

# **Copyright Modernisation Review**

## **submission from the**

# **Australian Libraries Copyright Committee**

## **July 2018**

The Australian Libraries Copyright Committee (ALCC) welcomes the opportunity to provide comments to the Copyright Modernisation Consultation.

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- [Australian Library and Information Association](#) (ALIA)
- [National and State Libraries Australasia](#) (NSLA)
- [Council of Australian University Librarians](#) (CAUL)
- [National Library of Australia](#) (NLA)
- [Australian Government Libraries Information Network](#) (AGLIN)
- [National Archives of Australia](#) (NAA)
- [Australian School Library Association](#) (ASLA)
- [NSW Public Library Association](#) (NSWPLA)

The ALCC strongly supports the government's stated goal to modernise Australia's copyright system and ensure that it is efficient, effective, accountable and, most importantly, able to adapt to changes in economic conditions, technology, markets and costs of innovating. The recent copyright reviews by the Australian Law Reform Commission (ALRC) and the Productivity Commission (PC) identified a number of flaws with Australian copyright law, primarily because "Australia's exceptions are too narrow and prescriptive, do not reflect the way people today consume and use content, and do not readily accommodate new legitimate uses of copyright material."<sup>1</sup> The ALCC supports the government's move to address these flaws and attempt to

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<sup>1</sup> Productivity Commission, Intellectual Property Arrangements, Inquiry Report: Overview and Summary Recommendations, p.13, available at <http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property-overview.pdf>

create a best practice copyright regime that supports innovation and public access to knowledge, without compromising protections for creators.

To achieve these goals, the ALCC recommends that the government:

- Adopt an open ended, flexible, fair use style exception. This is the only option that will future proof Australia's copyright laws and ensure it is truly able to adapt to the changing technologies and behaviours of the modern world;
- Protect all exceptions in the Copyright Act from being overridden by contract; and
- Introduce exceptions that permit the use of orphan works by both cultural organisations and others, in commercial and non-commercial circumstances. By preference this would be in the form of a fair use regime coupled with a separate direct exception for use of orphan works by cultural institutions, to recognise the special challenge orphan works pose for this sector;
- Modernise the libraries and archives exceptions relating to document delivery and interlibrary loan to simplify their language, reduce bureaucratic requirements, and harmonise user rights in relation to all categories of materials.

As a less desirable, second choice alternative to fair use, an extended fair dealing regime could increase the flexibility of Australia's copyright system and address many of the problems identified by the ALRC and PC. To ensure that copyright meets the needs of Australia's innovations and creators, and the expectations of consumers, this regime should at a minimum include exceptions for quotation, private and non-commercial use, incidental and technical copying, text and data mining, library and archives uses, educational uses and government uses. However, if this compromise solution were to be adopted, the government should also commit to review the changes in 5 years time, to determine if they remain sufficient in the face of technological and societal change.

## Flexible Exceptions

### Question 1

To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

### **The ALCC supports fair use as the best option for Australia**

The ALCC recommends that Australia adopt a full open-ended fair use-style exception as the best option for Australia going forward. This is the only option that will, as the government committed in its response to the Productivity Commission IP Inquiry, “create a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes.”<sup>2</sup>

In support of this recommendation, we provide at **Attachment A** an extract from our initial submission to the PC Inquiry, which sets out the case for fair use in Australia from a libraries and archives perspective.

### **Flexible fair dealing is supported only as a second choice**

The ALCC supports the introduction of an extended fair dealing regime only as a second choice option if fair use is not adopted.

Extended fair dealing will not provide a truly modern copyright system that adapts to new technologies and behaviours. To compensate for this lack of adaptability, an extended fair dealing system will need to be regularly reviewed to ensure it is still able to meet the needs of Australian consumers and innovators.

However, the ALCC acknowledges that the introduction of an extended fair dealing regime as described in the consultation paper could address a number of the most pressing problems with Australia’s copyright law and improve the situation of those attempting to comply with the system in their daily work and lives. In particular, the introduction of a fair dealing for library and archives would increase flexibility and certainty for Australia’s cultural institutions, and the introduction of a quotation right would significantly increase the utility of our collections for our clients.

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<sup>2</sup> Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements (August 2017) p.17  
<https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf>

### **Libraries and archives need flexibility**

At the Departmental roundtable for the review, it was suggested that libraries' and archives' core functions are sufficiently covered by the preservation, document delivery and interlibrary loan exceptions, and that no flexible exception was therefore needed at all. We strenuously reject this suggestion, which does not hold up to even the most basic scrutiny. Exhibitions and digitisation projects can currently only be undertaken under s200AB provisions, and are just as essential to the knowledge sharing role of library and archives as preservation and lending of collection items.

This is particularly the case when you remember that the phrase "library and archives" from the Copyright Act actually refers to all cultural institutions, including museums and galleries. Arguing that exhibition is not a central function of these organisations is nonsensical. The functions of the National Museum, for example, set out in s6 of the *National Museums Act 2000*, include "to exhibit, or to make available for exhibition by others, historical material from the national historical collection or historical material that is otherwise in the possession of the Museum". Similarly, the National Library is to "make library material in the national collection available to such persons and institutions, and in such manner and subject to such conditions, as the Council determines with a view to the most advantageous use of that collection in the national interest."<sup>3</sup>

Indeed, in the modern era, it can almost be argued that digitisation is more important. Digitisation programs open up our national collections beyond the handful of privilege researchers who have the time and resources to journey to our capitals, and facilitate access to the general population as never before. Australia's flagship discovery platform, Trove - maintained by the National Library but providing access to collections from across Australia - is a world leader, and provides instant access to more than 22 million pages from 1,386 Australian newspaper titles to any person in Australia.<sup>4</sup> The cultural and research benefits of this immeasurable.

### **Fair use/fair dealing for libraries and archives is preferable to s200AB**

To best achieve the flexibility needed by cultural institutions in the modern age, the ALCC strongly supports the introduction of a fair use exception which specifically lists libraries and archives as an illustrative purpose, or as a second choice a fair dealing for libraries and archives. Both of these options provide a number of advantages over the flexible dealing exception currently available to libraries and archives in s200AB.

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<sup>3</sup> *National Library of Australia Act 1960*, s6

<sup>4</sup> National Library of Australia, *Annual Report 2016-2017*, p. 10, [https://www.nla.gov.au/sites/default/files/annual\\_report\\_2016-2017\\_1.pdf#overlay-context=corporate-documents/annual-reports](https://www.nla.gov.au/sites/default/files/annual_report_2016-2017_1.pdf#overlay-context=corporate-documents/annual-reports)

The problems with s200AB have been well documented by our previous submissions and the submissions of others to the ALRC<sup>5</sup> and the Productivity Commission.<sup>6</sup> The ALCC has spent much of the last decade battling against conservative interpretations of this provision, and encouraging our members to work through the uncertainty it produces. We particularly refer the Department to the 2012 report by Policy Australia which documents the failure of s200AB in the eyes of the majority of the sector.<sup>7</sup> We include an excerpt from our 2015 Productivity Commission submission outlining the findings of the report as **Attachment B**.

In summary, a fairness-based exception has the following advantages over s200AB:

- it would allow commercial uses – removing the non-commercial limitation of s200AB would permit, for example, use of collection materials in publications and ticketed exhibitions in circumstances that are fair. The fairness limitation will ensure that rights holders interests are protected and licensing still occurs where possible and appropriate, while at the same time enabling public education and the sharing of knowledge;
- it would remove confusion arising from the technical language of s200AB – the Policy Australia report is particularly damning of the decision to import the “three step test” from international copyright law into Australian domestic legislation, and provides significant evidence of the uncertainty institutions and individual librarians feel in applying this test. We note that the “special case” requirement in particular has reduced use of the section, with arguments that this requires case-by-case assessment of uses making the exception entirely inapplicable to mass digitisation projects. It also implies that institutions should be justifying why individual materials are “special” in their own right, rather than considering the circumstances of the use in its entirety.
- it would also remove confusion around the “other exception” language – the requirement that a use not be covered by another exception has led many users to believe that they cannot use s200AB to make material available to clients for personal use or criticism and review (for example) because other provisions do allow supply for research and study.
- it would align more closely with the approach already taken by library staff – as a number of studies have now shown, individuals making copyright decisions on a day-to-day basis are far more confident assessing the overall fairness of a use than factors such as whether it “does not conflict with a normal exploitation of the work or other subject-matter”.<sup>8</sup>

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<sup>5</sup> Available at

[https://www.alrc.gov.au/sites/default/files/subs/586.\\_org\\_the\\_australian\\_digital\\_alliance\\_and\\_australian\\_libraries\\_copyright\\_committee\\_.pdf](https://www.alrc.gov.au/sites/default/files/subs/586._org_the_australian_digital_alliance_and_australian_libraries_copyright_committee_.pdf)

<sup>6</sup> Available at [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0004/195178/sub125-intellectual-property.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0004/195178/sub125-intellectual-property.pdf)

<sup>7</sup> Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?', by Policy Australia October 2012 available at [http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20\(1\).pdf](http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20(1).pdf)

<sup>8</sup> See 'Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?', by Policy Australia (October 2012) p.3 available at

We note that at the Department's roundtables for this consultation, a suggestion was put forward that we should "just fix s200AB" rather than to replace it with a new exception. The libraries and archive community strongly rejects this suggestion, which we note is put forward by groups that have no expertise in or experience trying to work with the provision. Firstly, as our comments above and in Attachment B demonstrate, the problems with s200AB are endemic to the language of the provision and would essentially require the entire provision to be re-written to overcome the uncertainty it gives rise to. Furthermore, the fear engendered by the conservative interpretations that have been promulgated since its inception will be almost impossible to address on a sector-wide level. Replacing the full exception with a simpler flexible exception that more closely aligns with individuals' natural understandings is not only more efficient, but it is also the only effective way to cure the current ills of the flexible dealing exception for the cultural sector.

### **Experience shows libraries and archives can be trusted to make "fair" judgement calls**

Everyday, libraries and archives make judgement calls about how and when to make use of copyright material. These decisions may be made in the context of specific exceptions such as the document delivery and interlibrary loan provisions, or in rarer cases the current s200AB flexible dealing provisions.

Evidence from this daily use of Australia's existing copyright exceptions shows that libraries and archives are not inclined to overreach the boundaries of the exceptions available to them. Indeed, despite strong principles in favour of providing access to knowledge, our library and archive sectors are without question conservative in our uptake of exceptions, and very conscious of avoiding not only negative impact on creators but also reputational damage that might put off future donors of collections, vendors etc. Library and archives feel a duty of care towards collections, and do not deal with them in a reckless manner.

For example, figures supplied by the National Library indicate that since 2012 they have fulfilled 73 percent of client requests for document delivery and only 65 percent of interlibrary loan requests - ie more than a quarter of requests were rejected. Reasons for rejecting a request amongst others include: non-compliance with exception requirements; licence (eg on e-resources where the licence prohibits supply to a client);<sup>9</sup> and underlying works being protected. The standard response in these cases is to encourage the requester to request to borrow the material from the library (3099 requests) or to seek permission directly from the

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[http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20\(1\).pdf](http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20(1).pdf). See similarly Pappalardo, Kylie, Aufderheide, Patricia, Stevens, Jessica, & Suzor, Nicolas (2017) *Imagination foregone: A qualitative study of the reuse practices of Australian creators*. QUT, Brisbane, QLD, p.3 available at <https://eprints.qut.edu.au/115940/>

<sup>9</sup> 3,519 requests over 6 years. Note that requesting libraries usually check the catalogue records holdings information to determine whether the material can be supplied under section 50 of the Copyright Act prior to making the request, so this figure relates to material already checked by the requesting library which the NLA has still rejected due to licensing arrangements. This figure also does not include where the electronic article has been embargoed and is not available to download.

copyright owner - meaning that over the last 6 years the National Library alone has directed more than 4,493 users to seek licences from copyright owners.

Industry practice strongly favours the seeking of licences for digitisation, exhibition and publication work. The National Film and Sound Archive, for example, provided the following scenario to the Productivity Commission:

The NFSA sought to use a radio serial from the mid 1940's on SoundCloud (an online distribution platform that allows NFSA to share rare interviews and unique recordings from the mid 1940's). While the broadcast rights have expired, the music and script were still in copyright. The NFSA approached who they believed held the underlying copyright and despite being unaware they held the copyright they granted permission for two episodes to be uploaded. In the process of researching the copyright status of more serials, the NFSA discovered that it was more likely that a second party held the rights to the copyright initially cleared. Faced with competing claims to copyright ownership, the NFSA made a business decision to stall the project, assessing that it would be too time-consuming and costly to negotiate with both parties, particularly given the extensive research and efforts made to date to clear copyright with the first claimant. As a result the NFSA, the industry and the general public lost the opportunity to easily access a unique part of Australia's audiovisual cultural heritage.<sup>10</sup>

Similarly, for the recent publication, *Letters to Lindy*, the National Library worked with author Alana Valentine for over a year to seek to clear rights to the 183 letters to Lindy Chamberlain-Creighton reproduced in the book. This is despite the fact that all were part of the library's collection (having been donated by Lindy Chamberlain-Creighton herself); none were commercial products; and most were orphan works. The effort made to clear the material was extremely thorough and diligent, including searching electoral rolls and contacting potential family members. Letters that couldn't be cleared were included only if they were central to the artistic integrity of the work, and non-copyright issues such as privacy and defamation were taken into account.

After a decade working with s200AB, libraries have demonstrated that they are able to appropriately navigate and apply a flexible dealing exception in a way that facilitates access to knowledge while respecting and supporting the rights of creators. But s200AB is limited in what it allows, and does not appropriately match the decision process used to reach these conclusions – a decision process that essentially revolves around the “fairness” of the sharing, for the client, the creator and the general population. A fair use/dealing provision would not only fix the ongoing issues created by s200AB, which have seen it underutilised by much of the

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<sup>10</sup> Submission by the Australian Digital Alliance to the Productivity Commission Intellectual Property Arrangements Inquiry (2015), p.9, available at [http://www.pc.gov.au/data/assets/pdf\\_file/0006/195009/sub108-intellectual-property.pdf](http://www.pc.gov.au/data/assets/pdf_file/0006/195009/sub108-intellectual-property.pdf)

sector; it would also align the provision with the reality of decision making on the floors of libraries daily.

### **A move towards fairness fulfils the government's goal of modernisation**

Most importantly, a move towards fairness for library and other users will achieve the government's goal of modernisation of the Copyright Act. As is clearly demonstrated above, s200AB has always been a complex and unsatisfactory exception. A fairness exception is simpler, more flexible, aligns more closely with common practices and expectations, and is more adaptable to changing technology and behaviour. In short, it is a better and more modern copyright exception. If the government is truly serious about wanting to modernise the Copyright Act and remove or fix outdated or inappropriate provisions, the replacement of s200AB with a fairness based exception is one of the simplest and most effective steps it can take.

### **We support the other purposes proposed**

Whether as illustrative purposes under a fair use scheme, or as separate fair dealings, the ALCC also supports the other purposes proposed in the consultation paper. We support the comments of National Copyright Unit of the Council of Australian Government Education Council (CAG) and Universities Australia (UA) with respect to the application of flexible exceptions to educational activities. Specific comments on other purposes are provided below.

#### *Existing purposes*

Although the revocation of the existing fair dealings are not proposed in the consultation process, the ALCC would like to take this opportunity to emphasise how important it is to continue to support the purposes that are already supported by Australia's current fair dealing exceptions, whether as part of a fair use or extended fair dealing regime.

Each of these existing purposes – ie research and study; criticism and review; parody and satire; reporting the news; and legal advice – meets an important and demonstrated need in supporting our democratic society. If changes are made to our flexible dealing exceptions, it is important that support for these existing exceptions is maintained, both to support free speech and public discussion and to ensure a continuous line in Australian copyright jurisprudence, ensuring the continued influence of important domestic cases such as the Panel Case.<sup>11</sup> The continuation of Australia's existing jurisprudence on copyright exceptions in a more flexible environment is supported by our members.

#### *Quotation*

We strongly support the inclusion of quotation as an illustrative purpose in a fair use provision, or as a separate fair dealing. The introduction of a quotation right is the single step which would go the furthest to aligning Australian copyright with the expectations and understanding of non-experts, be they academics, artists or the general public.

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<sup>11</sup> *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [\[2002\] FCAFC 146](#); [\(2002\) 118 FCR 417](#)

On a day to day basis, librarians and archivists are asked to explain Australian copyright law to members of the public seeking to access and make use of our collections, and the inability to make use of simple quotes in publications is one of the most difficult aspects to justify or reconcile with the expectations of a democratic nation. As QUT research demonstrates, even artists think that they currently have the right to quote material in Australia.<sup>12</sup> Although the doctrine of insubstantial part potentially provides some leeway, its emphasis on qualitative analysis and narrow interpretation internationally (eg. in cases related to music sampling) has cast such doubt on its utility to allow even the smallest quotation that we as a sector cannot confidently rely on it. Its failure to adequately address the problem of quoting is demonstrated by the fact that most academic publishers and universities still require you to clear even short quotes before publication.<sup>13</sup>

Libraries and archives also have a strong interest in ensuring our clients have adequate rights to access and make use of the materials that we painstakingly collect and preserve. Significant government resources are devoted to ensuring the broadest possible access to Australia's national collection, particularly through digitisation projects such as Trove<sup>14</sup> and the GLAM Peak initiative.<sup>15</sup> However, currently the ability of clients to actually make use of these collections in reasonable manners is extremely limited. The Australian Newspaper Digitisation Project makes over 20 million pages from over 1000 Australian newspapers from each state and territory available online in text-searchable form.<sup>16</sup> However, due the complexity and uncertainty relating to rights in most historic newspapers and the narrowness of Australia's existing fair dealing laws, Australians are generally unable to legally include even short quotes from these sources in personal blogs, family history publications, theses published online, academic articles, or even at family events, without going through laborious and often impossible clearance processes. This in turn leads to a lack of respect for the law, encouraging infringement.

Finally, the need to respond formally to Intention to Publish enquiries even for small quotes creates real productivity losses for library and archive staff. Risk averse publishers will generally require a written response for their files, even where the author themselves is confident of their use or rights holders are uncontactable. This places library staff in the position of having to determine whether a quote is a substantial part, with inexperienced staff in particular likely to be informed by high profile cases such as the Kookaburra Case.<sup>17</sup> This work adds an unnecessary additional cost to publication – for authors, publishers and libraries.

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<sup>12</sup> See Pappalardo, Kylie, Aufderheide, Patricia, Stevens, Jessica, & Suzor, Nicolas (2017) *Imagination foregone: A qualitative study of the reuse practices of Australian creators*. QUT, Brisbane, QLD, p.3 available at <https://eprints.qut.edu.au/115940/>

<sup>13</sup> See, for example guidance on quotes from academic publisher Wiley <https://www.wiley.com/legacy/authors/guidelines/stmguides/3content.htm>

<sup>14</sup> <http://trove.nla.gov.au>

<sup>15</sup> <http://www.digitalcollections.org.au/>

<sup>16</sup> <https://www.nla.gov.au/content/newspaper-digitisation-program>

<sup>17</sup> Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd [2010] FCA 29 (4 February 2010)

The need for a solution to meet the demand for non-commercial use of quotes by the Australian public is demonstrated by the efforts of the Copyright Agency to work with Australian news publishers to put together an Open Newspaper Licence.<sup>18</sup> The outcome of these efforts equally demonstrates the inadequacy of the market to provide this solution. The licence purports to allow a number of uses which are already permitted under Australian law, such as:

- quotes in unpublished PHD theses and dissertations;
- communicating the headline from up to 5 articles on a personal blog without ads; and
- linking to an article on a publisher's website (not paywalled).

In fact, the only uses the licence permits that go beyond the existing copyright exceptions and limitations are:

- unpublished, non-commercial quotations of up to 20 words in length;
- use of orphan works published before 1955;
- reproducing up to 5 articles for use in family history books that aren't commercially available.

This open licence fails to provide for even the most low impact and reasonable of uses, such as quoting a recent news story on Twitter, or including an orphaned article from 1960 in your family history blog. These remain unauthorised uses for which direct licences must be negotiated. This clearly demonstrates why government intervention is needed if we are to have a copyright ecosystem that meets the expectations of the Australian population.

Introducing a fairness-based quotation right will allow our clients to make appropriate use of our collections, including artists wishing to re-use material, family historians wanting to write publicly, and individuals wanting to express themselves through memes on social media. It would remove a number of ridiculous anomalies in our current law, including:

- quotations which can be legally included in PhDs having to be removed or cleared before these same theses are made available online;
- artists being permitted to reference their past works where the rights have been transferred to others (under s72 of the Act), while authors and musicians have to obtain licences. This particularly makes no sense in the academic world, where the common practice of transferring all rights to an article to the journal in which it is published coupled with the importance of building upon past work creates a dilemma for Australian researchers.
- creators being able to use excerpts from existing material for parody and satire, but not for serious artworks and historical documentaries.

We also strongly support the inclusion of the standard fairness factors in any quotation-based exception, such as the amount of work used and the commercial impact of the use. This will ensure that the new right is not abused and that existing functional licensing models – eg around sampling and music synchronisation – continue. However, we maintain that these

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<sup>18</sup> See <https://www.copyright.com.au/licences-permission/open-licence-newspaper-content/>

should only be considered as factors in an overall fairness determination, and should not be placed as hard limits eg in a specific quotation exception. If quotations were, for example, explicitly limited to only part of a work or uses in non-commercial circumstances, this would prevent many of the most common, non-harmful use of quotes, such as the use of screenshots in memes on commercial services like Twitter or the inclusion of quotes in academic papers published in journals or monographs.

### *Non-commercial private use*

The private copying provisions introduced a decade ago have never been satisfactory. They provide only piecemeal coverage focused on a very narrow category of personal use – time and format shifting – and do not permit many of the reasonable, non-commercial private uses which our clients frequently seek to make with library and archive materials, such as:

- the reproduction of an article on your grandfather at his 90th birthday party;
- the printing of the poster of the immigrant ship that brought your parents to Australia for home display;
- the use of a cookbook that is no longer commercially available for home cooking; or
- the repatriation of mission photographs to indigenous communities as part of community healing and reconciliation efforts.

This creates a dilemma for libraries seeking to serve their clients – can they provide access to documents under s200AB for uses which they know to be illegal?

In the modern digital era, one of the core functions of private copying exceptions is to allow consumer use of new technologies. They are therefore by their nature particularly susceptible to becoming outdated, and should be couched in flexible terms so as to be adaptable to technological development. Three well-cited use cases particularly demonstrate the need for a fairness-based private use exception that can keep pace with modern life:

- the fact that the current provision for format shifting of films (s100AA) refers to “videotape” – ignoring not only all digital film, but also other analogue film formats such as 8 and 16 mm. Allowing the transfer of legally purchased music CDs to personal devices, but not legally purchased DVDs, cannot be justified on a policy basis;
- the fact that Australian law did not permit the legal use of home video recorders until 2006, 20 years after it was found to be legal under the US fair use doctrine. If the Betamax case<sup>19</sup> had occurred in Australia, the entire home video market, and the DVD and now streaming markets which followed it, may never have emerged;
- the decision in the OptusTV Now case, which determined that Australia’s existing laws do not accommodate modern services that operate in the cloud environment.<sup>20</sup> It is difficult to calculate the harm done to Australian cloud startup services.

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<sup>19</sup> *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

<sup>20</sup> See discussion at

<https://theconversation.com/optus-and-tv-now-will-copyright-law-catch-up-to-the-cloud-9422>

### *Incidental and technical use*

The introduction of a general exception for incidental and technical use is one of the minimal steps required to make Australian copyright law functional and able to adapt to technological change. Without it the necessary technical processes that enable much of the modern communication environment remain illegal.

The Department's paper provides caching and indexing as examples of uses that might be covered by an incidental and technical use exception. Both of these activities are undertaken daily by Australia's libraries and archives in our important role as information, research and service hubs for the community. The current legal uncertainty surrounding these and similar uses increases the risk for the sector and reduces our confidence in taking up the latest technologies.<sup>21</sup> Other activities the library community would envisage being covered by the exception include cloud services and automatic translations. These activities provide significant public benefit and are non-harmful to copyright owners. It is unclear why they should be prohibited by our legal system.

### *Text and data mining*

We note that the Department has circulated materials proposing that the incidental and technical exception be used to permit text and data mining (TDM). We agree that it is vital that TDM be permitted under Australian copyright law, although we support the Australian Digital Alliance's call for it to be listed separately as a permitted use in any a fair use/fair dealing regime.

The international library community – including the International Federation of Library Associations and Institutions (IFLA),<sup>22</sup> the Association of European Research Libraries (LIBER),<sup>23</sup> Association of Research Libraries (ARL),<sup>24</sup> the Australasian Open Access Support Group (AOASG) and the Australian Library and Information Association (ALIA) – are some of the strongest advocates of exceptions for TDM, defending the idea that the right to read is the right to mine. They join 274 organisations and 647 individuals in signing the Hague Declaration on Knowledge Discovery in the Digital Age, which declares that “innovation and commercial research based on the use of facts, data and ideas should not be restricted by intellectual property law”<sup>25</sup> and calls for legislators to “immediately work to support the introduction of

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<sup>21</sup> The library and archives exception for the administrative use (s113K) will cover these activities only where they relate to “the care and control of the collection” ie not where the library is providing public internet access. The application of the flexible dealing exception (s200AB) to these activities is put in doubt because of its “special case” and “commercial activities” limitations (eg where these activities are undertaken on the library or archive's behalf by a commercial service provider).

<sup>22</sup> <https://www.ifla.org/node/59306>

<sup>23</sup> <https://libereurope.eu/blog/2014/03/28/liber-responds-to-elseviers-text-and-data-mining-policy/>

<sup>24</sup>

<http://www.arl.org/news/arl-news/3643-fair-use-in-text-and-data-mining-arl-publishes-issue-brief#.WzGuhKczbcs>

<sup>25</sup> See Hague Declaration Principle 5 a

<https://thehagedeclaration.com/the-hague-declaration-on-knowledge-discovery-in-the-digital-age>

changes which would allow users to undertake content mining on materials to which they have lawful access.”<sup>26</sup>

TDM exceptions will allow researchers and employees to take full advantage of modern technologies and research techniques to, for example:

- analyse the results of large numbers of commercially published research articles to and recognise patterns and the consensus of research on a particular topic;
- conduct plagiarism checks;
- make use of the large numbers of diverse born digital collections brought in under eLegal Deposit laws to conduct research in almost any field; and
- analyse and recognise shifting language use across formal and informal sources.

As the Australian Law Reform Commission confirmed, such activities are not currently supported by an exception in Australia.<sup>27</sup> This is despite the fact, as the Hague Declaration points out, “intellectual property was not designed to regulate the free flow of facts, data and ideas, but has as a key objective the promotion of research activity”.<sup>28</sup>

We strongly support a fairness test as the most appropriate method of achieving the goal of a TDM exception. This will fix the current problem of requiring licensing for every use in impossible circumstances (eg where agreement may be required from hundreds or even thousands rights holders) whilst still ensuring that appropriate protections for rights holders are maintained (eg only allowing TDM where materials have been legally accessed). It will also support licensing where it is possible and appropriate, such as where a commercial product relies heavily on a data set with a single copyright owner. However, a TDM exception should not be limited to non-commercial circumstances only, as this undermines the whole point of permitting TDM ie to enable the benefits of innovation in research to flow to the Australian economy as a whole. The limitation of the UK’s TDM exception to non-commercial activities has significantly undermined its utility for the research sector.<sup>29</sup>

It is also important that any TDM exception be protected from contractual override if it is to have effect. Evidence from the UK prior to the introduction of their own TDM exception shows that even where materials have been legally accessed and paid for under a subscription model, it is

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<sup>26</sup> See Hague Declaration Roadmap for Action, 2

<https://thehaguedeclaration.com/the-hague-declaration-on-knowledge-discovery-in-the-digital-age>

<sup>27</sup>

<https://www.alrc.gov.au/publications/11-incident-or-technical-use-and-data-and-text-mining/data-and-text-mining>

<sup>28</sup> See Hague Declaration Principle 1, available at

<https://thehaguedeclaration.com/the-hague-declaration-on-knowledge-discovery-in-the-digital-age/>

<sup>29</sup> See analysis at

<http://copyright4creativity.eu/2016/09/28/text-and-data-mining-how-the-future-tdm-workshop-highlighted-the-draft-exception-must-be-improved-for-tdm-to-have-a-future-in-europe/>

common for licence agreements to prohibit TDM<sup>30</sup> or limit its practice to the degree that it undermines the utility of the research.<sup>31</sup> The process for negotiating additional permissions is generally complex, lengthy and expensive with no guarantee of success. A study by the Publishing Research Consortium found that only 35% of publisher respondents granted permission for TDM in the majority of the cases for all requests.<sup>32</sup>

### *Government uses*

The ALCC also supports the introduction of a flexible dealing right to permit government uses as either part of a fair use or fair dealing regime. This would have the benefit of facilitating reasonable and incidental use by government institutions, and remove the requirement to introduce specific exceptions for government use of material. This would be useful, for example, to permit government archives to use non-Crown copyright material held in their collections without the need to seek permission from copyright owners or payment of remuneration. This would ensure material provided to government by third parties for administrative purposes could continue to be used for purposes of public administration, similar to the administration exceptions in the *Copyright, Designs and Patents Act 1988* (UK).<sup>33</sup>

### **Question 2**

What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums.

### **S200AB should be repealed**

As we have discussed at length above, s200AB has been problematic since its introduction and should be repealed in favour of a fair use or, as a secondary option extended fair dealing.

The reform process to remedy the ills of s200AB began last year with the replacement of its disability access subsections with a corresponding fair dealing exception. This was an extremely positive process for all parties involved, facilitated in large part by the creation of the Australian

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<sup>30</sup> See examples at

<https://docs.google.com/spreadsheet/ccc?key=0AtV3tlqlu0UZdGVMNTAtejBUIFySGk4QWdrVHJNdKE&authkey=CKC-LQP&authkey=CKC-LQP#gid=0>, collected and published in Ross, Mounce, *The right to read is the right to mine: Text and data mining copyright exceptions introduced in the UK*, [blogs.lse.ac.uk/impactofsocialsciences/2014/06/04/the-right-to-read-is-the-right-to-mine-tdm/](https://blogs.lse.ac.uk/impactofsocialsciences/2014/06/04/the-right-to-read-is-the-right-to-mine-tdm/)

<sup>31</sup> See <https://libereurope.eu/blog/2014/03/28/liber-responds-to-elseviers-text-and-data-mining-policy/>

<sup>32</sup> Note this sample included open access publications, meaning the rate for non-open access publishers is likely to be significantly lower

file:///J:/Copyright/2%20ALCC/ALCC%202018/modernisation%20consultation/PRCSmitJAMreport20June2011VersionofRecord\_000.pdf p.106

<sup>33</sup> *Copyright, Designs and Patents Act 1988* (UK) ss 48, 49. See further discussion in the National Archive of Australia's submission to the Australian Law Review Committee's Copyright and the Digital Economy review, which can be found at

[https://www.alrc.gov.au/sites/default/files/subs/595.org\\_national\\_archives\\_of\\_australia.docx](https://www.alrc.gov.au/sites/default/files/subs/595.org_national_archives_of_australia.docx)

Inclusive Publishing Initiative, a cross-sectoral coalition bringing together representatives of publishers, authors, rights holder organisations, disability advocates, and library and archives.<sup>34</sup> This has already led to the development of draft guidelines to support the implementation of the new fair dealing, and significant improvements in the provision of licensed access to material directly from publishers.

This process should be continued for the remaining s200AB provisions ie they should be repealed and replaced with fair use and/or fair dealings for educational purposes, and for libraries and archives. Australia's libraries and archives would be pleased to participate in similar collaborative projects to assist with the implementation of any new fairness based exception for libraries and archives.

### **Specific exceptions should be maintained**

In contrast, the ALCC does not recommend that the specific exceptions for libraries and archives currently set out in the Act be repealed with the introduction of a fairness-based exception. These exceptions represent non-controversial, daily activities that particularly at smaller and less well funded institutions may be undertaken by staff without specific copyright training or experience. These activities have already been considered by the Australian Government and been determined to be by definition fair, and therefore should not be subject to a fairness test. Clear industry practices and guidelines have built up around these exceptions over the years, which would be disrupted if current rules were replaced with a general fairness test, requiring non-experts to make judgement calls as part of their ordinary work practices. This in turn would inevitably have a negative effect, with individuals and even whole institutions defaulting to a no-use approach for these well established practices.

### **Remaining library and archive exceptions should also be modernised**

We do, however, support the modernisation of the current document delivery and interlibrary loan provisions, in a manner similar to the recent amendments to the preservation, administration and research exceptions. In general, we support proposals circulated by the Department for such amendments, including the proposal to move notice and declaration requirements to the regulations, to align with the approach taken in the new educational statutory licence.

These modernisation amendments should, at a minimum, harmonise the rules that apply to supply of audiovisual materials and other materials. In the day of podcasts, audio-documentaries, oral histories, and video blogs, applying different access rules to different materials cannot be justified. The current law significantly limits the circumstances in which published audiovisual materials can be supplied to remote users, even when they are no longer commercially available. These limits can be circumvented only using a complex and confusing s200AB assessment. Harmonisation of the rules around which these materials can be supplied

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<sup>34</sup> See

<https://www.alia.org.au/sites/default/files/Australian%20Inclusive%20Publishing%20Initiative%20Community%20Draft%202017.docx%20%282%29.pdf>

would provide benefits to librarians and archivists, members of the public and rights holders alike, by reducing confusion and creating bright line limits. These limits should be similar to those that currently apply to works, and ensure that only small parts can be supplied where the materials are commercially available.

This harmonisation would be in line with the ongoing move towards technological neutrality within the Australian Copyright Act since the Digital Agenda Amendments. It will also provide an opportunity to simplify the language of the provision, reduce bureaucratic requirements, and eliminate inefficient elements such as the requirement to destroy copies made as part of a supply.

### **Corresponding technological protection measure amendments**

Finally, should a new library and archive fair use/fair dealing provision be introduced the ALCC calls for a corresponding exemption to be introduced to the technological protection measure (TPM) provisions of the Act. It is unclear why educational institution uses under s200AB were granted a TPM exemption in the most recent amendments to the regulations, but libraries and archives were not. Libraries and archives play the same important information access role in society and have demonstrated the same reliability as educational institutions, and so deserve to be afforded the same level of trust as their educational peers to make case-by-case decisions about circumventing TPMs. If libraries and archives cannot circumvent TPMs we cannot fulfill our central legislative function of ensuring access to future generations.

## Contracting Out

### Question 3

Which current and proposed copyright exceptions should be protected against contracting out?

### Question 4

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions?
- all copyright exceptions?

### **All exceptions should be protected against being overridden by contract**

The Australian libraries and archives community strongly supports the protection of all exceptions against being overridden by contract.

The copyright exceptions represent important public policy limits that are just as fundamental to the operation of the copyright system as the rights granted to creators. Where they are abandoned or overruled the system loses its balance and no longer functions appropriately to incentivise the creation of content and facilitate access to the knowledge that content contains.

### **Library and archive exceptions in particular need protection**

Of particular importance is the need to protect the library and archive, education, and disability access provisions from contractual override. As the PC identified in their IP Inquiry, e-resources licensed by the library, archive and education sectors are the most common example of contractual override of exceptions. Particularly common prohibitions from licences include:

- interlibrary loan eg “a library may not lend any material or publication comprising the Service to another library”
- document delivery eg “the library may only permit its Members to view or access the material or publication comprising the Service from the Member’s web browser”
- onsite access to non-members of the library (ie walk-in clients)
- printing or downloading material for any purpose - here the onus may be put on libraries to physically prevent these activities.

Ample evidence of such clauses has been provided to past reviews; however we can provide evidence to the Department should they seek it.<sup>35</sup> The importance of the need to protect library and archive activities in particular from contractual override is also recognised internationally, with the new Copyright Directive currently passing through the European Parliament, for

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<sup>35</sup> See, for example, the Council of Australian University Librarian’s submission to the Productivity Commission, available at [http://www.pc.gov.au/data/assets/pdf\\_file/0006/195171/sub120-intellectual-property.pdf](http://www.pc.gov.au/data/assets/pdf_file/0006/195171/sub120-intellectual-property.pdf)

example, including a mandatory requirement for preservation exceptions, which are protected from override by contract.<sup>36</sup>

We note also that we would not expect the sector to be reckless in applying this guarantee. Library and archives' collections are often subject to access and use agreements from donors of rare and unique material that consider issues that go beyond copyright and are part of mutually respectful relationships. This may be the case where the collection contains, for example, private and personal information such as medical, commercial, or criminal records. We would expect librarians and archivists to consider the full context of the request before overruling any contractual obligations, and to ensure it is only undertaken in appropriate circumstances. For similar reasons, we would not want any contractual override provision to imply that third parties may demand access to or use of material where the institution is bound for reasons other than commercial arrangements.

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<sup>36</sup> See discussed at International Federation of Library Associations, *Sunshine and Clouds: The European Parliament Takes Position on the Copyright Directive*, (21 June 2018) <https://www.ifla.org/node/59306>

## Orphan Works

### Question 5

To what extent do you support each option and why?

- statutory exception
- limitation of remedies
- a combination of the above.

### **Our preference is for two exceptions for use of orphan works**

Our preference is for a fairness-based statutory exception which permits use of orphan works, such as fair use or a fair dealing for use of orphan works. This would permit use of orphan works by all Australians in circumstances that are fair.

However, following the example set by the recent disability access provisions, we also support the adoption of a specific exception for non-commercial use of orphan works by both cultural and educational institutions, in recognition of the special challenge that these materials pose for these sectors. In the absence of a fairness-based solution to allow use of orphan works for commercial purposes and by users outside the above sectors, we propose that a second specific exception be adopted for this group, with additional compliance requirements.

This would operate alongside and in addition to the fairness-based exception which would apply to other uses, creating a two-tier system whereby non-commercial use of orphan works could be undertaken quickly and efficiently by cultural institutions, while other uses could also be legally undertaken subject to a stricter test.

### **We welcome that a statutory licence has not been proposed**

We would like to take this opportunity to thank the government for not proposing that a statutory licence be used to provide access to orphan works. As our previous submissions have already detailed, the UK and Canada statutory licence systems have proved extremely expensive to set up and run, are difficult to navigate, bureaucratic, and place significant burdens on users whilst providing very little compensation to rights holders.<sup>37</sup> As a result, they act more as a barrier to use of orphan works than a pathway and orphan works remain greatly underutilised in these countries.

### **Use of orphan works by cultural institutions amounts to a special case that warrants a separate exception**

Although orphan works have been made available by institutions under s200AB, this exception does not provide a satisfactory solution to the orphan works problem for the cultural sector. Its

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<sup>37</sup> See detailed discussion in the Australian Digital Alliance's submission to the Productivity Commission (2015) p.12-14, available at [http://www.pc.gov.au/data/assets/pdf\\_file/0006/195009/sub108-intellectual-property.pdf](http://www.pc.gov.au/data/assets/pdf_file/0006/195009/sub108-intellectual-property.pdf)

“special case” limitation makes it problematic for mass digitisation projects, and its general complexity and uncertainty means that most institutions still treat their use of orphan works as a risk management decision, with s200AB (perhaps) playing a part in the risk assessment. While fair use or a fair dealing for library and archive use could partially address these defects, we argue that like the recent disability access provisions, a specific exception is appropriate for use of orphan works by cultural institutions.

Non-commercial use of orphan works by the institution that holds them in its collection falls into a category of privileged activities that provide significant benefit to the public with little or no harm to copyright owners and for which a specific exception is therefore appropriate. The uncertain copyright status of orphan works represents a real cost to libraries and archives - the government’s own analysis of the costs and benefits of fair use, undertaken by Ernst and Young, conservatively estimated diligent search costs of between \$10.3 million and 20.6 million a year.<sup>38</sup> At the same time, orphan works, by definition, have no market and no discernable owner, and therefore will always automatically satisfy the market impact test that underlies both s200AB and fair use. Where a copyright owner comes forward, the work stops being orphaned and therefore the exception would stop applying. The institution would therefore have to stop using the orphan work and takedown the material, or pay a licensing fee to continue the use.

### **Orphan works must be legally usable by all users, and in commercial circumstances**

In addition to ensuring that orphan works can be used in a non-commercial manner by cultural institutions holding them in their collection, libraries and archives also strongly advocate that the new provisions should allow full, legal use of orphan works in appropriate cases beyond these limits.

If the Australian government wants to liberate the orphan works in our national collections, they must ensure that use of these works does not stop on the institution’s website - they must be reusable by others, and in commercial circumstances, to ensure the full value of these works is obtained both culturally and economically.

Cultural institutions need to be able to use orphan works in their collections in commercial ways with legal certainty, such as in bookshop publications and ticketed exhibitions. They also have a strong interest in ensuring that the materials they make available are usable by their clients. For example, in the case of “Letters to Lindy” described above, the orphaned material was used not only in a library publication but also in an award winning play. While the library could arguably supply the materials to the author under existing library exceptions, the author’s ultimate use of them was “illegal”, as no permissions could be gained and no exception applied. This illegality of the end use put the library’s legal position in serious doubt (ie can the library supply material under s200AB if it knows the ultimate use is illegal?), and significantly raised the risk involved in proceeding with the project. In the end both the play and the publication proceeded on a risk

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<sup>38</sup> See Department of Communications and the Arts, Cost benefit analysis of changes to the Copyright Act 1968 (2016) p.72 available at <https://www.communications.gov.au/documents/cost-benefit-analysis-changes-copyright-act-1968>

management basis, but this placed an extremely high burden on both the author and the library, requiring extremely risk averse treatment of the material, and may not have occurred in another institution that had a lower risk tolerance.

Similarly, in the Department's roundtable for the review, the National Film and Sound Archive provided the further example of being approached by documentarians wishing to use orphaned material. The "illegality" of the use makes it difficult, if not impossible, for these parties to obtain insurance, enter a film festival or obtain a commercial distributor, even if the use of the material poses low or no financial risk.

It is for these reasons above that the ALCC strongly advocates for an exception rather than a mere limitation on liability for use of orphan works in commercial circumstances and by non-cultural and educational institutions. By preference such uses would be covered by a fair use or (secondarily) a fair dealing exception. We would expect a higher bar would apply to such uses of material than applies in the libraries and archives exception discussed above - however, we think this would result naturally from an assessment of such uses under the ordinary fairness factors and does not have to be imposed specifically. If a specific exception is introduced for such uses, rather than a fairness-based exception, we would expect it to be limited by, for example, requiring that a diligent search be undertaken before the material is used and that a reasonable licence fee be provided if a copyright owner comes forward.

**We do not support the creation of a category of "presumed orphaned" works or the inclusion of a definition of due diligence**

We understand the good intentions behind the government's proposal to include a category of "presumed orphaned" works in the proposed orphan works scheme, as a way to lower barriers to use of orphan materials by cultural institutions. However, we believe that any legislative tests along these lines would quickly become outdated and ineffective. We believe industry practices and guidelines are instead the most appropriate place to set standards for when material can be considered orphaned. Similarly, we prefer an industry led definition of "due diligence".

Any legislative system aimed at providing detail on these matters runs the risk of quickly becoming outdated and imposing unnecessary levels of bureaucracy - undoing the good work that has recently been done on the educational statutory licence and the library and archives exceptions. The experience with the EU orphan works directive demonstrates that any system for use of orphan works which imposes too onerous a compliance burden will not be utilised by institutions. In the case of the EU, it is the requirements for diligent search imposed by individual countries that have caused problems, proving to be so onerous as to be cost prohibitive. A 2016 study by diligent search project EnDOW<sup>39</sup> identified 210 sources, databases, and registers that need be checked in diligent searches in the UK, and 357 in Italy. Of the 87 identified sources in the Netherlands, 40 were not freely accessible, and 36 of these required personal contact or a

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<sup>39</sup> <http://diligentsearch.eu/>

physical visit.<sup>40</sup> This burdensome approach has been reflected in low uptake, with the OHIM Database on which orphan works must be registered only receiving 1,435 registrations in the first 4 years.<sup>41</sup>

Libraries and archives are extremely experienced working with guidelines, and are confident that we will be able to establish appropriate definitions for the implementation of the new orphan works system without the need to resort to legislative definitions which will be difficult to update. We also have a strong history of working with other relevant stakeholders in determining these guidelines, including rights holders, to ensure that they are non-controversial and represent an accurate and fair interpretation of the legislation. For example, the relevant guiding principles around diligent search that already exist for the sector - from the National and State Library Australasia<sup>42</sup> - are based on a joint statement from IFLA and the International Publishers Association.<sup>43</sup> We are also working jointly with rights holders on guidelines to assist with the implementation of the recent disability access amendments as part of the Australian Inclusive Publishing Initiative.<sup>44</sup>

#### Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use.

#### Limited liability does not meet the needs of users or rights holders

A limitation of liability is the ALCC's least favoured option for introducing a solution for commercial and non-cultural/educational institution use of orphan works under the Australian Copyright Act. As indicated above, our first preference is for a fair use exception which includes use of orphan works as an illustrative purpose. Our second is for a fair dealing along similar grounds. Our third would be to introduce a separate exception that permits use of orphan works in commercial circumstances or by those who are not cultural institutions, but imposes greater compliance requirements.

As discussion at the Department's orphan works roundtable quickly demonstrated, a limitation of liability solution does not adequately meet the needs of either users or rights holders. For

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<sup>40</sup> See discussion at Maarten Zeinstra, *Research: Orphan Works Directive does not work for mass digitisation* (16 Feb 2016)

<https://www.communia-association.org/2016/02/16/orphan-works-directive-does-not-work/>

<sup>41</sup> Ibid

<sup>42</sup> [https://www.nsla.org.au/sites/default/files/publications/NSLA.reasonable\\_search\\_orphan\\_works.pdf](https://www.nsla.org.au/sites/default/files/publications/NSLA.reasonable_search_orphan_works.pdf)

<sup>43</sup> <https://www.ifla.org/publications/iflaipa-joint-statement-on-orphan-works>

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<https://www.alia.org.au/sites/default/files/Australian%20Inclusive%20Publishing%20Initiative%20Communiqu%C3%A9%20draft%202017.docx%20%282%29.pdf>

users, while it reduces the financial risk associated with a project, it leaves the actual use of material illegal, creating problems with obtaining insurance, or working with distributors and publishers who require copyright clearances (see above). It will provide little help for those cultural institutions who in the interest of being good actors and pursuing risk elimination feel unable to supply materials for uses that they know to be technically illegal, or make such uses in their own institution (eg in ticketed exhibitions). For rights holders, a limitation of liability provides them with no clear avenue for compensation in the absence of court action. It does not encourage users to enter into licence agreements with any rights holders who come forward so much as it encourages them to push for legal action, in the hope that this will enable them to avoid any licence fee at all.

We believe a full exception provides a better approach to allowing use of orphan works outside of non-commercial use by cultural institutions for both users and creators. This exception would by preference be flexible, and through the application of the fairness factors would permit use of orphan works only subject to higher compliance requirements than the cultural institution exception, such as mandatory diligent search and payment of a reasonable licence fee if a rights holder comes forward. If a specific exception were preferred, such requirements could be prescribed. Such an approach would essentially signal to users and rights holders alike that the first response in the case of a disputed use of a previously orphaned work should to seek to negotiate a licence before commencing expensive and time consuming legal action. The determination of a reasonable licence fee would be left up to the parties; however, if the fee was not able to be agreed upon an judicial process (either to the copyright tribunal or a court) would apply. This could potentially be partnered with other non-judicial mechanisms to deal with orphan works, such as take down procedures.

#### **Question 7**

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

As discussed above, our preferred approach is for a fairness based exception which applies to orphan works and allows use by all users in circumstances that are “fair”.

However, we also agree with the consultation paper that cultural institutions have a special relationship with this material, as they are by far the major holders of them and the group with the strongest interest in making use of them. On a day to day basis, orphan works represent a cost and administrative burden for cultural institutions in a way they do not for other users.

With this in mind, and following the model set out by the recent disability provisions, we support the introduction of a separate approach for both cultural and educational users, to maximise clarity and reduce barriers to use by these sectors. This should be coupled with a broader fairness based exception for use of orphan works by all users.

## **ATTACHMENT A**

### **The case for fair use in Australia – a library and archives perspective**

A number of our recommendations in this submission make reference to the need for an open-ended flexible exception in Australia. We therefore felt it would be valuable to the Commission to spell out why the library and archives sector in Australia favours this specific method of introducing flexibility to the Australian Copyright Act.

#### **1. An open-ended, flexible exception is necessary to cover the broad range of uses undertaken by library and archive clients.**

In order to provide material to users under the s49 document supply provisions library and archives are required to obtain a statement from the client as to their proposed use of the material. As such, libraries and archives are particularly aware of the broad range of uses that clients make of collection materials – from research, to family history projects, to personal uses such as cooking or display at a birthday party. Our members recognise the social, cultural and economic benefits gained from such uses, and seek to facilitate them - after all, the core function of libraries and archives is not just to preserve material but also to promote access. They find it frustrating to be forced to deny uses that are clearly not harmful to the copyright owner because of the narrowness and rigidity of the current law. We strongly believe that the copyright system should be balanced so as to allow any use that is fair, not merely those that have been legislated for.

#### **2. Such an exception would give libraries, archives and other institutions the confidence they need to undertake innovative and ambitious online projects**

The limited nature of exceptions under Australian copyright law makes it risky for individual institutions to undertake new and untried projects. Whilst a private individual may choose to 'run the gauntlet' of restrictive copyright laws and just make their use anyway, the risk equation for institutions means that they do not usually have such a luxury. This means that high priority projects that have the potential to provide significant benefits for the public - such as mass digitisation, GLAM Hacks and text and data mining - simply cannot be undertaken by most institutions. A flexible exception would re-adjust the risk assessment for individual institutions to allow them to undertake projects that provide social benefits and do not harm copyright owners.

#### **3. Without a flexible exception Australian law will only continue to grow more complex as new technologies and uses emerge**

Currently the Australian Copyright Act must be amended each time the government wishes to legalise a new technology or use. This is inefficient, and means that the Australian copyright law is constantly playing catch up. Furthermore, it results in an increasingly long and complex Act. When the Copyright Act was first passed in 1968 it was 105 pages long and had about 40

exceptions - it is now 762 pages long and contains more than 90 specific exceptions. The end result is a legal system that it is almost impossible for even copyright experts to fully understand and apply, let alone a librarian or member of the general public. While fair use won't completely fix this problem, it should allow some degree of simplification and minimise the need for new exceptions.

#### **4. The fairness test applied by fair use is intuitive and allows individuals to make a common sense assessment based on all the facts**

As discussed above, individuals within the Australian library sector show a distinct preference for the simplicity and straightforwardness of a US-style fair use exception. It allows a 'common sense' assessment of a situation, and grants courts the ability to permit uses that clearly are reasonable or should be allowed. It protects copyright owners' rights by prohibiting uses that unreasonably impact upon their market without limiting the types of circumstances that can be found to be fair or requiring lengthy assessments of complex concepts such as 'special case'. It also aligns with the current behaviour of many library professionals, who already make judgements based on what they see as the 'fairness' of the intended use.

#### **5. US-style fair use exceptions are well established legally and understood around the globe.**

The ALCC's main priority is to establish an open-ended, flexible use exception in Australia. We are open to considering a range of models to provide such an exception, including an expanded fair dealing provision (as long as this provision is open ended). However, we advocate for the use of a US-style exception because it is well established, with a long history and legal scholarship. It has been thoroughly tested and proven to be robust, and is applied by millions of people across the world daily. US-style fair use exceptions now exist in a number of countries worldwide, including South Korea, Israel, Singapore and the Philippines. South Africa currently has a bill before parliament to introduce fair use.

#### **6. Fair use is necessary to provide an appropriate balance within copyright law, benefiting the institutions, their clients and Australian society as a whole.**

Fair use has been described as an essential doctrine 'that counterbalances what would otherwise be an unreasonably broad grant of rights to authors and unduly narrow set of negotiated exceptions and limitations'.<sup>45</sup> Australia's library and archive communities believe that Australia should strive for a world class copyright system which is able to accommodate the full range of desirable uses. This will never be the case while it relies on rigid exceptions, treating users as second class compared to copyright owners. Without fair use, the Australian copyright system will always have gaps, always be trying to catch up with new technologies and trends, and will never be truly efficient, effective or adaptable.

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<sup>45</sup> Pamela Samuelson, 'Unbundling Fair Use' (2009) 77:5 Fordham Law Review 2537, 2618.

## ATTACHMENT B

### Excerpt from the ALCC's 2015 submission to the Productivity Commission

#### **S200AB flexible dealing exception confusing and difficult to apply**

The s200AB “flexible dealing” exception was introduced in 2006 could, in theory, deal with some of the issues discussed above. Section 200AB allows libraries and archives, educational institutions, and institutions assisting those with a disability to make any use that falls within their primary purpose (eg ‘maintaining or operating the library or archives’ or ‘giving educational instruction’), as long as that use passes certain tests prescribed by the Act. The provision was intended to add flexibility to address the rigidity of the existing exceptions in the Act for these privileged users, in the public interest.

However, s200AB has not been effective because of a number of internal complexities which make it uncertain and difficult to apply. This has discouraged the target communities from making use of the provisions. Consultations undertaken by the ALCC with stakeholders in 2012 indicate that a broad number of educational institutions, libraries and cultural institutions view section 200AB as a failure.<sup>46</sup>

The reluctance to use s200AB appears to stem at least in part from confusion around the language used. The provision imports the ‘three step test’ from the international copyright treaties and applies it in the domestic context.<sup>47</sup> The result is that a test that was intended to judge whether exceptions are permitted within the law, is now being used to judge individual uses. This gives rise to a host of problems in its day to day application.

As part of our joint response to the ALRC's *Copyright and the Digital Economy Inquiry* with the ADA the ALCC commissioned a report from Policy Australia examining the sector's attitudes to s200AB, and querying whether the Australian education, library and cultural sectors would be

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<sup>46</sup> Attendees at ADA/ALCC consultations included: National Library of Australia, Powerhouse Museum, State Library of Western Australia, Australian Library & Information Association, National Archives of Australia, Art Gallery of NSW, National Gallery of Australia, National Museum of Australia, State Library of Victoria, Museums Australia, Museum of Contemporary Art, Swinburne University of Technology, Australian National University, Universities Australia, State Records Authority NSW, Public Libraries NSW and Murdoch University WA. The Australian War Memorial noted their use of section 200AB, and agreed that it could be repealed but only if it was to be replaced with something like fair use. Some members indicated a desire for “certainty” in the law, but opposed existing purpose-based exceptions which, while arguably “certain”, they found very restrictive. The majority, on clarification, confirmed their preference for an open-ended exception easier to understand than section 200AB

<sup>47</sup> See Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), Art. 9(2)

better off under fair use.<sup>48</sup> Policy Australia considered there to be four main reasons section 200AB has not benefited Australian educational institutions, libraries and cultural institutions as expected:

1. Particular drafting choices made in the incorporation of the three step test into section 200AB have created a high degree of uncertainty as to its practical application and scope. For example, s200AB(1)(a) requires that the use be a “special case”. With respect to exceptions generally this is taken to apply to the type of use covered (eg providing access to those with a disability); but in the domestic law context people frequently interpret it as meaning that each individual use must be judged on a case-by-case basis (eg is this particular copying of this particular work a special case). This narrow interpretation effectively precludes the use of s200AB for mass digitisation projects which can involve the copying of hundreds or even thousands of works.<sup>49</sup>
2. Section 200AB(6)(b) provides that the exception does not apply to any use that “because of another provision of this Act...would not be an infringement of copyright assuming the conditions or requirement of that other use were met.” There is debate as to the effect of this provision, and whether it precludes the use of the provision for uses that fall just outside s49, such as document supply for personal enjoyment, or criticism and review. Policy Australia noted that it appears to narrow the scope of the exception to a significant extent.<sup>50</sup> It also means that staff must complete all the steps needed to determine whether one of the other exceptions applies before they even move on to the three steps. This requires a great deal of expertise and is extremely time consuming, significantly increasing the compliance costs and discouraging all but the most confident of institutions from taking advantage of the provision.
3. The absence of an exception permitting institutions to circumvent access control technological protection measures (TPMs) for the purposes of section 200AB, combined with the increasing use of TPMs on audio-visual works, has resulted in an ever-growing pool of content that effectively falls outside of the scope of the exception (see further below); and
4. The uncertainty caused by Australia’s particular implementation of the three step test in section 200AB, combined with a general culture of risk aversion, has led institutions to refrain from using the exception for fear of facing a legal challenge.<sup>51</sup>

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<sup>48</sup> ‘Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?’, by Policy Australia October 2012 available at [http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20\(1\).pdf](http://digital.org.au/sites/digital.org.au/files/documents/Appendix%201%20-%20ADA%20s200AB%20report%2015%20Nov%202012%20(1).pdf)

<sup>49</sup> The ALCC does not necessarily endorse this restrictive interpretation of s200AB, but notes that it is common in the community.

<sup>50</sup> Policy Australia, *Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?* (2012) p.2 available at [http://www.alrc.gov.au/sites/default/files/subs/213.org-attachment\\_adaandalcc.pdf](http://www.alrc.gov.au/sites/default/files/subs/213.org-attachment_adaandalcc.pdf)

<sup>51</sup> Ibid 2-3

Policy Australia noted from discussions with stakeholders the uncertainty felt by institutions attempting to interpret the three step test in a domestic context. A number of stakeholders commented that the language of the three step test was not as ‘familiar or instinctive’ as the language of ‘fairness’, which Australians are already used to assessing for the fair dealing provisions.<sup>52</sup> Indeed, some institutions the ADA and ALCC have communicated with indicate they already take a “fairness” approach to providing access to their collections, and even describe the provision of access to items in their collection for public interest purposes as “fair use”.

Policy Australia undertook a detailed analysis of the application of the three step test drafted into domestic law. Noting widely divergent views on the proper interpretation of the three step test at international treaty level,<sup>53</sup> and the problematic application of “special case”, Policy Australia highlighted the difficulty for trained copyright officers and legal advisers to confidently advise on the scope and application of section 200AB, let alone library staff without legal training. The following scenario was provided by a regional library, and demonstrates the degree of uncertainty surrounding the application of section 200AB.

The library owns an original 120 year old diary handwritten by a notable early settler to the region, during his time there from November 1891 until December 1892. The author of the diary died in 1918. His son offered the diary for purchase in a letter to the library in January 1983. The library subsequently purchased the diary from the author’s son, although no longer has any documentary evidence of that payment. The son, from whom the diary was purchased, died in 1994.

The Library has a copy of a letter written by the son offering the diary for sale. He states in the letter (in which he enclosed some extracts from the diary) – “Whilst I am delighted to make this a personal gift to you [meaning the extracts] I am open to a financial offer from any local paper for the remainder of the diary”.

Currently, because of its fragile state and its value, nobody has access to the diary and the library cannot locate any rights holders. The library was uncertain as to whether they could lawfully digitise the diary and make it available to the general public. They considered the diary to be of interest to local history researchers in the region, family history researchers whose relatives or ancestors were mentioned in the diary, and family researchers in the UK whose relatives settled in the region during the early 1890s.<sup>54</sup>

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<sup>52</sup> Ibid

<sup>53</sup> Ibid 4.

<sup>54</sup> See ADA/ALCC first submission to the ALRC (submission number 213, [http://www.alrc.gov.au/sites/default/files/subs/213.\\_org\\_adaandalcc.pdf](http://www.alrc.gov.au/sites/default/files/subs/213._org_adaandalcc.pdf)) November 2012 p.47. The ADA/ALCC debated as to whether the offering of the diary for sale to the library satisfied ‘publication’ as per s29(1) Copyright Act 1968 (Cth) - ‘offering or exposing work for sale to the public’. Whether considered unpublished or published, the work is still in copyright and an orphan work.

The ALCC maintains that s200AB does facilitate digitisation and online access in this instance, but note certain issues of interpretation. If a rights holder was to come forward and allege infringement of copyright, how would the son's once-interest in a financial offer from a local paper (with view to publication) affect the scope of s200AB? Does the library's provision of free online access 'unreasonably prejudice the legitimate interests of the copyright owner'? And does unlimited, permanent online access to the diary satisfy the 'special case' requirement?

The Australian Copyright Council considers s200AB more likely to apply if:

- the number of people the use is for is small;
- the time-frame of the use is short;
- the proportion of the work you are using is small;
- the material you are using has been published.<sup>55</sup>

None of these comfortably fit the provision of web access to a digitised 120 year old diary.

It is this level of uncertainty that makes section 200AB an uneasy fit for institutions undertaking activities in the digital environment and encourages risk aversion. As Policy Australia noted from their consultation with libraries and archives on section 200AB:

It became clear to us that the reluctance to use s 200AB could not be explained merely by a general cultural aversion to risk in educational institutions, libraries and cultural institutions. It is, of course, true that these institutions do tend to take a more risk averse approach to copyright than many in the private sector. But the story is more complicated than that. The feedback from stakeholders suggests that the particular complexities of s 200AB mean that it is not amenable to ordinary risk management assessment in institutions of this kind.<sup>56</sup>

Policy Australia also considered whether educational institutions, libraries and archives would be more likely to make use of a different open-ended exception:

It does appear from the evidence provided in consultations that despite their generally risk averse nature, educational institutions, libraries and cultural bodies would be more likely to use an exception that required them to engage in a fairness risk assessment. This, in our view, is significant. There would be little point seeking to replace s 200AB with a provision such as fair use if the institutions intended to benefit from such an exception were no more likely to use it than they have been to use s 200AB. Our consultations suggest that this would not be the case.<sup>57</sup>

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<sup>55</sup> Australian Copyright Council, The 'Special Case' or 'Flexible Dealing' Exception: section 200AB' information sheet (Information Sheet G115 v02, February 2012) p.2, available at [http://www.copyright.org.au/admin/cms-acc1/images/49561653\\_34f39b84a7e662.pdf](http://www.copyright.org.au/admin/cms-acc1/images/49561653_34f39b84a7e662.pdf)

<sup>56</sup> Policy Australia, op cit, p.10

<sup>57</sup> Policy Australia, op cit, p.10

Policy Australia concluded that Australian cultural and educational institutions would fare better under a provision incorporating concepts of “fairness”.

*Recommendation:* That s200AB be repealed and replaced with an open-ended, flexible exception adapted from the US fair use model. We note that this was also the recommendation of the ALRC in its Copyright and Digital Economy Review.<sup>58</sup>

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<sup>58</sup> ALRC Copyright and the Digital Economy (November 2013), [http://www.alrc.gov.au/sites/default/files/pdfs/publications/final\\_report\\_alrc\\_122\\_2nd\\_december\\_2013\\_.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf), Recommendation 12-1