

## LIAC submission to Copyright Act Review

### Background

1. The Library and Information Advisory Commission (LIAC) under the National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003, has the following functions:
  1. The function of the Commission is to advise and report to the Minister on—
    - (a) library and information issues in New Zealand, including mātauranga Māori, and access to library and information services; and
    - (b) the role of library and information services, including mātauranga Māori, in the cultural and economic life of New Zealand; and
    - (c) any other matters requested by the Minister.
  2. Before giving advice to the Minister, the Commission must, to the extent practicable, have regard to—
    - (a) recent national and international developments in relation to library and information services; and
    - (b) the appropriate means for promoting collaboration among persons and institutions (for example, museums, libraries, and archives) in relation to protecting, preserving, and promoting access to information, including documentary heritage and mātauranga Māori.
2. MBIE's Copyright Act Review issues paper has identified the following objectives for New Zealand's Copyright Regime:
  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, where exceptions to exclusive rights are likely to have net benefits for New Zealand
  3. Ensure that the copyright regime is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law
  4. Meet New Zealand's international obligations
  5. Ensure that the *copyright system* is consistent with the Crown's obligations under the Treaty of Waitangi.
3. There is a strong overlap of interest between the Review and LIAC's purpose.

As a body which is concerned with the wider library and information landscape in Aotearoa New Zealand, rather than representing individual organisations, we have confined our comments to general concepts and approaches. We expect that other organisations and individual libraries will make submissions detailing specific examples and issues with current copyright legislation.

## Key Issues:

The legal framework within which people can create, share, store, synthesize and use information has wide-reaching consequences. These activities are vital in many areas of the economy, the education system and in people's ability to participate in community life.

Since at least as early as the mid-19<sup>th</sup> century, libraries, as collective or public entities, have been involved in the collection and dissemination of information - their very purpose is tightly connected to the concerns raised by copyright legislation. There is an inherent tension between the protective provisions of copyright for the benefit of individual creators and the collective activities of libraries in gathering and sharing documents and media in which information is recorded.

There are several areas in which the existing Copyright Act is inadequate or not fit for the modern world, especially with respect to the ubiquitous digital environment.

The ability of libraries to maximize their potential benefit to society requires supportive and efficient legislative frameworks, as well as a thriving relationship with those who create information sources or creative works. This broader context of the purpose and operation of libraries has framed our comments regarding the proposed objectives of copyright. It is important that these objectives form a test against which individual measures in the copyright system are analysed.

Aotearoa New Zealand has a particular opportunity to examine the operation of copyright, whose origins lie in a Western frame of individual property rights, and the approaches to indigenous knowledge and expression. The matters raised by the WAI262 report are of interest internationally and we have the opportunity to have a bold and progressive discussion about the primacy of Te Ao Maori and how copyright sits in relation to a Treaty partnership.

In summary:

- The creation, exchange and development of information is a vital activity for a thriving society. The copyright regime needs to provide adequate rewards and incentives to aid this activity in a manner that does not unduly inhibit the accessibility and sharing of new and old work.
- Access to information enables people's participation in their community and society which ultimately is of benefit to all and could be considered in the nature of a basic human right. Conversely, denial of access to information or cumbersome legal frameworks which inhibit availability lead to detrimental outcomes for individuals and communities. Copyright measures which provide individual reward need to be balanced against the larger benefit to society of having wide participation and engagement.
- The wide-spread availability of digital technology means that there is a near-universal reality that the exchange of images and text are now expected and practiced as part of individuals' normal daily life. Copyright legislation needs to not only be technology-neutral but to recognise the changes in human behavior with respect to the exchange of information.

- Libraries and similar collective public-good organisations are the holders and sharers of creative works and an important source for the creation of new works. Copyright exceptions that are afforded to these organisations should not be seen as punitive on the creators of works but beneficial to the utility and development of new knowledge.
- In seeking to adequately control copying and reward the creators of works, great care is needed to devise restrictions and incentives that genuinely lead to the creation and promotion of new work.

LIAC has a keen interest in the review of New Zealand Copyright legislation. We welcome the opportunity to have input into the discussion, identification of issues and development of possible solutions in due course.

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?

*In principle, LIAC supports the objectives. They align with LIAC's responsibility to advise on:*

- library and information issues in New Zealand, including mātauranga Māori, and access to library and information services; and
- the role of library and information services, including mātauranga Māori, in the cultural and economic life of New Zealand; and

*LIAC believes that the Copyright Act should have its purpose clearly stated within the Act*

*The purpose should include objectives or outcomes expressed in the Issues paper (para 101) as:*

*In our view the copyright regime should seek to **balance** the following outcomes:*

- o *creation of original works*
- o *use, **development** and adaptation of works created by others*
- o *dissemination and access to **knowledge** and creative works*

The inclusion of development and knowledge in the objectives would make a stronger connection to the purpose and benefit of an effective copyright regime.

The current proposed objective which refers to "net" benefit to New Zealand is not explicit as to what the opposing considerations are in determining benefit and appears to presume an adversarial approach.

Our view is that copyright legislation should support a virtuous information ecosystem and this needs to be clearly reflected in the Acts 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?

*LIAC supports a technology neutral copyright framework that allows library and information services to fulfil their roles into the future without a legislative time-lag.*

*A strong statement that purpose of activity is more important than the mechanics or method of an activity will help give greater longevity to the legislation and its future interpretation.*

*As part of its role to have regard for 'recent national and international developments in relation to library and information services' LIAC notes that the European Parliament adopted the European Copyright Directive (27 March 2019) (Directive*

on Copyright in the Digital Single Market).

*“Parliamentarians decided to vote for the whole text and not to vote for separate amendments, many of which were intended to delete the two controversial articles 11 and 13 (15 and 17 after renumbering).*

*The final text has several positive provisions for the cultural heritage, research and education sector:*

- *a text and data mining exception, both limited to research and cultural heritage institutions (with no possibilities for opt outs) and open to all individuals and institutions with legal access to work (but with the possibility for the rightholder to reserve the use)*
- *a mandatory preservation exception*
- *an education exception, for digital uses and which can be used in libraries as long as the teaching is provided by an educational institution, where adequate licensing schemes don't exist*
- *an out of commerce works provision (licensing solution, and a fall-back exception where this is not possible)*
- *a contract override provision applying to the above (with some exceptions)*
- *a provision stating that faithful copies of works in the public domain need to stay in the public domain*

*Member states now have two years to transpose the Directive into national law.”*  
<https://www.ifla.org/node/92063>.

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

*The objectives need to be considered as whole with no preferential weighting.*

## Rights: What does copyright protect and who gets the rights?

5	<p>What are the problems (or advantages) with the way the Copyright Act categorises works?</p> <p><i>Evolving technology in particular has made categorisation of works more blurred and difficult to define. The common practice of combining text, still and moving images, sound (including music) generates a lack of clarity as to which copyright provisions apply to individual works, or multiple layers of copyright which most users find difficult to understand or interpret.</i></p> <p><i>The term 'literary work' is often interpreted as being confined to the narrower concept of 'literature' diminishing the scope of library collections which cover the whole of human knowledge. This distorts the understanding of the impact of copyright on the 'cultural and economic life of New Zealand.</i></p> <p><i>Broader categories related to purpose may be more useful in the future.</i></p>
7	<p>Are there any problems with (or benefits arising from) the treatment of data and compilations in the Copyright Act? What changes (if any) should be considered?</p>
12	<p>What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?</p>

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*LIAC believes that the copyright term duration of 100 years for works created by the Crown is inconsistent with the intentions of NZGOAL and The Declaration on Open and Transparent Government that was approved by Cabinet on 8 August 2011.*

*The benefits of releasing open government data are stated as:*

- **Improving government** - Open data is improving government, primarily by tackling corruption and increasing transparency, and enhancing public services and resource allocation.
- **Empowering citizens** - Open data is empowering citizens to take control of their lives and demand change by enabling more informed decision making and new forms of social mobilization, both in turn facilitated by new ways of communicating and accessing information.
- **Creating opportunity** - Open data is creating new opportunities for citizens and organizations, by fostering innovation and promoting economic growth and job creation.
- **Solving public problems** - Open data is playing an increasingly important role in solving big public problems, primarily by allowing citizens and policymakers access to new forms of data-driven assessment of the problems at hand. It also enables data-driven engagement producing more targeted interventions and enhanced collaboration.”

<https://www.data.govt.nz/manage-data/policies/declaration-on-open-and-transparent-government/>

*A copyright term of 100 years limits these benefits due to difficulties in identifying the copyright owner of long defunct government departments and no single agency assigned to dealing with requests to copy. If historic crown copyright is to be retained, it is imperative that there be a centralised body that the users of material can seek permission and consult on the status of government created content.*

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Are there any problems (or benefits) in providing a copyright term for communication works that is longer than the minimum required by New Zealand's international obligations?

*A copyright term that is longer than that required by the TRIPS Agreement of 20 years for broadcast (communication) works limits the “dissemination and access to knowledge and creative works” outcome by an additional 30 years, without a clear justification that incentives for creation of these works would be reduced.*

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## Other comments

*[Insert response here]*

## Rights: Specific issues with the current rights

20	What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?
	<i>[Insert response here]</i>
21	Do you have any concerns about the implications of the Supreme Court's decision in Dixon v R? Please explain.
	<i>[Insert response here]</i>
22	What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?
	<i>The copyright regime should encourage this increasingly important form of creation and dissemination of knowledge.</i>
23	What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?
24	Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.
	<i>[Insert response here]</i>

## Other comments

## Rights: Moral rights, performers' rights and technological protection measures



## Other comments

### Exceptions and Limitations: Exceptions that facilitate particular desirable uses

31	<p>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?</p>
	<p><i>There is considerable latitude for interpretation, or mis-interpretation of the provisions enabling research and study. At one end almost any reading of a document could be term 'study' while at the other there could be a requirement for it to be in pursuit of a formal educational qualification. Libraries are frequently in the position of "turning a blind eye" to use which may or may not qualify as 'research or study'. Assessment of societal benefits of the flow of information and the realistic actual detriment to rights holders would suggest a more liberal interpretation would be desirable.</i></p>
36	<p>What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?</p>
	<p><i>LIAC notes that when the Copyright Act was last reviewed, cloud storage as a service did not exist. This is another example of the exceptions failing to keep pace with technology and conflicting with intent.</i></p> <p><i>Cloud storage has implications for the storage of Māori material and taonga works in offshore servers - there is concern that these works would no longer be protected by the Treaty of Waitangi and NZ Law. The UN Declaration of the Rights of Indigenous Peoples (2007) article 31 states that "Indigenous peoples have the right to maintain, control and develop their cultural heritage, traditional knowledge and traditional cultural expressions". Retaining the governance of culturally significant material in Aotearoa is essential to uphold our responsibilities in a bicultural society.</i></p>
37	<p>Are there any other current or emerging technological processes we should be considering for the purposes of the review?</p>
	<p><i>The current 1994 Copyright Act was framed in an age when the principal methods of copying and disseminating information and creative works involved either a printing press, a photocopier or a broadcast channel (TV or radio). Subsequent amendments to take account of changing technology have addressed the mechanics of transmission and exchange but have failed to recognise fundamental changes in human behavior and practice. The exchange of text and images between people is now as ubiquitous as the use of telephones for voice conversations a generation and more ago. Copyright legislation did not previously seek to limit or regulate phone conversations yet now, through the desire to capture a full range of technology</i></p>

*transmission and the wide definition of 'works', daily communication is captured by the legislation. This creates unintended infringements (which are largely ignored) and weakens the integrity of the legislation.*

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?

*We note that data compilations and data-mining are becoming central and more common to a range of research and policy work. There should be a low threshold for judging originality and the application of copyright in this area. Onerous application of copyright to individual data points could easily outweigh the benefits of obtaining complete or comprehensive data sets. Concerns of privacy with respect to data-mining are better dealt with in Privacy legislation, and are not matters of copyright.*

## Other comments

*[Insert response here]*

### Exceptions and Limitations: Exceptions for libraries and archives

41 Do you have any specific examples of where the uncertainty about the exceptions for libraries and archives has resulted in undesirable outcomes? Please be specific about the situation, why this caused a problem and who it caused a problem for.

*LIAC itself is not involved in specific situations applying the library and archive exceptions. We do however firmly support the continuation of such exceptions which are vital to libraries fulfilling their role for collective public benefit.*

42 Does the Copyright Act provide enough flexibility for libraries and archives to copy, archive and make available to the public digital content published over the internet? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?

43 Does the Copyright Act provide enough flexibility for libraries and archives to facilitate mass digitisation projects and make copies of physical works in digital format more widely available to the public? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?

*\*There is considerable overlap here to Questions 71 to 73 dealing with Orphaned works.*

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*LIAC supports the work and stance of LIANZA on this question following the LIANZA standing committee's survey of Librarians from 2017.*

*The issues stated in that survey included numerous projects being abandoned, restricted or changed because of copyright concerns. The time, money and skills needed to locate rights holders is a burden to libraries so projects that include copyright clearances are often shelved in favour of easier projects.*

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Does the Copyright Act provide enough flexibility for libraries and archives to make copies of copyright works within their collections for collection management and administration without the copyright holder's permission? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?

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*Preservation under section 55 should not be used only to protect against loss and degradation. Libraries should be empowered to make proactive copies of material before they degrade. There should be no distinction between copying for preservation, access and reuse. It is also more sensible, where resource allows, to make copies at the point of acquisition when the material is in optimal condition.*

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What are the problems with (or benefits arising from) the flexibility given to libraries and archives to copy and make available content published online? What changes (if any) should be considered?

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*LIAC supports the position of LIANZA and National Library to retain this flexibility.*

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46

What are the problems with (or benefits arising from) excluding museums and galleries from the libraries and archives exceptions? What changes (if any) should be considered?

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*Museums and galleries, like libraries and archives, are memory institutions.*

*LIAC is required to have regard for "the appropriate means for promoting collaboration among persons and institutions (for example, museums, libraries, and archives) in relation to protecting, preserving, and promoting access to information, including documentary heritage and mātauranga Māori."*

*The exclusion of museums and galleries from the exceptions compromises the ability to collaborate in these activities and creates inconsistency in the treatment, management and availability of similar material, simply by accident of the kind of institution particular collections have ended up in.*

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## Other comments

*There are many instances in which libraries and related organisations routinely copy material in the course of administering collections. Images of material are used for internal documentation, discussion and decision making. Conservators routinely photograph works during the course of treatment. Technically this copying requires express permission of copyright holders but in practice this is not obtained. Arguably there is no loss of revenue by rights holders in these instances so a provision for administrative copying should be considered.*

## Exceptions and Limitations: Exceptions relating to the use of particular categories of works

52

What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?

*Under section 81A format shifting is not permitted for libraries.. Section 55(3) does allow copying but only if the original is at risk of loss, damage or destruction. This section also states that the original must be made inaccessible and the digital copy must replace the original.*

*The copyright framework needs to be technology and format neutral. This is essential to allow memory institutions to fulfil their purpose of preserving cultural collections and making them available to the public. The sector is struggling with material in obsolete formats or readable only on obsolete equipment. The inability to shift formats leads to deaccession of material that cannot be legally format shifted or the loss of audio-visual heritage material on obsolete or unstable media.*

## Other comments

[Insert response here]

### Exceptions and Limitations: Contracting out of exceptions

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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?

*Contracting out an action that is legally permitted is unacceptable and probably unenforceable.*

*The UK Copyright Designs and Patents Act notes that "To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable."*

[https://www.communications.gov.au/sites/default/files/submissions/universities\\_australia\\_1.pdf](https://www.communications.gov.au/sites/default/files/submissions/universities_australia_1.pdf)

*Changes that would introduce this type of ambiguity should not be considered.*

### Exceptions and Limitations: Internet service provider liability

59

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

*The definition of an internet service provider in the New Zealand Act (s. 2) to include a person who "hosts material on websites or other electronic retrieval systems that can be accessed by a user" is ambiguous.*

60

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?

*LIAC supports the extension of safe harbour provisions to be explicitly applied to libraries and other cultural institutions to protect them against potential infringement of copyright by users. This would be in recognition of the extensive public good performed by libraries making material available and the disproportionate effort required to trace copyright holders of material held in large databases.*

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## Transactions

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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.

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*LIAC is aware that orphaned works are a considerable issue for libraries in providing access to information and supports changes that allow libraries to make copies available after a due diligence search to trace the copyright owner.*

*There is significant risk of the cost and effort involved in tracing copyright holders of older works being disproportionately increased if the term of copyright is extended. The 50-year term often results in needing to find grandchildren of original creators to obtain permission to copy. An extension to 70 years or longer would see this search being extended to great-grandchildren with attendant difficulties of tracing distant relatives and possible multiple rights-holders.*

*It is difficult to argue that financial reward paid to grandchildren under a copyright licence results in the production of more creative works. This is an example of our view that measures need to be tested against the Objectives of the legislation.*

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## Other comments

*[Insert response here]*

### Enforcement of Copyright

## Other comments

*[Insert response here]*

### Other issues: Copyright and the Wai 262 inquiry

93

Have we accurately characterised the Waitangi Tribunal's analysis of the problems with the current protections provided for taonga works and mātauranga Māori? If not, please explain the inaccuracies.

*LIAC agrees with the expression of the Waitangi Tribunal's analysis of the current issues with the Copyright Act and supports a standalone regime.*

94

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

*LIAC agrees with the concepts as they have been put forward in the Wai262 report from the Waitangi Tribunal.*

*However, these concepts need to be fully endorsed by Māori through consultation and wananga with iwi and hapu across Aotearoa.*

*We are aware of increasing interest and discussion among Maori in this area but note that compared with mainstream copyright there are relatively few practitioners who deal with and consider these issues on a daily basis. This should influence the nature of consultation and how to resource it.*

95

The Waitangi Tribunal did not recommend any changes to the copyright regime, and instead recommended a new legal regime for taonga works and mātauranga Māori. Are there ways in which the copyright regime might conflict with any new protection of taonga works and mātauranga Māori?

*LIAC supports this position and the parallel work stream that would be required to enact it. We cannot comment on any conflicts that may result from a new regime with any certainty until the Ministry put forward options for consultation.*

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*However copyright is a western construct of largely individual ownership with expiry dates and the concept of the Public Domain. Protection of matauranga Māori and expressions of indigenous knowledge should not have an expiry date and the public domain is not a concept that translates directly to Te Ao Māori.*

*Under Article 2 of the Treaty of Waitangi there is a guarantee “Te tino Rangatiratanga o rātou kainga me o rātou katoa” (tino rangatiratanga over all taonga or treasured things). The right to self govern and sovereignty over their taonga was never surrendered in 1840. The current copyright legislation does not uphold the Crown’s obligations to Māori. Given Wai262 was submitted in 1991 and the Waitangi Tribunal Report was released in 2011, arguably it is time for wide sweeping and restorative legislation to protect mātauranga Māori.*

*Data sovereignty is another area which needs to be considered. We recommend consultation with Te Mana Raraunga, the Māori Data Sovereignty Network to ensure any regime is compatible with data considerations.*

*Aotearoa/New Zealand has a particular opportunity to lead international thought and solutions in this area. There is and opportunity to protect Mātauranga Māori and Māori culture from foreign exploitation while also providing opportunities for innovation, business and economic gain.*

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96

Do you agree with our proposed process to launch a new work stream on taonga works alongside the Copyright Act review? Are there any other Treaty of Waitangi considerations we should be aware of in the Copyright Act review?

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*LIAC recommends a cross-Government stream of work to be led by Te Puni Kōkiri, the Ministry for Māori Development and MBIE.*

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97

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

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*LIAC notes that the creative and cultural sectors have been given extensive consultation and engagement on copyright and intellectual property issues over many decades. This needs to be extended to Māori. Consultation with Māori needs to be broad, resourced and in a wananga format in line with tikanga Māori.*

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## Other comments