ARCHIVING OUR CULTURE IN A DIGITAL ENVIRONMENT: COPYRIGHT LAW AND DIGITISATION PRACTICES IN CULTURAL HERITAGE INSTITUTIONS

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2011

A project funded by the New Zealand Law Foundation
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1. Executive Summary

This report presents the findings from interviews conducted with 26 employees involved in different aspects of the digitisation projects at seven New Zealand cultural heritage institutions (CHIs). The research project focused on copyright law and the digitisation of CHIs’ collections. The digitisation of Māori cultural heritage adds another dimension to the activities of New Zealand CHIs, and this area was also explored in the interviews.

The objectives of CHIs are to protect, preserve, and facilitate accessibility to cultural entities in the interests of research and education, and the general public interest in cultural matters. In line with overseas practice, New Zealand’s CHIs make use of digital technologies to achieve their objectives. However, many items in CHIs’ collections are protected by copyright. To make a copy of such items without the consent of the copyright owner is an infringement of copyright. Nevertheless, for various reasons including those that are linked to copyright law itself, as well as practical matters such as inadequate resourcing for CHIs to trace absent copyright owners, and a lack of metadata relating to some items in CHIs’ collections, most digitisation projects in CHIs proceed without the consent of copyright owners. Indeed, there is very little understanding within CHIs of the complexities of copyright law and how it relates to the practices of digitisation of their collections.

In essence, the permitted exceptions in the Copyright Act 1994 (“the Copyright Act”) which are intended to support the preservation and archiving of cultural heritage (“the archiving exceptions”) are, similarly to equivalent provisions in overseas copyright legislation, unsuitable in a digital environment. For example, the archiving exceptions permit a single digital copy of an item to be made, whereas digitisation inevitably results in multiple copies. In addition, it is unclear whether the archiving exceptions apply to CHIs that are museums.

In part, this gap between practice and law appears to exist because the broader purposes of digitisation of CHI collections were misconceived by the legislators. This research found that CHIs digitise their collections because they wish to provide accessibility to a more widespread audience. Conversely, the archiving exceptions have been drafted with a view that the main purpose of digitisation is similar to that of analogue reproduction; that is, to preserve a copy of an item in a collection that is in danger of deterioration.

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1 The author gratefully acknowledges the generous support of the New Zealand Law Foundation for this research project. The author also wishes to thank Mark Boddington for excellent research assistance; Ian Welch for technical advice; and Deidre Brown and Melanie Swalwell for comments on this report.
Another reason for the inadequacy of the archiving exceptions is that, as for all permitted exceptions in national copyright laws, these provisions are required to comply with each of the “three step test” provisions in Article 13 of the Agreement of Trade-Related Aspects of Intellectual Property Rights (“the TRIPS Agreement”).\(^2\) Part 8 of this report suggests that the three step test requirement can be satisfied while nevertheless providing more appropriate exceptions for CHIs.

While CHIs’ practices in the area of digitisation of Māori cultural heritage appear, on the whole, to be robust this Report proposes that to provide certainty a new provision to regulate this activity should be inserted into the Copyright Act. The report concludes by recommending further amendments to the Copyright Act to address the current gap between practice and the law that has been revealed by the research.

\(^2\) The three step test in the TRIPS Agreement is based upon the similar test in the Berne Convention for the Protection of Artistic and Literary Works 1886, art 9(2).
2. Background

CHIs play an important role as “custodians of culture” for contemporary New Zealand society and for future generations. The objectives of CHIs and all other national cultural bodies are supported by cultural property laws; a body of law that intentionally subordinates the rights and powers of the owners of cultural works to the public interest.\(^3\) Ideally, cultural property laws should support both the physical preservation of the authentic cultural entity, and also its accessibility to the public for scholarly research and for the public interest and enjoyment of cultural matters.\(^4\)

The cultural property laws relevant to this research are the archiving exceptions in the Copyright Act.\(^5\) These provisions permit specified CHIs to make copies of works that are protected by copyright, without first obtaining the consent of the copyright owner, for the purposes of preservation or replacement. The Copyright Act was amended in 2008 to acknowledge and regulate certain issues presented by digital technologies.\(^6\) Amendments were made to the archiving exceptions that were intended to facilitate the use of digital technologies by CHIs.\(^7\) Because exceptions to national copyright legislation are required to adhere to the rules provided in international copyright treaties and agreements such as the Berne Convention\(^8\) and the TRIPS Agreement,\(^9\) the amendments to the archiving exceptions in New Zealand are similar to amendments in overseas copyright laws.\(^10\) However, overseas commentary confirms that these amendments are inadequate because, in practice, they do not permit CHIs to achieve their objectives using digital technologies.\(^11\)

There are two possibilities:

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\(^2\)Ibid.  
\(^3\)See the Copyright Act 1994, s 50 and s 55-56C. Other cultural property laws include legal deposit, laws protecting architectural heritage and national parks, etc.  
\(^4\)See the Copyright (New Technologies) Amendment Act 2008, the majority of which came into force on 31 October 2008.  
\(^5\)The amended provisions are contained in the Copyright Act 1994, ss 55, 56 and in inserted provisions ss 56A-56C. These provisions are reproduced in full in the Appendix.  
\(^6\)See the Berne Convention for the Protection of Artistic and Literary Works 1886, art 9(2).  
\(^7\)See the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, art 13.  
\(^8\)These requirements are discussed further in part 8 of this report.  
1. New Zealand CHIs limit their digitisation projects to items in their collections that are either in the public domain,\(^{12}\) or to items where the copyright owner has consented to copying:

\emph{or}

2. The digitisation projects of New Zealand CHIs do not comply with the law.

Neither possibility is acceptable. The first suggests that cultural heritage may not be being archived as efficiently and effectively as it might be if appropriate legal provisions were in place.\(^ {13}\) The second requires a tacit acceptance that State funded institutions are required to operate outside the law in order to achieve their official objectives.

This report describes empirical research with employees of seven CHIs regarding the digitisation projects at their institutions, their objectives in digitising their collections, and their views regarding copyright law and its relevance to digitisation. The report recommends changes in copyright law that would permit CHIs to achieve their objectives using digital technologies.

This research project is formally linked with two other research projects: \emph{Te Ataakura: Re-connecting voyage collections in archives and museums through the creation of digital taonga} (funded by Ngā Pae o te Māramatanga, the New Zealand Centre for Māori Research Excellence) and \emph{Artefacts of Encounter} (Cambridge University). These research projects are concerned with the digitisation and digital repatriation of Māori heritage items in the collections of overseas CHIs.

\(^{12}\) “public domain” in this context means items in relation to which the term of copyright protection has expired, or items which were never protected by copyright.

\(^{13}\) In addition, technological development is so rapid that although new possibilities for archival best practice are available, the law that would permit their application is not in place. For instance student researchers at Victoria University of Wellington’s School of Engineering and Computer Science under the supervision of Dr Stuart Marshall and Dr Ian Welch, technical advisers to this project, have developed a technological process by which several users could simultaneously access and play a digitally archived computer game without the need for each user to duplicate the game on his or her computer (which would be an infringement of copyright). Unfortunately, Dr Marshall and Dr Welch are required to use public domain software for their research as New Zealand’s earliest games are not only still protected by copyright but are “orphan works” – their copyright owners cannot be traced.
3. International Research

The influence of copyright law upon digitisation initiatives by CHIs has become a popular field of research, internationally. However, although many scholarly articles and practical guidelines for CHIs have been published, there are few published reports of empirical research in the field.

One important exception describes empirical research carried out with CHIs in Australia. Emily Hudson and Andrew Kenyon conducted a series of semi-structured interviews, with 38 cultural institutions and other bodies throughout Australia. Over 150 people were interviewed. Each was asked two key questions. First, what digitisation projects exist, or are anticipated, in Australian CHIs? Secondly, to what extent does copyright law facilitate or inhibit such projects? The responses to these questions were used to ascertain whether or not digital copyright law achieves the following objectives contained in the Copyright Amendment (Digital Agenda) Act 2000:

To ensure that cultural and educational institutions can access, and promote access to, copyright material in the online environment on reasonable terms, including having regard to the benefits of public access to the material and the provision of adequate remuneration to creators and investors.

Hudson and Kenyon’s research revealed that compliance by CHIs with digital copyright law was incompatible with the requirement to promote access to the public. Recurrent themes from the interviews were the lack of legal knowledge by employees, the practical difficulties associated with adhering to copyright law and the resourcing that would be necessary to enable copyright compliance. The problems posed by orphan copyright works were particularly frustrating. These concerns were exacerbated by the “the lack of government funding specifically for copyright compliance and the difficulties in streamlining copyright

14 See above n 11.
17 Copyright Amendment (Digital Agenda) Act 2000 (Cth), s 3(d).
clearance processes.” Concerns were also raised by interviewees in relation to the technological aspects of digitisation, including practical matters such as the limited life cycles of software and hardware and the need to provide for regular content migration. Another aspect mentioned by interviewees was the lifespan of digital formats, which compares unfavourably with the longevity of established analogue formats.

4. The Relevant Law in New Zealand

The archiving exceptions are contained in Part 3 of the Copyright Act, entitled “Acts Permitted in Relation to Copyright Works”. The archiving exceptions were amended by the Copyright (New Technologies) Amendment Act 2008 in order to provide for digital reproduction. They are set out in full in the Appendix to this report. A brief summary of the relevant provisions is set out below, in order to provide context to the interview summaries which follow.

4.1 Interpretation (Copyright Act 1994, s 50)

Section 50 provides that the archiving exceptions apply to prescribed libraries and to specified archives, which include the Film Archive and Archives New Zealand, and “any collection of documents (within the meaning of s 2 of the Official Information Act 1982 ) of historical significance or public interest” in the custody of and being maintained by a not-for-profit body.

Section 2 of the Official Information Act (OIA) provides as follows:

**document** means a document in any form; and includes—

(a) any writing on any material:

(b) any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored:

(c) any label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means:

(d) any book, map, plan, graph, or drawing:

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19 Ibid, at 11.
(e) any photograph, film, negative, tape, or other device in which 1 or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

An archive is also stated to include “in relation only to its holding of public records”, an approved repository within the meaning of s 4 of the Public Records Act 2005. Section 4 states that an “approved repository means a repository approved by the Minister under section 26”. Section 26 (1) provides as follows:

(1) The Minister may, on the advice of the Archives Council, given on the recommendation of the Chief Archivist,—

(a) approve a relevant body (such as a museum, a library, another archive, or an iwi-based or hapu-based repository) as an approved repository where public archives may be deposited for safekeeping:

(b) amend or revoke that approval.

Museums are not mentioned in s 50 of the Copyright Act. Hence the archiving exceptions apply to museums only insofar as their collection falls within the definition of “document” in Section 2 of the OIA, or they hold public records in the capacity of “an approved repository” as defined in the Public Records Act.

Importantly for this research project, however, the archiving exceptions do apply to the following entities within a museum’s collection: scrolls, oral histories, video art and computer created art, books, maps, drawings, plans, graphs, drawings, photographs, films, negatives and tapes. Each of these entities complies with the definition of a “document” in s 2 of the OIA.

4.2 Copying to replace copies of works (Copyright Act 1994, s 55)

In s 55(1) of the Copyright Act, as amended, “a copy” does not include a digital copy. Section 55(3), however, permits a digital copy of an item in the collection to be made, if the item is “at risk of loss, damage or destruction”, it is not reasonably practicable to purchase a copy of the original item, and the digital copy replaces the original. Thereafter, the original item may not be publicly accessible, except for research purposes in which access to the original item is a requirement or benefit.

For practical purposes the differences between digital copying under s 55(3), compared with other kinds of copying under s 55(1), is that a digital copy must replace the original and the original must not then be publicly accessible. Conversely, a copy made under s 55(1) may be placed in the collection of the institution “in addition to, or in place of” the original item.
Section 55(4) permits one digital copy of a collection item to be made for another archive or prescribed library where the original item in that other institution has been lost, damaged or destroyed, and it is not reasonably practicable to purchase a copy of the original item.

4.3 Copying of certain unpublished works (Copyright Act 1994, s 56)

Section 56 of the Copyright Act, as amended, provides that “a copy” includes a digital copy, but a digital copy is also subject to s 56B. Section 56 allows one copy of an unpublished item in the collection to be supplied to “any person” for the purposes of research or private study, unless the copyright owner has prohibited such supply. Section 56B requires the institution providing such a copy in digital form to destroy any additional copy that was made in the process and to provide a written notice that sets out the terms of use of the copy.

Communicating a digital copy to authenticated users (Copyright Act 1994, s 56A)

Section 56A permits an archive or prescribed library to “communicate”21 a digital copy in a form that cannot be altered or modified to an “authenticated user”.22 The number of users at any one time must not exceed the total number of digital copies purchased for the collection or licensed to the institution:

This seems to be drafted with the notion that someone is interacting with a single copy that is, in a sense, in front of them. From the games perspective or interactive art would this allow a single user and multiple spectators (where they are watching it on their own devices)? Also consider preserving something like a multi-user game, such as “World of Warcraft”. Is it reasonable to have a licensed copy per potential user? Another instance would be migration of documents on a large scale, for example consider migrating word documents using a piece of software. When dealing with many documents is it reasonable to restrict the conversion process to opening and saving one document at a time if you have only one licensed copy?23

5. Research Methodology

The research sought to ascertain how the archiving exceptions are perceived by CHI employees and to what extent copyright law influences digitisation projects. The research was confined to the following seven CHIs, each of which is either a museum or an archive.

21 “communicate” means to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system: Copyright Act 1994, s 2(1).
22 “authenticated user” is defined in the Copyright Act 1994, s 56A(2): see Appendix.
23 Comments provided by the technical adviser to this project: Dr Ian Welch, School of Engineering, Victoria University of Wellington.
Archives New Zealand,
The New Zealand Film Archive,
Hawkes’ Bay Museum and Art Gallery,
Marlborough Museum,
Puke Ariki Museum (New Plymouth),
Auckland War Memorial Museum,
The Museum of New Zealand Te Papa Tongarewa.

The National Library of New Zealand was excluded from the project because it has the benefit of additional copyright exceptions, contained in the National Library Act, that are intended to facilitate legal deposit of off line and online materials. For reasons of financial and time constraints, as well as consistency of findings, it was therefore decided to exclude all libraries from the research.

The digitisation projects varied from large advanced projects (mainly in the largest CHIs) and small to medium projects, some using only the photographic collections, in both large and smaller CHIs.

Interviews were undertaken with CHI employees who were involved with aspects of their respective institutional digitisation project. In total, 26 employees were interviewed. Employee roles included the following: CEO/Director, Manager (Archives), Manager (Service Delivery), Collections Manager, Rights Manager, Contract and Compliance Manager, Archivist, Curator (Collections), Curator (Māori), Curator (Archives), Technical contractor, Collections technician, Software development manager. Most of the CHIs did not employ staff in all these roles. The smaller CHIs in some instances had a single employee who combined two or more roles.

Due to financial constraints, the availability of dedicated legal advice for most CHIs in New Zealand is limited. Of the seven participating CHIs, only one employs its own fulltime lawyer. Another CHI employs a rights officer (who is not a qualified lawyer, but who has developed expertise in copyright matters). Other CHIs have access to legal advice through their local Council, although it is not clear whether this legal advice would necessarily be from a lawyer who has expertise in the specific fields of cultural heritage and copyright law.
6. Limitations of the Research

The project was limited to seven CHIs and was originally envisaged as being more akin to a pilot study that would lead to further research. However, given the consistency of participant responses (both within the project and with the Australian findings) it seems likely that were the research to be extended to more CHIs the conclusions would not differ greatly.

The digitisation activities within CHIs that are libraries could provide further data if addressed in a future research project.

The focus of the research is copyright law. There are potentially other areas of law to be considered. For example trade mark law and patent law might present barriers to the archiving and online accessibility of some cultural heritage, particularly “born digital” items.24 The interrelationship between contract law and copyright law is another area that is highly relevant to the activities of CHIs.

The suggested interpretation of the “three-step test” in the TRIPS Agreement (see Part 8 of this report) has not been subject to judicial scrutiny.

7. Interviews and Analysis

The interview questions were designed to ascertain the following:

1. What, in the view of CHI employees, is the purpose of digitisation.
2. What effect copyright law has on current digitisation projects at CHIs.
3. To what extent CHI employees are aware of and understand the relevance of copyright law to their digitisation projects.
4. Whether other factors influence the extent of current digitisation projects at CHIs.
5. Whether the technical procedures of digitisation are permitted by the Copyright Act.
6. Whether copyright law prevents the potential use of any new technological developments.
7. To what extent digitisation of Māori cultural entities is occurring within CHIs.

What is the purpose of digitisation?

Three distinct purposes were mentioned: accessibility, preservation, and collection management.

**Accessibility.** The majority of participants claimed that the main purpose of digitisation is to provide increased public access to their collections. Online access to digitised collections is available on computers within the CHI itself and also remotely in homes, via the CHI website.

One participant noted that, following digitisation, the practice in their CHI was that the hard copy would be removed from physical accessibility so that online access would be the only possibility. This complies with s 55(3)(c) of the Copyright Act - but was the only example of such legal compliance. For more fragile items, limiting access to a digital copy permits the public to examine content related to that item that they would not otherwise be able to examine. (Some participants commented that “access to content” might not suffice in certain situations, for example where a researcher was more focused on a physical vehicle. In fact, s 55(3)(c) does provide for this possibility).

Where a donated collection consists of photographic negatives, digitisation provides a more effective way for the public to view the photographs.

Similarly, oral histories are more accessible when digitised.

Oral history recordings are easier to reproduce and to reutilise in digital format, for example by extracting sound bytes. In digital format, reproduction is simple. You can reproduce them over and over again. A secondary reason is that analogue tapes tend to deteriorate, although of course digital recordings can do as well. But essentially it’s access first and then preservation....

Digitisation of films is purely for access purposes - because of the practical limitations of technology.

[I]t is not possible in terms of the standards set internationally for film archiving, for example a 35mm film, to digitally preserve it. ..The amount of information held in a 35mm motion picture frame is greater than can be currently extracted from it by available scanning technology. And when you multiply that by 24 frames a second and by 90 minutes plus for a feature film .... just to give you one example, one feature film that is scanned by very high end scanners, those that aspire to be of preservation quality, contains more data than the entire National Library National Digital Heritage collection....
Preservation. According to the majority of participants, the secondary reason for digitisation of CHIs’ collections is for preservation purposes. However, according to those participants who are employed for their technical expertise, this reason is flawed. Contrary to popular belief, digital copies are not more advantageous than paper copies:

Digital is not better… it is so easy to lose things when they are digital. .. Consider a Word document: I have to have a copy of Word, I have to have a monitor, I have to have an operating system that can read the copy of Word that I used. You know, it is so many layers. If any one of those goes, you cannot access the item again. .. then you have to go and look at a paper copy! And paper is phenomenally resilient; way more resilient than something like a file. In IT we can’t even access things that were 15 years old. Yet, we can read books that were written six hundred years ago.

Even the concept of “backing up” digital data is difficult, due to the need to keep accurate records of the date and time that is relevant to each backed-up version of data that is stored “somewhere on a server”, or perhaps on multiple servers.

The concept of digital material becoming inaccessible over time is of great concern to experts in the field. The European KEEP project\(^{25}\) confirms that “any organization which depends on computer systems for its operation and future success is sensitive to the threat of data loss due to technical obsolescence.”\(^{26}\) KEEP recommends emulation-based preservation but notes the legal challenges to an effective strategy.\(^{27}\) The archiving exceptions are unsuitable for preservation of CHIs’ collections because many copies of a single item are required for effective emulation-based preservation.

Collections management. The third reason for digitisation is for collections management purposes. This includes recording metadata, such as the physical state of collection items, their location, and status, in terms of whether or not a donor has permitted an item to be lent to other museums, provided copyright information, etc.

In two CHIs, it is standard practice to make a digital copy of all items accepted for the collection for collections management purposes, no matter what their physical state. One CHI

\(^{25}\) The KEEP (“Keeping Emulation Environments Portable”) Project is co-ordinated by the Bibliothèque Nationale de France and co-funded by the European Union’s 7th Framework Programme’s ICT-3-4.3 Digital libraries and technology enhanced learning priority.

\(^{26}\) KEEP (Keeping Emulation Environments Portable) Project “Abstract” (September 2009) KEEP Newsletter 1 <www.keep.project.eu>.

\(^{27}\) KEEP (Keeping Emulation Environments Portable) Project “Cultural Heritage- Legal Aspects of Emulation” (March 2010) KEEP Newsletter 2 <www.keep.project.eu>.
described this purpose as “core digitization”, in contrast with the digitisation that takes place for public accessibility.

And potentially gather information. … … [W]e ask “do you know who is this person is? do you know what they are doing? do you know when it was?” … and so we are actually building our understanding of what we have by putting stuff out there.

All copying of copyright items without the consent of the copyright owner for collections management purposes of a CHI infringes the Copyright Act.

7.2 To what extent does copyright law affect digitisation projects?

Participants stated that copyright law requires CHIs to act in ways that are contrary to their cultural policies and objectives.

[I]f we did go to the letter of the law we wouldn’t be doing the archiving job that is our prime focus. So there is a real contradiction there.

I think the danger is where the law is acting … contrary to the mission of museums; to preserve things, to make them accessible … And not allowing that is hugely problematic for what everyone is trying to achieve. [T]hat’s a loss of cultural meaning, historical significance, all the things that make it worthy of collection and preservation. Not being able to pass it on to anyone else is just so far from what museums are really here for and what museums exist for and because I believe people have a right to see those things in various contexts when they are significant cultural objects. You know, that’s the whole point.…

Photographs were problematic for some CHIs:

[A]ccording to copyright law, the copyright resides with the person who commissioned the photography. So essentially in that collection we have hundreds of thousands of copyright holders. We don’t even know the names of most of the people, we have surnames on the packets, usually not full names. I think the photographer, when it was gifted to us, she signed over copyright despite the fact that for a lot of it she does not own the copyright. … We will be digitising vast tracts of that collection eventually. … Technically breaching copyright really.

Although the archiving exceptions apply to photographic collections in museums and permit a copy of a photograph to be made without the consent of the copyright owner; the requirement to make a single copy which replaces the original photograph may prevent their use in practice.
Most CHIs provide low resolution images on their websites. Although these could be downloaded and re-used, their quality is poor. If a higher quality image is required it must be ordered from the CHI. One reason suggested for this process is the need for a CHI to recoup costs. A second reason suggested by participants is that the process ensures that proposed uses by a secondary user, such as for commercial reproduction, are in accordance with the “rights” of the CHI in relation to each image (although the specific nature of these “rights” was unclear).

There are two levels, the first image is only a small image and people could steal that if they want but if you bring it up full screen it has a copyright to the originating museum. It might be X Museum, or one of the other museums we have contracts with. They hold the copyright. Whether or not they own it, they hold it.

Some CHIs were not prepared to place any copyright works online without prior consent from the copyright owner, until the works were “at least 50-60 years old” (the selection of this term of years is strange; copyright works remain protected for the life of the author and a further 50 years). However the end result is that many letters and papers of public interest may not be made available online for many years. *Although the archiving exceptions apply to such items, the restrictive requirements in s 56A pertaining to the communication of digital copies made under the archiving exceptions prevent a CHI providing public accessibility through its website.*

7.2.1 Orphan works

An orphan work is a work which is protected by copyright but whose rights owner or owners cannot be identified and/or located. Typically many items in CHIs are orphan works. The orphan works problem tends to be presented in the literature as a theoretical legal problem that is waiting patiently for a jurisprudential solution. This research project has revealed that the cultural heritage sector is not prepared to wait, because this would be contrary to its declared objectives.

The price that is paid for legislative delay is that a high level of time and financial resources are wasted on what is patently an impossible task in most cases. In addition, participants revealed a high level of anxiety about the legality of their processes (in proceeding to digitise without the consent of untraceable copyright owners) as well as ongoing frustration with the legal system.
In essence, the balancing exercise for collections managers and archivists was similar to that mentioned above: access versus legal compliance. Should the CHI take advantage of digital technology to provide increased public accessibility? Conversely, should the CHI be more influenced by the risk that the copyright owner might appear and instigate legal proceedings for infringement?

Well I don’t know if we have ever had any issue with it [making orphan works accessible online]. It’s just that it makes you a bit uncomfortable because you could be breaking the law… you have a public demand and... quite often, while it is within that 50 year criteria it is very hard to discover whether that person is alive, where they might be, and of course who might still own the copyright.

A risk management strategy was employed by some CHIs while others preferred to err on the side of caution.

We have what is called a letter of indemnity, which is a legal document that an outside user would sign saying that “I have made all reasonable attempts to contact the depositor and I will abide by any legal action that may result as a result of this being used.” … That can take quite a long time, but we have that protection that enables material to go out, provided that third parties take responsibility for any legal action arising out of the use of the material.

We often have really, without putting into a lot of resources into it, no way even if we do know [the owner of copyright] of tracing that particular person. I don’t want to be in a situation where we stop discussing things and stop talking about history because someone may own but may or may not be the copyright holder or may or may not object.

We have always laid a paper trail so we can prove that we have tried very hard to find the person who owns copyright. If we can’t and the end person is still desperate to have it, then we usually go ahead and it’s usually on the proviso that it’s used for that use….Occasionally we have one or two items that the family or the creator has retained copyright and you have to keep going back to them. One of the huge issues, of course, is if they move and they don’t tell you. It’s really quite hard and very frustrating.

[W]e take the risk on, we publish them online already. … there is a considerable amount of fear in museums country-wide about taking on that risk of getting it wrong. There will be a time where I have done my best efforts to trace the copyright owner and we will put it online and a year later someone will come out of the woodwork. But of the thousands of items that we have up online that are orphan works that has happened only three times.

If someone gets in touch then a conversation can take place as to whether or not they want it to be taken off the web. But generally speaking, for museums, the emphasis is on making available to the public what we have. And that’s the whole point and helps to fend off that argument that museums are
just hoarders and nobody knows what’s in here, and it come in here and nothing is seen of it ever again. Which is an accusation which is levelled towards museums quite a lot.

Some CHIs take a middle ground. They digitise the orphan work for their own records but do not make the digital image available online.

The solution, suggested by some participants, is to provide legislation that permits CHIs to use orphan works until the copyright holder objects.

I mean paying a licence fee to be able to use orphan works is ridiculous… we are already spending money, time, and energy, photographing it, putting it up online… adding to the culture of New Zealand and worldwide. … I think there is a responsibility on both sides. If we as an institution are going to invest in looking for you, then you should invest in making yourself available to be found. It’s not that hard.

I think there should be some onus on the copyright holder to come forward if we don’t have that information…. because we are using it not for commercial gain I mean if we want to use it to put a picture on a mug and sell it in the shop then certainly we should make sure that we have got the right to do so but if we are wanting to communicate information to people for information purposes, to tell a story, or to allow teachers to research for their students, or whatever, then I would like to see something that would allow us to just do that until such time as the copyright holder might come forward and identify themselves and at which time we would then have to agree whatever the deal is with them.

7.2.2 Risk management

Some CHIs take a “risk management” approach, reasoning that the possibility of making collections more accessible outweighed the risk of a copyright owner “coming out of the woodwork” and taking a not-for-profit institution to court. The risk management policy usually incorporates a “takedown if requested” policy. One participant justifies the need for risk management as follows:

[T]here is an assumption that if it is not on the web then it doesn’t exist.

[W]e don’t ask permission from our depositors but we inform them and give them the right of take down. So we inform them that we are putting it up and they have until next month or whenever it is, when it goes live and of course we wouldn’t do it against your objections and once again we get one hundred percent, mainly through silence, people just let it go.

One CHI uses a “reproduction form” which purports to place the onus of compliance with copyright on the end user of a digital image of a work. In essence the reproduction form warns the person ordering a digital copy that the CHI is charging them for making a
reproduction of what it holds and advising them that they are responsible for contacting the copyright owner if they want to make further copies. *If a CHI is able to copy an item in its collection under the archiving exceptions, only one copy can be made and this must replace the original (s 55). A digital copy can be communicated to an “authenticated user” but only in a form that cannot be altered or modified (s 56A).*

### 7.3 How much knowledge do CHI employees have of copyright law?

[Copyright] makes it very hard for museums to tell modern stories or stories that are less than 150 years old … because they are the only ones that you can guarantee are going to be out of copyright.

Many participants said they were not knowledgeable about copyright, commenting on the complexity of copyright law for the non-specialist, and stated they would welcome some training. Copyright law was described as “convoluted and twisted”. One commented that copyright in their CHI is only tackled “if it becomes an issue” in any specific case.

We do our best to ignore copyright at all points. Certainly in my area I don’t really care about it at all…. 

Most participants said that they needed to know more about copyright law, that the law itself should be less complicated, and that it should support the practices of CHIs.

[T]he law is too complicated to understand. I’ve been to a couple of copyright things and the general feeling is that it’s next to impossible…

It became clear that the maxim “a little knowledge is a dangerous thing” is singularly appropriate for copyright law. For example, some participants were aware, correctly, that copyright might be owned by the person who created an item, or their employer, or the person who commissioned that item for payment. Conversely other legal concepts, such as that copyright passes with other property in a will or intestacy on the owner’s death, were not well understood.

So the donor might own the copyright, or the photographer. But either way, if the person is dead then I would argue they’re not in a position to argue about the copyright anyway.. If the copyright is held by the person who is now dead, then what does the family have to do with it?

Some CHIs have been using digital technologies since the 1990s and relying upon the original archiving exceptions to copy works without the consent of the copyright owner. The

28 Copyright Act 1994, s 21.
word “copy” in the Copyright Act, prior to its amendment in 2008, was not limited in its meaning to the use of any particular technology – it was therefore legally possible to make use of the archiving exceptions to make a digital copy. CHIs should now change their practices to accord with the amendments to the archiving exceptions made by the Copyright (New Technologies) Amendment Act 2008.

7.3.1 The archiving exceptions

Participants were each asked whether they had heard of the permitted exceptions for archiving in the Copyright Act and, if they answered in the affirmative, whether they had any comments on the suitability of the archiving exceptions for digitisation projects.

Several participants were not aware of the provisions. Others were aware of them but believed them to be irrelevant to practice.

[T]hey are useless …. if a museum person read the Act, you don’t see the word “museum” there, not even in the definitions. Consequently it is very difficult, because as soon as you are including people who are not trained lawyers and do not know the parliamentary process and all the documentation that lead up to the change of the Act, they are immediately put off, and are, like, “well we are obviously not in there and so it doesn’t apply to museums”.

When advised that the archiving exceptions permit the making of one digital copy of an item to replace the original, participants commented as follows:

I think that would be counter-intuitive, especially with digitisation. The way we preserve things is often multiple copies. …. In the digital world it is very difficult to pin down exactly where stuff is sometimes, if it gets mis-labelled, or a server crashes, things like that … So we immediately make it more protected by making two master copies of every video tape and it’s repeated on data tape; two separate data tapes stored at different locations.

If we made one copy of something and lost it we would have much bigger problems than people complaining about copyright. … I don’t think there is an organisation in the country that would only make one copy. Certainly not in a digital format.

Intent to replace the original? Well we are all about the original, we’re never intending to replace the original. We have a whole conservation department making sure that the originals don’t go away!

On the website side I think archive provisions are nice in theory but they don’t seem to work in practice... SQL databases have memory of themselves, within themselves, so the nature of a database is that you don’t actually really delete things.
Dr Ian Welch, technical advisor to this project confirms that even for ordinary file systems, such as those found in Windows, standard deletion does not wipe the data; rather it just marks the data as available for reuse later when space is required. Additional steps are required to wipe the data. Similarly temporary copies are transparently stored by computer systems as caches. When a page is requested from a website it is downloaded from the cache rather than fetched again from the original site. Also on the server side of web applications, caching and replication are standard techniques for increasing performance.29

*It is clear that the requirement in s 55(3) that a single digital copy must replace the original is not practicable.*

### 7.3.2 Copyright and public accessibility

Although in most instances digitisation for collections management purposes was not affected by copyright considerations, a more cautious approach was taken by many CHIs toward providing public access to online collections.

*Although the archiving exceptions may apply to such items, the restrictive requirements in s 56A pertaining to the communication of digital copies made under the archiving exceptions prevent a CHI providing public accessibility through its website.*

The knowledge of copyright revealed by practice showed the complexity of copyright law for the non-specialist. For example, although one CHI regularly provides the public with copies of articles from a daily newspaper, the CHI employees are concerned that this process could be copyright infringement. However they were not aware of, or had not considered the possibility that the specific terms of the CHI’s agreement with the newspaper may license onward use.

Some participants said that oral histories could not be posted online without further authority. It was not clear whether the employees were aware that this is likely to be a privacy issue, rather than related to copyright ownership, since copyright would not protect the spoken word but only the recording (and would be owned by the person making the recording, or their employer). Furthermore as discussed in Part 4.1, *oral histories appear to be included in the archiving exceptions.*

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29 Advice from Dr Ian Welch, School of Engineering, Victoria University of Wellington.
Where letters and papers written by or sent to a well-known deceased person have been donated to a CHI, there was uncertainty about their legal status. One participant mentioned privacy concerns as being equally as important as copyright (although the Privacy Act 1993 does not protect the privacy of deceased persons, there could be living persons also mentioned in the papers.)

The ownership of X’s personal papers has come to us and I don’t understand if the copyright is transferred along with that, but it’s got to be sorted out. One thing that is clear is that the copyright of letters that X has received from other people isn’t part of that. That copyright is with other people.

*However letters and personal papers in a CHI collection are covered by the archiving exceptions; hence the owner of the copyright is not relevant.*

### 7.3.3 Donors’ knowledge of copyright

Many donors to the CHI were not familiar with copyright law:

> Often we just don’t get copyright clearance because people forget to sign the forms, because they don’t think it is important. Whereas artists and crafts people - they are more careful of their intellectual property rights.

The owners might say, well I own this, therefore I own the copyright, and we would sit down and explain it to them. We would say this is the copyright and this is what it means. The property is separate from the copyright. There is a whole spiel that we use. And that is probably one of the key issues we continually face, the lack of understanding that copyright is a separate property right. … And that it has an expiry date. Some people seem to think it lasts forever.

> It’s an ongoing issue with several thousand depositors. We actually turned up one the other day that was listed as dead on our database, but he was actually still alive. But it’s usually the other way and it is always a bit awkward when you go to a person whilst negotiating deposits – “do you mind putting down your next of kin”? Would you mind, or like us to talk to them if you are unavailable?

### 7.3.4 CHI intellectual property policies

None of the seven CHIs has a formal intellectual property policy, although several were in the process of developing such a policy. Not surprisingly, therefore, copyright issues were acknowledged in a patchy and somewhat ad hoc manner. Nevertheless participants from all CHIs were aware of and respected certain “rights” of their different stakeholders: donors, copyright owners, Māori, and the general public.
Several CHIs had developed acquisitions policies, generally requiring donors of items to the collections to assign copyright (and any other relevant intellectual property rights) to the respective CHI. These policies have not met with much success because, frequently, donors themselves were not aware of the possibility of the item having copyright protection, or they were not the owners of the copyright.

One CHI follows a more formal process with each item that is donated and accepted into its collection. An assessment is made regarding whether or not the item is protected by copyright and whether there are any other intellectual property rights in the item. The donor is then asked to make a choice between the following options: whether they want to assign copyright to the CHI; whether they agree to sign a “non-conditional, non-exclusive museum's licence” for the CHI to use it for museum purposes; whether their intellectual property is extinguished; or whether some other entity owns the intellectual property in the item.

Another CHI has two versions of an acquisition form that it requires depositors to sign. The form for non-Māori depositors cedes certain public good uses of that material and it allows us to duplicate for the purposes of preservation and in return for that it provides guardianship and longevity to the depositor. They retain physical and copyright ownership but once copies are made, then the physical copy is the property of and an asset for the CHI.

The form for Māori depositors acknowledges “another system of ownership beyond copyright” and sets out another layer of protection, rights, or non-legally enforceable rights, over the content of certain material that is considered important to Māori.

Another CHI has a donation form which asks donors to sign their agreement to the following provision (amongst other provisions): “I retain no rights including copyright associated with the item”. This begs the question of whether or not the donor owned copyright in the first place.

7.3.5 CHI documentation and resources

Te Papa National Services is funded to provide resources and guidance for other museums in New Zealand. These include a 2001 Resource Guide (the Guide) entitled “Copyright and Museums” and a supporting manual, “The Copyright Act 1994: A Manual for New Zealand Museums”. The Guide, which is not attributed to any author, warns its users that it is not a
comprehensive statement of the law and that if in doubt they should “refer to the Act or seek legal advice”. These statements rather devalue the worth of the Guide and place its potential users in a difficult position.

Hawke’s Bay Museum has a leaflet for persons wishing to reproduce items from its collection for publication or display. Although the leaflet was written in 1993, prior to the introduction of moral rights into the Copyright Act, it warns the public that photographs provided by the Museum may not be re-photographed, cropped, overprinted, or altered. In cases where the item in the collection is a copy of an original item owned by another institution or individual, the Museum requires prospective users to obtain prior written authorisation from the owners of the original material, before it will provide photographic copies. The Museum also asks for reproduction fees “to provide a fund for the preservation of items in the photographic archive” and assures prospective users that this fee is not a copyright fee: “Any fee payable to a copyright holder other than the Museum is additional to the reproduction fee”. The author of this leaflet (unattributed) appears to have had a good understanding of copyright.

Ideally in the future New Zealand CHIs should each be provided with a comprehensive and accurate manual on copyright issues written by a lawyer with expertise in the field. However, given the uncertainties and inadequacy of the archiving provisions this may not be practicable at the present time.

7.4 What factors, other than copyright law, influence digitisation projects?

It comes down to deciding whether getting a reasonable proportion of the collection digitised is core business of a CHI, just as CHIs ought to be studying collections and researching them, or publishing books… and that’s causing a bit of a debate in terms of where resources are allocated within the CHI. Resourcing issues, mainly lack of funding for the CHI, were frequently mentioned as severely limiting the extent of digitisation projects, particularly (but not exclusively) in the smaller institutions. For smaller CHIs the staff time that would be taken up by digitising their collections, as well as the costs of technology and its constant updating were obstacles. Funding is needed to undertake a digitisation project, to provide sufficient trained staff, and to ensure the records are preserved while being digitised, as well as thereafter. The costs of storage of digitised audio-visual materials, in particular, are very high.

31 Hawkes Bay Museum “Reproduction of Items from the Hawke’s Bay Cultural Trust Collections for Publication or Display” (December 1993, Napier, New Zealand).
even though storage is coming down in cost it is still a fundamental issue in terms of archiving, because what you want is it to be the highest resolution that you can afford, but that has implications, in terms of (a) keeping down costs and (b) in terms of storing them within the building. The higher the resolution the better picture quality will be. What we want is uncompressed works that lose none of their integrity in terms of picture information, but doing that means they take up a bigger chunk of the server. So we could store lots of things on low resolution copies, but that’s not going to enable the archivists of the future to care for the full layer of information contained in each file.

The CHI has the ongoing costs of looking after the original record indefinitely, even though it may not be used for access purposes.

People are only now recognising the [financial] commitment to storing high volumes of digital material and committing yourself to migrating them over time and all the things to keep them being a real proper digital surrogate of the original record. And they are some of the same problems that we are facing looking after digital-born records as well.

The KEEP project confirms this problem: “As new machines, storage media, software packages or file formats are introduced it is not unusual for some of the digital “capital” of an organization to become gradually inaccessible over time”.32

7.4.1 Economic rationales

In general, digitisation is not viewed as a commercial enterprise for New Zealand CHIs.

If you worked it all out, it’s really a public service. I doubt that we really recover our costs…. We used to have a scale of reproduction fees that were based on when it was going to be a commercial thing, say a book or something, we would charge a fee for that. But what we found was that we were wasting a spectacular amount of time having arguments with people about whether they could or couldn’t afford this extra reproduction fee and also what equated to actual commercial stuff, and what didn’t. With people saying “but it’s a not for profit” or whatever. With institutions like the National Library of New Zealand waiving their commercial reproduction fees, it opened us up to the argument “well they don’t do it, so why should you”?

Thumbnail, lower quality images are freely available from the websites of most CHIs. For high quality larger digital images, however, a charge is made although depending upon the purchaser’s planned use this is sometimes on a cost-recovery basis only. Additional fees are usually payable if the purchaser intends to use the image in a commercial publication. This can be problematic:

There is still a lot of difficulty in physically owning something and still recognising rights to have kaitiaki over it. And there is that cultural clash, particular when an iwi wants to come in and do a book of their taonga. They have hired a professional photographer and they want to do beautiful high resolutions images of their taonga and then take the images away. Well that will directly compete against our picture library.

Some CHIs do not permit any photography within the CHI. Such a policy means that members of the public who want a copy of an item must purchase a postcard, photograph, or online image from the CHI. Other CHIs believe that preventing personal photography within the institution is impracticable.

[If] we were truly wanting to control access to all our intellectual property then we would have to remove all cameras and phones from people at the front door - that has such a huge customer-service drawback. So what we have to be comfortable with I think is that people will take photographs. We do insist, as a condition of entry, that photography is allowed for personal use, but not for publication.

[We are investigating going down the Creative Commons route, particularly with the stuff where we own sole copyright in the thing. So photographs of three-dimensional works for example….If the work is out of copyright and we have taken the photo, we are considering releasing the photograph under Creative Commons. …

*Distributing a work under a Creative Commons licence implies that it is protected by copyright. However there is ongoing international debate about whether or not copyright subsists in images of public domain or copyright protected entities in a CHI collection. In essence, by attaching Creative Commons’ licences to its online images, a CHI is asserting an ownership of copyright to which it may not be entitled. An end-users who does not understand the complexities of copyright is unlikely to question the terms of the Creative Commons licence and may be unjustifiably restricted in their onward use of an image.*

**7.4.2 CHI copyright ownership**

One rationale commonly used by CHIs to justify their claims for payment for use of their digital online collections is that the CHI owns copyright in the digital images. This rationale is too simplistic. In particular, the issue of whether photographs of public domain items can be protected by copyright, in effect reviving copyright in a public domain item, is controversial. The alternative, which is that they are not protected by copyright, raises the equally contentious issue of whether or not contractual restrictions imposed by a CHI can override their public domain status in copyright law.
There was a lot of misunderstanding of this specific area. Five CHIs claim to own copyright in digitised items, although this is enforced to varying degrees.

We have a little stamp, and when we send something out I stamp them, that says that we retain copyright and so we have to be acknowledged when anything is published.

Collection items loaned temporarily from another CHI will sometimes have copyright restrictions placed upon them by the lending CHI.

[I]f we borrow something from another museum that is well out of copyright, they put their own copyright restrictions on it anyway and say no one’s allowed to photograph it because of copyright….I’m thinking “well, no, actually I don’t think you’re right”.

The threshold of “originality” that a work must achieve before it qualifies for copyright protection is low in New Zealand copyright law, requiring only that a work must not be a copy of another work or infringe copyright in another work, and that its creation required the input of sufficient skill and effort on the part of its creator. Although participants explained convincingly that the production of a high quality digital image of a collection item does require substantial time, skill and effort, the reason for this is that the photographer wishes to create a perfect copy of the item. Legally a copy of another item cannot be protected by copyright. Similarly if the digital image is not made in compliance with the archiving exceptions it will be an infringing copy of the original and cannot itself be protected by copyright.

7.4.3 Potential misuse of online collections

There were several different attitudes to misuse. Some participants believed that it was inevitable that collections online would be accessed and possibly misused. “The best you can do is hope that they respect the item.” Another participant explained that the real value of a digitised item is only realized by accessing it within its official [CHI] website.

Because it is on our website we can give you a guarantee that this is in its proper context, but once you divorce it from that it ceases to have that value and becomes another bit of de-contextualised rubbish floating around the Web.

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33 Copyright Act 1994, s 14(2).
35 Copyright Act 1994, s 14(2)(a).
36 Copyright Act 1994, s 14(2)(b).
Another participant argued that social media has changed the environment. Formerly a CHI could insist upon its “rights” but new technologies, such as cell phone cameras and online blogging, encourage practices that do not comply with strict CHI policies and are difficult to monitor.

People copy online material for blogs. At the moment ours is “all rights reserved” so if you want to use even a public domain item you have to come back to us with permission, because we own it and we put it on our website for you to view, not to reuse. But we do get infringements often. We get people coming in and taking photographs of collections items when they are on the floor, and that is a breach of the terms of entry, so they don’t have the permissions to do that. ...The difficulty is, with the changing environment of social media, that is impinging on the hard and fast rules that we use to have ... whereas we are trying to protect the copyright owners, where they are really hot on making sure that their items are not reproduced in a certain way, like a photograph of a digital artwork installation for example. ... People don’t think that publishing includes the internet - they see it as just them talking, they don’t see it as publishing.

7.5 Does copyright law support technology?

Although the production of high quality digital images, whether through scanning or photography, is a very time-consuming process, much digitisation tends to be done in-house by CHI employees. However for some CHIs, anything that requires specialist attention- for example, large format, a particular degree of resolution, high end scanning of film – is likely to be sent outside the institution to private contractors. This is permitted under the Copyright Act s 50(2) which permits a person acting on behalf of an archivist or librarian to make use of the archiving provisions.

As part of their digitisation programmes, all CHIs make multiple copies of items in the collection. They include high resolution and low resolution images, “replicated copies” for partner CHIs, and back-up copies (often made daily).

The images are held in TIF or JPEG, which will last forever. And the media we store it in is spinning and in fact we do backups on that media but it’s actually on spinning media so it doesn’t have a definite lifespan; it’s indefinite because it keeps getting backed up. ...when it’s backed up you keep making more copies. And if the original spinning material dies you can recover that. It’s not like they’re going on to CDs that deteriorate, or floppy disks, or things like that, they are actually on spinning media and backed up onto differing media depending on the timeframe. Those backups will flow with the times.

[T]here are so many different ways of accessing and reusing the content that we can’t do it all. We don’t have the resources to come up with all these new and different ways of searching and matching
objects. But if we made the information available, other people could maybe do it for us in ways that we would never have thought of.

The numbers of copies made and the intricacies of the technical process present compliance problems with copyright law. The outsourcing of storage overseas is also unlikely to have been envisaged by the drafters of the Copyright Act. The following quotation relates to a CHI which creates the electronic materials locally and uses a file transfer program (FTP) to copy the materials across the Internet to their web hosting provider in the United States:

You have the original digital image existing on a file server [at this CHI] and you make a copy onto another machine which is what I work on, which is physically separate, you’ve already got a copy at the time that file is set. Then we have this thing called Virtual Exhibit which takes that image and then produces a set of other images which are then embedded in web pages. Which I then track the copy of the images to a server in the United States, to a website where it is actually hosted…To get it on to the website from my machine here, I use Virtual Exhibit to create the pages which are still stored on my machine. I use a process called FTP which physically copies it electronically so there is no physical transfer here, except that one step here in which we are just in the process of getting rid of.

Another CHI made an interesting suggestion about enabling the public to effectively create new content by mixing or adapting the old.

I think we would be looking to provide more access for other people to do things [such as cropping]. I suspect what we will be doing is making it easier for other people to do things. So to take images and embed them in their blogs, or to take copies that they can use. And our challenge will be building software that will help other people, so they can be properly attributed or there is a link back to us that sort of thing. Or even so people can see how things have been used.

Ian Welch suggests that, absent the constraints of copyright law, this idea could be applied to a wide range of digital material; for example a game could be created using background images sourced from a CHI. Another application could be electronic guides that are downloaded to your smartphone or similar. For example, podcast guides to CHIs. Whilst audio-guides produced by the curator of the CHI are permissible, what if you downloaded one that had images of the art works or specific features of the art works? This would involve making many copies of such images, as each would be stored on a device owned by individual visitors to the CHI. *Copyright law prevents the use of new technological developments that could add value to the services provided by CHIs.*
7.5.2 Born digital collections

“Born digital” items are items that were originally created in a digital form. The underlying technology of all digital items is provided by a computer program, most of which were created in the 1980s or more recently. In New Zealand a computer program is protected by copyright for the life of the creator and a further 50 years. Hence all born digital items are currently protected by copyright and present unique problems to CHIs.

Older born digital items, produced in the 1980s and early 1990s, are likely to be orphan works. KEEP warns that the migration approaches to digital preservation are not suitable for more complex digital material, such as websites, games and software, and recommends emulation as the only solution for such entities. Emulation as a process however has more potential legal issues than migration. They include not only the ongoing requirement for a CHI to make multiple digital copies of an item, but also the possible need to circumvent any technological protection measures, the need to reproduce of substantial amount of computer code from a decompiled computer program, infringement of the layout of semiconductors, and possible patent infringement of patented hardware.

More recent born digital works include those created by the CHI itself.

The collection proper is not actively collecting born digital material but the museum does produce a lot of born digital material. So we have to include in the strategy that we are putting together how we handle both born digital that comes from the outside and born digital that we create ourselves. But currently there is no real policy but there are also no procedures for work flow or procedures for storing it, describing it, finding it… It’s a big area and the policy of the museum for so many years has been the focused on the physical, care of the physical, communication of the physical and its only existence has been in a stone building...

Recently-created born digital works are often acquired by CHIs directly from their artist or creator, who is also the copyright owner. The negotiations around copyright are, however, not necessarily straightforward because often the artistic experience which the artist intends to provide to the viewer will be specific to a particular digital platform. If a CHI intends to archive the work as part of its collection or make additional copies for accessibility or

37 See discussion in Susan Corbett, above n 24.
38 See “Cultural Heritage- Legal Aspects of Emulation” above n 27.
39 It is not clear whether this activity falls within the Copyright Act1994, s 80A; for example the activities of a CHI might be described in s 80A(3) (d) - which would negate the protection of s 80A.
40 Ibid.
41 See the Layout Designs Act 1994.
42 See “Cultural Heritage- Legal Aspects of Emulation” above n 27.
preservation at some future time, it is not unusual for an artist to refuse to assign copyright to
the CHI.

We are making active forays into the born digital realm. Actually what is so fabulous about born digital
works for us, is how easily they are acquired. …We can send a hard drive to the artist, maker, or
whatever, and they can download it in a file format that we are happy with for preservation. It comes
back in and off it goes into the system. So from a logistical and technical aspect it is really easy and a
low cost way of acquiring material.

We collect digital art, so …you have to get into that whole technology transfer as well. It’s not like a
painting that is oil on canvas and is always going to be oil on canvas. If it’s a ROB file and at some
point the ROB goes out of fashion and it is no longer being used and we want to transfer that into
another animation or footage type file, you have to talk the artist: “is the technology part of the
artwork? or is the technology part of the experience? do you want it playing on the VHS? or are you
okay with it playing on a DVD?” It’s that sort of talking to the artist about what the concept is, and for
the most part they are fine transferring it, and other times they are not. It’s a little bit more complicated
in terms of clearance online as well, again because it is an artwork there is an experience within a
gallery that they are trying to get to viewers and again they have to decide how they think about it,
what’s your perception of your artwork being put online? Is that the experience that you want to
provide somebody online? or does it denigrate the artwork down to a simple video? … it’s not
necessarily copyright but it is something that we would respect.

I think those kind of things [video art] blur the boundary of what is IT infrastructure and what is
actually part of the thing. You can’t have it without the layers. ……I think video, at least that is
contained, and you can move it, we are much better at moving format on that one, but software is just
so much more layered.

[T]he born digital artworks, which we are just starting to grapple with now, as we collect a few…and
not just the copyright implications of the copying the format and that sort of thing, but the preservation
of it as well, because we will often get them in a format that is not likely to last more than two or three
years. So we are trying to work with artists at the time of acquisition to try and get permission to
migrate, or to try and get them to give us an uncompressed version that is closer to a… open more
accessible copy. We get permission from them to store it on the central server, because they will often
give us a copy on a DVD. A DVD has a limited lifespan, so we will have to get it off there as well and
put it on a central server. But we get permission, so to have some processes around secure repositories
for those sorts of things.

There is a serious question to be considered in regard to modern “born digital” works and
their position within “cultural property laws”, the role of which is to subordinate the rights
and powers of the owners of cultural works to the public interest. Examples of such laws include laws preventing the export of cultural property, laws permitting the use of cultural property for research and education, laws of legal deposit and laws providing for the preservation of architectural, natural and cultural heritage. Although preservation of modern born digital cultural heritage is provided for in legal deposit laws, these are also inadequate for best practice preservation of complex digital works. However legal deposit laws are outside the scope of this report.

7.6 To what extent is digitisation of Māori cultural entities occurring

All participants described processes of consultation and negotiation that occur as a matter of course before Māori cultural entities are digitised and made available online. These processes varied depending upon the CHI. More significantly perhaps the responses of participants reveal subtle differences in attitudes and underlying objectives. Most participants believed that the wishes of the Māori tribe from whence the item originated must take precedence and would not proceed with digitisation if this was contrary to Māori wishes. This view demonstrates an ambivalence in attitudes towards cultural property laws the role of which is to support both the physical preservation of the authentic cultural entity, and also its accessibility to the public for scholarly research and for the public interest and enjoyment of cultural matters.

Usually with those there is restricted access and we don’t put them online unless permission has been granted by the iwi. With the ones that are online, when someone wants to use an image we always go back to iwi and ask if they can use them, depending on what use of the images has been requested.

Some of the biggest issues have not been around copyright so much as the cultural and privacy concerns… …I mean Māori have completely different view of privacy issues to Pakeha and we can tend to think of privacy issues diminishing over time, but certainly in my experience Māori don’t have that. They can talk about a letter from 1860 as if it was written yesterday. … And they started not wanting anything to go online and by the end of the afternoon were okay with almost everything going online, … in the end their decision was that only those works, letters that contained significant whakapapa information, should be restricted and they would be made available through their own website, but all the rest could go online….We’re digitising more of their material and knowing we will have to go back to the working group to test if that is still their thinking. Other hapū and iwi groups have been dealt with differently. So there has been a different response for most of the iwi…

44 Ibid.
Māori film is essentially the same, in that we have a memorandum of understanding with different iwi groups. There are also individual arrangements that don’t fit within any formal legal framework, but we honour those, because it is a whole other way of looking at the moving image. The spiritual dimension and how it embodies so much more than for, say, a Pakeha viewer, or a Pakeha person.

We recognize the moral rights of people, well not moral rights, in the legal definition, but the moral right for people to have that whakapapa relationship with that item that belongs to the CHI. Looking at it from a Māori perspective, kaitiakitangi is guardianship, rather than ownership, so there is a dual world view that you need to put into it. Copyright is a very western legal tradition, whereas the traditional knowledge side of things is a completely different world. The mana taonga principle is well how that affects us is that we do give people the right to say how they want that particular item to be displayed, and whether they want their item to go up online. Copyright is one thing, but the mana taonga principle is a different way of thinking. Putting those two things together in the same box just doesn’t work.

Other participants were conscious that there is a balance required. The public interest in culture that is supported by cultural property laws must, at some point, outweigh the preferences of the owners whatever their ethnicity.

Weighing up the benefit and the harm. … what if somebody puts Hitler’s head on Te Rauparaha or what is somebody puts a Tā Moko on a tea-towel and somebody finds it offensive? But the consequence of designing a policy around the exceptions is that nobody gets to see anything much.

Most CHIs have developed policies and protocols regarding the digitisation and posting online of Māori cultural heritage items. It is recommended that a new provision in the archiving exceptions in the Copyright Act should require consultation with appropriate bodies and an assessment of the balancing exercise required by cultural property law, before digitising copyright works originating from Māori. This would reinforce and standardise current practices and add an extra dimension to this aspect of cultural heritage.45 Such a provision would also acknowledge the importance of the recommendations made in the WAI 262 Report (“WAI 262”).46

7.6.1 Digital repatriation

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46 Ibid at 92-93.
“Digital repatriation” refers to the concept of “repatriating” digital images of indigenous cultural items to their originating communities by making them available online, as an alternative to returning the original items. Several participants explained that this ensured the original item was retained in the best possible environment.

The physical place that is home for that item is not necessarily the best place for it to be if it is to be cared for properly, if it’s light-sensitive, or the building that it is going into is potentially damp. Then digital repatriation is a really interesting option … in the sense that item is going home and being cared for by the people that have the connection to it, but not to the detriment of the physical object.

A lot of that Tāonga wasn’t just stolen or whatever, it’s gifted here because we have the right conditions to care for it. And the money involved in caring for it is something we absorb and they may not feel they’re capable of and that’s kind of an agreement museums enter into. It is often in both sides’ best interests.

Some CHIs have developed databases of tāonga, always in accordance with institutional policies of not digitising certain items such as sacred materials or personal items, such as diaries (which would not be made available for public viewing in hard copy). Resourcing issues, however, tend to limit the scope of these projects, despite requests from both iwi and the general public that they would like to see more information online.

We had two staff working on a database of tāonga and they were uploading the information, checking the information, verifying the information for each artifact, then taking good quality photographs and putting the information and the photograph on the tāonga database. The work on the tāonga database has stopped. … The only thing that we are digitising at the moment is photographing items that are in the collection that have not been photographed. Archival information for that object is not being uploaded. There is an enormous amount of information for each object, but none of that information is currently being inputted into the main database. The people that were doing it lost their job… and no one has picked it up. It’s a huge resource to do it constantly.

The concept of digital repatriation is internationally contentious.47 Commentators have warned that expectations of the indigenous community from whom the items were originally obtained may not be met. Digital repatriation of an image is not compatible with the Mataatua Declaration of Indigenous Rights, a provision of which specifically requires cultural institutions to “offer back” indigenous cultural objects to their traditional owners.48 The

Crown argues that the official status of the Mataatua Declaration within the law and policy framework of New Zealand is contentious because it was “drafted by non-governmental organisations and not negotiated by and for states’ governments”. The Crown’s argument has a certain irony, however, given that it was made during the WAI 262 negotiations which were directly concerned to address the gap between the Western notions of intellectual property and Māori culture.

Digital repatriation also exposes the indigenous items to international scrutiny and this may contravene community laws and customs (such as secrecy) surrounding a particular item. The misuse of digital images of sacred items by commercial entities and other unauthorised bodies is another risk.

I don’t think that the general Māori population is particularly aware that some [overseas] museums have all this…. it is quite ad hoc in terms of what museums put up. They might put up one or two Māori pieces or Pacific pieces…. dependent on what resources they have. So it is not complete and it varies in relation to the information that they have up there. Sometimes it is just “this is from New Zealand and this is what it is”. You know, no other information or provenance or anything like that.

Conversely, WAI 262 notes that

digital technology can connect Māori throughout the world to key information about their heritage….To that extent there is now a strong Māori interest in the principle of unrestricted access.

The possibility of digital repatriation of Māori cultural heritage items held by New Zealand cultural heritage institutions does not provide a rationale for their digitisation activities, although digital repatriation may nevertheless be one of the outcomes. Nevertheless as stated above it is standard policy of New Zealand CHIs to consult widely with Māori owners of cultural items in their collections before digitising any such item.

There is a strongly held view among some Māori groups that records that are about them belong to them. So part of our response … is to try and address that view. The work … is to look at the collective transactions that are documented in our archives and provide them with copies of this material that they have selected and give back to them in a digital form. Sometimes in a hard copy format as well, so they can have control of those records themselves. So in that way we do do digital repatriation…..They have also expressed an interest in us actually retaining the digital copy as well… it is nice that they trust us to do that.

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49 Waitangi Tribunal Report, above n 46 at 53.
50 Waitangi Tribunal Report, above n 46 at Vol 2, 539.
What are the Museum’s responsibilities in regard to cultural value? and what is the nature of protection, as opposed to accessibility? We have dual responsibilities, because the digitisation is a huge opportunity for us to reconnect those objects to the communities that made them, but also there is an obligation to make them available in such a way as to not cause offence to those communities.

*New Zealand is unique in providing provisions in both its Trade Marks Act 2002 and its proposed Patents Bill that are intended to address the ethical and cultural issues that are found in indigenous knowledge and culture.*\(^{51}\) The inclusion of a similar provision within the Copyright Act would reinforce New Zealand’s international leadership in the area of indigenous rights.\(^{52}\)

The practices regarding digitisation of indigenous works from other countries by New Zealand CHIs may be less robust. However it is not the focus of this report to address that specific point.

### 8. Can the Archiving Exceptions be Improved for CHIs?

The “permitted acts” in copyright law, which include the archiving exceptions, are statutory provisions that permit certain uses of a copyright work to be made that would otherwise be an infringement of a copyright owner’s exclusive rights. International copyright law allows certain flexibilities for member States in their selection and implementation of permitted acts into their domestic law. However, in New Zealand (and all other countries which are members of the WTO) the permitted acts must comply with each of the “three step test” provisions in Article 13 of the Agreement of the TRIPS Agreement.\(^{53}\) Article 13 provides as follows:

> Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.

#### 8.1. The “three step test” in the context of archiving

Archiving and preservation of CHIs’ collections are already treated as “special cases” in national copyright laws and hence compliance with step one of the three step test can be

\(^{51}\) Trade Marks Act 2002, s 17(c) and the Patents Bill 2008, cl 14.

\(^{52}\) Waitangi Tribunal Report, above n 46 at 98.

\(^{53}\) The three step test in TRIPS is based upon the similar test in the Berne Convention for the Protection of Artistic and Literary Works 1886, art 9(2).
presumed. Analysis of steps two and three in the context of digital archiving and preservation is less straightforward.

The leading decision is *InfoPaq International A/S v. Danske Dagblades Forening (InfoPaq)* in which the three step test was applied in the context of unauthorized transient reproductions of copyright extracts of newspaper articles produced in the process of offering an online media monitoring service. In *InfoPaq* the second step was interpreted to mean the use of the exception must not cause any reduction in sales figures. Paul Torremans argues that it is “almost inevitable that an exception will have *some* impact on sales” and suggests that an exception should only fail step two of the three step test if it has a significant impact on sales. In the specific context of the archiving exceptions, the restricted interpretation proposed in *InfoPaq* would be untenable:

It would mean that archiving and format shifting could lead to certain users consulting the archive…rather than acquiring copies of (at least some of) the original works in their original format. As long as copies of the work are available there could therefore be a reduction in sales volume and even afterwards, the availability of the archive could make a republication no longer commercially viable.

As Torremans explains, this approach fails to achieve a proper balance between copyright and technological developments in the information society. Instead it over-protects copyright and potentially restricts the activities of archives and format shifting to public domain works.

In *InfoPaq* the Advocate-General asserted that due to the comprehensive coverage provided by the cutting service, its activities can influence the sales of individual newspapers; hence they fail the third step. By analogy, because effective archiving sets out to ensure

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54 They are implicitly defined as such in New Zealand law by their inclusion in the Copyright Act 1994, Pt 3 “Acts Permitted in Relation to copyright works” and are explicitly defined as such in European law: see Art 5(1) of the Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L 167/10.
56 The ruling in *InfoPaq* (above n 56) provides an analysis of the TRIPS-equivalent three part test which is contained in the Directive, above n 55 at Art 5(5).
57 Opinion of Advocate-General Trstenjak, paras [137]-[138].
59 Ibid at 121.
60 Ibid.
61 Opinion of Advocate-General Trstenjak, para [140].
comprehensive coverage of a collection, under the *InfoPq* test archiving would also fail the third step.\(^62\)

Torremans contends, however, that the *InfoPq* test incorrectly conflates the second and third steps of the three step test. Step three acknowledges that that *some* form of prejudice is acceptable - as a special exploitation under the exception potentially has an economic value, but asks whether this prejudice is *reasonable*.\(^63\)

Noting that the restrictive analysis of the three step test in *Infopaq*, if correct, is problematic for national legislatures seeking to extend their archiving exceptions, Torremans proposes a more flexible approach which “would allow us to reconcile a full-blown archiving exception with the three step test”.\(^64\) He suggests that the three step test should be considered to be

an enabling tool that allows for a flexible interpretation of copyright exceptions that have been introduced into national law, while at the same time putting in place an upper limit to this flexibility.\(^65\)

Indeed, as Torremans indicates, the Agreed Statement that accompanies the WIPO Copyright Treaty 1996 (“the WCT”) suggests that a more flexible approach to the three step test is acceptable in a digital environment:

> It is understood that the provisions of article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.\(^66\)

The WCT, which came into force on 6 March 2002, is directed towards copyright protection in the face of new technologies. Unlike Europe, however, New Zealand is not a formal member of the WCT, although its 2008 digital amendments to the Copyright Act comply with the WCT.\(^67\) *It is suggested that New Zealand should amend the archiving exceptions in accordance with the flexible approach in a digital environment that is advocated by the WCT.*

\(^{62}\) Paul Torremans, above n 59 at 122.

\(^{63}\) Ibid at 123.

\(^{64}\) Ibid at 125.

\(^{65}\) Ibid.

\(^{66}\) See “Agreed Statements Concerning the WIPO Copyright Treaty 1996, Concerning Article 10” adopted by the Diplomatic Conference on December 20, 1996.

\(^{67}\) See further, Susy Frankel, *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2011) 45. Note that Frankel contends that “It is questionable whether a treaty subsequent to the TRIPS Agreement that has not been agreed to by all WTO members should provide interpretative guidance.”
9 Conclusion and Recommendations

CHIs are a crucial part of the New Zealand cultural framework. The notion that they should continue to choose between adhering to bad law and achieving their official objectives, in terms of the service they provide, is untenable. In making the following recommendations I have chosen to disregard the Infopaq ruling on the three step test and to accept Paul Torreman’s views regarding the potential flexibility of the three step test at least insofar as the archiving exceptions are concerned.\footnote{Paul Torreman, above n 59 at 123.}

With that caveat in mind, the following changes to the archiving exceptions in the Copyright Act are recommended:

1. Section 50 should clarify the position of museums \textit{vis a vis} the archiving exceptions. Of those participants who had heard of the archiving exceptions, most believed that they do not apply to museums.
2. Amend section 55 (3) to
   - permit the making of multiple digital copies of all items in a CHI’s collection, apart from those items regarding which the copyright owner has clearly stated in writing that the item is not to be digitised.
   - require CHIs to remove any item from their website upon request from its copyright owner. No damages should be payable to a copyright owner in any such case apart from where the CHI unreasonably refuses to take down an item.
   - require CHIs to consult with Māori before digitising and providing online public accessibility to cultural heritage originating from Māori. An assessment of the balance between the public interest in culture versus the owners’ rights in their property should also be required.
3. Section 55(3) (a)-(d) should be repealed. In a digital environment each of these requirements is meaningless. Furthermore these requirements bear no relation to the practices and policy objectives of CHIs.
4. New s 55A should be inserted to permit format shifting of archival copies by CHIs. This will alleviate the ongoing problem of obsolescence of computer platforms,
programming languages and hardware and will ensure that archives of cultural heritage works remain accessible.\(^{69}\)

5. Section 56A (1)(d) should be repealed. There is no logical reason to limit the numbers of users who can access a lawfully made digital copy of a work in a CHI’s collection at any one time.

6. Orphan works provisions for CHIs are urgently required and will be achieved by the proposed amendments to s 55(3) above. Given the resourcing constraints of CHIs, compulsory licensing should not be a prior requirement for CHIs to digitise orphan works.

Finally, it is noted that The Guide to Copyright, currently produced by Te Papa Services, will be more useful for other CHIs if drawn up by a (named) lawyer who can assert its accuracy and has professional indemnity insurance should any errors in their advice subsequently come to light.

\(^{69}\) The need for a format shifting exception to copyright for CHIs in the UK was also mentioned in *The Gowers’ Review of Intellectual Property* (HM Treasury, London, December 2006); see Recommendation10b.
Appendix: The digital archiving exceptions in the Copyright Act 1994

50 Interpretation

(1) In sections 51 to 56C, unless the context otherwise requires,—

Archive—

(a) Means—

(i) Archives New Zealand (Te Rua Mahara o te Kawanatanga); or
(ii) The National Library; or
(iii) The sound archive maintained by Radio New Zealand Limited; or
(iv) The film archive maintained by Television New Zealand Limited; or
(v) The film archive maintained by the New Zealand Film Archive Incorporated; or
(vi) Any collection of documents (within the meaning of section 2 of the Official Information Act 1982) of historical significance or public interest that is in the custody of and being maintained by a body, whether incorporated or unincorporated, that does not keep and maintain the collection for the purpose of deriving a profit; and

(b) includes, in relation only to its holding of public archives (within the meaning of section 4 of the Public Records Act 2005), an approved repository within the meaning of that section of that Act:

prescribed library means—

(a) The National Library; or
(b) The Parliamentary Library; or
(c) every law library provided and maintained under section 375(1) of the Lawyers and Conveyancers Act 2006 or provided and maintained by the New Zealand Law Society; or
(d) A library maintained by an educational establishment, government department, or local authority; or
(e) A library of any other class of library prescribed by regulations made under this Act, not being a library conducted for profit.

(2) In sections 51 to 56C, every reference to the librarian of a prescribed library or the archivist of an archive shall be read as including a person acting on behalf of the librarian or archivist.

55 Copying by librarians or archivists to replace copies of works

(3) The librarian of a prescribed library or the archivist of an archive may make a digital copy of any item (the original item) in the collection of the library or archive without infringing copyright in any work included in the item if—

(a) the original item is at risk of loss, damage, or destruction; and

(b) the digital copy replaces the original item; and
(c) the original item is not accessible by members of the public after replacement by the
digital copy except for purposes of research the nature of which requires or may benefit
from access to the original item; and

(d) it is not reasonably practicable to purchase a copy of the original item.

(4) The librarian of a prescribed library or the archivist of an archive may make a digital copy of any
item (the original item) in the collection of the library or archive without infringing copyright in
any work included in the item if—

(a) the digital copy is used to replace an item in the collection of another prescribed library or
archive that has been lost, damaged, or destroyed; and

(b) it is not reasonably practicable to purchase a copy of the original item.

56 Copying by librarians or archivists of certain unpublished works

(1) The librarian of a prescribed library or the archivist of an archive may, if the conditions
contained in subsection (3) of this section are complied with, copy for supply to any person a
copy of an unpublished work in the library or archive, without infringing copyright in that work.

(2) This section does not apply if the copyright owner has prohibited copying of the work and at the
time the copy is made the librarian or archivist making it is, or ought to be, aware of that fact.

(3) The conditions referred to in subsection (1) of this section are—

(a) That no person is supplied on the same occasion with more than one copy of the same
work; and

(b) That, where any person to whom a copy is supplied is required to pay for the copy, the
payment required is no higher than a sum consisting of the total of the cost of production
of the copy and a reasonable contribution to the general expenses of the library or
archive.

(4) Where any person is supplied with, or otherwise comes into possession of, a copy made in
accordance with this section, that person may use the copy only for the purposes of research or
private study.

(5) The provisions of this section do not apply to the sound archive maintained by Radio New
Zealand Limited, the film archive maintained by Television New Zealand Limited, or the film
archive maintained by the New Zealand Film Archive Incorporated.

(6) In this section, copy includes a digital copy, but in that case section 56B applies as well.

56A Library or archive may communicate digital copy to authenticated users

(1) The librarian of a prescribed library or the archivist of an archive does not infringe copyright in a
work by communicating a digital copy of the work to an authenticated user if the following
conditions are met:

(a) the librarian or archivist has obtained the digital copy lawfully; and

(b) the librarian or archivist ensures that each user is informed in writing about the limits of
copying and communication allowed by this Act, including that a digital copy of a work
may only be copied or communicated by the user in accordance with the provisions of
this Act; and

(c) the digital copy is communicated to the user in a form that cannot be altered or modified;
and

(d) the number of users who access the digital copy at any one time is not more than the aggregate number of digital copies of the work that—

(i) the library or the archive has purchased; or

(ii) for which it is licensed.

(2) In subsection (1), authenticated user means a person who—

(a) has a legitimate right to use the services of the library or archive; and

(b) can access the digital copy only through a verification process that verifies that the person is entitled to access the digital copy.

56B Additional conditions for supply of copy of work in digital format by librarian or archivist under section 51, 52, or 56

A copy of a work to which section 51, 52, or 56 applies must not be supplied in a digital format, by the librarian of a prescribed library or the archivist of an archive, to a person ("A") unless the following conditions are also complied with:

(a) the librarian or archivist must give A, when the copy is supplied, a written notice that sets out the terms of use of the copy; and

(b) the librarian or archivist must, as soon as is reasonably practicable, destroy any additional copy made in the process of making the copy that is supplied to A.
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