



submission to the

Review of the Copyright Act 1994

by the New Zealand Aotearoa

**Ministry of Business, Innovation and
Employment**

April 2019

The Australian Digital Alliance (ADA) welcomes the opportunity to be part of the review of the New Zealand Aotearoa *Copyright Act 1994*.

The ADA is a non-profit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy. It was founded following a meeting of interested parties in Canberra in July 1998, with its first patron being retired Chief Justice Sir Anthony Mason AC KBE QC. Its members include universities, schools, disability groups, libraries, archives, galleries, museums, research organisations, technology companies and individuals. The ADA unites those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture.

The ADA has a strong interest in the review, both due to the important influence New Zealand law has on Australia's own copyright policy, and due to a general interest in encouraging best practice in public interest copyright reform in the region and globally.

Our comments focus not on the specifics of New Zealand law, as there are local experts who can better supply this viewpoint. We instead aim to present the public interest viewpoint, informed by the experience of our members with Australian law in the areas on which the issues paper seeks comment. We provide additional information and examples (whether positive or negative) on the selected topics that we hope will be useful for informing the review. Where appropriate, we also discuss international standards and underlying principles that are common across copyright systems.

In our submission below, we comment only on a selection of the questions posed by the Issues Paper, which fall within our area of expertise and interest. As such, we have created a custom submission format below based on the template provided by the MBIE, rather than using the template itself.

We are happy for both our name and submission to be published on the MBIE's website.

Objectives

1. Are the above objectives the right ones for New Zealand’s copyright regime?
How well do you think the copyright system is achieving these objectives?

We commend and support the objectives proposed by the Ministry of Business, Innovation and Employment (MBIE), although we also propose two additional objectives (see below).

In particular, we endorse the inclusion of Objective 2 to enshrine a right of access to works for the public benefit. However, we encourage the New Zealand government to consider adapting the language of this objective to specifically link it to the general “public benefit” rather than the potentially more limited “net benefits for New Zealand.”

Although we believe the intent between the two phrases is the same, the new wording would avoid any confusion in relation to activities that have an international aspect or impact. For example, one of the central reasons for the development of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled was to encourage cross-border sharing of accessible materials.¹ It is conceivable that the current language could result in arguments that seek to limit the international aspect of the rights conveyed by this treaty. Removing the limitation would also better align the Objective with its natural counterpart in Objective 1, which enshrines economic rights for creators without reference to geographic boundary.

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?

Adaptability

We strongly support the inclusion of an objective to ensure the law is technology neutral and able to adapt to future technologies.

¹ See World Intellectual Property Office, *Summary of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT)* (2013) available at https://www.wipo.int/treaties/en/ip/marrakesh/summary_marrakesh.html

Adaptability is particularly important for IP systems, which are intended in their core to encourage change and development. It underpins the aims outlined by the proposed Objective 3, in that it is essential to ensuring that an IP regime remains effective and efficient over time. Without adaptability, IP laws quickly lose their relevance as new technologies and services are developed, and as society continues to absorb and adapt to these new creations.

Unfortunately, adaptability is an area in which the Australian copyright regime performs poorly. Our current system is extremely 'adaptable' with respect to creators' rights, in that it ensures creators have legal control over new technologies and uses the moment they come into existence. However, it fails to apply this principle in reverse, and is almost chronically unable to adapt to permit the use of new technologies or recognise changing consumer needs and behaviour. This is a major discrepancy in its approach: creators' rights are principle based, with a broad scope intended to 'cover the field' for all possible works and uses; while users' rights, are narrow, prescriptive and unable to adequately cover the full range of existing uses. If the situation were reversed and copyright owners were required to go to parliament to ensure each new technology or behaviour was covered by copyright, there would clearly be outrage. Yet this is what is currently asked of users and innovators - every time a new product or service is developed it is presumptively illegal until (and only if) a licensing model arises or a new exception is introduced. This results in a situation where many everyday uses are illegal in Australia, and significantly puts businesses seeking to create or make use of new technologies in Australia at a disadvantage to their international counterparts.

A system which relies on specific exceptions to permit new and socially desirable uses will almost by definition never be adaptable - it will always be playing catch up, always acting as a drag on innovation rather than facilitating and encouraging it. This results in the undesirable situation in which ordinary uses (such as forwarding emails and recording your child in their school concert) and socially beneficial transformative uses (such as cloud computing) remain illegal not because they harm copyright owners but because they are caught in a gap between licensing and legislation. That is, they do not offer sufficient revenue or cause enough harm to motivate rights holders to provide a licence; but neither are they viewed as urgent enough to overcome political realities - including lobbyist pressure, cumbersome processes and plain old inertia - to merit a specific legislative exception. As noted in the Hargreaves *Review of Intellectual Property and Growth* countries without a fair use doctrine have "witnessed a growing mismatch between what is allowed under copyright exceptions, and the reasonable expectations and behaviour of most people... [a flexible exception] keeps copyright closer to the reasonable expectations of most people and thus helps make sense of copyright law."² The result is a system in which copyright owners decide what uses should be legally permitted, without the public interest oversight that should always accompany a monopoly right. Adaptable exceptions put the decision-making power back in the hands of the judiciary to determine the appropriate application of copyright law.

The myth that flexible exceptions such as fair use are uncertain or lack clarity was refuted strongly by the Australian Law Review Committee (ALRC) in its 2014 report *Copyright and the Digital*

² Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 43.

Economy.³ This report examined the issue of certainty at some length and found that “fair use is sufficiently certain and predictable, and in any event, no less certain than Australia’s current copyright exceptions.”⁴ Particularly informative on this issue is a submission to the ALRC by US academics Gwen Hinze, Peter Jaszi and Matthew Sag, which refutes arguments that the US fair use is uncertain, taking the Australian context into account.⁵ They endorse the language of ‘predictability’ rather than ‘certainty.’ Certainty lends itself to an interpretation that requires absolute consensus on its application to contested facts in every individual case – something that is rarely available in the application of legal principles. Predictability is more achievable and useful in practice, as it emphasises the need for a fairly coherent set of principles that lend themselves to forward-looking application.

The ALRC also made the point that “a clear principled standard is more certain than an unclear complex rule” and thus recommended that Australia replace its “many complex prescriptive exceptions with one clear and more certain standard.”⁶ It recommended the adoption of fair use as this exception because:

fair use ... facilitates the public interest in accessing material, encouraging new productive uses, and stimulating competition and innovation. Fair use can be applied to a greater range of new technologies and uses than Australia’s existing exceptions. A technology-neutral open standard such as fair use has the agility to respond to future and unanticipated technologies and business and consumer practices.⁷

The ALRC’s findings and recommendations were echoed by Australia’s Productivity Commission (PC) in its 2017 Inquiry into Australia’s *Intellectual Property Framework*, which concluded that “Fair use would ... allow Australia’s copyright arrangements to adapt to new circumstances, technologies, and uses over time” and that this would help reduce “opportunities Australian businesses and consumers forego because of the current inflexible exceptions.”⁸ The PC found little evidence that fair use would substantially increase uncertainty after the initial implementation period, emphasising that “fair use is adaptive (as distinct from uncertain)”⁹ and

³ ALRC *Copyright and the Digital Economy* (ALRC Report 122) (2014)
<https://www.alrc.gov.au/publications/copyright-report-122>

⁴ ALRC *Copyright and the Digital Economy* (2014) para 41 at <http://www.alrc.gov.au/publications/4-case-fair-use/fair-use-sufficiently>

⁵ Hinze, Jaszi and Sag, *The Fair Use Doctrine in the United States — A Response to the Kernochan Report*, July 26, 2013 http://www.alrc.gov.au/sites/default/files/subs/483_g_hinze_p_jaszi_m_sag.docx

⁶ ALRC *Copyright and the Digital Economy* (2014) Executive Summary,
<https://www.alrc.gov.au/publications/executive-summary/flexible-fair-use-exception>

⁷ ALRC *Copyright and the Digital Economy* (2014) Executive Summary,
<https://www.alrc.gov.au/publications/executive-summary/flexible-fair-use-exception>

⁸ Productivity Commission, *Intellectual Property Arrangements Inquiry - Overview* (2015), p.7, available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf>

⁹ Productivity Commission, *Intellectual Property Arrangements Inquiry* (2015), p.165, available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>

that basing any new adaptable exception on the existing fair dealing factors, accessing foreign jurisprudence and adopting appropriate industry guidelines would further increase certainty.

The PC also took note of a report by Ernst & Young for the Australian Government which found:

Beyond these short-term impacts, it is unlikely that the fair use exception, by its inherent nature, would reduce certainty for rights holders and users compared to the status quo. This judgment is based on the observations that: (1) the status quo is relatively uncertain; (2) fair use, as a concept, is likely to be relatively predictable; and (3) the available evidence does not suggest that the relationship between fair use and increased enforcement costs is as strong as commonly assumed.¹⁰

After assessing the benefits and costs of introducing a broad US-style fair use exception, Ernst & Young concluded that (as described by the PC):

adoption of fair use in Australia would be a net benefit to the Australian community. While intrinsically difficult to assess, the analysis ... examined the impact of fair use on Australian consumers and the broader community, users of copyright material such as schools and libraries, and rights holders. Some aspects of fair use offer larger gains, including education and government use, and improved community access to orphan works. Other changes reduce uncertainty for consumers and businesses, improving Australia's innovation environment.¹¹

As a direct result of these reports and recommendations, the Australia government has made the move towards an adaptable copyright regime a priority. It has committed to creating "a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes."¹² This commitment was progressed with the announcement of the Copyright Modernisation Consultation, which includes in its stated goals "flexible exceptions, which need to adapt over time to provide access to copyright material in special cases as they emerge."¹³ The Modernisation Consultation remains ongoing.

¹⁰ Ernst & Young *Cost benefit analysis of changes to the Copyright Act 1968* (2016) <https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968> quoted at p.182 in Productivity Commission, *Intellectual Property Arrangements Inquiry - Overview* (2015), available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf>

¹¹ Productivity Commission, *Intellectual Property Arrangements Inquiry* (2015), p.165, available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf> p.7. See Ernst & Young *Cost benefit analysis of changes to the Copyright Act 1968* (2016) <https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968>

¹² Australian Government, *Response to the Productivity Commission Inquiry into Intellectual Property Arrangements* (August 2017) <https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf>, p.4

¹³ Department of Communications and the Arts, *Copyright Modernisation Consultation Paper* (March 2018) p.4, available at <https://www.communications.gov.au/file/34991/download?token=AseAjJWg>

Over the last decade flexible and adaptable copyright exceptions have been adopted by many countries internationally, including Israel, Singapore, Malaysia, South Korea. South Africa is also close to passing its own fair use exception.¹⁴ Ample evidence as to the benefits provided by such exceptions can be found in international reports and academic studies. Some of the most recent include:

- *Copyright in the digital age: Levelling the playing field*¹⁵ - This report assesses the impact of shifting from Australia's current fair dealing system to a more adaptable approach such as fair use, with reference to the experience of specific organisations including the University of Melbourne; Universities Australia; State Library of New South Wales; if:book Australia; Alexander Street Press; and the NSW Data Analytics Centre. It concludes that:
 - "because of the narrow scope of the fair dealing provisions, major new uses of copyright material are occurring outside of any clear, supportive legal framework, including vitally important growth areas such as text and data mining and cloud computing;
 - at the same time, the allowed scope of transformative uses of creative materials, such as digital remixing, remains shrouded in uncertainty and hindered by unnecessarily high transaction costs, leaving smaller, individual creators and public institutions such as universities vulnerable to litigation that seeks, or inadvertently seeks, to stymie innovation and creativity;
 - a move to a fair use approach would cut through these problems. Instead of trying to shoehorn new uses into narrow legislative provisions, by instead focussing on whether those uses meet clear principles, a fair use approach would make it more likely that any contentious issues would be resolved in a manner that promotes creativity, innovation and growth."¹⁶

We note that a similar report based on the experiences of New Zealand organisations was produced at the same time, to which we presume MBIE already has access.¹⁷

- *The User Rights Database: Measuring the Impact of Copyright Balance*¹⁸ - This research, which was presented to the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR), uses empirical data to test the impact of copyright reform in individual countries. It finds that copyright reforms that increase the openness of a country's copyright regime are associated with higher revenues in high

¹⁴ See discussed at Denise Rosemary Nicholson, *Why 'fair use' is so important for South African copyright law* (The Conversation, November 25 2018) <http://theconversation.com/why-fair-use-is-so-important-for-south-african-copyright-law-107098>

¹⁵ Deloitte Access Economics, *Copyright in the digital age: Levelling the playing field - Australian Report* (February 2018) <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-copyright-digital-age-google-160418.pdf>

¹⁶ Deloitte, op cit, p.5

¹⁷ Deloitte Access Economics, *Copyright in the digital age: Levelling the playing field - New Zealand Report* (February 2018) <https://www2.deloitte.com/nz/copyright-digital-age>

¹⁸ Sean Flynn and Michael Palmedo, *The User Rights Database: Measuring the Impact of Copyright Balance* (2017) <http://infojustice.org/wp-content/uploads/2017/11/Flynn-and-Palmedo-v1.pdf> - see description at <http://infojustice.org/archives/39079>

technology industries and greater output in scholarly publication, without harming the revenue of copyright intensive industries like publishing and entertainment.

- *Imagination foregone: A qualitative study of the reuse practices of Australian creators*¹⁹ - This study interviews 29 Australian creators working in a variety of artforms and with a range of expertise, about the extent to which their creative choices are influenced by copyright law. It aims to understand how copyright restrictions affect creative practice, and to what degree copyright inhibits the creation of new cultural goods that build on existing materials. It finds that Australia's unwieldy copyright system presents a significant barrier to creative practice, causing creators to break the law, alter or abandon projects, or avoid whole genres of creation entirely. It further finds that creators are more comfortable operating within "the spirit" of fairness and respect, rather than trying to interpret and understand "the minefield" of specific exceptions, and generally prefer a simple fairness test for determining appropriate reuse (ie "is that use fair?"), rather than the dual fairness and purpose test of Australia's fair dealing law (eg "is this use fair and for the purpose of parody and satire?").
- *Fair Use Is Good for Creativity and Innovation*²⁰ - The author of the paper draws on the history of copyright, his own experience working with fair use over 35 year as a creator and lawyer, and actual cases of fair use in the US, to describe and set out the benefits and limits of the doctrine. He then goes on to dispel some of the myths perpetuated about fair use, such as: that it reduces creator's rights; that it leads to a lot of litigation; that it is too fact-specific or unpredictable; and that it can only work in the context of the American legal system.

Public domain

The ADA also suggests that the New Zealand government consider including support for the public domain as an objective for its Copyright Act. The public domain is an often neglected area of copyright law, yet the creation of a rich and vibrant public domain of material available to all people is, at its heart, the overarching goal of all copyright policy. Copyright seeks to incentivise the creation of more material by providing exclusive rights to copyright owners not for the benefit of those owners but rather to increase the pool of public knowledge. It limits those rights to a set period of time specifically to ensure that this material will eventually become free for others to access and build upon to create new material, resulting in a continuous cycle of cultural and creative growth.

Including the fostering of a rich and diverse public domain as an objective would provide an important fundamental base for New Zealand's copyright law and would link to initiatives such as the ending of perpetual copyright.

¹⁹ 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.3 available at <https://eprints.qut.edu.au/115940/>

²⁰ Bill Patry, *Fair Use Is Good for Creativity and Innovation* (2017) <http://digitalcommons.wcl.american.edu/research/46/>

4.

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

The ADA does not propose an overall weighting of the objectives proposed by the issues paper. However, we do suggest that the first two should be given equal weight. Too often copyright is regarded only as a way to provide economic returns for the creative industries, and the equal importance of ensuring access and reuse for public interest purposes, including the creation of new material, goes unrecognised. We also suggest that the fourth objective should be lightly weighted ie that international obligations, and in particular bilateral agreements, should be agreed to only where they support and comply with the other objectives.

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

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 ADA does not presume to comment on New Zealand case law. However, it does note that the standard of originality is a matter of high importance, that has a direct impact on the public interest in copyright. As the issues paper notes, providing too low a threshold for copyright protection can lock up materials that are inappropriate for copyright protection, and impose significant negative costs on society.

It is for this reason that the ADA petitioned to contribute an amicus brief to the Australian High Court case of *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 254 ALR 386,²¹ which dealt with the protectability of electronic television guides. The ADA's amicus brief, which you can find attached, provides a detailed discussion of the global jurisprudence on the standard of originality and highlights the illogical and undesirable effects that would result from mere skill and labour being found to give rise to copyright protection.²²

In its decision the High Court confirmed that while skill and labour used to create a work are important when considering infringement, the focus must be directed to the originality of the particular form of expression. The use of mere facts without originality in the way those facts have been expressed, therefore did not constitute a copyright infringement.

²¹ See <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2009/14.html?stem=0&synonyms=0&query=%20IceTV%20Pty%20Ltd>

²² See <https://digital.org.au/resources/icetv-v-nine-network-australia-ada-amicus-curiae-submission/>

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 ADA does not have a formal position on the issue of rights reversion for authors.

However, we do note the global movement towards recognising and supporting creators' rights as distinct from intermediaries such as publishers.²³ On this matter, we urge the New Zealand government to consider the work of the Australian Research Council Future Fellowship project The Author's Interest, led by Associate Professor Rebecca Giblin.²⁴ The project aims to investigate ways in which strengthening authors' rights in copyright can not only improve remuneration outcomes for individuals, but in doing so, reclaim lost cultural value for broader society.

14.

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

The ADA strongly supports the ending of all forms of perpetual copyright.

As you will be aware, there is a global trend towards removing perpetual copyright provisions from copyright law, due to the fact that the endless costs it imposes on society simply cannot be justified as a way to incentivise new creation. The burden on cultural institutions is particularly great, with it being a practical impossibility to obtain copyright permissions for works that can be hundreds, or even thousands of years old.²⁵ Both the UK²⁶ and Canada have provided copyright terms for unpublished works under their systems over the last few decades, and Singapore is planning to do so as part of their latest reform package.²⁷ Australia, too, has recently introduced changes to its Copyright Act to end perpetual copyright in unpublished works as part of the *Copyright Amendment (Disability Access and Other Measures) Act 2017*. Although the origins of these perpetual copyright clauses is different from that of the s117 case, the logic remains the

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²⁴ See <https://authorsinterest.org>

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²⁶ See a recent consultation on whether to further update these laws in the UK at <https://www.gov.uk/government/consultations/reducing-the-duration-of-copyright-in-certain-unpublished-works>

²⁷ See *Singapore Copyright Review Report* (17 January 2019) <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Press%20Release/Singapore%20Copyright%20Review%20Report%202019/Annex%20A%20-%20Copyright%20Review%20Report%2016%20Jan%202019.pdf>

same - the artificial monopoly over information conferred by copyright can only be justified for a limited time.

Australia has already found significant benefits from the releasing of material that was previously locked up behind perpetual copyright terms. Some examples of materials that have already, or plan to be, publicly released by Australia's cultural institutions as a result of these changes include:

- Handwritten manuscripts and letters from numerous famous Australians, including one of our most famous poets Henry Lawson²⁸ and miners' poet and socialist, Marie Pitt;
- War posters and advertising held in the collection of the National Library of Australia;
- Hand-embroidered silk postcards held in the collection of the Australian War Memorial;
- Ephemera from both World Wars, including posters, postcards, and advertising;
- The personal papers of a multitude of former Australian politicians, including Governor General Sir Isaac Isaacs and Premier of South Australia Sir James Penn Boucaut;
- Soldiers' letters home, including love letters from acclaimed WWII RAAF pilot, Charles Learmonth;
- Indigenous language research from the papers of former Protector of Aborigines Archibald Meston;
- The records of one of Tasmania's first banks, the Derwent Bank, including its historic "Convict Savings Bank" accounts.

The transition to the new laws has been well managed by the copyright team in our Department of Communications and the Arts, with significant resources committed to ensuring that copyright owners were informed about how to ensure minimal impact on their rights.²⁹ As a result, there was little opposition to the changes from Australia's rights holder community, and the ADA knows of no instances of copyright owners expressing concerns. This demonstrates how a simple and well executed policy change can provide significant benefits for the public without harming copyright owners.

21.

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

Once again, the ADA does not presume to comment on New Zealand case law. However, it does strongly agree that providing property rights to mere information would be extremely problematic, and would result in the same absurd results mentioned in our amicus brief referenced in Question 6 above (see attached). The protection of mere information undermines

²⁸ See <https://library.sydney.edu.au/collections/rare-books/online-exhibitions/lawson/home.html>

²⁹ See, for example, the following fact sheet <https://www.communications.gov.au/departmental-news/new-copyright-duration-changes-coming>

the very basis of copyright, which is to encourage both the creation and the dissemination of knowledge.

22.

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

The ADA believes New Zealand should consider the introduction of broad exceptions to protect the creation of user generated content in fair circumstances, to better align their laws with reasonable public expectations and ensure ordinary individuals are not unknowingly exposed to the risk of significant penalties. This could be achieved through a single flexible exception such as fair use, a combination of flexible exceptions (eg fair dealings for parody and satire or quotation) or a direct exception. We note with interest that Canada was the first country in the world to introduce a direct exception to allow the creation of non-commercial user-generated content as part of its 2012 reforms.³⁰

23.

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

The ADA is a member of the Creative Commons international network, and supports laws that assist in the recognition and implementation of the Creative Commons licences, including CC0. We support the comments of Tohatoha New Zealand on this issue.

24.

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 ADA does not intend to provide comment on the working of New Zealand's individual fair dealing exceptions. However, we would like to express concern with any suggestion that fair dealing provisions should be limited to non-commercial circumstances. It would be out of line with all international precedent, and impose a strong chilling effect on New Zealand creativity

³⁰ See discussed in detail at Teresa Scassa, *Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law* in *The Copyright Pentalogy* (University of Ottawa Press, 2013) <https://books.openedition.org/uop/989?lang=en>

and innovation, if it were to limit these exceptions to non-commercial circumstances only. Furthermore, it would be impractical and inappropriate to do so.

Far from being a “loophole” that is being exploited, commercial uses are often the deliberate target of fair dealing exceptions. For example, one of the main purposes of the criticism and review exception is to allow professional review of material, whether it be a television show using clips of the movies it is reviewing or an art history book including images of the works it is critiquing. Similarly, radio news programs are intended to be able to use an excerpt from an interview with a politician, and academics are intended to be able to copy an article as part of developing a product for patent. This is why the “fairness” test is so practical and powerful. It takes all elements of the use into account, including any commercial intent, without treating any one element as definitely permitting or prohibiting the activity.

34.

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

The ADA commends New Zealand for having a functional exception that permits incidental copying in a broad range of circumstances. Australia does not handle incidental copying well, and can provide a cautionary tale against reducing or limiting this exception.

Australian law does include an incidental copying exception; however, it is limited to incidental filming or televising of artistic works.³¹ This has led to a great deal of difficulty for creators who may incidentally capture other works as part of their creative efforts, such as documentary filmmakers shooting footage in pubs. This can have a significant chilling effect on creativity. Interviews with 29 Australian creators conducted by a team of researchers at the Queensland University of Technology found that the rigidity of Australia’s copyright law in relation to use of copyright material in new works leads many creators to degrade the quality of their work (eg degrading the sound in film scenes where background music might be playing) or abandon work altogether to avoid dealing with unwieldy copyright laws even for use of extremely small or background excerpts.³²

Prof Patricia Aufderheide writes of a case she encountered while conducting work in Australia which demonstrates why licensing does not provide a solution in such cases. When filmmaker Andrew Garton attempting to license incidental and quotation excerpts in his documentary about a local choir, he was offered licences which imposed conditions that made distribution of the documentary unviable. These included only permitting the film to be shown at festivals; only allowing 100 DVDs to be produced (which could not be sold, only given away); and prohibiting the material from being shown on television, in a commercial cinema, online, or outside

³¹ *Copyright Act 1968* s67

³² Kylie Pappalardo, Patricia Aufderheide, Jessica Stevens and Nicolas Suzor, *Imagination Foregone: A qualitative study of the reuse practices of Australian creators* (Nov 2017) <https://eprints.qut.edu.au/115940/> Funded with support from the Australian Digital Alliance.

Australia.³³ This demonstrates how, even ignoring the cost, market failure means that licensing does not provide a suitable alternative to functional exceptions to enable new creativity.

35.	What are the problems (or benefits) with the exception for transient reproduction of works? What changes (if any) should be considered?
36.	What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?
37.	Are there any other current or emerging technological processes we should be considering for the purposes of the review?

As the issue paper points out, a number of common technological activities are currently technically illegal under New Zealand (and Australian) copyright law eg caching, search, automatic translation. While these activities may not be an essential part of individual communications, they are essential to the functioning of modern communications systems and the internet and as such should be treated as protected uses.

As discussed in detail in Question 4 above, this failure to keep up with new technologies is a direct result of the reliance on specific exceptions in both Australian and New Zealand copyright law. This creates a system that is endlessly trying to “catch up” with technological advances, leaving them illegal long after they are already established in the market.

We therefore suggest that, rather than tackling technological uses by adapting or adding to the current specific and limited exceptions, New Zealand should consider adopting an adaptable exception (eg fair use or a fair dealing for incidental and technical copying) to create a system that allows new and emerging technological processes to operate legally from the day they launch.

In a rapidly evolving digital environment, an open-ended, flexible exception is the only tool dynamic enough to respond to new technologies, services and consumer practices. The lack of such an exception can be a substantial barrier to innovation and investment in new technologies and businesses. Uncertainty in the law makes a real difference in calculating risk when setting up a business that takes advantage of such technologies.

The negative impact a restrictive copyright environment has on those seeking to launch tech-based businesses is demonstrated by the history of cloud storage in Australia. In the 2012 *Optus TV Now*³⁴ case, the Full Federal Court of Australia found that a television recording service which allowed private individuals to record programs to a cloud storage system was not covered by Australia’s home recording exception (Copyright Act s111), and so was illegal in Australia. The court’s reasoning, that ‘capturing, copying, storing and streaming back’ the program could not

³³ Patricia Aufderheide, Copyright rules crippling artists (The Saturday Paper, 10-16 June 2017) <https://www.thesaturdaypaper.com.au/2017/06/10/copyright-rules-crippling-artists/14970168004766>

³⁴ *National Rugby League Investments Pty Ltd v Singtel Optus* (2012) 201 FCR 147

be divorced from the making of the copy, threw into doubt the legitimacy of a wide range of cloud-based (as well as non-cloud based) services. As Dr Rebecca Giblin has noted, in the years following the decision, a number of similar cloud-based recording services running in Australia were suspended and the local cloud storage market remains undeveloped.³⁵

The situation in Australian can be contrasted with that in the US, where the Second Circuit Court of Appeals' 2008 decision, *The Cartoon Network, et al v Cablevision*³⁶ came to the opposite conclusion, finding that cloud recording and storage of a program at the request of a customer, supplying it back to them for timeshifting purposes and buffering of data (ie caching) were all legal under US fair use law. A study by Josh Lerner found that venture capitalist investment in cloud computing firms increased significantly in the US relative to the EU following the decision:

Our results suggest that the Cablevision decision led to additional incremental investment in U.S. cloud computing firms that ranged from \$728 million to approximately \$1.3 billion over the two-and-a-half years after the decision. When paired with the findings of the enhanced effects of VC investment relative to corporate investment, this may be the equivalent of \$2 to \$5 billion in traditional R&D investment.³⁷

This conclusion is supported by Lateral Economics in their *Excepting the Future* report, prepared for the ADA's submission to the ALRC Digital Economy Review. They concluded that investors value reduced risk and uncertainty from copyright limitations and exceptions in Australia at around \$2 billion per year.³⁸ In reaching this figure they draw on recent studies by Booz & Co looking at the impact of changes to copyright law on early stage investment in internet or digital content intermediaries.³⁹ Based on a survey of angel investors and interviews with venture capitalists, Booz & Co found that investors were highly averse to regimes that increased the cost of compliance or uncertainty of the size of damages in the event of non-compliance. 80% of US and 87% of European angel investors surveyed by Booz & Co indicated they were uncomfortable investing in an area with an ambiguous regulatory framework.⁴⁰

³⁵ Rebecca Giblin, 'Stranded in the Technological Dark Ages: Implications of the Full Federal Court's Decision in *NRL v. Optus*' (2012) 34.9 *European Intellectual Property Review* questions the validity of services like TiVo in light of the Full Federal Court's decision <http://works.bepress.com/giblin/16/>. See similarly Josh Taylor, *Cloud TVRs stop in wake of TV Now ruling* (May 24 2012) ZDNet <http://www.zdnet.com/cloud-tvrs-stop-in-wake-of-tv-now-ruling-1339338503/>. Beem and MyTVR are two services to have been suspended in the wake of the Optus decision.

³⁶ *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)

³⁷ Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (2012) <http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000642/eu%20cloud%20computing%20white%20paper.pdf>. At 2

³⁸ Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012), 38.

³⁹ Lateral Economics, *Excepting the Future: Internet Intermediary Activities and the case for flexible copyright exceptions and extended safe harbour provisions* (August 2012) 36.

⁴⁰ Booz&Co, *The Impact of US Internet Copyright Regulations on Early-Stage Investment* (2012a) <http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf> and Booz&Co, *The Impact of EU Internet Copyright Regulations on Early-Stage*

We note that Australia's PC examined this issue in detail and identified the inability to keep up with technological advancements as a major problem with our existing copyright system. The PC noted the importance of adequate exceptions is increasing with the growth of the digital economy.

The importance of this balancing role is increasing. In order to realise the benefits afforded by the digital economy, Australia's copyright arrangements must facilitate (or at a minimum not discourage) transformative, innovative and collaborative use of copyright materials. Digital technology, including search functions, cloud-based solutions and other digital platforms, provides opportunities to create and deliver new and valuable products and services, as well as productivity gains for individuals, businesses and governments. Participation in the digital economy will be a critical source of innovation for Australian firms and consumers.⁴¹

The ongoing Modernisation Consultation is looking at possible models for a flexible and adaptable copyright system that is able to keep up to date as new technologies emerge, and has included in its options both a fair use exception and a fair dealing for incidental and technical copying.⁴²

38.

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

We support New Zealand broadening its current exceptions, or adopting an adaptive exception such as fair use to ensure that text and data mining (TDM) is permitted. TDM is essential to modern research and development, and facilitates a number of valuable activities, including:

- artificial intelligence research and development
- visualisation of national collections
- plagiarism discovery tools
- indepth computer analysis of large quantities of published research results to summarise knowledge in a field

TDM is particularly important in the burgeoning field of Artificial Intelligence (AI), yet the nonconsumptive copying it requires remains illegal in many countries. The sheer number of works involved in training AI systems (ie in the millions) means that licensing does not provide a viable solution, as it is practically impossible to contact and obtain licences from sufficient copyright owners. A legislative solution is therefore the only option. Where licensing of a data

Investment (2012b) <http://www.booz.com/media/uploads/BoozCo-Impact-EU-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

⁴¹ Productivity Commission, *Intellectual Property Arrangements Inquiry* (2015), p.167, available at

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

⁴² Department of Communications and the Arts, *Copyright Modernisation Consultation Paper* (March 2018) p.11-12, available at <https://www.communications.gov.au/file/34991/download?token=AseAjJWg>

set is possible and appropriate, the fairness test will be sufficient to ensure it is required. As Bill Patry, Senior Copyright Counsel at Google, explained at the ADA Forum in 2017, this is the approach taken by Google with regards to its current AI research under the US fair use system – to license what data sets they can, and to only rely on fair use where licensing becomes impossible.⁴³

It is also important that TDM uses be judged on their overall fairness, and not limited to non-commercial activities. A non-commercial limitation is impractical, as it assumes that TDM research can be conducted in a research silo and then licensed before commercialisation. Yet non-commercial silos rarely exist in today's era of university and industry collaboration. It would also significantly undermine the benefits of a TDM exception to the economy if it does not enable businesses in this burgeoning field. As far back as 2011 McKinsey & Co estimated the global value of TDM as nearly \$700 billion⁴⁴ – money that will not be available to companies in markets where commercial use of the products of TDM is not permitted. Permitting TDM in both commercial and non-commercial circumstances is the growing international norm, with the copyright systems of Japan, the United States or other fair use countries already allowing TDM in any circumstances that are fair, and both the EU and Singapore also proposing broad TDM exceptions in their latest reviews which would not contain commercial limitations.⁴⁵ Without an exception, New Zealand therefore risks a research and innovation gap between it and the rest of the world.

40.

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

The ADA urges New Zealand to consider the introduction of a quotation exception. As you know, Australia also does not have such an exception, and its introduction was a recommendation of the ALRC⁴⁶ report. The introduction of such an exception is one of the options being explored by our Modernisation Consultation, and has received broad support from diverse stakeholders.⁴⁷

⁴³ See comments of Bill Patry on the Diffusing Fair Use Panel at the ADA Forum 2017, available at https://www.youtube.com/watch?v=l8_yabkiOyQ&t=877s at approximately 17 min

⁴⁴ McKinsey & Company, (2011), Big data: the next frontier for innovation, competition and productivity.

⁴⁵ See discussed at International Federation of Library Associations, *Sunshine and Clouds: The European Parliament Takes Position on the Copyright Directive*, (21 June 2018) <https://www.ifla.org/node/59306>

⁴⁶ ALRC *Copyright and the Digital Economy* (2014), Chapter 9, <https://www.alrc.gov.au/publications/9-quotation/summary>

⁴⁷ See Department of Communications and the Arts, *Copyright Modernisation Consultation Paper* (March 2018) p.11-12, available at <https://www.communications.gov.au/file/34991/download?token=AseAjJWg>. See support for this proposal in, for example, the submission to the review from the Australian Publishers Association (https://www.communications.gov.au/sites/default/files/submissions/australian_publishers_association_0.pdf). See a discussion of stakeholder views on the issue in *Roundtable on quotation and educational uses of copyright* available at <https://www.communications.gov.au/file/37196/download?token=nOrg-0bZ>

A quotation right, as well as being guaranteed by the Berne Convention,⁴⁸ is the bare minimum change needed to align copyright laws with the reasonable expectations and behaviour of the general population.⁴⁹ Being able to reference and make use of content in an illustrative manner - whether through fair use (our preference), a fair dealing, or a specific exception - is essential to allow public discussion, the sharing of knowledge and free speech.

Without such an exception the law does not leave room for ordinary daily activities such as:

- retweeting tweets and forwarding emails
- online publication of theses that include short quotes
- inclusion of charts and tables in conference presentations
- uploading logos of companies to their entries on Wikipedia
- incidental capture of short excerpts of background music in documentaries as they are being filmed

Artists, authors, academics and consumers all make use of small portions of copyright material in their practice - sometimes in ignorance of the law, but at others simply because the law doesn't make sense.⁵⁰ Where permissions for short quotes are sought, they can be extremely costly, time consuming and often not forthcoming at all.⁵¹ In examining the cost benefit analysis of the introduction of a fair use exception, Ernst & Young found that permitting quotation would have a positive net benefit for the Australian economy due to the corresponding reduction in transaction costs.⁵²

⁴⁸ *Berne Convention for the Protection of Literary and Artistic Works*, art 10(1)

⁴⁹ See, for example, the results of the 2013 survey by Choice (<https://www.choice.com.au/about-us/media-releases/2013/august/choice-says-it-is-time-to-fast-forward-copyright-past-the-vhs-era>). See also Pappalardo et al, op cit

⁵⁰ Pappalardo et al, op cit, p.25

⁵¹ Pappalardo et al, op cit, p.22

⁵² See Department of Communications and the Arts, *Cost benefit analysis of changes to the Copyright Act 1968* (2016) p.72 available at <https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968>

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.
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?

We support the comments of the Library and Information Association of New Zealand Aotearoa (LIANZA) in response to these questions, particularly with respect to the problems and benefits of particular exceptions within the New Zealand Copyright Act.

In addition, we provide the following discussion of the Australian experience as an example of the pluses and minuses of one possible approach to introducing flexibility to library and archives provisions. As you know, Australia introduced a flexible exception for libraries and archives (s200AB) as part of its 2006 amendments flowing from the United States Free Trade Agreement. The intention of the provision is to provide a flexible exception to enable copyright material to be used for certain socially beneficial purposes, including the operation or maintenance of a library.⁵³ It was introduced in response to ongoing difficulties within the Australian libraries and archives sector caused by gaps in our copyright law, which meant that many common activities that were increasingly seen as core to the function of libraries and archives were unintentionally excluded, such as digitisation, use of orphan works, and exhibitions. The flexible nature of the exception allows it to adapt to technological and behavioural changes and reduces the need for frequent updates to Australia's specific libraries and archives exceptions.

Our experience with this exception has been mixed. The flexibility it provides has for many been a gamechanger in the way materials are treated by our cultural sector, and has enabled amazing projects like Australian Newspapers Online⁵⁴ and the Australian Web Archive.⁵⁵ However, the complex drafting of the provision has been an ongoing issue, resulting in the exception being highly underused for many years. Consultations undertaken by the Australian Libraries Copyright Committee (ALCC) with stakeholders in 2012 indicated that a broad number of educational and cultural institutions at that time viewed s200AB as a failure.⁵⁶ Trial programs by a few brave

⁵³ *Copyright Amendment Bill 2006, Explanatory Memorandum*, para 6.53, available at https://parliinfo.aph.gov.au/parlInfo/download/legislation/ems/r2640_ems_2b1ade71-ecd4-477f-9b4f-f49198251a33/upload_pdf/305911.pdf;fileType=application%2Fpdf

⁵⁴ <https://trove.nla.gov.au/newspaper>

⁵⁵ <https://trove.nla.gov.au/website>

⁵⁶ Attendees at ALCC consultations included: National Library of Australia, Powerhouse Museum, State Library of Western Australia, Australian Library & Information Association, National Archives of Australia, Art Gallery of NSW, National Gallery of Australia, National Museum of Australia, State Library of Victoria,

institutions, coupled with a concerted education campaign by both the ADA and the ALCC, means that s200AB is more widely understood and utilised today. However, it is still used primarily by the most knowledgeable and least risk averse institutions, reducing the benefits to the Australian population as a whole.

The reluctance to use s200AB stems primarily from confusion around the exception's language. In an effort to bypass criticisms made of other flexible exceptions and their potential compliance with the Berne Convention,⁵⁷ the Australian government chose to import the 'three step test' from the international copyright treaties into the exception itself.⁵⁸ The result is that a test that was intended to judge whether exceptions are permitted within the law, is now being used to judge individual uses. Librarians and archivists wishing to apply the provision are required to determine not only whether it is part of the maintenance and operation of a library, and whether it is a non-commercial use, but also whether the use is (1) a special case; that (2) does not conflict with a normal exploitation of the material; and (3) does not unreasonably prejudice the legitimate interests of the owner of the copyright. This gives rise to a host of problems in its day to day application.

As part of our joint response with the ALCC to the ALRC's *Copyright and the Digital Economy Inquiry* we commissioned a report from Policy Australia examining the sector's attitudes to s200AB, and querying whether the Australian education and cultural sectors would be better off under fair use.⁵⁹ Policy Australia considered there to be four main reasons section 200AB has not benefited Australian institutions as expected:

1. Particular drafting choices made in the incorporation of the three step test into section 200AB have created a high degree of uncertainty as to its practical application and scope. For example, s200AB(1)(a) requires that the use be a "special case". With respect to exceptions generally this is taken to apply to the type of use covered (eg providing access to those with a disability); but in the domestic law context people frequently interpret it as meaning that each individual use must be judged on a case-by-case basis (eg is this particular copying of this particular work a special case). This narrow interpretation

Museums Australia, Museum of Contemporary Art, Swinburne University of Technology, Australian National University, Universities Australia, State Records Authority NSW, Public Libraries NSW and Murdoch University WA. The Australian War Memorial noted their use of section 200AB, and agreed that it could be repealed but only if it was to be replaced with something like fair use. Some members indicated a desire for "certainty" in the law, but opposed existing purpose-based exceptions which, while arguably "certain", they found very restrictive. The majority, on clarification, confirmed their preference for an open-ended exception easier to understand than section 200AB

⁵⁷ We note that these criticisms have largely been disproven in the last decade. See, for example, the ALRC's conclusion that fair use does comply with the Berne here: <https://www.alrc.gov.au/publications/4-case-fair-use/fair-use-complies>

⁵⁸ See Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), Art. 9(2)

⁵⁹ *Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?*, by Policy Australia (October 2012) available at [http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20\(1\).pdf](http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20(1).pdf)

effectively precludes the use of s200AB for mass digitisation projects which can involve the copying of hundreds or even thousands of works.⁶⁰

2. Section 200AB(6)(b) provides that the exception does not apply to any use that “because of another provision of this Act...would not be an infringement of copyright assuming the conditions or requirement of that other use were met.” There is debate as to the effect of this provision, and whether it precludes the use of the provision for uses that fall just outside s49, such as document supply for personal enjoyment, or criticism and review. Policy Australia notes that it appears to narrow the scope of the exception to a significant extent.⁶¹ It also means that staff must complete all the steps needed to determine whether one of the other exceptions applies before they even move on to the three steps. This requires a great deal of expertise and is extremely time consuming, significantly increasing the compliance costs and discouraging all but the most confident of institutions from taking advantage of the provision.
3. The absence of an exception permitting institutions to circumvent access control technological protection measures (TPMs) for the purposes of section 200AB, combined with the increasing use of TPMs on audio-visual works, has resulted in an ever-growing pool of content that effectively falls outside of the scope of the exception (see further below); and
4. The uncertainty caused by Australia’s particular implementation of the three step test in section 200AB, combined with a general culture of risk aversion, has led institutions to refrain from using the exception for fear of facing a legal challenge.⁶² For example, the non-commercial limitation in s200AB has meant it is not used for publication of collection materials or ticketed exhibitions, even where they are done on a cost recovery basis.

Policy Australia highlighted the difficulty for trained copyright officers and legal advisers to confidently advise on the scope and application of section 200AB, let alone library staff without legal training. As Policy Australia noted:

It became clear to us that the reluctance to use s 200AB could not be explained merely by a general cultural aversion to risk in educational institutions, libraries and cultural institutions ... The feedback from stakeholders suggests that the particular complexities of s 200AB mean that it is not amenable to ordinary risk management assessment in institutions of this kind.⁶³

However, this uncertainty does not appear to be linked to the flexibility of the provision per se, but rather to its precise drafting. A number of stakeholders expressed a preference for a ‘fairness’

⁶⁰ We note that the ADA and ALCC do not endorse this narrow interpretation, and believe it is much less common in the cultural sector today.

⁶¹ Policy Australia, *Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?* (2012) p.2 available at http://www.alrc.gov.au/sites/default/files/subs/213._org-attachment_adaandalcc.pdf

⁶² Policy Australia, op cit, p.2-3

⁶³ Policy Australia, op cit, p.10

based exception, which librarians are already used to assessing for the fair dealing provisions.⁶⁴ Policy Australia concluded:

It does appear from the evidence provided in consultations that despite their generally risk averse nature, educational institutions, libraries and cultural bodies would be more likely to use an exception that required them to engage in a fairness risk assessment. This, in our view, is significant. There would be little point seeking to replace s 200AB with a provision such as fair use if the institutions intended to benefit from such an exception were no more likely to use it than they have been to use s 200AB. Our consultations suggest that this would not be the case.⁶⁵

It is for this reason that the ADA and ALCC have in recent years advocated for the replacement of the s200AB with a fairness-based exception, be it fair use or a fair dealing for libraries and archives. This proposal was adopted as a recommendation by both the ALRC⁶⁶ and the PC.⁶⁷ It is also one of the key proposals on the table in the government's Modernisation Consultation.⁶⁸

Even in its current problematic form, Australia's experience with its flexible exception does provide evidence as to the benefits to be gained from such reform. In the digital era, libraries' and archives' core functions are no longer sufficiently covered by the preservation, document delivery and interlibrary loan exceptions. Exhibitions and digitisation are just as essential to the knowledge sharing role of library and archives as preservation and lending of collection items. Indeed, in the modern era, it can almost be argued that digitisation is more important. Digitisation programs open up our national collections beyond the handful of privilege researchers who have the time and resources to journey to our capitals, and facilitate access to the general population as never before. Australia's flagship discovery platform, Trove - maintained by the National Library but providing access to collections from across Australia - is a world leader, and provides instant access to more than 22 million pages from 1,386 Australian newspaper titles to any person in Australia.⁶⁹ Due to the high rate of orphan works within these titles, this project simply could not have been undertaken without the benefit of a flexible exception. The benefits of this for economic and cultural growth is immeasurable.

Australia's libraries and archives flexible exception has also proved useful for more everyday uses, and is increasingly being used to "fill the gaps" created by our outdated specific exceptions.

⁶⁴ Policy Australia, op cit, p.2-3

⁶⁵ Policy Australia, op cit, p.10

⁶⁶ ALRC *Copyright and the Digital Economy* (2014) Chapter 12 <https://www.alrc.gov.au/publications/12-libraries-and-archives/fair-dealing-library-and-archive-use>

⁶⁷ Productivity Commission, *Intellectual Property Arrangements Inquiry* (2015), Recommendation 6.1, p.193 available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>

⁶⁸ See Department of Communications and the Arts, *Copyright Modernisation Consultation Paper* (March 2018) p.10, available at <https://www.communications.gov.au/file/34991/download?token=AseAjJWg.pdf>. See a discussion of stakeholder views on the issue in *Roundtable on libraries and archives use* available at <https://www.communications.gov.au/file/37261/download?token=-AHeDIZm>

⁶⁹ National Library of Australia, *Annual Report 2016-2017*, p. 10, https://www.nla.gov.au/sites/default/files/annual_report_2016-2017_1.pdf#overlay-context=corporate-documents/annual-reports

For example, until it was updated recently our preservation exception allowed published works to be preserved only once they had been lost, stolen or destroyed, so s200AB was relied on to enable best practice preservation at point of acquisition. Uncertainties still remain around the ability to lend audiovisual materials for research and study, or to lend other works for harmless purposes that do not fall within Australia's restrictive definition of research and study (eg displaying a newspaper article on your grandfather at his 90th birthday party). Even library storytime remains a legal grey area. Section 200AB, again, is used to justify such activities - at least by those staff with sufficient knowledge and skill. For others, they are often abandoned.

Another positive lesson that can be learned from Australia's experience with its flexible dealing exception is that libraries and archives can be trusted to make appropriate judgement calls about how and when to make use of such an exception, and to not overstep its bounds. Indeed, despite strong principles in favour of providing access to knowledge, our library and archive sectors are without question conservative in the uptake of their exceptions, both specific and flexible, and are very conscious of avoiding not only negative impact on creators but also reputational damage that might put off future donors of collections, vendors etc. Library and archives feel a duty of care towards collections, and do not deal with them in a reckless manner. For example, figures supplied by the National Library indicate that since 2012 they have fulfilled 73 percent of client requests for document delivery and only 65 percent of interlibrary loan requests - ie more than a quarter of requests were rejected. Reasons for rejecting a request amongst others include: non-compliance with exception requirements; licence (eg on e-resources where the licence prohibits supply to a client);⁷⁰ and underlying works being protected. The standard response in these cases is to encourage the requester to request to borrow the material from the library (3099 requests) or to seek permission directly from the copyright owner - meaning that over the last 6 years the National Library alone has directed more than 4,493 users to seek licences from copyright owners.

Even with s200AB in place, industry practice in Australia still strongly favours the seeking of licences for digitisation, exhibition and publication work. The National Film and Sound Archive, for example, provided the following scenario to the Productivity Commission:

The NFSA sought to use a radio serial from the mid 1940's on SoundCloud (an online distribution platform that allows NFSA to share rare interviews and unique recordings from the mid 1940's). While the broadcast rights have expired, the music and script were still in copyright. The NFSA approached who they believed held the underlying copyright and despite being unaware they held the copyright they granted permission for two episodes to be uploaded. In the process of researching the copyright status of more serials, the NFSA discovered that it was more likely that a second party held the rights to the copyright initially cleared. Faced with competing claims to copyright ownership, the NFSA made a business decision to stall the project, assessing that it would be too time-

⁷⁰ 3,519 requests over 6 years. Note that requesting libraries usually check the catalogue records holdings information to determine whether the material can be supplied under section 50 of the Copyright Act prior to making the request, so this figure relates to material already checked by the requesting library which the NLA has still rejected due to licensing arrangements. This figure also does not include where the electronic article has been embargoed and is not available to download.

consuming and costly to negotiate with both parties, particularly given the extensive research and efforts made to date to clear copyright with the first claimant.⁷¹

Similarly, for the recent publication, *Letters to Lindy*, the National Library worked with author Alana Valentine for over a year to seek to clear rights to the 183 letters to Lindy Chamberlain-Creighton reproduced in the book. This is despite the fact that all were part of the library's collection (having been donated by Lindy Chamberlain-Creighton herself); none were commercial products; and most were orphan works. The effort made to clear the material was extremely thorough and diligent, including searching electoral rolls and contacting potential family members. Letters that couldn't be cleared were included only if they were central to the artistic integrity of the work, and non-copyright issues such as privacy and defamation were taken into account.

After a decade working with s200AB, Australian libraries have demonstrated that they are able to appropriately navigate and apply a flexible dealing exception in a way that facilitates access to knowledge while respecting and supporting the rights of creators. But s200AB is limited in what it allows, and does not appropriately match the decision process used to reach these conclusions – a decision process that essentially revolves around the “fairness” of the sharing, for the client, the creator and the general population.

We therefore strongly recommend that New Zealand adopt a flexible exception for its libraries and archives, as an essential step in enabling them to take full advantage of new technologies and meet the diversity of roles that libraries play in a modern society. However, to avoid the problems we have encountered with s200AB, we recommend that this be in the form of either a fair use or fair dealing exception.

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?

We support LIANZA's comments in relation to the problems and benefits arising from New Zealand's library and archive exceptions.

We also add that, in addition to the flexible dealing exception mentioned above, the ADA also strongly supports the retention of specific exceptions to cover the everyday activities of libraries and archives. Australia currently maintains exceptions for preservation, administration, research, document delivery, interlibrary loan, and publication of unpublished material. Having exceptions to cover the day-to-day activities of libraries and archives that are not subject to the same

⁷¹ *Submission by the Australian Digital Alliance to the Productivity Commission Intellectual Property Arrangements Inquiry* (2015), p.9, available at http://www.pc.gov.au/__data/assets/pdf_file/0006/195009/sub108-intellectual-property.pdf

complex decision making requirements as s200AB allows library staff without specific copyright training or skills to be confident in their role and the management of their collection.

We are in the process of modernising these exceptions, with amendments made to the preservation, administration and research exceptions as part of the *Copyright Amendment (Disability Access and Other Measures) Act 2017*. All three of these exceptions were clarified and simplified, with a specific view to:

- Removing unnecessary bureaucratic elements, such as requirements to keep notices in chronological order;
- Standardising the rules across all material types - so films and audiovisual materials are treated in the same manner as other works;
- Updating technological references - such as removing the requirement for libraries and archives to use “dumb terminals” for certain exceptions; and
- Ensuring they permit best practice international standards - such as removing restrictions on the number of preservation copies allowed, and ensuring preservation can happen at point of purchase.

These three exceptions are now far easier for individual library staff to apply, and can truly be said to be modern and fit for purpose.

The process for achieving these amendments was particularly positive, with rights holders and library representatives working together with the government’s copyright team to identify common ground and reasonable standards. The result was a bill of significant amendments that had bipartisan support from stakeholders. We are now embarking on a similar process to amend the remaining library and archive exceptions.

If there is the possibility of a similar modernisation of New Zealand’s library and archive exceptions to address the concerns raised in LIANZA’s submission, we encourage New Zealand to explore it as an option.

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?

The ADA strongly supports the inclusion of museums and galleries in the library and archive exceptions, and supports the comments of TePapa and LIANZA on this issue.

Providing museums and galleries with the same exceptions as libraries and archives is global best practice, due both to the common goal these institutions share of acquiring, preserving and giving access to our cultural heritage, and to the frequent difficulty of differentiating between the institutions and their activities. The line between an archive and a museum in particular can be difficult to establish. Many museums maintain libraries or archives within their collections, and vice versa. Treating the institutions differently therefore makes little sense, and merely reduces efficiency and increases costs for the whole cultural sector.

We note that this issue has been debated recently as part of the proposed Treaty on Libraries, Archives and Museums at the World Intellectual Property Office. A decision to treat all three types institutions together in the same action plan was made at the WIPO Standing Committee on Copyright and Related Rights meeting in June 2018 (SCCR/37), on the suggestion of international bodies representing each of the sectors.⁷² In advocating for equal treatment of all cultural institutions, the International Federation for Library Associations stated:

While libraries, archives, and museums in the past may have been quite different, they are experiencing the same convergence as we see in other sectors. This convergence drives our view that they have common functionalities that need to be permitted in a common legal framework. Museums have libraries and archives; archives have libraries and museum-like artifactual collections; and libraries house archives and also have artifactual collections. Convergence is so complete that there is an acronym often used to describe us: LAM's. In this context, the separate treatment proposed in the draft action plan, including a separate "scoping study" for archives, seem duplicative, retrograde, and ill-advised.⁷³

Exceptions and Limitations: Exceptions for education

47.	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?
48.	Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?
49.	Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?

The ADA supports the comments of Universities NZ with respect to the problems and benefits of specific education exceptions within New Zealand law. In particular, we support their call for more flexible exceptions for education purposes.

In this context, we again note that the Australian copyright system provides a cautionary tale in the design of flexible exceptions for education. Australian educational institutions are included in the same s200AB flexible dealing exception discussed above, intending to allow them to better

⁷² See Standing Committee on Copyright and Related Rights Thirty-Sixth Session Geneva, May 28 to June 1, 2018 Action Plans on Limitations and Exceptions through SCCR/39 available at https://www.wipo.int/edocs/mdocs/copyright/en/sccr_36/sccr_36_7.pdf.

⁷³ International Federation of Library Associations, *Agenda item 6 Limitations and Exceptions for Libraries and Archives: IFLA Statement* (30 May 2018) https://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/item_6_libraries_archives_and_museums_-_ifla_statement.pdf

adapt to changes in technology and teaching methods (as called for by Universities NZ). However, the drafting of this exception has been even more problematic for Australia's educational institutions than for Australia's libraries and archives. This is due primarily to the specific wording of s200AB(6) and its interaction with Australia's statutory licence regime.

In their submission to the Copyright Modernisation Consultation, the Copyright Advisory Group to the COAG Education Council (CAG) explains the problem with Australia's flexible dealing exception:

In explanatory material for the Copyright Amendment Bill 2006, the Government stated that the flexible dealing exception in s 200AB was introduced in response to its review of whether Australia should have an exception based on the principles of fair use.⁷⁴ In other words, the Government intended that the new exception would be relied on by educational institutions to undertake uses that were 'fair'.⁷⁵

In practice, however, this exception has had very limited application. There are two reasons for this.

Firstly, as currently drafted, s 200AB provides no scope at all for schools to make "fair" uses of copyright content without remuneration if the use would be covered by the educational statutory licence. That's because subsection 200AB(6)(b) prevents a teacher from relying on the flexible dealing exception if the use would be covered by another exception or statutory licence. As a result, we have the ludicrous situation of an exception that was intended to permit "fair" uses of content for educational purposes not applying to use of freely available internet content, or orphan works, for no other reason than that these uses fall within the scope of the statutory licence.

Secondly, the language used in s 200AB is both overly complex and ambiguous. [CAG]⁷⁶

This, coupled with similar limitations that prevent the fair dealing exceptions from being of assistance to schools, has resulted in the perverse situation in which Australian schools are in a worse position than commercial entities such as law firms, and pay for uses that would be free in other markets, such as teachers telling students to download material, or use of freely available internet materials such as public domain ebooks and shoe sale sites. Australian schools also pay an estimated \$10 million a year to use orphan works.⁷⁷

⁷⁴ Copyright Amendment Bill 2006, Explanatory materials for Exceptions and other Digital Agenda Review measures, 5

⁷⁵ Explanatory Memorandum to the Copyright Amendment Bill 2006 [6.53]

⁷⁶ Copyright Advisory Group to the COAG Education Council (CAG), *Submission to copyright modernisation discussion paper* (July 2018) p.26

https://www.communications.gov.au/sites/default/files/submissions/copyright_advisory_group_to_the_coag_education_council.pdf

⁷⁷ Ernst & Young *Cost benefit analysis of changes to the Copyright Act 1968* (2016) p.58

<https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968>

Once again, this demonstrates why the drafting of such as exception is crucial, and why it is important not to limit its flexibility.

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?

As the issues paper notes, contracting out is an issue that has been considered at some length by Australian copyright review processes, and is one of the issues that is currently being considered by the Copyright Modernisation Consultation.⁷⁸ Once again, this is one of the areas of reforms proposed by the Consultation that has received significant support from diverse stakeholders.⁷⁹

All exceptions in the Copyright Act, including the flexible exceptions, represent important user rights. Exceptions are included in the Act as a matter of public policy, generally after a long period of public comment and debate, because they protect essential free speech and access to information activities that are unlikely to be able to be licensed whether for practical reasons (disability access, incidental and technical copying) or because the use may not be palatable to copyright owners (eg criticism and review, parody and satire). Allowing them to be overridden by a simple contractual provision would undermine the parliamentary process and lead to highly undesirable outcomes. This is why the standard rules of statutory interpretation state that legislation takes precedence over private agreement. It is only due to a quirk of drafting, judicial decisions and industry practice that doubt has been cast on this in the Australian copyright context.⁸⁰

Rather than being less important for copyright, we would argue that this protection is doubly important in the “closed garden” world of modern content systems where, as the issues paper notes, “browse-wrap” and “click-wrap” licensing abounds and there is often little to no chance for negotiation or meeting of minds.⁸¹ Yet there is substantial evidence that, as the ALRC found, “contractual terms excluding or limiting copyright exceptions under the Copyright Act remain

⁷⁸ See Department of Communications and the Arts, *Copyright Modernisation Consultation Paper* (March 2018) p.15-18, available at <https://www.communications.gov.au/file/34991/download?token=AseAjJWg>. See a discussion of stakeholder views on the issue in *Roundtable on contracting out* available at https://www.communications.gov.au/file/37216/download?token=gJgn_twF

⁷⁹ For an example of stakeholder support see the FreeTV submission p.16 https://www.communications.gov.au/sites/default/files/submissions/free_tv_australia_2.pdf

⁸⁰ Copyright Law Review Committee, *Copyright and Contract* (2002) Chapter 5

⁸¹ References: <https://www.communia-association.org/2015/07/30/on-the-need-to-protect-copyright-exceptions-from-contractual-interference/>

common.”⁸² Multiple international studies have reached similar conclusions - so many, in fact, that we contend it is unnecessary to revisit the debate as to whether such licensing practices exist.⁸³ The question is essentially settled as a matter of public record - contracts governing the use of electronic materials for copyright users, including libraries, educational institutions and individuals, regularly seek to overrule socially valuable use exceptions, preventing libraries from delivering interlibrary loans, preventing the reproduction and communication of materials for educational purposes, and preventing researchers and students from relying on the fair dealing exceptions.

The law in Australia is unsettled as to what happens when a copyright exception and a contract come into conflict.⁸⁴ The ALRC found that “there are differing views on whether, and in what circumstances, contractual terms excluding or limiting exceptions to copyright may be unenforceable.”⁸⁵ However, the net result, due to factors such as power balances, uncertainty and risk aversion on the part of users, is that the contract is almost always treated as the defacto standard, and the exceptions are left to fall by the wayside.

As the issues paper notes, the ALRC agreed with the UK Government in its *Modernising Copyright: A Modern, Robust and Flexible Framework*⁸⁶ that this state of the law is undesirable and can in many cases be seen as eroding “socially and economically important uses of copyright works.”⁸⁷ This was also the conclusion of the Copyright Law Review Committee’s Copyright and Contract Report all the way back in 2002, which found that “should such agreements be enforceable, there would be a displacement of the copyright balance in important respects”⁸⁸; and the PC, which found that the inability to use copyright exceptions due to contractual override and technological protection measures (TPMs) has:

⁸² Australian Law Reform Committee Copyright and the Digital Economy (2014) at 17.91 available at <https://www.alrc.gov.au/publications/17-computer-programs-and-back-ups>

⁸³ Listed in the ALRC report alone are:

M Kretschmer, E Derclaye, F Favale and R Watt, A Review of the Relationship between Copyright and Contract Law for the UK Strategic Advisory Board for Intellectual Property Policy (2010)

D Clapperton and S Coronos, ‘Unfair Terms in Clickwrap and Other Electronic Contracts’ (2007) 35 Australian Business Law Review 152

R Wright, ‘Libraries and Licensing: the eFuture will Need Legal as well as Technical Skills’ (Paper presented at VALA 2012, Melbourne, 9 February 2012)

⁸⁴ For a fuller discussion of this issue, see Giblin, Rebecca and Weatherall, Kimberlee G., At the Intersection of Public Service and the Market: Libraries and the Future of Lending (August 1, 2015). (2015) 26 Australian Intellectual Property Journal 4-26; Sydney Law School Research Paper No. 15/71; Monash University Faculty of Law Legal Studies Research Paper No. 2015/11. Available at SSRN: <http://ssrn.com/abstract=2647705> from p14.

⁸⁵ Australian Law Reform Committee Copyright and the Digital Economy (2014) at 20.29 available at <https://www.alrc.gov.au/publications/20-contracting-out/current-law>

⁸⁶ See UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 19. <http://copyright-debate.co.uk/wp-content/uploads/Modernising-Copyright-a-modern-robust-and-flexible-framework-Government-response.pdf>

⁸⁷ Australian Law Reform Committee Copyright and the Digital Economy (2014) at 20.76 <https://www.alrc.gov.au/publications/20-contracting-out/approach-reform>

⁸⁸ Copyright Law Review Committee, Copyright and Contract (2002) p.8

the potential to restrict uses that have been expressly permitted by parliament, reduce competition and efficiency, and increase the return to creators over and above what is necessary to incentivise their creation.⁸⁹

Imagine, for example, if creators began including “no negative review” clauses on the click through licences applied when consumers access their materials online. Blanket “no further use” provisions in standard e-resource licences offered to libraries already risk the rights of individuals with a disability to convert works into accessible formats, and the rights of remote researchers to appropriately access national collections.

The CLRC⁹⁰ and ALRC⁹¹ identified that it is particularly important to protect:

- The fair dealing exceptions as fundamental to the working of a balanced and functional copyright system.
- The specific exceptions granted to key user groups, such as the library and archives, educational and disability sectors. The PC identified e-resources and content licensed by these groups as the most common example of contractual override of exceptions.⁹²
- Consumer protection exceptions such as format and time shifting – these rights are particularly prone to exclusion by EULAs and clickwrap licences, where there is no meeting of the minds, an imbalance in bargaining power and/or no opportunity to negotiate.

The PC, however, went further than this, concluding that it “does not see any reason why this should only apply to libraries and archives” and therefore recommending that “any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception should be unenforceable.”⁹³

The ADA agrees with the PC - even exceptions of lesser consequence are clear public policy statements, the result of careful thought and essential to the copyright balance, and so should be protected against being overridden. Taking a piecemeal approach to protecting exceptions, protecting only some and not others, will inevitably lead to unintended consequences.

Furthermore, it is important that this protection should not be conditional. Any amendment that protected exceptions only in some circumstances – eg where a contract is “unfair” – has a high likelihood of effectively reducing the level of protection given to exceptions in our copyright system. In the absence of clear court findings to the contrary, contracts will be assumed to have legal force (in this example, to be “fair”), creating a default position whereby it is presumed that

⁸⁹ Productivity Commission, *Intellectual Property Arrangements Inquiry* (2015), p.140, available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>

⁹⁰ See Copyright Law Review Committee, *Copyright and Contract* (2002) p.8 Recommendations 7.49-7.52

⁹¹ Copyright Law Review Committee, *Copyright and Contract* (2002) p.92

⁹² Australian Law Reform Committee *Copyright and the Digital Economy* (2014) Chapter 20 <https://www.alrc.gov.au/publications/20-contracting-out/scope-new-limitations>

⁹³ Productivity Commission, *Intellectual Property Arrangements Inquiry* (2015), Recommendation 5.1 available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>

contracts do overrule exceptions – exactly the opposite effect to that being sought. This especially risks being the case where the judgement call is being made by individual consumers or non-experts, who have little or no resources to bring judicial actions on their own.

Standard rules of contract and limitations in the exceptions themselves should be sufficient to preserve freedom of contract and prevent unintended consequences from a guarantee against contractual override. For example, doctrines such as estoppel may provide rights where two equal players have agreed to terms in a true meeting of the minds. Under fairness-based exceptions, contractual agreements could also be taken into account in the fairness test eg where an unpublished work was provided to critics subject to an embargo period, it would not be “fair” for elements of the work to be published in a critical piece prior to the embargo date.

Exceptions and Limitations: Internet service provider liability

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

We strongly encourage New Zealand NOT to follow the example of Australia listed in the issues paper by limiting the definition of ISP to commercial ISPs and non-commercial entities. The approach taken by New Zealand is far preferable to that in Australia, providing far greater certainty for the technology sector and creators alike. Australia’s restrictive definition has caused major problems, making us out of line with international norms and putting our technology sector at a disadvantage to their international peers.

This is clearly demonstrated by the report by Professor Kimberlee Weatherall *Internet Intermediaries and Copyright – A 2018 Update*. This report examines the law regarding intermediary liability among 10 comparable markets (Australia, United States, Canada, Singapore, South Korea, United Kingdom, New Zealand, Japan, Israel and the European Union) and concludes that Australia is isolated internationally by not providing its online service providers with protection from liability for copyright infringements undertaken by clients.⁹⁴ As the “traffic light” assessment provided by Weatherall in the table below clearly demonstrates, all comparable countries provide at least some protection for online platforms with respect to liability for content uploaded by their clients (see Table 1).

⁹⁴ Kimberlee Weatherall, *Internet Intermediaries and Copyright – A 2018 Update*, (February 2018) available at <https://digital.org.au/resources/internet-intermediaries-and-copyright-a-2018-update/>

Table 1: How risky is internet intermediary business?⁹⁵

Country	Providing internet access (IAP)	System level/proxy caching	Hosting (Cloud Computing)	Hosting a user-generated site	Running a search engine or similar
Australia: other online service provider	Green	Red	Red	Red	Red
Australia: carriage service provider	Green	Green	Green	Green	Green
United States	Green	Green	Green	Green	Green
Canada	Green	Green	Green	Green	Green
Singapore	Green	Green	Green	Green	Green
European Union	Green	Green	Green	Orange	Red
United Kingdom	Green	Green	Green	Orange	Red
New Zealand	Green	Green	Green	Orange	Red
Japan	Green	Green	Red	Red	Green
Israel	Green	Green	Orange	Orange	Orange
South Korea	Green	Green	Orange	Orange	Orange

Red = activities involve a high risk of liability for copyright infringement

Orange = legal situation is unclear, some risk

Green = low or non-existent risk of copyright infringement

⁹⁵ Extracted from Kimberlee Weatherall, Internet Intermediaries and Copyright – A 2018 Update, (February 2018) available at <https://digital.org.au/resources/internet-intermediaries-and-copyright-a-2018-update/>

The narrow definition adopted by Australia makes it a high-risk environment for hosting content, putting Australian startups at a competitive disadvantage to their international peers and encouraging them to move offshore. This risk is not hypothetical, as illustrated by the recent decision in *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541.⁹⁶ In this case, the Australian-based online design marketplace Redbubble was found liable both directly and through authorisation for infringing material uploaded by their clients, even though they followed international best practice and removed the material as soon as they became aware of it.

A decision to remove platforms from its safe harbours would similarly place New Zealand as an outlier globally. It is those platforms that want to operate in New Zealand and the creators and consumers that are denied access to them, who would be the losers. Although the recent discussions in the EU in the context of the Digital Single Market Directive⁹⁷ may be cited by others as a reason to consider changing New Zealand law, it would be extremely premature to do so, as even if the Directive is confirmed in its current form it will be years before the EU changes are put into effect in domestic legislation, or there is any evidence as to their impact or effect.

The ADA has written a number of times on the practical impacts of excluding platforms from the definition of service provider. For a full description of the problems caused in Australia, we recommend the MBIE read our submission to the *Senate Standing Committee on Environment and Communications Legislation Inquiry into the Copyright Amendment (Service Providers) Bill 2017*.⁹⁸ However, in summary, platforms must be included in any online service provider safe harbour scheme because:

- One of the principal purposes of safe harbour schemes is to provide both creators and service providers with certainty where infringing material appears online. A significant portion, if not the majority of, such material appears on online platforms. If they are not covered by the scheme, there is no legal clarity and little reason to maintain the safe harbour.
- Providing different legal settings for groups providing the same services creates an unnecessarily complex system for intermediary liability. Creators, consumers and service providers will all be expected to understand and comply with the different systems that apply when material is hosted on an ISP versus a popular online platform.
- The principal opponents to technology companies receiving protection under safe harbours are large commercial rights holder organisations who would prefer to rely on licences with the large platforms to manage infringements of material over which they control the rights. However, this provides no solution for individual creators or small platforms, who do not have the option to enter into individual licences.

⁹⁶ available at <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca1541>

⁹⁷ See discussed at Matt Reynolds, *What is Article 13? The EU's divisive new copyright plan explained* (Wired, 29 March 2019) <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban>

⁹⁸ See Senate Standing Committee on Environment and Communications Legislation Inquiry into the Copyright Amendment (Service Providers) Bill 2017 (January 2018) <https://digital.org.au/resources/submission-to-the-senate-committee-inquiry-into-the-copyright-amendment-service-providers-bill-2017/>.

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?

We have already discussed these issues in some detail in our responses to Question 2 and Question 59 above. In summary, searching and linking are both essential functions of the internet, without which it would be impossible for modern communications to continue. It is therefore essential that running a search engine and linking to material is legal in New Zealand. We recommend that New Zealand adopt an exception/s that are sufficiently broad and flexible to permit indexing as part of a search service, and to clarify how the law applies to linking. We also recommend that New Zealand establish a safe harbour for search engine providers, to ensure that they have legal protection and clarity where others make use of their services to undertake infringing activities without their knowledge.

Transactions

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.

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.

Although we do not presume to comment on the New Zealand CMO system, we note that there is a strong history of criticism of Australia's CMOs from their licensees, particularly relating to a lack of transparency and poor governance.⁹⁹ As a number of CMOs operate across both countries, we anticipate that comments on these issues may be of use.

Collecting societies impact the operations of a number of the ADA's membership groups, including our members in primary, secondary and tertiary education and in the libraries, archives, galleries and museums sectors. As we and other interested parties have outlined in previous submissions to Australian Government consultations, there is an urgent need for reform of the

⁹⁹ See, for example, Copyright Advisory Group, COAG Education Council, Submission to the Draft Report Review of Code of Conduct for Australian Collecting Societies (March 2018) https://www.communications.gov.au/sites/default/files/submissions/copyright_advisory_group.pdf and Universities Australia, Submission to the Draft REport of the Review of the Code of Conduct for Copyright Collecting Societies (March 2018) https://www.communications.gov.au/sites/default/files/submissions/universities_australia_0.pdf

governance arrangements for collecting societies in Australia.¹⁰⁰ Australia's current governance regime:

- does not impose on collecting societies sufficient transparency and accountability obligations;
- grants an inappropriate degree of discretion to collecting societies; and
- does not incorporate sufficient measures for effective oversight, including sanctions for non-compliance and independent mechanisms for external review and amendment.

Oversight that takes into account the public interest is essential to manage any collecting society scheme, particularly where the collecting society represents a monopoly. Australia's current system is woefully inadequate, and fails to meet the guidelines provided by the Australian Competition and Consumer Commission (ACCC) for voluntary codes.¹⁰¹ As far back as 2000 the voluntary Code of Conduct for Australian copyright collecting societies has been criticised for providing inadequate powers for the government to direct and oversee the behaviour of individual societies.¹⁰² It was also found to not meet the minimum standards required to be an effective regulatory mechanism by the UK Intellectual Property Office's 2012 report *Collecting Societies Code of Conduct*, which specifically examined the Australian code and found 'to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct [including that of Australia] struggle to meet these criteria.'¹⁰³ Another criticism of the Code is that it does not include an effective mechanism to respond to criticisms from either members or licensees. The ADA has called for wide-reaching reform – in the form of legislative amendments and mandatory guidelines – to set clear standards and incorporate effective enforcement mechanisms, to build in consistency, accountability, and transparency for the Australian collective licensing regime.

¹⁰⁰ See for example the ADA's submission to the Department of Communications and the Arts' 2018 *Review of Code of Conduct for Copyright Collecting Societies*, <http://digital.org.au/sites/digital.org.au/files/documents/ADA%20Collecting%20Society%20Review%20Submission%20-%20final.pdf>.

¹⁰¹ See for example recommendations regarding commercially significant sanctions for noncompliance at p.11 of the ACCC's Guidelines for developing effective voluntary industry codes of conduct, <https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>.

¹⁰² Review of intellectual property legislation under the Competition Principles Agreement, the final report of the Intellectual Property and Competition Review Committee (September 2000), p. 127, https://www.ipaustralia.gov.au/sites/g/files/net856/f/ergas_report_september_2000.pdf.

¹⁰³ Intellectual Property Office, *Collecting Societies Codes of Conduct*, BOP Consulting in collaboration with Benedict Atkinson and Brian Fitzgerald (December 2012), p. 52, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310172/ipresearch-collecting-071212.pdf.

We draw MBIE’s attention to the fact that the Australian Department of Communications and the Arts has this week released a report calling for significant changes to the Australian CMO code, with a particular view to improving transparency and governance.¹⁰⁴

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.
72.	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?

As discussed above, Australian libraries and archives have increasingly been able to make use of orphan works under s200AB. This has been one of the principal benefits of the introduction of a flexible exception for libraries and archives.

However, orphan works do nevertheless remain a major problem for the sector. Section 200AB’s “special case” limitation makes it problematic for mass digitisation projects, and its general complexity and uncertainty means that most institutions still treat their use of orphan works as a risk management decision, with s200AB (perhaps) playing a part in the risk assessment. With an estimated 10% - 70% of the Australian national collection constituting unpublished orphan works (dependent on the type of works collected)¹⁰⁵ the uncertain and risk management this entails represents a real cost to libraries and archives - the Australian government’s own analysis of the costs and benefits of fair use, undertaken by Ernst & Young, conservatively estimated diligent search costs for the use of orphan works between \$10.3 million and 20.6 million a year.¹⁰⁶

The Australian library and archives sector favours a combination of exceptions to address this defect - the adoption of a simpler, clearer flexible dealing exception such as fair use, coupled with a specific exception for use of orphan works by cultural institutions. This is because we believe that use of orphan works by the institution that holds them in its collection falls into a category of privileged activities that provide significant benefit to the public with little or no harm to

¹⁰⁴ The Bureau of Communications and Arts Research, *Review of the Code of Conduct for Copyright Collecting Societies* (1 April 2019) <https://www.communications.gov.au/departmental-news/review-code-conduct-copyright-collecting-societies-0>

¹⁰⁵ National and State Libraries Australasia, *Survey of Orphan Works* (Unpublished, 2012) Page 12. Photographs were recorded as being the highest proportion of unpublished orphan works on average in library collections (38%), alongside pictures, manuscripts, maps, oral histories and other AV material comprising the bulk of unpublished orphan works. The ADA can supply the raw data to the PC if it proves useful.

¹⁰⁶ See Department of Communications and the Arts, *Cost benefit analysis of changes to the Copyright Act 1968 (2016)* p.72 available at <https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968>

copyright owners and for which a specific exception is therefore appropriate. Once a diligent search has been undertaken and material has been identified as orphaned, undertaking the market impact test that underlies both s200AB and fair use is unnecessary and inefficient, as orphan works, by definition, have no market and no discernable owner.

Furthermore, if the New Zealand government wants to truly liberate the orphan works in its national collections, it must ensure that use of these works does not stop on the institution's website. Orphan works must be reusable by the general public, including in commercial circumstances, to ensure their full potential to benefit society is met both culturally and economically. Currently, when cultural institutions are approached by creators wishing to use orphaned material they are placed in an awkward position, with the "illegality" of the use frequently making it difficult, if not impossible, for the institution to grant access to the works. Similarly, significant problems can arise for creators when their use is technically illegal because of an inability to obtain copyright permission, even if it is harming and objected to by no one. For example, documentarians and other movie makers find it difficult to obtain insurance, enter a film festival or obtain a commercial distributor without clear legal assurances, even if the use of the material poses low or no financial risk.¹⁰⁷

73.

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?

The experience in Australia's libraries and archives is that, even when orphan materials are published under s200AB, copyright owners rarely if ever come forward. When asked, both the National Library of Australia and the Australian War Memorial - institutions which make large numbers of orphan works available under s200AB - were unable to identify a single incident in which a copyright owner of material they have identified as an orphan work has come forward. This aligns with the experience under the British, EU and Canadian systems, with few copyright owners coming forward to claim money collected (see further below).

74.

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

The ADA does not have detailed knowledge of the orphan works regime in Norway or Japan. However, we do not recommend replicating the UK, Canadian or EU systems for managing

¹⁰⁷ See this issue discussed in Patricia Aufderheide, *Fair Use Put to Good Use: 'Documentary Filmmakers' Statement' Makes Decisive Impact* (International Documentary Association, August 2007) <https://www.documentary.org/online-feature/fair-use-put-good-use-documentary-filmmakers-statement-makes-decisive-impact>

orphan works in New Zealand. These schemes too often result in a situation where the administrative cost of applying the licensing scheme outweighs the benefits to copyright owners.

For example, under the UK scheme, the minimum licence fee for non-commercial use is 10p, while the minimum administrative fee going to the IPO is £20 - making the administrative fees paid by the licensor up to 200 times the potential payment to the rightsholder. And this doesn't include the administration costs of a diligent search the applicant is required to undertake before accessing the scheme, or the transaction costs for the preparation of the application. Even focusing on commercial licences, the average licence fee per work is a mere £228.02 - hardly a windfall for creators and just 10 times the minimum administrative fee. At the 12 month review stage the UK scheme had collected £8,001.97 plus a further £1492 in administrative fees, and no rights holders had come forward.¹⁰⁸ Considering the substantial cost of setting up and running the scheme, this hardly seems an efficient or effective mechanism to remunerate creators, let alone incentivise the creation of new works.

Ariel Katz reached the same conclusion when he examined the issue of costs versus outcomes in the context of Canada's orphan works licensing scheme.¹⁰⁹ The scheme, which at that time had been in operation for 18 years, had issued an average of 12 licences a year and set fees of C\$70,000, an average of C\$326 per licence.¹¹⁰ Katz found that "the costs of maintaining the regime (for the applicants and for Canadian taxpayers) likely exceed the amount of license fees that it has generated, and even the cost of applying and processing a license likely exceeds the average license fee".¹¹¹

As Katz points out, compulsory licensing is unlikely to ever be an efficient or effective solution for orphan works, which no longer have a commercial market:

It is possible that, almost by definition, the cost of the mechanism would be higher than the license fees that it would generate, no matter how streamlined the procedure is and regardless of the rate of the license fees. That is because the mechanism ignores the root cause of the orphan works problem: the fact that the cost of maintaining themselves locatable exceeds the license fees that owners expect to earn. If it is inefficient for owners to administer their rights under these conditions, it is unclear why the Board would be able to do that at a lower cost.¹¹²

Add to this the low probability of the copyright owner of an orphan work ever emerging, and the fees paid essentially become a "tax" on users for making valuable use of these otherwise abandoned works. Katz makes this observation about statements made by Bouchard, the General

¹⁰⁸ Intellectual Property Office, *Orphan Works: Review of the first twelve months*, (2015) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480742/orphan-works-review.pdf

¹⁰⁹ Katz, Ariel, 'The Orphans, The Market, and the Copyright Dogma: A Modest Solution to a Grand Problem (July 27, 2012). 27(3) Berkeley Technology Law Journal, 2012. Available at SSRN: <http://ssrn.com/abstract=2118886>

¹¹⁰ Katz Ibid at 1326

¹¹¹ Katz Ibid at 1327

¹¹² Katz Ibid at 1329

Counsel for the Canadian scheme, justifying their collection of fees whether or not a copyright owner is located:

Bouchard explains that while the Board acknowledges that non-contingent royalties payable to a collective society are controversial, the Board's position is that the user must generally be required to pay because the Board [quoting Bouchard] "does not believe that it should be in the business of issuing free insurance policies against prosecutions for violation of copyright." ... Even though Parliament clearly contemplated that if the owner does not emerge the user can keep the surplus, the Board views disgorging the user of this surplus as a closer purpose because "given the choice, the unlocatable copyright owner would prefer that the royalties be paid to a group that represents interests similar to those of the owner than to see the user take advantage of the owner's copyright for free," and "when a protected use of a protected work is contemplated, the payment of royalties should be the norm, not the opposite."¹¹³

In such a case, when:

- running costs outweigh the money provided to creators;
- licensing fees are merely being used to tax users and support the collecting organisation; and
- the material to be used has already been determined to have no ongoing market value;

it is hard to see the economic or moral justification for the operation of a statutory licence scheme over the introduction of a flat out exception.

Meanwhile, the experience with the EU Orphan Works Directive provides a cautionary tale against imposing too onerous a compliance burden for the use of orphan works. The requirements for diligent search imposed by individual countries have caused significant problems, proving to be so onerous as to be cost prohibitive. A 2016 study by diligent search project EnDOW¹¹⁴ identified 210 sources, databases, and registers that need to be checked in diligent searches in the UK, and 357 in Italy. Of the 87 identified sources in the Netherlands, 40 were not freely accessible, and 36 of these required personal contact or a physical visit.¹¹⁵ This burdensome approach has been reflected in low uptake, with the OHIM Database on which orphan works must be registered only receiving 1,435 registrations in the first 4 years.¹¹⁶

It is for this reason that the ADA supports the use of exceptions to permit use of orphan works, rather than unnecessarily complex, expensive and inefficient licensing schemes.

¹¹³ Katz Ibid 1330. Katz's quotes for Bouchard come from Mario Bouchard, The Canadian Unlocatable Copyright Owners Regime, in The Copyright Board of Canada: Bridging law and economics for twenty years 137, 153 (2011) at 153-154.

¹¹⁴ <http://diligentsearch.eu/>

¹¹⁵ See discussion at Maarten Zeinstra, Research: Orphan Works Directive does not work for mass digitisation (16 Feb 2016) <https://www.communia-association.org/2016/02/16/orphan-works-directive-does-not-work/>

¹¹⁶ See discussion at Maarten Zeinstra, Research: Orphan Works Directive does not work for mass digitisation (16 Feb 2016) <https://www.communia-association.org/2016/02/16/orphan-works-directive-does-not-work/>

75.

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?

The ADA supports the submission of Tohatoha Aotearoa on this matter.

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?

Should NZ seek to introduce a website blocking regime, the ADA encourages it not to model its scheme on that of Australia, or to repeat the mistakes of the Australian regime.

As currently drafted, and particularly since the changes rushed through by the *Copyright Amendment (Online Infringement) Act 2018*,¹¹⁷ the Australian regime runs the risk of enabling the blocking of a large range of innocent and commonly used websites, such as meme-generators, auto-translation services and VPNs. This is a significant departure from the original intent of the legislation, which was to capture only “the worst of the worst” websites. This is due in large part to the lowering of the threshold requirements in the Australian scheme from websites with a “primary intent” of copyright infringement to websites with a “primary effect” of copyright infringement. We understand the intention of these changes was to capture sites such as cyberlockers; however, the potential effect is much broader.

Due to the lack of general exceptions in our *Copyright Act 1968* a large number of innocent and common activities currently infringe copyright in Australia, including generating memes, auto-translation, cloud storage, caching and indexing, and sharing screenshots of websites. As the issues paper notes, the same is the case for New Zealand. This means that sites which are perfectly legal in the United States and other jurisdictions with more internet-appropriate copyright laws are not lawful in Australia - even where they are innocent and commonly used by Australians. And where these technically illegal activities are a major, or even the sole, activity for the website, there is a strong argument that it has a “primary effect” of infringement.

In seeking to tackle piracy we are concerned that Australia has opened the door to the banning of a huge range of commonly used websites, such as Pinterest, the Internet Archive and Google Translate. VPNs, which allow unauthorised access to overseas material, could also be caught by this language, despite them being deliberately excluded by the Explanatory Memorandum of the original scheme. Although the scheme allows courts to take the flagrancy of infringement into account, this provides little protection for the operators of these sites, which are arguably

¹¹⁷ See

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6209

flagrant as to their facilitation of infringement in Australia, in that they allow our citizens to make use of the services without warning, geoblocking or otherwise seeking to limit infringements in this country.

Furthermore, the inclusion of “online search engines” in the Australian scheme results in expensive and inefficient “double dipping” as material that is blocked at the ISP level is already not accessible when searched for locally (including on local editions of international search engines).

Website blocking is a drastic remedy and a blunt tool which has significant implications for free speech and the functioning of the internet. As such New Zealand should remain cautious about adopting measures which, though with a laudable intent, could have serious unintended consequences.