Ministry of Business, Innovation and Employment
Review of the *Copyright Act 1994*
Google Submission to the Issues Paper

Executive summary

Google New Zealand welcomes this opportunity to provide a submission to the Ministry of Business, Innovation and Employment (**MBIE**) for its review of the *Copyright Act 1994* (**the Act**).

Google strongly supports the Government's objective to renew the New Zealand economy using advances in digital technologies. Google also supports the Prime Minister's announcement that one of the top five budget priorities is to support "a thriving nation in the digital age through innovation".

The goal of having Information and Communications Technology (**ICT**) be the second largest contributor to New Zealand GDP by 2025 is an ambitious one. However it is a goal that Google believes is achievable with Government and industry working together to ensure that New Zealand has the appropriate skills base and supportive regulatory environment to meet this target.

The review of the Copyright Act is an important opportunity to identify those areas of the Act that make it harder to achieve these important goals, and to ensure that New Zealand's copyright laws enable Kiwi creative industries, innovators, researchers and consumers to unlock the social and economic benefits afforded by ICT.

Google believes there are a number of areas where the copyright system does not meet the Government's goal to ensure that New Zealand becomes a leading digital nation. For example, despite the Government's digital and innovation goals:

- The Act does not support common internet functions such as web search, which is used by millions of people in New Zealand every day.

- Despite New Zealand's adoption of progressive cloud computing policies, the Act does not address cloud technologies in its exceptions framework.

- Artificial intelligence (**AI**) and machine learning technologies are capable of bringing enormous economic and social benefits to New Zealand. However the extent to which AI technologies can be used legally in New Zealand is in doubt.

- The Act does not provide exceptions for text and data mining (**TDM**) technologies which offer significant opportunity to improve medical and scientific research by enabling automated searches of vast quantities of text and data to look for patterns, trends and other useful information.

- The Act does not permit many transformative uses of creative works, such as 'mashups' and remixes, or allow creators and innovators to harness existing information to stimulate new investment and innovation.

Assessing the Copyright Act against regulatory best practice principles

New Zealand has adopted a set of Regulatory Best Practice Principles which can be used to assess regulations. A "traffic light" assessment is used in which Green indicates no significant concerns, Yellow indicates possible areas of material concern, and Red means that there are strong indicators of material concern.[1]

In assessing New Zealand's Intellectual Property (**IP**) system as a whole, Treasury found that the system was marked Green against each of the Principles. Google respectfully submits that, if the *Copyright Act* was specifically assessed on its own, several of the indicators adopted under the traffic light assessment would likely be marked as Yellow or Red.

Moving the Copyright Act to Green

The Act is not flexible enough to leave breathing room for innovation. It contains a number of 'static' exceptions - which are limited to a particular purpose, use, or technological format. As new technologies and services have emerged, the current Act has struggled to keep up to date.

InternetNZ has highlighted the time it has taken New Zealand's copyright framework to adapt to technological developments, noting that the legal status of many common technologies is still unclear:

[1] Treasury, *Best Practice Regulation: Principles and Assessments* (2015).

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

Along with struggling to keep up to date, the Act does not permit many ways that people use content - or permits some types of content but not others. Consider the legal complexity and inconsistency for people when they seek to understand whether they can make copies to backup content, or watch it in a different format:

- ***Back up copying*** (copying digital files in case they are lost, deleted, or corrupted)

Type of content	Is the use allowed?
Software	Yes
Music	No
Film or TV show	No
eBook	No
Video game	Unclear

- ***Format shifting*** (copying legitimately owned content to a different format)

Type of content	Is the use allowed?
Software	No
Music on CD	Yes
Film or TV show on DVD	No
eBook	No
Video game	No

Introducing flexibility to copyright framework
In a rapidly changing world, specifically drafted 'static' exceptions will always lag behind creativity and innovation. On the other hand, 'dynamic' exceptions (those that adopt a principles based approach for determining whether a new use should be permitted) allow creators to build upon existing works in fair and reasonable circumstances.

If New Zealand wishes to reach its innovation goals - including making the most of research and development - it will need to amend many of its copyright exceptions. When working out the best way to do this, it's important to ask:

> Is it better for an inventor/creator to get a clear 'no' as the default answer when they want to try using copyrighted content for something new (static exceptions)?
> or
> Is it better for an inventor/creator to assess whether a new way of using copyrighted content is permitted against a set of clear principles (a dynamic exception)?

The health of New Zealand's creative sector and digital economy will be influenced by this choice. That is, whether legislation supports innovative new forms of creativity and technological development, which often rely on transformative uses of other materials.

Google submits that continuing to try and design specific legislative solutions to known technologies and uses is not consistent with the Objectives of this Review, or New Zealand's broader regulatory Principles. The only way to reform the Act in a way that will cover emerging technologies is to ensure that the exceptions are principles based, flexible and durable enough to adapt to future change.

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Introduction to Google

Google's mission is to organise the world's information and make it universally accessible and useful. Helping people find the information they need to learn, create, and innovate is essential to our mission. Through tools such as Search, Google Play, YouTube, Google Books, and Blogger we provide music, video, literary, and other content creators and innovators with platforms that help them reach billions of people around the world.

Google has a small but strong presence in New Zealand, with around 40 people working in Auckland and Wellington. Everyday, Kiwis make about 3.5 million searches on Google to find information. On average, more than 3.5 million people using Google Search save over 30 minutes per day looking for answers to their questions.[2]

Other tools such as Google Maps help people explore New Zealand, reduce travel times and access public transport timetables.[3] Google Maps is an integral part of the way Kiwi businesses are found by potential customers and improved navigation saves between 14,500 - 19,500 tonnes of CO_2 from vehicle emissions each year.[4]

Google is also proud to partner with arts and cultural institutions like Te Papa, Auckland Art Gallery, and the Auckland War Memorial Museum.[5] Through our Google Arts and Culture app, we collaborate with over 1,200 international museums, galleries and institutions from 70 countries to make their exhibits available for everyone online. Our partnership with New Zealand's institutions allows people from around the world to experience New Zealand's rich culture and inspire tourists to visit New Zealand.

As the Ministry of Culture and Heritage has recognised, the creative sector is an engine of growth for the New Zealand economy.[6] Google is proud to offer products and services that play a part in this continued growth. For example, services such as Google Play allow Kiwis to access quality legitimate content from home and abroad, and YouTube has become a place for Kiwis to enjoy an enormously diverse range of content, as well as share Kiwi creativity and stories with the world.

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[2] AlphaBeta, *Google Economic and Social Impact New Zealand* (2017) 4.
[3] Sean O'Kane, *Google Maps will now help you find EV charging stations,* The Verge (Online) 16 October 2018.
[4] AlphaBeta, *Google Economic and Social Impact New Zealand* (2017) 4.
[5] *Arts and Culture,* Google <https://artsandculture.google.com/partner/te-papa>.
[6] Ministry of Culture and Heritage, *Cultural sector overviews*, <https://mch.govt.nz/what-we-do/cultural-sector-overviews>.

YouTube in New Zealand

YouTube began with a mission to give everyone a voice and today it is the home of diversity. People from communities across New Zealand are able to easily upload and view videos. It's also the favourite online video platform for New Zealanders with more than 3 million Kiwis accessing the platform each month in 2016. To put this in perspective, a Roy Morgan study estimated that 1.5 million New Zealanders watched the last Rugby World Cup on TV.

As a result of YouTube and other global services, Kiwi voices and stories are being shared and heard around the world. As noted by MBIE:

> *technological developments such as streaming have created opportunities for content creators to find new audiences (particularly international audiences) and reduced distribution costs.*[7]

Our YouTube Partner Program enables New Zealand content producers (large and small) to reach global audiences and directly monetise their content by displaying advertisements and sharing revenue. YouTube Channels like Speak Maori[8] and Maori Television[9] also help to showcase Maori culture and Te Reo to a global audience.

There are now over 100 YouTube creators in New Zealand who now have at least 100,000 subscribers to their channels – the point where many turn their content into a career. For more information about Google and YouTube in New Zealand please see Attachment 1.

Kiwis are using YouTube to showcase New Zealand stories

Kiwi creators like Crystal Earley and Mario Faumui from Tiki Lounge Productions are taking advantage of programs like Skip Ahead to share Kiwi stories with the world.[10] Tiki Lounge Productions' *Housiewives,* is a hilarious South Auckland dramedy set in the suburb of Avondale. The five-part web series follows the lives of this community after $10,000 goes missing from the church fundraiser, and fingers start pointing.

With a soap-style 'whodunnit' plot, *Housiewives* was one of three projects funded through the Skip Ahead program in 2018. Since launching in 2018, the web series has received over 100,000 views on YouTube.

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[7] Ministry of Business, Innovation & Employment, *Copyright and the Creative Sector* (Report, 2016) 5.
[8] *Speak Māori*, YouTube <https://www.youtube.com/user/TalkMaori>.
[9] *Māori Television,* YouTube <https://www.youtube.com/user/maoritelevision>.
[10] Skip Ahead is a joint initiative between NZ On Air and Google. Skip Ahead is a $300,000 grants program that is designed to help local rising stars create unique online content and engage new audiences around the world. The initiative provides funding of up to $100,000 for talented Kiwis that want to develop new scripted shows, experiment with online formats, and grow their global audience.

Encouraging Kiwi Innovation

As stated above, Google believes in the importance of the Government's plans to renew the New Zealand economy using advances in digital technologies as the driver, and supporting innovation and entrepreneurship through a rich innovation ecosystem. The Government's objective for ICT to be the second largest contributor to New Zealand's GDP by 2025 is an ambitious target,[11] but one that we are excited to continue to support. It is critical that New Zealand's regulatory environment enables this objective to be met.

The internet can be a platform to showcase Kiwi innovation to the world. For example, eyes from all around the world turned to New Zealand for the live streamed Rocket Lab Electron orbital launch - a channel with 34,000 subscribers.[12] This launch saw the startup successfully insert the vehicle into orbit, marking a significant milestone in opening up access to space, and well and truly putting New Zealand on the space innovation map. It can also be a springboard for creators and innovators to launch their careers.

YouTube is a springboard for Kiwi innovators

Shannon Harris is one of New Zealand's most recognisable YouTube creators. Starting out as a 17-year old uploading makeup tutorials from her bedroom, her channel now has a global audience of 3.2 million subscribers and her success has seen her named by Forbes as the world's fifth most powerful beauty influencer.

In 2013, Shannon expanded her business beyond her channel and started her own label xoBeauty, she produces Italian made makeup brushes along with vegan makeup products. Her brand has partnered with companies such as Clinique and Smashbox Cosmetics.

In order to maximise the many benefits that flow from ICT, all Kiwis need to have the skills to thrive in the digital economy. Google supports the Government's vision that everyone in New Zealand should have what they need to participate in, contribute to, and benefit from the digital world.[13] This means ensuring that teachers are equipped with the skills and resources that are needed to guide future generations of Kiwi innovators. As MBIE has previously found in its report *The Pulse of Our Nation*:

> *We also recognise the ongoing role of an evolving education system to build the skills base needed for New Zealand to continue to develop as an effective and productive digital nation.*[14]

Google also supports the recommendations made by the Future of Work commission, which found that:

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[11] *Information and Communication Technology: Highlights*, Labour Party Manifesto 2017.
[12] https://www.youtube.com/user/RocketLabNZ
[13] *Building a Blueprint for Digital Inclusion*, Department of Internal Affairs, 18 September 2018.
[14] Ministry of Business, Innovation & Employment, *Digital New Zealanders: The Pulse of our Nation* (Report, May 2017) 2.

> *In an environment where students are being prepared for "jobs that don't exist yet" it is vital that all teachers are supported to update and improve their knowledge and teaching practice.*[15]

More information about Google's support for education and skills is provided at Attachment 1.

It is clear that digital inclusion, and skills for all Kiwis is a critical policy goal in order for New Zealand to harness the power of the internet to spur further innovation and grow the digital economy. Against this background, it is essential to examine which areas of the Act hold back the achievement of these vital Government policy goals. The remainder of this submission highlights those areas.

[15] Future of Work Commission, *The Future of Work* (Report, 2017) 20.

Summary of Questions Answered by Google

Question	Answer
Question 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? Question 2: Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?	The proposed objectives are an excellent reflection of the appropriate goals for a copyright system, however, Google suggests that Objective 5 should reference the New Zealand Bill of Rights and that two new objectives are added: (1) ensuring that the copyright system is consistent with the Government's innovation goal that New Zealand becomes a leading country in the global digital economy; and (2) ensuring that copyright law is flexible and durable, to adapt to future change.
Question 6: Is it clear what 'skill, judgement and labour' 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?	Google considers that the current test is clear, however, that the current approach means that copyright protection is applied too widely. This means that New Zealand is inconsistent with other jurisdictions, which can have a negative effect on technological innovation. Google suggests that the New Zealand approach to the test for copyright protection is amended to align with the test in other jurisdictions.
Question 9: What problems (or benefits) are there with the current rules related to computer-generated works, particularly in light of the development and application of new technologies like artificial intelligence to general works? What changes, if any, should be considered?	The current rules relating to computer generated works under the Act are outdated and restrict the development of AI in New Zealand. Google recommends that a flexible, principle based approach to exceptions such as computer generated works is adopted (such as the exceptions in the US, Israel, and Singapore).
Question 7: Are there any problems with (or benefits arising from) the treatment of data and compilations in	There are problems based on the treatment of data, Crown copyright, and unpublished works in the Copyright Act. This is combined with the legal

the Copyright Act? What changes (if any) should be considered? Question 12: What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered? Question 14: Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?	uncertainty surrounding the use of orphan works. Specifically: (1) the low threshold for originality is blocking publicly beneficial uses of compilations of data; (2) the ability to opt-out has led to the overprotection of Crown copyright works; and (3) there is no public interest justification for perpetual copyright for unpublished works (as referred to in section 117). Google suggests that: (1) the approach to the test for copyright protection is amended to align with the test in other jurisdictions, enabling publicly beneficial uses of compilations of data; (2) the ability of Crown agencies to opt-out should be removed or restricted, and the term of protection for Crown copyright works should be comparable to jurisdictions such as Australia and Canada; (3) the Act is amended to bring the copyright term for unpublished works in line with the term for published works; and (4) consideration is given to introducing an orphan works scheme in New Zealand to enable New Zealand researchers and the public to make use of the enormous range of information in orphan works, while ensuring reasonable compensation for copyright owners who are later identified.
Question 31: What are the problems (or benefits) with how any of the criticism, review, news reporting, and research or study exceptions work in practice? Under what circumstances,	Google considers that there is no public policy justification in limiting the scope of any exception (such as criticism, review, news reporting, and research or study) to exclude uses with a commercial purpose. A flexible, principles based approach to

if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?	exceptions should be adopted that takes a range of factors into account. A user's commercial purpose should be relevant, but not decisive, to determining whether a particular use is fair.
Question 35: What are the problems (or benefits) with the exception for transient reproduction of works? What changes (if any) should be considered?	The problem with the exception for transient reproduction of works is that it is locked to particular technologies and purposes, and has not been flexible enough to extend to different technical and transient reproductions. The best way to ensure that the exception will cover new technologies and purposes is to adopt exceptions that are principles based, flexible, durable, and can adapt to future change.
Question 36: What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?	There is no exception in New Zealand that clearly covers common place consumer and business uses of the cloud. This is a significant problem given the prevalence of cloud computing among Kiwi consumers and businesses. Exceptions should be adopted that are growth compatible for new technologies, predictable and flexible and durable enough to adapt to future change.
Question 37: Are there any other current or emerging technological processes we should be considering for the purposes of the review?	Google submits that continuing to try and design legislative solutions to known technologies and uses is not consistent with the Objectives or the Principles. The only way to reform the Act in a way that will cover emerging technological processes is to ensure that the exceptions are principle based, flexible and durable enough to adapt to future change.
Question 38: What problems (or benefits) are there with copying of works for non-expressive uses like datamining. What changes, if any, should be considered?	Non-expressive uses of copyright works such as data mining, AI, and machine learning are not covered by any current exceptions under the Act. Exceptions should be adopted in New Zealand that allow for these non-expressive uses, that are growth compatible, predictable and flexible, and durable enough to adapt to future change.
Question 39: What do problems (or benefits) arising from the Copyright Act not having an express exception for parody and satire? What about the absence of an exception for	The lack of a parody and satire exception imposes a limitation on creativity in New Zealand. An exception should be adopted that considers whether the use is "fair". This would cover parody and satire and would ensure that the exception allows for growth, is

caricature and pastiche?	predictable and flexible and durable enough to adapt to future change.
Question 40: What problems (or benefit) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?	Currently, the use of quotations or extracts taken from copyright works will only be permitted if it is for the purpose of criticism or review. This leads to inconsistent and illogical results. An exception that considers whether the use is fair (rather than linking it to particular purposes) would ensure that the exception is flexible and durable enough to adapt to future change.
Question 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?	The current approach does not allow for new and innovative digital technologies to be used in New Zealand and does not recognise the changing way that learning can occur. A general or flexible exception that allows 'educational uses' should not be locked to particular technology or to classroom based learning styles.
Question 58: Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?	It is important that all copyright exceptions essential to the functioning of the internet and modern digital technologies are able to be used in practice. This means that consideration should be given to ensuring that these rights to use digital technologies are not able to be modified or excluded by contractual means.
Question 59: What are problems (or benefits) with the ISP definition? What changes, if any should be considered?	The ISP definition should not be narrowed. The current position is consistent with the US, EU, and Singapore.
Question 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?	Uncertainty regarding the current legal position of search tools and linking in New Zealand has the potential to discourage investment and innovation in New Zealand. The safe harbours provisions should be amended to expressly include linking and search tools, while also being flexible enough to cover future changes in technology.

Question 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.	The current Act provides the right balance between online platforms and copyright owners. Google has an efficient system in place that fairly compensates rights holders and provides an easily accessible platform that anyone can use to monetise their content.
Question 69: What are the advantages of social media platforms or other communication tools to disseminate and monetise their works? What are the disadvantages? What changes to the Copyright Act (if any) should be considered?	Social media platforms or other communication tools provide an easily accessible platform that anyone can use to monetise their content. These platforms foster creativity and allow New Zealanders to have access to a new source of income. However, the lack of copyright exceptions under the Act for parody, remixes, memes, mashups, and even simple retweets means that New Zealand content producers are disadvantaged compared to their peers in overseas markets where a wider range of these common creative uses are legally permitted and encouraged.
Question 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?	The existing systems available to copyright owners to address online infringement are sufficient and create the right balance between copyright owners and online platforms. Specific copyright website blocking injunctions would not be an appropriate enforcement approach in New Zealand.
Question 87: Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?	The person who wishes to enforce their rights should pay the costs associated with enforcing those rights – including the ISP's costs.

Part One - The Policy Framework for the Review

1.1 The Copyright Ecosystem

This review represents an important opportunity to ensure that New Zealand's copyright laws enable Kiwi creators, consumers, educational and cultural institutions, and innovators to unlock the social, creative, cultural, educational and economic benefits afforded by ICT. It is also a great opportunity to ensure that New Zealand's copyright framework is aligned with its broader social and economic goals, particularly innovation policies.

The Issues Paper is an excellent overview of the many challenges facing the copyright system in New Zealand. It highlights the complexity of ensuring a framework that works for all players in the Kiwi copyright ecosystem.

Google is grateful for the opportunity to contribute to this policy process, and believes that MBIE's evidence based approach will provide a solid foundation for developing a copyright framework where creators are rewarded for their efforts; consumers can engage with the content they love; cultural and educational institutions can deliver the benefits provided by the Internet and technology in fulfilling their public interest missions, and both Kiwi creators and innovators can flourish. Google also recognises the importance of the additional workstream proposed in relation to ensuring the Act, in conjunction with the Wai 262 recommendations, provides better protection for kaitiaki interest in taonga works and matuaranga Maori.

Google supports MBIE's broad understanding of the roles played by stakeholders in the copyright ecosystem. We agree that the distinction between 'owners' and 'users' of copyright materials is no longer binary - because consumers are also creators; and innovative digital platforms provide new content distribution methods for both new and traditional forms of content.

In recent years, the creative sector has become incredibly diverse with the traditional model of a professional media sector delivering content to passive consumers being enhanced by a model in which the lines between creator and consumer have been blurred. With the rise of platforms like YouTube, user generated content competes and complements professionally produced material. Consumers of media are now actively engaged with content through comment sections, live streaming, and sharing on social media.

Google's interests in this ecosystem are aligned with content creators and owners of copyright material. Google provides incentives for creators and existing copyright owners to develop new

content which may then be distributed and monetised, while at the same time investing heavily in new and effective steps to combat piracy.

As noted above, the creative sector is one of the engines of the New Zealand economy. The internet has provided creators with new methods of creation, and new ways to bring their creativity to a global audience, fundamentally changing the way fans enjoy videos, music and other media. Kiwis can now watch entire seasons of TV shows on Google Play or Netflix, or stream an entire catalogue from an artist on Spotify or YouTube Music. These changes are good for creators, consumers and the creative industries.

This boom in the creative economy has generated an enormous amount of revenue for all stakeholders. Digital video revenues are expected to soar from $64 billion to $94 billion between 2017 and 2022[16], while global music streaming revenues more than doubled from 2015 to 2017[17]. And the increased availability of affordable and consumer-focused content services has led to declines in online infringement.

A recent independent study commissioned by Vocus showed a significant decrease in piracy levels in New Zealand, largely attributable to the increased availability of free or affordable content options such as Netflix and OnDemand.[18] These New Zealand results are consistent with other global studies, such as:

- A 2018 report from the University of Amsterdam found that as European spending on legal content grew between 2014 and 2017, the percentage of Europeans committing piracy decreased[19];
- A French study conducted by EY found that the number of pirates declined by 8% from 2016 to 2017. Pirates also reportedly streamed less infringing content than the year before and were more willing to pay for content[20];
- A 2018 report by a Spanish anti-piracy group reported noticeable declines in the number of people who accessed unauthorized content[21];
- A 2018 survey from the Australian government also found an overall drop in the number of people accessing unauthorized content[22]; and
- A study released by the U.K. regulator OFCOM noted several features of content delivery services that could be improved in order to further reduce piracy, including working with creators and rights holders to increase the catalogues of available works,

[16] Juniper Research, '*OTTs Vs TV Networks - 3 Winning Strategies'*, <https://www.juniperresearch.com/document-library/white-papers/digital-tv-3-key-consumer-insights>.
[17] PwC, 'Perspectives from the Global Entertainment & Media Outlook 2018–2022,' June 2018
[18] Perceptive, *'Vocus Online Behaviour'*, January 2019.
[19] University of Amsterdam Institute for Information Law, *'Global Online Piracy Study'*, July 2018.
[20] EY, *'Un manque a gangner a minima de 1,18 milliard d'euros'*, June 2019
[21] Coalition of Creators and Content Industries, *'Piracy observatory and digital content consumption habits 2017'*, April 2018.
[22] Department of Communication and the Arts, *'Consumer survey on online copyright infringement 2018'*, August 2019.

and decreasing the window of time between when a television show, song, or movie premieres and when it is available for download[23].

How Google fights piracy

While the growth in the digital and creative economy globally, combined with decreasing piracy levels, is encouraging, Google continues to combat online piracy. Google takes the ongoing challenge of fighting online piracy seriously—investing significant resources in tools to report and manage copyrighted material and working with other industry leaders to set the standard for how tech companies fight piracy.

The MBIE Issues Paper has called for parties to set out their experiences under the existing Act and evidence of any problems.[24] Therefore Google considered that it would be beneficial to set out how Google currently deals with piracy – especially in relation to the enforcement of copyright and fighting piracy. We suggest that this section is read in combination with section 3.5 of this submission that sets out Google's recommendations for copyright enforcement. For more detailed information about Google's anti-piracy efforts please see our blog post and 2018 report "How Google Fights Piracy".[25]

Google's anti-piracy principles

Five principles guide Google employees, as well as our substantial investments of time, money, and computing power, in fighting piracy:

1. ***Create More and Better Legitimate Alternatives***
   As evidenced by the research referred to above, piracy often arises when consumer demand goes unmet by legitimate supply. The best way to battle piracy is with better, more convenient, legitimate alternatives to piracy, which can do far more than attempts at enforcement can. By developing products with compelling user experiences like Google Play Music and YouTube, Google helps drive revenue for creative industries and to steer people towards legitimate alternatives. Google also supports the wider copyright ecosystem by providing the cloud infrastructure that other legitimate services depend on to deliver fast, reliable streaming to their customers.

2. ***Follow the Money***
   Rogue sites that specialize in online piracy are commercial ventures, which means that one effective way to combat them is to cut off their money supply. Google is a leader in rooting out and ejecting rogue sites from our advertising and payment services, and we

[23] IDATE, '*Online Content Study: Changes in the distribution, discovery and consumption of lawful and unauthorised online content'*, November 2015.
[24] Ministry of Business, Innovation & Employment, *Review of the Copyright Act 1994* (Issues Paper, 2018) 6.
[25] Available at https://www.blog.google/outreach-initiatives/public-policy/protecting-what-we-love-about-internet-our-efforts-stop-online-piracy/.

help establish best practices across the industry. In 2017 alone, Google rejected more than 10 million ads that we suspected of copyright infringement. Moreover, since 2012, Google has terminated over 13,000 AdSense accounts and ejected more than 100,000 sites from our AdSense program for violations of our policy on copyrighted material. The vast majority of these ejections were caught by AdSense's own proactive screens.

3. ***Be Efficient, Effective, and Scalable***
   Google strives to implement anti-piracy solutions that work at scale. For example, as early as 2010, Google began making substantial investments in streamlining the copyright removal process for search results. As a result, these improved procedures allow Google to process copyright removal requests for search results at the rate of millions per week. Content owners have notified us about 882 million URLs in 2017 alone, and we removed more than 95% of these webpages.[26]

4. ***Guard Against Abuse***
   Fabricated copyright infringement allegations can be used as a pretext for censorship and to hinder competition. Google is committed to ensuring that it detects and rejects bogus infringement allegations, such as removals for political or competitive reasons, even as it battles online piracy. In 2017, we pushed back on around 54 million removal requests that were incomplete, mistaken, or abusive.[27]

5. ***Provide Transparency***
   Google is committed to providing transparency. In our external Transparency Report, Google discloses the number of requests it receives from copyright owners and governments to remove information from its services to inform ongoing discussions about online content regulation.[28]

Google also invests significant resources in developing tools to put content creators and owners in control of their content online, such as:

- **Content ID and YouTube copyright management tools**

Content ID is YouTube's proprietary copyright management system. It is a web-based tool that allows rights holders to protect and monetise their content on YouTube. YouTube has invested more than US$100 million in building Content ID, including staffing and computing resources, to maintain its status as a best-in-class copyright management tool.

Content ID represents a thoughtful and practical solution to piracy, as well as a new and growing revenue stream for rights holders. Content ID is good for users as well. By choosing to monetise their content or track user--submitted videos, rights holders allow users to continue to freely remix and upload a wide variety of new creations using existing copyright works. They

[26] Google, *How Google Fights Piracy* (2018) 14.
[27] Ibid.
[28] Google, *Transparency Report,* <https://transparencyreport.google.com>.

can also use the appeal process to dispute a Content ID claim if they think it is wrong or infringes on their rights.

Rightsholders can use Content ID to identify user-uploaded videos containing their content, and choose whether to monetise, track or block that content:

- Monetise: Allow users to view the video and display advertisements with it.
- Track: Allow users to view the video without advertisements; collect statistics about video views.
- Block: Don't allow users to view the video on YouTube.

Content ID works by scanning videos uploaded to YouTube against more than 600 years worth of audio and visual reference content. It then applies the rights holders' preferred action. YouTube has more than 80 million active reference files in our Content ID database as of November 2018, making it the most comprehensive in the world. As of November 2018, Content ID has been used by over 9000 partners to manage and monetise their works. The vast majority of rights holders choose to monetise their claims and leave their content up on YouTube - over 800 million videos have been claimed by partners[29].

Since launching Content ID in 2007 YouTube has paid out more than US$3 billion to rights holders who have monetised use of their content in other videos through Content ID.

Any of these actions can be country specific. For example, a content owner may choose to monetise a video in one country, and block or track in another. With advances in machine learning, Content ID can now catch efforts to evade detection, such as changing a videos aspect ratio, flipping images horizontally, and speeding up or slowing down the audio[30].

Over 98% of copyright issues on YouTube are handled through Content ID, rather than our notice-and-takedown process. Within Content ID, 98% of claims in 2017 were automated—meaning that Content ID automatically identified the work and applied the copyright owner's preferred action, without the need for intervention by the copyright owner.

YouTube also provides a variety of other copyright management tools, which we continue to innovate and invest in over time. These include a simple webform that can be used to submit takedown requests for individual videos, as well as a bulk submission tool. Just last year, we launched the Copyright Match Tool, which helps YouTube creators more easily find full reuploads of their original videos on other YouTube channels.

[29] YouTube for Press, <https://www.youtube.com/intl/en-GB/yt/about/press/>.
[30] Fast Company, *'YouTube is using AI to police copyright - to the tune of $2 billion in payouts'*, July 2016.

- **Google Web Search**

Users worldwide perform trillions of searches per year on Google Search. Hundreds of billions of pages are organised in the Search index - and only an extremely small proportion of these have any connection to piracy. For content-related queries, the vast majority of the top search results pages show only legitimate results. This is the result of ongoing improvements to the algorithms that power Google Search, and the efforts of content owners to prioritise and target copyright removal notices.

As part of our commitment to providing better alternatives to piracy, Google has launched a number of initiatives to present legitimate alternatives to people as part of search results, including providing advertisements on queries for movies and music to link people to legitimate means of purchasing or accessing that content.

Further information on the significant efforts Google takes in relation to Google Search is provided at pp 41 - 57 of How Google Fights Piracy[31], including:

- Demoting infringing websites - by the end of 2017 Google demoted an average of 500 websites in search results each week;
- Removing piracy-associated terms from Autocomplete and Related Search;
- Making legitimate alternatives more visible in search results;
- Updating Google Image Search, working with photographers and the stock photography industry, to improve the product to encourage people to view images in the context of the websites in which they are found.

- **Trusted Copyright Removal Program Partners**

In addition to our content removal webform, Google provides a tool for copyright owners with a proven track record of submitting accurate notices and a consistent need to submit thousands of web pages each day. Google created the Trusted Copyright Removal Program (**TCRP**) for Search to further streamline the submission process, allowing copyright owners or their enforcement agents to submit large volumes of webpages on a consistent basis. As of 2017, there are more than 178 TCRP partners, who together submit the vast majority of notices.

- **Creators Guide to Copyright**

Google also published an online and hardcopy guide for creators on how to use Google's tools to protect copyright. This is an 'easy to digest' pamphlet that provides short practical guidance for creators on how to use the tools listed above. The guide was developed specifically for local creators in New Zealand and is enclosed.

[31] Ibid.

1.2 MBIE's Proposed Objectives

Subject to our response to questions 1 and 2 below, Google supports MBIE's proposed objectives that the Act should:

- Provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so;
- Permit reasonable access to works for use, adaptation and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand;
- Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law;
- Meet New Zealand's international obligations; and
- Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi.

Question 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?

Question 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?

Google's Answer: The proposed objectives are an excellent reflection of the appropriate goals for a copyright system, however, Google suggests that Objective 5 should reference the New Zealand Bill of Rights and that two new objectives are added:

(3) ensuring that the copyright system is consistent with the Government's innovation goal that New Zealand becomes a leading country in the global digital economy; and
(4) ensuring that copyright law is flexible and durable, to adapt to future change.

Google submits that the proposed objectives are an excellent reflection of the appropriate goals for a copyright system. However, Google also wishes to propose an amendment to the last objective, as well as two additional objectives:

- ***Amendment to Objective 5****: MBIE's proposed objective 5 should also include reference to New Zealand's Bill of Rights*:[32] Google submits that New Zealand's copyright system should be consistent with the Crown's obligations under both the Treaty of Waitangi and the Bill of Rights.

[32] *New Zealand Bill of Rights Act 1990.*

- ***Proposed additional principle**: "Ensuring that the copyright system is consistent with the Government's innovation goal that New Zealand becomes a leading country in the global digital economy."* Google supports the Government's innovation targets and we will continue to work towards greater digital inclusion in New Zealand. However, Google submits that these targets will be difficult to meet under the current copyright system which is holding back Kiwi innovators from competing in the digital economy.

- ***Proposed additional principle**: "Ensuring that copyright law is flexible and durable, to adapt to future change*". Google agrees with MBIE that the copyright system must be adaptable and resilient to future change. However, in order to be consistent with the Principles, Google submits that MBIE should consider adopting similar language in the Proposed Objectives for the copyright review.

1.3 Ensuring an efficient copyright ecosystem: Assessing the Copyright Act 1994 against regulatory best practice principles

New Zealand has adopted a set of Best Practice Regulatory principles (**Principles**). According to these Principles, regulation in New Zealand should be:

- Growth compatible;
- Proportional;
- Flexible and durable;
- Certain and predictable;
- Transparent and accountable; and
- Involve capable regulators.

In 2015, the New Zealand Treasury published an assessment of areas of the New Zealand economy against these principles. The report utilises a "traffic light" assessment in which Green indicates no significant concerns, Yellow indicates possible areas of material concern, and Red means that there are strong indicators of material concern.[33]

In assessing New Zealand's Intellectual Property (**IP**) system in its entirety, Treasury found that the system was marked Green against each of the Principles. Google respectfully submits that, if the *Copyright Act* was assessed on its own in 2019, rather than as part of the IP system as a whole, several of the indicators adopted under the traffic light assessment would likely be marked as Yellow or Red.

Google acknowledges that the Principles are generally used to assess a system such as the IP or energy systems at a macro level, rather than being used in the assessment of individual aspects of a specific piece of legislation such as the Act. However, in a system such as the IP system made up of various statutes that serve different purposes (for example, the Trade Marks Act avoids consumer confusion and protects brands, the Patents Act allows inventors to

[33] Treasury, *Best Practice Regulation: Principles and Assessments* (2015).

exclusively recoup their investment for a period of time in exchange for public disclosure of their invention), each component of the system should be analysed separately. Failing to do so would be akin to analysing how well road infrastructure works in New Zealand, and finding that because the highways are functioning well and side streets are not, the overall system is working well. It would still be useful to assess how functioning of the side streets could be improved. Google believes that using the Principles to assess the functioning of the Act on its own would be a useful exercise.

We also reviewed MBIE's previous 'fitness-for-purpose' assessment of the IP system. This assessment was conducted against four criteria, reflecting the way in which MBIE describes its regulatory stewardship role:

- To what extent does the system deliver the intended outcomes and impacts (**Effectiveness**);
- To what extent does the system minimize unintended consequences and undue costs and burdens (**Efficiency**);
- How well does the system cope with variation, change and pressures (**Resilience**); and
- How well does the system respect rights and deliver good process (**Fairness and accountability**).

MBIE has adopted a similar "traffic light" assessment of these criteria, with Green indicating that the system performs well against the criteria, Yellow indicating the existence of some issues against the criteria and Red indicating significant issues against the criteria.[34] Against each of the criteria, MBIE has found that the IP system in its entirety is Yellow: "System has some issues against criteria".[35]

Google believes that the MBIE analysis indicates there is significant room for improvement in the *Copyright Act.* In Australia, the Productivity Commission (**PC**) reached a similar conclusion in respect to Australia's (very similar) copyright system - finding it not effective, not efficient, not adaptive and not accountable.

> *Australia's exceptions are too narrow and prescriptive, do not reflect the way people today consume and use content, and do not readily accommodate new legitimate uses of copyright material. Legislative change is required to expand the categories of use deemed to be fair. Even when this occurs, changes have simply 'caught up' with existing community practice — Australia did not legalise the widespread practice of home VCR recording until as late as 2006, by which time most VCRs were household relics.*[36]

[34] Ministry of Business, Innovation and Employment, *'MBIE's Regulatory Stewardship Strategy 2017/18'.*
[35] Ministry of Business, Innovation and Employment, *Intellectual Property Regulatory System* <https://www.mbie.govt.nz/cross-government-functions/regulatory-stewardship/regulatory-systems/intellectual-property-regulatory-system/>.
[36] Productivity Commission, *Intellectual Property Arrangements,* Report No 78 (2016) 9.

In the context of questions raised in the Issues Paper, and MBIE's consideration of its Objectives for the review, Google submits that the Principles represent a useful framework for analysis of the questions raised in the Issues Paper. An aspect of the Act that may result in a 'Red' assessment against the Principles may indicate a priority issue for MBIE's consideration and possible reform.

Google believes there are a number of areas of the Act that would likely be assessed as 'Red' in 2019. For example:

- ***There are numerous ways in which the Copyright Act is not growth compatible*.** As we discuss further below, there are many innovative uses of copyright materials that are being held back in New Zealand due to lack of clarity or flexibility in the Act. In our view, this must lead to a conclusion that in many ways the Act in its current form is not growth compatible. In addition, there is no capacity for the copyright system to assess new and innovative uses, many of which will not yet have been invented. Google believes that as part of assessing the Act against the Objectives and Principles MBIE should be adopting a practical approach: what is the best way to encourage the next big creative or technological phenomenon to be developed in New Zealand?

- ***The Copyright Act is not flexible or durable***
  Innovation is dynamic. In contrast, New Zealand's copyright exceptions are 'static'. They are confined to specific purposes and technologies, and are not capable of adapting to changes in technologies, consumer uses or business practices. We discuss below that New Zealand's copyright system arguably prohibits many critical technologies and innovative activities from being conducted with legal certainty in New Zealand, such as:

    - machine learning and artificial intelligence (**AI**);
    - cloud computing;
    - creative and transformative works, such as mashups;
    - medical and scientific research, such as text and data mining; and
    - various common consumer uses of copyright materials.

- ***There are a number of ways in which the Act operates in an uncertain manner*.** MBIE acknowledges in the issues paper that the Act in its current form is uncertain:

  > *Some people argue that the standard of originality applied in New Zealand is too low, and that some works qualify for copyright where protection is not justified. It may surprise many of us to think of the seemingly banal things, such as work-related emails, that the Copyright Act theoretically protects, especially when we find ourselves routinely infringing those protections (e.g by forwarding the email). In theory at least, protection comes at a cost to the rest of society (an 'opportunity cost'). So if our copyright regime gives people rights there is no public interest in them having (or even rights the person does not actually want or realise they have), we should try to understand the consequences of this and*

consider what, if anything, can be done to address it within the constraints of the Berne Convention.[37]

Professor Kimberlee Weatherall's legal analysis of the risks of running an internet intermediary business in major economies used a similar traffic light style analysis, with the following categorisations:[38]

- Red - an activity involving a high risk of liability for copyright infringement;
- Orange - the legal situation is unclear; and
- Green - a low or non-existent risk of copyright infringement.[39]

Professor Weatherall assesses New Zealand as Green for certain internet uses, but as Orange for Hosting a User-Generated Site and Red for Running a Search Engine or similar.

MBIE's review process represents a significant opportunity to move aspects of the *Copyright Act* from the Yellow and Red areas into the Green.

[37] Ministry of Business, Innovation & Employment, *Review of the Copyright Act 1994* (Issues Paper, 2018) 28.
[38] Kimberlee Weatherall, *'Internet Intermediaries and Copyright - A 2018 Update'* (Policy Paper Prepared for the Australian Digital Alliance) 11 February 2018, 1-2.
[39] Ibid 2.

Part Two - The importance of flexibility and durability as a goal

2.1 The Importance of Flexibility

Google believes that flexibility and durability are essential to a copyright system that is suitable for the digital age, and should be a core element of both copyright and innovation policies. This is not to say that any new use of copyright materials should be permitted. Rather, that the Act should contain a clear set of principles to assess whether fair and non-harmful new uses are permitted to emerge. These principles should always include a requirement to assess the impact or harm caused by any new use on copyright owners' markets.

The principles of flexibility and certainty are not inconsistent policy goals. In fact, as the Principles recognise, they should both be considered as part of a best practice assessment of any regulation.

Google submits that the existing exceptions under the Act are both inflexible and far from certain - and any certainty that is available for the majority of new forms of digital creation and consumer use, is that they are unlikely to be permitted in New Zealand. Many of the problems with the Act identified in this submission highlight this point: it is certain that many technologies, along with common creative and consumer activities, are not permitted in New Zealand, leading to areas of 'Red' and 'Yellow' when assessed against the Principles. This is a situation that is not consistent with the Objectives, nor with many international copyright laws (discussed in further detail below), as well as New Zealand's digital policy goals.

Certainty should not be a goal in and of itself. A 'certain no' (ie, certainty that a new technology cannot legally be developed in New Zealand) is not a pro-innovation policy stance, and is contrary to the government's innovation policy objectives.[40] For example, if it is certain that machine learning is not covered by an exception in New Zealand, then the Act will stand in the way of the $54 billion increase in New Zealand's GDP that the adoption of AI is forecast to bring by 2035.[41] This was recognised in the report *Artificial Intelligence: Shaping a Future New Zealand*, which recommended that:

> *The current review of New Zealand's copyright law should consider flexible exceptions to remove New Zealanders' perceived competitive disadvantage in respect to text and data.*[42]

In Australia, the Australian Law Reform Committee (**ALRC**) recognised that it is a better framework for an innovator to assess whether a possible new use is permitted against a set of clear principles, rather than having a clear and certain understanding that a use is not permitted due to the lack of an exception:

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[40] *Information and Communication Technology: Highlights*, Labour Party Manifesto 2017.
[41] Artificial Intelligence Forum of New Zealand, *Artificial Intelligence: Shaping a Future New Zealand* (Report 2018) 15.
[42] Ibid 86.

> *Standards are generally less certain in scope than detailed rules. However, a clear principled standard is more certain than an unclear complex rule. This Report recommends replacing a number of complex prescriptive exceptions, with a clear and more certain standard, namely, fair use.*[43]

Similarly, the Australian Productivity Commission noted in its 2016 review of Intellectual Property Arrangements:

> *...legal uncertainty is not a compelling reason to eschew a fair use exception in Australia, nor is legal certainty desirable in and of itself. Courts interpret the application of legislative principles to new cases all the time, updating case law when the circumstances warrant it. To say otherwise would be to argue that all laws should be prescriptive, which itself would be inconsistent with many laws across all social and economic areas.*[44]

We agree with MBIE that the current uncertainty in the Act comes at a cost both to creators and users of copyright material. As the Issues Paper highlights:

> *It is also important to review the Copyright Act in the context of new and emerging technologies like streaming or artificial intelligence, and new ways of creating and distributing content like user-generated content. Outdated laws can create uncertainty and a lack of respect for the rule of law, which can result in costs to creators, copyright owners, licensees, users and New Zealand as a whole.*[45]

In contrast, as the Singapore Government has noted, a flexible exception like fair use:

> *allows future creators (including those in the copyright industries themselves), in reasonable circumstances, to build upon existing works without seeking rights-holders' consent. For Singapore, the key objective of such an exception was to create an environment conducive to the development of creative works, and to facilitate greater investment, research and development in the copyright industries in Singapore. [The exception allows] new, and sometimes unanticipated, uses of copyright works beyond the traditional "fair dealing" categories … thus providing the flexibility to deal with the dynamic nature of technological change.*[46]

ReCreate South Africa is a coalition of writers, filmmakers, photographers, educational content producers, software and video game developers, technology entrepreneurs, artists, poets,

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[43] Australian Law Reform Commission, Copyright and the Digital Economy, Report No 122 (2013) [4.117].
[44] Australian Productivity Commission, Intellectual Property Arrangements, Report No 78 (2016) 182–183.
[45] Ministry of Business, Innovation & Employment, *Review of the Copyright Act 1994* (Issues Paper, 2018) 5.
[46] Ministry of Law, Singapore, *Singapore Copyright Review Report* (January 2019) 25-26.

producers of accessible format materials and other South African creators. ReCreate has supported the recent decision to introduce a fair use exception into South African copyright law. They view the proposed fair use exception not as something that will create uncertainty, but as a "right to create":

> *The Bill creates modern exceptions to copyright, including a balanced "fair use" right, that permit digital and other uses necessary to make original work and to exercise our freedom of expression.*[47]

A 2014 study conducted by Roya Ghafele and Benjamin Gilbert tested the hypothesis that flexible fair use exemptions may increase the growth rate of private copying technology industries as well as increasing the growth rate of copyright markets. The study found that:

> *… flexible fair use policy is correlated with substantially higher growth rates in private copying technology industries while having only a minor impact on copyright industries in Singapore. This economic value proposition stems from the fact that fair use acts as start-up capital in private copying technology industries, stimulating growth in an innovative high-technology sector.*[48]

For more discussion about how the principles of flexibility and certainty are aligned, including reference to research highlighting that flexible exceptions are not as uncertain as is sometimes claimed, please see Attachment 2.

Ensuring that copyright law is flexible and durable, to adapt to future change

The difference between static and dynamic copyright exceptions

New Zealand's existing copyright exceptions are 'static': they are expressly confined to particular purposes (and in some cases, particular technologies) and are not capable of adapting to changes in technology or business practice. As new technologies and services have emerged over time, it has been necessary for affected groups, including consumers, to advocate for the Act to be amended to bring the law into line with technology. No matter how forward thinking or careful legislators are, they cannot predict the future.

For example, the *Copyright (New Technologies) Amendment Act 2008,* sought to ensure that New Zealand's copyright legislation kept pace with advances in technology. However, in the decade since the introduction of this amendment, the ways in which consumers engage with the internet has radically altered. Consumers are now able to generate and share content through social media websites as well as online video platforms like YouTube. There are also more

[47] Statement by ReCreate South Africa on the passing of the Copyright Amendment Bill, December 2018 <http://infojustice.org/archives/40692>

[48] Ghafele, Roya and Benjamin Gibert, *'A Counterfactual Impact Analysis of Fair Use Policy on Copyright Related Industries in Singapore'* (2014) 347.

ways to access the internet than ever before with the proportion of users who accessed the internet through a mobile device increasing from 8% in 2007 to over 90% in 2017.

In a rapidly changing technological environment, static exceptions will always lag behind the current state of innovation. They will only ever be capable of applying to the technologies and uses that were in existence, or anticipated, at the time of their enactment.

On the other hand, 'dynamic' exceptions and a principled based approach with flexible exceptions have an inbuilt ability to respond to change - without the need for legislative intervention. The US fair use exception, for example, has provided the breathing space for technologies that had not even been imagined at the time that the exception was formalised in statute in 1976, including search engines, data mining and text mining, and social media platforms to name just a few.

The introduction of a dynamic exception does not mean "anything goes"; it means adopting a principles driven approach, in which legislators set forth the principles that they want the users of the system, and ultimately the courts, to apply. That this approach can work, and in fact does work, is seen in the application of fair use in the United States since 1841. No one can claim that in the intervening 174 years, the United States has been lacking in the production of creative works or in innovative technologies.

It is instructive to compare this dynamic approach to the approach in New Zealand. InternetNZ has highlighted the significant lag in legal certainty for technological innovation between the United States compared to Australia and New Zealand (both of which currently retain a static exceptions framework):

Figure 1: When were technologies declared legal?[49]

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

Of course the absence of a flexible exception has not stopped Kiwis from accessing innovative services created by businesses based overseas in countries that have fair use exceptions such as the United States. Rather, it has imposed regulatory constraints on Kiwi businesses who wish to develop new technologies and products, leaving them at a major commercial disadvantage to their overseas counterparts.

New Zealand already has a number of pieces of legislation that adopt a principles based, flexible and durable approach, that has been able to adapt to future change. One example of this is New Zealand's *Privacy Act 1993* (as well as the current draft of the *Privacy Bill 2018*). The Privacy Act has a set of 12 Information Privacy Principles that agencies must work within. This principles based approach has been able to adapt to significant changes in the privacy law environment over the last 26 years. The proposed new Privacy Bill also adopts this principle based approach. In comparison, the European General Data Protection Regulation (**GDPR**) (which has a prescriptive approach to the privacy law framework) is considered to be already out of date for new technologies such as blockchain.

Forbes magazine has noted:

> *The GDPR has been in the building stages for some time now, and was supposed to be a bridging piece of legislation that would help with the expansion of technology from the 1990s to 2018, and to keep it in check the changing landscape. That changing landscape has moved far quicker than the European Legislators have been able to keep*

[49] InternetNZ, *Getting copyright right in the information age – an InternetNZ position paper* (2019) 25. InternetNZ notes that the table indicates that New Zealand's slow progress in declaring new technologies to be allowed under copyright law is "partly due to our narrow “permitted acts”, and partly due to a lower volume of case law.

up with and now their forward-thinking regulation is already behind new technology in the form of blockchain.[50]

Google considers that a principles based copyright exceptions framework would be consistent with other areas of New Zealand law, and better able to adapt to the changing technological environment as well as society's views as they change over time.

2.2 What activities are being held back in New Zealand due to the absence of a flexible exception?

Each and every day, the Act is impeding innovation, creativity and research in New Zealand in at least the following ways:

Static exceptions do not provide adequate support for common Internet functions

Search engines work by using automated 'web crawlers' that find and make copies of websites on the Internet. These copies are then analysed so that search engines can create an index of information on the sites, and then users can search among the many pages in that index to find relevant information. Search engines also provide a snippet of information from relevant websites so that users can decide which sites to access. Many also provide a cached copy of the web page. In many ways, this is quite similar to the function and purpose performed by a library card catalogue. The difference is that a search engine's ability to search across images, video, music, and other content involves making a copy of that content first.

Search engines and other indexing tools are essential to making sense of the vast amount of information available online. If you were to ask most Kiwis today whether they could get through a day without using web search, the answer would be "no". The ability to search leads to significant economic benefits across the economy. In 2015, New Zealand consumers derived over NZ$750 million in benefits from Google Search.[51] These benefits are generated because users are able to answer questions and find solutions to problems quickly and inexpensively.

Despite this, there is no exception in New Zealand that clearly applies to all activities that would be technically required in order for a Kiwi-based search engine to provide services from New Zealand. New Zealand scored a 'Red' on this aspect in Professor Weatherall's legal analysis of intermediary laws referred to above; meaning that running a search engine or similar system would be considered an activity involving a high risk of liability for copyright infringement.

The development of technologies such as search engines - and whatever the next ground breaking technology will be - is exactly the kind of innovation that government policy should be

[50] Darryn Pollock ,'How Can Blockchain Thrive in the Face of European GDPR Blockade?', Forbes, 3 October 2018.
[51] AlphaBeta, *Google Economic and Social Impact New Zealand* (2017) 38.

fostering, not blocking. It is quite possible that if Google was invented in New Zealand, it could have been shut down in its early days due to the lack of a flexible copyright exception. This is a point that Google has made before in other jurisdictions, including in the United Kingdom, where Prime Minister David Cameron noted in a speech:[52]

> *"The founders of Google have said they could never have started their company in Britain," Cameron said. "The service they provide depends on taking a snapshot of all the content on the Internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States. Over there, they have what are called 'fair- use' provisions, which some people believe gives companies more breathing space to create new products and services."*

Static exceptions are standing in the way of cloud computing in New Zealand

Cloud computing is a way for people and businesses to use Internet services over any device anywhere they can connect. There are significant economic and consumer benefits to the use of the cloud. For example, an MYOB study of New Zealand businesses found that businesses who used cloud solutions were 13% more likely to have had revenue growth over the last 12 months, 43% more likely to have more work or sales in the pipeline for the next quarter, and 54% more likely to be able to be diversifying their business and product offerings. Similarly, businesses using cloud applications also enjoyed higher revenue expectations and a more positive outlook on future growth. Businesses using cloud solutions were 55% more likely to forecast revenue growth over the next 12 months and 41% more positive that the economy would improve over the next twelve months. Notably, businesses making use of cloud solutions were also able to pass the benefits along to their staff, being 61% more likely to be planning to increase their staff's wages and salaries over the coming year.[53]

The New Zealand Government is recognised as having some of the more progressive, proactive and permissions policies in the world when it comes to the adoption of the public cloud.[54] However as the Issues Paper recognises,[55] the Act does not reflect the importance of cloud computing in its exceptions framework.

A study assessed the economic impact of copyright case law involving cloud computing technologies.[56] The study found that there was evidence of additional investment in US cloud

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[52] East End Tech City Speech, National Archives UK, https://webarchive.nationalarchives.gov.uk/20130103011006/http://www.number10.gov.uk/news/east-end-tech-city-speech/, 4 November 2010.
[53] MYOB, *The State of the New Zealand Digital Economy* (2012) 8.
[54] Sam McNeill, *The New Zealand Government's View on Moving to the Cloud,* Microsoft NZ Education Blog, 20 December 2017.
[55] Ministry of Business, Innovation & Employment, *Review of the Copyright Act 1994* (Issues Paper, 2018) 59.
[56] Lerner, Josh and Greg Rafert, *Lost in the Clouds: The Impact of Changing Property Rights on Investment in Cloud Computing Ventures* (2015) National Bureau of Economic Research, Working Paper 21140.

computing firms following the Cartoon Network decision,[57] with estimates ranging from US$728 million to approximately US$1.3 billion over the two- and- a -half years following the decision. By contrast, the same study found that venture capital investment in cloud computing firms declined in France and Germany, relative to the rest of the EU, after court decisions in France and Germany which were less favourable to cloud computing firms.

However as MBIE recognise in the Issues Paper, there is no exception in New Zealand that clearly covers common place consumer and business uses of the cloud. This is a significant problem given the prevalence of cloud computing among Kiwi consumers and businesses. In New Zealand, over 1,000 businesses have taken advantage of G Suite, Google's cloud-based, collaborative office solution. G Suite alone supports over NZ$6.5 million of business benefits for New Zealand companies.

The absence of a clear exception that covers cloud computing is also inconsistent with the New Zealand Government's 'Cloud First' policy.[58] This policy requires government agencies to adopt cloud services over traditional IT systems in order to provide more cost-effective services that provide better outcomes for consumers.

Static exceptions are jeopardising New Zealand's ability to keep pace with global developments in artificial intelligence

Artificial Intelligence (**AI**) is one of the most significant developments in computing in our lifetime. AI is no longer the realm of science-fiction, but a practical software tool used to help millions of people every day. Recent breakthroughs in machine learning have been decades in the making and derive from the results of a long tradition of academic research and basic science, which are only now becoming practical because of the availability of computational power, richer sources of information, and a growing community of talent across the globe. AI is based on computer algorithms that autonomously learn from data and information. Instead of being programmed by humans, machine learning allows for algorithms to learn by experience. At Google and its affiliates alone, AI is being used for an ever increasing number of applications, including:

- understanding images in Google Photos;
- enabling Waymo cars (self driving cars) to recognise and distinguish objects safely;
- significantly improving Content ID and powering our anti-piracy efforts;
- understanding and producing speech for Google Home;
- translating more than 100 languages in Google Translate;
- captions for over a billion videos in 10 languages on YouTube;
- improving the energy efficiency of our data centers;
- suggesting short replies to emails; and
- helping doctors diagnose diseases, such as diabetic retinopathy.

[57] Cartoon Network, LP v. CSC Holdings, 536 F.3d 121 [2d Cir. 2008]. In this decision, the US Second Circuit Court of Appeals accepted that a cloud -based digital video recorder did not infringe copyright.
[58] Internal Affairs, *Why agencies must use cloud services*, 20 December 2018.

Google apps like Kupu are also helping Kiwi users learn te reo Maori. Kupu uses photo recognition to provide Maori words for objects identified by users. This app is powered by artificial intelligence paired with the Te Aka Maori dictionary, which will allow the platform to 'learn' and improve translations through user feedback.

Revenue from the application of AI software across the world has been forecast to grow from $8.1 billion in 2018 to $105.8 billion by 2025.[59] The New Zealand government itself recently launched the AI Forum's report *Artificial Intelligence: Shaping a Future New Zealand*, which outlines the opportunities for New Zealand in adopting AI technologies.[60] The report recognised that:

> *In the economy, AI can be used to substitute human labour in a growing range of manual or repetitive tasks, enabling that same labour to be redeployed onto new, higher value tasks. Our modelling analysis finds that just through this labour conversion alone, AI has the potential to increase New Zealand GDP by up to $54 billion by 2035 across 18 industry classifications.*[61]

Despite this, because of New Zealand's outdated copyright laws, the extent to which AI will be able to be developed in New Zealand is in doubt. In order for machines to learn, they need data-based training examples, and it is often necessary for the datasets to be copied, processed and re-purposed to enable these machine learning tools. Machine learning technologies frequently depend on having large sets of data and information to analyse. These datasets may, in some cases, include material protected by copyright. This can pose significant barriers to the development of AI in countries like New Zealand which have only inflexible and prescriptive exceptions in their copyright laws. Unless there is an exception or limitation to allow this technical copying, processing and storage, machine learning risks infringing copyright, even though the algorithm is merely learning from data, and not interfering with any market for that data or impacting the authors of the original datasets. As recently noted by Deloitte, "[f]or the potential of machine learning to be completely unlocked, there should be minimal barriers to accessing the data."[62]

Copyright is designed to both incentivise creation, and to ensure access to facts or information, such as the information extracted from datasets via the process of machine learning. Processes

[59] Tractica, Artificial Intelligence Software Market to Reach $105.8 Billion in Annual Worldwide Revenue by 2025, 20 August 2018.
[60] Artificial Intelligence Forum of New Zealand, Artificial Intelligence: Shaping a Future New Zealand (Report 2018).
[61] Ibid 15.
[62] Deloitte Access Economics, 'Copyright in the digital age: an economic assessment of fair use in New Zealand' (Report, 2018) 29.

such as extracting data or pattern matching which would not infringe copyright if done manually should not infringe copyright purely because a more efficient, mechanised process is used.

Of course, New Zealand's inflexible copyright laws will not stop the development of AI overseas in countries with flexible copyright exceptions, such as the U.S., Israel and Singapore. What it will mean, however, is that products and services developed using AI will be created in those countries and then exported for use by New Zealand consumers and businesses.

Google Translate is an example of a product that Google develops in the U.S., due to the innovative opportunities afforded by fair use. Google Translate is used by more than 500 million people monthly to translate 140 billion words per day in some 103 different languages. 92% of translations come from outside of the United States. Tools like these are particularly important for the tourism industry in New Zealand as they enable non-English speaking visitors to communicate with local businesses. For example, people in New Zealand made over 400 million queries to Google Translate in 2018.

Google Translate has several uses including the translation of online materials, text captured in images and real-time translation of spoken language. When Google translate first launched it used a rule based system. In 2006, the first pair of languages using a machine learning system was launched. As research scientist Franz Och explained at the time:

> *"we feed the computer with billions of words of text, both monolingual text in the target language, and aligned text consisting of examples of human translations between the languages. We then apply statistical learning techniques to build a translation model".*[63]

This approach proved vastly superior to the previous, rules-based approach.

More recently Google translate has improved again. For example, work on the Google Neural Machine Translation, an advanced machine learning technique, has shown reductions of more than 55% - 85% for translation errors on several major language pairs.[64]

To train the computing system, Google requires large amounts of training data: millions of translated texts, many of which are protected by copyright. Google sources this data from a range of places including books, government documents, the United Nations, and websites from all around the world, relying in part on fair use. Prohibiting the use of copyright works for machine learning would not increase the market for those works, but it would prevent society from benefiting from the highly creative and useful innovations that flow from machine learning technologies.

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[63] Franz Och, Google Blog (2006) <https://ai.googleblog.com/2006/04/statistical-machine-translation-live.html>.

[64] Quoc V Lee and Mike Schuster, Google Blog (2016) <https://ai.googleblog.com/2016/09/a-neural-network-for-machine.html>.

Static exceptions are blocking medical and scientific research, including through data mining and text mining

Another valuable new technology that is being blocked by copyright law in New Zealand is text and data mining (**TDM**). This technology is transforming scientific and medical research, as well as research in the humanities, by enabling automated searches of vast quantities of text and data to look for patterns, trends and other useful information.

The Singapore Government has noted that:

> *… text and data mining and its applications are crucial to fuelling economic growth and supporting Singapore's drive to catalyse innovation in the digital economy. These applications are used in many industries around the world for research and development, to identify issues and trends, to gain new insights, to speed up processes and reduce transaction costs.*[65]

New Zealanders are already beginning to unlock the potential benefits that TDM brings to the economy.

Datamine is an example of a company operating out of New Zealand that uses TDM to benefit Kiwi businesses. In 2018, Datamine worked with the Child Cancer Foundation to analyse the Foundation's data and allow them to access more information about their donors. By analysing the troves of data that had been stored, the Child Cancer Foundation was able to implement a target outreach system to provide better outcomes for the families of those dealing with child cancer.

In New Zealand, these sorts of activities (if they are conducted with publicly owned or many other data sets) are currently taking place outside of any clear legal framework, despite the obvious benefits that TDM could bring to the country. This is at the same time that countries like Singapore and Japan are actively encouraging TDM innovation, including by amending their copyright laws to facilitate these activities. This increases the danger of New Zealand being left behind, as talented Kiwis move to where these exciting technologies and job opportunities are emerging.

A report by the UK Joint Information System Committee found that the benefits of data mining and text mining include:

> *...increased researcher efficiency; unlocking hidden information and developing new knowledge; exploring new horizons; improved research and evidence base; and improving the research process and quality. Broader economic and societal benefits*

[65] Ministry of Law, Singapore, *Singapore Copyright Review Report* (January 2019) 33.

> *include cost savings and productivity gains, innovative new service development, new business models and new medical treatments.*[66]

Liber, Europe's largest network of research libraries with over 400 members, has observed:

> *TDM will increase the progress of science exponentially. It has the potential to facilitate the discovery of cures for diseases such as cancer and Parkinson's. It has already been used to discover how existing drugs can be used to treat other conditions. It will also act as a foundation for innovation and new industry.*
>
> *For libraries, who provide access to a growing amount of scientific content, it means that the researchers we support will be able to fully realise the value of the content we hold. This will, in turn, ensure a more rigorous approach to research, including more through reviews of the literature.*[67]

Those findings apply equally to New Zealand.

Text and data mining involves making a digital copy of the content that is to be automatically analysed, and is therefore impacted by copyright. It is arguable that much potentially valuable data and text mining would infringe copyright if undertaken in New Zealand. At present, to utilise text and data mining, an entity can either get permission for the use of every input from every copyright owner (which is costly, time consuming and impractical) or attempt to rely on the exceptions for research and private study and transient reproduction. This will often be the case even where the person or entity doing the mining has obtained a general licence to use the content that is being mined: many commercial content licences are either silent on the question of whether text or data mining is a permitted activity or they expressly prohibit such mining.

Static exceptions do not support creative and transformative uses of copyright works

Mashups

The Web 2.0 environment has also driven untold individual creativity. User-generated content hosting services such as YouTube have led to an explosive growth of "remix culture". This profusion covers the gamut from videos of infants intended for sharing within family circles to the political expressions that were an important catalyst for the revolutionaries involved in the Arab Spring uprisings.

Much of this user-generated content involves "remixing" existing copyrighted materials - whether excerpts from TV news programs, movies, or popular music - together with original user generated content. In our increasingly media-saturated age, it is more and more natural for individuals to create "mashups", or "remixes" of the media around them for new expressive purposes.

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[66] Joint Information System Committee, *The Value and Benefits of Text Mining to UK Further and Higher Education*, 2012.

[67] *Text and Data Mining: Its importance and the need for change in Europe*, LIBER Fact Sheet.

While some of these creative acts would be permitted by existing fair dealing exceptions, many would not. As a result, transformative uses of existing material may be unduly hampered.

Research published by the Intellectual Property Society of Australia and New Zealand has found: "the current copyright framework in New Zealand dis-incentivises the creation of transformative works".[68]

Professor Lawrence Lessig has found that transformative works provide value to society in three ways.[69] Firstly, transformative works have an economic value: creators purchase recording equipment, computer software and video cameras in order to produce high-quality products, thereby supporting a market for these goods. Additionally, works that build upon existing products and materials can themselves also create new value and new markets. Secondly, transformative works often have an inherently educational value. Lessig notes that transformative works have long been used by teachers to enable students to express ideas in unique ways. Thirdly, transformative works add societal value through the creation of new communities made up of people willing to create and share new works and ideas. As argued by Lessig, this practice is an inherently valuable activity.

Transformative uses

The health of New Zealand's creative sector and digital economy will be influenced by whether New Zealand develops an environment in which innovative new forms of creativity and technological development van flourish. Such an environment often depends on whether the transformative uses of other materials to encourage further creativity and innovation are supported and encouraged. We have discussed how many forms of new creation involve the transformation or 'remixing' of other reference works. In addition, major innovations are often iterative processes whereby developers and startups may create something entirely new, or envisage completely new uses of existing data to provide new innovative services to others. These types of activities are often highly inventive and creative.

Some examples of transformative uses include the use of thumbnail images to provide image searches or a media studies teacher copying short extracts of films to compile a teaching resource for his or her students.

One of Google's services that has seen an enormous amount of innovation and transformative uses is through the application of maps layers on Google maps, adding extra data on top of the existing Google mapping data. This enables people to combine existing datasets or information with Google maps (such as New Zealand's topographic data[70]) to present information in new

[68] Karli Menary, *'New Zealand Copyright Law and Transformative Works'* (2013) Intellectual Property Forum Journal of the Intellectual Property Society of Australia and New Zealand.
[69] Lawrence Lessig, *'Remix, Making Art and Commerce Thrive in the Hybrid Economy'* (New York: The Penguin Press, 2008) 80, 88-90.
[70] See http://googlemapsmania.blogspot.com/2012/12/topographic-layers-on-google-maps.html.

and useful ways. Enabling the Photo Layer on Google maps will show all of the photos that other people have taken and posted to Google Maps while visiting that part of the world.

Another example of the public interest in enabling transformative uses is Google Image Search, which displays 'thumbnail' images of copyright photographs in search engine results:

> *Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information. ... [A] search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.* [71]

Google submits that these sorts of unforeseen innovative uses - assessed against fairness principles to ensure copyright owners are not harmed - are exactly the sort of initiatives that a thriving digital economy should encourage.

As Menary writes in the Intellectual Property Forum Journal:

> *it is submitted that [the] balance of copyright law in New Zealand is currently weighted too greatly in favour of copyright owners. By inhibiting the ability of second authors to utilise materials in new and transformative ways, even where those uses do not impact upon the commercial interests of the first author, copyright protection goes beyond what is necessary to ensure that the original copyright works are produced at proper levels. The ultimate result is that copyright has a disincentive effect in relation to transformative works.*[72]

The ability for individuals and business - where appropriate, and when not causing economic harm to the copyright owner - to harness existing information to stimulate new investment and innovation is critical to the future development of the New Zealand digital economy. This is also completely consistent with the broader goals of copyright policy.

Static exceptions do not recognise common consumer uses of copyright materials and impose unnecessary technical restrictions

There is currently a large disconnect between the Act and ubiquitous consumer practices that are unlikely to harm copyright owners. At best, this makes copyright irrelevant to millions of Kiwis, at worst this can bring copyright law into disrepute. The copyright system is undermined

[71] *Perfect 10, Inc v Amazon.com, Inc*, 508 F 3d 1146 (9th Cir, 2007) at [11].
[72] Karli Menary, *'New Zealand Copyright Law and Transformative Works'* (2013) Intellectual Property Forum Journal of the Intellectual Property Society of Australia and New Zealand 45.

when millions of citizens are daily, often unwittingly, breaching copyright law without consequence.

Copyright treatment of common consumer content uses

The following tables show how common consumer uses with various forms of digital content are treated in different ways under the Act. They also illustrate the realities of a copyright system that adopts 'static' copyright exceptions - that an activity is not permitted unless it is specifically addressed by an exception. So for example, although the Act contains an exception allowing the backup copying of computer software, this does not apply to other forms of content such as eBooks or to a person's collection of digital music. Similarly, although Kiwis can format shift music they have purchased on CD to listen to on their mobile phone or tablet, they cannot format shift a film they have purchased on DVD to watch on the same device.

Figure 2: The legal treatment of common consumer uses

Backup copying (copying digital files in case they are lost, deleted or corrupted)

Type of content	*Is the use allowed?*
Software	Yes[73]
Music	No
Film or TV show	No
eBook	No
Video game	Unclear[74]

Format shifting (copying legitimately owned content to a different format)

Type of content	*Is the use allowed?*
Software	No
Music on CD	Yes[75]

[73] Section 80 Copyright Act 1994.
[74] The legal treatment of video games (as audiovisual works and/or literary works), and the application of exceptions regarding computer software remains unclear in New Zealand. See Frankel, S, Intellectual Property in New Zealand (LexisNexis 2011), p791 and Mac Sithigh, D, 'The game's the thing: properties, priorities and perceptions in the video games industries' In M. Richardson, & S. Ricketson (Eds.), Research Handbook on Intellectual Property in Media and Entertainment, 2017 pp 344-366.
[75] Section 81A Copyright Act 1994.

Film or TV show on DVD	No
eBook	No
Video game	No

Time shifting (recording to watch at a later time)

Activity	*Is the use allowed?*
Record TV show on VHS or DVR	Yes[76]
Record TV show using cloud service	Unclear
Record internet live stream	Unclear

It is instructive to compare the situation in New Zealand to the one in the US, which has a more flexible copyright law. In the US, fair use effectively operates as an innovation policy within the copyright system by creating the breathing space for private copying technologies such as Apple's iPod and TiVo's DVR that help consumers get more from legitimate content that they have already purchased without harming right holders' economic interests.

The lack of an exception that applies to common consumer uses is also apparent with social media and user generated content. Common consumer uses such as memes, sharing extracts of content on social media are not covered by an exception in most cases, even when these activities would otherwise be assessed as 'fair', or non-harmful to copyright owners markets.

Part Three – Google's response to specific MBIE questions

In Part 2 of this submission we have provided MBIE with Google's 'big picture' assessment of the current copyright system. In Part 3 we provide additional comments to some of the specific questions raised by MBIE below. We have used the headings from the Issues Paper to structure our response. Where relevant, we have included our assessment of how we believe each aspect of the Act would be assessed against the Principles, using The Treasury's Principles discussed above at Part 2:

- Green - no significant concerns
- Yellow - possible areas of significant concern
- Red - strong areas of material concern.[77]

We have confined our assessment to the Principles of Growth Compatible, Certain/Predictable and Flexible/Durable.

[76] Section 84 Copyright Act 1994.
[77] Treasury, *Best Practice Regulation: Principles and Assessments* (2015) 79.

3.1 Rights

Originality

Question 6: Is it clear what 'skill, judgement and labour' 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? Google's Answer: Google considers that the current test is clear, however, that the current approach means that copyright protection is applied too widely. This means that New Zealand is inconsistent with other jurisdictions, which can have a negative effect on technological innovation. Google suggests that the New Zealand approach to the test for copyright protection is amended to align with the test in other jurisdictions.

The New Zealand Court of Appeal has held the test for originality in New Zealand is "not high", and that "the determining factor is whether sufficient time, skill, labour, or judgment has been expended in producing the work".[78] The Court of Appeal cited with approval the Laws of New Zealand, Copyright, Vol 15A at paragraph 16, which said:

> *In order to fulfil the test of originality, the necessary skill and labour may consist in the compilation of dictionaries, directories, maps, or road books; or in the mere preparation of lists.*

This low standard of originality - which is often referred to as the "sweat of the brow" test - puts New Zealand out of step with comparable jurisdictions such as the US, Singapore, Australia and Canada.

In each of these jurisdictions, courts have held that the sweat of the brow test for establishing originality is too low. See, for example, *Feist Publications, Inc. v. Rural Telephone Service Company, Inc*.[79] in which the US Supreme Court held that while a work need not be novel for copyright to subsist, it was necessary to establish a "spark" or "minimal degree" of creativity in order for a work to be protected by copyright. This led the court to find that copyright was not capable of subsisting in a telephone directory, which was simply a compilation of names and addresses. The Australian and Canadian High Courts,[80] and the Singapore Court of Appeal have also held that the sweat of the brow test sets the bar too low for copyright protection.[81]

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[78] *University of Waikato v Benchmarking Services Ltd* [2004] NZCA 90.
[79] 499 U.S. 340 (1991).
[80] John S McKeown, *Originality and Copyright: When the Sweat of Your Brown is not Enough,* Cassels Brock Lawyers, 29 March 2004.
[81] Lim Ren Jun and Victor Looi, *Narrow Protection for Compilations: Where Creativity Trumps Effort*, Singapore Law Blog, 30 May 2017*; IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 and *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339.

The implications of a low originality threshold can be significant, and can have a chilling effect on technological innovation. The Australian High Court Ice TV case[82] (involving a copyright claim about a new electronic program guide) is particularly instructive. Had the Australian High Court not rejected the sweat of the brow test in that case, the Nine television network would have been able to rely on copyright in its television schedules to block the development of a new technology - electronic TV guides - that has been embraced by consumers.

The standard of originality has broad implications for the reach of copyright laws, and also influences how New Zealand should think about its copyright exceptions. In a jurisdiction such as New Zealand, with a relatively low originality threshold for granting copyright, having effective copyright exceptions becomes increasingly important. As the Issues Paper notes, many people would be surprised to know the extent to which they currently infringe copyright by engaging in such everyday activities as forwarding an email.

A holistic approach to copyright reform must keep firmly in mind the interplay between the threshold for subsistence of copyright and copyright exceptions. The combination of a very low standard of originality, and narrow, prescriptive copyright exceptions, puts New Zealand innovators at a very real disadvantage compared with their counterparts in jurisdictions such as the US, Singapore, Israel and Canada where copyright is much more "innovator" friendly.

Google supports MBIE's acknowledgement that copyright law can stop Kiwis from using copyright works in socially beneficial ways. As the issues paper recognises:

> *Copyright is a form of regulation. It prohibits people from doing things that they would otherwise be free to do. We have heard that people are being prevented from using copyright works in socially-beneficial ways (for example, using satire to make a political statement). It is therefore important to ensure that copyright's default rule (do not copy or distribute without the copyright owner's permission) does not apply where there is little or no public policy rationale for prohibiting the relevant behaviour, like copying that is necessary to facilitate basic functionality of digital technologies.*[83]

In Australia, the importance of balancing increased protections for copyright materials with exceptions that are flexible enough to permit socially beneficial uses was recognised by the Senate Select Committee considering the (then draft) Australia–United States Free Trade Agreement (**AUSFTA**):

> *45 3.101 Doctrines exist in both the Australian and United States copyright regimes which allow for exceptions to when copyrighted material may be used without payment of a royalty. In Australia this is known as 'fair dealing', and in the United States it is known as 'fair use'.*

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[82] *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14.

[83] Ministry of Business, Innovation & Employment, *Review of the Copyright Act 1994* (Issues Paper, 2018) 5.

3.102 The 'fair use' defence to copyright infringement in the United States operates more broadly than the Australian 'fair dealing' defences to copyright infringement. In Australia, to gain the benefit of the defence, the alleged infringer is required to show that the purpose of their use of copyright material falls within one of those enumerated in the Copyright Act: criticism and review, research and study, news reporting, or judicial proceedings. However, the defence is not confined to those purposes and there has been much confusion in Australia about the scope of 'fair dealing'.

3.103 In the United States, a non-exhaustive, flexible list of purposes is provided which has allowed United States courts to find 'fair use' for uses such as parody or other transformative use, time-shifting, space-shifting and device-shifting. Simply put, in the United States courts have the power to find new, or unforeseen but economically insignificant uses 'fair'. Australian courts do not have that power.

3.104 The Committee notes that, in 1998, the Copyright Law Review Committee ...recommended 'the expansion of fair dealing to an open ended model that specifically refers to the current exclusive set of purposes ... but is not confined to those purposes'. However, this recommendation has not been adopted in Australian law. As a result, under the AUSFTA, Australian users of information will have more restricted access to copyright material than users in the United States due to the higher standards of copyright protection overall and the lesser usage rights available. [footnotes omitted] [84]

Google submits that assessing the outcomes of the current standard of originality against the Principles may lead to the following categorisation:

Growth compatible	Certain/Predictable	Flexible/Durable
RED	YELLOW	RED

Data, Crown Copyright and Orphan Works

Question 7:Are there any problems with (or benefits arising from) the treatment of data and compilations in the Copyright Act? What changes (if any) should be considered?

Question 12: What are the problems (or benefits) with how Crown copyright operates? What alternatives (if any) do you think should be considered?

Question 14: Are there any problems (or benefits) in providing an indefinite copyright term for the type of works referred to in section 117?

[84] Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Final Report, 5 August 2004, 71--72.

Google's Answer: There are problems based on the treatment of data, Crown copyright, and unpublished works in the Copyright Act. This is combined with the legal uncertainty surrounding the use of orphan works. Specifically:

(1) the low threshold for originality is blocking publicly beneficial uses of compilations of data;

(2) the ability to opt-out has led to the overprotection of Crown copyright works; and

(3) there is no public interest justification for perpetual copyright for unpublished works (as referred to in s117).

Google suggests that:

(1) the approach to the test for copyright protection is amended to align with the test in other jurisdictions, enabling publicly beneficial uses of compilations of data;

(2) the ability of Crown agencies to opt-out should be removed or restricted, and the term of protection for Crown copyright works should be comparable to jurisdictions such as Australia and Canada;

(3) the Act is amended to bring the copyright term for unpublished works in line with the term for published works; and

(4) consideration is given to introducing an orphan works scheme in New Zealand to enable New Zealand researchers and the public to make use of the enormous range of information in orphan works, while ensuring reasonable compensation for copyright owners who are later identified.

The existing copyright treatment of compilations of data, Crown copyright, and unpublished works do not enable New Zealand innovators, creators, public institutions and consumers to take full advantage of the benefits that come from open access to public data.

Google supports the New Zealand Government Open Access and Licensing framework policy of encouraging government agencies to make their copyright works available for anyone to freely copy, distribute and adapt goes, but this policy only goes *some way* towards unlocking access to Government-owned data. That's because it relies on Crown agencies to opt-out. This, in our view, has led to the overprotection of Crown copyright works in ways that have no public benefit justification. That is particularly the case given that the term of protection for Crown copyright in New Zealand is twice that of comparable jurisdictions such as Australia and Canada.

Similarly, as we have already discussed above, New Zealand's low threshold for originality is blocking publicly beneficial uses of compilations of data. While it's true that there is no copyright in fact, the application of a sweat of the brow test for originality effectively "locks up" the data contained in factual compilations in New Zealand, which operates as a bar on innovative uses of that data.

Finally, Google submits that there is no public interest justification for perpetual copyright for unpublished works, as provided for in s117 of the Act. Unpublished works make up large portions of New Zealand's national library and archive collections. Unless the law is reformed, these works will **never** enter the public domain. This means that there are limitations to the way

cultural institutions can digitise and display these works, and they are not available for open use by researchers, family historians, documentary filmmakers, authors or other creators.

In 2017, the Australian Government amended s 33 of the *Copyright Act 1968* to bring the copyright term for unpublished works in line with the term for published works. This reform has freed large swathes of previously unusable works for reuse by researchers, authors and documentary makers.

The Statement of Compatibility with Human Rights accompanying the amendments stated:

> *Under the current framework, where copyright materials are unpublished they remain in copyright in perpetuity, meaning productive uses may be lost. Libraries and archives hold large numbers of unpublished materials which are an important part of Australia's cultural heritage. Setting a term of protection for unpublished materials would allow greater use of the considerable cultural value of these materials.*
>
> *Insofar as these provisions may regulate the establishment and maintenance of, and access to, libraries, archives and key cultural institutions, these measures would promote the right to enjoy and benefit from culture. The measures would do this by creating a legislative framework which enables students, historians and other researchers, film and television producers and writers to access, use and preserve valuable historical material of cultural significance, without unnecessary regulation or costly and often fruitless rights clearance processes. On this basis, these measures are consistent with Australia's human rights obligations.*[85]

There would be significant public benefits in the New Zealand Government enacting the same reform.

The National Library of Australia holds in its collection an original letter from Jane Austen to her sister Cassandra. As an unpublished work, this has been in perpetual copyright until recently. Following the recent legislative changes, this letter is now able to be published online for all to read.[86] Similar items now in the public domain include Captain Cook's recipe for carrot marmalade![87]

Te Papa holds many similar unpublished works of immense historical interest in its collection, from the unpublished autobiographical manuscripts of renowned New Zealand artist Sir Tosswill Woollaston, the Felton Mathew Diary - New Zealand's first Surveyor General and an eyewitness to the signing of the Treaty of Waitangi - and the diary of a soldier who served in Gallipoli during World War I.[88]

[85] Explanatory Memorandum to the Copyright Amendment (Disability Access and Other Measures) Bill 2017, 10.
[86] See, http://nla.gov.au/nla.obj-229629481/view.
[87] Peter Martin, '*Indefinite copyright is a joke - the recipe for carrot marmalade proves it*' Sydney Morning Herald (Online) 8 August 2015.
[88] See, https://collections.tepapa.govt.nz/topic/1659.

The benefits of removing perpetual copyright from unpublished works have also been recently recognised by the Singapore Government, which will introduce an amendment to limit the duration of copyright protection for unpublished works:

> *Granting perpetual copyright protection for unpublished works does not benefit the public as they have no access to the work. It does not encourage innovation or incentivise the creator to create new works either. Placing unpublished works into the public domain at some point serves a wider societal benefit - it adds to the store of public knowledge, aids scholarship, and allows users to build upon these works.*[89]

Similarly, there would be significant benefit from exploring mechanisms to provide researchers and the New Zealand public with meaningful access to orphan works, in a way that respects the rights of copyright holders that have not abandoned their works. There are many different options being considered around the world to unlock the public benefit in orphan works. Google believes that detailed consideration of these issues should also occur in New Zealand. Some of the issues MBIE may wish to consider in this regard include:

- How to best make use of technological solutions to enable copyright owners to make themselves "findable"? The creation of simple, accurate, non-mandatory and reliable databases of rights holder information would give copyright owners a way to publicise their contact information.

- How to encourage an array of productive uses, both commercial and noncommercial. Legislation would facilitate individual artistic output building on orphan works, libraries and museums preserving works, mass digitisation projects, and everything in between.

- How to ensure fair compensation to those holding copyright if they later come forward? If a rights holder later comes forward, there should be a way for them to be reasonably compensated, but not in a way that can kill good faith projects. No large scale project would make the necessary investments in time and money if the whole endeavor can be shut down at any time if a rights holder later comes forward and demands punishing monetary damages or an injunction.

Google submits that detailed examination of an orphan works scheme in New Zealand would be complementary to the suggestions we make in relation to Crown copyright, the test for originality and the term of copyright for unpublished works. All are part of an overall approach which will see New Zealand unlock the significant benefits of more liberal access to data, in ways which do not impact copyright owner markets.

[89] Ministry of Law, Singapore, *Singapore Copyright Review Report* (January 2019) 15.

Google submits that examining the capacity of the Act to enable Kiwis to access public information, publicly funded research and data as well as orphan works and other useful historical information, may lead to the following categorisation:

Growth compatible	Certain/Predictable	Flexible/Durable
RED	YELLOW	RED

Artificial Intelligence and Copyright

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

Google's Answer: The current rules relating to computer generated works under the Act are outdated and restrict the development of AI in New Zealand. Google recommends that a flexible, principle based approach to exceptions such as computer generated works is adopted (such as the exceptions in the US, Israel and Singapore).

We highlighted at Part 2.2 of this submission the ways in which the current Act is not equipped to deal with the opportunities created by the adoption of AI.

The importance of ensuring that the Act creates a supportive framework for AI and other forms of machine learning cannot be overstated. Machine learning continues to create opportunities for entirely new products. For example, Google Assistant leverages machine learning tools across different dimensions: *speech recognition* turns the sounds into words, *natural language processing* helps understand what you mean, and a type of *deep learning* helps rank search results. As noted by Google's founder "[e]very month, there are stunning new applications and transformative new techniques. In this sense, we are truly in a technology renaissance, an exciting time where we can see applications across nearly every segment of modern society".[90]

Google relies on fair use as part of the process of training and developing its AI models for Google Photos. Over 5 billion photos are viewed in Google Photos every day. Using AI in Google Photos provides a variety of functionality to the product that would not otherwise exist, including:

- enabling users to search through their photos by people, places and things;
- the automatic generation of albums (with Google Photos automatically suggesting collections based on faces, locations and trips);

[90] Sergey Brin, Alphabet Investor Relations Founders Letter (2017).

- turning static photos into videos;
- highlighting past memories at significant times; and
- improving the quality of photos and videos.

The training and development of the models that help power Google Photos occurs in the United States, in part because fair use enables better use of technology for these purposes.

The use of machine learning is no longer restricted to academics or major companies. With the release of open source tools such as Google's Tensor Flow, and support for machine learning–specific services through Google Cloud Services, small companies and individuals can create new products utilising machine learning. There are already many examples of small and medium businesses using machine learning technology in different spheres today, from retail to farming, to increase productivity and ensure business growth.[91] Take for instance an enterprising Japanese cucumber farmer who trained a model with Tensor Flow to sort cucumbers by size, shape, and other characteristics.[92]

Non-expressive uses of copyright works such as data extraction or pattern-matching do not harm the market for the original works. However, because New Zealand law relies on static exceptions, and does not have the benefit of a fair use exception, these technologies are not clearly permitted in New Zealand. This is despite the enormous economic and social benefits that can flow from adoption of technologies such as AI.

The use of copyrighted materials in order to bolster innovation and creativity, in a way that would not harm copyright markets, is consistent with the goals of copyright. The use of the data in machine learning is highly transformative. Many products developed from machine learning, such as translation services or visual art remix services, are used by artists and other creators.

Google respectfully submits that flexible copyright exceptions that permit these types of machine learning - and the wider development of artificial intelligence - should be a key plank of New Zealand's innovation policy. However, assessing the capacity of New Zealand businesses to adopt AI practices would lead to the following categorisation against the Principles:

Growth compatible	Certain/Predictable	Flexible/Durable
RED	YELLOW	RED

[91] See http://research.googleblog.com/2016/11/celebrating-tensorflows-first-year.html.
[92] Kaz Sato, How a Japanese cucumber farmer is using deep learning and Tensor Flow, Google Blog (2016).

3.2 Exceptions and limitations

General comment about exceptions and limitations

As discussed above, the Act does not contain exceptions for many common consumer, creative and technology uses that provide significant public benefits without imposing harm to copyright owner markets. The absence of an exception for a socially and economically beneficial use that does not pose harm to copyright owners constrains the capacity of Kiwi creators to use and repurpose existing materials, imposing barriers to Kiwi creators competing on the global stage.

The absence of exceptions that cover these types of uses means the copyright system would be assessed as 'red' in many areas against the Principles. This review provides an excellent opportunity for MBIE to make recommendations on how best to move the Act to 'Green' in the interests of Kiwi creators, innovators and consumers, and the New Zealand economy more generally.

How the Act should treat commercial and non-commercial uses

Question 31: What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions work 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?

Google's Answer: Google considers that there is no public policy justification in limiting the scope of any exception (such as criticism, review, news reporting and research or study) to exclude uses with a commercial purpose. A flexible, principles based approach to exceptions should be adopted that takes a range of factors into account. A user's commercial purpose should be relevant, but not decisive, to determining whether a particular use is fair.

New Zealand (and other common law countries) has long recognised that commercial uses of copyright material can be fair. For example, commercial media outlets may rely on s42 of the Act in reporting the news, or a commercial magazine publisher may include extracts of a work in an article order to criticise or review that work. The paramount consideration is not whether the entity making use of the work has a commercial outcome in mind, but whether the use is fair. This includes an assessment of the impact of the use on the market for, or value of the work. This principle has recently been affirmed in the United States:

> *while the mere fact of a commercial motivation rarely pushes the first factor determination against fair use (as so many of the canonical fair uses, such as book reviews; quotation of prominent figures in news reports, news commentary, and history*

> *books; the performance of parodic plays; and the sale of parodic books, are all commercial*[93]...

In the context of its new TDM exception, the Singapore Government has said:

> *The exception will not be limited to non-commercial [TDM] activities. Text and data mining is analogous to research work. Both activities involve obtaining data, manipulating and studying it, and coming to conclusions or discovering new ideas. The existing fair dealing exception for research and study is not limited to non-commercial purposes. The new exception should similarly not be so limited. This position taken for research and study recognises the fact that whether an activity is commercial or non-commercial is not always clear. It can start of as being non-commercial in nature but may evolve into an activity of a commercial nature.*[94]

YouTube is a good example of the difficulty of distinguishing between 'commercial' and 'non-commercial' uses. Many creators will start off with a non-commercial purpose, but may end up monetising their channel. For example, Kiwi YouTubers such as AverageKiwiGuy[95] and VivaLaDirtLeague (**VLDL**)[96] provide popular reviews and commentary on video games. The popularity of VivaLaDirtLeague's videos has led to complementary opportunities such as the sale of merchandise, the links to which are available via the VLDL channel.

Google submits that there is no public policy justification in limiting the scope of any fair dealing exception (or any new flexible exception such as fair use) to exclude any uses with a commercial purpose. Google agrees that a user's commercial purpose should be *relevant to* determining whether a particular use is fair. However, it is appropriate that this commercial purpose is taken into account in a broader determination of whether the particular use is fair, rather than automatically excluding the use from the scope of fair dealing provision simply on the basis of a commercial aspect to the use in question.

Google submits that Kiwis should not be prevented from using copyright works in new and innovative ways purely on the basis that they have some form of commercial purpose in mind. Rather, the commercial purpose and the nature of the use should be balanced against the rights of the copyright owners and should be considered as part of the relevant factors in determining whether the intended use is indeed fair.

An overall approach to exceptions

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

[93] *Capitol Records, LLC v. ReDigi INC*., 910 F.3D 649, 662 (2D Cir. 2018) 27-28 (Leval J).
[94] Ministry of Law, Singapore, *Singapore Copyright Review Report* (January 2019) 33-34.
[95] Average Kiwi Guy, YouTube http://www.youtube.com/user/AverageKiwiGuy/.
[96] See e.g https://www.youtube.com/watch?v=HYU6kIDgnhU.

Google's Answer: Google submits that continuing to try and design legislative solutions to known technologies and uses is not consistent with the Objectives or the Principles. The only way to reform the Act in a way that will cover emerging technological processes is to ensure that the exceptions are principle based, flexible and durable enough to adapt to future change.

In the context of highlighting the benefits of flexible exceptions in copyright laws, we highlighted the fact that there is no exception in the Act that clearly applies to the technical activities required to operate a search engine.[97]

A Discussion Paper prepared for InternetNZ has identified three other technical processes that are not clearly dealt with under New Zealand's copyright laws:[98]

- Text and data mining (TDM);
- Application program interfaces (APIs); and
- Geoblocking.

These examples show how even the most careful legislators at the time of introducing exceptions, cannot predict future technical developments.

Consider the framing of the second part of question 37: "are there any other ... emerging technological processes we should be considering for the purposes of the review?"

The honest answer is: we don't know what technological process will emerge that may provide opportunities for New Zealand creators or consumers. We do not know what innovations may be spurred by the bright minds of New Zealand's startup and technology sectors. This is because no one can know what the future will hold, and which technological processes are yet to be invented.

What we do know is, that due to the static nature of New Zealand's current copyright framework, many new and innovative uses of copyright materials will most likely not be permitted in New Zealand, as by definition a new use or technology will not specifically be covered by an existing exception - no matter how strong the public interest in enabling those new uses may be.

As Associate Professor Alexandra Sims has noted, the legislature is simply unable to keep up with advancements in technology:

> *Despite the obvious and justifiable need for an exception for parodies and satires in New Zealand, no exception has been forthcoming. In respect to sound recordings, the delay between the realisation of the need to create such an*

[97] See Part 2.1.
[98] Internet New Zealand, Discussion Paper on Internet/Copyright Issues (2015) 5.

> *exception and the implementation has arguably been even slower: the practice of copying sound recordings to make compilation tapes was many decades old by the time the exception was created in 2008. Experience shows that there is often a 'lengthy delay' between the time a new use emerges and the legislature even considering whether a new exception is required.*[99]

This situation applies equally to all participants in the copyright ecosystem - for creators wishing to use technological developments to create new forms of digital art or new technological formats to bring their creative works to audiences; for Kiwi innovators finding new research opportunities for datasets; or for students, academics or consumers adapting new technological ways to interact with content. In this sense the Act is inconsistent with the Principles - being neither growth compatible nor flexible.

We submit that a better question is: how can New Zealand ensure that its Copyright Act encourages new forms of creation, and ensures emerging technological process can be developed and used in New Zealand, when to do so does not harm copyright owners or their markets.

Google would like to see a copyright regime that will help local creators reach global audiences, make New Zealand more attractive to technology investment, attract a digitally skilled workforce, allow Kiwi technology and content creators to be competitive on the world stage – and permit New Zealand consumers to enjoy the content they own in innovative ways. We submit that continuing to try and design legislative solutions to known technologies and uses is not the most efficient way to achieve this vision, and is not consistent with the Objectives or the Principles.

Transient and incidental exceptions

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

Google's Answer: The problem with the exception for transient reproduction of works is that it is locked to particular technologies and purposes, and has not been flexible enough to extend to different technical and transient reproductions. The best way to ensure that the exception will cover new technologies and purposes is to adopt exceptions that are principles based, flexible, durable and can adapt to future change.

There are a number of other technical issues caused by the exceptions in the Act being locked to particular technologies and purposes. For example Kiwis have an exception (s43A) for the technical and transient reproductions made as a part of communicating a work (such as the copies made in RAM when viewing or listening to content streamed via the internet), but not an

[99] Alexandra Sims, *'The case for fair use in New Zealand'* (2016) 24 International Journal of Law and Information Technology 176, 189.

equivalent exception for the technical and transient reproductions made as part of the normal lawful use of a work (such as the copies made in RAM when viewing or listening to purchased content that has been stored on the device).[100]

As Professor Susy Frankel has noted:

> *The need for this exception seemed to be a recognition that the previous law would make every act in the digital world, no matter how fleeting or temporary, an infringing copy for copyright purposes. Without the exception, such acts would be infringements, but the exception is narrowly confined to the truly transient copy; otherwise Internet operations may well be infringing copying unless another exception applies.*[101]

Similar considerations apply to format and time shifting provisions, back up copying provisions and caching definitions. Whenever exceptions attempt to include some forms of content or technology and exclude others, uncertainty and lack of clarity can arise about the application of the exceptions to new forms of technology or creative formats.

This outcome is inconsistent with the Proposed Objectives, and may lead to an assessment against the Principles that for the technical and incidental uses, the Act needs to be significantly more flexible:

Growth compatible	Certain/Predictable	Flexible/Durable
YELLOW	RED	RED

Cloud computing

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

Google's Answer: There is no exception in New Zealand that clearly covers common place consumer and business uses of the cloud. This is a significant problem given the prevalence of cloud computing among Kiwi consumers and businesses. Exceptions should be adopted that are growth compatible for new technologies, predictable and flexible and durable enough to adapt to future change.

Google submits that any copyright system that is fit for purpose in the digital age must ensure the clear legal treatment of cloud computing services. As discussed above in Part 2, this is not the case currently in New Zealand.

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[100] See for example s43B of the Australian *Copyright Act 1968* which provides an equivalent exception to s43A for the copies made as part of the normal use of a work.
[101] Susy Frankel, *'Digital Copyright and Culture'* (2010) 40 Digital Copyright and Culture, 140147.

As InternetNZ has recognised, people put a range of information into cloud services, including copyright works such as documents, photographs, music, videos, games and software.[102] In practice though, the Act limits otherwise reasonable use of cloud services. Instead of adopting a technology and subject matter neutral approach to enabling uses involving the cloud, current exceptions:

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

Figure 3 - Current Copyright Law is not cloud-compatible[103]

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

The absence of a clear legal framework for cloud computing services and uses in our view leads to the following assessment against the Principles:

Growth compatible	Certain/Predictable	Flexible/Durable
RED	RED	RED

Non-expressive use of copyright works (data mining and artificial intelligence)

Question 38: What problems (or benefits) are there with copying of works for non-expressive

[102] InternetNZ, *Getting copyright right in the information age – an InternetNZ position paper* (2019) 12.
[103] Ibid.

uses like datamining. What changes, if any, should be considered?

Google's Answer: Non-expressive uses of copyright works such as data mining, AI and machine learning are not covered by any current exceptions under the Act. Exceptions should be adopted in New Zealand that allow for these non-expressive uses, that are growth compatible, predictable and flexible, and durable enough to adapt to future change.

As discussed in Part 2.2 above, non-expressive uses of copyright works such as data mining, AI and machine learning are not covered by any current exceptions. This means that the Act does not address one of the major technological innovations impacting all forms of industries in the global economy.[104] This is because the ability to use datasets to train algorithms, and to extract value from data is an increasingly important feature of the digital economy. For example, the McKinsey Global Institute suggests that data has the potential to generate significant financial value across commercial and other sectors, and become a key basis of competition, underpinning new waves of productivity growth and innovation.[105]

It is sometimes argued that the problem of ensuring access to the datasets required for AI can be solved by licensing. And it is true that licensing can address some concerns about access to data, for example AI researchers are able to obtain licences to access academic journals. However Google submits that to consider licensing as a complete solution to AI misses the fundamental nature of the way AI technologies relate to copyright works. It also does not recognise the large amounts of valuable data contained in sets of orphaned or unpublished works that are outside the scope of traditional licensing arrangements.

As identified by the Hargreaves Review in the United Kingdom, and the ALRC in Australia, technologies such as AI involve the 'non-consumptive' uses of copyright material. This captures uses which do not trade on the underlying creative and expressive purpose of the material. Other examples of non-consumptive uses include caching and indexing by search engines, and possibly text and data mining.[106] The Hargreaves and ALRC reports found that these types of non-consumptive or technical uses should be covered by exceptions.

The absence of any exceptions means that New Zealand's copyright system in this area would be classified as Red when assessed against the Principles. This review presents the Government with an opportunity to move the copyright system into the Green category in the interests of Kiwi innovators and the broader New Zealand economy.

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[104] Tristan Patience, *'Why is Artificial Intelligence (AI) so important?'* Adviser Voice, 23 August 2018.
[105] McKinsey Global Institute, *Big Data: The Next Frontier for Innovation, Competition and Productivity* (2011), Executive Summary. It is suggested that big data equates to financial value of $300 billion (US Health Care); 250 billion Euros (EU Public sector administration); global personal location data ($100 billion in revenue for service providers and $700 billion for end users).
[106] Australian Law Reform Commission, *Copyright and the Digital Age* (Discussion Paper 79) [8.1]-[8.8]; Matthew Sag, *'Copyright and Copy-Reliant Technology'* (2009) 103(4) Northwestern University Law Review 1607, 1608.

Growth compatible	Certain/Predictable	Flexible/Durable
RED	RED	RED

Uses that facilitate freedom of expression (parody and satire)

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

Google's Answer: The lack of a parody and satire exception imposes a limitation on creativity in New Zealand. An exception should be adopted that considers whether the use is "fair". This would cover parody and satire and would ensure that the exception allows for growth, is predictable and flexible and durable enough to adapt to future change.

The lack of a parody and satire exception imposes a real limitation on a valuable form of creativity in New Zealand[107], and is yet another way in which New Zealand copyright law is out of step with comparable jurisdictions.

Australia enacted a parody and satire exception in 2006. In the Second Reading speech for the Bill that contained this reform, the then Attorney-General, Phillip Ruddock, said that the exception was needed to *"ensur[e] that Australia's fine tradition of poking fun at itself and others will not be unnecessarily restricted'.*[108] A major impetus for the reform was the so-called Panel Case,[109] in which the High Court of Australia considered whether *The Panel* (a weekly TV program where panelists discussed that week's developments in current affairs, sports and the arts) had infringed copyright by using excerpts from other programs. The broadcaster of *The Panel*, the Ten Network, sought to rely on the fair dealing exceptions for criticism or review (s103A) and reporting news (s103A). The Court ultimately found that a number of the clips could not be pigeon-holed within either of these exceptions, and were therefore infringing. There was no consideration of whether or not the uses were nevertheless "fair".

While the parody and satire exception has been welcomed by creators in Australia, it remains the case that anyone relying on the exception will need to be confident that their use falls within the dictionary definition of 'parody' or 'satire'. Using small extracts of copyright materials for

[107] See e.g, Associate Professor Alexandra Sims, 'The case for fair use in New Zealand' (2016) 24 *International Journal of Law and Information Technology* 188-89. Sims notes that the lack of any exception for parody in New Zealand means "that socially useful commentaries often breach copyright".
[108] Parliament of Australia, Second Reading Speech, Copyright Amendment Act 2006, House of Representatives, 19 October 2006 (Philip Ruddock, Attorney-General).
[109] *Network Ten Pty Ltd v TCN Channel Nine* [2004] HCA 14.

memes, quotation in academic publications or documentaries, or use for humorous purposes that are not also parodical or satirical, would still not be permitted. This would also be the case if the purpose was for 'caricature' or 'pastiche', and these words were not expressly included in the Act. A far preferable approach - as has been recognised by the ALRC - is to simply ask: is this use fair?[110]

In the New Zealand context, it is also questionable whether the absence of an exception enabling small extracts to be used in parodic and satirical contexts, particularly in relation to political expression, is consistent with the Bill of Rights.

The absence of an exception for parody or satire may lead to the following assessment against the Principles:

Growth compatible	Certain/Predictable	Flexible/Durable
GREEN	YELLOW	YELLOW

However as discussed above, there may be additional concerns in this context when the Act is assessed against the Bill of Rights.

Use of quotations

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

Google's Answer: Currently, the use of quotations or extracts taken from copyright works will only be permitted if it is for the purpose of criticism or review. This leads to inconsistent and illogical results. An exception that considers whether the use is fair (rather than linking it to particular purposes) would ensure that the exception is flexible and durable enough to adapt to future change.

The Issues Paper highlights the problem with the existing exception in s42 of the Act: while it potentially permits uses of small extracts from copyright works, uses will only be permitted if they are for the purpose of criticism or review. This greatly limits the usefulness of the exception. This leads to confusing results, for example using a small extract from an historical film for the purpose of reviewing the film is permitted, but using the same small extract for the purpose of telling a Kiwi historical story would infringe copyright. It also means that New Zealand academics can safely use small extracts of works for conference presentations etc if they are actually criticising or reviewing the work, but will infringe copyright if they use the same small extract merely for the purpose of illustrating an academic point.

[110] Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) 23.

A general quotation right is required by Article 10(1) of the Berne Convention:

> *(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.*[111]

Uses that currently infringe copyright in New Zealand - but which would be likely to come within a quotation exception that was not circumscribed in this way - include:

- retweeting tweets or forwarding emails with the previous email quoted below;
- online publication of theses that include short quotes;
- inclusion of charts and tables in conference presentations by academics;
- incidental capture of short excerpts of background music in documentaries as they are being filmed.

As found by the *Copyright and the Creative Sector* report, content is becoming increasingly easier to find online. However, while Kiwi creators would welcome the opportunity to use this content in new and exciting ways, it has become harder to locate the owner of some copyright materials:

> *Identifying rights holders can be resource-intensive and it is often not possible to track down an owner to get permission in production timeframes. Using content often requires a risk assessment which means a lot of content, particularly older content, is locked up.*[112]

It is also important to recognise the value that small extracts or quotations of content can add to creators and consumers alike. For example, small 'snippets' of news content in search results in a service such as Google News or via Google Search can add significant value to the copyright ecosystem. The Australian Competition and Consumer Commission (**ACCC**) recently found that snippets create value all everyone: for consumers, who obtain information relevant to their choice of news item, for news businesses, which attract visitors to their online news service, and to the platforms themselves, which maintain the quality of their search or social media services. Snippets help consumers make informed choices, and incentivise media organisations to publish content more in line with consumers' preferences or expectations. An ACCC survey found showed snippets are more important than headlines when consumers choose which article to read (69 per cent of respondents said that an 'interesting headline' was an important

[111] *Berne Convention for the Protection of Literary and Artistic Works,* 828 UNTS 221 (entered into force 5 December 1886) Art 10(1).
[112] Ministry of Business, Innovation & Employment, *Copyright and the Creative Sector* (Report, 2016) 18.

factor in their choice, while 74 per cent placed importance on the 'text explaining the article' in choosing which article to read).[113]

When assessed against the Principles, the use of quotations or extracts from copyright works would be categorised as:

Growth compatible	Certain/Predictable	Flexible/Durable
YELLOW	YELLOW	RED

Education

Question 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?

Google's Answer: The current approach does not allow for new and innovative digital technologies to be used in New Zealand and does not recognise the changing way that learning can occur. A general or flexible exception that allows 'educational uses' should not be locked to particular technology or to classroom based learning styles.

YouTube has become a go-to place for learning and has over 1 billion views of learning related videos every day.[114] New Zealand is no different with 79% of Kiwis coming to YouTube to educate themselves.[115] This is just one example of how ICT is revolutionising education.

No one is in a position to anticipate what new and innovative digital technologies will be used in New Zealand classrooms in coming years. What we can be sure of is that most, if not all, of them will be impacted by copyright. That's because almost every use of digital technology involves making copies.

Educational exceptions are a good example of how even exceptions that appear certain in the Act can be locked in time and purpose, and can fail to accommodate advances in technology. For example, s47 of the Act permits the performance or display to an audience of students and staff, or other persons directly connected with an educational establishment. A similar exception in the Australian *Copyright Act 1968* (s28) limits the equivalent exception to "the classroom". In 1968 it was impossible to predict that teaching and learning would occur anywhere other than a

[113] Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Preliminary Report, December 2018) 91, 111-113, 279.
[114] YouTube Internal Data, 2018.
[115] Google/IPSOS Human Stories Quantitative Research, May 2018.

classroom. However flipped classrooms, online and flexible learning courses mean that often students access learning resources from home, or even at school via a device for later access.

A general or flexible exception that allows ‘educational use’ would not be locked to particular classroom based learning styles, or require assessments of whether students accessing a recorded lesson were still in a ‘classroom’ or ‘audience’. This approach will allow for greater access to education for all New Zealanders and will be particularly beneficial to people that (whether due to personal circumstances or geographical location) may not currently have suitable access to educational institutions or resources.

Contracting out

Question 58: Are the exceptions relating to computer programmes working effectively in practice? Are any other specific exceptions required to facilitate desirable uses of computer programs?

Google's Answer: It is important that all copyright exceptions essential to the functioning of the internet and modern digital technologies are able to be used in practice. This means that consideration should be given to ensuring that these rights to use digital technologies are not able to be modified or excluded contractual means.

The internet is the critical infrastructure of the digital economy–ensuring its effective functioning is absolutely core to public interest. Google submits that in the 21st century, ensuring appropriate protection for private use or copyright works (including via the cloud) and non-consumptive technical and incidental uses such as AI and machine learning, is as critical to the public interest and the future of New Zealand’s digital economy and well being, as the more traditional fair dealing purposes were in the 20th century. This means not only ensuring that these activities are permitted by appropriate copyright exceptions, but also ensuring that these exceptions can actually be used. This means ensuring that contractual terms can not be used to prevent reliance on these exceptions. .

3.3 Internet service provider liability

The importance of safe harbours

Safe harbours are a critical part of a balanced copyright ecosystem whereby internet service providers - including internet access providers, schools and universities, cultural institutions, and digital platforms - are not held liable for copyright infringements performed by their users, so long as those service providers are diligent in removing infringing material when notified.

Safe harbours are not unique to copyright.[116] For example, please see the safe harbour process in the *Harmful Digital Communications Act 2015* - a website operator or host is not held legally responsible for content someone else put on their website or app if they follow the 'safe harbour' process in the Act. It is also a critical feature of the safe harbours in the Act.

The economic importance of the certainty provided by safe harbours for internet intermediaries cannot be overstated. For example, a study of angel and venture capital investors in the United States conducted by Booz & Company found that:[117]

- Increasing liability for content providers would have a greater negative impact on early-stage investment than would a weak economy and an increased competitive environment combined;
- Holding [intermediaries] liable for the content uploaded by users would have a significantly negative effect on investment in this space, reducing the pool of interested angel investors by 81%.
- Regulations making users more easily prosecuted for copyright violations would have a negative effect on investment in this space, reducing the pool of interested angel investors by 48%; and
- A large majority of angels and venture capitalists support increased clarity in copyright law, especially if it would decrease the level of ambiguity surrounding the probability of facing a lawsuit in cases of copyright infringement, as well as the size of damages in the event of liability. Fully 80% report being uncomfortable investing in business models in which the regulatory framework is ambiguous.

A study by Oxera conducted in 2015 identified country-specific impacts on intermediary startups in Chile, Germany, India and Thailand.[118] Oxera's analysis suggested that a regime with clearly defined requirements for compliance - including safe harbours for intermediaries - and low associated compliance costs, could increase start-up success rates for intermediaries in our focus countries by between 4% (Chile) and 24% (Thailand).

Another study by Fifth Era into the impact of internet regulation on early stage investment found similar results:

> *[An] area of consistent concern worldwide was secondary liability. Here lawmakers genuinely want to help in the fight against copyright infringement. However, focusing mainly on [internet intermediaries] can have unintended consequences for investment -*

[116] Peter Leonard, *'Building Safe Harbours in Choppy Waters - Towards a Sensible Approach to Liability of Internet Intermediaries in Australia'* (2010) 29(3) Communications Law Bulletin 10, 14.
[117] Booz & Company, The impact of Internet Copyright Regulations on Early-Stage Investment - A Quantitative Study (October 2011) 6. This report was financed by Google Inc., and independently researched and written by Booz & Company.
[118] Oxera, *The economic impact of safe harbours on Internet intermediary start-ups* (February 2015) 2. Google commissioned Oxera to prepare this independent study. Oxera is responsible for the analysis and conclusions. Google and Oxera jointly chose the focus countries, with the aim of reflecting a spectrum in terms of both geography and level of liability protection.

a danger particularly important for content creators given that [intermediaries] are now driving a significant and growing proportion of revenue for the creative industries.[119]

Similarly, a 2017 economic study by NERA consultancy found there would be substantial economic costs to the United States economy from any weakening of safe harbours for internet intermediaries:

> *We have estimated the economic costs of weakening the protections offered by Internet safe harbours as a consequence of legislation or litigation on the U.S. economy by surveying consumers in two areas: first in their use of Internet search engines and second in their use of cloud storage. The surveys measured the decline in consumer demand following an increase in price (in the case of cloud storage) or an increase in the number of advertisements (in the case of Internet search). The results of these surveys were then combined with a study measuring the overall economic contribution of the Internet sector to the U.S. economy to estimate the cost in terms of gross economic output, income, and employment in the United States following a weakening of Internet safe harbours.*
>
> *The consumer surveys reveal that increases in price for cloud storage and amount of advertising for Internet search will likely reduce revenues obtained by these two services by approximately 7.8%. This translates into a loss of over 53,000 jobs. Many of these jobs pay above average wages. Consequently, U.S. gross domestic product (GDP) would decrease by $5 billion annually for the search and cloud services categories alone. There are many more Internet intermediaries (other than search and cloud services), and a weakening of safe harbour protections would affect most of them. Based on our findings, we estimate that the decline in the U.S. Internet sector would eliminate over 425,000 jobs. The U.S. gross domestic product would decrease by $44 billion annually.*[120]

These studies suggest that copyright policy decisions can have significant impacts on investment and innovation, and in particular on the question of whether investment flows in the online economy from one jurisdiction to another.

These are just some of the benefits that come from New Zealand's copyright safe harbours:

- They allow schools and non-profits to focus on doing what they do best – educating and providing critical social services – rather than worrying that what might be happening on their networks could leave them vulnerable to threat of serious legal consequences, without any practical way to limit the financial risk.

[119] Le Merle et al,'The impact of internet regulation on early stage investment', iFifth Era, 2014, p5.
[120] Christian Dippon, 'Economic Value of Internet Intermediaries and the Role of Liability Protections', NERA Economic Consulting, June 2017.

- They encourage service providers to take steps to work with rights holders in quickly and diligently removing infringing content, while providing the legal certainty that the service provider liability will not liable for financial penalties for the acts of users when they offering this assistance;

- They encourage leading global online service providers to bring their newest and best offerings to New Zealand.

- They provide legal certainty and minimise compliance costs for startups. They do this by setting out a clearly defined and cost effective mechanism for rights holders to seek removal of illegal content, thus giving startups a clear design brief to build in copyright protection from the get-go, and clear, simple steps to take if they receive a copyright takedown notice.

Safe harbours also provide significant benefits to rights holders. They provide a streamlined and cost-effective process for rights holders to send a "takedown" notice. A service provider who receives such a notice has a very strong incentive to remove any infringing content expeditiously: failure to do so means that they would lose the benefit of the safe harbour.

Content ID is only possible because of safe harbours

The US safe harbours have encouraged and facilitated anti-piracy initiatives such as YouTube's Content ID system, which was first developed in the U.S as a direct result of the legal protections provided by the safe harbours. Rather than operate as a disincentive for service providers to act quickly to remove infringing material, they provide a degree of legal certainty which rewards internet service providers for working with rights holders to remove infringing content.

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

Google's Answer: The ISP definition should not be narrowed. The current position is consistent with the US, EU and Singapore.

Google urges MBIE to resist any calls to narrow the class of service providers entitled to claim the benefit of the safe harbours. This would be a backward step for New Zealand, not only for the service providers who rely on the protection that the safe harbours afford them when they act to remove infringing content, but also for New Zealand rights holders. That's because without the safe harbours in s92 B-E of the Act, New Zealand rights holders would no longer have access to a localised and universally applicable anti-piracy notice and takedown system for addressing local copyright infringements.

The Issues Paper recognises the importance of New Zealand not considering its copyright rules in isolation from key trading partners.[121] New Zealand's current application of safe harbours to all forms of online trading partners is consistent with schemes in the United States, the EU, Singapore and countries such as Korea and the Philippines. Australia's safe harbours currently apply to a narrower class of service provider (excluding online service providers and internet platforms), however the Australian Government has flagged its intention to revisit the question of whether to extend the safe harbours to *all* online service providers.[122]

Excluding online service providers from the ISP definition would make New Zealand a high-risk environment for hosting content as compared to countries with technology-neutral safe harbours. This would create an uneven playing field for Kiwi technology companies who wish to compete with online companies hosted in jurisdictions that maintain safe harbours for online providers. In the US, strong safe harbour legislation plays a critical role in driving economic growth and innovation. A recent study found that weakened safe harbour protections would cost the US economy an estimated $44 billion in GDP and 425,000 jobs each year.[123] We anticipate that a similar effect (although at a smaller scale) would likely be felt in New Zealand.

A recent White Paper in the United Kingdom found that the safe harbour regime established by the EU e-Commerce Directive (and implemented in the UK) is critical to the role of online platforms as a key growth engine for the UK economy and society, enabling knowledge discovery, sales, social and economic interaction and the sharing and distribution of content.

> *This legal regime delivers immense tangible benefits for the UK. By enabling users to share content quickly and easily, platforms are breaking down social and economic barriers. They are providing a voice to ethnic communities underrepresented in the traditional media. They are helping new groups to become e-commerce entrepreneurs. They are creating channels for British talent and businesses of all sizes to reach international markets.*[124]

The same Paper found that the removal of safe harbours for intermediaries would expose internet service providers to unnecessary legal risk and risking conflict with the Human Rights Act.[125]

It is important to recognise that the safe harbour scheme does not allow internet service providers to abdicate all responsibility for content on their services. To the contrary, the safe harbours provide legal incentives for service providers who choose to act expeditiously to

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[121] Ministry of Business, Innovation & Employment, *Review of the Copyright Act 1994* (Issues Paper, 2018) 18.
[122] Mitch Fifield, Minister for Communications and the Arts, Press Release, 6 December 2017.
[123] Christian Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections* (2017) NERA Economic Consulting, 2.
[124] Hogan Lovells, *'Liability Regulation of Online Platforms in the UK'* (White Paper) 21 April 2018. The work for this paper was financially supported by Google, but the authors are solely responsible for the content.
[125] Ibid 19.

remove infringing content from their platforms. Further, intermediaries will lose the protection of the safe harbour scheme if they fail to comply with the procedural steps set out in the Act in relation to removing, and disabling access to infringing content. As such, they operate as an incentive to ensure that content is removed in an efficient timeframe, as the legal protection granted depends on meeting these requirements.

The importance of retaining New Zealand's current approach to notice and take down

Google endorses the current approach in the Act whereby internet service providers obtain safe harbour protection when they take steps to remove infringing content in response to take down notices. Google believes in a system of shared responsibility, with technology companies providing the tools (such as Content ID) that make it easy for rights holders to control the use of their content in a timely and efficient manner. However, rights holders also need to work with technology companies to identify the content that they own, so that online platforms can quickly and efficiently remove any infringing content.

Given the complexities involved in determining who owns the copyright in many types of work, a partnership approach is required so that platforms such as YouTube can correctly identify the rights holder(s) for a particular piece of content, and respond to take down notices or use Content ID to act on the rights holder's instructions in relation to that content. (See further discussion below regarding the complexities regarding identifying the copyright owners for individual works).

The notice and takedown system enshrined in the safe harbours strikes an appropriate balance between encouraging online providers to assist in copyright owners in the fight against online copyright infringement, without undermining the incentives so critical to encourage internet companies to see New Zealand as an attractive place to launch a business and contribute to the growing digital economy.

MBIE would be aware that the European Parliament has agreed on the final text of a Copyright Directive (**Directive**). Although the European Parliament has passed the text, it did so despite significant concerns from a wide variety of stakeholders including:

- Mr. David Kaye, the EU Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression[126];
- Consumers and civil rights proponents via the #SaveYourInternet coalition[127], with over 4.5 million people signing a Change.org petition that asks legislators to reconsider the Proposed Directive;
- The European startup community[128];

[126] David Kaye, 'EU must align copyright reform with international human rights standards, says expert', United Nations Human Rights Office of the High Commissioner, 11 March 2019 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24298&LangID=E>.
[127] See <https://saveyourinternet.eu/> and <https://www.change.org/p/european-parliament-stop-the-censorship-machinery-save-the-internet>.

- 57 signatories representing fundamental rights organisations, including Human Rights Watch and Reporters without Borders;[129]
- More than 200 academics and copyright experts from over 25 research centres;[130]
- 70+ of the Internet's original architects and current pioneers including Tim Berners-Lee, Inventor of the World Wide Web;[131]
- 200+ Members of the European Parliament from all political groups and many different countries;[132]
- Large groups of education, research and digital rights communities, including the European University Association and the International Federation of Library Associations;[133]
- Small and medium sized publishers from nine countries;[134] and
- Online content creators[135] and the platforms they work on,[136] including YouTube, reddit, Twitch.tv, Patreon and Automattic.
- Many other concerns are summarised at: https://dontwreckthe.net/.

Google shares many of these concerns. Google submits MBIE should carefully examine the significant critiques of the Directive before considering whether similar issues should be considered in New Zealand.

Policy concerns with Article 17 (previously Article 13[137])

Google supports the overall objective of updating Europe's copyright laws for the digital age. However the text of Article 17 will have significant consequences which will limit the variety of information available online, and actually harm the creative sector it is designed to protect. Google is concerned that the practical requirements of Article 17 will harm the thriving creative economy in Europe, including YouTube's creator community, and impose significant restrictions on the ability of consumers to access a diverse range of media content and information. It will also make it harder for emerging artists to be discovered and heard on a global stage. This would be particularly acute for emerging New Zealand artists if similar measures were adopted in New Zealand.

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[128] See <https://alliedforstartups.org/> and <http://www.innovatorsact.eu/wp-content/uploads/2019/01/An-SME-exemption-is-not-a-startup-exemption.-1.pdf>.
[129] Liberties EU, *Article 13 Open letter - Monitoring and Filtering of Internet Content is Unacceptable*, 16 October 2017.
[130] CREATe, *The Copyright Directive - Misinformation and Independent Enquiry*, 29 June 2018.
[131] See https://www.eff.org/files/2018/06/13/article13letter.pdf.
[132] Julia Reda, *#SaveTheLink: No extra EU copyright for news sites*, YouTube, 11 January 2017.
[133] Sparc Europe, *International coalitions joins together to halt potentially harmful copyright reform.*
[134] European Innovative Media Publishers, *Open Letter to the Austrian Presidency of the European Council and rapporteur Axel Voss MEP on Article 11 and Recital 32 of the proposed Copyright Directive*, 29 October 2018.
[135] See https://createrefresh.eu/.
[136] See https://dontwreckthe.net/.
[137] Note: In the final text of the EU Copyright Directive, Article 13 was renamed to become Article 17.

As discussed above in this submission, platforms such as YouTube provide opportunities for creators to bring their content to a global audience, and for content owners to take advantage of significant monetisation opportunities from revenue generated from subscriber views of that content. Artists like Dua Lipa and Ed Sheeran reached fans on YouTube long before they were discovered by a record label. Even acclaimed musicians like Elton John have used YouTube to breathe new life and reach new audiences from iconic songs.[138] The music industry has earned over US$6 billion in total revenue from YouTube.[139] In the 12 months preceding November 2018 alone, YouTube paid the global music industry more than €1.5 billion in advertising-generated revenue.[140]

Google believes that internet platforms must work with rights holders to remove infringing content from their platforms. However the Directive fails to clearly outline requirements for how rights holders should cooperate to identify their content. Instead, it introduces vague, untested requirements on well-meaning platforms, content creators and rights holders. This will likely result in online services over-blocking content to limit legal risk.[141]

Despite the significant stakeholder concerns raised during the consultation process, the final Directive adopted an amended version of Article 17 which makes internet companies liable for the infringements of their users at the moment of upload, irrespective of whether the platform has information regarding the copyright status and ownership of the content being uploaded. This will have a particularly profound impact on emerging 'startup' services, the range of content that will be able to emerge on online platforms, and will likely create investment disincentives to launch both creative content sites and internet service from and in the EU.

One analysis of Article 17 has noted:

> *Whilst certain relevant technical components exist for limited types of content, no such solutions exist for the vast amount of content and platforms that appear to fall within the scope of the proposed directive. A content-filtering mandate would impose high costs on those platforms for which limited solutions already exist, while the possibilities of developing additional technologies to comply with the proposed legislation are fraught with difficulty and potentially extremely costly.*[142]

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[138] Ibid.

[139] There is still a lack of transparency between the money YouTube pays to labels and the amount that artists actually receive due to contractual restrictions. Google has committed to disclosing the revenue earned on YouTube to artists and songwriters directly if labels and publishers waive these contractual restrictions. See Lyor Cohen, 'Article 13 could mean less money for artists and songwriters on YouTube', Music Business Worldwide, 20 November 2018.

[140] Susan Wojcicki, 'The Potential Unintended Consequences of Article 13', YouTube Creator Blog, November 12, 2018.

[141] Kent Walker, 'Now is the time to fix the EU copyright directive', Google in Europe blog post, February 7 2019.

[142] Gann, Alexander and David Abecassis, *The Impact of a Content Filtering Mandate on Online Service Providers*, June 2018, Allied for Startups, 2.

Google submits that similar concerns would exist in New Zealand, where emerging content providers and internet services may not have the resources to immediately develop an expensive technology such as Content ID.

Copyright is complex, and rights holders can often disagree over ownership. In these instances it becomes impossible for open hosting platforms to make sound decisions on rights during the uploading process.[143] As MBIE identified in the Issues Paper, a single song can have many different copyright holders and technology companies need help figuring out who owns what. It is important that any legal regime recognises technical realities. In the case of copyright ownership, these issues are often unclear, or the subject of legal dispute. This is particularly the case in many jurisdictions, including New Zealand, that do not have a register where copyright information can be easily searched.

Lyor Cohen, YouTube's Global Head of Music, has stated:

> *Well over 50% of music has some portion of unknown ownership. It's a blackbox that often pits music collecting societies, publishers, labels, and even artists against one another in a fight for who owns what … Currently, even when we have incomplete ownership information, today's global safe harbour legal framework means that we can still pay for unidentified portions to the remainder of rights holders … If we don't have a licence, publishers can use Content ID to remove and block their content.*
>
> *When you combine YouTube's scale - 400 hours of video are uploaded every minute - with the fact that 50% of songs have unknown ownership you create an impossible framework for YouTube to enforce rights ownership correctly 100% of the time. Yet, the Parliament's version of article 13 would remove current protections and hold YouTube and other platforms directly liable for any copyright infringement, opening us up to unmitigated liability and such a large financial risk that we would be forced to block huge amounts of video …*
>
> *Under Parliament's version of article 13, tomorrow's generation of European artists may never see the light of day, their videos blocked at scale to avoid copyright liability. Rather than drive more value to artists, major labels and small, independent artists would get less money and less promotion from open platforms like YouTube."* [144]

Although YouTube has licensing arrangements in place with myriad entities, many content owners remain unknown. This uncertainty means that content may be wrongly blocked simply because we need to err on the side of caution.

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[143] Google Blog Post, 'Everyone benefits from access to information and creativity online', Together for Copyright.

[144] Lyor Cohen, 'Article 13 could mean less money for artists and songwriters on YouTube', Music Business Worldwide, 20 November 2018.

The freedom of speech concerns in relation to Article 17 are profound. The United Nations' Special Rapporteur on freedom of expression has stated:

> *Europe has a responsibility to modernise its copyright law to address the challenges of the digital age. But this should not be done at the expense of the freedom of expression that Europeans enjoy today ...*
>
> *… Most platforms … would face legal pressure to install and maintain expensive content filtering infrastructure to comply with the proposed Directive. In the long run, this would imperil the future of information diversity and media pluralism in Europe, since only the biggest players will be able to afford these technologies …*
>
> *… Misplaced confidence in filtering technologies to make nuanced distinctions between copyright violations and legitimate uses of protected material would escalate the risk of error and censorship. Who would bear the brunt of this practice? Typically it would b e creators and artists, who lack the resources to litigate such claims."*[145]

These concerns would apply equally in New Zealand in relation to creators, startups, investment incentives and compliance with the Bill of Rights. Creators would be especially hard hit. Videos that could be blocked include: educational videos, a large number of official music videos, fan music covers, mashups, parodies and more. As such, Article 17 threatens hundreds of thousands of jobs, European creators, businesses, artists and everyone they employ.

Google is committed to working to eliminate infringing copyright content from our services, but it is a practical reality of internet platforms that we need rights holders to cooperate in that process to identify the rights owner for their content. Any effective copyright safe harbour system must make it clear that rights holders need to provide reference files of content, and copyright notices with key information (like URLs), so that platforms can identify and remove infringing content.[146] Platforms that follow these rules, and make a good effort to help rights holders identify their content, shouldn't be held directly liable under the Act for every single piece of content that a user uploads. New Zealand's existing safe harbour framework strikes the appropriate compromise in this regard, and represents a fair and effective balancing of interests between all players in the copyright ecosystem.

Linking to copyright materials

Question 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 (e.g search engines)? What changes (if any) should be considered?

[145] David Kaye, 'EU must align copyright reform with international human rights standards, says expert', United Nations Human Rights Office of the High Commissioner, 11 March 2019.
[146] Kent Walker, 'Now is the time to fix the EU copyright directive', Google in Europe blog post, February 7 2019.

Google's Answer: Uncertainty regarding the current legal position of search tools and linking in New Zealand has the potential to discourage investment and innovation in New Zealand. The safe harbours provisions should be amended to expressly include linking and search tools, while also being flexible enough to cover future changes in technology.

Google understands from public reports that the decision to exclude linking and search from the New Zealand safe harbours was based on the Government's view that search engines could not be exposed to legal liability merely for directing users to websites. In 2010, the New Zealand delegation in the Anti-Counterfeiting Trade Agreement negotiations was reported as saying:

> *We understand this provision covers information location tools such as search engines. It is not clear how the provision or use of information location tools breaches copyright, or why third party liability should arise for the provision of such tools. We would welcome further explanation on the need to provide such a safe harbour.*[147]

While we fully support this view of the law, we are nevertheless concerned that there remains a risk - however theoretical - that a New Zealand court may take a different view of the law. Search is expressly included within the US DMCA safe harbours, and while there is no specific mention of safe harbour for search in the EU legislation, the Court of Justice of the European Union has interpreted the EU hosting safe harbour as applying to search engines where the relevant conditions are met.[148]

Google submits that uncertainty regarding the legal position of search and linking in New Zealand has a real potential to discourage investment and innovation. Extending the New Zealand safe harbours to expressly include linking and search would address this by putting the question of potential liability for these activities beyond doubt for all service providers that complied with the safe harbour requirements.

Distinguishing between search engines and infringing links sites

Google submits that there is a material difference between a website that operates with a purpose of directing users to infringing content, and a search engine, which crawls trillions of web pages to direct users to content on the world wide web, some of which may inadvertently result in links to infringing content uploaded by third parties.

By way of example, the Australian Federal Court in *Universal Music Australia Pty Ltd v. Cooper* rejected an argument that a website that was deliberately designed to facilitate copyright infringement by providing users with links to infringing content did no more than merely

[147] Nate Anderson, *New ACTA leak shows major resistance to US-style DRM rules,* Ars Technica (Online) 3 March 2010.
[148] Joined Cases C-236/08-C0238/08, *Google France SARL v Louis Vuitton Malletier SA*, 2010 E.C.R. I-2417, [109-114].

'facilitate' copying in the same way that the Google search engine does, and did not necessarily authorise infringements by its users. Branson J noted:

> *Mr Cooper placed considerable weight on a suggested analogy between his website and Google….*
>
> *Google is a general purpose search engine rather than a website designed to facilitate the downloading of music files. The suggested analogy is unhelpful in the context of Mr Cooper's appeal.*[149]

As is the case in Australia, the law of authorisation in New Zealand is well placed to deal with the kind of activity that was being considered in Cooper's case. Expressly extending safe harbour protection to search engines would not result in websites that purposefully provide links to infringing content being immune from liability.

European ancillary copyright proposals should be rejected in New Zealand

MBIE would be aware that another controversial element of the EU Directive is Article 15.[150] Under the Directive, certain online services like search engines will be restricted from showing anything beyond mere facts, hyperlinks and "individual words and very short extracts" from press publishers. While it appears that the Directive gives publishers the freedom to grant free licenses for broader use, the Directive's approach will create uncertainty, and may lead online services to restrict how much information from press publishers they show to consumers. Cutting the length of snippets will make it harder for consumers to discover news content and reduce overall traffic to news publishers, as shown by one of our recent search experiments.[151] This will particularly hurt small and emerging publishers, and limits consumer access to a diversity of news sources.

Google submits that there are a number of concerns with this proposal which will make it harder for citizens to find local news and special interest content, as well as restricting the flow of internet traffic to smaller, niche or new publications.

Google's role in the copyright ecosystem for journalism

Services such as Google News, publishers and journalists all play critical roles in an ecosystem where citizens have access to an increasingly diverse range of information, news and current affairs services. Google cares deeply about the future of journalism. Quality journalism matters, and we strive to ensure that quality news content is recognised across our platforms, that content is readily discoverable, and news partners benefit from creating this content.

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[149] *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 (18 December 2006) [40].

[150] Note: In the final text of the EU Copyright Directive, Article 11 was renamed to become Article 15. The substantive text of this submission has been amended in order to reflect this change.

[151] https://blog.google/around-the-globe/google-europe/now-time-fix-eu-copyright-directive/?_ga=2.149851957.2060903558.1554046695-1880509916.1539810825

Google has invested heavily in providing news partners with cutting-edge tools and capability to better understand and connect with readers, improve their products and power the underlying technological infrastructure that brings news content to readers.[152] In one recent example, the Google News Initiative announced that New Zealand tech start-up PressPatron will receive funding as finalist in the Innovator Challenge.[153]

Google News has become an important part of the copyright ecosystem. More than 80,000 news publishers around the world receive traffic from Google. Google Search is used to send people to news sites more than 10 billion times each month.[154] Google provides significant economic value to publishers in the form of traffic, which publishers can then monetise. Every click we send to publishers has a real return, and provides an opportunity for publishers to turn readers into loyal subscribers. A recent Deloitte study has found that a visit to a news site is worth on average between €0.04 and €0.08 to publishers, irrespective of whether a visitor accesses a news site directly or through a referral site such as a search engine.[155]

At present, Google Search and Google News are open to all content from all publishers, large and small. This helps readers to connect with a range of publishers, and to uncover diverse perspectives and topics of interest from more than 80,000 publishers. In a market with a relatively concentrated media market such as New Zealand, this provides an opportunity for New Zealanders to search and engage with news and current affairs reports from all over the world.

Under the Directive, certain online services will be restricted from showing anything beyond mere facts, hyperlinks and "individual words and very short extracts" from press publishers, absent a license.

There are several significant problems with this proposal, including:

- **The Directive is inconsistent with basic copyright approaches to substantiality**
  As the Issues Paper recognises, copyright law is not designed to protect facts and ideas, merely the expression of these ideas. Proposals that would require licences to use single words or very small factual descriptions significantly expand the scope of copyright. As we note above, there are significant social and economic benefits that flow from ensuring that copyright does not unreasonably constrain access to facts and data.

- **Article 15 will make it harder for consumers to search for news and information**
  Reducing the length of snippets to just a few individual words or a short extract will make

[152] For more information see the Google News Initiative <https://newsinitiative.withgoogle.com/about>.
[153] https://newzealand.googleblog.com/2019/04/new-zealand-tech-startup-to-benefit1.html
[154] Together for copyright, ibid.
[155] Deloitte, 'The impact of web traffic on revenues of traditional newspaper publishers', March 2016. The report was commissioned by Google Ireland, but the findings are based on research by Deloitte from material provided by Google and independent sources.

it harder for consumers to discover news content and critical research information, and reduce overall traffic to news publishers.

Google runs many experiments involving its search engine each year as part of making continual improvements to users' experience of Search. We undertook a recent experiment[156] in the EU to understand the potential impact if we could only show URLs, very short fragments of headlines and no preview images in Google News. All versions of the experiment resulted in significant loss of traffic to news publishers. Even a moderate version of the experiment (where we showed publication title, URL and video thumbnails) led to a 45% reduction in traffic to news publishers.[157]

- **Requiring search engines to obtain licences for links and snippets will require them to choose which content to include and which to exclude**
  As discussed above, Google Search indexes trillions of web pages to organise information on the world wide web for Google users. Google News alone provides links to over 80,000 news publishers. It is simply not possible to obtain licences to cover the volume of material.

  Imposing licence obligations on the provision of snippets will likely benefit larger news publishers, and restrict the flow of traffic to smaller ones. This will make it harder for small, niche, or new publications to find an audience, generate an income, and compete with existing publications. This could lead to a form of censorship where smaller voices are not easily accessible. This could be particularly detrimental for SMEs in New Zealand when trying to compete with large publishers of international content.

- **Article 15 intends to support high quality journalism, but may harm the publishers it is designed to protect.**
  The experiments with Google News referred to above, demonstrated that when snippets were not included in Google News, many users turned instead to non-news sites, social media platforms and online video sites to find information. Searches on Google Search increased as users sought alternative ways to find information.[158]

  Similarly, requiring all publishers to enter into licensing contracts may impede innovation in the delivery of news to consumers in novel ways, perhaps by the development of business models using Creative Commons or similar open licences. Preserving publishers' choices in how they should make their content available, and receive value from traffic generated by their content, is critical to ensure news and other publishing can continue to evolve to meet the needs of consumers.

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[156] Greg Sterling, 'EU copyright directive nearing final form as Google tests stripped-down news SERPs', *Search Engine Land*, January 15, 2019.
[157] Kent Walker, 'Now is the time to fix the EU copyright directive', Google in Europe blog post, February 7 2019.
[158] Ibid.

Google believes that MBIE could address any similar concerns in New Zealand by:

1. publishers should maintain the freedom to choose how they would like their content to be available online, and
2. protect the need for sharing of facts and the use of traditional limited previews (whether text-based snippets or other visual formats like thumbnail images) which provide needed context for web users.
3. It is also important to provide clear definitions of who counts as a “press publisher,” which could well be interpreted too broadly, including anything from travel guides to recipe websites.

Question 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.

Google's Answer: The current Act provides the right balance between online platforms and copyright owners. Google has an efficient system in place that fairly compensates rights holders and provides an easily accessible platform that anyone can use to monetise their content.

The Issues Paper notes that some rights holders have complained that safe harbours create a disincentive for service providers to fight piracy. In fact, the opposite is true. As we’ve discussed above, safe harbours are a critical aspect of the copyright ecosystem when it comes to developing strategies to address piracy. Since launching Content ID in 2007, over 600 million videos have been claimed by partners, and YouTube has paid out more than US$3 billion to rights holders who have opted to monetise their content through Content ID.

Safe harbours do not provide an absolute defence to infringement. The beauty of the safe harbour system is that it spells out the minimum steps that service providers must take to get protection from financial liability. If they don't take the steps, they don't get the protection. It also provides the needed protection for companies to go above and beyond the minimum threshold and continue to invest in anti-piracy tools such as Content ID.

MBIE would be aware that some rights holders have claimed that the existence of safe harbours has led to a so-called ‘value gap’ (an argument put forward by some rights holders that online service providers have relied on safe harbour protection to avoid properly compensating rights holders for use of their content). The premise of this argument is the claim that YouTube does not pay enough to performing artists, and that the existence of safe harbours is the reason for this.

This claim is not supported by the facts. As an initial matter, it is important to understand that YouTube has had license agreements in place with both major and independent record labels for many years, and today we have we have thousands of licensing agreements, including with

labels and with publishing societies all over the world. It is simply incorrect to say that YouTube relies on the safe harbours instead of licensing works.

We are committed to working with industry to increase opportunities and revenues on YouTube. We have paid over US$6 billion to the music industry, and growth is strong - in calendar year 2016, we paid out US$1 billion. And from November 2017 to October 2018, we paid out US$1.7 billion. Content ID alone has paid rights holders over US$3 billion.

Nevertheless, those pressing the "value gap" argument also assert that the royalty rates in these licenses are too low, allegedly because safe harbour's notice-and-takedown process makes it too difficult for record labels to withdraw their works from YouTube in the face of users re-uploading those works. This claim, however, ignores Content ID, which has been in existence since 2008 and which record labels (and many other copyright owners) use every day to monetise their works on YouTube. Thanks to Content ID, record labels do not have to rely solely on the DMCA's notice-and-takedown process on YouTube—they can remove any or all user-uploads of their works from the platform on an automated and ongoing basis. Indeed, since January 2014, over 98% of all YouTube copyright removal claims have come through Content ID.

In this context, it is important to note that the music industry is thriving. Citigroup reports that in 2017 the music industry in the United States had its most successful year since 2006, generating $43 billion dollars in revenue.[159] Similarly, the International Global Music Report found that the music industry worldwide grew by 8.1% in 2017, with a staggering 41.1% growth in revenue from streaming revenue.[160]

Writing about the so-called "value gap", Grammy award winner Wyclef Jean states:

> *The truth here is that there's no "value gap," and this line of thinking — even if it's well-intentioned — takes musicians in the wrong direction. The solution to the challenges of the internet isn't to tear it down, it's to build on top of it. Instead of pointing fingers, we should be having productive conversations.*
>
> *The music industry has been rocked by crises before, and always found solutions. Digital music is no exception.*
>
> *First there was the problem of piracy, then we saw legitimate downloads come along. Then streaming disrupted the distribution model once again. Everyone fought against it, but we've since adapted and couldn't imagine going back. Today, we're talking about platforms that allow user-generated content and remixed content…*
>
> *That brings me back to the "value gap" conversation going on today. Is copyright*

[159] Citi GPS, *Citi GPS: Putting the Band Back Together,* 6 August 2018.
[160] IFPI, *Global Music Report 2018: Annual State of the Industry*, 6.

important and should it be protected? Absolutely. Should artists still be on their guard? Of course — we make art for the love of it, and that leaves us vulnerable to exploitation. I get that other artists haven't had as positive an experience as I have had with some services, and their voices matter too.

But we are collectively better off — both financially and promotionally — because of internet platforms. I wouldn't have it any other way.So rather than demonising and tearing down the internet and responsible service providers, we should team up and make the music community work better for everyone.[161]

Although business partners can be expected to disagree from time to time about the price of a license, any claim that the safe harbours are responsible for a "value gap" for music on YouTube is simply false. To the extent there are concerns about how value is shared across the ecosystem, the appropriate starting point is transparency. The Citigroup research referred to above suggests that artists may only receive approximately 12% of music revenue in the United States.[162]

As YouTube's Global Head of Music has noted:

YouTube has licensed music content for well over a decade. We have deals in place with thousands of publishers, collecting societies, labels and artists around the world. We pay the music industry the majority of the revenue generated on their music content on YouTube. We've built a fabulous new subscription offering: YouTube Premium is now in 29 countries, with 24 new markets added in the last six months. And we ***pay the same rates as Spotify*** *for this growing subscription service. Period….*

Disclosing Payments to Artists

Yet, the creative community has an incomplete picture of how much we pay. There is a lack of transparency between the money YouTube pays to labels and the money artists see in their pocket.

To fix this, we commit to disclosing revenue earned on YouTube to artists and songwriters directly IF their labels and publishers waive their contractual prohibitions that prevent us from doing this. We welcome more transparency so we can put to rest false accusation from the IFPI and others about our payments. (emphasis in original)[163]

Google is committed to working with rights holders to improve information and transparency in this regard. However it must be recognised that the monetisation that is made possible by services such as Content ID is wholly dependent on the existence of a robust and effective safe harbour scheme.

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[161] Wyclef Jean, *For artists, internet platform are less threat than opportunity,* Politico, 9 September 2018.
[162] Citi GPS, *Citi GPS: Putting the Band Back Together,* 6 August 2018.
[163] Lyor Cohen, 'Article 13 could mean less money for artists and songwriters on YouTube', Music Business Worldwide, 20 November 2018.

3.4 Transactions

It is sometimes suggested that licensing makes reform of copyright exceptions unnecessary. This is a very shortsighted view of the role that copyright exceptions play in ensuring an appropriate balance between copyright owners and users. Exceptions that facilitate publicly beneficial uses of copyright content that cause no harm to rights holders are essential to create breathing space for creators and innovators, and to permit reasonable access to works for re-use and adaptation where this is likely to have net benefits for New Zealand.

As the Singapore Government has recognised (in the context of its decision to remove a factor from its existing fair use provision regarding the commercial availability of works):

> *It would be undesirable to perpetuate the misconception that as a result of the fifth factor, users of copyrighted works must always try to seek a licence to when relying on "fair use". … At the same time, removing the fifth factor, along with any associated misconception that a user must first try and seek a licence, will not compromise rights-holders' interests in ensuring that the market for their works will not be usurped without compensation. Such interests are already considered as part of the fourth factor (which considers any effects on the potential market for, or value of, a copyrighted work …)*[164]

Use of social media and other creative communication tools

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

Google's Answer: Social media platforms or other communication tools provide an easily accessible platform that anyone can use to monetise their content. These platforms foster creativity and allow New Zealanders to have access to a new source of income. However, the lack of copyright exceptions under the Act for parody, remixes, memes, mashups and even simple retweets means that New Zealand content producers are disadvantaged compared to their peers in overseas markets where a wider range of these common creative uses are legally permitted and encouraged.

The Internet is a boon to creativity. More music, more video, more text, and more software is being created by more people in more places than ever before. Every kind of creative endeavour, both amateur and professional, is being transformed by the new opportunities and lower costs made possible by digital tools and online distribution.

A recent study from the United States found that in 2017 nearly 17 million Americans earned income posting their personal creation on nine major online platforms.[165] This was an increase

[164] Ministry of Law, Singapore, *Singapore Copyright Review Report* (January 2019) 26.
[165] Amazon Publishing, eBay, Etsy, Instagram, Shapeways, Tumblr, Twitch, Wordpress and YouTube.

of 16.6 per cent in one year. In total these American internet creators earned a baseline of $6.8 billion on these platforms in 2017, a one-year increase of nearly $1 billion. The earnings increased most rapidly in percentage terms for creators on YouTube, Twitch and Instagram.[166]

Platforms like YouTube are also providing talented young New Zealand filmmakers, bloggers and musicians with the ability to make a living out of their creativity.

How to Dad - an accidental YouTube sensation

Jordan Watson's 2015 home-made video *How To Hold A Baby* went viral, and in a short period reached an international audience.[167] Building on the success of the video, he made the decision to launch his channel, How to DAD,[168] which has over 300,000 subscribers. With his online success, he has published two books and launched a web series *How to Dad: Legend of the Gumboot.*

Jimi Jackson - serving your weekly dose of Kiwi humour

New Plymouth based actor, comedian and filmmaker Jimi Jackson began uploading short clips to YouTube in 2013 with a unique and irreverent take on Kiwi humour. His videos instantly struck a chord and within two years, Jimi had racked up close to a million views on his channel. His growing online audience led to a nationwide tour in 2015, the first time he had performed to live audiences. His YouTube videos also led him to appear regularly on Maori television, and land his first role in a feature film as Riko in *Alien Addiction.*

Despite this explosion in new creative forms and opportunities enabled by the internet, as we highlighted above, many common creative uses of social media - from parodic or humorous remixes, memes, mashups to simple retweets or shares of popular content online - are simply not covered by an exception in the Act. This means that Kiwi creators can be are at a disadvantage compared to their peers in overseas markets where a wider range of these common creative uses are legally permitted and encouraged.

International law firm Hogan Lovells has noted that user provided content on online platforms takes many forms: from online sales by business users of platforms, to travel updates provided by passengers.[169] This makes it impossible to measure precisely the volume or impact of that content. However it is clear that the development of online content creation as a significant economic and cultural activity has reinforced the strength of the UK's creative industries:

[166] Re:create, Taking Root: The Growth of America's New Creative Economy, February 2019
[167] Kidspot, *How to Dad reveals hack videos started as a joke*, December 11 2017,.
[168] https://www.youtube.com/user/watsojg1.
[169] Hogan Lovells, *'Liability Regulation of Online Platforms in the UK'* (White Paper) 21 April 2018, 11.

> *An entirely new breed of content creators, vloggers, 'how to' experts, musicians, influencers and the like are using platforms to build their profiles and fan bases … This process can form the jumping off point for award winning projects [such as] Asim Chaudhry's BAFTA Award winning comedy series "People Just Do Nothing" ran on YouTube for 2 years before its BBC Commission.*[170]

The vast majority of rights holders who use Content ID - more than 90 per cent - choose to monetise their claims, leaving their content up on YouTube. That means that all players in the copyright ecosystem benefit - rights holders in existing works can monetise new uses, and create additional revenue streams, while new creators can freely remix and upload their new creations that use existing works.

3.5 Enforcement of Copyright

We have discussed at Part 1.1 above Google's general approach to addressing online copyright infringement:

1. Create more and better legitimate alternatives to piracy;
2. Follow the money;
3. Be efficient, effective and scalable;
4. Guard against abuse; and
5. Provide transparency.

In the context of enforcement, the Principle of proportionality is critical. It is important to keep in mind the volume of content on the internet, as well as the relative cost impacts of particular enforcement measures on all players in the ecosystem. Google spent over $100 million developing Content ID - this kind of investment in anti-piracy and revenue management for rights holders would be out of the reach of startups, and outside the scope of what is possible for public libraries and educational institutions.

It is also critical to ensure that enforcement measures are consistent with the Bill of Rights, and do not unnecessarily or inappropriately impact on free speech, or the rights of consumers to due process in appealing any copyright claims that are made against them.

Are additional enforcement measures needed for online infringements?

Question 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? Google's Answer: The existing systems available to copyright owners to address online infringement are sufficient and create the right balance between copyright owners and online platforms. Specific copyright website blocking injunctions would not be an appropriate

[170] Ibid.

enforcement approach in New Zealand.

Google recognises and takes seriously the significant problems caused by online piracy. We outlined at Part 1.1 above our general approach to addressing online infringements. This includes ensuring that there is legitimate content available to consumers that is more attractive to consumers than pirating content, and focusing on interrupting the traffic and revenue streams to infringing sites.

Pirate sites are almost exclusively for-profit enterprises, and as long as they continue to be able to make money, anti-piracy strategies will have limited effect. One of the most effective ways to combat rogue sites that specialise in online piracy is to cut off their money supply. As a result, Google is committed to ejecting rogue sites from our advertising services. For example, Google has worked with regulators and other industry leaders in countries such as the UK, France, Italy, Southeast Asia to create self-regulatory principles that help ensure ads do not appear on alleged copyright-infringing websites.[171]

These strategies have been shown by research to be effective. For example, a study of the 'piracy ecosystem' found that efforts directed towards blocking access to pirated content have been less effective than efforts directed towards interrupting the flow of money to rogue sites.[172] 2017 research from the Australian Department of Communication and the Arts found that recently passed site blocking measures may have helped to deter users from accessing infringing content, but that "pricing and availability continue to be key factors for people consuming unlawful content".[173]

Google is aware that there have been calls for New Zealand to introduce a site blocking system for rights holders to seek injunctions forcing ISPs to prevent Kiwis from accessing infringing websites.[174] It is important to recognise that site blocking is not always effective in the long term, and can create alternative problems if not implemented effectively. For example the European Commission's Joint Research Centre found that site blocking led to "significant but short-lived declines in piracy levels", and that the "streaming piracy market" quickly recovered from the intervention (ie, site blocking order). Significantly, the EU found that there was "limited substitution into licensed consumption".[175]

[171] Google, *How Google Fights Piracy* (2018) 57.
[172] Tobias Lauinger et al, *Clickonomics: Determining the Effect of Anti-Piracy Measures for One-Click Hosting* (2013).
[173] Department of Communications and the Arts, Australian Government, *New online copyright infringement research released 2017*, 7 November 2017.
[174] See https://www.consumer.org.nz/articles/consumer-nz-is-against-website-blocking.
[175] Luis Aguiar et al, *Online Copyright Enforcement, Consumer Behaviour, and Market Structure* (2015) Scientific and Technical Research Reports.

It is also clear that existing anti-piracy efforts are working. For example, after Google launched improvements to its demotion signals in Google Search in 2014, one major torrent site acknowledged traffic from search engines had dropped by 50% within the first week.[176]

Google considers that New Zealand should be very cautious in proceeding with any specific copyright based approach to address online infringement that allows website blocking injunctions, and carefully consider all of the technical and practical considerations involved before adopting any scheme.

Technical considerations regarding site blocking

On the basis of available evidence, Google submits that there is no compelling reason for MBIE to consider recommending site blocking as an enforcement approach in New Zealand. However, before any consideration is given to a site blocking regime in New Zealand, Google submits that at least the following issues must be identified and carefully resolved:

- ***How can site blocking orders be narrowly targeted to only flagrantly infringing websites, without risking inadvertent application of the law to legitimate websites?***
  For example, as noted in the Australian Parliamentary debates about the implementation of site blocking powers, it is critical that site blocking orders are narrowly targeted:

  > *[the Bill] is aimed at a very specific mischief; the power it confers is intended to be exercised very carefully and in limited circumstances. The Bill is directed, essentially, at the worst of the worst. It is intended to give rights holders a remedy against a category of websites which deliberately and flagrantly flout copyright laws and operate as havens for pirate activity.*[177]

  Ensuring site blocking orders are narrowly targeted only to flagrantly infringing sites - 'the worst of the worst' - is particularly critical in a jurisdiction like New Zealand where the Act does not have copyright exceptions applicable to so many common non-harmful consumer, business and technological uses. Technologies, content and products that can be lawfully created, or internet services that can be offered, in countries like the US or Singapore may not be lawful in New Zealand. Allowing site blocking orders to apply to "infringing" sites could have incredibly serious consequences given commonly used services such as Dropbox, Flickr or Box, meme generator websites etc may not be lawful if they were operated from New Zealand.

- ***How can orders be structured to ensure only the particular website in question is targeted, and avoid capturing additional websites or domains?***
  Unless great care is taken in how site blocking orders are implemented, there is

[176] *Google's new downranking hits pirate sites hard*, Torrent Freak (Online) 23 October 2014.
[177] The Hon Mark Dreyfus QC MP, Second Reading Debate *Copyright Amendment (Online Infringement) Bill 2015*.

significant risk that site blocking can be implemented in an overbroad manner. For example, efforts in Australia to target specific sites resulted in the accidental blocking of approximately 250,000 websites.[178]

- ***Will website blocking injunctions actually be effective or will the infringer just continue the infringing conduct by creating new versions of the website at a different location?***
  The ISP injunction method has been ineffective overseas when dealing with persistent infringers that flagrantly flout copyright laws. In a number of these cases the rights owner has applied for a dynamic injunction (ie encompassing future infringements committed through other domain names). However, this denies the infringer's right to be heard for each action of infringement and this approach may not be considered "proportionate" under New Zealand law. In the CJEU Telekabel case, the Court referred to the Commission's guidance on the Enforcement Directive. In particular:

  > *Furthermore, injunctions may in certain cases lose some effectiveness because of changes in the subject matter in respect of which the injunction was ordered. This may be, for example, the case of website blocking injunctions, where a competent judicial authority grants the injunction with reference to certain specific domain names, whilst mirror websites can appear easily under other domain names and thus remain unaffected by the injunction.*

- ***How can the New Zealand government avoid 'scope creep'?***
  For example, in the United Kingdom, the injunction process designed for copyright infringement was extended to trademark violations with no recourse to Parliament.[179] In India, injunctions were issued against services commonly used in India (and by New Zealanders) such as URL shorteners, services designed to enable the sending of large files, general storage sites and Google Docs. This court order was quickly amended, but highlights the significant risk of site blocking orders extending to legitimate sites.[180]

- ***How can New Zealand avoid the risk of 'copyright trolls'?***
  In Germany, the preliminary injunction procedure was designed to stop the relevant infringing activity as soon as possible and the injunction proceedings are often on an ex-parte basis, low cost and fast (sometimes even within hours). While this is a laudable goal, this process has led to the rise of so-called "copyright trolls". One recent example of this is Mr McHardy, who was a former contributor to the Linux Netfilter project, which is licensed under a General Public License (GPL).[181] In the *McHardy v Geniatech*

[178] For example, the risks of significant 'over-blocking'. https://www.abc.net.au/news/2014-08-27/asic-accidentally-blocked-250,000-websites-ip-address/5701734.
[179] *Cartier International & Ors v British Broadcasting Limited & Ors* [2014] EWHC 3354
[180] Nikhil Pahwa, *World Cup 2014: 219 websites blocked in India, after Sony complaint*, Medianama (Online) 7 July 2014.
[181] http://ipkitten.blogspot.com/2019/02/copyright-trolling-abusive-litigation.html.

dispute, the initial decision resulted in the Regional Court of Cologne granting McHardy an injunction covering the entire Linux kernel. In March 2018, during the appeal proceedings in the Higher Regional Court of Cologne, McHardy withdrew his request to uphold the injunction. The Court stated that McHardy acted in a systematic manner to satisfy his monetary goals; his primary motivation was not to achieve licence compliance.

It is critical that any scheme considered in New Zealand protects website owners from being effectively held to ransom for minor infringements to avoid the appearance in New Zealand of similar copyright trolls that have developed under the German system.

- **How can site blocking laws protect the free speech rights granted under the Bill of Rights?**
  For example, the Court of Justice of the European Union (**CJEU**) has stated:

  > *In order to assess whether an injunction … is consistent with EU law, it is … necessary to take account in particular of the requirements that stem from the protection of the applicable fundamental rights.*[182]

  The CJEU found that in order to protect human rights, injunctions must provide a possibility for internet users to assert their rights, protect the fundamental rights of internet users to freedom of information, and ensures that measures are strictly targeted to bring an end to the infringement without affecting internet users who are using the provider's services to lawfully access information.[183]

- ***How to ensure transparency about any orders that are made?***
  For example, there should be a requirement to publish the details of site blocking orders that have been made, and 'landing pages' should appear if a user attempts to access a blocked site. For example, in the United Kingdom a landing page is required to not merely state that access to the site has been blocked by a court order, but also identify the party(s) who obtained the order, and state that affected users have the rights to apply to the Court to discharge or vary the order.[184]

Removals from search engines

MBIE may be aware of a recent expansion of the Australian site blocking legislation to apply to search engines. Google is not aware of any other jurisdiction where this has been proposed, and we submit that it is technically unnecessary. Further, it was introduced into Parliament with very limited public consultation, or detailed consideration of the potential impacts on Australian internet users.

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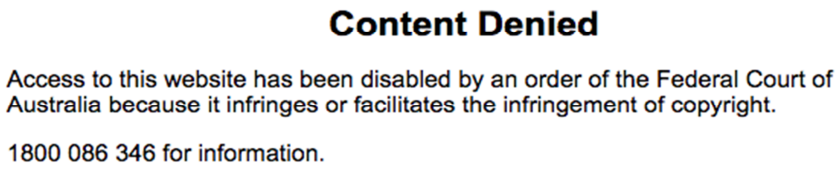
[182] *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* C-314/12 (27 March 2014) 57.
[183] Ibid 55-56.
[184] *Cartier International & Ors v British Broadcasting Limited & Ors* [2014] EWHC 3354, 32.

There is no technical need to extend a site blocking scheme to search engines. All internet users receive their internet services via an ISP. Once connected to the internet, they can then find websites either via a search engine, or by directly typing a URL into a web browser. As discussed above, Google and other search engines spend millions of dollars and engineering hours each year in demoting and removing rogue sites from search results.

If a site is subject to a site blocking order in Australia, it will be blocked at the ISP level irrespective of whether the internet user found the website via a search engine or typed in the address of the site themselves. As such, the imposition of site blocking obligations on search engines imposes additional cost and regulatory burden on search engines, with no corresponding practical benefit to rights holders.

For example, any Australian user attempting to obtain access to the blocked site www.thepiratebay.se directly from home, school or a library receives the following error message:



If a user does try and find the URL for The Pirate Bay via a search engine, clicking on the search result will lead them to exactly the same error message. Paradoxically, consumers will be less likely to see such messages if these websites' URLs are removed from search results, reducing the educative value of these notices.

Who should bear the costs of copyright enforcement?

Question 87: Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements? Google's Answer: The person who wishes to enforce their rights should pay the costs associated with enforcing those rights – including the ISP's costs.

It is a general legal principle that the person who wishes to enforce their rights should pay the costs associated with enforcing those rights. Intermediaries, including ISPs and Google, have taken their own role and responsibility in the ecosystem seriously, and will continue to invest in helping the fight against piracy.

3.6 Copyright and the Wai 262 inquiry

Google supports MBIE's proposed process for a separate work stream to fully consider the important issues raised by the Wai 262 inquiry in respect of the Act. As discussed above, Google has proudly partnered in many projects to strengthen and celebrate Te Reo and culture both in New Zealand and globally via YouTube and tools such as Google Translate.

We anticipate this proposed workstream, in conjunction with the copyright review, will enable appropriate protection for kaitiaki interest in taonga works and matuaranga Maori, as well as ensuring that the exceptions regime in the Act is conducive to this protection.

Developing an appropriate approach to copyright exceptions can be challenging and we would respectfully offer an observation about a possible approach to take into account the wider kaitiaki interest.

As we discuss above at Part 2.2, New Zealand's copyright exceptions are 'static' and limited to specific purposes or types of copying. Static exceptions can provide some certainty (e.g a school may always copy a work for the purposes of an examination,[185] or representations may always be made of certain works on public display in the circumstances set out in section 73 of the Act). However, the static nature of these exceptions do not allow flexibility to adapt to any specific considerations or sensitivities involving taonga works or matuaranga Maori. Static exceptions may also be inconsistent with the spirit of Te Tiriti o te Waitangi, which has been viewed as a living document to support an ongoing partnership.

In contrast, flexible exceptions based on a fairness assessment may provide scope for addressing cultural concerns. For example, the fairness factors in the Act require consideration of the nature of the work copied and the purpose of the copying.[186] Similarly, the United States fair use factors require an assessment of the purpose and character of the use and the nature of the copyrighted work.[187]

Please see information in Attachment 2 of the type of best practice guidelines and codes of practice that have been developed in the United States to provide tailored sector-specific advice and guidance to how fair use applies to certain industries or areas of creative or cultural uses. It may be that a flexible exception, combined with appropriate guidelines for the use of taonga works (perhaps developed as part of MBIE's suggested work stream on the Wai 262 recommendations) might represent part of developing an appropriate copyright framework for the protection of taonga works and matuaranga Maori.

[185] Section 49.
[186] Section 43(3)(a) and (b).
[187] 17 US Code s107.

Attachment 1- Google in New Zealand

Information is the critical resource of the 21st Century and Google has played a key role in facilitating access to this new commodity. In 2015, Google products supported between NZ$1-3 billion in business benefits for New Zealand companies, and more than NZ$2 billion in benefits for consumers.[188] Google helps New Zealand businesses to overcome the "double tyranny" of size and distance. By enabling Small and Medium Enterprises (**SMEs**) to promote their products to new markets, new businesses models like the "micro-multinational" have begun to emerge. These are small businesses that operate on a global scale by relying heavily on tools like AdWords and AdSense to promote and export their products around the world.

Google in New Zealand

As discussed in the submission, Kiwis have embraced Google tools such as Google Search, Google Maps and Google Translate. Google also works with content creators to bring the best of global and local content to Google users, particularly on Android. Google Play is a service that helps rights holders and creators sell their applications or content directly to Google users. It's a digital store where people can find, purchase and enjoy entertainment for their devices - from computers to tablets to smartphones. We've partnered with all of the major record labels, publishers, and movie studios to offer millions of songs and books, thousands of movies and TV shows, and hundreds of magazines that can be enjoyed across devices.

New Zealand has also been a fantastic test bed for innovation. In 2013, Google launched Project Loon, releasing thirty balloons into the sky from New Zealand's South Island. Project Loon is a network of balloons traveling on the edge of space, beaming the internet to people in rural and remote areas and helping to fill coverage gaps.

Google is also a strong supporter of the Government's digital inclusion and innovation goals. Google has been offering the Educator Professional Development Grant in both New Zealand and Australia since 2011. During this time, over 12,000 teachers have been trained through the Educator PD Grant program, which aims to equip teachers with the skills and resources they need to confidently teach computational thinking and computer science concepts in new and exciting ways.

We have also sponsored an online Field Guide for Computer Science[189] for New Zealand High Schools and the Manaiakalani Digital Teaching Academy[190] to support professional development in digital skills for teachers in low decile schools.

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[188] AlphaBeta, *Google Economic and Social Impact New Zealand* (2017) 17.
[189] Computer Science Field Guide <www.csfieldguide.org.nz/>.
[190] Manaiakalani Digital Teaching Academy <http://www.manaiakalani.org/>.

Google's economic contribution to New Zealand

Economists broadly agree that the digital economy has improved living standards in areas that are not captured in official statistics. For example, products like Google Search have made it vastly easier for consumers to access information, and free tools Google Maps have reduced the need for consumers to rely on expensive add-on devices like GPS units. The digital era has also improved the quality of leisure by enabling access to platforms like YouTube and streaming services. These positive impacts on the everyday lives of Kiwis are not captured in official GDP estimates.

In order to measure Google's total economic impact in New Zealand, a 2017 report by Alpha Beta analysed three separate benefits that Google provides the Kiwi economy:

- *Business benefits:* Advertising, sales and labour productivity;
- *Consumer benefits:* Time saved, information and improved quality of life; and
- *Social benefits:* Innovation, education and philanthropy.

Business benefits

Services like Google AdWords help local businesses to find potential customers and allow local creators to monetise their content online. New Zealand businesses who are advertising through Google products earn between NZ$20 – $100 million through displaying ads on websites and videos, and AdWords supports more than NZ$2.9 billion in revenue uplift for businesses in New Zealand overall.[191] Products like these help small-scale New Zealand entrepreneurs and creators to reach large-scale audiences. The process is simplified and the costs are kept low to ensure that there are minimal barriers to accessing to widest possible reach. Tools like these have helped over 200,000 SMEs in New Zealand to compete with bigger businesses despite the overall global economic slowdown.

With access to a global customer base, SMEs are able to overcome the obstacles of New Zealand's relatively small domestic market and isolated location.

Consumer benefits

The benefits that Google products provide to New Zealand consumers are not always captured within GDP statistics. For example, using Google Search to complete a task faster than accessing a physical library, using Google Maps to reach a destination sooner or using Gmail everyday to stay connected. These activities increase productivity, but the results may not be included in measures of economic growth. Alpha Beta estimates that Google Search saves each New Zealander more than five days per year, which translates into consumer benefits of more than NZ$750 million.

[191] AlphaBeta, *Google Economic and Social Impact New Zealand* (2017) 10.

Social benefits

Google provides many social benefits to New Zealand society that may not accrue directly to any one company or individual. In economic terms, these are known as "spill-over benefits", which may not appear in measures of GDP today, but will have a lasting impact on New Zealand's economy over time.

In 2013, thanks to the work of a passionate group of volunteers, Google was able to add Te Reo Maori to Google Translate. For minority languages such as Te Reo Maori, Google Translate provides more ways for the language to be seen and used, and greater understanding for those who are unfamiliar with the language. The online presence of small languages keeps helps in keeping these languages relevant in the age of the Internet and globalisation, encouraging minority language use by children who are ultimately responsible for bringing the language to future generations.

The social benefits provided by Google's tools can often be seen in unlikely places. For example, Google-built AI software has been used to help recognise the calls of endangered species of birds native to New Zealand.[192] Faced with an overwhelming amount of data to analyse (tens of thousands of hours of birdsong), researchers at Victoria University and NEC New Zealand utilised AI software first developed by Google to recognise different bird calls. This information could then be used to measure the activity of endangered species at specific times and locations.

YouTube in New Zealand

YouTube empowers the world to create, broadcast, and share video in furtherance of its mission to give everyone a voice and show them the world. More than 1.9 billion people visit YouTube every month. Each day these users watch more than a billion hours of video and generate billions of views. More than 400 hours of video are uploaded to YouTube every minute, spanning every conceivable topic from politics to comedy, from sports to religion.

According to the 2018 New Zealand On Air study, YouTube reached 42% of all New Zealanders daily, up from 35% in 2016.[193]

YouTube supports over NZ$450 million in benefits to consumers in New Zealand. These benefits represent the value that individuals place on being able to easily access the vast collection of free videos on YouTube. Kiwis use YouTube to learn new skills from watching tutorials such how to tie a tie; to relax by consuming entertainment content like variety shows; and to gain new knowledge through informative videos.

[192] Jamie Morton, *'Google built AI software boosts NZ birdsong study' NZ Herald* (Online) 19 September 2017.
[193] *'Where are the audiences?'* 2018, New Zealand on Air, 1 August 2018.

Each New Zealander views an average of 300 hours of YouTube a year, and a recent survey reveals that over 2.5 million New Zealanders watch on average more than 50 minutes of videos on YouTube per day.[194] This product is valuable to consumers: research by AlphaBeta shows that Kiwis would rather have access to YouTube than receive more than a NZ$180 discount on their internet bill each year (roughly the equivalent of an annual subscription to Netflix).[195] Despite this value, YouTube remains completely free to Kiwi consumers.

While free to watch for users, YouTube represents a significant revenue stream for creators. Content ID is an industry leading copyright management system that gives rights holders the tools they need to effectively monitor and manage their works on YouTube. For a more detailed discussion of Content ID see Part 1.1.

Using Content ID, rights holders can be automatically notified of user-uploaded videos that contain their creative work, and can choose in advance what they want to happen when those videos are detected. Creators are able to choose to monetise their content, leading to significant new revenue streams for creators. As discussed in the submission, the music industry has earned over US$6 billion in total ad revenue from YouTube.

As discussed in the submission, our YouTube Partner Program enables New Zealand content producers (large and small) to reach global audiences and directly monetise their content by displaying advertisements and sharing revenue. More than 45% of local New Zealand content YouTube content views originate from overseas.[196] In New Zealand there are 100 YouTube creators who now have at least 100,000 subscribers to their channels, making YouTube a significant source of income for many New Zealand creators. YouTube provides a platform for aspiring artists and creators to make a living from their creativity.

Google is passionate about encouraging creativity and innovation in New Zealand. Through initiatives like Skip Ahead, a partnership between Google New Zealand and NZ On Air, Google has helped Kiwi creators to find their place on the global stage that is YouTube.

In 2019, Google is doing even more to support this emerging local industry by hosting creator workshops that we be offered around New Zealand, including the regions. This initiative will allow us to meet, teach and work with more local creators in more parts of the country and will help to kick start the careers of even more Kiwis.

[194] AlphaBeta, *Google Economic and Social Impact New Zealand* (2017) 4.
[195] Ibid 45.
[196] Ibid 15.

Attachment 2 - Aligning the Principles of Flexibility and Certainty

Flexible exceptions are based on clear principles - this is no different to other areas of law such as privacy law, consumer protections, or antitrust laws. Principles-based regulations are capable of being applied to new challenges and allow for legislation to be 'future-proofed' against uses of copyright material that have not yet been thought of.

In Google's view the critical aspect of a copyright system that is fit for purpose in a digital age is that there is scope for the flexibility that is required to enable new creative works, and to allow both creativity and innovation to flourish. However flexibility in copyright exceptions can be achieved in a number of ways. Some countries, for example Singapore, have retained purpose-based fair dealing exceptions (e.g fair dealing for the purpose of criticism or review, fair dealing for the purpose of research etc) but have added an open--ended, flexible exception that is capable of adapting to new and unforeseen uses that may not fit within the scope of any of the existing exceptions, and doing so without the need for legislative revision. Others, such as Israel, have adopted a fair use provision, but also included a regulatory power for the Minister to clarify the conditions under which certain uses are deemed lawful.[197] South Africa has decided to introduce a number of new specific exceptions as well as a general open fair-use style exception[198].

Recent scholarship in the US has highlighted the extent to which fair use is in fact much less unpredictable than many of its critics suggest. Examples include a 2009 "qualitative assessment" of US fair use case law by Professor Pamela Samuelson (in which she found that it is generally possible to predict whether a use is likely to be fair use by analysing previously decided cases in the same policy cluster),[199] and a 2012 empirical analysis of fair use case law by Matthew Sag, which found that the fair use doctrine is "more rational and consistent than is commonly assumed".[200] Sag found that there are consistent patterns in the case law, which provide assistance to individuals, businesses, and lawyers in assessing the merits of particular claims to fair use protection. In the UK, economics professor Antony Dnes - in his report previously referred to above - reached the same view. His report to the UK Government said "[a]s a matter of observation and from an assessment of US cases, a system of copyright law adhering to a doctrine of fair use does not appear to be characterized by unusual levels of uncertainty".[201]

Significant certainty can also be achieved through the use of guidelines and codes providing examples of uses that should and should not be considered to be fair uses of copyright materials. Although never binding, reference to industry customs in relation to fair use can be

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[197] *Copyright Act 2007* s19(2) (Israel).
[198] See http://www.ip-watch.org/2018/07/24/south-africas-proposed-copyright-fair-use-right-model-world/.
[199] Pamela Samuelson, *'Unbundling Fair Uses'* (2009) 77 *Fordham Law Review* 2537.
[200] Matthew Sag, *'Predicting Fair Use'* (2012) 73:1 Ohio State Law Journal, 47-91.
[201] Antony W. Dnes, *A Law and Economics Analysis of Fair Use Differences Comparing the US and UK*, 2011.

helpful. In the United States, significant guidance in relation to fair use has been provided by the developments of codes and best practice statements such as:

- Code of Best Practices in Fair Use for Software Preservation;[202]
- Code of Best Practices in Fair Use for the Visual Arts;[203]
- The Documentary Filmmakers' Statement of Best Practices in Fair Use;[204]
- Code of Best Practices in Fair Use for Online Video;[205]
- Code of Best Practices in Fair Use for Media Literacy Education;[206] and
- Association of Research Libraries' Code of Best Practice for Fair Use.[207]

In the case of the Documentary Filmmakers' Statement of Best Practices in Fair Use, these guidelines have been considered to provide sufficient certainty that they have been accepted by major insurance companies for errors and omissions insurance for fair use claims.[208]

[202] Patricia Aufderheide et al, *Code of Best Practices in Fair Use for Software Preservation* (2019).
[203] College Art Association, *Code of Best Practices in Fair Use for the Visual Arts* (2016).
[204] Association of Independent Video and FIlmmakers et al, *Documentary Film Makers Statement of Best Practices in Fair Use* (2005).
[205] Peter Jaszi, *Code of Best Practices in Fair Use for Online Video* (2008).
[206] Media Education Lab, Temple University et al, *Code of Best Practices in Fair Use for Media Literacy Education* (2008).
[207] Association of Research Libraries et al, *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012).
[208] Patricia Aufderheide Fair Use Put to Good Use: 'Documentary Filmmakers' Statement' Makes Decisive Impact August 2007.

The Ultimate Google Guide to Copyright: Stuff You Need to Know

Kiwis love watching great content online. More of us than ever are using the web, and for younger people in particular, it has become the most valuable source of entertainment.

We know how much time and effort goes into making new content to keep your fans and subscribers coming back for more. So naturally you want to protect that content, right?

Fortunately copyright infringement is rare, but it does happen. That's why Google works hard to support you, the creators and artists who drive this exciting new industry.

One way we can do this is to protect your copyright and deter online piracy. We invest in a suite of tools you can use to report abuse, and manage copyrighted content. We also work with industry leaders to set the standard for fighting online piracy.

This is a brief guide to using Google's tools. We've written it to help you manage your content easily, so you can spend more time creating and less time worrying about stuff like copyright!

Google

YouTube

YouTube is the world's largest online video platform, with over 400 hours of content being uploaded every minute for audiences all over the globe. YouTube respects the rights of copyright holders and publishers. We've invested heavily in copyright and content management tools to give rights holders control of their content on YouTube[1].

You can help protect your copyright on YouTube by:

- **Requesting Takedown**
  You can submit takedown requests through the **YouTube Copyright Center -** (https://goo.gl/04O7mj), which offers an **easy-to-use webform -** (https://goo.gl/muTbE2). It also contains plenty of information to educate YouTube users about copyright.

- **Using Content ID**
  Content ID - (https://goo.gl/Twk3CB) is system of copyright and content management tools that give copyright owners control of their content on YouTube. Through Content ID, videos uploaded to YouTube are scanned against a database of files that have been submitted to YouTube by copyright owners. When a match is made between the owner's content and the uploaded content, copyright owners choose which policies to apply - monetizing, tracking, or blocking. Over 98% of copyright issues are successfully resolved via **Content ID**.

- If you meet **specific criteria -** (https://goo.gl/SfVlqY) you can use the Content ID system directly. In particular, you must own exclusive rights to a substantial body of original material. If you don't meet the criteria, you can get assistance through a **service provider -** (https://goo.gl/wcJo4h) who offers Content ID management services for their customers.

Sources: 1Internet Trends in New Zealand 2007-2015, World Internet Project New Zealand.

Google Search

The internet is a pretty huge place. So it's inevitable there will be some people who search for pirated content from time to time. But to put things into perspective, "Katy Perry was searched 14,812 times more often than "Katy Perry free download" in 2015.

Despite the small number of piracy related searches, Google works hard to prevent this problem by stopping certain web pages appearing on Search. It's always a good idea to protect your copyright on Search by:

- **Reporting alleged copyright infringement**
  You can submit takedown notices using a quick **web-form -** (https://goo.gl/R9Ukwo)**,** and we process those notices, on average, within six hours. Google then uses those notices to demote sites for which we receive a large number of valid takedown notices, making them less visible in search results. To see more details on submitting copyright removal requests, please see **this resource -** (https://goo.gl/NISW7s).

Google runs other initiatives to help fight online piracy, including removing advertisers from our ads network who infringe on copyright.

Since 2012, we've routed almost 100,000 sites from our AdSense network for violating copyright policy. The vast majority of these ejections were caught by AdSense's own proactive screens. Google has also terminated more than 10,000 AdSense accounts for copyright violations.

- Almost all AdSense ad formats include a link that permits a copyright owner to report sites that are violating Google's policies. Copyright owners may also notify Google of violations through a **webform -** (https://goo.gl/JaL0yX). Each time Google receives a valid copyright removal notice for Search, we also blacklist that page from displaying any AdSense advertising in the future.

To learn more about Google's efforts aimed to fight online piracy, take a look at our **annual report -** (https://goo.gl/6xOEk8), or explore our global programs aimed to support online creators community, such as **YouTube Spaces -** (https://goo.gl/bwiS30) and Skip Ahead **(AU, NZ) -** (https://goo.gl/rrSWh8).