

DISCUSSION PAPER ON INTERNET/COPYRIGHT ISSUES

A Paper to Spark Discussion on Internet-related Copyright
Issues in Advance of the Copyright Act 1994 Review

InternetNZ is proud to present this Discussion Paper on Internet & Copyright Issues.

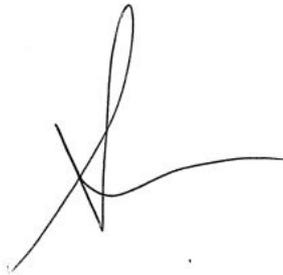
We have commissioned this work as a means to start a conversation about how Copyright Law in New Zealand can be enhanced, developed and improved. Copyright is a dynamic area of intersection with the Internet; the challenges that this intersection creates are ones that we need to grapple with in New Zealand if we are to *promote the Internet's benefits and uses, and protect its potential*.

This paper seeks to do this though evaluating international trends in both user rights to copyright and in legislative responses. We have commissioned this not only as a tool to assist legislators and Government Agencies in any potential review of Copyright Law in New Zealand, but also to serve as a resource for the Internet Community in understanding the present issues and their ramifications.

We intend this to be the start of our work in this area in 2015. We will be engaging with our members and with the public at large to gather further perspectives and refine our input into this important policy debate. The mode and timing for this engagement will be announced via our email lists and on our website – www.internetcz.net.nz.

In the meantime, any commentary on this paper may be directed to me at Andrew@internetcz.net.nz.

We thank Chalmers and Associates for their work on this issue for us.



Andrew Cushen
Work Programme Director

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Executive Summary

New Zealand is overdue for a review of its copyright law. A review was scheduled to take place in 2013. It was postponed by the Trans Pacific Partnership agreement negotiations, because the text of the agreement could require that New Zealand implement new rules in its copyright law. If New Zealand agrees to sign, the copyright-related obligations in the treaty will then be written into national law. The implementation process will happen as part of the Review.

In the meantime, given the complexity of Internet-related copyright issues, as well as developments unfolding abroad, InternetNZ has commissioned this paper to spark discussion on copyright reform options. The paper describes a handful of Internet/Copyright issues and possible approaches to solutions.

For example, what does the “right to copy” mean in the Internet environment? How have other jurisdictions, and New Zealand, dealt with this question? How are activities like text and data mining, application programming interfaces, user-generated content, and routing around geoblocking restrictions treated by current law? Might these activities bring greater social and economic benefit if copyright exceptions were created for them? Do developments in technology mean new exceptions are needed? Should New Zealand introduce more flexibility in its copyright exceptions?

In terms of answering these questions, this paper suggests two ways to consider solutions. Copyright rights, and the exceptions to those rights, are two sides of the same coin. One can reassess the right, and one can reassess the exception.

In the first instance, the rights side of the coin is assessed. Has the Internet changed the meaning of the right to copy? Are there instances where the same activity is subject to two different rights? If so, what are the complications of having overlapping in rights from a public policy perspective?

In the second instance, the exceptions side of the coin is assessed. Has the Internet created a need for review or addition of “standalone” exceptions to the Act? Or, would New Zealand be better served by an exception based upon a fairness test, the rules for which are outlined in the Act?

Jurisdictions generally take two different approaches to creating exceptions based on fairness. Under a prescribed approach (e.g. fair dealing), Parliament creates a list of reasons, or purposes, for why someone could use a copyright work without permission. This list is then put into law. During a copyright infringement case, the court cannot consider purposes that are not specifically listed (e.g. parody) in the fair dealing exception. In practice, any new use that is not listed will generally be considered an infringement.

Under the other, more flexible approach (e.g. fair use), any purpose can be considered by the court as potentially being covered by the exception. The court then uses a test to determine overall whether the use of the work was fair. These two approaches share much in common, but there are some key differences which set them apart.

Introduction

New Zealand is overdue for a review of its copyright law.

The last major update to the Copyright Act 1994 (the Act) came via the Copyright (New Technologies) Amendment Act 2008 (the 2008 Amendments), the purpose of which was to “ensure that the Act keeps pace with developments in digital technology and...in many respects make New Zealand’s copyright law consistent with new international standards.”¹ The 2008 Amendments were to be reviewed after five years.²

In July 2013 the Ministry for Business, Innovation and Employment (MBIE) announced that “the Government has agreed that this [copyright] review will be delayed until the conclusion of the on-going Trans Pacific Partnership Negotiations [because] it would be impractical for a review to be undertaken before negotiations have concluded.”³

In the Cabinet paper explaining the delay, the Minister acknowledged that there remains a “significant demand for a broad review of the Act,” “that it is still the Government’s intention to undertake a review,” and that “it is likely that many of the provisions setting out exceptions to copyright are now out of date with current technology.”⁴

New Zealand’s copyright review (the Review) may well be delayed pending the outcome of the Trans Pacific Partnership agreement (TPP) negotiations, but that does not mean that discussion on Internet-related copyright reform issues – referred to in this paper as “Internet/Copyright” issues for brevity’s sake – cannot take place in the meantime. Stakeholders and the policy development process can only benefit from more time for discussion and idea exchange in advance of the Government’s formal consultations for the Review.

How this Paper is Organised

The paper is organised into two parts.

PART I

Part I gives context to the complicated interplay between copyright law and the Internet environment before turning to four Internet/Copyright issues that could be considered as part of the Review. First, challenges that the Internet environment puts to the traditional concept of the

¹ Office of the Associate Minister of Commerce Economic Development Committee Cabinet Paper “[Digital Technology and the Copyright Act 1994: Policy Recommendations](#)” (October 2005) (2005 Cabinet Paper) at 1.

² 2005 Cabinet Paper, at 49. CAB Min (05) 42/1.

³ [MBIE website](#); See also Susan Chalmers “Our Copyright Review, in Context” (14 Jun 2013) Auckland District Law Society [website](#); Clive Elliott QC “Copyright Act review overdue” (31 January 2014) New Zealand Law Society [website](#).

⁴ Office of the Minister of Commerce Economic Growth and Infrastructure Committee Cabinet Paper “Delayed Review of the Copyright Act 1994” (July 2013) (2013 Cabinet Paper) at 5.

'right to copy' are discussed. Then, four emerging issues that have been picked up in recent copyright debates are addressed:

1. Text and data mining (TDM),
2. Application Programme Interfaces (APIs),
3. Geoblocking, and
4. User-generated content (UGC).

Some jurisdictions have created or proposed copyright exceptions in these areas.

PART II

Part II explores two ways to create solutions for the issues identified in Part I. The first way is to reassess the nature of copyright rights. The second is to reassess the scope and nature of the exceptions.

When reassessing a right - in the case of this paper, the right to copy - it is important to ask how that right overlaps with other rights granted under copyright, for example, the right to communicate the work to the public, or the right to perform it in public. When significant overlap exists, the user will have to pay several licenses to do one thing, sometimes to multiple parties. The European Union explored this question during its 2013 Public Consultation on the review of the EU copyright rules (EU Consultation).⁵

As for exceptions, one option is to create "standalone" exceptions in response to specific technological use cases or public interest concerns.⁶ In this case, the scope of the exception is set in the statute and there is no need for a fairness assessment. For example, in order to increase access to reading materials for the visually-impaired, New Zealand (like many countries), has a standalone exception that allows copying without rights holder permission in order to produce braille versions of books, provided that braille versions are not available in the market.⁷ Another example is the exception for temporary copies, also known as "transient reproductions" of a work, which is discussed below.⁸ The fairness of copying in this case need not be assessed.

The "fairness assessment" is another option for recognising copyright exceptions. Fairness tests exist in addition to standalone exceptions in the copyright statute. These tests are generally structured in one of two ways.

In one, Parliament creates a list of reasons, or purposes, for why someone can use a copyright work without permission. This list is then put into law. Only the listed purposes can be

⁵ [Webpage](#) of the European Commission EU Single Market, *Public Consultation on the review of the EU copyright rules*.

⁶ Consider s 83 of the Copyright Act 1994, which allows one to record a show for the purposes of lodging a complaint with the Broadcasting Standards Authority, for example. This is not infringement so long as the recording is deleted after the complaint has been laid.

⁷ Copyright Act 1994, s 69.

⁸ Copyright Act 1994, s 43A.

considered. For example, in New Zealand, copying something to include it within a report could be assessed as fair, but copying the same thing to make a parody could not; parodies are not a listed purpose. This prescribed approach is referred to as “fair dealing.” New Zealand, Australia and Canada, for example, use this approach.

In the other, more flexible approach, the list of purposes in law is advisory or illustrative. Purposes that are not listed can still be assessed as being fair. This approach is referred to as “fair use.” The United States and Singapore, for example, use this approach.

When considering which fairness approach to take, policymakers should ask whether it is better, especially in the Internet environment, to list purposes exhaustively in advance, or to allow users and courts some flexibility in being able to assess and potentially accommodate new uses and purposes.

A number of jurisdictions have recently conducted or initiated reviews of their copyright laws, including Australia, Canada, Ireland, the European Union, the United Kingdom, and the United States. This paper draws upon the discussions that have occurred during these reviews.

Part I - Internet/Copyright Issues

Challenging fundamental concepts: Thinking about what it means to 'copy' in the Internet environment

Copyright law deals with the ability of a person who holds rights in a creative work (the rights holder) to control how the work is used, and to receive payment when it is used. The law also provides the user of the copyright work (the user) with exceptions to this right, which protect wider public interests. This “balance” between the rights holder and the user serves the overarching purpose of copyright law, which is to promote the public good.⁹

Copyright law makes reference to *copies* specifically, that is, refers to the right to *copy*, for the historical reason that the law of copyright emerged in response to the invention of a technology that made copying easier – the printing press. From its inception, and to this day, the law of copyright has empowered the rights holder to stop others from making copies of their works (subject to exceptions, of course).

This approach to copyright law made sense in the age where the making of a physical copy resulted in something functionally equivalent to the licensed original (for example, a paper copy of a book), which could be consumed in its place. This is still the case with some, but not all, digital copying – for example making a copy of a music file or burning a CD, instead of purchasing one.

However, the Internet and digital technologies challenge the fundamental notion of ‘copying’ and when a copy may be seen as a substitution for the original. The word ‘copy’ takes on added meaning because the Internet makes temporary copies of content as part of how it works. Copies are made not only to be consumed, but for information to be communicated. Copying is in effect a design feature of how information is transmitted over networks.

At the 2012 Internet Governance Forum, Vint Cerf, known to many as one of the inventors of the Internet, was challenged by the idea of how the Internet could even function were a right to authorise or prohibit temporary electronic copies on the network fully recognised and enforced by rights holders:¹⁰

The Internet is made up of store and forward routers and intermediate devices that hold packets for varying periods of time. The packets contain the content. So if there is some prohibition on storing things temporarily anywhere in the Internet I honestly don't know how that would be enforced. In fact I'm not even sure I understand how the Internet would work, given the

⁹ The language of England's first copyright statute, the Statute of Anne, very plainly reflects a utilitarian purpose: “An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned.” 1709 (GB) 8 Ann c 19. Article 1, Section 8, Clause 8 of the United States Constitution empowers Congress “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries.”

¹⁰ “Rethinking Copyright: Can we Develop a Common Set of Principles?” <http://friendsoftheigf.org/session/378> at 1:05:12.

fundamental nature of store and forward networking which is you store something for a while and then you get rid of it, to move it to its destination.

- Vint Cerf

As the quote from Mr. Cerf makes clear, some ways of attempting to cover activities on the Internet – in this case, some of its technical activities – under traditional copyright concepts – which emerged in the times of the printing press – are inherently problematic.

Temporary copy rights

The modern origins of the temporary copy concept are found in the 1996 World Intellectual Property Organisation (WIPO) “Internet Treaties.” These treaties recognise that the right to copy, and the exceptions to that right, “fully apply in the digital environment.”¹¹ Further, the “storage of a protected work in digital form in an electronic medium constitutes a reproduction,” or copy of that work, according to the treaties.¹² Similar language requiring recognition of a temporary copy right can be found in many US free trade agreements, and appears to be included within draft text of the TPP.¹³

The states which have agreed to this language have translated it into their own laws in different ways over the years. (Note that New Zealand has refrained from signing the Internet Treaties but has addressed the temporary copy issue). The scope of this right over temporary copies remains unclear however, especially in relation to Internet services and activities.

THE EUROPEAN UNION

The 2001 EU Copyright Directive, which implements the Internet Treaties into EU law, provides for a temporary copy right, as well as an exception to that right.¹⁴ This right has existed in the EU for over ten years, but its application continues to be debated.

During the 2013 EU Consultation for example, stakeholders were asked whether “the viewing of a web-page, where this implies the temporary reproduction of a work or other subject matter protected under copyright on the screen and in the cache memory of the user’s computer, either in general or under specific circumstances, [should] be subject to the authorisation of the rights holder?”¹⁵

On one hand, many rights holders responded by saying that “browsing should be subject to the rights holders’ authorization.”¹⁶ Rights holders would wish for the right to copy to apply,

¹¹ WIPO Agreed Statements concerning the WIPO Copyright Treaty (Article 1(4)) and the WIPO Performances and Phonograms Treaty (Articles 7, 11 and 16).

¹² Ibid.

¹³ See negotiation draft (an unofficial leak) as at October of 2013, available via [Wikileaks](#), Article QQ.G.3 {Copyright and Related Rights}.

¹⁴ [Directive](#) 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society at art. 2 [the right] and art 5(1) [the exception] (OJ L 167 of 22.6.2001) (EU Copyright Directive).

¹⁵ European Commission [Public Consultation](#) on the review of the EU copyright rules (May 2013), question 12.

¹⁶ European Commission [Report](#) on Responses to the Public Consultation on the review of the EU copyright rules (July 2014) (EC Report), page 18.

allowing for the recovery of payment from one or more parties for the temporary copies made during browsing activity.

On the other hand, “almost all end users/consumers consider that browsing should not require rights holders’ authorisation as it is akin to reading. Reading, viewing or simply listening to a work has never been subject to copyright and this should not change.”¹⁷ Users and Internet intermediaries simply would not want the right to copy to apply to the Internet environment in this way because, amongst other reasons, it would create costs where they do not currently exist.

THE UNITED KINGDOM

This same question – whether browsing the web should require rights holder authorisation because of the temporary copies made – was recently addressed by the United Kingdom Supreme Court. In this case, the issue was whether “temporary copies retained on the screen or the [I]nternet cache are infringing copies unless licensed by the rights owner.”¹⁸ The Supreme Court said no:¹⁹

[I]f it is an infringement merely to view copyright material, without downloading or printing out, then those who browse the internet are likely unintentionally to incur civil liability, at least in principle, by merely coming upon a web-page containing copyright material in the course of browsing. This seems an unacceptable result, which would make infringers of many millions of ordinary users of the internet across the EU who use browsers and search engines for private as well as commercial purposes.

- United Kingdom Supreme Court

The Supreme Court referred the matter on to the Court of Justice of the European Union, which ruled in June of this year that on-screen copies and cached copies do not infringe the EU’s temporary copy right because they qualify for the corresponding exception in the EU Copyright Directive.²⁰

The EU and UK provide two examples of how the scope of the right to copy in the Internet environment is being handled. How has New Zealand approached this quandary?

NEW ZEALAND

New Zealand examined this Internet/Copyright issue ten years ago, during the Digital Copyright Review (which led to the 2008 Amendments). The Ministry of Economic Development (MED), which directed the review, distinguished temporary copies that are ‘stored’ from temporary copies that are ‘transient’ and asked stakeholders:²¹

¹⁷ Ibid.

¹⁸ Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited [2013] UKSC 18 at [2].

¹⁹ Ibid at [36], emphasis added.

²⁰ CJEU [Case C-360/13 Public Relations Consultants Association v Newspaper Licensing Agency and Others](#) (5 June 2014); see Elonora Rosati “Breaking News: CJEU says that you can keep browsing the internet without (copyright owners’) permission” (5 June 2014) IPKat [weblog](#).

²¹ Ministry of Economic Development [Position Paper](#) “Digital Technology and the Copyright Act 1994” (December 2002) (MED Position Paper) at 36.

1. Whether the existing definition of copying is broad enough to allow copyright owners to prohibit unauthorised copying of material in digital form...('storage').
2. Whether the definition of copying should be amended to address explicitly incidental and temporary copies that are automatically made by computers and communications networks as a result of technical processes ('transient copying'), for example, caching or the creation of a history file.

On the first question, the MED concluded that the definition of copying in the Act covered both stored and transient copies and thus (on the second) "liability for unauthorised copying could... arise in relation to transient and incidental copies. For example, copies created in a computer's random access memory ('RAM') when a user browses the World Wide Web may give rise to infringement."²²

Though the MED said that "it is highly doubtful that protecting transient copies that are automatic and part of a technical process would play a significant role in encouraging the creation of new works,"²³ it nonetheless recommended that a specific exception be created "for transient copying undertaken automatically by computers or communications networks as a result of an automatic or inevitable technical process."²⁴ This is now recognised in Section 43A of the Act.

So, while the MED did not expressly expand the right to copy to include temporary (in this case 'transient') copies, it did create a specific exemption for them. This goes to suggest that, in reassessing the right, the MED found it to be potentially too broad in the Internet environment, which is why an exception was introduced.

The Review could ask whether the wording of this exception remains adequate in light of the changing Internet landscape. New services and technologies,²⁵ as well as international legal trends,²⁶ might support a revisit to the Section 43A language. An alternative approach, as explored in Part II, is to reassess the exception's corresponding right - to copy. As discussed in Part II, the right to copy can coincide with the right to communicate a work in the digital environment, because sending data over the Internet necessarily means to make a copy of it. Considering communication of works to be the same as copying them, both of which are restricted acts in New Zealand's copyright law,²⁷ can be unworkable from a technical standpoint and is a fundamental Internet/Copyright issue.

²² MED Position Paper at 45.

²³ *Ibid* at 47.

²⁴ Copyright Act 1994, s 43A.

²⁵ Cisco estimated that streaming traffic increased by 56% during the five year span of 2008 to 2013. See Cisco [Visual Network Index: Forecast and Methodology, 2008-2013](#), p 10.

²⁶ In light of the EU temporary copy exception examples provided, it is important to note that New Zealand's sister exception differs in some aspects, but a discussion on the matter would be rather technical and beyond the scope of this paper.

²⁷ Copyright Act 1994, ss 16(1)(f), 16(1)(a).

Discussion Questions

1. When does it make sense to treat a digital copy the same as a tangible copy? Is it a question of technology, how the copy is used, or something else?
2. Should Section 43A - New Zealand's exception for transient copies - be revisited during the Review? Why or why not?
3. Should the right to copy interact with the right of communication to the public? Should there be any overlap? Should overlap be specifically avoided?

Four emerging Internet/Copyright issues

Text and data mining (TDM), user-generated content (UGC), application programme interfaces (APIs) and geoblocking are four illustrations of modern problems awaiting policymakers at the intersection of Internet policy and copyright law. These Internet/Copyright issues could be considered during the Review.

A number of jurisdictions have reviewed these issues and, in the case of TDM, UGC and geoblocking, enacted or proposed standalone copyright exceptions for them. In the case of APIs, major litigation in the US deemed APIs to be copyrightable, but the question remains if using another's API in one's own work can be considered 'fair use.'

TEXT AND DATA MINING

Text and data mining (TDM) enables people "to extract, but also to crawl, process, compare, copy, analyze, retrieve, interpret, search, sort, parse, [and] remove" data within a document.²⁸

TDM has commercial and non-commercial applications alike:²⁹

Businesses use data and text mining to analyse customer and competitor data to improve competitiveness; the pharmaceutical industry mines patents and research articles to improve drug discovery; within academic research, mining and analytics of large datasets are delivering efficiencies and new knowledge in areas as diverse as biological science, particle physics and media and communications.

- Jisc Report on *The Values and Benefits of Text Mining*

TDM has become a copyright issue because it involves making a temporary copy of the (lawfully acquired) original in order to 'data mine' it. Put simply, if one were to buy an online

²⁸ 2014 EU [commissioned report](#) *Study of the legal framework of text and data mining (TDM)*, 9-10 (EU TDM Report). At 9. As explained by the UK Government in 2011 "Automated analytical techniques such as text and data mining work by copying electronic information, for instance articles in scientific journals and other works, and analysing the data they contain for patterns, trends and other useful information." United Kingdom (HM Government), "Modernising Copyright: A modern, robust and flexible framework", Government response to consultation on copyright exceptions, Annex E: "Data analytics for non-commercial research" (August 2011) p 36.

²⁹ [Report](#) by Jisc (March 2012).

article and then duplicate it by loading it into the TDM software, it is the duplicated copy at issue. Should such temporary copies qualify for an exception? Or should rights holders be paid for the temporary copies made in order mine the data of their works?

In the United Kingdom

Following recommendations in the 2011 Hargreaves Review of Intellectual Property and Growth (Hargreaves Report),³⁰ the United Kingdom created an exception for TDM for non-commercial research, but not commercial TDM.³¹ The purpose of the TDM exception is to promote research and better align the UK copyright regime with the following principles, adopted by the government in 2012:³²

1. The copyright framework must continue to incentivise creators of content and support them in protecting their rights from unlawful use;
2. Where possible, barriers to competition and growth should be reduced;
3. There are areas of life where copyright should not interfere.

The exception for TDM appears to have been, in the main, created in furtherance of the second principle. The UK government made the following observations in relation to a TDM exception:³³

[U]nder current conditions, research projects may in some cases require specific permissions from a large number of publishers in order to proceed. The Government has heard that the current requirement for specific permissions from each publisher is in some cases an insurmountable obstacle, preventing a potentially significant quantity of research from taking place at all. ... Evidence provided to the consultation suggests [a TDM exception] would benefit researchers by £124m each year, and given the strength of the UK research base and the growing importance of data sharing/re-use this has a potential to be much higher if exploited effectively.

- HM Government Report Modernising Copyright: A Modern, Robust and Flexible Framework

The UK exception allows one to make a copy “for text and data analysis for non-commercial research.”³⁴ New Zealand law does not have this specific exception, though the temporary copies made during TDM could arguably be covered under Section 43A (discussed in the previous section), or a ‘fair dealing’ provision (discussed in Part II).

³⁰ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011).

³¹ The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 introduced the TDM exception last June. It amends the Copyright, Designs and Patents Act 1988.

³² HM Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (December 2012), at 2.

³³ *Ibid*, at 37.

³⁴ The language of the provision can be found [here](#).

Discussion Questions

4. Are uses of text and data mining tools being impeded by the Copyright Act?
5. What benefits would adding a TDM exception to the Act bring to New Zealand? What costs?
6. If such an exception were introduced, should it cover both commercial *and* non-commercial activities?

APPLICATION PROGRAMMING INTERFACES

Another pressing Internet/Copyright issue is whether Application Programming Interfaces (APIs) should be protected by copyright, and if so, how? Unsurprisingly, given the name, APIs are key to the interoperability of applications. APIs have been described as “digital glue”³⁵ and have been likened to the common “noun or verb.”³⁶

If a piece of software offers an API, you can build applications that plug into that piece of software. Using the APIs for Apple’s iOS mobile operating system, for instance, you can build an application that runs on the iPhone. And using the Facebook APIs, you can plug that application into Facebook. It’s little more than a way of sending and receiving data.

- Cade Metz, Wired Magazine

In the United States

In May of last year, in a case between Oracle and Google, one US Federal court recognised that APIs can fall within the scope of copyright protection, although they might qualify for an exception under fair use.³⁷

The ruling is controversial because it could extend copyright protection to technologies which are proving to be the building blocks – or at the very least the mortar between those blocks – of modern Internet economies.

When Oracle purchased Sun Microsystems in 2010 it acquired the widely-used Java API. The company then sued Google for having incorporated some of the API into its Android platform for mobile phones. “Oracle’s main copyright claim was that Google’s Android platform infringed copyright because it copied the “structure, sequence, and organization” of 37 Java APIs without permission.”³⁸

Ruling in favour of Oracle, the court reasoned that copyright protection extends to such “structure, sequence, and organization” in code, despite a provision in the US Copyright Act, commonly referred to as the “idea/expression dichotomy,” that basically says that copyright

³⁵ Byron Deeter, The API Economy is Coming, and Fast [Venture Beat News](#) (31 Aug 2013).

³⁶ Cade Metz, If you can Copyright an API, what else can you Copyright? [Wired](#) (15 May 2012).

³⁷ *Oracle America Inc. v Google Inc.*, No. 2013-1021-1022 (Federal Circuit, 9 May 2014).

³⁸ Pamela Samuelson *Oracle v Google: Are APIs Copyrightable?* (1 Nov 2012).

cannot be claimed in an idea, but it can in the expression of it.³⁹ Google has since appealed to the US Supreme Court, asking “[w]hether copyright protection extends to all elements of an original work of computer software, including a system or method of operation, that an author could have written in more than one way.”⁴⁰

For software developers, APIs are tools for innovation that traditionally have not been subject to permission, the unrestricted use of which has incentivised competition to the benefit of consumers. At the same time, developers invest time and energy into building APIs, and the policy question is whether that should be rewarded with intellectual property protection.

Discussion Questions

7. Should APIs be copyrightable? Why or why not?
8. If so, what exceptions may be necessary to ensure basic functionality and interoperability between applications on the Internet?
9. How would copyright protection for APIs affect New Zealand developers?

GEOBLOCKING

An Internet user’s access to content can be “geoblocked” based upon their location, which is determined by their Internet Protocol address (IP address), or credit card information. Geoblocking is a technical measure used to control the distribution and sale of copyright works online, and familiar issue for the average Internet user in New Zealand.

Circumventing - or “routing around” - geoblocks to access off-shore content is now a commercial service offered by some New Zealand ISPs. The legality of circumvention, however, has yet to be plainly addressed in law.

In one sense the Internet transcends geography as a global network. In another sense the Internet recognises geography through its numbering system. In the way of background, the International Corporation for Assigned Names and Numbers (ICANN) allocates IP addresses (which provide connection to the Internet) to five Regional Internet Registries (RIRs) - one for North America, one for Europe, one for Africa, one for Latin America and the Caribbean, and one for the Asia Pacific. The RIRs then further allocate these IP addresses to ISPs and other networks in their respective regions.

Because New Zealand is in Asia Pacific region, it receives its IP addresses from Brisbane-based Asia Pacific Network Information Center (APNIC). Netflix cannot be accessed via an APNIC-issued New Zealand IP address but it can, however, be accessed through IP addresses issued by ARIN or RIPE NCC, the RIRs for the US and the UK, respectively, because Netflix will have

³⁹ Copyright Act of 1976 (US), s 102(b) says that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”

⁴⁰ Google’s Petition to the Supreme Court can be viewed [here](#).

agreed with rights holders to provide services within those territories but not others. Slingshot's Global Mode works by making a New Zealand user's Netflix request appear as if originating in the US or the UK.

Quite frequently, policy debates on geoblocking will involve discussions on parallel imports and technological protection measures.

Parallel imports analogy

Geoblocking is often likened to border protection measures; both prohibit copyright works from entering the country without authorisation from the rights holder. Border protection measures can lead to less choice and higher cost for the consumer, a problem that can be alleviated through parallel importation policies.

Parallel importing allows consumers to purchase legal copies of works from a vendor in a different country, and to import them. New Zealand began to permit parallel imports of copyright works in 1998.⁴¹ With some exceptions, parallel importation of copyright works is legal, though infringing copies can never legally be imported.

Should New Zealand adopt a similar approach to online "importation" of copyright works? For example, should the law allow a user to circumvent geoblocking measures to access the copyright content he or she has paid for? "Circumvention is to Geoblocking as Parallel Importation is to Border Protection Measures" is not perfect in this case as an analogy, but it does raise questions about how New Zealand policy should treat access to copyright works across different media.

Technological Protection Measures

Technological Protection Measures or "TPMs are technical locks copyright owners use to guard or restrict the use of their material stored in digital format, such as encryption software."⁴² With exceptions, the Act treats the circumvention of TPMs - the breaking of digital locks - in the same way as it does copyright infringement.

In Australia

The relationship between geoblocking, TPMs, and copyright law was the focus of recent discussion in Australia. During Australia's recent Inquiry into IT Pricing, the Standing Committee on Infrastructure and Communications asked stakeholders whether the rights holder practice of geoblocking qualifies as a TPM under copyright law, and whether routing around geoblocking is the same thing as circumventing a TPM, in which case the activity could qualify for an exception or otherwise be considered copyright infringement.⁴³

⁴¹ Copyright (Removal of the Prohibition on Parallel Importing) Amendment Act 1998

⁴² Ministry of Business, Innovation and Employment [website](#) "What is a TPM?"

⁴³ See the House of Representatives IT Inquiry [webpage](#).

New Zealanders have been creating their own “global modes” for some time by using VPNs and/or proxy servers. As explained in the report which issued from the Australian Inquiry (Inquiry Report):⁴⁴

Consumers may use a proxy server or a virtual private network (VPN) to bypass IP address-based geoblocking. Proxy servers and VPNs create an encrypted tunnel between a customer's computer and a server elsewhere, usually in another country. The customer's internet traffic is routed through that server and as a result vendor websites recognise the IP address of the server, rather than that of the customer, which may enable consumers to access content that would otherwise be region-blocked.

The Inquiry Report pointed to a section⁴⁵ in Australia's Copyright Act, which “provides that Australians are permitted to circumvent a TPM if it is applied to a ‘film or computer program (including a computer game)’ and if the TPM ‘controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the [content] acquired outside of Australia.’”⁴⁶ This exception was written in the context of the technological landscape at the time, with DVD region coding in mind, and there is disagreement as to whether it is technologically neutral enough to extend to geoblocking.

Section 226(b) of New Zealand's Act gives an illustration with similar effect, explaining that a mechanism which “controls geographic market segmentation by preventing the playback in New Zealand of a non-infringing copy of a work” is not a TPM. The exception refers to breaking a digital lock to access a copyright work, instead of to copy it. Some jurisdictions - the US for example - prohibit circumvention for both purposes, but New Zealand declined to do so:⁴⁷

The Ministry is of the view that it is not the role of the Act to protect access control technology, which is used in some cases to price discriminate and control geographical distribution of works, to the detriment of New Zealand users.

Following the IT Inquiry, the Inquiry Report recommend that the country's “anti-circumvention provisions [be amended] to clarify and secure consumers' rights to circumvent technological protection measures that control geographic market segmentation.”⁴⁸

Discussion Questions

10. Is geoblocking a TPM by definition?
11. Should users be allowed to circumvent geoblocking?
12. How would local distribution markets be affected if circumvention was clearly legal?

⁴⁴ The Parliament of the Commonwealth of Australia, Standing Committee on Infrastructure and Communications, Report on the Inquiry into IT Pricing, “At what cost? IT pricing and the Australian Tax” (Inquiry Report), at 4.63.

⁴⁵ Section 10(1) of Australia's Copyright Act 1968.

⁴⁶ Inquiry Report, at 4.73.

⁴⁷ MED [Position Paper](#) at 107.

⁴⁸ Inquiry Report, at 4.82.

USER-GENERATED CONTENT

The ever-increasing availability of consumer-friendly devices and applications has had a positive effect on the creation of User Generated Content (UGC). From TradeMe advertisements to Internet memes and sketch comedy, UGC encapsulates a broad range of socially and economically significant activity. It becomes an Internet/Copyright issue when the content generated by the user incorporates or somehow includes the work of a rights holder.

The US case of *Lenz v Universal Music* gives a simple example of the Internet/copyright concerns involving UGC. The Electric Frontier Foundation filed suit on behalf of Stephanie Lenz, whose 29-second video was taken down for copyright infringement by YouTube after receiving a notice from Universal. A song by Prince was on in the background while her toddler was dancing. Because videos like these are common - that is a video created by a user which somehow includes a copyright work - UGC has become a major policy issue.

UGC involves use of an original work to make something new, the person who created the new content without clearing licenses from the rights holder faces liability. In New Zealand, though UGC could in some instances be argued to be a “fair dealing” of the work, it would have to fit within the narrowly-prescribed parameters of the Act and a listed fair dealing purpose. Thus, current law is unclear as to when UGC should be permitted, and when it should not, which makes the issue good for discussion during the Review.⁴⁹

Several other of jurisdictions have considered an exception for UGC.

In Canada

Canada enacted an exception for UGC in 2012.⁵⁰ Under Section 21.29 of the Canadian Copyright Act, UGC is not an infringement of copyright if the following four conditions are met:

1. The UGC is non-commercial;
2. Attribution is given to any original content when ‘it is reasonable in the circumstances to do so’;
3. The creator of the UGC has ‘reasonable grounds to believe’ that no infringing content was used in the creation of the UGC; and
4. The UGC does not have a ‘substantial adverse effect, financial or otherwise,’ on either any original content or any existing or potential market for such content.

When designing the exception, Canadian policymakers had an interest in “legitimizing Canadians’ everyday activities” while also protecting the economic value of copyrighted content used during the creation of UGC.⁵¹ The law requires that the UGC have no “substantial adverse effect” on the marketability of the underlying work,⁵² but also asks whether the UGC creator

⁴⁹ Note that UGC has been the subject of discussion by the legal community recently in New Zealand, though in terms of an online content host’s liability for UGC that breaches advertising standards. See Elliot Sim “User generated content within ASA jurisdiction” (28 Apr 2014) New Zealand Law Society [website](#).

⁵⁰ The Copyright Act (Canada), [Section 29.21](#).

⁵¹ Government of Canada “Balanced Copyright Backgrounder” (September 2011).

⁵² Copyright Act (Canada), s 29.21(d).

believed that their use infringed copyright.⁵³ Under the Canadian regime, if UGC has a “substantial adverse effect” on the marketability of a work, then it infringes copyright.

In Ireland

Ireland followed the Canadian example and proposed a UGC exception that uses similar language.⁵⁴ Aside from minor differences in drafting, the UGC exception being considered in Ireland conditions the lawfulness of UGC on the same four considerations.⁵⁵ According to the Irish Copyright Review Committee, such a copying exception “relates to users’ reasonable assumptions and basic expectations.”⁵⁶

While the UGC exception is a relatively recent development, it relates to basic, widespread, Internet-user activity in New Zealand. It is timely to consider how UGC should be treated under the law.

Discussion questions

13. Should there be an exception for UGC in the Copyright Act?
14. If yes, then what should the exception say, in general terms? Does, for example, the Canadian provision have all of the right considerations listed or could there be others?

⁵³ *Ibid*, s 29.21(c).

⁵⁴ Copyright Review Committee for Department of Jobs, Enterprise and Innovation (Ireland), *Copyright and Innovation: A Consultation Paper* (2012), at 83-84.

⁵⁵ Compare Section 29.21 of The Copyright Act of Canada with proposed Section 106D currently under consideration in Ireland (Copyright Review Committee for Department of Jobs, Enterprise and Innovation (Ireland), *Copyright and Innovation: A Consultation Paper* (2012), at 83-84).

⁵⁶ Copyright Review Committee for Department of Jobs, Enterprise and Innovation (Ireland), *Modernising Copyright* (2013), at 60.

Part II - Finding Solutions

Reassessing the rights, reassessing their exceptions.

One way to find policy solutions to the issues described in Part 1 is to reassess how the rights granted to copyright owners should be defined in the digital environment. Another is to reassess the nature and scope of the exceptions to these rights.

Reassessing rights in the Internet Environment

There are many things to consider when reassessing the nature of any right, including economic, legal, social, and cultural objectives. The MED's Digital Copyright Review was essentially a balancing exercise that considered:⁵⁷

1. The incentives required to ensure creation, production and distribution of creative works that meet society's needs and demands;
2. Minimising the costs to society of copyright protection; and
3. Ensuring reasonable access to copyright material, both for creators as an input in cumulative creation, for special needs groups and for consumers in general.

These considerations form a nice framework for copyright policy analysis, generally speaking, which can be broadly applied across the many different parts of the Act.

When approaching an Internet/Copyright issue such as the optimal scope of the right to copy in the Internet environment, however, the applicability of the right within that environment should also be considered as a general matter. In other words, how does the right work online?

The EU Consultation sought views on potential problems raised by cases where the reproduction [i.e. the right to copy] and the making available rights [i.e. the right to communicate] apply together to a single act of economic exploitation.⁵⁸ A basic question to ask in reassessing a right is whether and to what extent it overlaps with another one. In certain cases, the right to copy practically converges with the right to communicate (and arguably other s 16(1) rights).

In its response to the EU Consultation, one intermediary, an online video service, gave an example of one such case:⁵⁹

In territories where different collecting societies administer each right, each society wants to be paid for the same activity by claiming that separate rights are implicated, including rights that have no independent economic value. A collecting society in charge of managing the right of making available might claim royalties for the act of simply loading files to a server connected to the Internet, even if no one ever accesses those files. A collecting society in charge of managing

⁵⁷ MED Position Paper, p 27.

⁵⁸ European Commission [Public Consultation](#) on the review of the EU copyright rules (May 2013), page 12.

⁵⁹ Google's response can be found on the [Public Consultation](#) website, as a non-anonymous respondent, registered with the EU Transparency Register.

the communication to the public would claim royalties for the act of transmission, while a third would do the same for the reproduction right even in the absence of downloads because temporary copies are made as a necessary adjunct of the transmission.

This phenomenon has been attributed to legacy licensing practices - approaching digital music services in the same way as analog ones were.⁶⁰

The licensing of digital musical services is, in practice, structured by rightholders as if a digital act of exploitation is a mixture of pressing a compact disc - implicating the mechanical reproduction right - and broadcasting - implicating the performing rights/communication to the public right. This made sense in the context of analog media, but in the digital era where we are moving to "copyright without copies" viewing each right in isolation fails to take into account the market experience. Since both the reproduction and performing rights are needed there is a significant problem: each right in isolation is without economic value. Having them separate is the equivalent forcing buyers to acquire single gloves separately.

Buying gloves separately, especially from different glovers, increases transaction costs - an oft-cited policy consideration in the responses to the consultation question above. Some respondents thus called for these rights to converge in these instances, into single right over the single act of exploitation.⁶¹

In the 2008 Amendments to the Copyright Act, New Zealand created a new, technology-neutral communication right. Currently, this right sits alongside the right to copy. In light of the discussion unfolding abroad, New Zealand can use the Review to reassess the right to copy in the Internet environment and its interaction with the communication right.

Discussion Questions

15. Does the application of two rights to a single act of economic exploitation in the online environment (e.g. a download) create problems?
 - a. If no, why not?
 - b. If yes, what type of measures would be needed in order to address these problems (e.g. facilitation of joint licences when the rights are in different hands, or legislation to achieve the "bundling of rights")?
16. Does the exception for transient copies in Section 43 of the Copyright Act provide an adequate balance to the right to copy?

⁶⁰ Ibid.

⁶¹ See European Commission [Report](#) on Responses to the Public Consultation on the review of the EU copyright rules (July 2014) (EC Report), page 16, which explains that many service providers called for "the introduction of a single right for digital transmission" because "the application of two rights to a single act of exploitation increases transaction costs, as they have to contract with multiple licensors and make multiple payments."

Reassessing Exceptions in the Internet Environment

Exceptions to copyright are just as important as the rights themselves. The balance that copyright law is meant to achieve between rights holders and the public cannot exist without them.

Sometimes, Parliaments find that a particular use of copyright material is so clearly in the public interest that legislation should expressly permit that type of use. These circumstances result in what are often referred to as “standalone” exceptions.

New Zealand for example (like many countries) allows copying without rights holder permission in order to produce braille versions of books, to increase access to books for the visually-impaired, provided that braille versions are not available in the market.⁶² The US Copyright Act allows for musicians to make and sell cover versions of songs without permission, so long as a statutory license is paid on a quarterly basis.⁶³ In these cases, lawmakers clearly thought that policy solutions to address the book famine, and for cover bands, should take the form of standalone exceptions.

In addition to standalone exceptions, most common law countries also additional exceptions which permit certain uses of works where the use is considered “fair.” These “fair dealing” and “fair use” tests assess whether one’s use of a copyright work is fair. If it is not, the rights holder is entitled to compensation for the use. If it is, then that use can occur without the rights holder’s permission, or license. New Zealand and several other Commonwealth jurisdictions have a “fair dealing” test. The US and a number of other jurisdictions have a “fair use” test.

The two schemes share the same general policy objective. Professor Susy Frankel has written that “the historical basis for [fair dealing] in New Zealand is not the same as the “fair use” approach, but the broad policy objective to achieve a balance of users and owners rights is not different.”⁶⁴ Generally speaking, fair use and dealing facilitate uses of copyright material, which yield economic, social and cultural benefit, and so should not be subject to permission.

This final section of the paper examines the prescribed, fair dealing approach and the flexible, fair use approach to creating exceptions.

THE PRESCRIBED APPROACH

Here, the acceptable purposes for using copyright works without permission are prescribed by law, which, in the event of a copyright infringement case, also provides the court with things to

⁶² Copyright Act 1994, s 69.

⁶³ Copyright Act of 1976 (US), s 115.

⁶⁴ Suzy Frankel Submission on Copyright (New Technologies and Performers’ Rights) Amendment Bill, page 2.

consider in determining whether the work was dealt with fairly. In New Zealand, five purposes are available: criticism, review, reporting, research, and private study.⁶⁵

When a user is considering whether they can use copyright material, the first question is whether they are copying the work for one of the five purposes, irrespective of how otherwise “fair” the user may consider their purpose to be. If not, the copying constitutes infringement. If the user wants to use the work for one of the five specified purposes, the next question to be asked is whether the use of the work is fair.⁶⁶

The answer to this second question depends in part on what the purpose was, because different purposes require different considerations in New Zealand. Private study and research have different considerations than criticism, review and news reporting, for example.⁶⁷ Further, only some copyright material (e.g. films, photographs) can be copied for certain purposes.⁶⁸

THE FLEXIBLE APPROACH

With the flexible approach, the user’s enquiry is not as constrained, as a range of purposes can potentially be allowed, as long as the overall fairness criteria are met. In other words, it does not matter whether the user copied the work to satirise it or to quote it, so long as what the user does is fair. In the US fair use provision, the test can be applied to various purposes not listed within its preamble (copying for criticism, comment, news reporting, teaching, scholarship, or research).⁶⁹ Further, it can be applied to all types of works (books, films, etc.).

Fair use is a general-purpose test, based on a set of factors for the court consider when determining whether the use was fair.⁷⁰ Was the use commercial or non-commercial, for example? Or was it transformative of the original?⁷¹ The US provision features four factors, while an eight-factor fair use test was recently drafted during the Irish copyright review.

⁶⁵ Canadian law provides for eight purposes – the five recognised by New Zealand, in addition to education, parody and satire. See *generally* Copyright Act 1985, s 29. Australian law recognises seven of the eight Canadian exceptions (there is no exception for education in Australian law, but there is one for attorneys giving professional advice.) See *generally* Copyright Act 1968 (Cth) ss 40 – 43.

⁶⁶ Note that not all fair dealing exceptions are available for all types of copyright material. See Copyright Act 1994, ss 42, 43.

⁶⁷ Copyright Act 1994, s 43(3): (1) the purpose of the copying (e.g. commercial or non), (2) the nature of the work, (3) whether the work could have been obtained within a reasonable time and at a normal price, (4) the effect of the copying on the market – real or potential – for the work, and (5) where only part of the work was copied, the amount and importance of that part in relation to the whole of the work.

⁶⁸ See Copyright Council of New Zealand, Fair Dealing (Information Sheet, Jan 2009). Criticism, review or news reporting determinations depend on the type of copyright material and whether there was “sufficient acknowledgement” made.

⁶⁹ 17 USC s 107.

⁷⁰ There are four factors in Section 107 of the US Copyright Act, which are practically identical to the considerations in New Zealand’s Section 43(3). They are: (1) the purpose of the use (e.g. commercial or non), (2) the nature of the work, (3) the amount and substantiality of the portion used in relation to the work as a whole, and (4) the effect of copying on the market – real or potential – of the work.

⁷¹ The basic rationale here is that transforming an original suggests the application of creative effort, which copyright law should not operate to discourage.

The US is not the only jurisdiction that takes this flexible approach. The approach has been adopted by a number of other countries, including South Korea, Israel, Singapore, and the Philippines.⁷² Several fair dealing jurisdictions have recently considered whether they should do the same, including Australia, the United Kingdom, and Ireland. The last section of this paper briefly canvasses these developments.

Australia

An important difference between fair use and fair dealing is that the former is principles-based, while the latter is rules-based. In the digital landscape, prescriptive rules become outdated more quickly than technology-neutral principles.

During the Australian Law Review Commission's (ALRC) Copyright Inquiry, conducted in 2012 and 2013, stakeholders expressed concern about "the lengthy delay between the emergence of a new use and the legislature's consideration of the need for a specific exception."⁷³ The ability of an open, flexible approach to respond to developments in technology is an oft-cited forte of the test. As stated in the ALRC Final Report: "A technology-neutral open standard such as fair use has the dynamism or agility to respond to 'future technologies, economies and circumstances—that don't yet exist, or haven't yet been foreseen'."⁷⁴ In its submission to the inquiry, one company explained that it could not have launched its search engine in Australia, under a fair dealing regime, and, to this day considers the fair dealing regulatory environment as hostile to its business.⁷⁵

More than 15 years after search engines first came to be widely used, there is still a significant and unacceptable level of business risk from hosting a search engine in Australia due to the lack of legal protection for standard search engine activities such as crawling, indexing and caching.

In its final report, the ALRC recommended that Australia adopt the flexible approach of fair use and repeal its fair dealing scheme.⁷⁶

Ireland

Modernising Copyright, the 2013 report of Ireland's Copyright Review Committee, recommends the introduction of a "tightly-drafted and balanced" fair use provision.⁷⁷ Ireland's existing exceptions, the Committee suggested, should be "regarded as *examples* of fair use."⁷⁸ The Committee drafted a model provision that features eight consideration factors, five of which are the same as those in New Zealand's fair dealing provisions.

⁷² See for example, Copyright Act 1967 (South Korea) art 35–3; Copyright Act 2007 (Israel) s 19; Intellectual Property Code of the Philippines, Republic Act No 8293 (the Philippines) s 185.

⁷³ ALRC Discussion Paper at 4.41.

⁷⁴ ALRC Final Report at 4.41.

⁷⁵ Google [Submission](#) to the Copyright Inquiry, p 5.

⁷⁶ ALRC Copyright and the Digital Economy [Final Report](#) (ALRC report 122) (November 2014). ("This Report recommends replacing many complex prescriptive exceptions with one clear and more certain standard—fair use.")

⁷⁷ *Modernising Copyright*. A [report](#) prepared by the Copyright Review Committee for the Department of Jobs, Enterprise and Innovation. (2013).*Modernising Copyright*.

⁷⁸ *Ibid*, p 11.

United Kingdom

The Hargreaves Report, mentioned above in Part I, considered whether the United Kingdom should switch from a fair dealing approach to fair use. As acknowledged by other jurisdictions in their reviews, the Report cited fair use's "flexibility to realize the benefits of new technologies."⁷⁹ Ultimately, however, the Hargreaves Report recommended against adopting fair use in the UK because "significant difficulties would arise" at the European law level.⁸⁰ As part of the European Union, the UK is constrained in its legislative activities – UK law must fall in line with EU law. New Zealand is of course not so constrained.

While the fair dealing would remain in the UK, the report went on to advise that:⁸¹

In order to make progress at the necessary rate, the UK needs to adopt a twin track approach: pursuing urgently specific exceptions where these are feasible within the current EU framework, and, at the same time, exploring with our EU partners a new mechanism in copyright law to create a built-in adaptability to future technologies which, by definition, cannot be foreseen in precise detail by today's policy makers.

This latter change will need to be made at EU level, as it does not fall within the current exceptions permitted under EU law. We strongly commend it to the Government: the alternative, a policy process whereby every beneficial new copying application of digital technology waits years for a bespoke exception, will be a poor second best.

As mentioned earlier, fair dealing and fair use share the same policy objective. However, the prescribed approach to exceptions and the open, flexible approach differ in important ways. One lets a person argue that a new and different purpose for copying – caching, for example – is fair, while the other does not. Fair use may better suit the Internet environment's rapid pace of change. Is a closed or open list better for New Zealand's digital economy? Assessing which approach would best suit the Internet environment will be a critical issue to consider during the Review.

Discussion Questions

17. Should the Copyright Act provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of parody or satire, and if so, how should it apply?
18. Under New Zealand's current fair dealing provision, fairness criteria differs according to purpose. Should the fairness criteria be the same for all purposes?

⁷⁹ Hargreaves Report at 5.22.

⁸⁰ Hargreaves Report at 5.23.

⁸¹ Hargreaves Report at 5.19.

19. Should the Copyright Act be amended to include a broad, flexible exception like fair use? If so, how should this exception be framed?
20. Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?
21. What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?

Conclusion

Several Internet/Copyright issues are canvassed in this paper. These issues present challenging and complex considerations for policymakers and stakeholders alike, because many questions raised herein have not been decidedly resolved elsewhere in the world.

New Zealand's copyright review is on hold until the Trans Pacific Partnership negotiations are finished. One could expect new copyright obligations to arise from the agreement, which may or may not limit what can be changed in the Copyright Act. For example, it appears that the US has proposed that TPP signatories recognise copyright in temporary copies, which could affect the definition of copying in the Act or the exception in s 43A. Copyright term extensions have also apparently been proposed.⁸² Given that the TPP negotiations are not public, however, it is impossible to say how the Review will be constrained, if at all, until the agreement is signed and the Terms of Reference for the Review established.

While this situation is might not be ideal, what can happen in the meantime is a community-wide discussion on the important issues raised in the preceding pages. The purpose of this paper is to spark discussion on Internet-related copyright issues in advance of New Zealand's impending Copyright Review. In this vein the paper poses questions in lieu of attempting to answer them. Stakeholders from across all sectors can benefit from exchanging views and ideas on the way to developing such answers.

⁸² Negotiation draft as at October of 2013 is available via [Wikileaks](#). See Article QQ.G.3 {Copyright and Related Rights}.

Discussion Questions

1. When does it make sense to treat a digital copy the same as a tangible copy? Is it a question of technology, how the copy is used, or something else?
2. Should Section 43A - New Zealand's exception for transient copies - be revisited during the Review? Why or why not?
3. Should the right to copy interact with the right of communication to the public? Should there be any overlap? Should overlap be specifically avoided?
4. Are uses of text and data mining tools being impeded by the Copyright Act?
5. What benefits would adding a TDM exception to the Act bring to New Zealand? What costs?
6. If such an exception were introduced, should it cover both commercial and non-commercial activities?
7. Should APIs be copyrightable? Why or why not?
8. If so, what exceptions may be necessary to ensure basic functionality and interoperability between applications on the Internet?
9. How would copyright protection for APIs affect New Zealand developers?
10. Is geoblocking a TPM by definition?
11. Should users be allowed to circumvent geoblocking?
12. How would local distribution markets be affected if circumvention was clearly legal?
13. Should there be an exception for UGC in the Copyright Act?
14. If yes, then what should the exception say, in general terms? Does, for example, the Canadian provision have all of the right considerations listed or could there be others?
15. Does the application of two rights to a single act of economic exploitation in the online environment (e.g. a download) create problems?
 - a. If no, why not?
 - b. If yes, what type of measures would be needed in order to address these problems (e.g. facilitation of joint licences when the rights are in different hands, or legislation to achieve the "bundling of rights")?
16. Does the exception for transient copies in Section 43 of the Copyright Act provide an adequate balance to the right to copy?
17. Should the Copyright Act provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of parody or satire, and if so, how should it apply?
18. Under New Zealand's current fair dealing provision, fairness criteria differs according to purpose. Should the fairness criteria be the same for all purposes?

19. Should the Copyright Act be amended to include a broad, flexible exception like fair use? If so, how should this exception be framed?
20. Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?
21. What empirical evidence and general policy considerations are there in favour of or against the introduction of a fair use doctrine?