

# Getting Copyright right in the Information Age

An InternetNZ Position paper



InternetNZ



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## Summary

**The Internet unlocks new ways for creative New Zealanders to make content and reach global audiences. To make the most of those opportunities, we need an up-to-date and innovation-compatible copyright law.**

We want to see New Zealand's copyright law continue to provide New Zealand creators with internationally recognised, world class copyright over their creative works. We also want to see New Zealand creators utilising and leveraging the Internet for distribution and access to new markets and communities who can benefit from their creations.

We would also like to see New Zealanders enabled and empowered to engage in social, cultural and economic innovations by useful, technology neutral exceptions to copyright.

We believe that New Zealand's Copyright law has not stood the test of time and that New Zealand deserves fair, balanced law that reflects the ways that New Zealanders use the Internet to access, consume and protect copyrighted works.

# Recommendations

## Principles for Copyright

The new Copyright Act should be guided by the following principles:

- Protect and respect New Zealanders' creative works
- Encourage new creativity
- Allow people to add new value to copyrighted works
- Make copyright usable by everyone
- Protect New Zealanders' ability to use and access creative works

## Enable the benefits of the Internet

- Allow cloud services for backups and personal copying of legitimate copies of works
- Permit text and data mining as a resource for new research and business insights
- Maintain safe-harbour principles as a shield for Internet-based innovation
- Create a broad, open-ended exception to allow our law to adapt as technology changes, and to recognise the potential of local creativity to add new value
- Align our permitted acts and exceptions with the more innovation-compatible rules in Israel, Singapore, and the United States

## Support fair consumer access

- Support consumer access to legitimately provided content, including avenues for self-help where New Zealanders would otherwise miss out
- Support continued access to legitimately obtained content by allowing technology-neutral shifting between formats and devices

## Enable expression and interaction

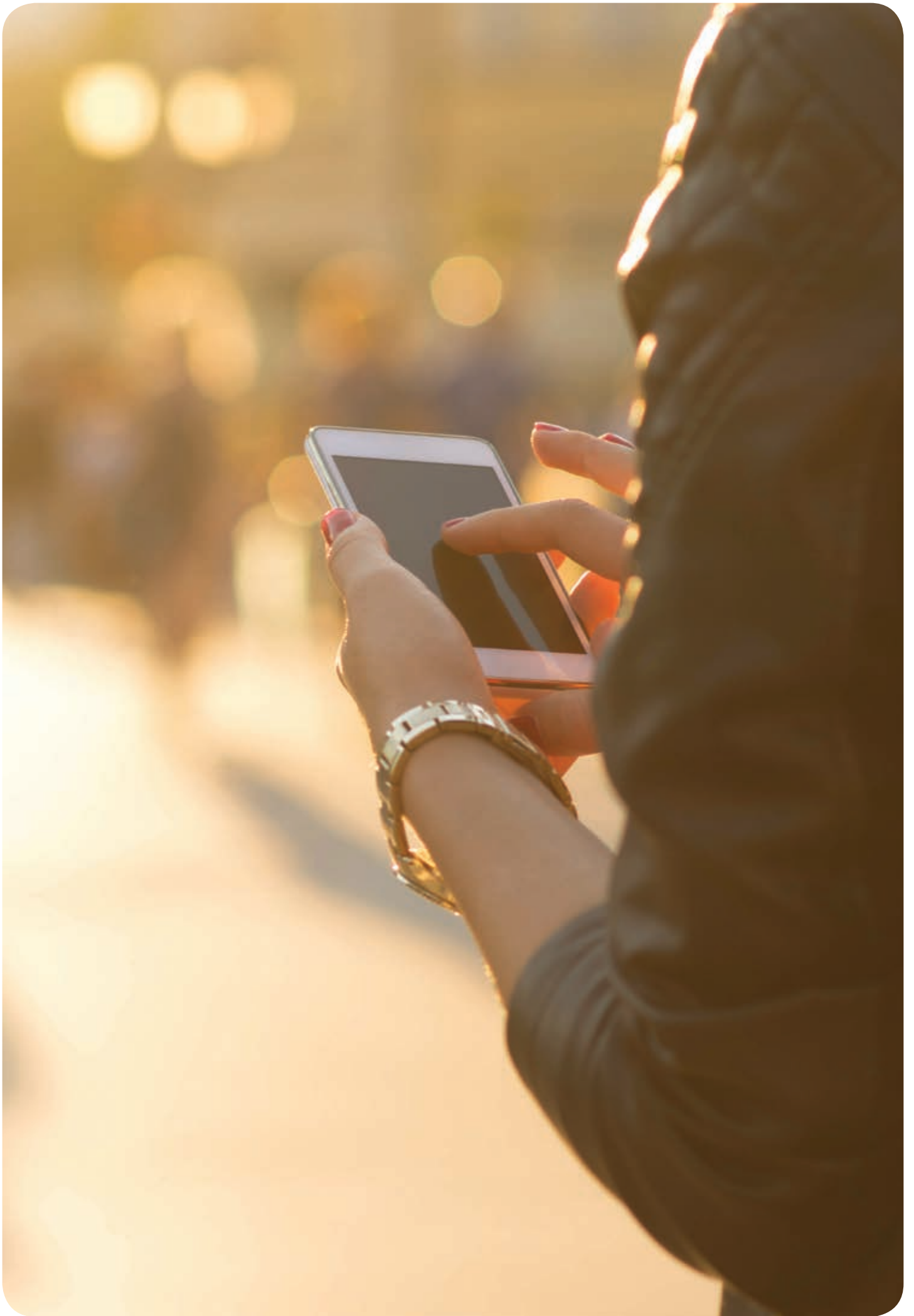
- Enable creative online expression including fair quotation and remixing
- Balance and monitor enforcement measures, to protect legitimate uses and sharing of content as well as creators' commercial interests

# Talk to us

If you care about Copyright law in New Zealand, then we want to hear from you. This is about the your ability to access and share information, and the opportunities you will have in the future as a creative New Zealander.

Use #getCopyrightRight on Twitter or Facebook and have your say.





# What and why

This paper is about unlocking the creative potential of the Internet to benefit New Zealand. Through the Internet, New Zealanders have new opportunities to learn skills, to build businesses and to reach audiences around the world. As this paper explains, to get the most from those opportunities, New Zealand needs a fair and balanced copyright law, which is up-to-date, and which can adapt to change. We need copyright which works for today's technology, and which supports the benefits of innovation over time.

## What is InternetNZ?

InternetNZ is a not-for-profit membership organisation. We work to support the benefits of the Internet to New Zealand in a range of ways, including work in our focus areas of access, trust, and creative potential. Through position papers like this one, we aim to identify current issues affecting the Internet, and to develop fair and effective principles for responding to those issues.

## Why copyright?

Copyright is a big subject, affecting everyone who makes, shares, and uses information. New Zealand is geographically isolated, but the Internet gives us a great vehicle for developing and sharing our creative skills and projects with the world. To get the most from those opportunities, we need to balance our law in a way that respects and rewards creativity, while allowing for experimentation, innovation, and changing technology.

## Why now?

Our Government has started a copyright review, intended to:<sup>1</sup>

 **Ensure that the copyright regime keeps pace with technological and market developments and is not inhibiting the provision of, and access to, innovative products and services, which will underpin higher levels of wellbeing in New Zealand.”**

InternetNZ supports that goal, and will assist by providing our perspective on Internet issues and copyright. This paper is part of our contribution to that review.

<sup>1</sup> MBIE, “Terms of Reference for a review of the Copyright Act 1994”

# Our approach

## We respect and encourage creative effort

We all benefit from people making new creative works. Some of these works teach or entertain us. Some have commercial success here and overseas, boosting our economy. This paper highlights key areas where we could do even better.



**We can unlock greater benefits to New Zealand from our creative work AND from the Internet. We do not have to choose one or the other, but need a balance which respects both.”**

That means maintaining and updating copyright, to work in a way that is fair and fit for purpose in the 21st century. Any trade-offs involved in setting that balance should be considered in terms of an overall benefit to New Zealand.

## We want to enable gains from innovation

New Zealand can and should find its own path, reflecting its own interests. But lessons from elsewhere in the world can inform us as we make our own decisions. Like New Zealand, countries around the world want to enable use of, and gains from, changing technologies driven by the Internet. Israel, Singapore, Canada, the United Kingdom, and Australia have each run processes asking “how should our copyright settings adapt to changing technology?”. These processes have identified a need for flexible and adaptable copyright laws.

## The opportunity: the Internet solves content distribution

Doing more online has economic benefits, particularly in a small, remote, and skilled nation like New Zealand. Businesses are realising this value, and we have a \$34 billion per year opportunity to do even better.<sup>2</sup> Our export-focused games industry is now worth \$100 million per year, and has room to continue growing. New Zealanders are continuing to pay for content, taking up streaming and other models where these deliver content and convenience.

We think New Zealand creators and consumers will gain most from a copyright balance which recognises and enables the benefits of easier distribution via the Internet. It is no longer an issue of “content” versus “connectivity” -- we need both.

<sup>2</sup> Sapere Research Group, “The value of Internet services to New Zealand businesses”, (31 March 2014), <http://innovationpartnership.co.nz/app/uploads/2016/07/The-Value-of-Internet-Services-to-NZ-Businesses.pdf>, at p 4.





# Copyright is...

## ...a way to encourage creativity

Copyright encourages people to make and share new creative works. This benefits all of us. Through news reports and novels, films and music, games and apps, we gain a better-informed and more interesting world.

The Ministry of Business, Innovation and Employment (MBIE) says the goal of copyright is to benefit New Zealanders as a whole, by incentivising the creation and dissemination of original works.<sup>3</sup> This is similar to the goal identified by the Australian Productivity Commission in its review.<sup>4</sup>

## ...a legal rule which says “no copying”

Copyright law controls the distribution of creative works, by restricting copying of those works.<sup>5</sup> Our law says “no copying” unless:

- You are the owner of copyright in the work (you made the work, or paid someone to make it, or the person who made it gave you copyright in it);
- OR you have the owner’s permission to make the copy;
- OR making the copy is defined as a “permitted act” under the law.

Copying any work outside these situations is an infringement of copyright, which faces legal penalties.<sup>6</sup> Anyone who infringes risks legal consequences, including fines and jail terms.

## ...a legal right which the owner can use or sell

Copyright in a work is a legal right owned by a person or a company. The law says only that person or company can do certain things: copying the work, or performing it in public, or giving permission for others to do so. Because it’s limited to one person or company, and stops everyone else from doing these things, this is sometimes called an “exclusive” right.

## ...sometimes misunderstood

The “Copyright and the Creative Sector” study surveyed New Zealanders working in a range of creative industries, to support better understanding of how copyright works in practice. One key finding is that copyright is misunderstood, both within the creative sector and more broadly.<sup>7</sup>

<sup>3</sup> MBIE, “Terms of Reference - Review of the Copyright Act 1994”, (2017).

<sup>4</sup> OzProdCom at 2.2

<sup>5</sup> We will use “copying” in a general way in this document, to include other restricted acts such as performing or showing the work in public under s 32 of the Copyright Act 1994.

<sup>6</sup> Infringement also includes other activities.

<sup>7</sup> MBIE, “Copyright and the Creative Sector”, (2016), p 6.

# Copyright covers a broad range of ‘works’

Copyright applies to any ‘work’ which is the result of creative expression, from multi-million-dollar movies to the first stories kids write at school. This includes:

<b>Texts and other writing</b>	Books, articles, scripts, sheet music, software code, emails, blogs, social media posts
<b>Visual works</b>	Paintings, drawings, photographs, sculptures, models
<b>Recordings</b>	Recorded music, recorded video footage, movies
<b>Communication works</b>	A controlled broadcast or stream of information, such as live sports or news coverage

In practice, it can be complicated to identify and apply rights in copyright. What users think of as one item might combine several ‘works’. For example, a smartphone app might include source code written by programmers, graphics made by designers, wording by writers, and sounds from recording artists. When you download the game to a device, you are copying all of these ‘works’.

## Copyright controls copying

New Zealand’s copyright law is set out in the Copyright Act 1994. The word “copy” is the key. When the law tells everyone else “you can’t copy”, the person who can copy has a special ability to serve their market.

The owner of a work may earn a return by selling copies of a work, or by bargaining with a publisher who wants permission to make and sell copies. In some cases they will sell all reproduction rights to the publisher, in others they might give a licence for a period of time or a particular geographic location. Sometimes the author of a work is in a strong position to bargain, sometimes not.

## Copyright covers all works automatically

Copyright works get legal protection automatically. The benefit is open-ended protection for creative works, in any current or future medium, without upfront permission or costs. That contrasts with patents or trademarks, which require a formal application process for legal protection.

Copyright’s automatic application can also create some complications and misunderstandings. Copyright applies equally to works regardless of their commercial value. Compared with other rights where expert help is a normal part of the process, there may be a copyright “advice-gap”. Resulting uncertainty may cloud decisions for everyone, from experienced creators to end-users. Copyright confusion was a strong theme revealed in the recent Creative Sector Study.<sup>8</sup>

<sup>8</sup> MBIE, “Copyright and the Creative Sector”, (2016), p 6.

# Why is copyright an Internet issue?

## The Internet connects us

The Internet connects 3.5 billion people, offering faster access to more diverse information than any prior technology.<sup>9</sup> For people who make and market creative works, it is now easier to publish and reach global audiences than ever before. This new model for distribution presents new creative opportunities, which many New Zealanders are already taking up.

## The Internet works by computers copying information

The Internet is a global, instant communication network. What that means, at a technical level, is that the Internet depends on copying and sharing to work. The Internet connects people by connecting computers, which access, store, and share information. All of these stages involve copying of information.

At a social level, the modern, useful Internet we know has grown through an open, shared process. Many people have worked together over time to improve the underlying technologies, and to build new services on top of them. This is similar to how Wikipedia has grown from millions of small, individual contributions into a knowledge-base with millions of articles.

Copyright law is the broadest set of rules about when we can copy information. Our copyright settings affect how we can use the Internet, and how we can innovate on top of it to unlock value for New Zealand. If our copyright law fails to allow services people rely on, or unfairly limits the benefits of innovation and new technologies, then we all miss out.

## Copyright has adapted to innovation over time

The history of copyright reflects waves of technological change, which enabled new business models and presented challenges to existing ones. Technologies like the printing press, then cameras, film, vinyl records, cassette tapes, and VCRs each made it possible for new types of work to be copied and widely distributed. With physical media, there might be substantial up-front and distribution costs, which had to be recouped to justify investment in new works.

Digital distribution via the Internet largely solves the problem of distributing works. This is a radical change for some types of work. Easier making and sharing of content has had substantial effects on the publishing and music industries. By comparison, markets for apps and games have always been digital. Blockbuster movies and video games still have substantial up-front costs, mounting into the tens or hundreds of millions of dollars.

<sup>9</sup> The International Telecommunications Union reports 48% of the global population have Internet access

Technological shifts have enabled a wide range of works and business models. It is a challenge for our copyright law:

- To fairly protect existing works and business models;
- To enable benefits from continuing technological change and creativity.

Copyright recognises the creative value of making new works. But creative people can add value by combining and reworking ideas. New Zealand's Productivity Commission said:<sup>10</sup>

**“Business innovation is about more than just R&D expenditure or activity. It includes how firms combine new ideas with those of others and how they translate ideas into new goods and services that customers want, ideally on international markets. Firms need to be clever at absorbing ideas and knowledge from their environment – including customers, suppliers, and even competitors – and at connecting the products they generate with the needs of others.”**

Doing innovation well is in New Zealand's strategic interest. We have invested in better Internet connectivity through the UFB fibre rollout, opening new opportunities to reach the rest of the world. To fully realise those opportunities, we should consider how to foster innovation, how to develop valuable skills, and how to package those into creative, high-value exports.

## Our current system has tensions

New Zealand's current copyright framework has some tensions, mostly due to the fact it is from the mid-1990s. The Copyright Act 1994 has not managed to keep up with modern technology or business, which has led to some areas of confusion, or conflict where everyday, advisable behaviour could lead to a breach of copyright law.

We think clear, concrete examples are the best way to understand the avenues to the Internet's potential which are limited by current copyright settings. The Internet has grown and become valuable because it is open. At the moment, we are seeing waves of change in how people and businesses work, as people adopt and use cloud services, big data, and online social platforms. In the next section, we outline the ways in which these new uses of the Internet, with clear benefits to people and businesses, fall outside the model of our current copyright law.

<sup>10</sup> New Zealand Productivity Commission, “Successful innovation needs more than just R&D”, (29 June 2015) <http://www.productivity.govt.nz/news/successful-innovation-needs-more-than-just-rd>



# Unlocking cloud storage

*Cloud services help New Zealanders to better protect and utilise our digital “stuff”. To fully enable these benefits we may need updated copyright law.*

## What is “the cloud”?

“The Cloud” refers to services which work via the Internet, letting users store and work with data, or run applications and services, across devices and locations.<sup>11</sup> Through cloud services, users can access computer services on-demand, as a utility like mains water or power. If you use a smartphone, you are already using the cloud.

Cloud services can have a range of benefits:

- Availability: access your emails, documents, and photos regardless of where you are or which device you have access to;
- Ease of use: properly setting up and running your own servers is hard, but cloud services can be very easy to use;
- Flexibility: users can change services, storage, and number-crunching as-needed, often resulting in lower costs;
- Security: cloud providers can invest in modern security at scale, for example using encryption to protect user data.

Recognising these benefits, the New Zealand Government has mandated a “cloud first” approach for all Government agencies.<sup>12</sup>

Service	What’s the benefit?	Examples
Cloud Storage	Access files across locations and devices	Dropbox, iCloud, Google Drive, Microsoft OneDrive
	Email from your phone	Your email provider
Cloud Backup	Protect against data loss from ransomware or lost device	Code 42, Backblaze, Google Restore, iCloud
Cloud Compute	On-demand, cost-effective access to processing power	Amazon AWS Microsoft Azure Google Cloud

## Getting concrete about the cloud

Cloud services allow users do things online without thinking about computers. But at some level, all cloud services run on physical computers. The benefits of the cloud rely on easy copying of information from computer to computer: from your laptop, to a server, to a cellphone tower, to your smartphone. This happens automatically when you put a file into Dropbox, Google Drive, or OneDrive, or when you email an attachment via Gmail or Outlook.com.

<sup>11</sup> CERTNZ, “How the cloud works”, <https://www.cert.govt.nz/businesses-and-individuals/guides/keeping-yourself-safe-secure-online/how-the-cloud-works/> (as at 12 Sep 2017).

<sup>12</sup> Department of Internal Affairs, “Why agencies must use cloud services” (21 August 2017), <https://www.ict.govt.nz/guidance-and-resources/using-cloud-services/why-agencies-must-use-cloud-services/>

# Current copyright law is not cloud-compatible

People put a range of information into cloud services, including copyright works: documents, photographs, music, videos, games and software. Our law recognises that people can have legitimate reasons to copy works. In practice though, the way our law is drafted limits otherwise reasonable use of cloud services. Current permitted acts:

- Are based on old technologies, such as VCRs and iPods;
- Do not allow copying by third parties such as cloud providers;
- Do not allow for changing technologies and business models.

Section	Permitted Act	Comment
43	Fair dealing for research or private study	Unclear that a third-party cloud provider may copy on a user's behalf
43A	Transient reproduction	Allows the basic operation of the Internet, but not more persistent cloud copies authorised by a user
80	Back-up of a computer program	Does permit copying on behalf of a user, but suppliers can override by notice. In practice users may be unable to backup apps, games, and software.
81A	Copying sound recording for personal use	Allows "format-shifting" of sound recordings to enable use on new devices. Does not allow a third-party to copy on behalf of the user.

## Use case: online backups

Backing up your data is CERTNZ's number one security recommendation.<sup>13</sup> Cloud backup is generally the easiest way to have a reliable, regular backup separate from your main devices. This is important to protect against a range of data-loss risks such as ransomware. We agree that regular or automated cloud backups are best practice for most New Zealanders at home, and for many of our businesses.<sup>14</sup>

At the moment, backing up your devices online, including purchased music, movies, games, apps, and software, is likely to infringe copyright law. We think all New Zealanders should be able to follow good backup practice without worrying about copyright issues.



<sup>13</sup> CERTNZ, "Getting started with cyber security", <https://www.cert.govt.nz/businesses-and-individuals/guides/simple-steps-to-cyber-security/get-started-cyber-security/>

<sup>14</sup> See NetSafe, "How to back up your data and devices for a swift recovery" (19 Feb 2016) <https://www.netsafe.org.nz/howtobackupyourdataanddevices/>

# Enabling big data

*Better and wider use of data promises benefits across our economy and society.*

Data-driven innovation offers a multi-billion dollar opportunity for New Zealand.<sup>15</sup> The promise is better-informed, more transparent decisions from government and business, delivering better services to New Zealanders. To realise this promise, we need the right technology, and permission to use it.

The technology problem is being solved through the Internet, which makes it easy to share, find, and access data. Better access to data has encouraged investments in skills and platforms for working with data, like our government's data.govt.nz service.

The permissions problem includes laws and measures which manage privacy and security risks, alongside copyright concerns. Copyright law controls how people can access and use data contained in copyright works. Text documents, images, maps, videos, sensor data, and sound recordings can all qualify as copyright works. Whether by computer or by hand, accessing and using the data contained in these works is likely to involve making copies and potentially infringing copyright.

## Open licences help with some issues

Owners may be happy for others to access, share, re-use, or build upon their works. Open licences, such as those managed by Creative Commons, are a way for owners of works to release them for re-use by others.<sup>16</sup> A key local example is our government's NZGOAL framework.<sup>17</sup> NZGOAL recognises the potential value of government-produced information, and encourages agencies to release information under open licences, allowing re-use to realise this value.

Open licensing is a good tool, enabling owners of works to proactively release these for wider sharing and re-use. Our copyright framework should continue to enable and respect this choice, but should also solve broader problems.

Open licensing cannot address all of the permissions issues relating to increasing use of data. In particular, "big data" techniques, drawing on many sources to generate insights, will face permissions problems under current law.

## Unlocking data to support innovation

Text and data mining is using computers to read the contents of documents, photos, spreadsheets, maps and other sources of information. Just as people can learn by reading, this is one way to build, improve, or test the functions of computer software. Reading each individual work may contribute only a little, but the whole created may create useful insights. Data mining has a range of applications. One example is academic work to improve automated translation between English and Te Reo Māori.<sup>18</sup>

<sup>15</sup> Innovation Partnership, "Data-driven innovation", <http://innovationpartnership.co.nz/app/uploads/2017/04/Data-Driven-Innovation-in-New-Zealand-1-1.pdf>

<sup>16</sup> See CCANZ, "Licences Explained", <http://creativecommons.org.nz/licences/licences-explained/>

<sup>17</sup> See Department of Internal Affairs, "NZGOAL (New Zealand Government Open Access and Licensing) framework" (12 Oct 2016) <https://www.ict.govt.nz/guidance-and-resources/open-government/new-zealand-government-open-access-and-licensing-nzgoal-framework/>

<sup>18</sup> See Mohaghegh, M., McCauley, M., and Mohammadi, M. (2014). Māori-English Machine Translation. Paper presented at NZCSRSC New Zealand Computer Science Research Student Conference-Canterbury University. <http://hdl.handle.net/10652/2966>

As highlighted by the Chalmers and Associates paper we commissioned in 2015, our current copyright law creates barriers for text and data mining.<sup>19</sup> New Zealand law does permit transient copying of works, but only where this has no independent economic significance.<sup>20</sup> It may be in New Zealand's interests to allow economic returns from text and data mining, where this does not prejudice any owner's interests in a work. The EU has a proposed data-mining permission, but because this is limited to "research organisations", it will not unlock the benefits of data-driven business innovation.<sup>21</sup> In our view, any move to allow text-and-data mining should apply to all uses which pass the relevant fairness analysis.



## Stacking licences can become unwieldy

Open data in New Zealand is commonly released under an "attribution" licence, which requires only that people using the data say who it came from. Attribution or "CC-BY" licences are the most permissive of the Creative Commons licences, and the most common on [data.govt.nz](https://data.govt.nz).<sup>22</sup>

When information is combined from many different sources, even this most permissive licence can become unwieldy. Datasets can pass through the hands of a series of people, with each making changes, and each having to name all of the previous contributors. Particularly for smaller or non-commercial projects, this may become a substantial burden in proportion to other aspects of the work.

The NZGOAL framework identified this "licence stacking" problem as a barrier to use of even the most permissively licensed data under New Zealand law.<sup>23</sup>

A review of our copyright law should consider how to enable the benefits of data, including big data techniques drawing on many sources. Options might include:

- Enabling owners to release works without restriction;
- More generally enabling data from copyright works to be used in ways which do not interfere with the economic interests of owners.

<sup>19</sup> Susan Chalmers, "Discussion Paper on Internet/Copyright Issues" (18 February 2015)

<sup>20</sup> Copyright Act s 43A.

<sup>21</sup> Eleanora Rosati, "An EU text and data mining exception"

<sup>22</sup> At the time of writing at least 80% of datasets were under a CC-BY or variant licence.

<sup>23</sup> Department of Internal Affairs, "Suitability of Creative Commons licences for copyright databases and datasets", (20 April 2015) <https://www.ict.govt.nz/guidance-and-resources/open-government/new-zealand-government-open-access-and-licensing-nzgoal-framework/nzgoal-guidance-notes/nzgoal-guidance-note-4/suitability-of-creative-commons-licences/>

# Platforms and user content

*Internet platforms make it easier for people to connect, with benefits for everyone, particularly content creators. Our copyright law should enable those benefits while continuing to protect and respect copyright owners' interests.*

The modern Internet is a platform for people to connect. Websites like Facebook and YouTube have become popular by offering the ability for users to share content, including their own writing, music, and videos. New Zealand's creative funding institutions now recognise platforms as an incubator for new talent, and a distribution mode to reach beyond the broadcast audience.

Copyright is about encouraging people to make and share new creative works. As we set out below, Internet platforms also support that goal, by enabling new creators to reach an audience, be discovered, or develop new business models.

## Platforms have benefits for local creators

Historically, a key challenge for creators starting out has been the cost and difficulty of reaching an audience or “getting discovered”. Internet platforms can make it much easier and cheaper to reach an audience. This can serve as a gateway to or market test for traditional distribution modes. For example, Lorde's first EP *The Love Club* was initially released for free on SoundCloud,<sup>24</sup> and was then released commercially in 2013 after 60,000 free downloads.

Platforms can also offer new revenue models for local creators. One example is the “Skip Ahead” project, under which NZ On Air and YouTube co-fund New Zealand creators with a track record in the online video medium. This is similar to the broadcast-funding model, with up-front support for new content, and potentially ad-supported revenue based on viewer numbers.

### Skip Ahead

Skip Ahead Title	Funding	Creators	Subscribers (June 2017)	Top video (June 2017)	# views (June 2017)
Ao-terror-oa	\$80,040	H2Ow Ltd	4,205	AFK 1 & 2	48,064
Happy Playland	\$85,000	Good Times Company	7,491	Nothing much to do trailer	120,229
How to Dad	\$84,903	How To Dad	145,641	How to hold a baby	2,887,833
Rekt	\$80,000	Viva La Dirt League Productions	138,097	Redd what?	562,045



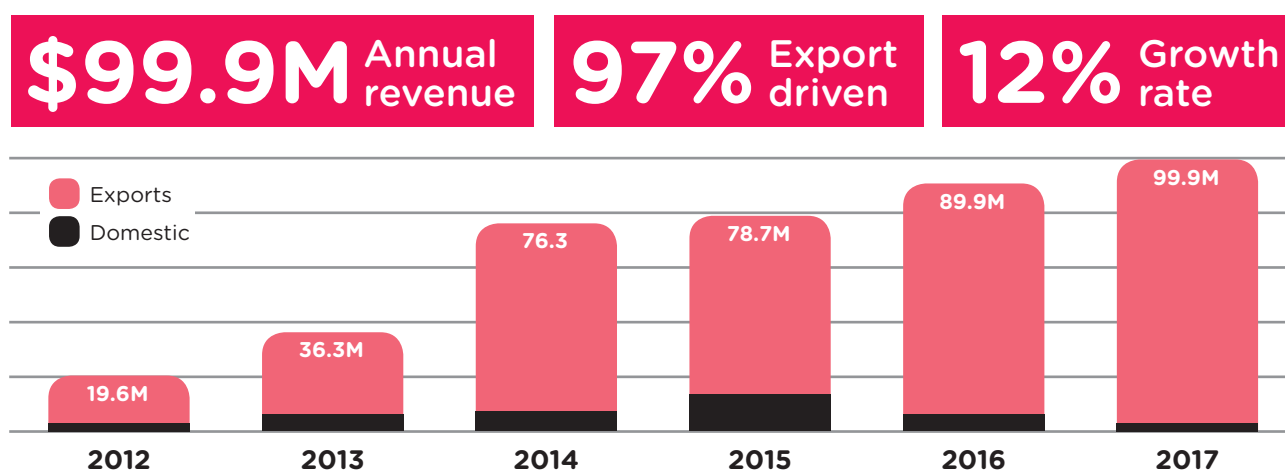
## NZ On Air Funding

More broadly, our cultural funding institutions are changing their approach as creators and audiences move to spend more time online. NZ on Air's 2016 Annual Report records \$4.45 million invested in online-only projects, as well as multi-platform TV and radio investments.

## Platforms support business: the NZ games industry

New Zealand's game development industry is a growing part of our creative sector. The NZ Game Developers Association's 2017 survey shows a high growth, export driven industry with an annual revenues of almost \$100 million.<sup>25</sup>

### Growth of NZ Game Exports 2017



Source: New Zealand Game Developers Association 2017 Survey

Global platforms such as Steam, the Google Play store, and Apple's App Store enable worldwide sales from developers working in New Zealand.

## Platforms deliver scale to everyone

Building fast, global networks to deliver video and other content is a substantial engineering challenge. Established Internet platforms offer an accessible path for New Zealand creators to reach global audiences.

<sup>25</sup> New Zealand Game Developer's Association, "NZ Game Development Revenues Hit \$100M" (September 3, 2017), <http://nzgda.com/survey2017/>

# Enabling the benefits of platforms to New Zealand

## Strong safe harbours enable innovation

Enabling users to easily access global audiences is the key benefit of platforms, but also creates some risks, including risks of legal liability. As in many areas, these risks are biggest for small and new players, who are adopting or enabling a new approach.

Legal “safe harbours” reduce this risk, enabling and encouraging innovation. One example is the safe harbour under the United States’ Digital Millennium Copyright Act.<sup>26</sup> This protects platforms from liability due to user content which the platform itself is unaware of. Without this liability protection, it would have been practically impossible for YouTube, Facebook, Twitter and other platforms to successfully gain venture funding and grow into global platforms.

The “safe harbour” approach strikes a balance between enabling platforms to innovate and connect people, while protecting the interests of copyright owners. When a platform knows about infringing content, it is fair that they take it down. When they don’t know, it is not fair to hold them liable for it.

To enable continuing innovation, and the emergence of new platforms, it is important that we continue to offer balanced safe harbours for copyright liability.

## Enabling users to make creative use of platforms

Our current copyright law allows the use of content, without permission, to do qualifying “permitted acts”. Current permitted acts are defined in a narrow and prescriptive way, which means common practices like sharing “memes” or videos with background music online is likely to be a technical breach of the law.

Platforms make the distribution of re-worked material easier, and more beneficial, as it can readily reach a large audience. One example is the “Defined Lines” video created by students at the University of Auckland, which parodied the music video for “Blurred Lines”, to convey the students’ views on sexism and consent.<sup>27</sup> There is no provision in New Zealand copyright law for parody, satire, or for open-ended use of content in this way.

Compared with other jurisdictions, New Zealand’s approach is less consistent with “permissionless innovation”. Enabling users to add new creative value, in ways that do not unfairly impact an owner’s interests, would enable New Zealanders to confidently make creative use of Internet platforms.

<sup>26</sup> Digital Millennium Copyright Act, 17 USC. § 512

<sup>27</sup> Emma Gray, ‘Defined Lines’ Is The Robin Thicke ‘Blurred Lines’ Parody That Trumps All Others, HuffPost (9 March 2013), [https://www.huffingtonpost.com/2013/09/03/defined-lines-robin-thicke-blurred-lines-parody\\_n\\_3860969.html](https://www.huffingtonpost.com/2013/09/03/defined-lines-robin-thicke-blurred-lines-parody_n_3860969.html)







# Copyright in context

Wide adoption of Internet-enabled technologies has changed the options for makers and users of copyright content. Our look at cloud services, data-mining, and platforms offers some lessons for thinking about copyright in the 21st century.

The Internet does not typically challenge or reduce the creation of copyright material. It enables creation through better, faster, easier access to likeminded creatives and collaborators and easy access to previous works for inspiration.

## The Internet challenges distributors

Historically, it was slow and expensive to publish and distribute works to new markets, particularly across large distances. Publishers and distributors arose to solve that distribution challenge, pooling the rights to many creative works, to justify the investment needed to ship books, CDs, or film reels around the world. Now the Internet offers an alternative.

This very clearly challenges pre-Internet distribution methods, and the expectations that went with them. If a big movie were released months later in New Zealand than elsewhere, people would be annoyed. The current ecosystem, enabled by the Internet, has created significant platforms to creative endeavours to be started, discovered, funded, and distributed. There are new possibilities for collaboration and experimentation.

## The Internet helps creators

The Internet enables new creative opportunities through new forms or creative expression, new collaborations, new motivations for creation (e.g. the Free and Open Source Software community) and enables creatives to access new audiences easily.

One emerging example is the way that streaming video services providers are changing distribution options for smaller creators. Independent films shown at Cannes are now being picked up and distributed by Netflix and Amazon Prime. The low distribution cost of adding one more title to an online platform can serve both creators and consumers, for example making it more viable to serve scattered niche audiences.

Crowdfunding platforms like Kickstarter, Indigogo and PledgeMe have enabled creative New Zealanders in niche areas to access capital, create things they are passionate about and make a living - all thanks to tapping into global communities of interest through the Internet.

### Case study: Garphill games

Garphill games is a New Zealand games design company (based in Waikanae). It's high quality gameplay, design, art and components are well received by the international board game community. One of Garphill's recent game has been nominated for one of the most prestigious games award - Kennerspiel des Jahres (Strategy Game of the Year). Garphill funds its games through Kickstarter campaigns, the most recent of which met its funding target in just one day.

See more at <http://garphill.com/>



# The Internet offers opportunities

The Internet does challenge prior distribution models, but overall this is to the benefit of New Zealand. Below we explore an approach to copyright which continues to protect and benefit New Zealand creators. We think a law which works with the architecture of the Internet, and which supports continuing innovation, will ultimately boost our ability to create works and reach new audiences.

New Zealand needs a policy approach which works both today and tomorrow, enabling current technologies and adapting to new innovations.

## Principles for future-proof copyright

We think our analysis, and the examples of cloud services, data-mining, and platforms, support some general lessons for the future direction of copyright. Below we set out principles which can guide a balanced approach to copyright, delivering New Zealand the combined benefits of creative effort and continuing innovation.

## Make the law clear and easy to use

Copyright is everywhere, but it is complicated and often poorly understood. Misunderstandings complicate decisions for everyone: creators and publishers, retailers and customers, startups, investors, and online platforms. Because copyright is automatic, there may not be an expert on the scene to help, as there would be with comparable patent or trademark rights.

As a result, creators and users of copyright can struggle to navigate the law. The resulting doubt and difficulty serves no-one. We think copyright could be made more usable by:

- Defining a guiding purpose and principles for our copyright law;
- Developing and supporting best-practice guidelines for creators and users of copyright material.

### Define a purpose and principles for our copyright law

Our copyright law does not state a clear purpose or set out guiding principles. This is out of step with Cabinet's drafting guidelines, which say "the purpose provision of [any] Act is a key aid to interpretation".<sup>29</sup> Given that most New Zealanders routinely make, share, and access copyright content online, we think this is particularly important for our copyright law.

Defining a purpose would be in line with overseas recommendations. The Australian Productivity Commission said of their framework that "absence of an overarching objective, policy framework and reform champion have collectively contributed to poor policy outcomes."<sup>30</sup>

<sup>29</sup> See Cabinet Office, "CO (15)3: Revised Legislation Advisory Committee Guidelines" (22 May 2015), <https://dpmc.govt.nz/publications/co-15-3-revised-legislation-advisory-committee-guidelines-cabinet-requirements>

<sup>30</sup> Australian Productivity Commission 2016, Intellectual Property Arrangements: Overview and Recommendations, Inquiry Report No. 78, Canberra, p 25.

## **Our proposed principles for the new Copyright Act**

A lack of understanding about copyright creates problems for everyone. We think a clear purpose statement in a revised Copyright Act would help to make the law more usable for everyone.

We propose that these are:

- protect New Zealanders' creative works
- encourage future creative work(s)
- allow people to add value to copyrighted works
- make copyright usable by everyone
- protect New Zealanders' rights to use and access creative works

## **Support guidance on best practice for all users**

With the Internet enabling anyone to publish to the world, we think it makes sense for everyone to have good guidance on their copyright options. One model is the “best practice” guidelines published by the American University’s Washington College of Law. We would welcome similar guidelines for all users of copyright.



**We recommend the development of “best practice” guides to support predictable and fair uses of current and proposed permitted acts.**

## **Maintain and add to familiar permitted acts**

We support a flexible, open-ended exception to make our copyright law more compatible with innovation. Our dialogue with content distributors reveals one main concern with this - that a new exception would undermine predictability. We recognise this concern.



**We recommend maintaining the familiar permitted acts, to allow predictability for existing creators, distributors, and users. These should be supplemented, not replaced, by new permitted acts.**



# Make the law adaptable

## Go beyond technology-specific exceptions

In the 300 years since the first copyright act,<sup>31</sup> a range of new technologies have required rethinking of copyright law: cameras, piano-roll-players,<sup>32</sup> photocopiers,<sup>33</sup> multi-tracks, synths, cassette tapes, VCRs, and home computers. Originally applying to printed works only, the law has been extended to protect new kinds of work periodically.

The last real update to our copyright law was in 2008, under the “new technologies” amendment.<sup>34</sup> Controversial changes responded to the then-novel way people were using the Internet to access recorded music. New exceptions made it legal for people to use their iPods, by “format-shifting” music from purchased CDs to mp3 files. New liability rules focused on online “file-sharing”, imposing penalties and potential withdrawal of Internet service from repeat infringers.<sup>35</sup> Ultimately, the s 92A threat of disconnection was withdrawn under intense public pressure.<sup>36</sup>

Since 2008, take-up of new technologies has changed the market again. New Zealanders still pay for music, but over half of revenues come from Internet streaming services.<sup>37</sup> The focus of the 2008 reforms now seems out of date: we have an iPod law in a smartphone age.

## Allow copyright to adapt as technology changes

Over the past two decades, increases in the uptake and speed of Internet services have changed the way people access and distribute content. As just one example, Internet distribution has enabled gaming to become a \$100 million export industry, with room for much more growth.

Our approach to updating copyright has relied on new legislation. As in 2008, each change in technology requires a full Parliamentary process to adapt our law. The approach of specifically enabling each new technology, puts a high burden on already busy Parliamentary processes. In effect, it asks MPs to do the impossible. When people innovate, they make something new. It is unfair on our lawmakers that they be asked to anticipate the next decade’s worth of innovation, and unfair on creative New Zealanders that they be constrained to the specific uses of new technology which our law has anticipated.

Our copyright law is intimately linked with the permission we give people to innovate and add new value. We think that a more open-ended set of permissions, guided by overall principles for our copyright law, can strike a better balance between enabling innovation and protecting the business interests of creators and owners of content.

<sup>31</sup> Copyright Act 1710 (8 Ann. c. 21)

<sup>32</sup> <http://digital-law-online.info/lpdii.0/treatise17.html>

<sup>33</sup> <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline>

<sup>34</sup> Copyright (New Technologies) Amendment Act 2008.

<sup>35</sup> Copyright (New Technologies) Amendment Act 2008, cl 53.

<sup>36</sup> Copyright (Infringing File Sharing) Amendment Act 2011, s 4.

<sup>37</sup> Recorded Music NZ, “Music industry records second straight year of growth” (6 Apr 2017), <https://www.recordedmusic.co.nz/music-industry-records-second-straight-year-of-growth/>

Universities Australia said of their system:<sup>38</sup>

“After 20 years of reviews that have considered this question, the evidence is in: Australia’s existing inflexible, purpose-based copyright exceptions are no longer fit for purpose. They are holding Australia back, not just in our universities and schools, but also in our digital industries. Innovative and useful technologies, and new ways of using content in socially beneficial ways, automatically infringe copyright in Australia unless their use falls within one of the existing narrow, purpose-based exceptions.”

## When were technologies declared legal?

Technology	U.S.	Australia	NZ
VCR	1984	2006	1994
Reverse Engineering	1992	1999	2008
Internet Search	1999	NA	Law unclear
Hyperlinking	2000	Law unclear	Law unclear
Digital video recorders	1999	2008	Law unclear
Cloud services	2008	NA	Law unclear

The table above indicates that New Zealand law has been relatively slow to declare new technologies allowed under copyright law. This is partly due to our narrow “permitted acts”, and partly due to a lower volume of case law.

We are proposing that a move to more flexible exceptions is matched with best-practice guidance, to enable predictability about what is fair. More accessible case-specific guidance might also deliver predictability.

<sup>38</sup> Australian Productivity Commission 2016, Intellectual Property Arrangements: Overview and Recommendations, Inquiry Report No. 78, Canberra, p 9.



# Work with the internet, not against it

## Copyright law should not limit the freedom to link

Websites and social media make it easy for people to share information. At the heart of this sharing is linking: pointing to information others have shared. Linking is similar to offering directions to an information source like a library, but in a way your computer can understand. The ability to reference information, and to build upon what others have shared, is part of the Internet's strength as a platform for learning and conversation.

In Europe, decisions by courts have moved to treat linking to content as a re-publication of that content under copyright law.<sup>39</sup> We think that this reflects a misunderstanding of the underlying technology. Linking does not involve copying content, but instead points to an existing copy. If that copy is an infringing one, the owner should be talking to the person who hosted or posted it, not to ordinary users who link to it.

To demand that users of social media, or writers of websites, check the copyright status of all material they link to seems unrealistic and unfair. It attacks a key benefit of the Internet and Internet platforms: the free-flowing discovery and sharing of information by all users.

## Focus on production not protection

Stronger and broader legal protections do not guarantee more production of works. One example is the EU database right, created in 1996 and not adopted elsewhere. An official 2005 analysis found no evidence that protecting databases had improved productivity, stating:<sup>40</sup>

 **Introduced to stimulate the production of databases in Europe, the new instrument has had no proven impact on the production of databases.”**

Though not technically copyright, the failure of the database right demonstrates that more legal protection does not always translate into more production or better economic outcomes.

Since the EU database right was created in 1996, wide adoption of the Internet has changed the economics of data use. It is easier to create and databases by finding and compiling information. At the same time, the value of permissionless sharing and re-use of data has increased.<sup>41</sup>

<sup>39</sup> See Rosati, *GS Media and its Implications for the Construction of the Right of Communication to the Public within EU Copyright Architecture* (2017) 54(4) CMLRev 1221-1242

<sup>40</sup> Commission of the European Communities, “First evaluation of Directive 96/9/EC on the legal protection of databases” at p 5 [http://ec.europa.eu/internal\\_market/copyright/docs/databases/evaluation\\_report\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf)

<sup>41</sup> <https://creativecommons.org/2017/08/30/european-commission-repeal-extra-rights-databases/>

## Enable innovation to enrich our learning

Internet-enabled innovations hold promise for improving the way our public institutions work. Schools and universities, libraries, museums, and galleries, can all use the Internet to share their work more widely, and to bring the broader world to people in their physical locations. These benefits may be missed, particularly in smaller institutions, due to a fear of extensive legal liability or the difficulty of negotiating explicit license terms for innovative ways of enriching content. Our copyright framework should help to overcome these barriers to better, more modern ways of learning and accessing our culture.

## Reduce copyright transaction costs

Transaction costs are barriers to people doing things. The Internet reduces the costs of sharing information, making it easier to collaborate and distribute content. With easier communication, other transaction costs loom larger. Barriers of time, effort, and uncertainty can make it hard to do creative work. Ideally, these transaction costs would not exist. In the real world, they do.

Creative work is often a collaborative process, drawing on different people's skills and perspectives to add value. This same collaborative process can operate after a work is published. People who read, hear, or see a work may want to licence it for use in their own projects, or build something new on top of it. The default under our law is "no copying", so re-use of a work will generally require an owner's permission.

Where owners are readily contacted, this can work well. Collective licensing schemes can help, for example the OneMusic scheme, which makes it easier for cafés and other businesses to licence music for public use.<sup>42</sup> It is important to ensure that such schemes, and other options for gaining permission to use content, are fair and efficient. This may be a particular problem for re-use of content in New Zealand, which is a small and distant market from the perspective of many content owners. Measures to more easily find and contact owners, or to make reasonable uses of content without risking substantial legal penalties, may help to realise value that would otherwise be missed due to transaction costs.

The effect of transaction costs is most obvious for orphan works, which do not have an identifiable owner. The Australian Productivity Commission refers to a popular game which was commercially unavailable for 15 years, despite the radical improvements in Internet distribution:<sup>43</sup>

**“System Shock 2 was commercially unavailable for nearly 15 years despite it being the most requested game on a digital distribution website and more than 34 000 people registered their interest in playing the game. A game developer and digital distributor were keen to update and sell the game but they could not track down the rights holders.”**

<sup>42</sup> <https://www.onemusicnz.com/>

<sup>43</sup> Australian Productivity Commission 2016, Intellectual Property Arrangements, Inquiry Report No. 78, Canberra, p 116.



# Draw on overseas lessons

New Zealand is a small economy, and a net importer of commercial copyright works. We can usefully draw on lessons from overseas, to help in finding a balance between local interests and alignment with our trading partners.

The United States, Israel, and Singapore have all adopted variants of a flexible fair use test, enabling creative re-use of works consistent with an original owner's interests. Reports in Australia have recommended the same move.

## Overseas moves on copyright policy

<p><b>Australian Law Reform Commission<sup>44</sup></b></p> <p>The 2013 “Copyright and the Digital Economy” report proposed a fair use exception for Australia, based upon the four-factor test in the United States.</p>	<p>Proposal 4-3 The non-exhaustive list of fairness factors should be:</p> <ul style="list-style-type: none"> <li>a) the purpose and character of the use;</li> <li>b) the nature of the copyright material used;</li> <li>c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and</li> <li>d) the effect of the use upon the potential market for, or value of, the copyright material.</li> </ul>
<p><b>Australian Productivity Commission</b></p> <p>The 2016 report on Intellectual Property Arrangements recommends moves to address imbalance in copyright, including a broad, principles-based fair use right.<sup>45</sup></p>	<p>The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:</p> <ul style="list-style-type: none"> <li>• the effect of the use on the market for the copyright protected work at the time of the use</li> <li>• the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work</li> <li>• the commercial availability of the work at the time of the infringement</li> <li>• the purpose and character of the use, including whether the use is commercial or private use.</li> </ul>
<p><b>Singapore - Proposed changes to copyright regime</b></p> <p>Singapore is reviewing copyright law, in light of recent and continuing copyright change.</p> <p>Singapore already has a principles-based exception similar to fair use in the United States. The consultation paper proposes to remove factor (e) from the expressed list of key factors.</p>	<p>3.48 The five factors are:</p> <ul style="list-style-type: none"> <li>a) The purpose and character of the use, including whether the use is commercial in nature or for non-profit educational purposes;</li> <li>b) The nature of the creative work;</li> <li>c) The amount of the creative work that has been copied, or whether the part that is copied is substantial to the whole of the creative work;</li> <li>d) The effect of the use on the potential market for, or value of, the creative work; and</li> <li>e) The possibility of obtaining the creative work within a reasonable time at an ordinary commercial price</li> </ul>

<sup>44</sup> Australian Law Reform Commission 2013, “Copyright and the Digital Economy”, Report 122, Sydney.

<sup>45</sup> Australian Productivity Commission 2016, Intellectual Property Arrangements, Inquiry Report No. 78, Canberra.

<p><b>Israel</b></p> <p>Israel's copyright law provides a flexible "fair use" exception, modelled on that of the United States.<sup>46</sup></p> <p>There is one change: the first factor does not require consideration of whether use is commercial, enabling a broader analysis of net benefit.</p>	<p>19. Fair Use</p> <p>a) Fair use of a work is permitted for purposes such as these: self-study, research, critique, review, news reporting, quotation, or teaching and examination by an educational institution.</p> <p>b) In examining the fairness of the use of a work under this section the following will be considered, inter alia:</p> <ul style="list-style-type: none"> <li>(1) The purpose of the use and its character;</li> <li>(2) The character of the work being used;</li> <li>(3) The extent of the use, in qualitative and quantitative terms, proportionate to the entire work;</li> <li>(4) The impact of the use on the work's value and potential market.</li> </ul> <p>c) The minister is authorized to establish conditions under which use will be considered fair use.</p>
<p><b>United States</b></p> <p>The United States has an open-ended "fair use" right in its copyright law.<sup>47</sup> This enables re-use of material which is "transformative", adding new value to the existing work.</p> <p>The "such as" wording makes this an open-ended exception. This has enabled the law to adapt to emerging technologies such as VCRs, Internet search, and cloud services.</p> <p>It is the model for exceptions in Singapore and Israel, and for proposed exceptions in Australia.</p>	<p>Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—</p> <ul style="list-style-type: none"> <li>(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;</li> <li>(2) the nature of the copyrighted work;</li> <li>(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and</li> <li>(4) the effect of the use upon the potential market for or value of the copyrighted work.</li> </ul> <p>The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.</p>

<sup>46</sup> See Elkin-Koren et al, "Code of Best Practices for Use of Works in Teaching and Research", <http://weblaw.haifa.ac.il/en/AcademyInCommunity/ClinicList/tech/Pages/openeducation.aspx>

<sup>47</sup> 17 US Code § 107.



# Create an open “fair use” style exception

Copyright is meant to encourage new creative efforts. It does this by creating a legal monopoly, with rules to help owners of works control their distribution and use. This is a delicate balance - like other monopolies, the protection given by copyright can become a basis for unfair market practices going against consumer interests. To respect human creativity, we must recognise the original authors and subsequent owners of works, but also acknowledge that all of us have creative skills, and can transform works to add new value.

Distribution enabled by the Internet has made this “follow-on” creativity more socially and economically important. Enabling fair re-use of works to add value is now about economic benefits and innovation as well as free expression.

## Allow for innovation without legislation

Earlier in this document, we highlighted present issues where copyright affects the use of the Internet: cloud computing, social platforms, and the use of big data techniques. Alongside these existing technologies is the potential for continuing innovation and change. Our copyright balance should be open to benefits from that innovation, which neither InternetNZ nor anyone else can specify in advance - that’s what innovation means.

Each new technology for copying, including each new use of the Internet, has resulted in potential roadblocks due to copyright. Open-ended exceptions in other countries, most notably the United States, have enabled a quicker path to finding a fair copyright balance.

The Australian Productivity Commission put it like this:<sup>48</sup>

“One of the key differences between fair dealing and fair use is where responsibility lies for determining the ‘fairness’ of new uses of copyright material. In Australia (and other Commonwealth countries), legislative change is required to expand the categories of use deemed to be fair. In contrast, in countries such as the US, courts have the latitude to determine if, on the facts, a new use of copyright material is fair (box 6.3). The US courts have developed considerable case law on the scope of fair use of copyright-protected material, and a range of guidance tools exist to assist rights holders and users to determine what uses of copyright material the courts might consider fair.”

<sup>48</sup> Australian Productivity Commission 2016, Intellectual Property Arrangements, Inquiry Report No. 78, Canberra, p 168.



### **Open-ended exceptions lower transaction costs for adding value**

By creating a “no use” default, copyright law can create cost and uncertainty around uses of content which create new value. With open-ended exceptions, the “fairness” test relates to information held by the person doing the use: How much creativity are they applying? What type of work are they using? How much are they using? Will it affect the market for the original work?

These are questions which a conscientious user can answer, particularly if supported through industry-guidance. By comparison, gaining permission for even trivial uses requires contacting the relevant rights-holder. This can be a slow and uncertain process, particularly where distribution rights are carved-up by duration or location, or where the rights-holder has no local business.

### **Protect original creators with an economic impact test**

We think an open-ended exception could enable beneficial new creativity. At the same time, it is important to respect the interests of owners, original authors, and those who have invested in the source work. For example, it would be wrong to allow a new use of a work which unfairly impacts its existing market. The Australian Productivity Commission put it this way:<sup>49</sup>

“The opportunities Australian businesses and consumers forego because of the current inflexible exceptions are much more extensive. Participants argued that Australia’s current exceptions frustrate the efforts of online businesses seeking to provide cloud computing solutions, prevent medical and scientific researchers from taking full advantage of text and data mining, and limit universities from offering flexible Massive Open Online Courses. The education sector has also indicated that fair use would avoid the current perverse situation where Australian schools pay millions of dollars each year to use materials that are freely available online.”

<sup>49</sup> Australian Productivity Commission 2016, Intellectual Property Arrangements: Overview and Recommendations, Inquiry Report No. 78, Canberra, p 9.



### Balance copyright policy in New Zealand's interest

New Zealand's policy latitude on copyright is substantially restrained by international agreements. The duration of copyright protection, its automatic nature, and the categories of qualifying works are all required by international agreements. The key area of domestic policy latitude is in the scope and nature of "user rights": the activities where our law turns "no by default" into "yes by default".

The Australian Productivity Commission identified over-protection as a key problem in their, generally comparable, copyright law:<sup>50</sup>

Australia's copyright arrangements lack balance and have been slow to adapt to technological change, imposing costs on the broader community.

- Overly broad and long copyright protection means Australians pay more or have difficulty accessing copyright material.
- Excessively long copyright protection increases the likelihood works will become commercially unavailable or orphaned (where rights holders can no longer be identified). Copyright works that have already been produced, but cannot be accessed and used by consumers, benefit no one.



**We recommend a broad, open-ended exception as the best available measure to re-balance our law, to allow for changing technology, and to recognise the potential of local creativity to add new value.**

<sup>50</sup> Australian Productivity Commission 2016, Intellectual Property Arrangements, Inquiry Report No. 78, Canberra, p 103.

# Support consumer interests in copyright

## Consider principles for access to content

Separate from the issue of innovation and added value are issues of consumer access to content.

The Internet largely solves the technical problems of distributing content from anywhere to anywhere. In principle, New Zealand consumers should now be able to access content when, where, and how they want it, at a reasonable price. The remaining barriers to content are legal and business problems - problems of permission and transaction costs.

Unfortunately, as a small market, New Zealanders cannot always rely on international or overseas businesses to deliver the content we are interested in, in a usable format. These access issues are most acute for users who need works in a particular format. People who are blind, or otherwise suffer reading disabilities, can only read text content in braille or audio formats. People with hearing disabilities rely on audio relay services and closed captions, which are not universally applied to videos or other online content.

We think that the best outcome for access is a competitive market in which commercial agreements deliver content that consumers want, how they want. Unfortunately, existing markets do not always deliver this outcome. Australian research indicates reduced access to content, and higher prices, in Australia than in larger markets.<sup>51</sup> New Zealand is likely to be in a similar position.



**Copyright should support consumer access to legitimately provided content, including avenues for self-help where New Zealanders would otherwise miss out.**

Current law offers two models to improve access to works: conversion to accessible formats, and parallel importation.

### Clearly allow Braille, captioning, and accessibility innovations

Section 69 of the Copyright Act allows the Blind Foundation, and other bodies prescribed by regulation, to make braille copies or modified copies of works to enable access by people with a print disability.<sup>52</sup> This is a self-help approach, for when these formats are not commercially available at a reasonable price.

Having text captioning on TV and movies can be a great help to people who are deaf or hard of hearing. It is expensive to do, and here in NZ it is not explicitly required by law as it is in the United States (one of the reasons why local SVoD providers do not always have text captions on all movies and films). Putting aside the accessibility and inclusivity arguments on regulating for text captioning, we think that copyright law should not restrict third parties from overlaying text captioning over video where the copyright holder has chosen not to do so.

<sup>51</sup> Suzor, N., Van Geelen, T., Pappalardo, K., Burgess, J., Wikström, P. & Ventura-Rodriguez, Y. 2017, Australian consumer access to digital content, Australian Communications Consumer Action Network, Sydney. [https://accan.org.au/ACCAN\\_QUT\\_Digital%20Content\\_web.pdf](https://accan.org.au/ACCAN_QUT_Digital%20Content_web.pdf)

<sup>52</sup> See s 69 Copyright Act 1994, R 5, Copyright (General Matters) Regulation 1995.

## Parallel importation

As a net importer of commercial content, New Zealand might benefit from a general right to parallel import legitimate copies of content which is not otherwise available. This could provide an incentive to serve our small market, which might otherwise be neglected by distributors.

The analogous right exists in our law on trademarks. A registered trademark protects the distinctive identity of a business. Ultimately this is intended to serve consumer interests: helping consumers to identify specific suppliers encourages investment in the nature and quality of goods and services. Since 2002, New Zealand law has allowed parallel importation of genuine trademarked goods. It seems fair that a New Zealander buying a legitimate Louis Vuitton bag on an overseas holiday should be able to bring it home without being prosecuted.

## People expect to buy works, not formats

We think that one of the consumer protections needed in a new copyright law is format shifting. Copyrighted works are available in a number of digital formats, each valid and usable on specific platforms. We think that New Zealanders should have the rights to format shift copyrighted works they have purchased as and when they need to. For example, if Anika has a library of Kindle books (.mobi format) but for christmas she is given a new Kobo, she should be able to convert her ebooks from .mobi to .epub.

End-user agreements, and the restrictions on how New Zealanders can use and enjoy the copyrighted material they purchase should not hinge on formats and devices.



**Copyright law should support continued access to legitimately obtained content, by allowing technology-neutral shifting between formats and devices. This should be a permitted act, with a corresponding right to bypass technological protection measures, and to help others do so.**

We want to see New Zealanders have legal avenues to purchase or access creative works where they want, when they want, in the formats and devices they want, at a fair price.





## Respond to emerging issues

The ability for people to make and share content has some fantastic positive results, but also some negative ones. When photos and videos “go viral” an individual can all of a sudden have to learn about copyright and intellectual property.

### **Allowing reasonable responses to online content**

Effectively fact-checking and responding to harmful or misleading content online may require quoting from that content. Users should be able to make proportionate, non-competing use of online materials to engage effectively in online conversations, especially where they are simply talking to others and not seeking to profit.

A broad and flexible exception offers some options for responding to these issues. A more targeted exception might also be desirable to set a clear permitted scope for this kind of response.

### **Responding to enforcement measures which hurt consumers**

Enforcement measures, particularly automated measures, can have unfair results. New Zealand creators may have legitimate content removed from platforms, perhaps due to quotation from or resemblance to existing works, perhaps due to errors.

Unfair removal of content also has adverse effects on all those consumers who want to access it.

As the Internet becomes an increasingly important distribution mode, it may be desirable to monitor the consumer impacts of measures taken, or presented as, protecting interests in copyright.



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