular people, actions, or technologies.

### **Offer purpose-based exceptions to serve the public interest**

- 5.51 Many New Zealanders work to serve the public interest through access to culture or information, but face barriers in copyright law. Permitted acts recognise institutions which serve important public purposes, and enable access and use of works to serve those purposes. Currently, libraries, archives, and educational institutions are recognised in this way. People working in these organisations serve important non-commercial purposes, operate according to professional standards, and are very conscious of relationships and reputation. New Zealanders’ access to culture depends equally on the work of people working in a range of other roles and institutions. For its population, New Zealand has a high number of museums: “in 2013 there was one museum for every 9,500 people. Most of them are small local museums staffed by volunteers”.<sup>90</sup> Other institutions are similarly important, for example galleries as well as cultural festivals such as Te Matatini, the world’s largest kapa haka festival, or Pasifika, which are also vital to cultural participation in New Zealand.
- 5.52 Current permitted acts recognise the importance of purposes such as education, but restrict the acts allowed in a way that bars reasonable access to and uses of works. To deliver sustainable wellbeing as technology changes, New Zealanders will need more flexibility to share and use information. Enabling reasonable access to works. Where people are serving the public interest, and applying professional standards, copyright law should support reasonable uses of works in the digital era.

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<sup>89</sup> Australian Law Reform Commission, *Copyright and the Digital Economy (ALRC Report 122)*, <<https://www.alrc.gov.au/publications/9-quotation/fair-dealing-purpose-quotation>>, Chapter 9.  
<sup>90</sup> C McCarthy, “Museums”, *Te Ara - the Encyclopedia of New Zealand*, (October 2014) <<https://teara.govt.nz/en/museums>>.

### **Case study: Enabling Online Education**

The Government's Future of Work programme includes a focus on new models for training and education as technology changes affect our job markets.<sup>91</sup> Based on OECD research, widespread adoption of current technologies would change 32% of jobs significantly, and completely automate 14% of jobs.<sup>92</sup> The OECD assesses New Zealand's adult education system as weak on flexibility, impact, and alignment of learning.<sup>93</sup> To improve those aspects of adult education, New Zealand will need to make effective use of online learning.

Current permitted acts for education only allow use of works in prescribed educational establishments.<sup>94</sup> Even though Te Pape has qualified teachers, who teach the New Zealand curriculum to school students, these teachers cannot use copyright exceptions for education. According to the Tertiary Education Commission, the current state of copyright law is a barrier to New Zealand organisations delivering effective online education:

"New Zealand institutions could breach existing copyright restrictions by offering MOOCs, because course materials commonly include third-party material not owned by the host institution. In these cases, it is likely that New Zealand institutions would need to comply with US (and/or other jurisdictional) regimes. Because of the large number of learners who are studying off-campus, and who can and do access content from non-institutional sources, a licensing option is unrealistic."<sup>95</sup>

There are many ways to enable better use of copyright works by people and organisations who serve a purpose in the public interest. The culture of these organisations is often risk averse, with a focus on relationships and reputation. InternetNZ has heard that the type of commercial risk assessment a business might apply is alien to public interest organisations. Giving clear legal permissions, which are flexible enough to apply in a range of contexts, is needed to enable beneficial uses of works.

### **Permissions for public interest uses of works**

- 5.53 We think a broader exception or limitation is needed to enable reasonable use of works which serve public interest purposes in the digital era. People working in public interest organisations or contexts have a heightened sense of responsibility to respect works and the interests of their owners, and generally work under a set of professional norms and standards of conduct. Where people are working to serve a mission, or public interest purpose, the need for the law to deter improper uses of works is likely to be less pressing than in the context of commercial or personal use.
- 5.54 We think the law should give people working to serve the public interest the permission and encouragement they need to contribute to the cultural life of New Zealanders, in ways that are consistent with the interests of copyright owners. This principle could be implemented in a

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91 Grant Robertson, Terms of Reference for an Inquiry into Technological Change, Disruption and the Future of Work, <[productivity.govt.nz](http://productivity.govt.nz)>, p 4.

92 OECD, "Getting Skills Right: Future-Ready Adult Learning Systems" p 11. <https://doi.org/10.1787/9789264311756-en> ("Getting Skills Right").

93 The OECD identify New Zealand as weak on impact, alignment, and flexibility of learning, see "Getting Skills Right", pp 14, 123.

94 Copyright Act 1994, s 2 definition of "educational establishment".

95 Tertiary Education Commission, "Massive Online Open Courses" (May 2014) <[educationcounts.govt.nz](http://educationcounts.govt.nz)>

range of ways, which provide test of purpose and professional conduct, and allow or reduce the liability for reasonable uses of works intended in good faith to serve the relevant purpose.

**R34** We recommend that options are provided to enable the beneficial use of works by people and organisations that serve an important public purpose, including:

- a) a permitted act which allows organisations and professions to serve the public interest, through reasonable use of works which complies with standards of a relevant profession (for example, librarians, archivists, curators, teachers, researchers)
- b) options that enable reasonable use of orphan works, and minimise transaction costs, for example by allowing reasonable reliance on a prior diligent search.

## Technology questions

<b>52</b>	What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?
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5.55 The format shifting exception falls short because it is technology-specific and limited to sound recordings. Limiting the exception to one copy, and a requirement to retain ownership of the original, do not readily apply to works distributed digitally.

5.56 As discussed above, software tools are allowing convenient, on-demand shifting of works to suit the preferences of New Zealanders, in ways that would historically have required the making of a new work. For example, on-demand transformation from text to audio is convenient for people who are commuting or multitasking, and essential for New Zealanders with a print disability. New ways to transform works will offer similar benefits.

5.57 The policy concern with format-shifting is that its impact on the market for a work will outweigh its benefits to use and access over time.

**R35** We recommend that format shifting exceptions are broadened to include works beyond sound recordings, enabling New Zealanders to reasonably access legitimate copies of works using the medium and technology they prefer.

<b>56</b>	Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?
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5.58 The provisions for computer programmes are out of date. For example, section 80 allows for a backup of a computer programme, but can be overridden by contract, and does not contemplate Internet-based distribution models. The restriction to one copy, to be used only as a replacement, fails to allow good practice of three copies across at least two different formats.<sup>96</sup> This restriction serves policy concerns that are now out of date, based on a model where software can involve an expensive up-front cost purchases. New revenue models, using subscription payments for software delivered as a service, have overtaken this concern to some extent.

5.59 When a back-up is made online, it can offer a range of benefits to users,<sup>97</sup> such as making the work accessible from a smartphone as well as from a computer. The restrictions on these permitted acts fail to enable important benefits of the Internet, in circumstances which have

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<sup>96</sup> See NetSafe, "HOW TO BACK UP YOUR DATA AND DEVICES FOR A SWIFT RECOVERY" (February 2016) <[netsafe.org.nz](http://netsafe.org.nz)>

<sup>97</sup> CERTNZ, "How the cloud works" <[cert.govt.nz](http://cert.govt.nz)>

no market impact for the original work. These restrictions go beyond efficient incentives to make and share works.

**58** What problems (or benefits) are there in allowing copyright owners to limit or modify a person's ability to use the existing exceptions through contract? What changes (if any) should be considered?

5.60 Exceptions are vital to the balance of copyright. They serve the objective of reasonable access, reduce transaction costs, and support efficient markets. Use of end-user-licences, particularly through digital distribution methods, can put individual New Zealanders in a disadvantaged position for negotiating contracts, whether as creators or as users of works. Transaction costs are better borne by sophisticated distribution and platform businesses than by New Zealanders who are using exceptions and limitations offered as a balance to copyright protection.

**R36** We recommend that options are offered to prevent contracts from overriding exceptions and limitations, similar to the basic protections in the Consumer Guarantees Act 1993.

## Questions on ISP Liability

**59** What are problems (or benefits) with the ISP definition? What changes, if any should be considered?

- 5.61 We focus here on the definition of ISP under sections 92A-92E, which applies very broadly to services which route connections or host content. This definition is different from the IPAP definition under s 122A which relates to the file-sharing provisions.
- 5.62 We recognise that there are legitimate policy considerations related to the content New Zealanders share and access through the Internet. We understand, and appreciate the wider context relating to social media platforms and other organisations that are not in the business of providing Internet to New Zealanders that are currently covered by the definition of an ISP within the Copyright Act, and thus provided certain protections from liability.
- 5.63 We are not opposed, in principle, to possible changes to the definition of an ISP, however Internet markets are complex and a simple ISP vs hosting distinction is likely to create adverse unintended consequences. It is important that any options in this area are informed by discussion with New Zealanders in the technology sector and local ISPs.
- 5.64 Modern network engineering requires efficient allocation of resources between both transmission and hosting of content users request and access.

## Current law

- 5.65 Under the current law, Internet Service Providers (ISPs) have specific obligations and limits on liability. Added in 2008,<sup>98</sup> sections 92A to 92E created procedural obligations on ISPs, as well as limiting their liability for infringement by users. The rules require ISPs to deal with notices of infringement or risk liability,<sup>99</sup> and originally would have required implementing a policy to terminate user accounts.<sup>100</sup> Under the rules, ISPs are still liable for user-directed infringements where they know or have reason to believe that content infringes.<sup>101</sup> These provisions recognise that it may not always be efficient, or even technically feasible, to monitor and control user's access to infringing content at the infrastructure level.

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98 Copyright (New Technologies) Amendment Act 2008, s 53.

99 Sections 92C(3) and 92D mean a notice of infringement affects the liability of an ISP.

100 Section 92A, which imposed this requirement was suspended and later repealed by amendments in 2011.

101 Copyright Act, s 92C(2).

### Internet services facilitate choices by New Zealanders

5.66 The ISP liability rules reflect the respective roles of users and infrastructure providers on the Internet. The Internet is built according to the end-to-end principle, meaning it empowers users and services at the edge of the network to control connections. An Internet connection is an open-ended way for people to request, receive, and transmit information, and is open to new uses by default. This architecture empowers users to seek and receive information, but also limits an ISP’s ability to see or control user behaviour. ISPs do not generally direct or restrict people’s use of the connections they provide.

### Copyright works cannot be effectively monitored at the network level

5.67 Though copyright works may be visible and meaningful to users, at the level of data packets, they are unlikely to stand out from other traffic that New Zealanders send and receive. Your ISP does not see everything you do, but instead operates based on metadata at the network level, which may include features like the network address of a device you use, the network address of computers hosting information you access, and the volume of data moving between these addresses.

5.68 Some policy concerns show up at the network level, and it is reasonable to expect ISPs to address them. For example, ISPs should protect their networks and users from malicious network traffic, and can often do so based on network metadata. However, concerns that are primarily at the content level, such as copyright infringement, are much harder to monitor, and trigger other interests such as free expression rights.

**Figure three: Internet layers and relevant policy interests**

Behaviour	Where is it noticeable?	How easy is it for an ISP to monitor & control?	What policy interests may be triggered?
User seeks or shares information	Content layer	<u>DIFFICULT</u> Network traffic will often look similar to legitimate uses and may be encrypted. Interferes with an ISPs role of providing the Internet.	Copyright Harmful Digital Communications Privacy Free expression
Malicious traffic (eg malware, SPAM, network attacks)	Content layer & Network layer	<u>EASY to DIFFICULT</u> Network traffic can reliably detect a proportion of malicious activity online. Network security is part of what an ISP offers users.	User security User privacy Network security, availability, and performance
ISP holds customer information	Content layer & Business systems	<u>EASY</u> Personal info is held as part of a customer relationship with the business (eg address and payment information)	User privacy Consumer rights

5.69 It is not feasible for ISPs and other intermediaries to inspect the content of every data packet delivered to users while maintaining an economic, efficiently engineered service. As security concerns drive more encrypted connections, it will become not just infeasible, but potentially impossible for ISPs to routinely inspect all data across their networks.



## Free expression requires limits on intermediary liability

- 5.70 The Internet’s open architecture also supports the human right of free expression. The UN Special Rapporteur on Free Expression has endorsed the Manila Principles on intermediary liability.<sup>102</sup> Based on these principles, even where online intermediaries do see content which users post or access unlawfully, the intermediaries should not be liable for it by default. Instead, the principles require that intermediaries respond to a notice of infringement from a mandated authority. New Zealand’s current copyright law implements this requirement. InternetNZ believes this is the best way to balance rights of free expression with reasonable measures to allow copyright enforcement online.<sup>103</sup>
- 5.71 The Internet we have now, and are likely to have in the future is different from that of the 1990s, or even the 2000s. We think that ISP’s need protection from liability. However, how this is defined, and what other parts of the Internet ecosystem that delivers copyrighted content to New Zealander should be carefully examined.
- 5.72 We think that there is potentially room to debate and find new ways of articulating ISP liability exception options.
- R37** We recommend that liability limits continue to apply to Internet Service Providers.
- R38** We recommend that when designing options for ISP liability, MBIE consider the wider Internet ecosystem including the roles of ISPs, CDNs, and online platforms, including smaller and New Zealand based services.
- R39** We recommend that MBIE consult with technology providers to estimate the business benefits and costs from any change to the ISP liability rules.
- R40** We recommend that any proposals extending copyright liability for Internet services offer a range of options for when liability applies, including:
- a) situations where online intermediaries should reasonably respond to third-party infringements without being liable themselves, for example by passing on infringement notices
  - b) thresholds for knowledge, intent, or business activity which would reasonably make online intermediaries liable for authorising third-party infringements
  - c) preserving liability limits for Internet infrastructure services, where it is not reasonably possible to monitor or control third-party infringements.

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Are there any problems (or benefit) with the absence of an explicit exception for linking to copyright material and not having a safe harbour for providers of search tools (eg search engines)? What changes (if any) should be considered?

- 5.73 Many of the Internet’s benefits to New Zealanders depend on other people and service providers sharing information online. Copyright law should allow for reasonable online sharing. If liability rules required due diligence for all sharing or linking, New Zealanders would miss out on benefits from the Internet.

102 D Kaye, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Comment on Draft directive on copyright in the digital single market OTH 41/2018* (“Comment on Draft Directive”).

103 D Kaye, Comment on Draft Directive.



5.74 Linking is a central part of how New Zealanders use and benefit from the Internet, particularly through websites, social media, and online messaging. The ability to link makes it easier to share, find, or respond to information, and is now a part of everyday conversations about the news, or which movie screening to buy tickets for. The European Court of Human Rights has recognised that automatic liability for linking would be incompatible with free expression rights.<sup>104</sup> As Judge Pinto de Albuquerque explained:<sup>105</sup>

“If such a burden were to be imposed automatically on journalists, by way of an objective liability regime, it would stifle the freedom of the press. To paraphrase the words of Berners-Lee, hyperlinks are critical not merely to the digital revolution but to our continued prosperity—and even our liberty. Like democracy itself, they need defending.”

5.75 The Australian case *Universal Music v Cooper*,<sup>106</sup> which decided linking could count as authorisation, depended on factors going beyond the act of linking. As the judgement indicates, there may be a difference where a service is “a general purpose search engine rather than a website designed to facilitate the downloading of music files”.<sup>107</sup> The purpose of Mr Cooper’s website was collating links to musical works for download, for access at the domain name mp3sforfree.com, and involved a commercial element through advertising revenue. These facts indicate a level of knowledge and intent, which in our view are important factors in assessing liability for authorisation of infringement.

5.76 People providing links in online communications generally do not intend to gain, or to undermine the interests of copyright holders. In our view, to treat linking in itself as an authorisation would impose undue liability and transaction costs on New Zealanders’ use of the Internet. This use can have a range of motives.

**R41 We recommend that options for secondary and authorisation liability:**

- a) recognise the value of easy online sharing to New Zealanders
- b) apply tests of subjective guilt to set a fair and efficient threshold for liability under copyright law.

**61** Do the safe harbour provisions in the Copyright Act affect the commercial relationship between online platforms and copyright owners? Please be specific about who is, and how they are, affected.

5.77 We are not aware of ISP liability rules affecting commercial relationships between online platforms and copyright owners in New Zealand. Our understanding is that the most commercially significant platforms operate primarily under overseas law, so it is unclear that New Zealand’s liability provisions affect these commercial relationships.

5.78 If liability for user-posted content is extended, platforms will need to implement automated monitoring and removal of content. Current large platforms have a head start, with billions of users providing training data.<sup>108</sup> However, even the best automated filtering will result in some level of over-blocking.

104 A Davenport and J Buatti “The European Court of Human Rights affirmed that hyperlinking is protected free expression. Here’s why we’re applauding”, Wikimedia Foundation (December 2018) <<https://wikimediafoundation.org/2018/12/12/the-european-court-of-human-rights-affirmed-that-hyperlinking-is-protected-free-expression-heres-why-were-applauding/>> (“Hyperlinking is Free Expression”).

105 A Davenport and J Buatti, Hyperlinking is Free Expression.

106 *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187.

107 *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187, [40].

108 UN Office of the High Commissioner of Human Rights “EU must align copyright reform with international human rights standards, says expert” (March 2019)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24298&LangID=E>>

- 5.79 Given that New Zealanders are enthusiastically paying for copyright works online through digital distribution services, it is unclear how the ISP liability rules have negatively impacted commercial distribution of works.

**62** What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?

- 5.80 The ISP liability provisions recognise the core role of Internet intermediaries, and the benefits they provide New Zealanders. Every user of the Internet depends on the infrastructure that efficiently delivers data at their request. That infrastructure is generally built and managed based on metadata, such as file sizes and network capacity, which have no easy link to copyright.
- 5.81 Liability for infringements should serve the efficiency objectives of copyright, and be consistent with human rights concerns. Internet infrastructure providers cannot efficiently see or control copyright infringements in general, so it makes sense to limit their liability to situations where they do know or have reason to believe that content infringes.
- 5.82 Free expression concerns support a broader limitation of liability, to facilitate platforms which allow user directed hosting and sharing of content. Providing a facility for online sharing, which people may use to infringe, should not in itself count as authorising infringement.

## 6. Transactions

**69** What are the advantages of social media platforms or other communication tools to disseminate and monetise their works? What are the disadvantages? What changes to the Copyright Act (if any) should be considered?

### Social media

- 6.1 Social media and other online platforms create both opportunities and challenges for distributing works. Online platforms can make it very easy to reach and grow an audience. On the other hand, using these platforms to share works may trigger both contractual terms and conditions, as well as implied social norms related to the platform, making it harder to later assert exclusive rights. As with other aspects of changing technology, these shifts create both challenges and opportunities, which may have different effects depending on the type of work and the desired approach to revenue.
- 6.2 Sharing on social media but may be part of a broader business strategy. For example, New Zealand's games industry earns substantial revenue from selling in-game upgrades and merchandise, in games that are free to play,<sup>109</sup> a business model which complements broad sharing and promotion through social media. Other licence terms may be part of that bargain as well. Free tools make it easier to build complicated games, but the licence may limit free use, for example based on annual revenue as with the free version of the Unity game engine.<sup>110</sup> That example suggests that social sharing can have both benefits and harms, depending on the type of work, the desired business model, and the broader context of distribution modes and works competing for audience attention. This is likely to be an area where business models are evolving rapidly over time.
- 6.3 In that context, it is at best unclear whether there is a policy problem that justifies new rights or restrictions in New Zealand copyright law. Balancing risks and benefits is the type of contextual decision which seems best suited for individual businesses and creators to make,

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109 MBIE, *Creative Sector Study*, p 31.

110 Unity Store, <<https://store.unity.com/>>

ideally supported by usable guidance through a Government agency or adequately resourced independent organisations.

- 6.4 We think this is similar to the use of open licences, which can also have a mix of benefits and drawbacks, depending on the type of work involved and the desired business model. We think that broader and better guidance would help New Zealanders navigate these issues and make informed choices, whether applying Creative Commons licences or open source licences for software.

**R42** We recommend that the options paper include resourcing better guidance for New Zealanders, including guidance on the use of social media and open licences, both within and beyond our creative sector.

## Orphan works

- 6.5 The reason copyright requires permission for use is to support efficient incentives for making and sharing works. But sometimes the process of getting permission does not work, because reasonable efforts cannot identify the owner of a work, or because a work has no legal owner. In these situations, requiring permission becomes a pure transaction cost, which bars beneficial uses of the work while serving no economic purpose.

<b>71</b>	Have you ever been impeded using, preserving or making available copies of old works because you could not identify or contact the copyright? Please provide as much detail as you can about what the problem was and its impact.
<b>72</b>	How do you or your organisation deal with orphan works (general approaches, specific policies etc.)? And can you describe the time and resources you routinely spend on identifying and contacting the copyright owners of orphan works?
<b>73</b>	Has a copyright owner of an orphan work ever come forward to claim copyright after it had been used without authorisation? If so, what was the outcome?
<b>74</b>	What were the problems or benefits of the system of using an overseas regime for orphan works?

- 6.6 We recommend that options are put forward to addressing the transaction costs of orphaned works. We understand that this is an area where distributors and rights organisations in New Zealand are particularly comfortable to consider and discuss changes to the law.

**R43** We recommend that options for orphan works:

- a) prioritise easy and efficient processes, for example allowing other people and organisations to reasonably rely on a prior diligent search
- b) allow for the needs of New Zealand's many small and volunteer-run public interest organisations, including museums
- c) consider permissions and guidance that can be used and readily updated as technology changes
- d) be considered alongside broader exceptions and limitations, including an exception that permits uses of works intended to serve a public purpose, and limits liability for uses in good faith.

<b>75</b>	What problems do you or your organisation face when using open data released under an attribution only Creative Commons Licences? What changes to the Copyright Act should be considered?
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- 6.7 A Creative Commons attribution-only licence (CC-BY) is the most permissive licence allowed under the Government’s Open Access framework. A CC-BY licence works well for works such as photographs, where the licensed work is likely to have a distinct identity and place within the context of use. However, uses that combine many works face a problem of licence stacking, where proper attribution becomes impractical.
- 6.8 Licence stacking creates uncertainty and unwanted transaction costs.

**R44** We recommend that options to respond to this problem includes:

- a) open-ended exceptions allowing use without attribution where this is reasonable based on contextual factors, with guidance on best practice
- b) the option to renounce copyright, including the option of doing so under a CC0 licence.

## 7. Enforcement

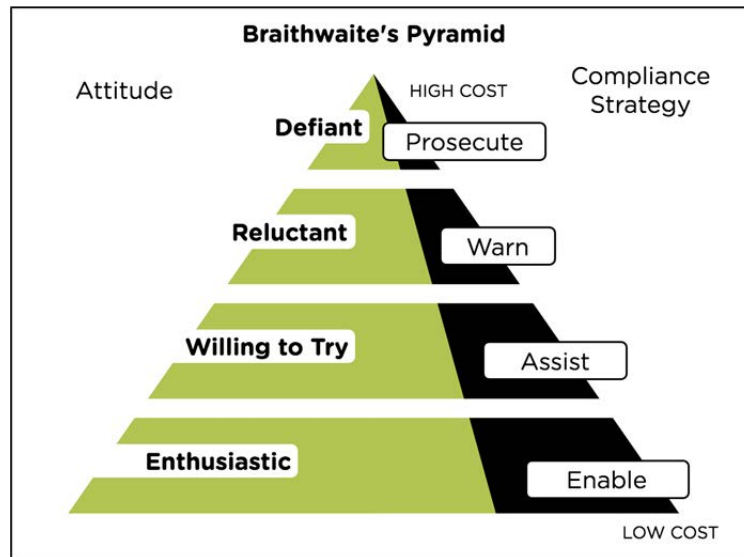
### Copyright needs guidance to complement enforcement

- 7.1 Copyright regulates works across a range of contexts, creating property rights which can have substantial economic significance. To protect relevant rights and interests, the law must provide for efficient and proportionate enforcement measures, and those measures must remain workable as technology and business models change over time. To support the objectives of copyright, enforcement measures should:
- a) allow a response to unfair commercial activities, protecting efficient incentives under objective 1
  - b) maintain reasonable access to works under objective 2
  - c) be efficient and support respect for the law under objective 3
  - d) be consistent with New Zealanders’ human rights and sustainable wellbeing over time
  - e) be resilient to change, not based on specific technologies or distribution models.
- 7.2 Best practice for New Zealand regulation, as set out in the document *Achieving Compliance*, recognises that specific enforcement steps should be part of a broader mix of regulatory responses.<sup>111</sup> Most New Zealanders, and most organisations in New Zealand, operate in good faith, and would prefer to do the right thing under copyright law, but need to be assisted and enabled to do so. See Figure four (below) which summarises the Braithwaite Pyramid, as presented in *Achieving Compliance*.

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111 Department of Internal Affairs, “Achieving Compliance” (2011), <[dia.govt.nz](http://dia.govt.nz)>.

**Figure four: Braithwaite Pyramid for Responsive Regulation**



### Considerations for enforcement in the digital era

- 7.3 Enforcement should maintain the Internet's benefits to New Zealand. The recent history of copyright enforcement in New Zealand suggests that current models for dispute resolution are not working well. The *Global Mode* litigation involved large ISPs, as well as large distributors of commercial content in New Zealand, and addressed an area of law which was unclear. That dispute did not result in a judgement, and so failed to guide New Zealanders in understanding or applying the law.
- 7.4 The Internet is a basic utility for New Zealanders, but one which is open-ended and facilitates new ways to connect. Copyright law should work with the Internet, preferring efficient enforcement approaches which minimise transaction costs, and allow and enable New Zealanders to benefit from the Internet in new ways. Earlier in this document, we explained the interaction of Internet layers with potential policy concerns. Copyright infringement occurs at the content layer, and raises particular challenges where intervention is sought through ISPs and other services that operate primarily at the network or infrastructure layers.
- 7.5 As more New Zealanders have taken up the Internet, for a wider range of uses, it has become a vehicle for both benefits and potential risks to sustainable wellbeing over time. We recognise that policy concerns exist online, including important concerns at the content level. Our analysis of those concerns draws on both technical understanding, and an emphasis on the importance of human rights online. As set out earlier, service providers cannot always efficiently monitor or control the ways people use their services. Nonetheless, where policy concerns trigger vital human rights interests such as personal privacy, physical safety, or democratic participation, a response that proportionately impacts technical, business, or free expression interests may be demonstrably justified in a free and democratic society, according to human rights tests of necessity, proportionality, and narrow tailoring. Copyright is an important right, but a primarily private and economic one. Measures to enforce them require a robust human rights impact assessment, and the economic costs of enforcing them should be borne by those they benefit.

## Technical challenges will increase over time

- 7.6 The Internet is currently seeing a shifts to more encrypted traffic, which will make content-based blocking more difficult.<sup>112</sup> People using modern browsers and smartphones already see most web traffic encrypted by default.<sup>113</sup> Technologists are developing encrypted versions of basic Internet protocols.<sup>114</sup> The Domain Name System is the way browsers and other tools link domain names like “mbie.govt.nz” to the IP address of the relevant computer. Current technical developments of DNS include proposals for encrypting domain name lookups, using either HTTPS or TLS.<sup>115</sup>

## InternetNZ does not support content blocking for copyright

- 7.7 Some commercial distributors have proposed measures to block New Zealanders’ access to online content as a response to copyright infringement.<sup>116</sup> We agree that in recent decades, some commercial distributors of works have faced real challenges from people sharing infringing copies online and at scale. Beyond copyright, we accept that there are broader issues with content-level harms online, which New Zealand needs to understand and address.
- 7.8 For the reasons set out below, InternetNZ does not support website blocking as a part of the copyright enforcement toolkit.
- 7.9 UN experts have assessed content blocking for copyright purposes as harming human rights:<sup>117</sup>
- [Any] proposals to address digital piracy through website blocking and content filtering ... “could result in restrictions that are not compatible with the right to freedom of expression and the right to science and culture.”
- 7.10 Copyright enforcement protects private economic interests. To require content blocking between New Zealanders and third-party ISPs would involve inherent costs, technical challenges, and detriments to the benefits of the Internet.<sup>118</sup> Before considering content blocking as a solution, we think it is vital to clearly define the relevant policy problem in terms of the objectives and available evidence.
- 7.11 Objectives of efficiency, minimising transaction costs, and upholding human rights, are relevant to particular costs and harms of content blocking. Objectives of efficiently incentivising making and sharing of works may support enforcement measures, although copyright may not be the most efficient mechanism. The objective of upholding respect for the law may count in either direction, depending for example on blocking impacts innocent users.

**We do not support content blocking for copyright. In our view, compelling evidence would be needed to justify a requirement for content blocking to serve a private economic interest. That evidence would have to quantify the costs to ISPs, enforcement institutions, and other New Zealanders, as well as the benefit in terms of a behavioural shift from infringing to purchasing.**

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112 Internet Society, ‘An Overview of Internet Content Blocking’ <<https://www.internetsociety.org/resources/doc/2017/internet-content-blocking/>>, p 15.

113 InternetNZ, “The what and why of encryption”, <[internetnz.nz](http://internetnz.nz)> p 8.

114 See for example Ted Hardie <[ted.ietf@gmail.com](mailto:ted.ietf@gmail.com)>, *Confidentiality in the Face of Pervasive Surveillance* <<https://tools.ietf.org/html/draft-iab-privsec-confidentiality-mitigations-08>>.

115 G Huston, “DOH! DNS over HTTPS explained” (12 October 2018), <<https://blog.apnic.net/2018/10/12/doh-dns-over-https-explained/>>.

116 NZOnScreen Seminar “Getting © Right in New Zealand” event, October 25 2018, Te Papa, Wellington.

117 D Kaye, Comment on Draft Directive

118 ISOC, “Internet Society Perspectives on Internet Content Blocking: An Overview” (24 March 2017)

<[internetsociety.org](http://internetsociety.org)>

7.12 Further, if copyright law requires ISPs or other innocent third parties to take enforcement steps, the parties seeking enforcement should cover their costs. Where third parties are asked to assist, the UK Supreme Court has said:<sup>119</sup>

“[T]he starting point is the intermediary’s legal innocence. An ISP would not incur liability for [third party] trade mark infringement under English law, even in the absence of the safe harbour provisions of the E-Commerce Directive.”

7.13 We have proposed objectives for copyright that consider efficient incentives, minimising transaction costs, and upholding human rights. These objectives require that enforcement costs are not borne by innocent users and providers of Internet services. New Zealanders using and providing online services care about many things, most of which have nothing to do with copyright infringement. ISPs and online services deliver open-ended ways to seek, receive, and impart information. Service providers can make efficient decisions to invest in technologies and communications infrastructure, but cannot efficiently decide whether and how to protect particular copyright works through enforcement.

7.14 Copyright owners get the economic benefit of exclusive rights. Because it is automatic, copyright covers works which vary radically in commercial value and creative quality. Copyright owners are best placed to make efficient business decisions about investments in works, including which works to create, distribute, and protect by enforcement actions. For costs of enforcement to be fair and efficient, they should be borne as part of those business decisions.

**R45** We recommend that any options for online enforcement involve:

- a) consultation with ISPs and others in the Internet Community to test and inform technical details
- b) analysis of human rights impacts including impacts of mistakes or abuses, consistent with New Zealand’s obligations (for example applying the NZ Bill of Rights tests of necessity, proportionality, and minimal restraint on rights).
- c) legal protection for third parties implementing content blocking, with costs of implementation and civil liability for unintended consequences of content blocking being assigned to the organisations seeking content blocking (e.g. rights holders).

### **What is the scale of the problem given shifts in distribution?**

7.15 Given convenient ways to access and pay for content, a huge proportion of New Zealanders are using them. Data on Internet use show that New Zealanders are enthusiastically taking up authorised online ways to access works. According to CreativeNZ, in 2017 in a typical week, 58% of New Zealanders spent 5 or more hours accessing online video, and 65% spent 5 or more hours accessing online music.<sup>120</sup> According to NZOnAir, in 2018 Spotify reached 1 in 3 New Zealanders per week, and streaming video reached 62% of New Zealanders.<sup>121</sup> A recent survey by Vocus found that 55% of New Zealanders were using paid online streaming.<sup>122</sup> The scale of online infringement in 2019 is less clear, but we would expect it to be declining based on easier access to legitimate sources of copyright works.

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119 *Cartier International AG and others (Respondents) v British Telecommunications Plc and another (Appellants)* [2018] UKSC 28, at [31 - 33].

120 CreativeNZ, *Audience Atlas 2017*,

[http://www.creativenz.govt.nz/assets/paperclip/publication\\_documents/documents/631/original/audience\\_atlas\\_new\\_zealand\\_2017\\_final.pdf?1526983746](http://www.creativenz.govt.nz/assets/paperclip/publication_documents/documents/631/original/audience_atlas_new_zealand_2017_final.pdf?1526983746) >

121 NZOnAir “Where are the Audiences? 2018” <<https://www.nzonair.govt.nz/research/where-are-audiences-2018/>>

122 Vocus Online Behaviour Research 2019



- 7.16 Alongside changing ways New Zealanders access content, recent research in MIS Quarterly Journal<sup>123</sup> outlines that turning a blind eye to piracy can benefit consumers, creators and retailers, all at the same time. This is because piracy can be seen as a form of “shadow competition”. New Zealand’s Creative Sector Study reflected a mixed attitude to people distributing infringing copies, with some, particularly in the games industry viewing this as free promotion that could help to reach an audience. Given the mix of economic effects for creators, distributors and consumers, it is unclear what policy problem is being addressed.

### **Apply human rights tests to any proposed content blocking measures**

- 7.17 Content blocking requires some level of information about what users are doing and seeing online. This involves a level of intrusion into privacy. At the level of networks and traffic, these privacy concerns are less pressing. However, in the near future, when network traffic is largely encrypted by default, enforcement might require more intrusive steps. Monitoring activity at the level of people’s devices would likely require on-device surveillance tools, similar to the spyware which Sony music CDs secretly installed in the 2000s.<sup>124</sup> That level of intrusion would trigger severe privacy and security concerns, and would require analysis of impacts under the New Zealand Bill of Rights Act 1990.

**R46** We recommend that any content blocking options being considered are subject to a robust human rights analysis to ensure that New Zealand does not restrict fundamental human rights for private commercial purposes.

### **Will content blocking drive uptake of legitimate services?**

- 7.18 The aim of efficient online enforcement would be to shift behaviour, so people in New Zealand replace infringing access with uptake of legitimate services. It is not clear that this market needs extra enforcement steps to operate efficiently. Many New Zealanders already use legitimate services to access works. It is unclear that there is a separate group of New Zealanders, accessing infringing copies of works, who could be moved to purchase legitimate copies by enforcement measures. Research by the University of Amsterdam suggests that the people who access the most infringing works online, are often the same people who spend the most to access legitimate online services.<sup>125</sup>
- 7.19 an increase in illegal consumption over time is found to correlate with an increase in legal consumption and vice versa. Apparently, substitution effects – ‘Shall I buy or shall I pirate?’ – occur on the spot. Over a longer time span, improvements in the availability from legal channels are dominant and changes in personal preferences affect legal and illegal consumption alike.
- 7.20 The technical, financial, and free expression costs of content blocking would impose harms on all New Zealanders who use the Internet. To justify those harms, there would have to be strong evidence that behaviour change would result from any measures, and in particular that people who would otherwise access infringing copies would be shifted to accessing legitimate sources.

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123 Antino Kim, Atanu Lahiri, and Debabrata Dey, 2018, The ‘Invisible Hand’ of Piracy: An Economic Analysis of the Information-Goods Supply Chain.” MIS Quarterly Journal <<https://misq.org/the-invisible-hand-of-piracy-an-economic-analysis-of-the-information-goods-supply-chain.html>>

124 Computerworld, *Sony BMG Rootkit Scandal: 10 Years Later*, (October 2015) <<https://www.computerworld.com.au/article/587720/sony-bmg-rootkit-scandal-10-years-later/>>.

125 IviR, *Global Online Piracy Study*, (July 2018), <<https://www.ivir.nl/publicaties/download/Global-Online-Piracy-Study.pdf>> p 16.



## Peer-to-peer file sharing

**82** Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?

- 7.21 Provisions on peer-to-peer file sharing were introduced in 2011, and are now sections 122A to 122U of the Copyright Act 1994.<sup>126</sup> They apply specifically to file sharing, defined as the act of downloading or uploading through an application or network which enables the simultaneous sharing of material between multiple users.<sup>127</sup> These provisions respond to the specific concern that peer-to-peer applications and networks were facilitating infringement,<sup>128</sup> creating procedural obligations for ISPs, referred to as Internet Protocol Address Providers (IPAPs), to assist in enforcement.<sup>129</sup>
- 7.22 Since 2008, shifts in technology have overtaken peer-to-peer file sharing. Modern Internet infrastructure has opened new distribution modes, with faster connections and CDNs enabling on-demand streaming of audio and video works. Secure and easy online payments enable new business models to match. The wait for some online services has been longer in New Zealand than elsewhere, but once here they have become very popular very quickly. Recorded Music NZ's 2016 market report shows growing consumer spending on music, driven by streaming and download volumes.<sup>130</sup>
- 7.23 Peer-to-peer protocols facilitate direct data transfers between users of a network, offering an alternative to centralised servers or CDNs, which can help to efficiently distribute the load on a network. Microsoft uses peer-to-peer protocols to distribute Windows updates, so that computers “can source content from other devices on their local network that have already downloaded the updates or from peers” over the Internet.<sup>131</sup>
- 7.24 The technology mix of the late 1990s to the mid-2000s was probably a key factor driving infringement through peer-to-peer protocols. Then, people primarily bought music on CDs, computers had CD readers, there was software like iTunes for format-shifting music from CDs to mp3 files, and early broadband Internet was available. These factors have changed radically in the past twenty years.

**83** Why do you think the infringing filing sharing regime is not being used to address copyright infringements that occur over peer-to peer file sharing technologies?

- 7.25 The framework is not being used because technology and business models have changed. File sharing infringements are less of a problem. Most New Zealanders now use and value the Internet, and many pay to access authorised copies of works online.
- 7.26 Aside from the smaller scale of the problem, rightsholders may be making a business decision not to use the framework. Enforcing against individual account holders may involve reputational risks, and may be less appealing than investing that effort elsewhere.

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126 Copyright (Infringing File Sharing) Amendment Act 2011.

127 Copyright Act 1994, s 122A.

128 Copyright (Infringing File Sharing) Amendment Bill, Commentary under “Introduction”.

129 Copyright Act 1994, s 122B.

130 Recorded Music NZ is the industry representation, advocacy and licensing organisation for recording artists and their labels. <[recordedmusic.co.nz](http://recordedmusic.co.nz)>

131 Microsoft, “Optimize Windows 10 update delivery”, <[docs.microsoft.com](https://docs.microsoft.com)> (at 13 March 2019).

**84** What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing filing share regime (if any) should be considered?

- 7.27 The key advantage is that the framework aims to strike a workable balance of obligations. At its core, the framework requires ISPs to pass on notices from rightsholders to account holders, based on the IP address which the ISP has assigned to them. Overall, these procedural obligations on ISPs are tailored to support enforcement, are reasonably clear and efficient, and limit negative impacts on free expression and the privacy of Internet users and account holders.<sup>132</sup>
- 7.28 The key disadvantage is that the framework assumes a technology specific problem and solution, which has been overtaken by shifts in technology, business models, and other areas of policy. New business models for legitimate online access have made online infringement less of a problem. The enforcement mechanism relies on linking activity to an IP address, and the IP address to a user account. This may become less effective over time, as uptake of encryption, and compliance with modern privacy laws like the GDPR, means services collect, retain, and share less information about user activity.<sup>133</sup> The file sharing rules have been overtaken by change and are now seldom used.
- 7.29 Mobile networks are excluded from file sharing provisions,<sup>134</sup> because their use of Network Address Translation (NAT) means that IP Addresses cannot be reasonably used to identify a particular user account.

**R47** We recommend that the infringing file sharing provisions are repealed, making copyright law more relevant, streamlined, and usable.

**86** Should ISPs be required to assist copyright owners enforce their rights? Why / why not?

- 7.30 ISPs currently have limited ability to monitor and control network activity linked with copyright infringement. Though in principle, there may be efficient ways for ISPs to implement or aid in enforcement steps, specific proposals involve specific complications that need to be worked through, in detail.
- 7.31 Copyright works exist at the content level, and cannot be directly identified or controlled at the level of network traffic. This complicates enforcement at the network level, which inherently involves a risk of interfering with legitimate online activity. When Pakistan moved to block YouTube, the operation of autonomous systems that share network addresses resulted in the service being blocked worldwide.<sup>135</sup> Similarly, Google services in New Zealand were very briefly blocked by the Department of Internal Affairs due to a misconfiguration in their opt-in filtering of digital child exploitation material.<sup>136</sup>
- 7.32 What may seem like straightforward enforcement steps can involve a range of complications. For example, technologies like Network Address Translation (NAT) on mobile and other networks mean there is no ready link between a particular IP address and particular account activity. Those challenges will increase, as privacy and security concerns result in encryption applying to more types of network traffic.

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132 For example, a court order is needed to identify account holders under s 122Q.

133 A. Andersdotter, "An update to RFC6302 on Logging Recommendations for Internet-Facing Servers", (24 October 2018) <<https://tools.ietf.org/html/draft-andersdotter-intarea-update-to-rfc6302-00#section-3.1>>

134 Copyright Act 1994, s 122S.

135 D McCullagh, "How Pakistan knocked YouTube offline (and how to make sure it never happens again)", (25 February 2008) <<https://www.cnet.com/news/how-pakistan-knocked-youtube-offline-and-how-to-make-sure-it-never-happens-again/>>

136 Department of Internal Affairs, *Censorship IRG Meeting Minutes June 2013*, <<https://www.dia.govt.nz/Censorship-IRG-Meeting-Minutes-June-2013>>

- 7.33 As set out in R45 (above), if required to assist copyright owners, ISPs should be given legal protection for civil liability and that costs should be borne by copyright owners.

## 8. Thank you for reading our submission

- 8.1 If you have any follow up questions in relation to this submission, or would like to request further information please contact our policy team on [policy@internetnz.net.nz](mailto:policy@internetnz.net.nz).
- 8.2 Additionally, we would like to extend an offer to help you engage with the tech sector and tech community should you want to discuss or explore particular issues as you prepare the options paper. We are always available to assist public service departments in community engagement, please do not hesitate to ask.
- 8.3 Yours sincerely,

Jordan Carter  
**Group Chief Executive**  
**InternetNZ**

## 9. Summary of our recommendations

9.1 Below is a list of the recommendations set out in this submission.

### Objectives

- R1** We recommend that copyright law include a purpose statement, to be developed based on the objectives for copyright.
- R2** We recommend that MBIE apply the Living Standards Framework to assess policy impacts and options for copyright.
- R3** We recommend that the options paper present a clear commitment to considering human rights in all aspects of copyright law.
- R4** We recommend that the objectives include resilience to change over time, and that the options paper consider new approaches to the design of copyright law which serve that objective, such as more open-ended exceptions.
- R5** We recommend that the options paper put forward objectives for copyright which respect concerns of human rights, sustainable wellbeing, and resilience to changing technology.
- R6** We recommend that the options paper present a range of options for objectives, including options with different weightings on objectives, to serve constructive debate.
- R7** We recommend that the objectives for copyright be modified to read as below:

### InternetNZ's proposed objectives for copyright

1. Provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so
2. Permit reasonable access to works for use, adaptation and consumption, **enabling New Zealanders to benefit from human rights, cultural participation, and changing technologies, and ensuring human rights are upheld** ~~where exceptions to exclusive rights are likely to have net benefits for New Zealand~~
3. Ensure that the copyright system is effective, and efficient, **and understandable**, including providing clarity and **predictability** ~~certainty~~, facilitating competitive markets, minimising transaction costs, and maintaining integrity, and respect for the law, **and resilience to change over time**
4. Meet New Zealand's international **and human rights** obligations
5. Ensure the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi

### Rights

- R8** We recommend that copyright law recognise and allow for continuing shifts in technology and distribution models
- R9** We recommend that longer duration is not put forward in the options paper
- R10** We recommend that options are put forward to reduce transaction costs from a low originality threshold, including consideration of exceptions and limitations which contribute to the overall balance and efficiency of copyright regulation.

- R11** We recommend that for a computer-generated work, first ownership of copyright continues to go to the person who has made arrangements for its creation.
- R12** We recommend that Crown copyright is fundamentally reconsidered to avoid transaction costs.
- R13** We recommend that the options paper include the following options for addressing Crown copyright:
- a) Removing Crown copyright entirely.
  - b) Allowing opt-in use of Crown copyright by agencies, requiring that permissions are resourced and with durations aligned to other works.
  - c) Establishing a Government agency to guide and manage Crown copyright requests
  - d) Requiring all State Sector agencies to have a Copyright Officer, similar to the requirements of agencies to have a Privacy Officer in the Privacy Act.
- R14** We recommend that options on secondary liability and authorisation continue to require an element of subjective guilt, through a knowledge or intent requirement.
- R15** We recommend that the issue of computer files being property in some situations is assessed separately from the present review, in a process that allows for detailed analysis and consultation with legal experts and the New Zealand technology sector.
- R16** We recommend that options for exceptions and limitations consider the role and benefits of user-generated content for New Zealanders, including free expression implications. Options should include:
- a) a specific exception allowing use for non-commercial purposes, comparable to the Canadian approach
  - b) a broader open-ended exception which would allow beneficial uses, based on tests of purpose, nature of use, and potential harm to the market for a work used.
- R17** We recommend options to allow for copyright to be renounced, including an option that would clearly allow the use of CCO under New Zealand law
- R18** We recommend that copyright law contain explicit exceptions to TPMs for security research.
- R19** We recommend that options for the TPM rules:
- a) retain a focus on preventing infringement, with tests of knowledge and intention that are adaptable across contexts
  - b) offer an open-ended approach to the purposes for which TPMs can be bypassed
  - c) are complemented by guidance on their use, which will empower conscientious New Zealanders to benefit from these permissions.

## Exceptions

- R20** We recommend options for exceptions and limitations that support balance in copyright and better accommodate change over time.

- R21** We recommend options for exceptions and limitations that allow new ways to serve a recognised purpose, and options that allow for new purposes to be recognised over time.
- R22** We recommend that options consider how to apply provisions of international trade agreements which allow and require flexibility for balanced copyright law in the digital era.
- R23** We recommend that options include the use of open-ended legislative frameworks combined with contextual best-practice guidance.
- R24** We recommend that the options paper address the need for exceptions that allow new uses over time, and include the following as potential approaches.
- a) Purpose-based exceptions which are open to activity, with factors that consider whether use is reasonable, such as market impact.
  - b) An exception open to any purpose, but with consideration of factors that would make use of the work reasonable, such as market impact.
  - c) Using tertiary law to specify and update activities and who can perform them, within broader exceptions established in primary legislation.
  - d) Options that allow a broad role for use of exceptions to be guided by New Zealanders in professions and communities.
- R25** We recommend a different and less prescriptive approach to exceptions and limitations to better allow for change over time.
- R26** We recommend that the relatively open-ended news reporting permitted acts are considered as models for other exceptions and limitations in the law
- R27** We recommend that exceptions for incidental copying are retained.
- R28** We recommend that exceptions for transient reproduction are retained.
- R29** We recommend that options for cloud computing include broad exceptions that are based on the purpose of use, rather than specific actions or specific technologies, and allow for reasonable assistance by third parties.
- R30** We recommend that options for exceptions consider and support the benefits New Zealanders derive from on-demand and other transformations of works that do not interfere with the primary market for a work.
- R31** We recommend that options for data mining:
- a) include an open-ended, purpose-based exception to enable data mining for research purposes
  - b) frame limits on any exception in terms of market impact rather than specific uses or types of user
  - c) consider and allow the benefits of commercial use. Any options restricting use to noncommercial purposes should allow for use by commercial organisations, as the current news reporting rules do.
- R32** We recommend that copyright rules have an exception for parody, satire, caricature and pastiche.

- R33** We recommend that options include a broad permitted act allowing use for the purpose of quotation, which is not confined to particular people, actions, or technologies.
- R34** We recommend that options are provided to enable the beneficial use of works by people and organisations that serve an important public purpose, including:
- a) a permitted act which allows organisations and professions to serve the public interest, through reasonable use of works which complies with standards of a relevant profession (for example, librarians, archivists, curators, teachers, researchers)
  - b) options that enable reasonable use of orphan works, and minimise transaction costs, for example by allowing reasonable reliance on a prior diligent search
- R35** We recommend that format shifting exceptions are broadened to include works beyond sound recordings, enabling New Zealanders to reasonably access legitimate copies of works using the medium and technology they prefer.
- R36** We recommend that options are offered to prevent contracts from overriding exceptions and limitations, similar to the basic protections in the Consumer Guarantees Act 1993.
- R37** We recommend that liability limits continue to apply to Internet Service Providers.
- R38** We recommend that when designing options for ISP liability, MBIE consider the wider Internet ecosystem including the roles of ISPs, CDNs, and online platforms, including smaller and New Zealand based services.
- R39** We recommend that MBIE consult with technology providers to estimate the business benefits and costs from any change to the ISP liability rules.
- R40** We recommend that any proposals extending copyright liability for Internet services offer a range of options for when liability applies, including:
- a) situations where online intermediaries should reasonably respond to third-party infringements without being liable themselves, for example by passing on infringement notices
  - b) thresholds for knowledge, intent, or business activity which would reasonably make online intermediaries liable for authorising third-party infringements
  - c) preserving liability limits for Internet infrastructure services, where it is not reasonably possible to monitor or control third-party infringements.
- R41** We recommend that options for secondary and authorisation liability:
- a) recognise the value of easy online sharing to New Zealanders
  - b) apply tests of subjective guilt to set a fair and efficient threshold for liability under copyright law.

## Transactions

- R42** We recommend that the options paper include resourcing better guidance for New Zealanders, including guidance on the use of social media and open licences, both within and beyond the creative sector.



**R43** We recommend that options for orphan works:

- a) prioritise easy and efficient processes, for example allowing other people and organisations to reasonably rely on a prior diligent search
- b) allow for the needs of New Zealand's many small and volunteer-run public interest organisations, including museums
- c) consider permissions and guidance that can be used and readily updated as technology changes
- d) be considered alongside broader exceptions and limitations, including an exception that permits uses of works intended to serve a public purpose, and limits liability for uses in good faith.

**R44** We recommend that options to respond to licence stacking problems include:

- a) open-ended exceptions allowing use without attribution where this is reasonable based on contextual factors, with guidance on best practice
- b) the option to renounce copyright, including the option of doing so under a CC0 licence.

## **Enforcement**

**R45** We recommend that any options for online enforcement involve:

- a) consultation with ISPs and others in the Internet Community to test and inform technical details
- b) analysis of human rights impacts including impacts of mistakes or abuses, consistent with New Zealand's obligations (for example applying the NZ Bill of Rights tests of necessity, proportionality, and minimal restraint on rights).
- c) legal protection for third parties implementing content blocking, with costs of implementation and civil liability for unintended consequences of content blocking being assigned to the organisations seeking content blocking (e.g. rights holders).

**R46** We recommend that any content blocking options being considered are subject to a robust human rights analysis to ensure that New Zealand does not restrict fundamental human rights for private commercial purposes.

**R47** We recommend that the infringing file sharing provisions are repealed, making copyright law more relevant, streamlined, and usable.

## 10. Glossary

### Internet technologies

<b>The Internet</b>	The global network of networks which communicates through Internet Protocol and is built on shared open technical standards
<b>ISPs</b>	<b>Internet Service Providers</b> operate the networks that let New Zealanders access the Internet at home, work, and when mobile.
<b>DNS</b>	The <b>Domain Name System</b> , which resolves domain names like mbie.govt.nz into connections between devices on the Internet. InternetNZ operates the .nz registry which is New Zealand's home within this system.
<b>Web</b>	The most visible protocols and services on the broader Internet. Includes websites, web apps, and other services people access through a web browser, the web built on Tim Berners-Lee's development of hyperlinks as an easy way to point to information.

### Encryption technologies

<b>HTTPS</b>	<b>HyperText Transfer Protocol Secure</b> applies encryption to support private and secure web browsing and web traffic.
<b>TLS</b>	<b>Transport Layer Security</b> is an encryption standard applied to allow secure and private connections over the Internet, including HTTPS.
<b>DoH</b>	<b>DNS over HTTPS</b> allows domain name lookups to be performed through encrypted HTTPS traffic.
<b>DoT</b>	<b>DNS over TLS</b> allows domain name lookups to be performed through encrypted TCP traffic.

### International Treaties and Organisations

<b>UDHR</b>	<b>Universal Declaration of Human Rights</b>
<b>ICCPR</b>	<b>International Covenant on Civil and Political Rights</b>
<b>UNESCO</b>	<b>United Nations Educational, Cultural, and Scientific Organisation</b>
<b>WIPO</b>	<b>World Intellectual Property Organisation</b>
<b>Berne</b>	<b>The Berne Convention</b> is the oldest international agreement on copyright that remains in force. New Zealand is party to the 1968 version.
<b>CPTPP</b>	<b>Comprehensive and Progressive Trans-Pacific Partnership</b>
<b>WCT</b>	<b>WIPO Copyright Treaty</b>

### Copyright terms

<b>TPM</b>	<b>Technological Protection Measure</b> is a method or device applied to restrict the ways people interact with a copyright work, for example the Content Scrambling System which encrypts content on DVD media.
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