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Department of Infrastructure, Transport,
Regional Development and Communications

Discussion paper—Exposure Draft Copyright Amendment (Access Reform) Bill 2021

& Review of Technological Protection Measures Exceptions

December 2021



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Glossary

The following abbreviations are used in this Discussion Paper:

<i>Abbreviation</i>	<i>Meaning</i>
Act	<i>Copyright Act 1968</i>
ALRC inquiry	Australian Law Reform Commission 2013 Copyright and the Digital Economy inquiry
Bill	Copyright Amendment (Access Reform) Bill 2021
Copyright Tribunal or Tribunal	Copyright Tribunal of Australia
CSIRO	Commonwealth Scientific and Industrial Research Organisation
Cultural institution/sector	A library, an archives, a gallery or museum that may be a library or an archives, or a key cultural institution as defined by section 113L of the Act
Federal Court	Federal Court of Australia
Library or archives	Includes a gallery or museum that may be a library or an archives, or a key cultural institution as defined by section 113L of the Act
Orphan work	Copyright material whose owner is unknown or cannot be contacted.
PC inquiry	Productivity Commission 2016 Intellectual Property Arrangements inquiry
TPM	technological protection measure

Introduction

This Exposure Draft of the *Copyright Amendment (Access Reform) Bill* (the Bill) aims to simplify and update provisions of the *Copyright Act 1968* (the Act) to better support the needs of Australians accessing content in the digital environment. The Bill builds on the *Copyright Amendment (Disability Access and Other Measures) Act 2017* and the *Copyright Amendment (Service Providers) Act 2018* by providing reasonable and practical measures that reflect contemporary use of copyright material in the public interest, while maintaining appropriate protections and incentives for content creators.

The Government has released the Bill, and this discussion paper, so that interested individuals and organisations can have their say on these proposed reforms.

The Government is also conducting a review of the technological protection measure (TPM) exceptions in section 40 of the *Copyright Regulations 2017*, and invites your views.

The consultation has commenced and will remain open until 5pm (AEDT) Friday 11 February 2022. More information, including how to participate, is available at infrastructure.gov.au/have-your-say/have-your-say-draft-copyright-reform-legislation.

Reform measures

Details of the reform measures in the Bill and what to address in a submission are in [Part A](#).

The Bill comprises five main reform measures:

[Schedule 1](#) — Limitation on remedies for use of orphan works

[Schedule 2](#) — New fair dealing exception for non-commercial quotation

[Schedule 3](#) — Update and clarify library and archives exceptions

[Schedule 4](#) — Update and restore education exceptions

[Schedule 5](#) — Streamline the government statutory licensing scheme

Additional minor and technical amendments in [Schedules 6 to 10 of the Bill](#) streamline some procedural aspects of the Act, update certain references and improve consistency of language.

Review of TPM exceptions

Details of the review and what to address in a submission are in [Part B](#).

Context of reforms

Australia's copyright framework has been subject to extensive review over recent years. These reviews have assessed how copyright is adapting to the modern challenges of evolving technology, changing consumer usage patterns and broader global trends. They have consistently highlighted the need for a more flexible and adaptive framework to facilitate access to, and dissemination of, creative content in the digital environment.

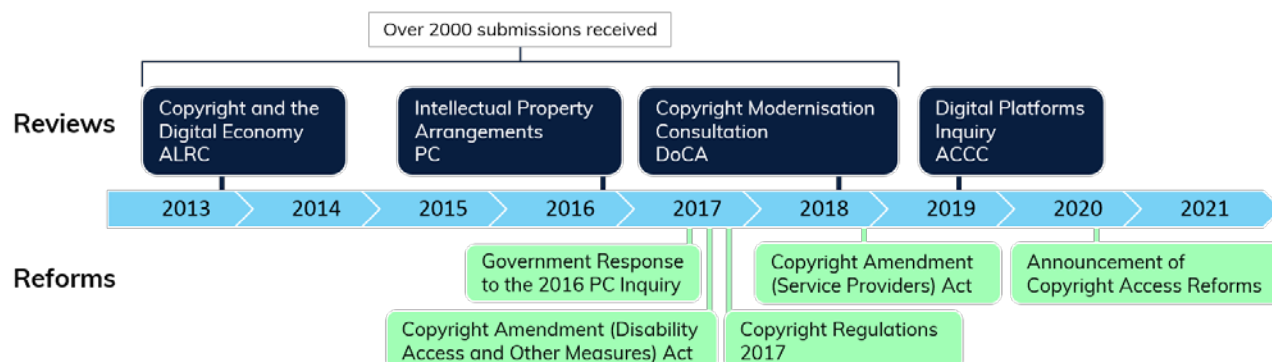
Copyright law is essential in incentivising creators and their industries to produce Australian content and receive payment for their creativity. At the same time, allowing reasonable access to that creative content is critical to enhance learning and Australian culture, and driving new creativity and innovation. The Act seeks to balance the rights of copyright owners to manage and protect their content with the public interest to access that content. It is also important that the Act gives creators, copyright owners and users certainty about the scope of rights and the permissible use of copyright material.

A key issue is how to introduce more flexibility in the Act to allow clear and reasonable access to content in the public interest in an increasingly digital world, while maintaining appropriate safeguards to protect copyright owners' commercial interests.

Finding workable solutions for long identified problems

The reforms in the Bill represent the culmination of extensive stakeholder consultation, including the Government's [2018 Copyright modernisation consultation](#), and will finalise the Government's response to recommendations of the Productivity Commission's [2016 Intellectual Property Arrangements inquiry](#) (PC inquiry) (see **Figure 1**).

Figure 1 — Reviews and reforms of Australian copyright law



PC inquiry recommendations and the Government's response

The PC inquiry and, before it, the Australian Law Reform Commission's [2013 Copyright and the Digital Economy inquiry](#) (ALRC inquiry), recommended adopting a broad 'fair use' copyright exception to replace Australia's narrower, purpose-based 'fair dealing' exceptions and some other specific exceptions. A 'fair use' system (such as in the United States) is a principles-based system that allows the use of copyright material if it is 'fair'.¹ By contrast, a 'fair dealing' exception regime allows the use of copyright material for certain purposes specified in the legislation.² Proponents of fair use argue that it is a more flexible legal tool, capable of accommodating new and valuable fair uses of copyright material without waiting for legislative change.

The PC inquiry overlapped with copyright reforms that were already being developed by the Government. These reforms resulted in the [Copyright Amendment \(Disability Access and Other Measures\) Act 2017](#) that improved the workability of the Act for the disability, library and archives, and education sectors and included:

- technology neutral exceptions that facilitate access to copyright material for people with a disability, on par with the general community
- updated preservation provisions for libraries and archives and other key cultural institutions
- new standard terms of copyright protection for works, sound recordings and films, including unpublished material, and
- streamlined education statutory licence.

The [Government response to the PC inquiry](#) flagged that further consultation was necessary for certain recommendations given the complexity of the issues and different approaches available to address them. The Government's subsequent Copyright modernisation consultations held in 2018 sought views on flexible copyright exceptions such as fair use and extended fair dealing exceptions; access to 'orphan works' (where the copyright owner cannot be found); and 'contracting out' of exceptions.

¹ In the United States, four factors are applied to the facts of a case to determine whether a use is 'fair'. These include the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the whole work; and the effect of the use on the potential market for or value of the work. See *United States Code*, Copyright Law of the United States (Title 17), section 107.

² In Australia, to be considered a 'fair dealing', currently the dealing must be for one of the following six purposes prescribed in the *Copyright Act 1968*: research or study; criticism or review; parody or satire; reporting the news; giving legal advice; or enabling a person with a disability to access material.

More specific, targeted reforms favoured

The Copyright modernisation consultations highlighted that there is no clear case to move to a broad, principles-based ‘fair use’ system. Stakeholders’ views remained polarised, and the evidence base for broader reform was not clear. A change to fair use would represent a significant departure from Australia’s current copyright system of fair dealing and specific exceptions. It would risk introducing ambiguity or uncertainty, which may be difficult and costly to resolve, and in some cases lead to litigation or people simply abandoning use of creative content. While there is no uniform international approach, the large majority of countries rely on copyright frameworks that include exceptions similar to Australia, rather than fair use.

The Government has chosen, at this time, to undertake more specific, targeted reforms to the existing exceptions framework. This framework recognises that certain reasonable uses of copyright material in the public interest should be permitted without the consent of, or payment of money to, the copyright owner. As demonstrated in previous copyright reform, incremental reform to this existing exceptions framework would avoid significant disruption to copyright owners’ commercial markets that sweeping reforms may cause.

Shift in the digital landscape

In recent years, the digital landscape has changed significantly with the rise of multinational digital platforms, driven by user-generated content. The Australian Competition and Consumer Commission’s [2019 Digital Platforms Inquiry](#) final report reinforced copyright owners’ concerns that broad flexible exceptions could potentially result in content being exploited by digital platforms for commercial gain. At the same time, the access issues identified by the Government’s Copyright modernisation consultations, the PC inquiry and the ALRC inquiry remained. This COVID-19 pandemic has further highlighted these access issues, with the need for an urgent transition to widespread online and remote learning, and many public institutions having to move their services online.

If the law does not keep pace with new technologies and emerging practices, activities that were allowed under copyright exceptions may fall out of scope and become remunerable. Such changes can also give rise to entirely new activities and avenues to re-use creative content and generate new content. Without the continued evolution of Australian copyright law, it may fail to support the societal benefits that these uses can achieve.

What do the current reforms seek to achieve

The reforms in the Bill target those sectors that serve important public interests, including the cultural, education, research and government sectors. It will make sure that they can provide their services effectively and efficiently in an increasingly digital environment and, in doing so, enhance access to the wider community. Recognising too the importance of copyright law in incentivising creators and their industries to produce Australian content and receive payment for their creativity, these reforms have been designed in a way to minimise the commercial impacts on copyright owners. For the most part, the reforms relate to non-commercial use of copyright material or use that has a limited impact on the commercial market for the material.

Open up access to ‘orphaned’ material

Orphan works (copyright material where the copyright owner cannot be found), can be of great cultural, social or educational value but are generally underused. Many copyright owners cannot be identified or contacted to permit the use of material, even after time consuming and costly searches. This is a significant issue for Australia’s cultural institutions, as they hold huge amounts of orphaned material in their collections. There is a reluctance to use or allow others to access orphan works as there remains a risk the copyright owner could emerge and claim compensation for use of the material, or object to its use altogether. This could result in any new material that uses the orphan work being destroyed, withdrawn or modified at significant expense.

Reduce time, costs and uncertainty of quotation for academics and researchers

Seeking clearances of quotes of copyright material in publications and presentations, particularly when multiple copyright owners are involved, can represent a significant and disproportionate time and cost burden for academics, universities, libraries and archives and researchers. This can sometimes result in academics and researchers abandoning the use of material or risking using unlicensed material in their works.

More certainty and efficiencies for cultural, education and government sectors

The current copyright exceptions available to cultural and educational institutions, and the government statutory licensing scheme, originated in a paper-based era. Many provisions are outdated, narrow and overly prescriptive. This creates uncertainty and exposes our public sectors to a higher risk of legal liability, and imposes significant administrative burden. Many of the reforms aim to provide reasonable and practical measures to allow the use of copyright material fit for a contemporary digital-based society, and improve efficiencies.

Part A: Reform measures

In Part A an overview of each of the reform measures as set out in Schedules 1 to 10 of the Bill is provided, along with some information on their practical application and explanation of key concepts.

Making a submission

We seek your feedback on the implementation of the proposed reform measures in the Bill, including the specific questions set out in Part A. Your views will be considered before any legislation is finalised.

In developing these measures, we have relied upon analysis and evidence received as part of the Government's 2018 Copyright modernisation consultation, the PC inquiry and, where it remains relevant, the ALRC inquiry. This includes using updated information on the different models of possible reform where available.

Specifically, we want your views on:

- the questions set out in Part A
- any likely significant impacts (good or bad) on your sector, including economic, financial or social impacts
- whether the proposed reforms are sufficiently clear and workable, including whether they would create or reduce administrative burden
- any other unintended consequences, including unintended legal risk, and
- the calculations, assumptions and other relevant context (such as industry information) for any information you provide.

Confidential information can be provided by either:

- (a) submitting a public release and an in-confidence version of the submission, or
- (b) identifying the parts of a submission that should be treated as in-confidence.

Schedule 1: Limitation on remedies for use of orphan works

Overview

The Bill will introduce a scheme to allow for the use of copyright material if the copyright owner cannot be found, commonly known as an ‘orphan work’, after a reasonably diligent search is done. This measure implements the [Government’s response to the PC inquiry’s](#) recommendation 6.2 in a way which is simple and efficient. It provides clear safeguards to copyright owners and does not introduce unnecessary red tape for creators or users.

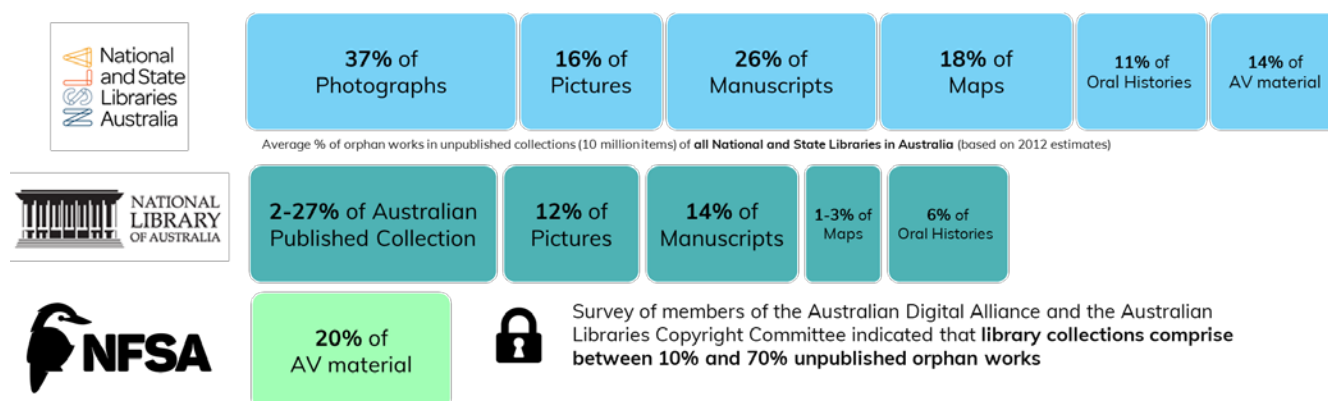
ISSUE	POLICY INTENT	KEY ELEMENTS OF PROPOSED REFORM
Copyright material cannot be used productively or for other socially and creatively beneficial reasons where it is orphaned.	Allow wider use of all orphaned copyright material. This will open up access to a larger collection of cultural, historic and educational works held by our cultural and educational institutions, and enable use of orphaned material in modern creative endeavours.	<ul style="list-style-type: none"> • Scheme will limit relief that can be sought against a person for use of an orphan work where: <ul style="list-style-type: none"> ○ a reasonably diligent search has been undertaken for the copyright owner within a reasonable time before use of the material, and ○ the copyright owner cannot be identified or contacted to obtain permission, and ○ if it is reasonably practicable, the author of the copyright material has been attributed. • Scheme will cover all types of copyright material, users and use. This includes commercial use, although more search effort may reasonably be expected where the use is commercial or the copyright material is disseminated widely. • Scheme will set out a range of factors that may be considered in determining whether a reasonably diligent search was conducted, including the nature of the copyright material; purpose and character of the use; who conducted the search and how; available search technologies, databases and registers; and any relevant industry code of practice (guidelines). • Commencement of the scheme will be delayed for 12 months to allow the development of industry guidelines. • Statutory licences will not apply to use of copyright material covered by the orphan works scheme.
	Where the copyright owner is later identified and able to be contacted, the copyright owner will have an avenue to negotiate payment and other reasonable terms for ongoing use of an orphan work.	<ul style="list-style-type: none"> • If the copyright owner later emerges, the scheme will allow them to seek reasonable payment for ongoing use of the work if the user wishes to continue to use the work. However: <ul style="list-style-type: none"> ○ no compensation or other relief can be sought against the user for past use of the work ○ if the parties are unable to reach agreement on terms for ongoing use, either party will be able to apply to the Copyright Tribunal to fix reasonable terms, and ○ if the agreed terms, or terms fixed by the Tribunal, are not met by the user, the copyright owner will be able to pursue available remedies. This may include seeking an injunction from a court against future use of their copyright material or enforcement of agreed terms, as is appropriate.

In practice

Orphan works are a significant problem for cultural institutions (see **Figure 2**). Current copyright law can leave historically and culturally valuable items inaccessible to the public, historians and researchers, resulting in significant gaps in knowledge and research. Seeking to obtain individual permissions from copyright owners, especially in the case of the mass digitisation of collection items, can be time consuming, costly and often fruitless.

Educators and creators, including public broadcasters and documentary makers, can also have trouble using orphaned archival material such as literary works, audio-visual footage or photographs.

Figure 2 — Scope of orphaned copyright material in cultural institution collections



Case Study: Trove Newspapers Collection

TROVE

The Trove Newspaper collection has made over 23 million pages from Australian newspapers freely available online. Due to the risk of copyright infringement, newspapers that are made available online are usually those published before 1955 (on the understanding that they are generally out of copyright). The introduction of an orphan works scheme will provide confidence to Trove that they can use more newspapers published after this date where the copyright owner is unknown or uncontactable, including where the material has been abandoned, without being financially liable. This will allow research into and production of new works on diverse topics, such as local and regional history and bushfire control, and further support new creative works. If an owner of an orphaned newspaper eventually comes forward, Trove can then either negotiate terms for its ongoing use or stop making it available online.

Case Study: National Film & Sound Archive (NFSA)

NFSA

Screen producers often request access to orphaned material held by the NFSA for inclusion in a new production. This may include old newsreels, film clips that are unpublished or long out of circulation, field recordings or home movie footage. The commercial nature of these requests, coupled with the likelihood of a broad audience, can discourage the NFSA from releasing such material as they could be financially liable if the copyright owner later comes forward. The orphan works scheme will allow the NFSA to provide greater access to such material and both enhance cultural learning and support new creative works.

Key concepts

‘Reasonably diligent search’ (Schedule 1, item 2, new section 116AJA)

What constitutes a ‘reasonably diligent search’ will depend upon the individual circumstances. While the burden on a prospective user to search for the copyright owner should not be unreasonable, a number of factors need to be considered when deciding whether a reasonably diligent search has been conducted. This includes the matters set out in **Table 1**.

Table 1 — ‘Reasonably diligent search’ (new section 116AJA(2))

Matters that may be considered	Examples
The nature of the copyright material	<ul style="list-style-type: none"> • This may include the: <ul style="list-style-type: none"> ○ age of the work ○ type of work, for example, whether it was created for personal consumption or without an expectation of commercial return, or ○ amount of identifying information.
The purpose and character of the use	<ul style="list-style-type: none"> • More search effort may reasonably be expected where the use is commercial or the material is disseminated broadly by the user. • Where urgent use of the work is required, such as an urgent broadcast where the safety or welfare of a person is at risk, a shorter, less onerous search may be considered reasonable.
How the search was conducted	<ul style="list-style-type: none"> • Publishers, broadcasters and collecting societies may hold relevant information to help identify and locate the copyright owner, depending on whether the material is published, broadcast or performed. • In some cases, it may be reasonable to narrow searches to a shorter investigation based on the outcome of a representative sample of the works, for example in the case of mass digitisation of collection items. • If there is evidence that the copyright owner is outside Australia, the search should extend to the overseas country. • The mere absence of a response from a copyright owner (where known) may not suffice. However, if a response is not received within a reasonable time after various attempts to contact the copyright owner, especially through more than one channel (for example, by post, email and telephone), the user may reasonably expect that the copyright owner is not actively exercising their exclusive rights and the work is orphaned. A reasonable time may, in turn, depend upon the purpose and character of the proposed use.
Who conducted the search	<ul style="list-style-type: none"> • The search will generally be undertaken by the user of the material or a person authorised by the user to undertake the search. • In some circumstances it may be reasonable for the user to rely upon a prior search conducted by another person. For example, a librarian may be able to rely upon a previous search by another librarian at the same or another library. • This may also extend to secondary use of material containing an orphan work, such as: <ul style="list-style-type: none"> ○ a member of the public using orphaned material made available to access by a library or an archives

Matters that may be considered	Examples
	<ul style="list-style-type: none"> ○ the publication of a historical study that includes copies of old photos, maps or records for which the copyright owner could not be located by the historian ○ the use by a filmmaker of archival programming material containing music, stills or third party footage for which the copyright owner could not be identified by the archives, or ○ the use by a broadcaster of a screenplay produced by a film studio that is based on an orphaned novel.
The search technologies, databases and registers available at the time	<ul style="list-style-type: none"> ● What constitutes a reasonably diligent search may change as new technologies, databases and registers, etc., emerge. ● This could include accessible registers established by collecting societies or industry associations.
Any relevant industry codes of practice	<ul style="list-style-type: none"> ● 'Industry codes of practice' will cover written guidelines, protocols or other industry guidance material on conducting diligent searches. This may include, for example, guidance about relevant organisations to consult, publicly available databases and registers to check and documenting the search.

Reasonable terms for ongoing use (Schedule 2, item 2, new section 116AJB)

If, after its initial use, the copyright owner of an orphan work is identified or comes forward, the copyright material will stop being an orphan work. If the user wishes to continue to use the former orphan work, the copyright owner will be able to negotiate terms for ongoing use of the work or, if unable to reach an agreement with the user, apply to the Copyright Tribunal to fix reasonable terms. (See **Question 1.1** below.)

Application to statutory licence holders (Schedule 1, items 1, 3 and 4; Schedule 5, item 26)

Educational institutions and governments (and other statutory licensees) will not need to pay remuneration under the statutory licences in the Act for the use of orphan works if they choose to rely on the orphan works scheme and have met the requirements. This includes the statutory licences in Part IVA (education), Part VC (retransmission of free-to-air broadcasts), Part VD (re-broadcasts by satellite BSA licensees) and Part VII (government) of the Act. Where education and government sectors use the orphan works scheme we would encourage them to work with collecting societies to establish best practice for searching for copyright owners and identifying orphan works. This would determine how their reliance on the scheme would operate alongside the statutory and other licences.

Questions

Question 1.1: Orphan works: Application to Copyright Tribunal to fix reasonable terms

Part 11, Division 3 of the *Copyright Regulations 2017* sets out the matters to be included in particular kinds of applications and references to the Copyright Tribunal. What matters do you consider should be included in an application to the Tribunal to fix reasonable terms for ongoing use of a former orphan work?

Schedule 2: New fair dealing exception for non-commercial quotation

Overview

The Bill will introduce a new, stand-alone fair dealing exception to permit the quotation of copyright material by certain public bodies, organisations and individuals for non-commercial purposes or if the quotation is of immaterial commercial value. Cultural institutions, educational institutions and governments can use this exception for their own purposes, however, individuals and organisations can only use it for research purposes.

ISSUE	POLICY INTENT	KEY ELEMENTS OF PROPOSED REFORM
<p>Uncertainty exists about whether current fair dealing exceptions adequately cover what may be regarded as fair 'quotation' of copyright material.</p> <p>It is a particular problem for academics, universities and other public research bodies.</p> <p>This quotation generally has no impact on the market for the original copyright material, but its absence can degrade the value of academic work or research.</p>	<p>Support the use of excerpts of copyright material by our public institutions and researchers where this does not interfere with the commercial market for the copyright material.</p> <p>Significant safeguards will be provided to copyright owners through limiting the user set and the application of non-commercial criteria and fairness factors.</p>	<ul style="list-style-type: none"> • New exception will permit quotation from any copyright material, for the purpose of, but not limited to, explanation, illustration, authority or homage, provided: <ul style="list-style-type: none"> ○ If it is reasonably practicable, the copyright material has been attributed to the author and the title is identified. ○ The quotation is made by: <ul style="list-style-type: none"> - a library or an archives (including a museum, gallery or key cultural institution that is a library or an archives), an educational institution, the Commonwealth or a State or Territory, or a person acting under the authority of such an institution or government, or - by a person or an organisation for the purpose of research. This may include individuals such as academics, teachers, students, documentary makers and family historians, and organisations that are engaged in scientific, medical or industrial research such as hospitals, medical research institutes and CSIRO. ○ The quotation is for a non-commercial purpose, or is for a purpose where the quote is immaterial to the commercial value of the product or service in which it is used. ○ The copyright material has been lawfully made public already. ○ The use of the quotation is a fair dealing with the copyright material having regard to (among other things) four standard fairness factors: <ul style="list-style-type: none"> - the purpose and character of the use - the nature of the copyright material - the effect of the use upon the potential market for, or value of, the material, and - the amount and substantiality of the material used. • New exception will apply to all types of copyright material and be technology neutral, allowing quotations to be made in digital formats and in online contexts.

In practice

The new exception targets public institutions and researchers where difficulty in getting clearances for quotes can cause a disproportionate administrative burden, cost and uncertainty. Some quotations will be too short or generic to qualify for copyright protection, which generally depends upon use of a ‘substantial part’ of original copyright material.³ However, the courts have held that whether a part is ‘substantial’ depends more on its quality than its quantity.⁴ This can be difficult to determine. Even short quotes may be copyright protected. Existing exceptions such as the fair dealing exceptions for the purpose of research or study are limited in scope and may not cover, for example, quotation for academic publication.⁵

At the same time, by limiting the persons and organisations able to rely on the exception and incorporating both non-commercial criteria and fairness factors, copyright owners’ commercial markets will remain protected. Quotation in commercially driven activities, such as using copyright material in search snippets to attract advertising income, are not covered. Nor are many everyday uses of quotes, for example:

- retweeting or quoting small amounts of copyright material on social media, or
- putting a recognisable quote from a movie or television show on a t-shirt.



Case study: PhD students

When PhD students publish their thesis on university websites, they are required to seek permission to use all third party content including text, images, figures and graphs before online publication. This can be a significant burden on students and can sometimes result in students changing their thesis topic. The new exception will provide PhD students, and the universities they are associated with, with greater freedom to disseminate their research to new audiences.



Case study: Academics

Academics often end up redacting some material or risking using unlicensed material in their academic works. This is due to the time, cost and uncertainty of getting clearances for quotes in publications and presentations, especially where there are multiple copyright owners. The new quotation exception will reduce this risk, and help academics maintain the integrity of their work.



Case study: Documentary makers

Documentary makers can struggle to complete their film projects if their project needs to reference third party content. The costs associated with getting copyright clearances for short, sometimes seconds-long, film clips and archived newspaper articles can be prohibitive and lead to compromises being made. A quotation exception will help these creators use excerpts of copyright material in their projects without significant cost or legal risk.

³ *Copyright Act 1968*, paragraph 14(1)(a).

⁴ See *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444 (Full Federal Court) (the Kookaburra case).

⁵ Sections 40 and 103C have been held to apply only if the person who does the copying is the person doing the research or study: *De Garis v Neville Jeffress Pidler Pty Ltd* [1990] FCA 218. This means that librarians and teachers cannot rely on the exceptions to copy material for the benefit of a researcher or student, nor can publishers of a book that is the subject of academic research.

Key concepts

‘Quotation’

The Bill does not define the term ‘quotation’. It should be given its ordinary meaning, that is ‘to repeat’ or ‘cite’ all or some part of copyright material. Common forms of quotation may include, for example, citing a group of words from a book, a passage from a piece of music or a spoken line from a movie.

Some uses of copyright material may not be ‘quotation’ in the ordinary sense of the word, in that there may be no attempt to clearly reference the original work. For example, the sampling, mashup and remixing of copyright material to make a brand new product would not be ‘quotation’ using its ordinary meaning.

Quotation by cultural and educational institutions and governments (Schedule 2 item 4, new section 113FA(1)(a)(i)–(vi))

Libraries and archives, educational institutions and governments will be able to use this exception to allow the reasonable quotation of copyright material to support their core functions. Some examples of quotation by these institutions that may be supported by this exception are set out in **Table 2**.

Table 2 — Quotation by cultural and educational institutions and governments

Use of quotation by...	Examples
Libraries and archives	<ul style="list-style-type: none"> Excerpts of collection material to support screen producers and other researchers. Extracts of literary works or audio-visual material or thumbnail images: <ul style="list-style-type: none"> to enhance presentations about an era in community or educational outreach material, or in an exhibition catalogue.
Educational institutions	<ul style="list-style-type: none"> Extracts of text or images in school teaching resources such as power point presentations. Quotes from academic commentary and professional works in university lectures.
Governments	<ul style="list-style-type: none"> References to commentary of scientific, social or other public interest in a report or information for the public. Images or diagrams in conference presentations to illustrate a point.

Quotation by 'a person or an organisation for the purpose of research' (Schedule 2, item 4, new section 113FA(1)(a)(vii))

‘Research’

The Bill does not define the term ‘research’. The ordinary dictionary meaning of ‘research’ should be used which is the ‘diligent and systematic enquiry or investigation into a subject in order to discover facts or principles’.⁶

⁶ This aligns with the Federal Court’s interpretation of ‘research’ in the existing fair dealing exception for the purpose of ‘research or study’ (section 40): see [De Garis v Neville Jeffress Pidler Pty Ltd \[1990\] FCA 218](#) at [25]–[26], in which Beaumont J relied upon the meaning of ‘research’ according to the Macquarie Dictionary.

Publishing and disseminating research

Dealing with copyright material ‘for the purpose of research’ extends to making the research public, including the publication or dissemination of research material by the researcher. This includes communicating any research findings online, which is an integral part of the research process in a digital, networked environment.

If the publication or dissemination of the research results in some commercial gain, the researcher would need to demonstrate that the use of quotation is immaterial to the value of the publication or presentation and is otherwise fair. Some examples of quotation for the purposes of research that may be supported by this exception are set out in **Table 3** below.

Table 3 — Quotation by a person or organisation for the purpose of research

Use of quotation by...	Examples
Individuals and organisations ‘for the purpose of research’ (including making public research)	<ul style="list-style-type: none"> Excerpts of copyright material in: <ul style="list-style-type: none"> a PhD thesis published on a university website an academic work published in a journal or book a documentary film, in which excerpts of background music or images are captured a non-fiction book based on historical facts or real-life events a family history, or a presentation of research material at a conference or seminar, to illustrate a point.

Quotation for a ‘non-commercial purpose’ or for a ‘commercial purpose’ but of ‘immaterial’ value (Schedule 2, item 4, new section 113FA(1)(b))

The Bill does not define the terms ‘non-commercial’ and ‘commercial’. The word ‘commercial’ should be given its ordinary meaning, that is, of the nature of commerce, trade or business. While these qualifiers to the exception may add some complexity, in combination with the fairness factors, they will provide additional protection to copyright owners by excluding explicitly profit-driven activities or services and protecting the market of the original quoted material.

The exception may extend to quotation where the product has some commercial value, such as:

- text or images cited in scholarly works that are published commercially
- excerpts of background music or images captured in a documentary that is aired by a commercial broadcaster, or
- images and diagrams used in papers presented at conferences which people pay to attend.

Copyright material has been ‘made public’ (Schedule 2, item 4, new section 113FA(1)(c))

Only copyright material that has already been ‘made public’ with the copyright owner’s permission can be quoted.⁷

‘Made public’ is defined in section 29A of the Act and includes ‘publication’ of copyright material (as defined in section 29). Copyright material is also ‘made public’ when it is ‘communicated’ to the public, including when it is made available online or electronically transmitted.

⁷ Under the *Copyright Act 1968*, any ‘making public’ of copyright material must be disregarded if it is not authorised by or with the licence of the copyright owner: see subsection 29A(3) and, by reference, subsections 29(4)–(7).

Unpublished material

Given the requirement that only copyright material made public with the copyright owner's permission can be quoted, the quotation of unpublished material, for example from private letters, would generally not be covered under this exception. Traditionally, the 'right of first publication' is generally reserved to the creator.

However, such an approach does have limitations. It could make the quotation exception less effective and more difficult to administer given different arrangements will be needed depending on whether the quoted material is published or unpublished. For example, this may limit the public quotation of a large amount of non-commercial material held in our national institutions, including for research purposes.

Moreover, if the quotation exception is extended to unpublished material it is likely that the fairness factors would exclude commercially valuable or confidential material from being quoted. Such an approach would be consistent with other, existing fair dealing exceptions in the Act, such as those for the purpose of research or study, criticism or review, parody or satire, and news reporting, under which quotation of unpublished material can occur.

This is a matter on which stakeholders' views are sought. (See **Question 2.1** below.)

Fairness factors (Schedule 2, item 4, new section 113FA(2) and (3))

When determining if the use of the copyright material is 'fair', consideration must be given (but is not limited) to four standard fairness factors. The appropriate weight given to each factor will depend on the circumstances of the particular case. Matters that may be relevant in considering each fairness factor are set out in **Table 4** below

Table 4 — Relevant matters under the fairness factors

Fairness factor	Relevant matters
The purpose and character of the dealing	<ul style="list-style-type: none"> Where the activity has some commercial character this may weigh against fair dealing. For example, the free publication of research material from which a commercial enterprise may derive promotional benefits. The extent to which the use is 'transformative' is also relevant. If, for example, the use for a very different purpose than the use for which the material was originally created, it is less likely to be considered fair.
The nature of the copyright material	<ul style="list-style-type: none"> The age or currency of the material, for example: <ul style="list-style-type: none"> using material that is commercially available is less likely to be considered fair than material 'out of print'. The type of material, for example: <ul style="list-style-type: none"> using more creative, unique content is less likely to be considered fair than less original, factual content disclosure of certain material may need more careful consideration owing to cultural sensitivities, and using material that is not widely distributed or is made available on a confidential basis only, may be considered less likely to be 'fair' than if the quotation is from well-known material.

Fairness factor	Relevant matters
The effect of the dealing upon the potential market for, or value of, the material	<ul style="list-style-type: none"> • The effect of a quotation on the current or potential market for the original copyright material will be an important consideration. • The more extensively the original material is quoted, the greater the possibility of affecting the market for the original material and less likely it will be considered fair. • Where licensing models exist for ‘sampling’ of copyright material, for example, music and film clips, this may weigh against fair dealing. However, the mere availability of a licence will not be determinative.
If only part of the material is dealt with — the amount and substantiality of the part dealt with, taken in relation to the whole material	<ul style="list-style-type: none"> • The amount used in a quotation, both in relation to the original and the new material, will be relevant, and depends on the type of copyright material being quoted and on the context of use. • The extent of the quotation should be limited to what is reasonable for the purpose for which it is quoted. Generally, the more you use, the less likely it will be considered a fair dealing. However, this does not imply that quotation of the whole of copyright material, such as a photograph or a short poem, can never be fair (it will depend upon the individual circumstances). • Some quotations may be too short to qualify for copyright protection under the Act (paragraph 14(1)(a)).

Questions

Question 2.1: Quotation: Unpublished material

Should the proposed new quotation fair dealing exception in section 113FA extend to the quotation of unpublished material or categories of unpublished material?

Schedule 3: Update and clarify library and archives exceptions

Overview

The Bill will simplify, consolidate and update the exceptions in the Act relating to libraries and archives, including galleries, museums and other key cultural institutions, to allow them to operate more efficiently and effectively in the digital environment. This measure builds on reforms made by the *Copyright Amendment (Disability Access and Other Measures) Act 2017*.

ISSUE	POLICY INTENT	KEY ELEMENTS OF PROPOSED REFORM
Current exceptions in the Act for libraries and archives are outdated and too prescriptive. This creates inefficiencies in everyday processes, restricting access to material and not allowing libraries and archives to respond flexibly to new ways of curating and displaying collections in today's digital environment.	<p>To reduce the regulatory burden upon libraries and archives, and update the provisions to apply equally to all types of copyright material and be technology-neutral.</p> <p>Open up wider community access to a broader range of cultural and educational material held in collections, where this does not encroach on copyright owners' commercial markets and with appropriate precautions to minimise the risk of user infringement.</p>	<ul style="list-style-type: none"> Extend current provisions in the Act that allow libraries and archives to make certain copyright material available online at their premises, to all types of copyright material and for remote online access, provided: <ul style="list-style-type: none"> the institution takes reasonable steps to ensure that a person accessing the material does so in a way that does not infringe copyright, and copyright material acquired in hardcopy form is only digitised and made available online if an electronic copy cannot be obtained within a reasonable time at an ordinary commercial price (other than preservation and research copies). Amend the Act to enable libraries and archives to make preservation and research copies available to be accessed online remotely (not simply at the premises of the institution). Extend current provisions that allow libraries and archives to supply a copy of certain published works, if requested for the purpose of research or study, to: <ul style="list-style-type: none"> all types of copyright material (including audio-visual and unpublished material), and for the additional purpose of private and domestic use, whilst maintaining a commercial availability test where either the whole or more than a reasonable portion of the material is requested. Remove unnecessary and excessively prescriptive requirements from the Act, including in relation to record keeping, limiting the supply of more copies, destroying electronic copies after supply and related criminal offences. Extend current provisions that allow access to older unpublished copyright material and unpublished theses held in libraries or archives, to also permit access for private and domestic use.

Schedule 3: Update and clarify library and archives exceptions (continued)

ISSUE	POLICY INTENT	KEY ELEMENTS OF PROPOSED REFORM
<p>Libraries and archives are sometimes restricted under licensing contracts in providing access to digital content that may otherwise be permitted under exceptions in the Act. The Act currently does not specifically prevent agreements from excluding or limiting the operation of any exceptions, other than in relation to the reproduction of computer programs (section 47H).</p>	<p>At this time, it is not proposed to introduce additional regulation. Rather, cultural institutions and creative industries will be encouraged to work together to address the concerns of the sector. However, to provide greater certainty, it is proposed to clarify that section 47H of itself does not create a presumption that other exceptions can be overridden by contract.</p>	<ul style="list-style-type: none"> Technical amendment to section 47H to clarify that this section (which precludes contracting out in relation to the reproduction of computer programs) does not imply that agreements can limit the operation of other exceptions in the Act.

In practice

Online access limited

Many exceptions in the Act that apply to libraries and archives were introduced in an analogue, paper-based era to facilitate physical access to material. Online access to material, where this is permitted, is generally restricted to viewing the material on site. This disadvantages people who cannot visit the premises of libraries and archives located in capital cities or major centres in person, particularly people living in regional and remote areas, people with a disability, or during times of crisis such as the COVID-19 pandemic lockdowns. Extending the ability of libraries and archives to make copyright material in their collections available to view online and remotely will help these institutions provide wider and more equitable access for all Australians, while not harming copyright owners' commercial markets.

Narrow application and overly prescriptive

The current exceptions discriminate between the types of copyright material libraries and archives may allow people to access and, where a copy is requested, the purposes for which it can be used. For example, members of the public can request a copy of a journal article or chapter of a book where it is for the purpose of research or study, but not for other reasonable personal uses. They cannot generally request a copy of the whole or part of an unpublished work or an audio-visual item such as a sound recording, film or broadcast. With audio-visual material becoming an increasingly dominate medium for content creation, access to such material is important to promote research and broader community understanding. The provisions in the Act are also complex and administratively burdensome.

Simplifying and updating the exceptions to apply equally to all types of copyright material and be technology neutral will facilitate access to a broader range of material held in collections for a wider range of uses. The removal of unnecessary formalities will reduce the regulatory burden on libraries and archives. However, reasonable requirements placed on institutions and users will remain. This includes the requirements for libraries and archives to investigate commercially available alternatives, and to provide notices to users to alert them that the material supplied to them may be subject to copyright.

Case study: National Library of Australia (NLA)



The NLA has recorded a surge in demand for online material in recent times. It reports that over the two years from June 2018 and June 2020, Australian page views of its digital collection increased by 15%. Updating the libraries and archives exceptions will allow the NLA to leverage this growth by providing online access to a larger proportion of its collection. This will benefit users unable to access the NLA collection in person.

Case study: University libraries



The Act currently requires libraries and archives to destroy the electronic copy of a requested item after it is supplied. This means that they are required to repeat the labour intensive process of digitising hardcopy material each time a copy is requested. This is a particular problem for university libraries fulfilling requests for students undertaking the same course of study who require copies of the same material. Removing this requirement will eliminate an unnecessary administrative burden on university libraries, potentially allowing them to respond more rapidly to requests, and reducing costs for students.

Relocation of provisions

The Bill relocates the current provisions in the Act relating to libraries and archives (as amended) to Part IVA of the Act. The renumbered provisions are set out in **Table 5** below.

Table 5 — Relocated (renumbered) library and archives provisions

Proposed provision	Current provision in Act	Dealing with
Section 113G	Section 48	Interpretation
Section 113KA*	Sections 39A and 104B	Infringing copies made on machines
Section 113KB*	Sections 48A and 104A	Assisting a member of a Parliament
Section 113KC	Subsection 49(5A)	Making material available online
Section 113KD	Section 49	Supply of copies to persons
Section 113KE	Section 50	Supply of copies to other libraries and archives
Section 113KF	(new)	Retention copies
Section 113KG	Sections 51(1) and 110A	Use of unpublished copyright material
Section 113KH	Section 51(2)	Use of unpublished theses
Section 113KJ*	Section 52	Publication of unpublished works
Section 113KK	Section 53	Application to illustrations accompanying articles and other works
Section 113KL	Section 51AA	Use of copyright material in the care of the National Archives of Australia

Provisions that are marked with an asterisk (*) have not changed in a substantive way.

Key concepts

Online access to collection material (Schedule 3, item 38, new section 113KC)

The Bill will provide libraries and archives with greater flexibility to make material available online for browsing, in a similar way to that of ‘borrowing’ physical items, but using digital technologies. This will extend to all material held in the collection, including unpublished material and material acquired in hardcopy or electronic form, subject to certain limitations. The Bill will not allow libraries and archives to become quasi-e-book or streaming services, or displace their acquisition of commercial products where they are available.

Reasonable steps to ensure copyright is not infringed (new section 113KC(1)(b))

In making material available online, libraries and archives must take ‘reasonable steps’ to ensure a person accessing the copyright material does not infringe copyright. This may include limiting access to registered library users with password protection and for viewing only, as well as providing an appropriate attribution to the author and copyright notice. (See **Question 3.1** below.)

The main responsibility for non-infringement of copyright will remain with the person accessing the material. These changes will not limit the liability of a user that infringes the copyright of material made available online by a library or archive.

Commercial availability test (new section 113KC(2))

Before digitising copyright material that is acquired in hardcopy form (physical items) and making it available online, an authorised officer of a library or an archives must be satisfied, after ‘reasonable investigation’, that an electronic copy of the copyright material ‘cannot be obtained within a reasonable time at an ordinary commercial price’. An investigation of whether a commercially available electronic copy of the copyright material can be obtained does not need to be exhaustive, only reasonable in the individual circumstances.

Many physical items held in collections are not commercially available in electronic form, either because they were not produced in electronic form or e-book licences are not made available to Australian libraries and archives. Other examples of when material may be considered to not be commercially available in electronic form in place of physical items (outside considerations of time or price), include:

- a copy of the material is not commercially available in a resolution or format that is suitable for the purpose, or
- a copy of the material is not able to be purchased individually, and is only available through purchase of a more substantial item or service (for example, through a box set or a subscription covering several titles or volumes).

Supplying copies of collection material (Schedule 3, item 38, new sections 113KD–113KL)

A diagram showing how new sections 113KD and 113KE will operate in practice is at **Figure 3**.

Provisions allowing libraries and archives to supply a copy of copyright material will be extended in the Bill:

- to all types of copyright material, including audio-visual and unpublished material, and
- for the purpose of the person’s ‘private and domestic use’ (in addition to ‘research or study’).

This includes new sections 113KD and 113KE, as well as provisions allowing use of older unpublished material (new section 113KG) and unpublished theses or similar literary works (new section 113KH). Current section 51AA, relating to use of works in the care of the National Archives of Australia, has also been simplified and extended to apply equally to all types of copyright material (new section 113KL).

The person’s ‘private and domestic use’

The ‘private and domestic use’ of a copy supplied by a library or an archives can occur either ‘on or off domestic premises’.⁸ The copy is only to be for the private and domestic use of the person entitled to receive the copy and members of their family or household. This will not extend to either commercial use or the sharing of material more broadly, for example on social media.

Extending the purposes to include private and domestic use will allow other reasonable personal uses of the material, either for general interest or for creative development. This may include, for example, supplying a copy of sheet music for someone learning to play a piece for personal enjoyment or a newspaper article of personal interest. This will also address current ambiguity around the meaning of ‘research or study’.

Request for supply – formal requirements (new section 113KD(1)–(7))

Any request made by a person to a library or an archives to supply a copy of copyright material must state they require the copy for the purpose of research or study, or for a private and domestic purpose, and that they will not use the copy for any other purpose. Requests should be made in writing and signed where practicable. This can also be done electronically (using an electronic signature). If it is not practicable, then a verbal request can be made but an authorised officer of the library must make, or cause to be made, a record of the request.

⁸ *Copyright Act 1968*, subsection 10(1) (definition of ‘private and domestic use’).

Libraries and archives will have a discretion to refuse to supply a copy if they are not satisfied that it is reasonable to supply a copy, for instance, if the material is culturally sensitive. Libraries and archives should not supply a copy if they know a statement in the request is untrue.

Commercial availability test (new section 113KD(9)–(11) and section 113KE(2)–(4))

For most copyright material, if a copy of either the whole or more than a ‘reasonable portion’ of the material is requested, the library or archives must be satisfied, after ‘reasonable investigation’, that such a copy of the material, including an electronic copy but not a second-hand hardcopy, ‘cannot be obtained within a reasonable time at an ordinary commercial price’.⁹

‘Reasonable portion’ test

The ‘reasonable portion’ test for literary, dramatic or musical works, other than a computer program, is being simplified and streamlined:

- For works of 10 pages or more (whether in hardcopy or electronic form), a standard limit of 10 percent of pages will apply. (If less than 10 pages, the ordinary meaning of ‘reasonable portion’ will apply.)
- For works in an electronic form that have no pages, the standard limit will be 10 per cent of content.
- Where the work is divided into chapters, the limit will be one chapter of the work in cases where the chapter is more than 10 per cent of the pages (if paginated) or more than 10 per cent of the content (if in electronic form and there are no pages).

For consistency, given the test is also used in the fair dealing exception for research or study in section 40 of the Act, the Bill updates the test in section 40 (see Schedule 3, items 7–11).

Investigating commercial availability

An investigation of whether a commercially available copy of the copyright material can be obtained only needs to be reasonable in the individual circumstances, not exhaustive. In the case of an inter-library request, it is the requesting library or archives that needs to investigate commercially available alternatives.

Examples of when material may not be considered to be commercially available in electronic form in place of physical items (outside considerations of time or price), include:

- a copy of the material is not commercially available in a resolution or format that is suitable for the purpose, or
- a copy of the material is not able to be purchased individually, and is only available through purchase of a more substantial item or service (for example, through a box set or a subscription covering several titles or volumes)

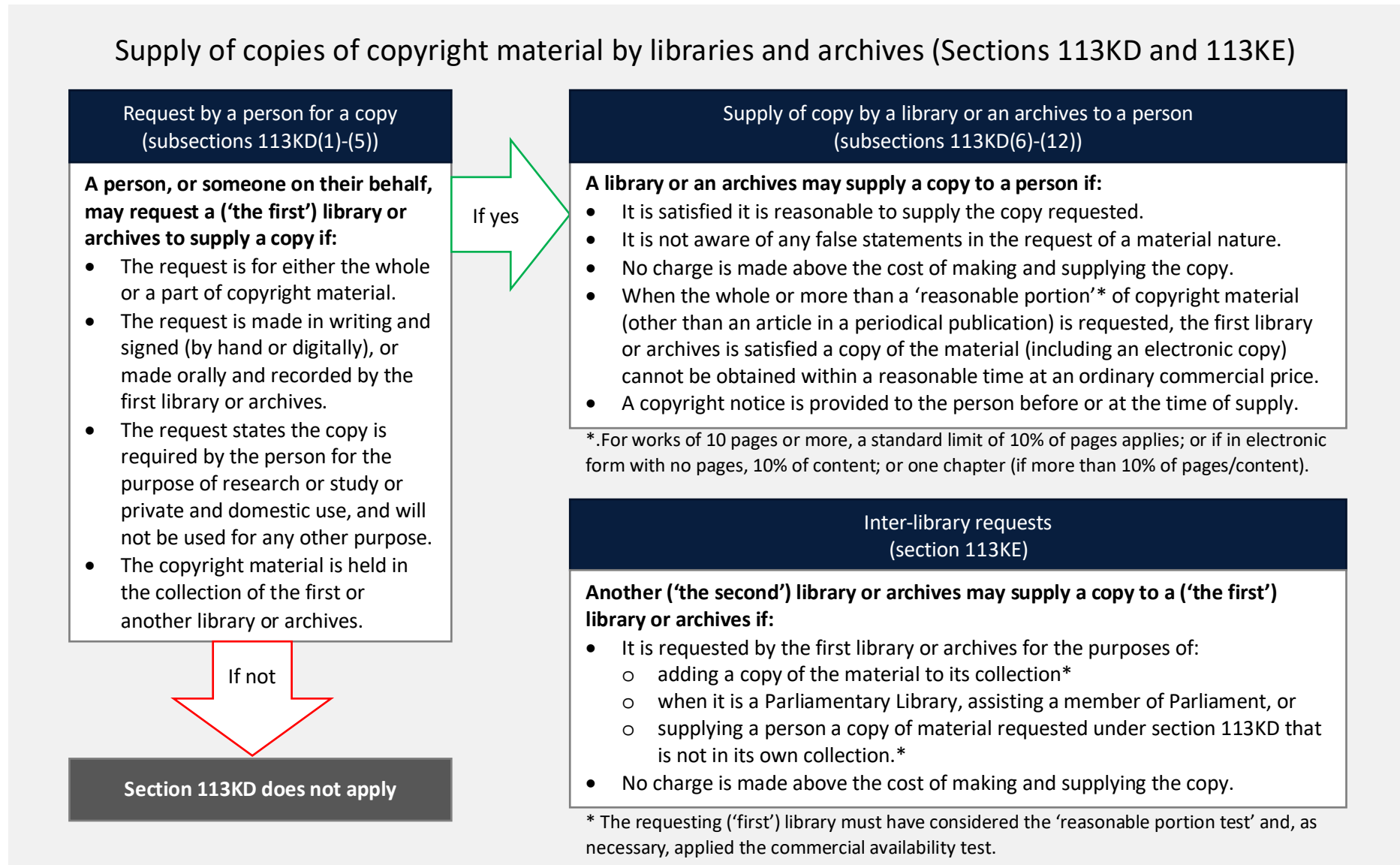
Retention copies (Schedule 3, item 38, new section 113KF)

The Bill removes current requirements in subsections 49(7A) and 50(7C) that electronic copies be destroyed as soon as practicable after communication of a copy. Instead, libraries and archives will be able to retain any electronic copies of copyright material made for this purpose and use them to respond to future requests.

This will create efficiencies for libraries and archives by not having to make further supply copies, for example to fulfil requests for a pool of students and staff pursuing the same course of study, and in turn reduce costs for users.

⁹ As is currently the case under the Act, a commercial availability test does not apply where a copy of an article contained in a periodical publication is requested, nor where the request is made by a parliamentary library.

Figure 3 — Diagram of Sections 113KD and 113KE in operation



Illustrations (Schedule 3, items 23 and 38, new section 113KK)

New section 113KK replaces and simplifies current section 53, but is not intended to make any substantive changes to it. The definition of an ‘article contained in a periodical publication’ has been amended to clarify that this includes an artistic work covered by section 113KK. (See **Question 3.2** below.)

Contracting out (Schedule 3, items 12 and 13)

This amendment is a technical clarification that section 47H does not imply that agreements can exclude or limit the operation of other provisions in the Act. Section 47H provides that agreements that exclude or limit the operation of certain provisions allowing the reproduction of computer programs have no effect. Section 47H is the only provision in the Act that specifically precludes what is commonly referred to as ‘contracting out’ of copyright exceptions.

The default position under the Act is that all copyright exceptions apply. The purpose of this amendment is to make it clear that section 47H does not mean another exception can be excluded or limited by contract. However, it will not limit parties’ freedom to enter into agreements that may be more restrictive.

Questions

Question 3.1: Libraries and archives: Online access - ‘Reasonable steps’

For the purposes of new paragraph 113KC(1)(b), what measures do you consider should be undertaken by a library or an archives to seek to limit wider access to copyright material when made available online?

Question 3.2: Libraries and archives: Illustrations

Does proposed new section 113KK, which replaces and simplifies current section 53 but is not intended to make any substantive changes to that section, adequately cover all of the matters set out in current section 53 or are there some potential gaps in coverage?

Schedule 4: Update and restore education exceptions

Overview

The Bill will update and streamline the exceptions in the Act relating to educational institutions so that they are material and technology neutral, support contemporary teaching methods, and facilitate remote and online learning. This measure aligns with the goals of the 2019 [Alice Springs \(Mparntwe\) Education Declaration](#), made by all Australian Education Ministers, which emphasised the importance of schools working in partnership with parents, carers, families and the broader community to foster a supportive learning environment.

ISSUE	POLICY INTENT	KEY ELEMENTS OF PROPOSED REFORM
Uncertainty about how section 28 of the Act applies to allow the performance and communication of material in class in online and remote settings.	Update section 28 to be material and technology neutral and support online and remote learning.	<ul style="list-style-type: none"> Clarify/update section 28 of the Act to allow: <ul style="list-style-type: none"> the performance, or otherwise causing to be seen or heard, copyright material in class any copying, communication or recording required to facilitate such activity lessons to be livestreamed lessons to be temporarily recorded and made available to students and others taking part in the lesson to view or hear later lessons to be conducted at sites external to the educational institution or via the internet if reasonable steps are taken by the educational institution to limit access to persons taking part in the lesson, and parents, work placement supervisors, community members and others to take part in lessons.
Public schools and TAFEs, unlike independent schools, currently cannot rely upon the exception in section 106 when playing sound recordings for non-curricular activities, such as school concerts and assemblies.	Put private and public not-for-profit bodies on the same footing when they play recorded music in public. This includes educational institutions and other public bodies such as community libraries, museums and disability organisations.	<ul style="list-style-type: none"> Restore section 106 of the Act (which is currently limited to ‘registered charities’ and therefore to non-government schools and other charitable bodies) to its pre-2012 scope to enable government educational institutions and other public, not-for-profit bodies to similarly rely on this exception to play sound recordings.

In practice

As digital technologies and teaching methods have developed, there is uncertainty about how the education exceptions and the education statutory licence interact. For example, section 28 of the Act allows teachers and students to perform (or ‘visually or aurally present’) copyright material in a classroom setting. However, the extent to which this exception applies to online and remote lessons, including when teachers are teaching from home or parents are helping at home, remains unclear.



Case study: Classroom teaching exception (section 28)

Schools and the wider community have embraced the flexibility and opportunities provided by digital platforms such as Zoom and Microsoft Teams to deliver lessons online. However, many teaching activities using copyright material that are permitted by this ‘show and tell’ exception when students and teachers are in the physical classroom, may not be permitted when delivering the same lesson remotely.

This discrepancy has been highlighted during the COVID-19 pandemic, when schools are unable to carry out normal activities in the physical classroom for extended periods. Interim arrangements have helped schools, teachers and students transition between face-to-face and remote learning during successive COVID-19 lockdowns. These reforms will support the adoption of digital technologies and practices by schools that are necessary for students learning in both the classroom and the home in the long term.

Relocation of provisions

In the Bill, the current provisions in the Act relating to education (as amended) are relocated to Part IVA of the Act. The renumbered provisions are set out in **Table 6** below.

Table 6 — Relocated (renumbered) education provisions

Proposed provision	Current provision in Act	Dealing with
Section 113MA	Section 28	Use of copyright material in the course of educational instruction
Section 113MB*	Section 200	Use of works and broadcasts for educational purposes
Section 113MC*	Section 200AAA	Proxy web caching by educational institutions

Provisions that are marked with an asterisk (*) have not changed in a substantive way.

Key concepts

‘Classroom teaching’ exception (Schedule 4, item 7, new section 113MA)

New section 113MA will make it clear that this exception applies equally to all types of copyright material, and that certain digital uses of copyright material in the course of giving or receiving lessons without remuneration will be considered reasonable. This includes the ‘performance’ (that is, the ‘visual or aural presentation’¹⁰) of copyright material or other act that ‘causes the material to be seen or heard’, as well as any copying, communication or recording of copyright material to facilitate such performance or other act.

¹⁰ ‘Performance’ is defined in subsection 27(1) of the Act and provides that it shall: ‘(a) be read as including any mode of visual or aural presentation, whether the presentation is by the use of reception equipment, by the exhibition of a cinematograph film, by the use of a record or by any other means; and (b) in relation to a lecture, address, speech or sermon – as including a reference to delivery.’

‘A person taking part in the giving or receiving of the educational instruction’ (new section 113MA(2))

The phrase ‘a person taking part in the giving or receiving of the educational instruction’ is intended to include any person involved in the giving or receiving of the lesson. This may include, as well as a teacher or student:

- a parent, family member or friend assisting the student or in the ‘audience’ of a class performance
- a tutor, or work placement supervisor of the student, or
- a guest speaker from the community or industry invited to speak to the class.

Temporary recording of lessons (new section 113MA(2)(b)(v) and (vi), and (2)(c))

Where copyright material is presented as part of a lesson, teachers or lecturers will be able to record the whole or part of the lesson so that students and those assisting them can access the lesson at a later time. This may include pre-recording a lesson for online teaching or recording a ‘live’ lesson. This is intended to help bridge gaps in time between the giving and receiving of a lesson. There may be times when not everyone involved in the lesson (including a teacher) can attend in person or participate in a livestreamed lesson, for example due to illness, distance, technical limitations or a requirement to stay at home or self-isolate.

Recorded lessons are intended to serve as a temporary reference and be made available only for the period of time necessary to deliver (present) the lesson to its intended audience. Educational institutions should disable access to the recordings once this is done. The recordings are intended for playback by students in the relevant class or course or people assisting them, and not be further copied, downloaded or shared.

This exception is not intended to extend to broader use of recorded copyright material such as where the recording is uploaded to:

- a system server and retained as a more permanent teaching resource
- a learning management environment that the whole school or university community can access, or
- a public website such as a school website where wider access to the material is possible.

If an educational institution wishes to retain a recorded lesson that contains copyright material for use in future lessons, the current position remains unchanged. Unless another exception in the Act applies, generally this would require remuneration under the statutory licence or other licence, or the permission of the copyright owner.

Making material available online (new section 113MA(2)(d))

Copyright material will be able to be made available online in the course of the lesson, including on the internet, provided the educational institution ‘takes reasonable steps to limit access to the material to persons taking part in the giving or receiving of the educational instruction’. This may include, for example, limiting access to students via username and password, in a closed environment and not on an open internet page where possible. The material can only be used for the purposes of the lesson. This exception will not permit the dissemination of copyright material to students to keep. (See **Question 4.1** below.)

Registered charities’ sound recording exception (section 106) (Schedule 4, item 4)

Section 106 of the Act will allow both public and private educational institutions to use this exception to play sound recordings for non-curricular activities, for example, during school concerts, assemblies and graduation ceremonies. Amendments made to the Act in 2012¹¹ had the unintended consequence that this exception no longer applied to public schools but still applied to private schools. The provision clarifies which not-for-profit organisations this exception now applies to. This provides greater certainty to public schools, pre-schools, libraries, archives, museums and galleries that they can rely upon this exception to play sound recordings.

¹¹ See *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012*.

Questions

Question 4.1: Education: Online access – ‘Reasonable steps’

For the purposes of new paragraph 113MA(2)(d), what measures do you consider should be undertaken by an educational institution to seek to limit access to copyright material, when made available online in the course of a lesson, to persons taking part in giving or receiving of the lesson, and ensure it is used only for the purposes of the lesson?

Schedule 5: Streamline the government statutory licensing scheme

Overview

The Bill will update and streamline the government statutory licensing scheme in Part VII, Division 2 of the Act, and clarify the interaction of the statutory licence with other licences and exceptions or limitations in the Act.

ISSUE	POLICY INTENT	KEY ELEMENTS OF PROPOSED REFORM
Collective licensing arrangements that form part of the government statutory licensing scheme are limited to government copying, and are inflexible and very prescriptive.	Provide for a more flexible and facilitative statutory licensing scheme, that covers both the copying and communication of copyright material which reflects broader usage by governments in the digital environment.	<ul style="list-style-type: none"> Update and streamline collective licensing arrangements with the declared collecting societies¹² to: <ul style="list-style-type: none"> Extend the collective licensing arrangements to include the communication (making available online or electronic transmission) of copyright material. Provide for a simpler licensing model that will give governments and declared collecting societies more flexibility in negotiating licence agreements, including removing the current requirement for sampling surveys to be conducted to determine equitable remuneration. Give government agencies that rely on the statutory licence the option of dealing directly with copyright owners even if the use of material falls within the scope of the collective licensing arrangements.
Intersection between the government statutory licence and the operation of other licences or exceptions in the Act is unclear.	Confirm that the statutory licence is not intended to 'cover the field', allowing governments to rely on other licences and exceptions in the Act.	<ul style="list-style-type: none"> Clarify that the statutory licence applies only when the use would constitute an infringement of copyright but for the statutory licence (consistent with the approach for the education statutory licence). <ul style="list-style-type: none"> This includes amendments to clarify that the existence of the statutory licence should be disregarded when determining whether an implied licence exists.
Uncertainty as to whether governments can rely upon an implied licence to use copyright material it receives given the statutory licence.	Provide certainty that such use is reasonable in the public interest and not intended to be remunerated under the statutory licence.	<ul style="list-style-type: none"> Introduce a new exception to permit use by governments of correspondence and other copyright material provided to the government (incoming material) for the services of the government if: <ul style="list-style-type: none"> the use is reasonable having regard to the purpose for which the material is provided or any related purpose, and the material is not used to obtain a commercial advantage or profit.

¹² Copyright Agency is the declared collecting society for government copying of text, artworks and music (other than material included in sound recordings or films). Screenrights is the declared collecting society for government copying of audio-visual material, including sound recordings, film, television and radio broadcasts.

In practice

Under the Act, a government using copyright material ‘for the services of the Commonwealth or State’ does not infringe copyright (section 183) (‘statutory licence’). The Act requires the government to inform the copyright owner of the use, unless it would be contrary to the public interest, and agree terms. For government ‘copying’ of material there are special arrangements in place under which the government pays equitable remuneration to the relevant declared collecting society (section 183A) (‘collective licensing arrangements’). These special arrangements do not currently extend to government ‘communication’ of material (that is, making the material available online or electronically transmitting it).

While there is a continuing and important role for a government statutory licence, technology and work practices have changed in recent decades. A more flexible statutory licensing scheme is required in the digital environment, including the collective licensing arrangements that form part of this scheme).



Case study: Communication of material

Government agencies that provide services to Australians living in regional and remote communities, and to others who cannot visit government premises in person, may want to make documents that include some third-party copyright material available online or by email. Broadening government collective licensing arrangements to cover the communication of copyright material will help the delivery of government digital services to the community. Reasonable precautions will continue to be taken by government agencies to prevent copyright infringement, including providing a copyright notice and other precautions around handling sensitive material.



Case study: Use of incoming material

Currently, when people send copyright material to governments, the statutory licence makes it unclear whether governments have permission to use the material. The new exception will make it clear that governments can use this material at no cost for non-commercial purposes consistent with the purpose for which it was provided or related purposes.

This will give government agencies greater confidence that they can carry out many everyday functions of government, for example:

- scan and file incoming correspondence that may later be emailed to another government officer
- copy and communicate incoming material in responding to freedom of information requests (subject to any relevant exemptions), and
- make information available online that:
 - is factual information of general scientific, technical, commercial or economic interest
 - forms the evidence base on which government decisions are made (for example, patent or trade mark decisions), or
 - facilitates the exercise of rights under statute, including making material available to the public for inspection if done so on a cost-recovery basis.

Reordering of provisions

The Bill reorders some provisions relating to the government statutory licence (as amended) in Division 2. The renumbered provisions are set out in **Table 7** below.

Table 7— Reordered (renumbered) government statutory licence provisions

Proposed provision	Current provision in Act	Dealing with
Subsections 183(1)	Subsections 183(1)	Use of copyright material for the services of the Crown
Subsection 183(2)*	Subsection 183(2)	Supply of goods for defence of another country
Subsection 183(3)*	Subsection 183(3)	Authorising a person
Subsection 183(11)	Subsection 183(11)	Copying or communication for educational purposes
Subsection 183(12)	New	Orphan works scheme
Subsections 183A(1)-(2)*	Subsection 183(4)	Notice
Subsection 183A(3)*	Subsection 183(5)	Terms of use
Subsection 183A(4)*	Subsection 183(6)	Agreement or licence
Subsection 183A(5)*	Subsection 183(7)	Purchaser of article
Subsection 183A(6)*	Subsection 183(9)	Exclusive licensee
Subsection 183B(1)	Subsection 183A(1)	Special arrangements – collecting society
Subsection 183B(2)	Subsection 183B(1)	Terms of use
Subsection 183B(3)	Subsection 183B(2)	Recovery of debt due
Subsection 183B(4)	Subsection 183A(6)	Non-disclosure in public interest

Provisions that are marked with an asterisk (*) have not changed in a substantive way.

Key concepts

A diagram showing how the new sections in the Act will operate in practice is at **Figure 4**.

Update and streamline collective licensing arrangements (Schedule 5, item 27, new section 183B)

Extension to ‘communication’

The digital environment is now the main way of document sharing and service delivery across government sectors. Extending the collective licensing arrangements to cover the ‘communication’, or making copyright material available to the public online or through electronic transmission, will allow government agencies to:

- undertake many everyday communications, for example, emailing documents in which some third party copyright material may be embedded, and
- provide services online, which generally have no commercial purpose, where this may involve making information available that includes some third party material.

Government agencies will continue to negotiate directly with copyright owners on other uses of copyright material, such as the performance (or presentation) of copyright material in public, that do not fall in the scope of the collective licensing arrangements.

Simpler, more flexible licensing model

The Bill will remove the requirements in current sections 183A, 183B and 183C around conducting sampling surveys to determine equitable remuneration, payment arrangements and related inspection powers. This will

leave the terms of agreements, including any provision for surveys or inspection, to be agreed by the parties or, if agreement cannot be reached, determined by the Copyright Tribunal, rather than being prescribed in legislation.

The current limitations in subsection 183A(1) will also be removed, making it clear that governments have the option of dealing directly with copyright owners. This reflects what is happening in practice, with governments now spending significant fees on direct licensing of copyright material delivered in digital form such as online journal subscriptions and media monitoring services.

Clarify intersection of statutory licence and other licences or exceptions (Schedule 5, item 22, section 183(1)(b) and item 27, new section 183C)

The Bill will clarify that the government statutory licence only applies if the use of that material would normally infringe copyright were it not for the presence of a statutory licence.¹³ The statutory licence is intended to act as a 'safety net'.

This will provide greater certainty to government agencies that they can rely on unremunerated exceptions or limitations to the extent that they apply, as well as licences other than the statutory licence. New section 183C makes clear this includes an implied licence and is intended to overcome potential limitations of *Copyright Agency Limited v State of New South Wales* (2008).¹⁴

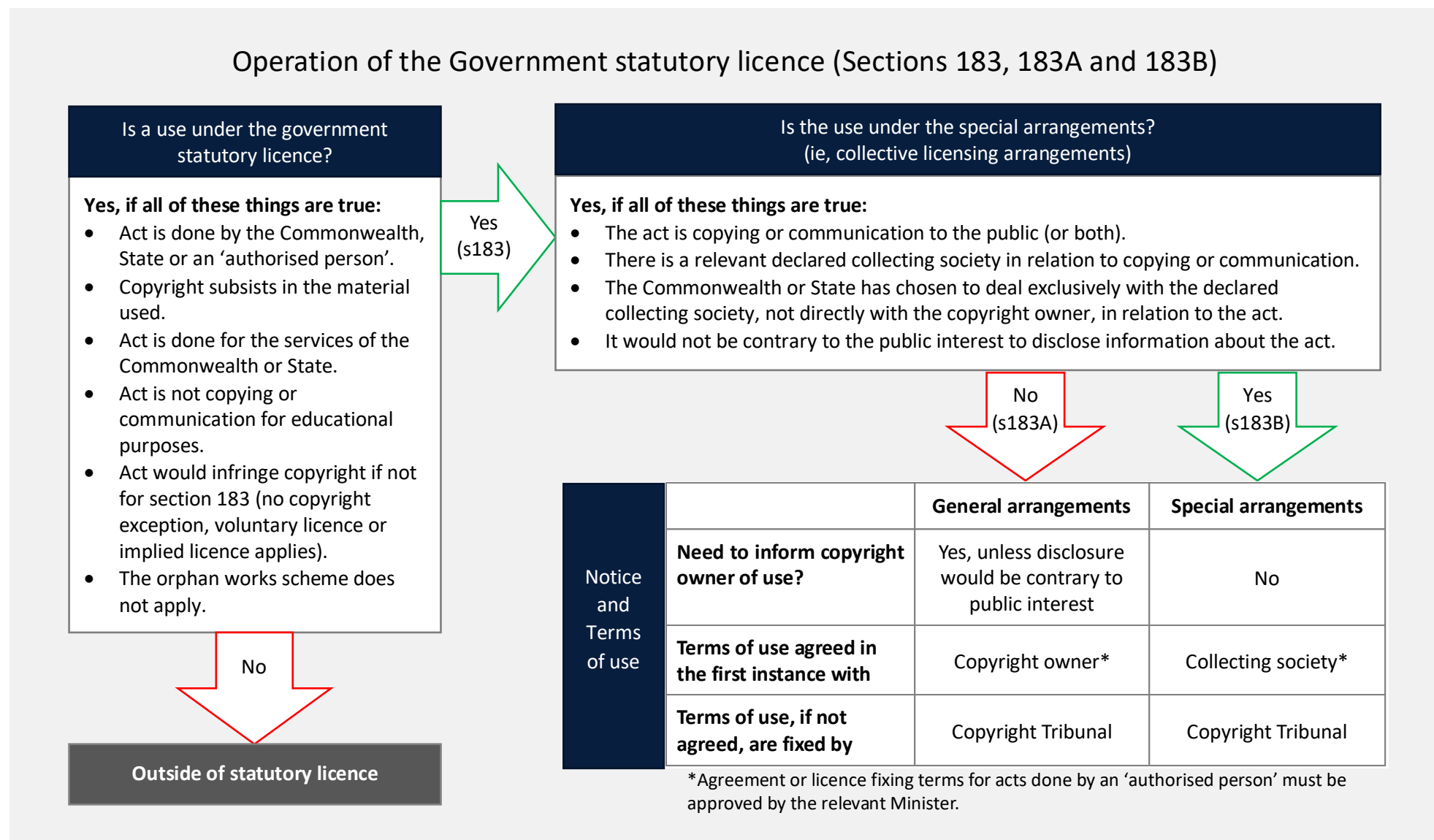
This will allow government agencies to rely upon, for example:

- current fair dealing exceptions for the use by government employees of works for the purpose of research, critical evaluation or the giving of legal advice
- direct subscriptions to access and use published works, and
- any of the new exceptions in this Bill relating to quotation and use of incoming material.

¹³ This is consistent with the High Court's observations in [Copyright Agency Limited v State of New South Wales](#) (2008) 233 CLR 279, [11].

¹⁴ See [Copyright Agency Limited v State of New South Wales](#) (2008) 233 CLR 279, [92], [93].

Figure 4 — Diagram of Sections 183, 183A and 183B in operation



Use of incoming material (Schedule 5, item 28, new section 183G)

Governments receive large amounts of copyright material, including by email and online, most of which is not commercially available. Some material is lodged with government agencies because it is required by law. The law may also require the agency to provide public access to the documents, such as land survey plans. Where statutes require copyright material to be open to public inspection or on an official register, government use of this material should not be remunerable, provided the material is not provided to the public on a commercial basis and reasonable precautions are taken. This recognises the need of governments to make available or disseminate information that is in the public interest.

The new exception will allow governments to use incoming correspondence and other material for internal purposes and, as necessary or otherwise reasonable, make that incoming material available to the public. However, the use must not be done, even partly, to obtain a commercial advantage or profit, and must be reasonable having regard to the purpose for which the material was provided to the government or a related purpose. (See **Question 5.1** below.)

Questions

Question 5.1: Government: Use of incoming material

Does proposed new section 183G contain effective safeguards to avoid unwarranted harm to copyright owners' commercial markets? If not, what other safeguards would assist?

Additional minor measures

Schedule 6: Registrar of the Copyright Tribunal

The Bill will simplify the process for appointing the Registrar of the Copyright Tribunal. These amendments will align the Act with current practices for the appointment of other Australian court registrars by giving the power to the Chief Executive Officer and Principal Registrar of the Federal Court to appoint, or terminate the appointment of, the Registrar of the Copyright Tribunal.

Schedule 7: Streamline the process for making technological protection measure (TPM) exceptions

The Bill will streamline the process for making regulations to create or amend exceptions to liability for circumventing a TPM that controls access to copyright material. The amendment removes the requirement that a ‘submission’ must be made before the Minister can recommend changes to the regulations.

Allowing regulations to be made in relation to access control TPM exceptions, where changes are consequential to amendments to the Act or otherwise identified in a review or proceeding, without first obtaining a specific stakeholder submission seeking this, will improve Australia’s ability to maintain a copyright framework that is fit for the digital environment.

More information about TPM exceptions, and the current review of the exceptions listed in the *Copyright Regulations 2017*, can be found at [Part B](#).

Schedule 8: Archives

The Bill will update the definition of ‘archives’ to capture current Commonwealth and State archives offices in the Act.

Schedule 9: Referrals to the Copyright Tribunal

The Bill will improve the consistency of language in the Act when referring to applications and references to the Copyright Tribunal.

Schedule 10: Notifiable instruments

The Bill will update the mode of notification required by the Act, changing outdated references to ‘Gazette’ publication to ‘notifiable instrument’.

Part B: Review of Technological Protection Measures (TPM) exceptions

Why is this needed?

The Australia-United States Free Trade Agreement (AUSFTA) requires a review of exceptions to the TPM provisions made under the *Copyright Act 1968* (the Act) every four years. The last TPM exceptions review occurred in August 2017.

Consultation on this Bill provides an opportunity to consider whether existing TPM exceptions should remain and whether any new TPM exceptions should be added to section 40 the *Copyright Regulations 2017* (Copyright Regulations). This includes any consequential amendments because of measures proposed in the Bill.¹⁵

All new TPM exceptions, including those that are consequential to the amendments proposed in the Bill, are subject to the criteria for review as set out in subsection 249(4) of the Act (and discussed further below).

Current TPM scheme

What are TPMs

Technological protection measures (TPMs) are technical locks that copyright owners, and exclusive licensees, use to stop their material being accessed or copied. For example, passwords, encryption software and access codes. TPMs can be grouped into two broad categories:

- **Access control TPMs** that prevent a person from being able to read, listen to or watch material.
- **Copy control TPMs** that allow a person to read, listen or watch material but prevent a person from making a copy of the material.

Australia's TPM scheme allows for both civil actions and criminal actions in response to unlicensed circumvention of TPMs (see Part V of the Act: Division 2, Subdivision A, and Division 5, Subdivision E).

Specific exclusions

The scheme specifically excludes protection for TPMs that:

- control geographic market segmentation:
 - For example, consumers can bypass region coding measures to play overseas purchased DVDs or computer programs on Australian devices.
- restrict use of after-market goods or services, including restricting the supply of spare parts or repair or maintenance services by third parties:
 - For example, a computer printer manufacturer cannot use the TPM scheme to stop generic cartridges being used in its printers.
 - TPMs used by the providers of computer systems to restrict services being provided by competing computer system maintenance providers are also not protected.

¹⁵ In particular, the proposed amendments which include the introduction of an orphan works scheme; a new fair dealing exception for quotation; and changes to the library and archives exceptions, the education exceptions and the government statutory licensing scheme.

Exceptions to override access control TPMs

The Act provides for a number of exceptions to civil and criminal liability for circumventing an access control TPM. This includes:

- specific exceptions in subsections 116AN(2)–(8) and 132APC(2)–(8) of the Act. These exceptions are not subject to this review, and
- additional exceptions for acts which are prescribed by the regulations (see subsections 116AN(9)(c) and 132APC(9)(c)). These provisions implement Article 17.4.7(e)(viii) of AUSFTA. The current additional exceptions are set out in section 40 of the Copyright Regulations, and are the subject of this review.

Scope of review

This review covers both existing exceptions to access control TPMs as set out in section 40 of the Copyright Regulations, as well as possible new TPM exceptions to add to the Regulations.

Currently, section 249 of the Act allows the making of new regulations in relation to TPM exceptions, and regulations varying or revoking existing regulations, on the recommendation of the Minister.

Subsection 249(4) of the Act allows an additional act to be prescribed by the regulations when a submission for is received which provides credible evidence of certain criteria, and the Minister makes a decision to grant an exception.¹⁶

Under subsection 249(8) of the Act existing additional prescribed acts can be revoked or varied through a similar process.

Making a submission

The Department welcomes submissions on:

- the appropriateness of the current TPM exceptions listed in section 40 of the Copyright Regulations, and
- potential consequential amendments to section 40 of the Regulations due to the Bill.

Submissions should:

1. Identify whether you are seeking a new exception, or to vary or revoke an existing exception.
2. If seeking the variation or revocation of an existing exception, identify the existing exception.
3. If a new exception is sought, clearly outline the exception and the circumstances in which it would apply.
4. Address how the exception does or does not fit the criteria of subsections 249(4) and/or (8) of the Act. The submission should provide examples to support whether or not (as relevant):
 - the use of the TPM has had an adverse impact on the non-infringing use by the person or body the subject of the exception, or is likely to have such an impact, or
 - the TPM exception would impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM.

¹⁶ Schedule 7 to the Bill proposes to amend section 249 of the Act to remove the requirement for a submission to have been made before the Minister can recommend changes to the TPM exceptions in the Regulations.