

Submission on review of the Copyright Act 1994: Issues Paper

Your name and organisation

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Responses to Issues Paper questions

Objectives

1	<p>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?</p> <p>Universities New Zealand agrees that the Act does need objectives, but these need to be carefully considered and should acknowledge that the traditional objectives are no longer sufficient in the digital age to redress the balance between the rights of the copyright owner and the rights of users to access and use the fruits of our culture. This is particularly important in New Zealand which does not have the benefit of a public domain stretching back hundreds of years, which expresses New Zealand’s unique identity.</p> <p>We agree that copyright seeks to balance the outcomes set out in paragraph 101, however we believe that access to knowledge through education needs to be explicitly stated in the objectives. Learning and education are the foundation of creativity. Traditionally the objectives of copyright are to promote learning and build knowledge.</p> <p>Universities are uniquely placed to comment on this as our staff and students are both prodigious creators of copyright works and users of others’ copyright content in their teaching, research and community outreach activities. Universities welcome the balance set out in the objectives between</p>
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incentivisation, reasonable use and effectiveness. As we will argue throughout this submission, everything the university sector does has a direct impact on New Zealand's cultural and economic well-being and done at a scale that represents major investment by the New Zealand government:¹

- 173,880 students in 2016, including 51,575 post-graduate students (30%)
- NZ universities are home to around 27,100 researchers (70% of all of New Zealand's researchers, including postgraduate research students).
- The stock of all knowledge generated by New Zealand universities, and adopted across the wider economy, accounts for around 9% of GDP.
- \$500m+ generated each year through commercialising university research.
- Universities account for 28% of New Zealand's Research and Development expenditure, driving 65% of all of NZ's basic research expenditure and 25% of applied research expenditure.
- New Zealand's public investment (including public subsidies to households and other private entities, like student loans, allowances, scholarships and other grants) in all forms of tertiary expenditure is relatively high - 1.8% of GDP compared with an OECD average of 1.5%.
- Over 40,000 works produced annually by our staff.

We agree that the sole purpose of copyright is not to protect creation and creators *per se* as noted in paras 59 and 60 of the Issues Paper. The main beneficiaries of creative works are the publishers and distributors not the creators. See research by Professor Rebecca Giblin and her interview with novelist Cory Doctorow²

We think that the current system does not achieve the objectives set out in the Issues Paper as the rights of the copyright owner are increasing in the digital the space. It is the rights owner who has the means to prevent those traditional uses of work – the reading, the borrowing, the sharing. Too great a level of protection for rights owners has a chilling effect on the pursuit of knowledge in the digital age, where rights owners have the ability to charge for every use. As noted in the Australian Productivity Commission Report at page 2:³

“Copyright is broader in scope and longer in duration than needed — innovative firms, universities and schools, and consumers bear the cost.”

We believe that objectives four and five should be removed as they are core to our legislative or treaty obligations and the duty of the court. They add nothing to assist in the interpretation of the legislation. By specifically focusing on these it in effect excludes an interpretation that takes account of other such important legislation as the New Zealand Bill of Rights.

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?

The objectives are a guide to interpretation of the legislation. Adding other objectives can have the result of making the court's role in interpreting the legislation more circumscribed. The objectives should be as simple as possible and principle based to maintain the flexibility needed in an age where technology and practices are changing rapidly. Creating certainty works against adaptability and resilience in the face of change. The objects of copyright are not to be adaptable and resilient

¹ Source: www.universitiesnz.ac.nz/sector-research/growing-new-zealand-economy

² <https://boingboing.net/2019/02/21/writers-first.html>

³ <https://www.pc.gov.au/inquiries/completed/intellectual-property/report>

to technological change, but to facilitate the pursuit of knowledge.

While we agree that meeting our international obligations, considering the Treaty of Waitangi and “[a]daptability and resilience in the face of technological developments” must be considered in undertaking the review of the Act, we do not believe that these need to be included in the legislation.

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.

We believe that generally adding sub-objectives will only make interpretation more difficult. By providing more specific objectives there is a move away from a principled approach which gives greater flexibility to interpret the legislation as technology and social values change and evolve.

4

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

A balance must be struck. The objectives are a guide to interpretation and they should not be inconsistent with each other such that they require different weightings. In some circumstances the court may consider that incentivising the creation of new works would allow certain un-monetised uses, in other circumstances the court may consider the incentive to create new works is best met by monetary reward.

Universities create vast amounts of copyright works⁴ and use that of others in their statutory obligations to undertake research, teaching and community service.⁵ New Zealand university researchers make a significant contribution to peer review of academic literature as part of their normal duties to teach and undertake research. See Publons.⁶

All of objectives 1 - 3 are directly relevant to universities and we stress the need for equal balance between these objectives and, in particular, highlight the emphasis in objective two on reasonable exceptions where there are net benefits to New Zealand.

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

5

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

A broad general categorisation of the works, without differentiation in accordance with our international treaties is less confusing. However there are problems arising with the increased use of electronic technology to deliver content. As noted in the LIANZA submission “The boundaries

⁴ Collectively universities created more than 40,000 copyright works in 2017, according to collated information from the Tertiary Education Commission’s Performance-Based Research Fund (PBRF) exercise. In 2017 staff of universities produced many thousands of research articles and chapters, wrote or edited almost 800 books, produced 725 commissioned reports for external bodies, put on 554 performances and 120 exhibitions, had 85 patents and wrote 59 pieces of software/code, among many types of work.

⁵ Education Act 1989 s 162 (4) (b) (iii) “a university is characterised by a wide diversity of teaching and research, especially at a higher level, that maintains, advances, disseminates, and assists the application of, knowledge, develops intellectual independence, and promotes community learning.”

⁶ Using publicly-available data released by Publons, over a twelve-month period 1,964 New Zealand researchers had 8,191 verified peer reviews, accessed 18 March 2019, calculations based on the 12 months prior to that date, ranking 17th in the world. Publons released a report in 2018, based on a 2016 survey of its users, estimating 5 hours taken per review.

<https://publons.com/static/Publons-Global-State-Of-Peer-Review-2018.pdf> (p. 32)

between categories of works are becoming increasingly blurred as the Internet and other forms of digital media become the primary delivery mechanism for many works, and digital technologies allow the easy conversion from one type of work to another. For example, the current definition of 'sound recording' includes 'a recording of the whole or any part of a literary, dramatic, or musical work, from which sounds reproducing the work or part may be produced'. It is unclear whether this would apply to any digital text which text-to-speech software could read aloud."

Where the categorisation of works can be confusing is in the 'commissioning rule' in s 21. Section 21 (3) states that where:

...a person commissions, and pays or agrees to pay for, the taking of a photograph or the making of a computer program, painting, drawing, diagram, map, chart, plan, engraving, model, sculpture, film, or sound recording; ...that person is the first owner of any copyright in the work.

The list sets out specific types of artistic works. This is presumably for policy reasons. Thus something that does not fall neatly into these specific types (for example, a kete commissioned for display purposes in a public place) must be accounted for by normal laws of contract. This means copyright remains with the creator unless the commissioner enters into a contract with the creator to assign copyright to them.

6

Is it clear what 'skill, effort and judgement' means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?

The case law is clear what 'skill, effort and judgement' in other words "sweat of the brow" means as a test, if you spend time and effort in creating a work you can gain copyright over that work even though you are compiling facts that could not be protected by copyright individually.⁷

The application of the test does make copyright protection apply too widely.⁸ Given that compilations of data may be created with no creative input and minimal skill, judgment and labour, requiring a 'creative spark' means that they may not qualify as original works and therefore copyright protection, thereby making them available for research and data mining. We believe that there should be some "creative" or "original" act involved in developing a work. This would also reduce the number of works protected by copyright and help move the balance back to users, rather than locking up and monetising every use.

7

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?

There are problems with protecting data and compilations. Technically the protection of data and compilations does not protect others from going to the original sources and using that data. But if the copyright owner or the aggregator is the only person or entity with access to the underlying data then the copyright owner or aggregator in effect has copyright over the data.

⁷ Walker McMurdo, "Facing the facts: an analysis of originality for the purposes of copyright subsistence in compilations of facts" *NZLSJ* (2012) 2 NZLS.

⁸ Sims, A. J. (2006). Copyright's protection of facts and information. *New Zealand Business Law Quarterly*, 12 (4), 360-383.

University researchers want to make greater use of databases for research purposes, but face a number of challenges to making use of the content. One student wished to make use of a database the university subscribed to, to research information which was available on the database. The research needed a large sample size (from previous research, which had downloaded 50,000 to 100,000 scripts), however the database download limit was only 10,000. When the database was asked for permission for the student to undertake the research, the response was,

"Please be aware that the ...Licence do not allow analytics of the service. The License/fees are for reader access only.

While they may be downloading the content manually, analytics of the content is still not allowed. If s/he is interested in conducting analytics with the content, a license for this usage is available starting as \$20,000/one time project/paper.

Such fees make this type of research impossible for students and researchers who are conducting non-commercial research. Making text and data mining legal under the Copyright Act, provides one less hurdle for our researchers to overcome. Most of the electronic resources that university libraries subscribe to prohibit data and text mining of their content, however many allow uses of their content so long as it falls within the exceptions available under the user's copyright law. Content aggregators and the copyright owners of these databases are able to cut access to their databases for the whole of the university community if software such as scripts, agents, or robots are used. While changing the law will not make this content available for text and datamining, it may give those negotiating these agreements with the vendors some leverage in the negotiations for licences, either now or in the future.

A specific exception for text and datamining would make it clear that where content is openly available or not protected by a paywall, it can be used for these purposes. We believe that if the test for originality is narrowed to require a 'minimal level of creativity' or 'creative spark', this would mean that collections of facts that in themselves have no copyright protection, could be used for text and data mining for the benefit of society. Research findings are often based on research data. This data should be in the public domain and freely available so other researchers and the general public can test the results to ensure the findings are accurate.

8

What are the problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?

Universities generally have policies in place which mean that staff retain copyright in their research outputs, creative works and instructional material.

On the issue of films, we believe that ownership should be vested in one person, whether it is the director or the producer. Trying to track down multiple owners of copyright works would impose an administrative burden that has a chilling effect on use of these works.

The commissioning rule needs to be changed. The current rules are confusing. Either the commissioner owns the copyright in any work created as a result of the commission, or the commissioner does not own the copyright in the work created as a result of the commission depending on the type of work commissioned. We can see no reason why different works should have different rules applied to them.

In Australia and the UK the commissioning rule no longer exists, so that the author of a commissioned work is the owner of the copyright in the work (unless there is an agreement to the contrary). Both ways can result in unfairness, but would be an advantage over the current confusing rules. On balance it would be best to follow the UK and Australian rule as that means that New Zealand can benefit from their jurisprudence on the issue.

Also, if the commissioning rule is not changed, then copyright ownership should not be gained by the commissioner until actual payment is received by the author not the current position where

there is only an agreement to pay before ownership is transferred.

With regard to photographs, s 105 provides some protection to individuals where photographs have been commissioned for private and domestic purposes.

For a discussion of the problems that have arisen with the commissioning rule in practice see Alexandra Sims, "Copyright protection of functional objects in New Zealand" (2016) *Intellectual Property Quarterly* 297 at 303-311.

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?

The rules for ownership of copyright in s 5 are that a person is the author of works. A person in its ordinary meaning being a human being regarded as an individual. We do not believe that this should change. AI, at least at present, is still a tool, an intelligent tool but still one that requires a human to direct it. The development of AI has raised a number of complex legal and ethical questions. As well as having the potential to provide benefits to society it also has the potential to cause great harm. We could suggest, for clarity's sake, that any copyright works created due to the software is granted to the operator of that software.

We note that machine learning required to develop the software inevitably creates biases in the system that should be minimized to the greatest extent possible by creating an exception for use of content used to develop machine learning so as wide a range of content as possible is available to the developer. We note that the public domain of published material skews toward "wealthier, whiter, and more Western than [published material] today".⁹

10

What are the problems (or benefits) with the rights the Copyright Act gives visual artists (including painting, drawings, prints, sculptures etc)? What changes (if any) should be considered?

The fine arts are a vital component the university's place in our wider society, particularly in view of our role as critic and conscience of society, with many of our institutions having annual arts fellowships and many of our staff in the creative disciplines actively working as artists. For further information on the contribution of universities to the arts see, Jenny Wilson, "The hidden topography of Australia's arts nation"¹⁰, which applies equally to New Zealand. The University sector is responsible for the majority of New Zealand's tertiary creative arts education. A major omission in our current copyright regime is that artists who wish to build upon, comment on, or otherwise incorporate the work of others' into their own have no clear right to do so. While this kind of reuse is common on the web for non-commercial purposes on social media (though still not legal in many cases), the artist who wishes to use, appropriate, remix and potentially sell the resulting work faces a difficulty and uncertainty as to what use might be permitted. Such works are critical, in particular, where social, historical or cultural commentary is the purpose of the work. In such cases, licensing is often not possible or would be rejected, due to the nature of this type of work. As the legislation currently stands only s 42 might be reasonably relied upon as a defence as a kind of critique or review of the original work.

⁹ Levendowski, Amanda, How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem (2017). 93 Wash. L. Rev. 579 (2018). Available at: <https://ssrn.com/abstract=3024938>

¹⁰ Jenny Wilson, "The hidden topography of Australia's arts nation: The contribution of universities to the artistic landscaper" *Australian Universities Review*, vol 58, no.1, 2016 page 21,

Kari Schmidt has specifically examined appropriation art, and its unique place at the juncture of the idea/expression dichotomy.¹¹

Despite the fact that there is little to no common law in the various fair dealing jurisdictions pertaining to artistic works, expansive copyright laws do impact on artistic practice. Thus, liberal fair dealing provisions which recognise transformative use, and uses such as parody and satire should be adopted, as this would send a signal to artists and copyright holders that at least some degree of appropriation is legitimate in artistic works. Fair dealing has already widened over the last decade in expanding the uses to which fair dealing can apply and the manner in which it is conceptualised, particularly in Canada with its emphasis on users' rights and liberal interpretation of the doctrine. This already suggests a shift away from or at least a reconsideration of an entrenched system of copyright. New Zealand, however, is the exception to this development and yet it is clear such provisions are necessary given the reality that the application of the fair dealing provisions to artistic works are characterised by uncertainty in this country. In particular New Zealand should also adopt both parody and satire, as this would obviate the problems associated in distinguishing between them and allow for a greater variety of critiques in artistic works, as opposed to only allowing criticism in the very narrow circumstances of parody.

Were New Zealand to follow the lead of countries such as Canada, Australia and the United Kingdom, fair dealing would better contribute to artists feeling able to create, uninhibited by excessive copyright restrictions. This would not only help to facilitate a culture of creativity and critical thinking, but a more meaningful copyright balance.

This is also evidenced by the review of our copyright legislation which will soon be taking place as a result of similar reviews in the United Kingdom and Australia, as well as "public perception that New Zealand consumers suffer from a lack of access to copyright content and flexibility to use this content how they wish in the digital environment" [quoted from Cabinet Paper "Delayed Review of the Copyright Act 1994" (15 July 2013) at [3].]

It might be noted that these problems are not exclusive to the visual arts but to any form of artistic expression that might rely on borrowing, building or commenting on work that has gone before, such as literary, musical or film work.

More generally, this is supported by research undertaken in Australia with creators from a range of disciplines draws similar conclusions about the missed opportunities for cultural expression when copyright acts a barrier:¹²

Creators responded to the difficulties of lawfully reusing content in the following ways: they deliberately ignored copyright rules which they knew would make it impossible to do their work; they altered or abandoned projects to avoid problems with the law; and/or they self-censored such that they avoided even starting projects that they predicted would be too difficult to undertake legally.

Several of the creators we spoke to expressed a desire to engage more actively with Australian culture by documenting, using and sharing this culture within their own works. However, they were reluctant to reuse Australian cultural content because of the difficulties (real or perceived) with obtaining permission and the risks of copyright enforcement.

Our own experience with staff and students who create works aligns with these views.

¹¹ Appropriation Art: Fair Use, Fair Dealing and Copyright Law (2015) 7 NZIPJ 249, (2015) 3 NZLSJ 381 at page 58.

<https://www.otago.ac.nz/law/research/journals/otago085117.pdf>

¹² Pappalardo, Kylie, Aufderheide, Patricia, Stevens, Jessica, & Suzor, Nicolas (2017) Imagination foregone: A qualitative study of the reuse practices of Australian creators. QUT, Brisbane, QLD: p. 4. Retrieved from: <https://eprints.qut.edu.au/115940/>

Another issue for consideration is the right of integrity (right to object to derogatory treatment). As drafted it applies only if there has been a treatment, which means an alteration of a work. It is possible, however, to do something in relation to the work that is prejudicial to the honour or reputation of the author even though the work itself has not been altered in anyway.

The irony in New Zealand's protection of visual artists is that copyright law, which is allegedly meant to protect creators such as visual artists, is in fact not used to protect creators, rather it is used to protect mundane commercially produced products.

If any changes are made to strengthen visual artists rights the changes must not grant even greater protection for mass produced items. For an article on the problems that arise with the very broad protection of functional mass produced items, see Alexandra Sims, "Copyright's protection of functional objects in New Zealand" (2016) *Intellectual Property Quarterly* 297-317.

11

What are the problems creators and authors, who have previously transferred their copyright in a work to another person, experience in seeking to have the copyright in that work reassigned back to them? What changes (if any) should be considered?

The drive for academic authors to publish outweighs concerns about ownership of copyright. In effect this means that many authors assign copyright to the publisher without thought for the consequences. In one instance an academic author published the materials he had collected and written over a number of years as a textbook. These materials had previously been made available to students as course materials. In order to have the work published he had assigned copyright in the content to the publisher. The book was published and students instead of receiving a course book now were required to purchase it in the form of a textbook. When the publisher went out of business and the book was no longer available for purchase, the academic author was left unable to reuse the original content he had created because copyright in the work had been assigned to the publisher. In this case the publisher was able to be contacted and the rights were reverted back to the author. In other instances the publisher may have gone out of business before the author realises that the book is no longer available and it may be difficult to trace who the current copyright owner is. These books may be the accumulation resources built up over a number of years of research and teaching, which would be difficult to recreate without breaching copyright which now belongs to the publisher. While some publishing contracts will contain reversion clauses, this is not universal.

On occasion academic authors will have their copyright reverted back to them. In one instance where an academic editor of a book published less than 6 years before, had had his rights returned he contacted the other contributors to the book and all agreed that the book should be made openly available under a creative commons licence. The book can now be accessed publicly through the University of Auckland library catalogue and freely downloaded under a creative commons licence, see, [Being Cultural](#). Changes should recognise the economic life of a work is generally short and that educational institutions and libraries should be able to copy and share works that are not commercially available without facing an action for breach of copyright.

Other countries have various reversion rights to protect the interests of authors. Associate Professor Rebecca Giblin has published extensively on the issues of fair remuneration for authors. She is currently leading the Author's Interest project, which is an Australian Research Council Future Fellowship. Professor Giblin and her team are investigating ways in which taking seriously the author's interest in copyright can improve not only remuneration outcomes for individuals, but

in doing so, reclaim a great deal of currently lost cultural value for broader society. As part of her research Professor Giblin has researched authors' reversion rights in other jurisdictions.¹³ As part of the project Joshua Yuvaraj investigated reversion laws of 193 countries and found that 56% of them have author-protective reversion laws of one kind and another.¹⁴ The author noted that main rights were:

1. Right to reclaim rights to unexploited languages (or territories, or rights)
2. Right to reclaim rights if there are no/low sales.

New Zealand Universities support appropriately crafted rights that would protect publishers' commercial interests, at the same time recognising authors' ongoing interests in their works. This would provide protections for authors that would override contracts to the extent that they are outdated, unfair or poorly drafted. It would also enable our academic authors to make their works openly available once the economic life of the work was exhausted.

12

What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?

NZGOAL has benefited universities, not only in clarifying government policy on reuse of its works, but also in increasing the number of works available for reuse.

NZGOAL itself states: It is widely recognised, in New Zealand and abroad, that significant creative and economic potential may lie dormant in such material when locked up in agencies and not released on terms allowing re-use by others. That potential is two-fold.¹⁵

- a. individuals, non-profit and commercial organisations can leverage this material for creative, cultural and economic growth, improved environmental sustainability, greater productivity, and the wider public benefit; and
- b. experts and others can contribute to improved policy development and more efficient financial performance by government through being able to access, manipulate and provide feedback on such material.

If NZGOAL is the default, consideration should be given to making Crown copyright totally free of copyright as in some other jurisdictions such as the US, where federal works are free of copyright. Currently, the duration of Crown copyright is too long, and finding who is able to grant permission to copy and reuse content is difficult and in some instances impossible.¹⁶

While NZGOAL means that most Crown publications are free to copy with appropriate attribution under the CC-BY licence, the time it takes to determine whether or not a work is free to use is considerable as there is no one place where this information can be sought. Information on Government websites is unclear as to whether or not works that are not made available electronically are free to copy. The publications most often encountered with questions about copyright are older Ministry of Education films, sound recordings and other teaching resources.

¹³ Rebecca Giblin *Authors Interest Project* <https://authorsinterest.org/2018/02/16/author-protective-copyright-hows-it-done-by-other-countries/>

¹⁴ Joshua Yuvaraj, "Reversion laws: what's happening elsewhere in the world" *Authors Interest Project*, 4 April 2019, <https://authorsinterest.org/2019/04/04/reversion-laws-whats-happening-elsewhere-in-the-world/>

¹⁵ NZGOAL Version 2 Purpose s 1 <https://www.data.govt.nz/manage-data/policies/nzgoal/nzgoal-version-2/>

¹⁶ UK IP Office empirical study from 2015 "The inability of potential creators and entrepreneurs to rely on criteria to ascertain, predictably, the status of materials as in the public domain is a theme which emerges strongly" -- (Copyright & the value of the public domain, 2015, p. 66; <https://www.gov.uk/government/publications/copyright-and-the-value-of-the-public-domain>)

These often need to be reformatted for use in the classroom, our lecturers also want to share these resources more widely. It is difficult to find any information about whether or not these are free to copy and distribute under a Creative Commons licence. If it was clear that Crown works were not protected by copyright, it would save considerable time.

It may be possible to carve out an exceptions for works such as those produced by Standards New Zealand and other works which are currently protected by Crown Copyright that are expensive to produce. The U.S. copyright act provides:

§105 · Subject matter of copyright: United States Government works

37 Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

This would be possible by either providing clauses dealing with Crown Copyright with a contractual override, so all works created by the Crown are freely available with provision for a contractual override for those such as Standards New Zealand. Ideally standards should be freely available and either the Government or private industry should fund the development of these, which currently costs about \$150,000 per standard.

School Journals are another source of quality content published by the Department of Education that cannot be reused and shared because of concerns about copyright.

13

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?

The term of a communication work should not be extended beyond that of New Zealand's international obligations. Many of these works are orphan works or the economic life of these works is exhausted. They provide valuable resources for our staff who rely on short clips of film, including broadcasts to demonstrate complex concepts to students.

The Universities have a licence which relies on the broader definition which includes both broadcasts and films made available on the internet.

14

Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?

Section 117 applies where an unpublished work has been transferred to an institution, with conditions restricting publication, those conditions restricting publication apply even if copyright has expired. Archival papers which are protected for 50 years beyond the death of the author should not continue to be protected because the depositor may be embarrassed by what is in those papers and not want it published. The Act should not be used to facilitate censorship.

In Alexandra Sims' article, "Strangling Their Creation: The Courts' Treatment of Fair Dealing in Copyright Law Since 1911"¹⁷ where in *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* 613 which related to the publication of twelve-year old documents relating to the thalidomide tragedy because the documents in that case had not been published the Court found that the criticism and review fair dealing exception could not be made out as it was not fair to criticise them publically. The ability to use copyright law to prevent the vital discussion of events as important as the thalidomide tragedy is concerning.

Where culturally sensitive works are deposited under an agreement, these terms and conditions are generally respected by institutions. In some instances it may be appropriate to not release certain works for other reasons. These works could be covered by the Films, Videos, and

¹⁷ (2010) Intellectual Property Quarterly 192 at 203

Publications Classifications Act 1993 and should not be treated separately under the Copyright Act.
Australia has recently changed its law in this area and New Zealand should follow Australia's lead.

Other comments

No response

Rights: What actions does copyright reserve for copyright owners?

15

Do you think there are any problems with (or benefits arising from) the exclusive rights or how they are expressed? What changes (if any) should be considered?

The exclusive rights are extremely broad, whereas the exceptions are very narrow, this imbalance gives too much power to copyright owners.

16

Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?

We don't see any issues with this. Having the "knowledge" requirement safeguards those who have no means of knowing that the performance etc is infringing. To remove the knowledge requirement would create a chilling effect on the development and performance of works, which may fall outside conventional channels, but are innovative and challenging of the status quo.

17

What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?

There is uncertainty about how this operates now and we wouldn't want to see it expanded beyond its current scope.

Universities rely extensively on links to provide content to their students. In many cases it is difficult to determine whether or not the content is infringing or whether the content has been made available with the authorisation of the copyright owner. For example YouTube. Copyright protected works are made available because the rights owner has agreed and is receiving payments for the accompanying advertisements or benefits from the publicity. In other instances where a work is not registered on the system, the work be uploaded and made available despite the work being infringing content. We recommend that the law should protect those who act in good faith and remove links where they have been notified that the works are infringing.

Another example is the Harvard Business Review, which requires an additional fee (for one university \$US 4,000 to allow linking from the institutions learning management system to the subscribed content online. Uncertainty has arisen as to whether a citation represents a copy and if not, then the restriction is simply a contractual agreement. It should be clarified that linking itself does not infringe copyright in the work linked to. Failure to do so would make the Internet and the information available there inaccessible to those risk averse institutions such as universities and other cultural institutions.

Where the work is clearly infringing, we don't provide links or use that content

Changing the authorisation rules could expose universities to actions for breach of copyright. One university recently received a demand for \$250,000 because two paragraphs of a work were

allegedly copied in a 55 page guideline, which was available to the public on a third party website.

Other comments

Paragraph 194. We support and endorse the approach taken to parallel importing.

Rights: Specific issues with the current rights

18	<p>What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?</p> <p>We do not think that streaming video and broadcasts should be treated differently and agree that they are technology neutral and this should continue. The right to communicate to the public covers a broad gamut of works including literary and artistic works and we support the provision as currently worded.</p>
19	<p>What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?</p> <p>The benefits of having communication works as a separate category of works means that it makes a broader range of works that are technology neutral both discoverable and usable.</p>
20	<p>What are the problems (or benefits) with using 'object' in the Copyright Act? What changes (if any) should be considered?</p> <p><i>No response</i></p>
21	<p>Do you have any concerns about the implications of the Supreme Court's decision in <i>Dixon v R</i>? Please explain.</p> <p>If the reasoning in <i>Dixon v R</i>, that digital files can be treated as property, is applied to the Copyright Act, then this would create problems as it may create a property right over information/data. It needs to be made clear in the Act that <i>Dixon v R</i> does not apply to the Act.</p>
22	<p>What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?</p> <p>Yes there are problems with how the Copyright Act applies to user-generated content.</p> <p>User-generated content is an accepted part of our society which the Issues Paper notes, but in NZ most user-generated content infringes copyright. Canada has recognised that user-generated content is important and to be encouraged and has created an express exception. We suggest that New Zealand follows Canada, which would have the added advantage of being able to draw on the</p>

	Canadian jurisprudence on the issue. Teresa Scassa has written on the Canadian exception ¹⁸ see also the Canadian Copyright Act exception for Non-commercial user Generated Content ¹⁹
23	<p>What are the advantages and disadvantages of not being able to renounce copyright? What changes (if any) should be considered?</p> <p>As the Issue Paper notes, sometimes people do want to renounce their copyright, yet there is no ability under the Act to do so. Even if they do attempt to renounce their rights, eg by using the Creative Commons 'No Rights Reserved' license, this license can be revoked at a later date.</p> <p>Educational institutions rely heavily on the use of content in the public domain or that have been made available under a CC0 licence. Often these works are incorporated in teaching materials or shared publicly. The revocation of a licence would be difficult if not impossible to implement.</p>
24	<p>Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe.</p> <p>The length of protection is much too long. With many works being protected for the life of the author plus 50 years, this can result in copyright protection for over 100 years.</p>

Other comments

No response

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

25	<p>What are the problems (or benefits) with the way the moral rights are formulated under the Copyright Act? What changes to the rights (if any) should be considered?</p> <p><i>No response</i></p>
26	<p>What are the problems (or benefits) with providing performers with greater rights over the sound aspects of their performances than the visual aspects?</p> <p><i>No response</i></p>
27	<p>Will there be other problems (or benefits) with the performers' rights regime once the CPTPP changes come into effect? What changes to the performers' rights regime (if any) should be considered after those changes come into effect?</p> <p>This will make rights clearances more difficult and we do not support changes.</p>

¹⁸ Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law" in Michael Geist (ed) *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, see <https://books.openedition.org/uop/989?lang=en>.

¹⁹ <https://laws-lois.justice.gc.ca/eng/acts/c-42/page-9.html#h-27>

28

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

The requirement to have the rights owner's permission to exercise a permitted act under Part 3 of the Act but cannot practically do so is unworkable. It is difficult to determine who the rights owner might be and if it is clear they may not respond. Protecting communication works with TPMs is standard these days as rights owners take steps to protect their works from indiscriminate copying by the public. It seems illogical to have to contact the rights owner when, if the rights owner refuses to assist with the circumvention, the user can engage a qualified person to exercise the permitted act in any event.

The benefits for universities in being able to circumvent TPMs is that they can exercise their rights under s 48 or under the licence from Screenrights to make content available for teaching purposes. Most on demand TV is protected by TPMs and special programmes must be employed to unlock these to make them useable in the classroom situation where often only a short clip is required.

29

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

Universities support the LIANZA response on this issue.

Other comments

No response

Exceptions and Limitations: Exceptions that facilitate particular desirable uses

30

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?

We are aware that some students have removed all images from their PhD theses before posting these on the institutional repositories where they are available to the public. Many of these images could have been included under the criticism and review provisions, but the risk averse approach of some institutions meant that these could not be included where there was any uncertainty.

Other institutions will assess risk by applying the fairness factors set out in case law. In the case of criticism and review: no more has been taken than is necessary to undertake the criticism or review, the amount take does not mean that a buyer will purchase the new work instead of the original and the work is attributed to the original author. The fact that these works are non-commercial and openly available to the public is also a factor in the risk assessment that takes place.

The section 43 Fair dealing for research and private study exception has a "1 copy" limitation, as do a number of the educational exceptions. This "1 copy" limitation does not make sense in light of the increasing demand for copies to be available in digital format rather than hard copy.

Many academics would like to format shift their collection of learning, teaching and research

materials from hardcopy format so that it can be stored electronically for many reasons including:

- hard copy formats are easily lost, damaged, require manual work to find that can be difficult and time consuming even with a good filing system;
- they take up significant physical storage space;
- they are not easily portable for those academics who are researching in the field or overseas; and
- in the case of a civil defence emergency (such as an earthquake) could be damaged/destroyed or in a building that is for a period of time (or permanently) no longer accessible. The University of Canterbury, Lincoln University, the University of Otago's Christchurch campus and Victoria University Wellington have suffered earthquake damage and staff were unable to access their offices for a period of time.

Making a single copy of these works under the research and private study provisions is permitted under the Act, however, making a second copy to preserve it electronically is a breach of the Act.

One of the individual exceptions in the current Act allows a person to make copies *per device* of sound recordings legally obtained. A similar approach to research copies would make more sense as people routinely need access to copies made under s 43 in various places and from various devices.

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?

The benefits of criticism and review is that it can be broadly interpreted to cover uses that were not envisaged when the Act was first drafted. Because these are 'fair' dealing exceptions, application of the fairness factors set out in case law means that, in the absence of an open-ended exception such as fair use, new uses not envisaged in the previous review of the Act can be undertaken so long as the copying is fair. An example in the university sector is the use of the exception to review works submitted by researchers for assessment under the PBRF funding model. Another example is 'systematic' reviews, which require that thousands of articles on a particular topic are gathered together to be reviewed by panels of experts, who may be in different institutions and different countries to determine agreed best practice guidelines and treatment regimes in the medical and health sciences and other disciplines.

Considering much of the research and private study undertaken could potentially have a commercial outcome, this should not be restricted to non-commercial uses.

The criticism and review exception is unlikely to cover all uses that universities are likely to want to make. For this reason universities believe that a fair use type exception would cover new uses as technology develops or uses that fall outside the current available licences or exceptions, see a more detailed consideration of this issue in the article "Why universities want fair use".²⁰

32

What are the problems (or benefits) with photographs being excluded from the exception for news reporting? What changes (if any) should be considered?

Citizen journalism is now mainstream and an increasing way of how news is being communicated on a global scale. In New Zealand case law has been in favour of blogs and podcasts being able to

²⁰ Melanie Johnson, "[Why universities want fair use](http://hdl.handle.net/2292/46354)" (2018) 8 NZIPJ 145 unpublished version available here: <http://hdl.handle.net/2292/46354>

utilise this exception.

There's a growing concern that images of a sensitive nature (indigenous works, accidents, acts of terror, victims of crime) would be taken from social media or image repositories from cultural institutions and then used in news media reporting without any consultation or permission with the creator and/or subject or families of those images. Current practice is that news outlets have a "take first, apologise later" attitude towards using photographs from Facebook and other social media profiles. This exception strongly highlights the intersection of copyright and the rights of creators versus the ethical considerations, human rights framework and this gap that the copyright Act does not meet.

33

What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?

No response

34

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

We believe that the Canadian Act provides greater clarity and should be considered for the New Zealand Act. Canada has clarified the incidental copying issue and section 30(7) of its Act provides that:

"Incidental use

30.7 It is not an infringement of copyright to incidentally and not deliberately

(a) include a work or other subject-matter in another work or other subject-matter; or

(b) do any act in relation to a work or other subject-matter that is incidentally and not deliberately included in another work or other subject-matter.

35

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

The Act should make it clear that internet caching is expressly covered in transient reproduction of works. Also, if a person is to view a video streamed online, there will normally be a temporary copy made so that the person can view the video – this should not be infringing.

Section 43A has the potential to be beneficial where a new technology is developed. For example, under s 47 teachers can play or show for the purpose of instruction of a sound recording, film or communication work, but they cannot copy that work in order to be able to play or show the work. DVDs have now replaced VHS and they cannot be cued to the particular clip to be played in class. This necessitates the copying of the clip on to a storage device in order to play it in class. Section 43A provides that if the reproduction is incidental and is an integral part of a technological process for enabling the lawful use of, or lawful dealing in, the work and has no independent economic significance it could be useful. It could also be modified or extended to include copying to enable good practice continuity and disaster recovery. While this is a broad interpretation of the section, the key component is that it facilitates the lawful use of a work and has no independent economic significance.

36

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

Cloud computing is standard practice now and the Copyright Act should be amended so that copyright cannot be used to prevent a legitimate activity.

Universities New Zealand supports Internet New Zealand's submission on cloud computing and

refers MBIE to that submission.

37

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

Makerspaces are an emerging trend in libraries within universities, tertiary institutions and schools. The AUT Library Makerspace and the University of Auckland Unleash Space are spaces designed for students and staff to be creative and inspired by new and emerging technologies. Sessions are held by lecturers for students as an introduction to new technologies that could be incorporated into their coursework.

The technologies within Makerspaces can include anything from 3D scanning and printing, laser cutters, virtual reality, augmented reality headsets to low-tech technologies including sewing machines, fine art material and construction tools.

It is important that an updated Copyright Act is technology neutral to allow for these emerging and future technologies, while also allowing for the non-commercial use of new technologies within educational and creative spaces. This would enable further creativity providing net benefits to New Zealand (Objective 2) and provide clarity and certainty (Objective 3). The Canadian Copyright Act contains a non-commercial User Generated Content exception (29. 21) that legitimises these types of activity and future-proofs their Act as technologies change.

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?

While data itself is not protected by the Act, a compilation of data is. The lack of a specific exception makes it difficult for university researchers to use these new and emerging technologies and research techniques with any surety as to their legality, thus inhibiting innovation and beneficial research outputs. The UK now has a specific exception for text and data mining for non-commercial research. The Australian Productivity Commission report on Australia's IP regime recognised that a more flexible copyright regime in Australia would enable medical and scientific researchers to better utilise text and data mining. Jerome H. Reichman[†] and Ruth L. Okediji writing on science and copyright describe the issue:²¹

Information technology is transforming fields as diverse as molecular biology, especially genomics and proteomics, and conservation ecology, while spawning new fields, such as metagenomics and metabolomics. The combination of massive storage capacity, powerful data manipulation techniques, and graphical capabilities has revolutionized both how basic research is conducted and how the resulting knowledge is preserved and disseminated in nearly all fields of science. These methodologies have also helped to generate networked communities of users and collaborators, often working in dynamic knowledge hubs, whose interactive communications steer computational applications in potentially more fruitful directions and fill open repositories with new data and information.

Reichman and Okedji concluded that the increase in protections for copyright owners and the erosion of the public domain "impedes access to scientific data and literature, just at the time when developments in scientific research methods require the use of automated knowledge discovery tools that depend on unfettered access and re-use conditions for their successful applications"

The Hargreaves report gave the example of mining over a thousand journal articles from the first

²¹ Jerome H Reichman and Ruth L Okediji "When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale" (2012) 94 Minn L Rev 1362 at 1366.

half of the twentieth century that described malaria in indigenous peoples and soldiers, as well as details of therapeutic measures available at that period. Uncertainty about the legality of text mining at that time in the U.K. meant researchers could not digitally index or text mine sources that offered potentially significant insights for the development of methods for preventing and treating malaria today.

It is critical that text and datamining is not restricted to non-commercial uses if it is to have a benefit for the wider society.

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?

Fair dealing exceptions that cover parody and satire are currently missing from the Copyright Act 1994. This current situation favours large media companies while chilling the speech of citizens. The entertainment television series *The Jono & Ben Show* on TV3 is one example of a corporate entity using works in this manner.

University student union magazines are small-scale productions that turn out weekly print material. These often includes items of parody and satire, most likely with no thought given to copyright, which goes against Objective 3 "respect and integrity for the law".

Universities New Zealand supports the adoption of fair dealing for both parody and satire. We suggest that in considering implementation of such an exception that Australian law is considered rather than the narrow interpretation given to this exception in the US. See "Defining Parody and Satire: Australian copyright law and its new exception".²²

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?

Universities New Zealand recommends that an exception allowing the 'right to quote' be considered for inclusion in New Zealand's Copyright Act. Under the Berne Convention, of which New Zealand is a part of, Article 10 states:²³

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

We are aware that some publishers will not publish works that contain quotations, without written permission from the rights owners. This creates an enormous amount of work for both the author and the publisher, who may not hold the rights. Difficulty in finding the rights owner or a refusal of permission to publish quotations, can impact on the quality of a research publication. We have had one instance where a researcher contacted the University for permission to use a presentation that had been transcribed and made available online. The University did not own the rights, and the author was dead, it proved impossible to find the heir, although the author's publisher had contact details for the heir these were no longer current.

Universities New Zealand supports Te Papa's response to this question and highlights the framing of Article 10(1) as a required provision under the Berne Convention. Providing a fair quotation exception would be in line with Objective 2 of the Issues Paper as it would "permit reasonable access for use, adaptation and consumption, where exceptions to exclusive rights are likely to have

Condren, C., Davis, J.M., McCausland, S., & Phiddian, R.A., 2008 "Defining Parody and satire: Australian copyright law and its new exception" *Media and Arts Law Review*, 13(3), 273-292

²³ https://www.wipo.int/treaties/en/text.jsp?file_id=283698#P144_26032

net benefits for New Zealand.” Researchers would benefit from a similar exception to the UK with the use of thumbnails or snippets of works. A quotation exception would harmonise copyright law across jurisdictions which would mean that lectures created in the UK or US would not need to be edited of third party material before showing them in New Zealand.

Another advantage would be that a “right to quote” exception could include an allowance of a variety of works to be reviewed or critiqued at one time. If a fair dealing quotation was introduced then it would need to be format type and technology neutral to enable any future changes in technology and allow for the variety of transformative uses.

The UK Government has introduced a general quotation right in in Section 30(1ZA) of the Copyright Designs and Patents Act. The exception was introduced by the *Copyright and Rights in Performances (Quotation and Parody) Regulations 2014*²⁴.

Other comments

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.

University libraries rely very heavily on sections 51 – 53, each library relying on each exception multiple times a day.

S 53 allows Inter-Library Loans (ILL), which, again, are a fundamental feature of university libraries. The size and breadth of University library collections means they supply articles and other works to other libraries and their patrons. For example in 2018 one university library made 2704 requests for digitisations and supplied 3402 digitisations to other libraries. Due to the extremely broad and sometimes very specific nature of the research and teaching universities undertake, ILL are an important exception to ensure researchers are able to access the specialised content they require from other libraries. One undesirable outcome of ILL in the digital age is that, increasingly the vast majority of the works we provide to our patrons are now ‘accessed’ rather than owned, that is, under digital subscription licences, many of which prohibit ILL. This content is available in ‘packages’ of content and each of these has different terms of use, depending on the agreements with the suppliers. There is uncertainty in the libraries about what constitutes a ‘published edition’ in the context of these subscriptions packages and, as a result, at least one university library only exercises the rights in s 53 in relation to physical items. Therefore, as outlined above, although universities expend large sums on subscription access, much of this is now locked away from use under s 53.

Several exceptions include a requirement that copies made by libraries in supplying a copy must be destroyed within a reasonable timeframe. This is a frustration in cases where the same work may be requested multiple times over time, in particular theses. One library comments: “Currently approximately 50% of the thesis scans we create are deleted, as we are unable to get author permission to make them openly available in our repository. Over the period 2015 – 2017 we averaged 13.66 thesis copies per month. A thesis that can be fed into a document feeder for copying takes 3.5 hours to copy; some theses can’t go in the document feeder and have to be done by hand, taking between 8-12 hours depending on the number of pages. As a result some theses are scanned multiple times, this causes damage to the original archival copy and results in

²⁴ <http://www.legislation.gov.uk/ukpga/1988/48/section/30#commentary-key-f163b5fac876f89f6ad1ed2ba6635bba>

significant duplication of work for library staff.” Universities would argue that copies made under library exceptions could be kept under secure storage for future use: if a new request came in for the same item it should not matter that the copy was made for an earlier, separate request. It should only matter that the new request was legitimate under an exception. This could also translate to educational exceptions: as long a licence or exception allowed use then the administrative process of copying should not need to be repeated.

Uncertainty often arises because of inconsistencies in the scope of the exceptions. Inconsistencies include copying for the collections of other libraries under sections 54 and 56C. This exception seems only to apply to books, but section 55 (copying for preservation or replacement) seems to include any kind of work, even a computer program, which is specifically excluded from sections 52, 53 and 54. This sort of inconsistency makes it unnecessarily difficult for librarians to interpret and apply the exceptions available to them.

One example is the inability of university libraries to provide copies of a student thesis to another library for their collections under s 54. This is because this provision only allows copying of unpublished works for private study and research, not the collections of other libraries. Libraries may wish to create specialised research collections of which very little is available in formal publications. Theses are often sought for these collections and if students cannot be found and permission sought, these works cannot be provided. A specific example was a request from the University of the South Pacific requested copies of theses written by Tongan students who graduated from a NZ university, for a specialised collection of Tongan research. Copies were unable to be provided for the reasons stated above.

Uncertainty often arises because of inconsistencies in the scope of the exceptions. Inconsistencies include copying for the collections of other libraries under sections 54 and 56C. This exception seems only to apply to books, but section 55 (copying for preservation or replacement) seems to include any kind of work, even a computer program, which is specifically excluded from sections 52, 53 and 54. This sort of inconsistency makes it unnecessarily difficult for librarians to interpret and apply the exceptions available to them.

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?

The Copyright Act does not provide enough flexibility for university archives and libraries to make their digital collections available to the public.

Not all institutions will take the risk of making their collections available. One university copyright officer recalled speaking to library colleagues about copyright barriers to digitisation for the open web and it seems that uncertainty around IP is a big disincentive and a lot of our cultural and scientific heritage is “locked up in dusty libraries” because of this. The specific example was a reluctance to use illustrations from old (1940s-50s and later) issues of New Zealand dairy exporter for an online collection of documents on agricultural technology because of copyright concerns. The economic value of such works would be minimal and the time involved in obtaining permission, even if the rights owner could be found would make the project unaffordable.

There is another (and much bigger), set of unquantifiable opportunity costs arising from the inhibiting effect of copyright and uncertainty around copyright. These costs fall most directly in the areas of teaching and research but there is a wider deleterious effect on our national culture as a whole. This doesn’t just relate to orphaned works but also a more important body of out of print works that will be protected by copyright for many years to come.

Archiving material of importance to local communities is a vital function of some of the libraries

and archives maintained by universities. Born digital content is a huge gap for these institutions at present. For example, the Hocken Library, attached to the University of Otago, is a nationally significant research archive, part of its mission being to preserve local material of cultural and historical significance. One such example is preserving music and other works related to the 'Dunedin Sound': however many Dunedin bands now only release material on digital platforms and thus the Hocken is unable to archive such material and make it available to future researchers.

Universities New Zealand supports LIANZA and The National Library of New Zealand's response to this question in their respective submissions.

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?

The Copyright Act does not provide flexibility for libraries and archives to facilitate mass digitisation projects. While university can preserve items that are in its collections if the requirements of s 55(3) are met, the decision to make these publicly available is in part reliant on the fact the Copyright Act does not have a statutory damages requirement. The absence of an ability for a rights owner to claim statutory damages is one factor which is considered in the risk assessment of whether or not to make collections available to the public. Any introduction of statutory damages without a safe harbour for cultural institutions and universities to safely digitise and make their content available would in effect lock up many of the collections that university libraries currently make available

Universities New Zealand support the LIANZA submission on this issue.

44

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?

Universities New Zealand supports the LIANZA submission on this issue.

45

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?

New Zealand Universities support the LIANZA submission on improving access to the National Libraries collections for all New Zealanders unable to visit the library in person.

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?

Universities New Zealand support LIANZA and Te Papa's response to this question in regards to broadening the library and archive exceptions to include museums and galleries.

This would ensure more content is in the public domain and in turn would benefit researchers and society as a whole.

Other comments

Does the Copyright Act provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?

Technology has utterly transformed learning since the commencement of the 1994 Act. The Act is outdated and fails to deliver the flexibility universities for the blended learning environment of the digital age in that:

1. The current exceptions are complex and rigid and do not allow for anything that falls outside its tightly-defined scenarios. There should be provision for reasonable copying, in line with Objective 2 of the Issues Paper.
2. Exceptions should be purpose-based, not strictly defined by who is doing the copying, for whom, and by what means.
 - a. Almost all university teaching is now delivered in part or wholly using digital technologies; universities now prefer digital media for third-party content we provide to our students, the vast majority of which is licensed material, with universities spending vast sums on the acquisition of – or access to – resources. However, some teaching still conforms to more traditional methods. Therefore exceptions should be technology neutral to so that the classroom and the digital learning space are governed by the same rules, freeing educators to use whatever they consider the best means of achieving their pedagogical aims.
 - b. The traditional roles of ‘instructor’ and ‘student’ are increasingly invalid. The Act conceives of education as a one-way communication of information (and therefore copies of that information) from the instructor to the student but learning is now multi-dimensional, shared and co-created.
3. Universities are integral to New Zealand’s intellectual, economic, social and cultural well-being. We need exceptions that are flexible enough to allow reasonable reuse of materials that have been licensed or used under exception to fulfil our core functions: to undertake “a wide diversity of teaching and research, especially at a higher level, that maintains, advances, disseminates, and assists the application of, knowledge, develops intellectual independence, and promotes community learning” (Education Act, 162 (4) (b) (iii)). Currently the Act impedes these public good activities by treating education as a closed activity inside classrooms and password-protected systems.

Teaching and learning has been transformed by new technologies where the classroom and the digital space are one

Technology has transformed learning at an incredible pace since the commencement of the 1994 Act and universities are at the sharp point of this change. The ways in which we teach vary incredibly, hardly surprising when you consider the immense scale of our teaching activities. One mid-sized university has calculated that in 2018 there were 75,336 lectures, tutorials and practical laboratories, workshops, film screenings, computer labs and seminars. Across the sector there are thousands of teaching staff and countless platforms and tools available to them to teach our learners. All our teachers – and our 170,000+ students – are creating and sharing copyright works, their own and those of third parties.

The most fundamental development, in copyright terms, has been Learning Management Systems (LMS), which have been in use since the late 1990s in New Zealand universities and have become ubiquitous. The majority of university teachers now combine classroom teaching with the Learning Management System (LMS), sometimes referred to as 'blended learning.'²⁵ That is, there is face-to-face teaching combined with use of an electronic platform through which students can access things like course documentation, slides used by lecturers, links to or copies of readings, recordings of lectures, etc. Since 2007 when the Act was last reviewed, in some cases the way students are taught has literally been turned upside by the 'flipped' classroom, where the lecture may be pre-recorded and made available to students in the virtual classroom to watch prior to class, with class time devoted to group work, solving problems using the content delivered prior to the lecture. Also since 2007, teaching staff can record their teaching activities at the flick of a switch. Most lectures are now recorded but, while the Act allows various kinds of copying (e.g. copying, playing, showing or performing of works in the classroom), those exceptions do not cover by the education exceptions. This means content has to be removed before the lectures or lecture slides can be made available to students on the LMS.

The LMS increases student engagement with the course content and is an invaluable teaching and learning tool. Given that all course content can be made available for access at any time during the period of enrolment, it also helps students catch up if they miss a lecture and can be an invaluable review tool for students for whom English is not their first language or for those with learning or other disabilities. These issues will affect any educational institution, not only universities.

To demonstrate the scale and ubiquity of LMS use one of our mid-sized universities has collated statistics from its LMS over a twelve-month period:

- 7 million LMS sessions (i.e. times users logged in).
- Access is from all over the world. Aside from NZ and Australia, there is use from North America, Western Europe, China, India and the Middle East and even small amounts of access from parts of Africa, and South America.
- Use by time of day shows 24/7 usage. Naturally normal business hours show the heaviest use but the evening hours (6pm to midnight) show very high levels of use also.
- About 14000 students (about three-quarters of the total number) viewed recorded lectures, labs, seminars and tutorials.
- The total number of views of these recordings was around 1 million.

This is borne out by a 2019 UK-based study of Australian and New Zealand students, which found "Around nine in ten [learners] accessed lecture notes or recordings weekly."²⁶

LMSs are complex IT solutions that provide access only to students enrolled in the relevant university course and involve many interdependent IT systems, such as student enrolment systems, authentication systems and library systems. Copyright is one of the main reasons such a complex

²⁵ "Blended learning has been a feature of higher education since the late 1990s. It has grown in popularity during the intervening years ...with ever-increasing numbers of higher education institutions offering at least some of their provision in blended mode. Its ubiquity within higher education practice has led some to describe it as the 'new normal'. Smith, K. & Hill, J. (2019). 'Defining the nature of blended learning through its depiction in current research,' *Higher Education Research & Development*, 38:2, 383-397, DOI: 10.1080/07294360.2018.1517732

²⁶ Beetham, Helen, Newman, Tabettha & Knight, Sarah. (2019). *Digital experience insights survey 2018: findings from Australian and New Zealand university students*: p. 6. Accessed 3 April 2019: <http://repository.jisc.ac.uk/7202/1/digital-experience-insights-survey-anz-2018.pdf>

set of systems is required in that many of our licensing agreements require that resources are provided only to the students while enrolled in the relevant course, that is, they can not necessarily access resources they received in a course in their previous period of enrolment, even though a university degree will typically involve several years of study that progressively build upon the learning of each year.

Distance learning is another consideration, where there is normally no requirement for students to be physically on-campus. The Act contains references to 'correspondence' teaching, at ss 45 and 177, as well as the Interpretation section for 'instruction,' which may be "either in person or by correspondence." This is practised by all universities in New Zealand to a greater or lesser extent. Massey University is the largest provider of distance learning, in 2018 providing 1389 distance courses of 4506 in total (or 31%). These days, of course, this is achieved not by mail or broadcast television but by live teaching via video or audio conference software or via recorded lessons. In distance courses there may be no face-to-face teaching at all; or it may be largely distance-based but include short-course elements where teachers and student meet for days or a week. We note that there are what are officially on-campus courses where it is possible to complete the course without physical attendance at lectures, rendering the distinction less relevant in the digital age. It is true, however, that the use of print course packs of readings is still used in distance teaching more than in on-campus learning.

The point is: teaching is teaching, however it is delivered. Therefore the exceptions for education should be purpose-based as opposed to specifying delivery mechanisms or media format or whether 'secondary' copies are communicated by technological processes that facilitate modern teaching practices, such as live streaming or using a recordings for our students anywhere in the world. We believe if a use is acceptable in a face-to-face situation then it should be equally acceptable in the digital environment and vice versa.

Educational exceptions imagine an outdated model of teaching and learning that restricts universities' pursuit of our core activities

The Issues Paper states:

The [educational] exceptions are intended to allow the use of copyright works to facilitate teaching, learning and the creation of new knowledge, while having due regard to the rights of copyright owners. (para. 340)

Universities New Zealand concurs that the educational exceptions are vital to two of our core activities, namely teaching and learning. We fail to see, however, how the exceptions, as currently framed, facilitate the creation of new knowledge and would highlight this as a key problem that revised exceptions should address. The exceptions solely deal with copying by instructors in the classroom or playing or performances of others' works. They fail to address what has become a key element of learning in the twenty-first century: sharing parts of, building upon, adapting, remixing and transforming others' work for new purposes and via new formats and innovative delivery systems. It is not only teachers who do this, of course, but students too and even the communities with whom we now more commonly engage with. The vast majority of this activity takes place in restricted environments and with resources used under licences or exceptions or that has been made freely available on the web, yet communication of such works beyond the first copy or communication may not be allowed by current legislation.

The wording of s 44 is problematic in the digital age not only because its wording is outdated but also we believe that relying solely on enumerated exceptions will prevent the adoption of new technologies as they arise. Universities have advocated for the enactment of broad, principle-based exceptions to take account of changes in technology since at least 1989 when the 1962 Act was reviewed. The failure to heed this has meant the current education exceptions in the Act no

longer suffice.

A key weakness in the way the exceptions are currently framed is that they focus on who is doing the copying or by what medium. Instructors are clearly imagined to be the only ones doing any copying and learners are passive receivers of material.

- s 44 (1) and (2) allow copying for instruction when “the copying is done by or on behalf of the person who is to give, or who is giving, a lesson at an educational establishment” - thus excluding any learner engaged with our teaching, nor does specifically address use for a research activity or assessment.
- s 44 (3) specifies that “the copying is done by or on behalf of an educational establishment”; s 48 repeats this in relation to copying communication works “by or on behalf of an educational establishment”
- s 44A applies to the activities of an “educational establishment”
- s 45 *does* allow learners to exercise the same rights as an instructor but of course this section is very limited in scope, applying only to very specific learning contexts (“where the lesson is on how to make films or film soundtracks” and where the lesson ...relates to the learning of a language; or...is conducted by correspondence”

Universities New Zealand contend that the *purpose* of doing the copying should be the focus, i.e. an educational purpose, regardless of whether this person is, say, a school student joining a university’s community outreach activity or a university student who wants to share his or her work whether the activity is strictly locked down within a secure, password-protected authentication mechanism that gets in the way of the learning experience and of learners’ ability to access these materials at a later date.

If any exceptions do facilitate the creation of new knowledge these would be s 42 and 43 for fair dealing for criticism and review and for the purposes of research. These at least allow *productive* use of others’ works in limited ways but may not apply to the learning context where multiple learners will need access to a work for the purposes of research or learning. Sections 44-49 do not mention the word ‘research’ despite this being one of the core activities of universities and being fundamental to the activities of our students.

Students now commonly create course content or material that they want to share online. Many student collaborations that previously took place face-to-face now happen in the digital space. For example: students posting ideas and work on class projects on the LMS, or collaborating via email, through class networks set up on social media, or via Skype/Facettime/Zoom etc. The source of student learning is no longer just the lecturer: students themselves are sharing and collaborating with their fellow students. Students as teachers can be more effective in conveying ideas and concepts to fellow students. This is evidenced by research on the flipped classroom model of teaching. An added complication is that, increasingly, students may want to share this work beyond the confines of a password-protected LMS or other environment that is restricted to the learners themselves. Direct engagement with external people, groups or communities may in fact be directly relevant to the students’ courses or learning outcomes and one of the statutory responsibilities of universities under the Education Act.

Examples:

- A lecturer sets an assignment for students in which they are asked to select examples using photographic images, plans, maps and drawings, which can be sourced from a number of existing resources, which may or may not be protected by copyright. The students are then asked to upload the completed projects into the password protected learning management system as a resource for the whole class. The work will have been copied by the student under either the research and private study provisions or the examination provisions in the Act, but this only allows a single copy to be made and these copies cannot be communicated to others.
- A lecturer in a focus group expressed concern about how to produce work, and also encourage their

students, to produce work that is contemporary, because so much contemporary work requires sampling, remixing, quotation, referencing. Licensing is not practical or affordable. The purpose is clearly educational in such instances.

- Another lecturer expressed concern that students are being penalized because they cannot legally participate in cultural commentary that is routinely practiced globally— commenting immediately upon current culture, e.g. Lorde, with fan remix, meme, or other kind of commentary that does not look like traditional criticism.

Moreover, universities are increasingly outward-facing. The development of social media platforms and technology has made it is easier for students and academics to engage with their peers, teachers, subject-matter experts and the community-at-large. The focus of teaching and research is also changing, with emphasis now on “the need for collaboration and iteration across various boundaries: between different disciplines and fields, between different sites of knowledge production and use, between practitioners and academics and between the users and creators of advanced knowledge.”²⁷ An example, this year one initiative the University of Auckland has undertaken is STEM online. Because there is a critical shortage of STEM teachers in post primary schools, many students, particularly Maori and Pacifica are coming to university without the skills necessary to succeed. The University is now offering a series of online courses which are free for all secondary schools to support teachers who are not subject specialists to teach Mathematics and Physics. This will be extended to other STEM subjects. This will enable these students to meet the standards required for NCEA and success at University without having to expend their precious first year of free tertiary education on a foundation course. Once again the education exceptions do not cover this content as it is delivered outside the institution despite its clear educational purpose. This is one example: there are countless similar initiatives across the sector as we engage with iwi, community groups, government agencies, health professionals, district health boards, city councils, GLAM institutions, businesses, industry, etc. And, of course, universities host researchers, visitors and dignitaries who speak on our campuses but do not benefit from exceptions as they are currently framed.

In this respect the Copyright Acts is a major barrier for these public good, non-classroom activities, even though they are clearly part of the core functions of a university. This excerpt from the annual report of one university demonstrates the huge volume and diversity of activities undertaken by our staff, our communities and by guests that would have open to other people than just staff and formally enrolled students: ²⁸

...more than 700 continuing education²⁹ events were held in total, including 195 open lectures, 362 seminars, 21 inaugural professorial lectures, forty-three short courses, 35 symposia and 16 conferences. Forty-nine performances were given, including three concerts.

Distinguished visitors to the campus included ...one of the world’s foremost historians, Professor Sir Richard J. Evans (University of Cambridge) who addressed audiences in Dunedin, Wellington and Auckland about the truths and myths surrounding the Holocaust and World War 2. Lectures were also delivered by ...the Deputy Governor of the Reserve Bank Mr Geoff Bascand and internationally respected cancer specialist Professor Sir Murray Brennan

As things stand however, universities may not use certain materials when there is a ‘public’

²⁷ Mary Henkel, “Policy Change and the Challenge to Academic Identities” in J. Enders et al. (eds.) *The Changing Face of Academic Life*, Palgrave Macmillan 2009

²⁸ University of Otago. (2018). *Annual Report 2017*: p. 43. Retrieved from: <http://ebooks.norcross.co.nz/ou-annual-report-2017-150/44/>

²⁹ “Continuing Education is all forms of is non-credit teaching and learning activity which makes available the fruits of academic scholarship for inquiring minds within and beyond the university community, and which fosters discussion on matters of public good in the University’s role as critic and conscience of society.” University of Otago website: <https://www.otago.ac.nz/continuingeducation/for-staff/index.html>. Accessed 3 April 2019.

audience, even where the purpose is still clearly educational and part of our core activities – for example, provide copies of a research article relevant to a talk on cancer research, include images or video content about a biological process to explain because licences or exceptions are framed as classroom-based or needing to be made available only by authentication systems. A further frustration is that we can increase the value of such public good events by recording them and making them available on our websites. However, some universities remove content from presentations or talks (damaging their utility and integrity) before they can be posted online due to third-party content being included, even where that content was licensed or the purpose may well be criticism or review due to concerns that the licence or fair dealing may have covered the original use but not the secondary one of the university making the recording available.

An example of a technical restriction that the Act imposes on educational organisations unnecessarily is contained within s 44A. This exception is extremely useful to universities, allowing us to “store” a work from a “website or other electronic retrieval system”. As we evidence below, universities rely on this exception multiple times a day. The exception is important because:

- websites sometimes become completely unavailable;
- URLs change when websites are restructured (e.g. government department websites are particularly prone to this);
- websites may change over and a version from a particular point in time may be essential to the teaching point; and
- we may have had legal access to a file or web page in the past but no longer do, though the teaching point or critique of the material may still be essential to a course.

However, the provision restricts storage of such material to a password-protected system, i.e. provision to students only in digital form. But it may be that a lecturer wishes to provide such material in print (e.g. for a group assignment in class; as part of a course pack for distance students; for students in regions without reliable internet access, e.g. certain Pacific islands; for students with print disabilities, etc.). But this technological restriction gets in the way of providing equitable access or teaching pedagogy. One lecturer provided the following concrete example: “I have a specific class where I provide students readings (some academic and some from news websites) in class and then get them to do some particular activities using the papers. I don’t want them to have access to the readings prior to class, hence me bringing them along.”

The implication of 44A as it stands is it imagines providing an electronic copy via a password-protected system to be more secure than providing someone with a print copy. Surely the principle should be: if we have legal access to a website and we think it's of educational use to us we can provide it to students by the most appropriate means to achieve the educational goal. It shouldn't matter how we distribute it and, regardless, the exception should not be concerned with trying to ensure compliance at a point after which the exception is no longer relevant. In other words the exception covers our copying but any copying after that would require a different exception. The effect of technical restrictions³⁰ in the exception is to strangle certain pedagogical approaches and should be removed by a principled approach that a website can be provided to learners for educational purposes as long as it is relevant to their learning.

Teaching and learning is no longer limited to the classroom or to formally-enrolled students. The exceptions should be made more flexible to allow core activities of universities undertaken for the public good and to achieve the best possible educational outcomes for our students and our broader communities.

³⁰ We also note that the requirement in s 44A to *delete* content after is no longer required is technically difficult to achieve. Archives of old courses are kept by institutions for records purposes but are no longer *accessible* via the LMS once a course has finished. The digital files are only accessible to system administrators.

New technologies have transformed the way we provide students with resources

A very significant change has occurred in the way universities acquire the resources we need for our teaching and research purposes since the commencement of the current Act. Prior to the development of the digital technologies we now rely on our libraries acquired 'real' books only and there were no blanket educational licences or licences for copyright or for digital subscription access to content.

As detailed above, the LMS has transformed the way in which we engage with our learners, including the way we provide resources. In general, the current education exceptions clearly imagine a model where sets of readings are provided to students in printed 'course packs'. The following figures from one university's print shop demonstrate the scale of change: print distribution has been steadily declining and this is expected to continue.

In contrast, in 2018 this same university had over 800 reading lists in its electronic system for providing access to readings for students. Indeed some universities no longer support distribution of printed packs for a multitude of reasons. For one, students expect to have everything available to them in electronic form; secondly, the cost of electronic distribution is less; thirdly, many university libraries have a 'digital first' policy, meaning if something is available electronically as well as in print then the electronic form is preferred; lastly, many of the electronic resources we subscribe to prohibit distribution in electronic form.

As indicated above in our discussion of the technical restrictions imposed by s 44A, it is still vital that exceptions allow distribution by the best means possible for the educational approach being taken. Some lecturers refer, for many different reasons (it aids in-depth reading, allows highlighting or notations, getting around technological difficulties, etc.). That is, we believe as long as the purpose is educational and distribution is appropriately restricted to relevant learners then the means by which content is delivered should not matter.

In terms of licensing, the universities are each party to three blanket licence agreements: with Copyright Licensing New Zealand (CLNZ), covering print-medium literary works; with APRA/AMCOS, covering music and sound recordings; and with Screenrights, covering broadcast and communicated audio-visual material. The annual cost for each licence is determined by a fee for each on Effective Full-Time Student (EFTS) enrolment. In 2017, for example, a total of \$3.7m was paid to CLNZ, APRA/AMCOS and Screenrights for educational copying. These agreements require various commitments on the part of universities to develop processes for, devote staffing resources to and have in place software systems to ensure staff comply with the licences and to monitor copying done in reliance of the licence terms and, finally, report on usage.

In 2019 Digital subscription licences are the predominant means by which universities access the published research we need to teach and undertake research. The Consortium of New Zealand University Libraries (CONZUL) collates information about the spending of our eight universities on such resources. In 2017 we spent \$68.5 million on electronic resources,³¹ which includes journals, books, reference materials, audio-visual materials, etc. The total collection spend – that is, also including physical items, such as books, print magazines/periodicals and audio-visual resources on physical media – was approximately \$75.4 million. In other words, over 90% of our library budget for acquisition and access is spent on electronic resources. Access to these resources is vital not only to teaching but also for our researchers to be able to access the current research in their respective disciplines. Clearly the amount of expenditure is prohibitive, one effect of which is that universities with ever decreasing library budgets must choose which resources we can afford to

³¹ Data provided by the Consortium of New Zealand University Libraries (CONZUL).

provide access to and the rates of access for our eight universities are significantly different.³² We might also be note that other tertiary organisations are able to afford even less access. This is a significant risk to the New Zealand tertiary sector as prices continue to rise at rates much higher than inflation.³³ One mitigation against this risk for all tertiary education organisations in New Zealand is s 53 that provides for Inter-Library Loans (ILL). We will detail the reliance of our sector and associated organisations, including tertiary organisations and government agencies, on the ILL service for access to current research.

As a result, any given reading list (of which there will be many hundreds in any given teaching period in each university) is able to be provided to students via a patchwork of licences and exceptions. In some cases we may only link to material, providing access via password authentication systems and content controlled by TPMs, and in others we may literally copy the content. The below resource list is fictional but representative and demonstrates the wide variety of source materials we habitually provide to our students and the complexity of the licences and exceptions. While many of our resource lists for students are made up of the traditional book and periodical ‘readings’, increasingly our teaching staff use new media, such as video, podcasts, blogs, social media content, and the like.

Reading	Licence or exception	Notes
Article from academic journal available only via subscription	Library subscription	Many licences allow licensees to link only, so the article could not be provided in print or copied in the LMS The use of the journal article is determined by the licence – these vary as to whether we can use the article in a printed course pack, put a PDF in an LMS. Some only allow us to use links in the LMS.
Article from open access academic journal available online	Open access licence	Could link or copy under open licence
Article from a print journal not available electronically	CLNZ licence (or possibly s 44 (3) (f) if less than 3 pages)	Can provide to students in print or electronically
Chapter from a published book	CLNZ licence (or possibly s 44 (3) (f) if less than 3 pages)	Can provide to students in print or electronically. If a book is not held by a library we rely on Inter-Library Loan to get a physical copy of the book to copy from.
Chapter from an e-book	Library subscription	Access to the amount used will vary according to the subscription model. It is common, for example, for students to only be allowed to print 20% of an eBook, which is managed by TPMs.
New Zealand newspaper article (print)	CLNZ licence (or possibly s 44 (3) (f) if less than 3 pages)	

³² Radio New Zealand (25 September 2014). *Research publishers costing taxpayers*. Accessed 3 April 3 2019: <https://www.radionz.co.nz/news/national/255421/research-publishers-costing-taxpayers>. The 2013 total figure reported of \$51.1m paid by universities also demonstrates the increase in subscription costs over the last five years.

³³ Van Noorden, Richard (2013). *Open access: The true cost of science publishing*. Nature 495, 426–429. doi:10.1038/495426a

Online overseas newspaper	No licence available, s 44A exception	Linking to an online resource is possible but news content often changes or URLs are altered so s 44A allows us to record a particular instance in time.
Pamphlet produced by NZ government agency in print	No licence or exception	S 44 (3) would not apply because we would be copying more than 50% of the whole. A single copy could be made under 44 (1) but this would not allow distribution via the LMS. Possibly available under NZGOAL CC-BY licence, but this is not clear, particularly for older works.
Video - Online video that is freely accessible	Screenrights licence, terms of use on the page or s 44A.	
Video excerpt - Commercial DVD	No licence or exception; possible under an education licensed copy, but T&C not clear as generally drafted for fair use jurisdiction library subscription	A commercial DVD can be played in class but not otherwise copied, unless the class is on making films. Some commercial content is available via Library subscriptions but this depends on availability. Playing short excerpts in class requires these to be copied to a portable device for playing on the PCs in lecture theatres. This also restricts our ability to record classes where commercial DVDs were used.
Video excerpt - Documentary available on a streaming service	No licence or exception (Covered by the Screenrights licence)	If the content was available via a TV on demand service we could also rely on s 44A. Linking to this content not available to enrolled students accessing content from out of New Zealand
Podcast	s 44A	

This is complicated and beyond the average member of teaching staff to understand copyright at this level. Universities take copyright compliance very seriously, with specialised roles in place to advise staff and ensure legislation and licence obligations are adhered to. Some universities have estimated costs in the hundreds of thousands of dollars per annum. This takes the form of specialist copyright advisors, library staff, training and education programmes, software and processes for monitoring IT systems, and specialised reading lists software systems. Time spent by academic staff ensuring compliance was not considered as part of these calculations due to the thousands of staff involved, who will each expend different levels of effort on compliance depending on the nature of their teaching and research.

To demonstrate the level of reliance on licensing, one university has analysed its materials used for teaching purposes in its electronic reading list software for 2017, finding the following:

Licence or exception used	Amount in reading lists*
Licensed use (subscription or blanket, may be copies or links to source)	74.80%
Openly accessible on web	20.70%
Copyright Act exception	3.30%
Permission or transactional licence	0.40%
No copyright	0.30%

* Total number of readings: 23,502.

Further analysis suggests this example is broadly similar across the eight universities. This clearly demonstrates that universities' reliance on licences is vital, also reflected in the commensurate spending by universities on licensed material. Although reliance on the Act is small by comparison to licenced or freely accessible works – noting the total number of readings is large, 23,502 – the seemingly small 3.3% of the total still represents 775 occasions during the year or around 3 times per working day at one university. The large majority of these exceptions will rely on s 44A, though detailed analysis of this subset has not been possible at this stage.

Universities are arguing for the adoption of open-ended exceptions for education and research in this submission. One approach to resolving the issue is that taken in Canada, adding 'education' to one of the types of fair dealing allowed under s 29 of their Copyright Act.³⁴ We do not envisage that adoption of such measures would alter the proportions above, rather that they would allow us to do things that we are currently simply not able to do but that would fall under the 'reasonable' criterion set out in the second objective in the Issues Paper. The addition of this exception as has no impact on publishers in Canada. See Michael Geist's research on this issue "Inside Views: Why Fair Dealing Is Not Destroying Canada Publishing"³⁵

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Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?

Universities New Zealand refute the comments in paragraph 357 (that is, that s 44(1) is too broad in allowing a single copy to be made for the purposes of instruction). We see no evidence that lecturers are copying whole books as the library acquisition policies enable the purchase of specific books required by academics at their request. Where it is valuable is copying and downloading of whole works such as images or poems, which lectures and teachers may use in their presentations. These are copied from a wide range of sources and some will be copied under licence and others will be from sources for which there are no licences and for which obtaining consent is difficult and labour intensive. This would result in less than optimum content being used.

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Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?

The narrowness of the current exceptions for education and the outdated 'instruction' model envisaged by the language of the Act creates numerous problems for universities.

Copyright acts as a barrier to making lecture slides and lecture recordings available on the LMS

As evidenced above, it is extremely common practice for lecturers to provide students with resources used in-class via the LMS. This is most often slides used in lecture presentations but universities now also have automated systems for making audio or video recordings of lectures, where lecturers simply click a button to record and then automatically post to the LMS afterwards. While exceptions currently allow use of some materials in slides and in the classroom they do not cover making these available in the LMS.

The use of third party copyright works in slides that are shown only in the lecture are covered by the s44(1) exception that allows a single copy to be made for use in teaching. Slides are tailored by each lecturer for each class and may contain several or many third-party works -- usually from many different sources -- for illustrative, review or critique purposes, though the lecturer's own intellectual property will be the defining feature in terms of content and structure of ideas.

³⁴ "Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright." Copyright Act of Canada 1985.

³⁵ Michael Geist, "Why Fair Dealing Is Not Destroying Canada Publishing" *Intellectual Property Watch* 25 July 2014 <https://www.ip-watch.org/2017/07/25/fair-dealing-not-destroying-canada-publishing/>

However, the exception does not apply when the slides or lecture recordings are posted on the LMS. s 44(1) does not provide for audio or video works so no content that would be able to be played in class could be included in the recording.

Students now expect lectures to be recorded and uploaded to the LMS. One university reports that, in 2016, 7661 lectures were recorded and that the total number of times the lecture recordings were accessed by students was 1.14 million. The recording of lectures is a valuable educational resource. It allows an audio-visual presentation of material to students who are unable to attend a lecture. It is also a valuable revision tool (particularly for those with disabilities, who have English as second language or for all students revising difficult or new concepts), and is well utilised before exam periods. Many students struggle to find affordable accommodation near to some of the city-located university campuses, and incur significant transportation costs to attend lectures. Many of these students rely on lecture recordings to save on transportation costs. In addition, most students work one and often two jobs and cannot always attend lectures.

The copyright issue is that although lecturers do not need to check copyright compliance of slides in order to show them in the lecture, they do need to check these prior to posting the slides or the lecture recording on the LMS. This means they may need to redact certain third party content from the slides (and or the lecture recording) prior to posting on the LMS. The scale of this incredibly time consuming task cannot be overstated: each university will have tens-of-thousands of teaching activities in a year and the use we have demonstrated by students of the LMS demonstrates their value.

Example:

An academic produces a paper using video clips to demonstrate a point he's making. He puts it on the LMS, but the clips have had to be removed for copyright reasons. The content he's pointing to is not there. So when students revise, they want to see the clips. If students can't access the content they look for alternative sources and this is often pirated content.

Lecture recording is so useful to students that it can influence which courses students enrol in. However, where content has had to be removed because the exception does not permit multiple copying, those students relying on accessing content remotely are unfairly disadvantaged. This is despite the fact that access to content provided in the LMS, is limited to those enrolled in the course.

Examples:

- One lecturer commented, "We routinely use lecture theatre recordings at stage 1 and these are so useful for the students that many in the department have decided to use these at stage 2 and 3 level, which has not been done previously. This is dependent on all copyright visual material being edited out before the recording is able to be placed on the LMS".
- One university reported that many students are employed on zero hour contracts, this means that they may be given half an hour's notice to be on the job, whether or not this clashes with lectures. By not accepting the work offered they risk losing their means of livelihood. Lecture recordings enable these students to retain their employment without compromising their studies too much.

As we have argued above under Q47, universities contend that such secondary copies of material that is legally used in the classroom should be permitted in the LMS and in relation to our public good activities.

While the LMS is a useful tool it does impose restrictions on how courses may be delivered. Access to courses is controlled by complex internal systems to ensure that only students enrolled in the relevant paper have access to content between certain dates. It also puts technological barriers in between the student and course content. For this reason, lecturers are looking for alternative means of delivering content to students.

Examples:

- From a lecturer: as teaching staff we might load screenshots, videos or images on a portable device and then make the files unlisted, i.e. non-public, but provide access to students with a URL to the content which is stored on the web, not actually behind a password-protected system. This content is only accessible to the class using a specific URL but students could potentially forward the link to other contacts or post it on social media (though this would breach the terms they sign up to on enrolment). The content might be stored in Google Docs or LinkedIn and have a URL that links it back to a university LMS. This type of teaching tool is becoming more prevalent, but copyright compliance limits how this technology can be adopted and developed for educational purposes.
- One university mounted a 'winter school', specifically designed to encourage enrolment in a short, three-week teaching period from Northern hemisphere students during their summer break. This was in line with university and New Zealand Government strategic imperatives to increase enrolment by international students. Teaching staff wished to provide access to readings prior to students' arrival but, due to the restrictions of copyright and enrolment within the specific dates, this was not possible, as the learners were not yet formally university students with access to the resources required, even though they would be paying standard fees and formally-enrolled in due course. This can affect any course with high reading requirements that wishes to make materials available to students earlier.
- One university provides training to small groups of health professionals that is vital for the development of the New Zealand health workforce. This is often in the form of short courses to small groups of students (numbering in the 10s or 20s). These learners are not eligible for access to electronic resources as they are not formally enrolled, meaning not only that they can't access content behind password-authentication systems but also that many of our electronic access agreements prohibit provision of resources to non-students. Clearly copying relevant readings is reasonable: the purpose is educational, it benefits the New Zealand health workforce, the group of students is small, and the university has licensed the materials in question, just not for this specific purpose. Yet there is no exception that would allow a test of 'reasonableness' to provide these students with the resources they need.

Narrow exceptions and licensing gaps prevent universities from making reasonable use of important and relevant work

The following list demonstrates further gaps for universities under the current regime, where licences are not available and/or exceptions are too specific.

1. Again the way exceptions are constructed imagines an outdated model of teaching. For example, the 3%/3 pages exception (s 44 (3)) includes the stipulation that an educational organisation cannot copy from the same work within 14 days. This clearly imagines the time when there was scarcity of physical copies, with readings being given to students in print. However, in the digital age copies can be made available continuously for the relevant teaching period via the LMS. This means either we can only rely on this exception once in any teaching period in one course across a whole university or it requires careful management of the copies, i.e. posting a copy in one course, ensuring no other course uses that work, removing the first copy when it is no longer needed, waiting 14 days and then posting another extract. Of course, the students might then require all of the extracts for exam revision. The point of this exception is to allow small extracts to be copied without the need for a licence but does not work with digital delivery methods and, moreover, the exception is impractical to manage in a large organisation with thousands of employees.
2. It is unclear whether illustrative uses would be covered by fair dealing for the purposes of review under s 42. For example, in lecture slides a physiology lecturer might include a picture of a lung next to some information about lungs. The use is not research/private study; it is not criticism or review of the image itself. 44 (1) would cover the use in the slide as a single copy for use in the course of instruction. But now students expect that we will make the slides available in the LMS, where the fair dealing argument becomes problematic. And, as discussed above, 44 (1) does not cover video or audio works and therefore fair dealing is the only possible applicable exception to cover *copying* of such works whether to present these in class or to post on the LMS.

3. Making printed sheet music available to students is problematic. Copyright Licensing Limited (CLL) and APRA/AMCOS have been unable to secure the rights to provide the universities with a licence covering this. As such, the universities are only able to copy printed sheet music within the very restricted limits of s 44(3)-(7) exception. The 'no more than 50% of the whole work' limitation means that only half a music score can be copied, unless only a single copy is required (s 44(1)). While in some cases it is possible to acquire specific licences, in general this can be time consuming and costly, meaning transactional licences are not pursued due to lack of resources and students miss out. In other cases, rights holders cannot be located, are unresponsive, or unwilling to deal with one-off licensing arrangements that provide little return for time involved in processing the transaction.
4. Increasingly teaching and research materials are available in electronic form only, such as ebooks or online PDF documents. Some of this has no option for licensing and we have no print version to copy from under the CLNZ licence. Some are available for purchase in electronic form but only on the basis of an individual licence. Thus the only exception that would allow us to copy any part of such a work for teaching purposes is 44(3), thus limiting us to 3%/3 pages. Similar to the sheet music example, licences can sometimes be an option but the same issues apply in that licences sometimes simply cannot be obtained.
5. Similarly, increasingly some content is produced and available only on commercial streaming services. We can copy broadcast media under the Screenrights licence and we have licences for video services through our libraries like Kanopy or Alexander Street Press. But new delivery mechanisms, such as streaming services like Lightbox or Netflix may not be able to be copied under these licences or subscriptions. It is uncertain whether we could apply 44A to copy something from a website (i.e. directly from the service) and the terms of use for these services are individual and cannot be purchased for institutional access. We might be able to rely on fair dealing for excerpts that were being specifically critiqued but this would be limited in scope, again an issue when these excerpts are re-copied in slides or lecture recordings in the LMS.
6. Non-broadcast/Non-communicated video: the universities' Screenrights licence does not cover copying from resources like commercial DVDs. The Act permits the playing of films and sound recordings in class, however, the lecturer usually only wants to play a short clip. It would take too much class time to find the relevant place on a DVD to play, so the clip needs to be copied in advance. However, none of the educational exceptions have kept pace with this change in technology and do not allow copying for this purpose.

Examples:

- After being told that copying small extracts of a DVD onto a portable device was a breach of copyright, a lecturer responded: "I defy anyone to have 500 students in a mass lecture patiently sitting there waiting for the lecturer to get through the copyright and even sometimes the pre-view block, into the menu, then into the chapter and try and shuttle with the current technology available on the media desks to the right place to show a 30 second segment!"
- A lecturer wanted to use a number of short clips from a copyrighted film (*Eye In The Sky*) with students in lectures. This film was not available from any subscription source (e.g. Netflix/Amazon Prime) in New Zealand but a DVD could be purchased. The lecturer's reason for using the film was a pedagogical one and illustrates how lecturers are using innovative means of conveying difficult conceptual and ethical problems to students but she was advised that making short clips was not allowed. The lecturer responded: "My goal for using various clips from the movie is to bring to life to the students the full nature of electronics and software engineering. The movie depicts a global military operation where military and political decisions are made about the risks of a strike against terrorists, versus the collateral damage (lives of innocent civilians). The use of the clips was to highlight the decision making processes involved and then to turn these decisions into an algorithm. The focus of discussion is that while we could develop a machine that made these decisions for us, the real dilemma is to consider where we are going with technology, and should we turn this over to a non-human decision process."

With modern technology it is very easy to format shift from a legal copy in order to overcome technical barriers and improve the learning experience. We should also be able to include any

such material in a lecture recording on the basis that this was legal in the classroom.

7. **Obsolete formats:** many academics have copyright works that they use in teaching and research activities that are stored on formats that have become obsolete because the technology to use them is no longer widely available. For example, content on video tapes, cassette tapes, microfiche, overhead-projector transparencies, slide-projector slides. Even CDs and DVDs may not be usable in a lecture theatre because these facilities (and/or lecturer's laptops) no longer necessarily have the hardware to play them.

Example:

An academic has a personal copy of a sound recording of Shakespearean sonnet readings by a particular performer on a commercially produced and purchased cassette tape. The technology to play cassette tapes is no longer widely available and the recording is no longer available for purchase. The academic would like to format shift the cassette tape into a digital sound file.

8. **New formats:** similarly new formats are the subject of doubts regarding interpretation.

Example:

In a joint project between a museum curator and a university researcher, the researcher wanted to scan a skull of an extinct bird that was held within another museum collection to print as a 3D model for teaching purposes. Access was granted by the museum who held the object but a dispute and confusion arose around the rights within the resulting 3D scan data. The Copyright Act does not state if there is any copyright in a 3D scan of an out of copyright or public domain work. The parties agreed that a new copyright arose. The museum who provided access agreed that any copyright that did arise would be owned by the university who scanned the object, but in order to control the rights over the way the 3D scans were disseminated, a contract was signed that assigned any copyright over to the museum who granted access to the object. This resulted in a very limited use of the resulting 3D scans, as the agreement stipulated only a small number of 3D prints were to be made and all scan data was to be given to the museum. Any further scans and prints would carry a reproduction fee. The impact this example has is the potential loss of the discovery of new scientific knowledge and research about an extinct species in New Zealand.

This highlights the need for wider educational exceptions to allow 3D scanning (or any other technology) of non-copyright or out of copyright material within GLAM collections for educational and teaching purposes.

9. **'Grey literature'** (material not produced as part of formal, traditional publishing) is increasingly prevalent in the digital age and relied on more and more in teaching and research. It is often produced with non-commercial ends in mind yet it attracts the full rights associated with copyright; however, current exceptions would not, for example, allow the copying of a whole report for teaching purposes, depending on who it was to be made available to and by what means. The Australian Productivity Commission inquiry into that country's intellectual property regime has said (at p. 114):

...there can be real costs to the community associated with the application of copyright laws for non-commercial works. For example, Australian Policy Online (APO) highlighted the contributions of one category of non-commercial works protected by copyright known as 'grey literature', which includes:

... reports, discussion papers, briefings, case studies, literature reviews, fact sheets, evaluations, submissions, working papers, conference papers, data, technical reports and specifications, policies, strategic plans, infographics and much more. Known collectively by the term 'grey literature', it makes a substantial contribution to public policy, education, commercial innovation and social development. (sub. DR444, p. 2)

APO estimates over 4000 organisations in Australia produce and use grey literature: around one third are universities, one third government departments and agencies, and one third non-

government organisations, 'think tanks' and consultants. APO's current collection of grey literature extends to over 30 000 items, the vast majority of which is originally "... made available to the public, or to a limited audience, for free, disseminated in print or digitally online, however a portion is also sold' (sub. DR444, p. 2). Although difficult to measure, researchers have estimated a lower-bound value of better access to grey literature in Australia at around \$2.4 billion annually (Lawrence et al. 2014).

The point is that much of this work is commissioned, is produced with the intention of influencing government decision making, or is undertaken in the course of research, or made available freely online by organisations that wish to make such reports publicly available. The provision of copyright protection is irrelevant in the creation of much of this work, yet as APO highlights, the exclusive rights embodied in copyright represent a major impediment to libraries, archives and other repositories curating and making this work available for use.

Together, these examples demonstrate the issues universities face because of the specific nature of current exceptions. We reiterate the need for some form of flexible, open-ended exception that would enable educational organisations to consider reasonableness of the copying should apply, where something is not available in a commercial or licensable format or where copies are made from legally acquired copies to get around technical difficulties.

The examinations exception is very useful but could be extended

Section 49 (things done for purposes of examination) is a valuable exception for staff and students. It is a good example of a flexible, purpose-based exception without technological restrictions. Most university course still have traditional examinations and of course there are examination processes for the assessments of theses and other work produced by postgraduate research students.

For traditional examinations there is often considerable time pressure on staff setting examinations, so the exception is useful in that there is no need to worry about copyright restrictions in this limited context. Similarly students should be focused on demonstrating the knowledge or skills they have acquired. However, there are some issues of interpretation with s 49:

- Does the exception apply to assessment generally, such as assignments or mid-term tests?
- Can universities make old examination papers available to students preparing for upcoming examinations? This is practised widely as it is clearly an extremely useful tool for students. However, universities generally put the papers behind password authentication systems because of uncertainty as to whether the exception – which clearly covers the original purpose of examinations – covers that subsequent copying for exam preparation. The time and cost it would take to ensure compliance would be significant and an unnecessary expense for universities, given the thousands of examinations that take place each year. If the exception did not cover such use it could also lead to having to redact content from past papers, which is less than ideal from a student learning perspective. Universities have never received any complaints about the current practice.

Digital thesis deposit and making student research publicly available

All universities now require deposit of electronic copies of theses by graduate research students as part of the submission process. Across the sector, graduate research students produce many thousands of theses each year, many focused on New Zealand-specific research issues. This represents a very significant investment by the university sector into extremely valuable, unique research outputs. Many of these research outputs would be partially publicly funded (either through government funding towards student fees, or government-funded research grants).

Example:

One university has around 8000 research works deposited in its online research repository, the majority of

which are student theses, with some staff research outputs also included. These research outputs have been accessed 3.5 million times in the last 10 years from all over the world. 26% of the works have 'New Zealand' in the title or as a keyword but only just over half of those are available in full text – in other words, a huge repository of New Zealand-specific research. Copyright is one barrier that may cause a student to decide not to make the research available in full text, meaning it cannot be read or discovered via web searches.

A student may include third party content in their thesis without infringing copyright under the section 49 exception for the examination part of their thesis. However, this exception does not apply once the thesis is digitally deposited in the Library's online thesis database since this is public communication of the work. Students are often advised to seek permission for any third party copyright content since relying on the fair dealing for criticism and review exception provides no certainty. Seeking permission can be an extremely time-consuming and sometimes a costly process. It may also be difficult for them to find out who the copyright owner is and/or how to contact them to seek the permission. Students unable to locate a rights owner or required to pay licensing fees will either redact the third party content from their thesis or apply to deposit it in the closed/confidential archive resulting in valuable research being unavailable to the public. All of these options are less than ideal. It has been clearly shown that making work openly accessible increases discoverability via search engines, thus increasing readership and academic citations.³⁶

There is a disproportionately heavy impact on students who work in disciplines that make use of a lot of media, as the following example demonstrates. This is largely because, while people are generally comfortable with the concept of quoting short passages of text, images and artistic works are considered to be a whole work, as opposed to a small percentage of a work.

Example:

A Design PhD student experienced significant challenges dealing with copyright compliance for over 200 images used in her thesis examining chair design in New Zealand. She said, "I really want to highlight the importance of getting your entire thesis into the academic world, rather than copping out of the copyright necessities by selecting a diminished level of access." She was asked to pay reproduction fees for many images, even some made available online by national archives. In many cases she chose not to do so due to the fees involved, diluting the integrity of her work and lessening the utility for readers interested in the research.

A further issue, as discussed in the library section of this submission, is that universities are unable to digitise historical thesis to make these publicly available without permission from the thesis author. Some universities do not make theses available online because of concerns about content which may be a breach of copyright, copied under the examination provisions of the Act.

Theses are not considered published works in the traditional sense but may be communicated to the public via the Internet since the inception of digital deposit. From a copyright perspective, nothing has changed from the days of print-only theses in that students would produce a print copy of their thesis, deposit it in the university library, and that copy would be available to anyone with access to another library that had an ILL service. In those print copies copyright was considered less of a barrier simply because we did not have search engines that make our theses discoverable instantly.

Whether the examination exception can be expanded or a more flexible exception adopted for educational research and public good purposes – clearly there is a goldmine of current and historical research content, a considerable amount of which is New Zealand-specific, that could be unlocked if copyright barriers were clarified or removed, enabling this work to be made available

³⁶ A recent, large-scale study found that "accounting for age and discipline, OA articles receive 18% more citations than average." Piwowar H, Priem J, Larivière V, Alperin JP, Matthias L, Norlander B, Farley A, West J, Haustein S. 2018. The state of OA: a large-scale analysis of the prevalence and impact of Open Access articles. *PeerJ* 6:e4375 <https://doi.org/10.7717/peerj.4375> This study

online by the libraries of educational organisations.

Another issue with the current exceptions relates to the copying of films for educational purposes is unreasonably restrictive, being limited under section 45(2)(a) to “where the lesson is on how to make films or film sound-tracks” and considers this clause should be deleted from section 45(2)(a). Short clips of films are increasingly used for teaching purposes to illustrate difficult concepts that are often better explained visually. While universities have a Screenrights licence to copy broadcasts, often the quality of these copies, which are cropped and of low resolution are unsuitable for the large screens in lecture theatres.

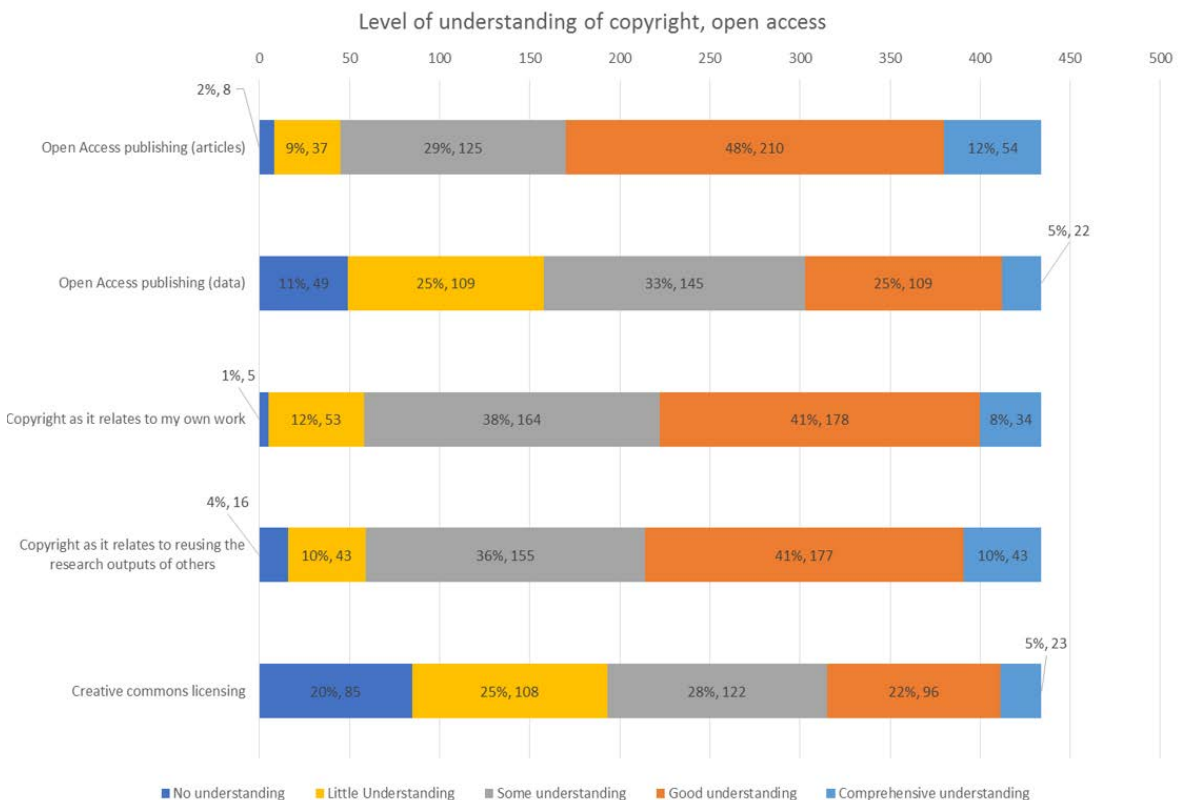
Likewise, copying of sound recordings for educational purposes is unreasonably restrictive, being limited under section 45(4)(a) to “where the lesson – (v) relates to the learning of a language; or (vi) is conducted by correspondence”. These two clauses should be deleted from section 45(4)(a).

If sub-clause (vi) of section 45(4)(a) is not deleted, the phrase “conducted by correspondence” should be defined, and the definition should include courses conducted online or by distance education.

Universities New Zealand supports the broadening of the educational exceptions to allow for changes in the technology and methods of teaching, particular allowing for more flexibility when copying films and sound recordings for educational use.

Is copyright well understood in the education sector? What problems does this create (if any)?

The basic principles of copyright are well understood in the university sector, with all universities having information about copyright and specialists available to answer questions from staff and to provide training. The graph is from a survey undertaken at the University of Otago in 2016, showing about half our staff self-reporting a good or comprehensive understanding of copyright as it related to their own work and using others’ work.



As producers and users of copyright material most staff acquire a good, broad understanding of copyright. However, as mentioned above understanding the patchwork of licences and exceptions we rely on for providing resources to students is extremely complex. As a result, as detailed above, universities have a broad range of licences with rights owners covering most of the uses of content for teaching and also have staffing, processes, training and software systems that ensure compliance and staff understanding. Each university now has a mandatory system for collecting information about copying for teaching under the CLNZ licence to ensure compliance with that licence.³⁷

Where copyright tends to be less well understood is where people consider a use to be quite reasonable, as evidenced in many of the examples above, but is not actually covered by an exception in New Zealand law. This is particularly true for staff who have moved to New Zealand from a country with fair use or a more flexible fair dealing regime.

It is critical that copyright laws provide for a simple and easy-to-apply framework of limitations and exceptions that enable educational and cultural institutions to fulfil their mission and mandates and assist individual users in understanding the appropriate use of copyrighted content, notably through simple, targeted guides.³⁸

Other comments

No response

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

³⁷ See further discussion of this in Johnson, Melanie. (2016). "Taming the Lurking Beast: can mandatory e-reporting and the creation of course lists manage copyright in the digital space?"

<https://www.vala.org.au/vala2016-proceedings/vala2016-session-2-johnson/>

³⁸ See IFLA Statement on Copyright Education and Literacy 2018 at <https://www.ifla.org/publications/node/67342>

51

What are the problems (or advantages) with the free public playing exceptions in sections 81, 87 and 87 A of the Copyright Act? What changes (if any) should be considered?

The free playing exceptions are complicated and need simplification, plus as the Issues Paper points out, the exceptions do not cover all of the works involved.

The University of Auckland has an extensive archive of communication works and films that have been recorded from New Zealand television and radio for many years and preserved under an exception in the Act or under the Screenrights licence. Obtaining permission to play these works in public or share them with members of the public and researchers from other institutions in New Zealand and overseas is problematic given the complexity of rights ownership for these works. If these exceptions could be extended to include the underlying works in the sound recordings, films and communication works these works could be used to provide insight and understanding of a particular era. An example is an exhibition held in one of the University's art galleries. The curator wanted to have a television programme playing during the exhibition that illustrated and complemented the theme of the exhibition.

Most people would not understand that the underlying rights were not covered by this exception and would not seek permission to use the work.

We would suggest that for films the exception be restricted to films that are 20 years old. Generally communication works broadcast by the TV providers are available on OnDemand television

52

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

Format shifting is limited to sound recordings, not sound recordings and films, thus it will infringe copyright to format shift a movie. This distinction makes no sense, format shifting should be extended to include films (video files). The use of cloud services to format shift should be recognised as non-infringing.

Format shifting is particularly problematic for our staff. Many of our lecturers have content on audio and video tapes, which they have relied on in the past for teaching purposes. The lecture theatres are no longer capable of playing these. These works are also no longer available for purchase in the new formats. Transposing these works to more up to date formats is no longer a simple process of copying on a tape recorder and requires the assistance of specialist audiovisual services who will not format shift these works because it is a breach of copyright. These works are the personal copies of the lecturers, but are being used for teaching purposes so fall outside the personal use requirement in the exception in s 81A.

We suggest the following changes to s 81A, that the works that can be format shifted be extended to include films. That the copying in s 81A(1)(d) of the film or sound recording is extended to anyone acting on behalf of the owner. We also suggest that in s 81A(1)(f) the reference to personal be removed. We also believe that s 81A(2) be removed as this section is already very restrictive and would be negated if the rights owner restricted all copying of the work.

53

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

No response

54	What are the problems (or advantages) with the reception and retransmission exception? What alternatives (if any) should be considered?
	<i>No response</i>
55	What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?
	<i>No response</i>
56	Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?
	<i>No response</i>
57	Do you think that section 73 should be amended to make it clear that the exception applies to the works underlying the works specified in section 73(1)? And should the exception be limited to copies made for personal and private use, with copies made for commercial gain being excluded? Why?
	<p>Universities have a number of sculptures and models of buildings that are permanently situated in premises or grounds which are open to the public. We rely on this exception when taking photographs or filming around our campuses for marketing and educational purposes, particularly for older works where we may not have agreements in place which cover the use of these works. We have no objections to the public photographing, drawing or filming on campus for their own personal use.</p> <p>Section 73 does provide some protection as a person cannot create three-dimensional versions of the sculptures. Also, for visual artists, it only affects those that are permanently in a public space or in premises open to the public. In circumstances such as <i>Radford v Hallenstein Bros Ltd</i> where the use of the image itself directly generated an income for the business, then if it is possible to amend the section to enable the artist to be compensated proportionally for the gain without making it overly complex, it should be considered. To remove this section (or allow for moral rights to override it) would affect the ability of people to take photographs in parks as it risks infringing copyright as also for films to have scenes outside.</p>

Other comments

No response

Exceptions and Limitations: Contracting out of exceptions

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?
	Although it has not been tested yet in NZ or Australia, it is likely for a court to find that a contract could be used to defeat copyright exceptions, with the exceptions of the sections which state that

contracting out cannot occur, for example section 80D states that “[a] term or condition in an agreement for the use of a computer program has no effect in so far as it prohibits or restricts any activity undertaken in accordance with section 80A(2) or 80B(1)”.

The development of digital technologies has driven a change where less content is owned and more is licensed for use under certain conditions. This issue has been examined frequently in intellectual property reviews in Australia, the UK and other countries in recent years.³⁹

The Australian Law Reform Commission (ALRC) examined contracting out in its copyright inquiry, finding evidence that digital licences can conflict with copyright exceptions, and recommended amendments preventing the fair dealing exceptions from being overridden by contracts (ALRC 2014). Other reviews have made similar recommendations, including the Copyright Law Review Committee (CLRC 2002) and United Kingdom’s Hargreaves Review (Hargreaves 2011).

Both the Australian Productivity Commission’s inquiry into that country’s IP regime (quoted above) and the UK’s Hargreaves Review concluded that “...that there are good grounds for preventing copyright exceptions from being overridden by contracts. The use of contracts to override exceptions effectively enables the rights holder to rewrite the limits that the law has set on the extent of the right conferred by copyright.”⁴⁰

Universities depend on access to content, for which we pay significant sums of money, and these contracts may have terms that on face value restrict rights that are otherwise allowed by exception in the Copyright Act. For example it is common for many electronic subscription licences for academic journals to prohibit electronic copies to be supplied to users of other libraries. s 53 permits what is termed Inter-Library Loan (ILL), where a library to supply a ‘reasonable proportion’ of a work to another library for the use of a patron of that other library, including the right to provide this digitally (s 53 (5)). Due to the lack of certainty about whether the right has been ‘contracted out of’ the practice has been to follow the terms of the contract rather than rely on the statutory provision. Like the Australian Productivity Commission itself concluded, the universities believe that contract arrangements should not be able to override exceptions provided by the Act. Clarity on this point would be welcome.

See also Alexandra Sims, “Copyright and Contract (2007) 22 New Zealand Universities Law Review 469-495.

Exceptions and Limitations: Internet service provider liability

59

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

Universities fit within the definition of ISPs and do not have any problems with the definition. Universities benefit from the safe harbour provisions given that we have no means of controlling all the content that is uploaded onto our systems by staff and students.

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?

Universities rely extensively on linking to content on external websites without the need for a

³⁹ AU Productivity Commission Review p.140

⁴⁰ AU Productivity Commission Review p.140

	specific exception for this.
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.
	<i>No response</i>
62	What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?
	<i>No response</i>

Transactions

63	Is there a sufficient number and variety of CMOs in New Zealand? If not, which type copyright works do you think would benefit from the formation of CMOs in New Zealand?
	Universities New Zealand believes that there are sufficient CMOs in New Zealand. As Nicola Searle has noted “Collecting Societies are often framed as natural monopolies. The presence of multiple societies would be inefficient and fail to capitalise on economies of scale (per unit price falls as quantity increases)” ⁴¹ . Any gaps in the licenses available should be covered by exceptions in the educational context. “The challenge Collecting Societies now face is that their business model, like many business models, is hugely disrupted by the digital era. Whereas artists themselves may be able to innovate and seek revenue from other avenues (such as concerts, special editions, sponsorships etc.), the avenues for Collecting Societies are more limited as their main assets are the rights they manage and their network of licenses.”
64	If you are a member of a CMO, have you experienced problems with the way they operate in New Zealand? Please give examples of any problems experienced.
	Universities are members of Copyright Licensing Limited (CLL) and regularly receive payments for content that has been copied under that licence. While these are tiny sums in relation to the amount we pay in licence fees, most of our staff and students have assigned rights to third party publishers and receive payments for their books through their publishers or through overseas CMOs they are members of (noting however that generally university staff do not receive any direct compensation for research published in scholarly journals). As members, we have not experienced problems with the way CLL operates.
65	If you are a user of copyright works, have you experienced problems trying to obtain a licence from a CMO? Please give examples of any problems experienced.
	We do not believe that CMOs can meet the requirements of the modern classroom.

⁴¹ Some Economics of Collecting Societies *IPKat: Intellectual Property News*, <http://ipkitten.blogspot.com/2015/09/some-economics-of-collecting-societies.html>

Licensing does not always provide a satisfactory solution. As Lionel Bentley and Brad Sherman noted, "Collection societies have been seen to be ill-equipped to offer solutions to users who want to use a range of different types of work, of varying levels of obscurity, in low-value activities."⁴²

The licence New Zealand universities have entered into to copy print material does not cover a number of works. These include: printed music; loose maps and charts; unpublished religious orders of service; house journals (publications for employees); photographs and/or illustrations published separately from a textual work; privately owned documents; theses, dissertations and student papers; works downloaded from the internet; and any work in which the owner has stipulated that it not be copied under a licence of this nature.⁴³ The music licence excludes, amongst others, printed music, grand right works, ballet music, choral works of more than 20 minutes and dramatic works set to music.⁴⁴ The Screenrights licence only licenses copying of films as communication works.⁴⁵

These excluded works are all works that lecturers wish to copy and share with their students from time to time and generally are of little economic value. Getting permission is time consuming both for rights owners and for users and is often impossible to obtain particularly for older works.

66 What are the problems (or advantages) with the way the Copyright Tribunal operates? Why do you think so few applications are being made to the Copyright Tribunal? What changes (if any) to the way the Copyright Tribunal regime should be considered?

No response

67 Which CMOs offer an alternative dispute resolution service? How frequently are they used? What are the benefits (or disadvantages) with these services when compared to the Copyright Tribunal?

No response

68 Has a social media platform or other communication tool that you have used to upload, modify or create content undermined your ability to monetise that content? Please provide details.

No response

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?

No response

70 Do the transactions provisions of the Copyright Act support the development of new technologies like blockchain technology and other technologies that could provide new ways to disseminate and monetise copyright works? If not, in what way do the provisions hinder the development and use

⁴² Lionel Bentley, Brad Sherman, *Intellectual Property Law*, Oxford University Press (2014) 310

⁴³ Copyright Licensing Ltd *Copyright Licensing Guidelines*,

<https://www.copyright.co.nz/Downloads/Assets/3212/1/copyright-owners-brochure.pdf> accessed 7 March 2018

⁴⁴ APRA NZ Ltd, AMCOS NZ Ltd and PPNZ Music Licensing Limited, *Universities Agreement* (2010) clause 4

⁴⁵ Audio-Visual Copyright Society Ltd (Screenrights), New Zealand Universities Licence Agreement, 2014, Licensed Communication Works are: Broadcasts; Films that are communicated; Works communicated via the internet by those radio stations listed.

of new technologies?

No response

71

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.

The University of Auckland has digitised the School Journal under s 55 of the Copyright Act and made the works available to authenticated users of the library under s 56A. While these works are available internally to members of the University, the University is unable to make these works available to the broader public and schools because of the immensity of the task of identifying and obtaining the permission of the copyright owners. The value of this journal and the frustration experienced by our staff and students is expressed in the following email:

'I am a summer scholar currently working on a project. I have been fortunate enough to have had access to all digital copies of Junior Journal's since 1907 on the restricted bookcase. With these fantastic resources, I have been able to create a social studies teaching plan which will be used primarily by Year 7/8s. It has been extremely difficult to get organise copyright to share these resources. Some have no author and were published over 50 years ago and one had the author listed which I have been luckily enough to reach. As the last journal has been published within the last 50 years and no author was listed, teachers would only be able to use the first three pages [under s 44(3)]. As a teacher myself, I have seen such value in students and teachers having access to the old school journals. They provide such an insight into different periods of time. It is a great opportunity to foster critical thinking in our students. It seems such a shame to have all the journals digitalised yet limited access by others.'

See "Research into School Journal uncovers family history"⁴⁶ for another example of how the resource has been used by staff of the University and on the value of the publication.

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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?

Generally universities do not use orphan works. They do not have the resources to identify and contact copyright owners of orphan works.

We are however often contacted by members of the public where works have been uploaded into our research repositories by the rights owner or under exceptions in the Act. The works may appear in our library catalogue with the University listed as the publisher. Where the University is the publisher, it is unlikely that the University will own copyright in the individual articles and other content in the publication. We are frequently contacted by publishers and researchers wanting to reuse these works. It would take at least an hour to identify who the Department was that published the work and whether the academic author was still employed by the University. Sometimes it is relatively straightforward to contact a rights owner, but often any email addresses held are no longer current.

Some orphan works have been made publicly available. These works have been made available after a risk assessment was undertaken. The risk assessment was based on the fact that the works had already been published, there was no economic value in the work and the research value of the publication to the broader community was high, because the work was in a digital format, the

⁴⁶ <https://www.auckland.ac.nz/en/about/news-events-and-notice/news/news-2015/03/research-into-school-journal-uncovers-family-history.html>

cost of taking down a work that the rights owner objected to being on line would not be high.

One example is Broadsheet magazine. Broadsheet was published between 1972 and 1997 – it was published as 214 issues. The magazine is an important historical resource for the social history of the period. There were many individual contributors to Broadsheet and they retained copyright over their material.

The National Library had been considering the digitisation of Broadsheet since about 2005, but the anticipated amount work needed to clear copyright meant plans stalled.

In 2016 the Library was approached by a former Broadsheet editor who was interested in digitising the magazine. The Library decided to undertake some initial exploration of what would be involved in clearing Broadsheet for digitisation.

The National Library searched Index New Zealand, which had indexed many articles from Broadsheet, to identify contributors. Nearly 1000 individual contributors were identified.

The Library then completed a pilot of clearance work for a sample of just over 100 of these contributors. Of these the Library found:

- Contact information for 64%
- That 18% of the contributors in our sample had died
- We had a 70% response rate when we made contact
- It took an average of 1 hour per contributor to search for searching and contacting

Many who responded were happy with their content being made available under a CC-BY-NC, but a few wanted a different licence or more clarity about the licence we were proposing.

At this point the work on Broadsheet was halted because of the resourcing commitment required. Later in 2016 the Library hired contract staff to undertake some more work on Broadsheet to gauge the full extent of work needed to identify and contact rights holders. The list of contributors culled from Index New Zealand wasn't comprehensive, so just over half the total number of issues were checked giving a list of 1453 individual contributors. The next step was to try and find contact details for the contributors and contact them. A search was undertaken for nearly 1000 contributors and found:

- Definite contact details for 41%
- 32% where we thought we knew who the right person was, but we would need to contact them to confirm this
- 5% of contributors who had died, and what would be required for rights clearance would be to locate the person now managing their rights
- 3% of articles were reprints from other publications, which would require contacting them regarding clearance
- For 18% of the contributors we had no real leads about how to find them

The costs of the initial assessment had been considerable, and the National Library estimated that to complete the clearance they would need to spend additionally 4 times that amount.

In 2016 the University of Auckland had digitised and made Broadsheet available only to staff and students of the University. They did this under sections 55 and 56A of the Copyright Act. The University was approached by some of the original Broadsheet editors, who wanted to see the magazine publicly available. Through the editors, the University contacted as many rights owners as possible to let them know that they wanted to make the digitised issues publicly available, and to reassure them that they still owned copyright and that no one could do anything with the works without their permission. All the contributors contacted gave permission to make the content publicly available, and since the content has been available the University says that it has received

feedback from various authors pleased that the work is publicly available. The website has a statement inviting copyright holders to contact the University if they do not want their work to be publicly available, but to date they have not been asked to remove any content.”

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?

Universities have digitised and made available a number of publications without the permission of the rights owners. No rights owner has ever come forward to claim copyright.

The University of Auckland has digitised the following Journals and Magazines, without the permission of individual authors but with the agreement of the publishers:

1. **Journal of the Polynesian Society 1892-2015** (made publicly available with the agreement of the Publisher- copyright status unknown - One query from a descendent of a contributor - no other complaints we are aware of).
2. **NZ Journal of History 1967-2015** (digitised and made publicly available following resolution from the Journal - copyright remains with authors –1967-2010– no complaints from authors).
3. **School Journal 1907-1985** (Available to authenticated users only, under Ss 55 and 56A)
4. **Broadsheet 1972-1997** (digitised initially, under Ss 55 and 56A, now publicly available - no complaints)
5. **Craccum 1927-1990** (No agreements with authors – digitised and made available at request of the President of the Student Union and the Student Union manager only – no complaints).
6. **Kiwi – 1905-1966** – online since 2011 –No copyright permissions - No complaints..
7. **Mathematical Chronicle/NZ Journal of Mathematics** (Online since 2014, no complaints. AGM resolution)
8. **NZ Operational Research** (Online since Feb 2013 –No complaints. AGM resolution).
9. **Tane – University of Auckland Field Club** (Online since 2009 – No complaints. No copyright permissions at all).

University of Otago Press had digitised the first twenty years of *Landfall* (1947-1966), New Zealand’s foremost literary journal in the mid-2000s. The Press held the copyright in the original publications of these works, yet uncertainty about whether contributions were commissioned, whether copyright was transferred to the publisher or retained (no agreements were made at this time) prevented making these digitised facsimiles available to the public, despite being a ‘buried literary treasure.’⁴⁷ It had been estimated that those twenty years alone involved 500 contributors. The university did not have the resources to approach all the contributors and given there was no guarantee that all would respond there would be permissions gaps in the issues. After about 10 years the decision was made to make the digitisations available online⁴⁸ to researchers and the general public under an all-rights-reserved licence, instructing those interested in reuse to contact the contributors or their estates directly. Access to the site has been steady and no complaints have been made by potential rights holders to the Press. Radio New Zealand has incorporated some of the works into its ‘Short Story Club’ segments. However, these works were made available on a risk assessment basis as opposed to any surety provided by an exception in the Act.

What were the problems or benefits of the system of using an overseas regime for orphan works?

No response

⁴⁷ Radio NZ (24 May 2018). Landfall’s ‘buried literary treasure’ online. Retrieved from:

<https://www.radionz.co.nz/national/programmes/afternoons/audio/2018646328/landfall-s-buried-literary-treasure-online>

⁴⁸ <http://www.landfallarchive.org/omeka/>]

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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?

No response

Other comments

No response

Enforcement of Copyright

76

How difficult is it for copyright owners to establish before the courts that copyright exists in a work and they are the copyright owners? What changes (if any) should be considered to help copyright owners take legal action to enforce their copyright?

The rules for enforcement of copyright have developed under common law over many years since the Statute of Anne was first enacted. We believe that changes to make enforcement easier could result in unfairness to users and have a chilling effect on the use of copyright works, particularly orphan works which have little or no economic value.

77

What are the problems (or advantages) with reserving legal action to copyright owners and their exclusive licensees? What changes (if any) should be considered?

We support LIANZA's response to this question.

78

Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?

We believe that if CMOs wish to enforce copyright on behalf of their members they need to obtain an assignment of copyright from their members. There have been cases when CMOs have taken cases in the name of their publisher members.

The business of CMOs is not enforcement of copyright but the management of licensing schemes. The appropriate mechanism for CMOs and others to dispute terms of the licensing scheme is through the Copyright Tribunal.

CMOs are powerful monopolies and should not be able to use threats of litigation for breach of copyright to pressure organisations into taking out a licence. There should be a separation between actions for breach of copyright and the operation of CMOs.

79

Does the cost of enforcement have an impact on copyright owners' enforcement decisions? Please be specific about how decisions are affected and the impact of those decisions. What changes (if any) should be considered?

No response

80

Are groundless threats of legal action for infringing copyright being made in New Zealand by copyright owners? If so, how wide spread do you think the practice is and what impact is the practice having on recipients of such threats?

At least one university has had a groundless threat of legal action for infringing copyright since the

	beginning of 2019.
81	Is the requirement to pay the \$5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are there any issues with the border protection measures that should be addressed? Please describe these issues and their impact.
	<i>No response</i>
82	Are peer-to-peer file sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?
	One university has seen significant use of peer-to-peer applications on their network, predominantly in Campus accommodation. Previously staff and students had used this software on the campus network, but as unlimited broadband at home has become mainstream this is very rarely seen anymore. For those students who reside on campus there has been a plateau in the use of peer to peer software coinciding with a significant rise in the use of legitimate streaming services. This followed a number of years of strong growth in peer-to-peer traffic.
	The inference is that the majority of peer-to-peer use involves copyright infringement, but we are not able to examine the content that is actually being shared to confirm this.
83	Why do you think the infringing file sharing regime is not being used to address copyright infringements that occur over peer-to-peer file sharing technologies?
	The Act does not allow the disclosure of personal information of alleged infringers until the tribunal process is exhausted. This limits the ability of rights holders to make an example of infringers that would serve as a deterrent to others. The aims of rights holders in pursuing infringers isn't to recover damages, but rather to act as an example to deter others from infringing.
	While the university still receives occasional US DMCA notices, they've not had a notice under the NZ provisions since 2014.
84	What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing file sharing regime (if any) should be considered?
	The definition of IPAP in the legislation was intended to exclude universities, libraries, and businesses that provide Internet access to their members or employees but are not in the nature of a traditional ISP. ⁴⁹ Because universities allocate IP addresses to their account holders we do receive DMCA notices. We resolve these under our own policies and associated disciplinary processes. Because universities are not in the commercial business of providing access to the Internet it should be clarified that universities are excluded.
85	What are the problems (or advantages) with the existing measures copyright owners have to address online infringements? What changes (if any) should be considered?
	<i>No response</i>
86	Should ISPs be required to assist copyright owners enforce their rights? Why / why not?
	Without the assistance of ISPs it would be impossible for copyright owners to enforce their rights.

⁴⁹ Copyright (Infringing File Sharing) Amendment Bill 2010 No 119-1, Explanatory note, General policy statement, p4.

	One university sees over 40,000 unique people access the internet through their network per week, placing them as one of the top 10 ISPs in NZ. The processes and infrastructure used to detect and identify copyright infringement are those same ones used for other cybersecurity purposes, so there is no additional cost to the university in terms of infrastructure to provide this assistance to copyright owners.
87	Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?
	There is a workload involved in responding, nominally 1 hour per infringement notice DMCA infringement notice. If every use of peer-to-peer file sharing on the university network resulted in an infringement notice this would equate to ~2FTE to manage these. The current \$25 fee per notice would not cover the costs.
88	Are there any problems with the types of criminal offences or the size of the penalties under the Copyright Act? What changes (if any) should be considered?
	<i>No response</i>

Other comments

No response

Other issues: Relationship between copyright and registered design protection

89	Do you think there are any problems with (or benefits from) having an overlap between copyright and industrial design protection. What changes (if any) should be considered?
	<i>No response</i>
90	Have you experienced any problems when seeking protection for an industrial design, especially overseas?
	<i>No response</i>
91	We are interested in further information on the use of digital 3-D printer files to distribute industrial designs. For those that produce such files, how do you protect your designs? Have you faced any issues with the current provisions of the Copyright Act?
	<i>No response</i>
92	Do you think there are any problems with (or benefits from) New Zealand not being a member of the Hague Agreement?
	<i>No response</i>

Other comments

No response

Other issues: Copyright and the Wai 262 inquiry

93	<p>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.</p>
	<p>The following section from the Waitangi Tribunal report clearly defines the relationship between mātauranga Māori and the kaitiakitanga of traditional communities and places a conceptual limit on the definition of taonga works :⁵⁰</p> <p>“We do not recommend that all mātauranga Māori should be protected, but only those aspects of it so personally held by traditional Māori communities that a kaitiakitanga relationship arises in respect of it. Thus, it is the proximity of the mātauranga and the community that is the core defining factor, not the broad category of mātauranga Māori itself.”</p> <p>This section should have been included.</p>
94	<p>Do you agree with the Waitangi Tribunal’s use of the concepts ‘taonga works’ and ‘taonga-derived works’? If not, why not?</p>
	<p>Universities New Zealand agrees with the Waitangi Tribunal’s use of the concepts of ‘taonga works’ and ‘taonga-derived works.’</p>
95	<p>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?</p> <p>Universities New Zealand agrees with the proposal to create a new legal regime and recognise that the concept of law does not fit particularly well with a Māori worldview. Under the law knowledge must be expressed as a “work” in order to receive protection, but once expressed in this way it can then enter the public domain on the expiry of the copyright. Copyright law is based on the notion of an identifiable creator, or of a tightly-defined group, and a major focus is the protection of financial interests, while according to the definition of the Waitangi Tribunal mātauranga Māori is defined by its relationship to Māori communities and its value is spiritual as well as material.</p> <p>Many university researchers and teachers in Aotearoa New Zealand seek to engage with Māori communities and to recognise and respect the unique status of mātauranga and taonga. It is not unusual, for example, for theses to contain material that has been conveyed to the student under the condition that it is not to enter the public domain. Although it is usual practice for electronic copies of theses to be placed online, in these cases the works will be embargoed or material redacted before they are made publicly available. There can be a tension between the need for protection of mātauranga and the natural tendency of universities to promulgate research findings as widely as possible.</p> <p>It will be important to include a definition of taonga works within the Copyright Act in order to ensure an easy “handover” to the proposed mātauranga Māori regime, and the section from Wai</p>

⁵⁰ New Zealand. Waitangi Tribunal. Ko Aotearoa tēnei : a report into claims concerning New Zealand law and policy affecting Māori culture and identity. Te taumata tuatahi. (Waitangi Tribunal report) Published 2011 by Legislation Direct, Wellington, New Zealand
https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356054/KoAotearoaTeneiTT1W.pdf

262 quoted above may be appropriate. More thought needs to be given to circumstances in which works that fall within the scope of Copyright Act may contain mātauranga Māori – for example a published book may contain whakapapa material with a kaitiakitanga relationship that would need to be protected separately from the rest of the book in order to prevent it from entering the public domain at the expiry of the copyright. It is possible for parts of the publication to be separately copyrighted – for example, graphs in a journal article that are derived from another source – and some means of applying a separate protection for mātauranga Māori within the copyright works may need to be included within the Act.

It should also be recognised that under copyright law works are not protected until they are recorded. When these works are taonga and mātauranga Māori, a new copyright will arise in the sound recording, film or literary work that may not be owned by the cultural group whose taonga has been recorded. Consideration should be given to amending the Copyright Act to prevent a new copyright arising and what may be the only recording of a particular taonga or mātauranga Māori work from being used or repatriated to the iwi or hapu whose work was recorded. See Jennifer Campion, Marie O’Connell and Melanie Johnson “Human Rights, Copyright and Indigenous Cultural Expressions”.⁵¹

The concept of legislative protection of taonga is not new. The Protected Objects Act 1975 already regulates the ownership and trade of taonga tuturu. Taonga tuturu are objects and must be more than 50 years old.

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?

If this work stream is to embody the Treaty principles of partnership, participation and rangatiratanga, then Māori communities need to be engaged in all roles throughout the process from the very beginning, including decision-making.

97

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

The consultation must be full and extensive. Maori researchers in Universities should also be consulted. The timing of this made it difficult to get meaningful discussions and feedback from academics and researchers.

We would suggest MBIE engage with stakeholders, through hui, and use of online feedback channels, connecting with Māori organisations such as the Iwi Chairs Forum and Te Mana Raraunga.

Other comments

No response

⁵¹ Conference presentation *Intellectual Property & Human Rights: Shifting Boundaries* 7 December 2018, AUT. <https://researchoutputs.auckland.ac.nz/viewobject.html?cid=1&id=767271>