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FOR PUBLICATION

Ms Jenna Priestly
Assistant Secretary, Content & Copyright Section
Department of Infrastructure, Transport, Development & Communications
GPO 594
CANBERRA ACT 2601

By email: copyright.consultation@communications.gov.au

Dear Ms Priestly

Submission on Copyright Amendment (Access Reforms) Bill 2021 – December 2021

The Australian Centre for the Moving Image ('ACMI') welcomes the release of the *Copyright Amendment (Access Reforms) Bill 2021 – December 2021* (the 'Bill') and the *Discussion Paper – Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions* (the 'Paper') and appreciates the opportunity to make this submission.

ACMI welcomes the Government's intent to ensure that sectors that serve important public interests such as the cultural, education, research and government sectors are enabled to provide their services effectively in a digital environment and facilitate greater public access to content, whilst limiting the impact on the commercial market for copyright owners. ACMI strongly supports the proposed reforms in the Bill and seeks to address certain questions raised in the Paper.

ACMI is Australia's national museum of screen culture, based at Federation Square in Melbourne. As a publicly funded cultural institution which celebrates, explores and promotes the cultural, creative and educational richness of the moving image in all its forms, the proposed reforms will allow ACMI to better deliver public value to the community in ways that keep pace with changing technologies and creative practices. The Bill will also offer greater legal certainty to ACMI with regard to providing timely and contemporary digital access by the public for non-commercial purposes and uses, while protecting creators. Further the Bill will significantly reduce the administrative burden on ACMI's limited resources to allow workflows to be streamlined and managed more effectively.

Schedule 1: Orphan Works Scheme

Question 1.1

ACMI welcomes the Government's stated intention to lower the risk and increase the options for using orphan works. ACMI strongly supports the proposed scheme for the use of orphan works after a diligent search has been undertaken. The limitation on liability (after a due diligence search has been conducted) will provide ACMI with greater comfort in making orphan works accessible particularly because many of our uses are non-commercial and do not prejudice the interests of the copyright holder, for example as elements in our exhibitions. However we submit that the proposal to delay the commencement of the scheme for 12 months after the commencement of the enabling legislation is an unnecessary delay. The basis for the proposed delay is to allow the development of industry

guidelines for the use of orphan works in the cultural sector. However ACMI submits that the cultural and government sectors are experienced in handling such materials and many institutions either already have guidelines in place or are well placed to develop guidelines for the specificities of their sectors in a timely manner.

Schedule 2: New Fair Dealing Exception For Non-Commercial Quotation

Question 2.1

The proposal to establish a new fair dealing exception for non-commercial quotation is greatly encouraged by ACMI. As a key cultural institution that manages and preserves an archive of moving image content consisting of linear, non-linear and interactive material (ie. films, television programs, video games, home movies, video and interactive artworks), a specific fair dealing quotation exception will enable ACMI to achieve its public benefit purposes more efficiently and effectively.

Specifically it will allow greater certainty in producing our exhibition catalogues as well as explanatory video essays containing visual and audiovisual quotations from moving image content for illustrative, interpretative and/or educational purposes (eg. stills, thumbnail images of feature films used in an exhibition catalogue for Scorsese's films or in comparing visual references between artworks and popular culture). In our award-winning Story of the Moving Image exhibition that launched in 2021 and is intended to run as an ongoing free exhibition, ACMI has had to resort to using current criticism and review exceptions for some key interactive and educational elements of the exhibition such as the Edit Line, and a quotation exception would allow these to continue to be updated with more contemporary examples of moving image culture. Such uses do not detract from the commercial value of the content or interfere with the commercial market for such content.

ACMI submits that the proposed quotation fair dealing exception should extend to unpublished material given that such uses would be for non-commercial purposes, remain subject to fairness factors and would have the public benefit of permitting greater public access to publicly held materials. ACMI holds a large collection that consists of home movies and amateur video that give examples of the social and cultural life of Australia in previous decades. The ability to use audiovisual extracts from such works in social history exhibitions is essential and virtually impossible to do without a quotation clause.

Schedule 3: Library and archives exceptions

Question 3.1

ACMI is supportive of the intent of the proposed reforms in this area. ACMI is a public institution whose vision includes connecting people in vibrant physical and digital spaces. The importance of curating vibrant digital spaces, facilitating connections and enabling dynamic access to ACMI's collection of moving image content was highlighted by the recent pandemic lockdowns.

ACMI submits that cultural institutions are best placed to establish the reasonable steps they would take in assessing whether to grant online access to the copyright material they hold and that 'reasonable steps' should not be prescribed in legislation, and s.113KD be amended to reflect this. Libraries and archives as cultural institutions are predominantly publicly funded bodies with internationally recognised experience and expertise in such matters and should be entrusted to establish appropriate access processes. For example ACMI currently allows general access to users to browse online catalogues and content on an anonymous basis without requiring a user to 'login', register, or provide personal information. However a request for research access usually requires

providing a temporary streamable copy to the user and in such cases ACMI would require the user to complete a registration process.

In relation to proposed s.113KD(6), ACMI submits that cultural institutions should have the flexibility to deny a request for access (irrespective of whether for research or private, domestic purposes) to copyright material held by the institution for a range of reasons. This could include for example denying access to indigenous content in line with community norms and/or cultural practices then applicable. It could also include where the cost to the institution of making and supplying an electronic copy is prohibitive and cannot be recouped from the user. This can arise where audiovisual materials require digitisation which may be an expensive, complex process given the age and nature of the materials. ACMI submits that the ability of institutions to deny a request for access should be clarified.

Part B Review of TPM exceptions

With respect to the review of Technological Protection Measures (TPMs), ACMI makes the following submissions:

ACMI's collection holds many historical Australian videogames and interactive media from the 1980s, 1990s and more recently that form part of moving image history and are of significant Australian cultural heritage. Examples of this are the [REDACTED] games [REDACTED] and [REDACTED], created by an Australian games developer, [REDACTED] in 1992. [REDACTED] was the first videogame ever made about the [REDACTED]; [REDACTED] was modelled on the [REDACTED] that was hosted in Australia from 1979 to 1996. These were among the first [REDACTED] licensed games to be made in Australia and were made specifically for an Australian audience, which demonstrates the rapid expansion of the videogame industry at this time.

Videogames are complex digital artefacts that are at risk of loss due to deteriorating materials and the continuous modernisation of computing environment. Cassettes, cartridges, floppy discs, optical discs for example physically deteriorate, as well as delamination, segment corruption, bit rot, obsolete hardware mean that such games are no longer playable on modern computers. Along with a team of researchers ACMI aims to preserve and make such media known to, and accessible by the public to interact with (for personal use) within a strictly controlled, emulated environment both on ACMI premises but also via ACMI's website, as permitted within the proposed library and archives exceptions. Providing online access to such interactive media will be subject to the requirements of taking reasonable steps to ensure that copyright is not infringed, and investigating to ensure that a copy of the game is not otherwise commercially available in its original form.

To do so often requires circumvention of TPMs in order to enable the public to access such material. However it is unclear and unnecessarily complex to assess whether this would be permitted under existing TPM exceptions.

Accordingly ACMI submits that libraries and archives (or alternatively key cultural institutions) be enabled to circumvent TPMs in order to access, preserve and make such materials available online, ie. to utilise the proposed library and archives exception and fair dealing quotation, as well as existing fair dealing exceptions, in order that the reforms in these areas to permit wider public access to content are meaningful. Currently valuable administrative resources are unnecessarily expended on assessing whether circumvention of TPMs creates legal risk for an institution which is simply trying to rely on uses permitted under the Act.

Further, ACMI submits that the existing TPM exception for educational institutions' uses under s200AB be extended (i) to videogames and (ii) to libraries and archives (or alternatively key cultural institutions) as there is no basis for (i) differentiating video games from other works or (ii) permitting libraries and archives to use s200AB but denying them the same legal protections afforded to educational institutions.

Yours sincerely,

Katrina Sedgwick
Director & CEO