

**Productivity Commission**

**Inquiry into Australia's Intellectual Property  
Arrangements**

**Submission by the**

**Australian Libraries Copyright Committee**

## **Introduction**

The Australian Libraries Copyright Committee (ALCC) welcomes the opportunity to provide comments to the Productivity Commission for its Inquiry into Australia's Intellectual Property Arrangements.

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](#)
- [National and State Libraries Australasia](#)
- [Council of Australian University Librarians](#)
- [National Library of Australia](#)
- [Australian Government Libraries Information Network](#)
- [National Archives of Australia](#)
- [Australian School Library Association](#)

## This Submission

The ALCC provides copyright training to the libraries and archives community across Australia each year and in doing so obtains feedback from attendees about current sector practices and concerns. As such, we have a particularly strong understanding of the issues that arise in relation to copyright implementation for libraries and archives. We will therefore focus specifically on the problems faced by this particular community, rather than directly addressing the questions posed by the Commission on the broader IP landscape. Our submission seeks to respond to the Commission's general inquiries regarding the fitness of Australia's IP arrangements and to address the following questions posed by the Issues Paper:

- Is licensing copyright-protected works too difficult and/or costly?
- How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/or fair use provisions play in striking a better balance?
- Are copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators?
- To be efficient and effective in the modern era, what (if any) changes should be made to Australia's copyright regime?

On broader matters raised by the Issues Paper, the ALCC supports the submission of the Australian Digital Alliance (ADA).

## Overview

The ALCC supports the statements of the Commission regarding the central purpose of copyright. To paraphrase the Commission, IP is intended to promote innovation and creativity by promoting the creation of genuinely new and valuable IP.<sup>1</sup> However, we also strongly support the comments of the ADA regarding interpretation of this purpose. Copyright and other IP systems exist to encourage the creation of works not as an end in itself, but rather because of the economic and cultural benefits those works can provide to broader society.<sup>2</sup> As the Commission also acknowledges, dissemination and reuse of the works is central to realising these benefits.<sup>3</sup> Following on from this, the ALCC contends that ensuring a healthy public domain and the ability to access and make use of material should be a key goal, not just a side effect, of copyright regulation. Libraries and archives and the role they play in facilitating public access to copyright material are an essential part of this.

In its current state Australian copyright law places significant restrictions and compliance costs on libraries and archives. The current exceptions available to libraries and archives are too rigid, complex and difficult to apply, creating significant inefficiencies for the sector and presenting a

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<sup>1</sup> Drawing on the Productivity Commission's Issues Paper (PC Issues paper), pp.3 and 7

<sup>2</sup> For more discussion of the benefits that arise from the use of works, see the ADA submission to the Inquiry.

<sup>3</sup> See PC Issues Paper, p.6-7

barrier to the dissemination of knowledge. To add to the complexity, these exceptions are often excluded by contracts and technologies. As a result, many of the works in our national collections remain locked behind complex laws, unable to be used.

Digitisation and access to Australia's cultural collections remains a top priority for Australia's cultural sector. Providing broad public access to copyright material can lead to a range of unexpected benefits. For example the world's first 3D-printed body-powered partial hand prosthesis was recently developed based on a design from 1845 that had been published as part of the National Library of Australia's Trove collection.<sup>4</sup> Further examples of beneficial reuses of digitised materials can be found in **Attachment A**. The Australian Government has indicated that digitisation of cultural collections is a priority through the recommendations of the Digital Technologies Working Group of the Meeting of Cultural Ministers. However, mass digitisation is one of the areas most affected by uncertainty in the application of Australian copyright law and the rigidity of the current exceptions. For many institutions, this makes the prospect of any significant digitisation of their collections almost impossible.

Discussions with representatives of Australia's library and archives sector indicate that existing exceptions in the Australian copyright are inadequate in the digital environment in numerous aspects. Libraries and archives undertaking digital preservation are infringing copyright. Complex document supply and interlibrary loan provisions have had a chilling effect on legitimate library activities, encouraged institutional risk aversion and are vulnerable to misinterpretation by library staff without legal backgrounds. And without a copyright term duration for unpublished works and exceptions to deal with orphan works, a wealth of material is locked up in cultural collections in perpetuity. It's worth noting, too, the increasing tendency of digital content licences to contract libraries out of existing copyright exceptions, and ways in which TPMs impede preservation and long term access to copyright works in the public interest.

Specific examples of problems which copyright laws present to library and archives and recommendations to address them are provided below. These include:

1. overly complex and restrictive library and archive exceptions;
2. private interventions restricting exceptions; and
3. untradeable materials.

We also include in **Attachment B** a discussion of the case for fair use in Australia from the library and archives perspective.

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<sup>4</sup> See Hannah Walmsley, World-first 3D-printed hand prosthesis inspired by 1845 design kept in online archive, News.com, 17 December 2015, <http://www.abc.net.au/news/2015-12-17/world-first-3d-printed-hand-prosthesis-inspired-by-1845-design/7032736>

## Specific Examples and Recommendations

### 1. Overly complex and restrictive library and archive exceptions

#### Complex document supply for providing material to users

The current exceptions for library and archives in the Copyright Act 1968 are prescriptive and rigid, and not fit for purpose in the digital age. For example, the principal exception used by libraries and archives - the document supply provision, which allows the copying and communication of works to users for research and study (s49) - is over 1600 words, with multiple caveats, limitations and compliance requirements. Compare this to, for example, the Parliamentary Library copying equivalent (s48A) which is only 70 words long.

This complexity makes the exception extremely difficult for library staff to interpret and apply, and significantly increases the compliance costs for institutions. Examples of a few of the counter-intuitive, costly complexities included in the current document supply exceptions include:

- the limitation of s49 to research and study, without any definition of this term in the Act. This prevents libraries and archives from copying and supplying works to users for other socially beneficial purposes, such as reporting the news, criticism and review or private use. Currently libraries receive a large number of requests for document supply for such purposes which they do not feel they can fulfil as they do not fit squarely within research and study. Examples of user requests libraries have felt they could not supply because of these restrictions include:

#### **Example 1: Request for copy of 1952 sheet music, to play at home**

*The work:* China doll / by Gerald Cannan and Kenny Cannan. Sydney: W.H. Paling & Co., c1952. 1 score (2 p.)

*The request:* Request for copy of entire work. 'Research or study' conditions agreed. Requester note: "To play at home". Request received 28/06/2011...

*Availability search:* Amazon.com 'china doll kannan sheet music' – no hits; APRA/AMCOS 'works search' by 'Cannan' – zero hits; Sheet Music Direct – zero hits on Cannan, another work (not this one) by search on 'china doll'; General Google search – found a site listing the lyrics but no sites in first 2 pages of results listing this work; musicroom.com (the online shop of the Music Sales Group) lists a China Doll by another composer (Legrand) but not this work.

#### **Example 2: Request for 1983 recipe book for cooking at home**

*The work:* Eating for immortality. Sydney: Raja Yoga Centre, 1983. 128 p.: ISBN 0959227105.

*The request:* Request for copy of entire work. Requester note: "To cook at home. I just want all the recipes, especially the one for tomato chutney". Requester

declaration: I will use the copy only for the purpose of research or study, I will not use it for any other purpose and declare that it has not previously been supplied by an authorized ... Request received 27/05/2012. ...

*Availability search:* publisher web site – nothing under ‘Raja Yoga Centre Sydney’ but publisher may have changed name to Brahma Kumaris: [www.bkwsu.org/au/BKAustralia](http://www.bkwsu.org/au/BKAustralia), where a search of their book shop’s search box on ‘Eating for immortality’ produced no hits ; Google search on ‘Eating for immortality’ found no results linked to a book store; Amazon.com – no hits.

### **Example 2. A 1971 edition of a bushwalking map for framed display at home**

*The work:* The northern Budawang Range and the upper Clyde River Valley / compiled and drawn by G.L. Elliott. Author: Elliott, G. L. 5th ed. [Sydney: Budawang Committee, 1971]. 1 map; 78 x 73 cm.

*The request:* Request for copy of entire work. Requester note: “framed display at home”. Requester declaration: I will use the copy only for the purpose of research or study, I will not use it for any other purpose and declare that it has not previously been supplied by an authorized ... Request received 20/09/2011...

*Availability search:* Correspondence between the National Library’s Map section and a member of the now-disbanded Budawang Committee confirmed that the work is no longer available new. Others have reported searching for purchasable new copies of the later editions of this map without success.<sup>5</sup>

- requirements that electronic copies made to supply one user request be destroyed, meaning they cannot be used to supply an identical later request (s49(7)). This can impose a significant cost burden on individual institutions. For example, the Australian National University reports that during 2011-2012 of the 10,693 bibliographic titles requested from its offsite Hume repository alone, 3,077 titles were requested 2 or more times. Of these, 2 titles were requested more than 100 times.<sup>6</sup> Further:
  - 5 titles were requested between 50 - 99 times
  - 23 titles were requested between 25 - 49 times
  - 132 titles were requested between 10 - 24 times
  - 477 titles were requested between 5 - 10 times.<sup>7</sup>

The Explanatory Memorandum to Copyright Amendment (Digital Agenda) Bill 1999 indicates that this limitation was intended to “prevent libraries and archives from building up electronic

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<sup>5</sup> These examples are drawn from the National Library of Australia’s original submission to the ALRC Copyright and the Digital Economy Review (submission number 218, available at [http://www.alrc.gov.au/sites/default/files/subs/218.\\_org\\_national\\_library\\_of\\_australia.rtf](http://www.alrc.gov.au/sites/default/files/subs/218._org_national_library_of_australia.rtf)). Many more similar examples are provided in the submission.

<sup>6</sup> This information was provided to the ADA/ALCC as part of its inquiries for the ALRC Copyright and the Digital Economy Review - 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.41. The ANU notes that the ‘title’ refers to serial title, not individual article. Articles from 1 title requested more than 100 times.

<sup>7</sup> Ibid. ANU also noted the top five repeat requested serials: *Archaeology in Oceania* (138 times), *Linguistics* (121 times), *Australian Historical Studies* (78 times), *Medical Journal of Australia* (61), and *Nature* (60).

collections of parts or the whole of articles or works as a result of communicating such works to users.”<sup>8</sup> This seems to have arisen out of concerns libraries would use s49 to develop electronic collections of article excerpts rather than purchasing them in electronic format. Yet commercial availability is already one of the considerations a library takes into account in deciding whether to supply a work. Internal storage of documents supplied in electronic format merely increases efficiency and effective provision of services.

*Recommendation:*

- The document supply provisions should be reviewed and simplified to remove unnecessary and unworkable restrictions.
- Materials should be able to be provided to clients for purposes other than research and study – at a minimum, including all fair dealing purposes in the Act as well as ‘private use.’
- Requirements to destroy copies supplied to the requesting user should be removed.

### **Inadequate preservation exceptions**

Preservation of materials is an essential part of running and maintaining a collection and at the core of Australia’s cultural institutions’ responsibilities to the nation. It should also be one of the least controversial exceptions, as it is an activity that operates as part of an institution’s internal processes and is explicitly separate from any public access that could affect the copyright owner’s market. You would expect preservation exceptions to be simple, with few limitations or compliance requirements.

Unfortunately, this is not the case in Australia. The current preservation provisions in the Australian Copyright Act are some of the most confusing and least fit for purpose. They apply inconsistent standards to different institutions and materials, do not allow best practice preservation, and impose confusing, even paradoxical compliance requirements. For example:

- the preservation exception for audiovisual works (s110B) currently only allows the preservation of published audiovisual works *after* the material has already been damaged, lost or stolen. This is clearly an illogical restriction, which completely undermines the purpose of the exception, and arguably makes the exception impossible to apply in many circumstances (how do you preserve a film after it has been lost?). It fails to acknowledge that in many cases the copy held in a library or archive, even of a published work, may be one of only a few, or even the only, currently in existence. It is unclear why preservation of audiovisual works should be more restricted than other works (which can be protected against damage, loss or theft);
- both ss51A and 110B, the exceptions which govern preservation of most materials by most institutions, only allow one copy to be made of materials. This is out of alignment with international best practices for preservation, which require at least three copies across multiple formats.<sup>9</sup> This contrasts with ss51B, 110BA and 112AA, which allow ‘key cultural institutions’ institutions holding nationally significant collections to make three copies.

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<sup>8</sup> Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999, p 36.

<sup>9</sup> For example, International Standards Organisation contemplates a range of different archived copies, including: an archived master copy; an access copy; at least one backup copy which enables restoration in the event that a system is compromised; and at least one remote master copy. International Standards

- None of the preservation exceptions currently allow communication of the work, despite the fact that off-site digital storage is necessary for insurance against collection damage and loss.<sup>10</sup>
- the work being preserved cannot be commercially available ie “a copy (not being a second-hand copy) of the work, or of the edition in which the work is held in the collection, cannot be obtained within a reasonable time at an ordinary commercial price” (ss51A(4) and 110B(3)).<sup>11</sup> Many libraries and archives consider the commercial availability test to be unworkable in practice. As one member commented in response to our inquiries for the ALRC submission, “it fundamentally misunderstands the nature of preservation.”<sup>12</sup> Best practice requires that preservation copies of an item be made at the point of acquisition to ensure best quality and protect against damage or loss. For example, libraries transfer newspapers to microfilm as soon as possible after acquisition due to the unstable acidic nature of newsprint. Preservation copies made at point of acquisition are also used as a reference to track stability and deterioration of the work as time goes on. Yet for most published works, commercial copies of the item will of course still be available at this point, therefore prohibiting preservation copying.
- The ‘ordinary commercial price’ element of the above restriction can also cause problems. The ‘ordinary commercial price’ of a well-known artist’s works may be in the tens of thousands of dollars, making the commercial availability requirement financially impossible to comply with for most institutions. For example Tracey Moffatt, one of Australia’s most prominent artists, primarily uses photography and video. Her photos may come in editions of 30, with each print worth \$15,000-\$20,000. With tight budgets there is no way that an institution should be expected to purchase an additional copy rather than preserve the copies they have. Indeed, many artists would prefer the money be spent buying another, different print for exhibition.

Our members point out that purchasing another copy of the work is not preservation – it is the acquisition of a new work (or, the replacement of a work). For example:

- If the work is in an unstable or inaccessible format then purchasing another copy simply means acquiring another problem of the same kind. For example, recordable compact discs (CD-R), often used by local musicians to self-publish their work, have an unpredictable life expectancy that relies on the interaction of the individual burner, the blank disc and the

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Organisation, Reference Model for an Open Archival Information System (OAIS) Recommended Practice (IOS 14721:2012), (2012), 8. See also United Nations Educational, Scientific and Cultural Organisation, Guidelines for the Preservation of Digital Heritage (2003), 93.

<sup>10</sup> For a tangible example of the importance of offsite preservation, see

[http://www.nytimes.com/2015/10/10/insider/flooding-threatens-the-timess-picture-archive.html?\\_r=1;f](http://www.nytimes.com/2015/10/10/insider/flooding-threatens-the-timess-picture-archive.html?_r=1;f)

<sup>11</sup> S51A(4) also provides that “a copy (not being a second-hand copy) of another edition of the work can be obtained within a reasonable time at an ordinary commercial price--stating why the reproduction should be made from the copy of the work held in the collection”

<sup>12</sup> See ADA/ALCC second submission to the ALRC (submission number 586,

[http://www.alrc.gov.au/sites/default/files/subs/586.org\\_the\\_australian\\_digital\\_alliance\\_and\\_australian\\_libraries\\_copyright\\_committee.pdf](http://www.alrc.gov.au/sites/default/files/subs/586.org_the_australian_digital_alliance_and_australian_libraries_copyright_committee.pdf)) p.36

playback equipment.<sup>13</sup> If the first copy of a CD-R is unreliable or has an unexpectedly short life-span, it is likely that subsequent copies purchased will have the same inherent faults.

- For born digital material, collecting institutions need to make decisions during acquisition whether to store the resource as received or to reformat.<sup>14</sup> Preservation reformatting may involve replication, emulation, migration or a hybrid approach of more than one process.
- Purchasing a further copy of the work rather than preserving the work itself can lead to the content of the original work being lost to future generations. A film acquired by an archive, for example, in 35mm format, may still be commercially available in DVD format at the point the archive would like to make preservation copies, but the DVD formatted work may be significantly different.

*Recommendation:* The current complex group of preservation exceptions should be replaced with a single, simple exception that allows any use of copyright materials in the collection of any library or archive for preservation purposes. Copies should not be limited in number or format. We note that this was also the recommendation of the ALRC in its Copyright and Digital Economy Review.<sup>15</sup>

### **Providing access to those with a vision or print disability**

The Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities prescribes international standards for ensuring adequate access to copyright material for people with a vision or print disability. The completion and signing of the treaty was an important and exciting development in copyright history, as it is the first international treaty to deal primarily with user rights. Other treaties have always focused almost exclusively on the rights of creators.

The ALCC contends that Australia's mechanisms for providing access to people with a print disability arguably do not meet the requirements of the Marrakesh Treaty. The primary enabling mechanism is a free statutory licence set out in Part VB, Division 3 of the Act. This licence is inefficient and not fit for purpose for the following reasons:

- organisations cannot provide a copy of a work in an accessible format to a user if the same work is already commercially available in that format. The way the restriction is drafted often means that institutions cannot provide content in the exact form that the person needs eg if it is available in printed form in one size large font, but the person needs it in an even larger font.

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<sup>13</sup> See, for example, UNESCO Guidelines - <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/risks-associated-with-the-use-of-recordable-cds-and-dvds-as-reliable-storage-media-in-archival-collections-strategies-and-alternatives/>

<sup>14</sup> See, for example, standard text Beagrie, N & Jones, M 2009, 'Organisational activities – storage and preservation' in Preservation management of digital materials: a handbook, Digital Preservation Coalition, viewed 23 April 2013, <http://www.dpconline.org/advice/preservationhandbook/organisational-activities/storage-and-preservation>.

<sup>15</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 12-2

- The requirement to conduct a lengthy commercial availability test before the institution can provide a work to a user creates a significant administrative burden, increasing compliance costs and processing times.
- As with s49 discussed above, the licence requires the mandatory destruction of all electronic copies in delivering services for students with a disability. Institutions are permitted to scan whole books and other materials for individuals with a disability, but any items supplied must be re-scanned for the next student, even when these students are taking the same classes or multiple classes are using identical material. This is clearly inefficient and achieves little except adding to the cost and administrative burden. In the ALCC's submission to the ALRC, the ANU estimates the cost of scanning each book at over \$100, and noted delays for individual students to receive whole scanned works could be up to a month, due to limitations on staff resources.<sup>16</sup>

When the Marrakesh Treaty was considered by the Joint Senate Committee on Treaties (JSCOT), the National Interest Analysis recommended certain changes to the current law as part of Australia's Marrakesh ratification, to ensure that the provisions can flexibly adjust to the needs of the sector.<sup>17</sup> They included replacing the current provisions with a fair dealing exception.<sup>18</sup> JSCOT accepted these recommendations, and the ALCC also supports their implementation.

As the NIA states:

Ratification and implementation of the treaty is in Australia's national interest. It provides equitable access to information to people who are print disabled while balancing the commercial interests of rights holders. Ratification of the Treaty by Australia will mark an important advance to help overcome the significant barriers that limit the availability of print accessible literature to people who are blind and vision impaired and that precludes these Australians from full participation in society.... Early ratification of the Treaty provides an opportunity for Australia to be a global leader in facilitating access to accessible format works.<sup>19</sup>

<sup>16</sup> ADA/ALCC first submission (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.42

<sup>17</sup> Although they contended that these changes are not necessary, merely advantageous, and that Australia's laws already comply with the treaty: National Interest Analysis [2015] ATNIA 9 with attachment on consultation Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh, 27 June 2013) [2014] ATNIF 15, paras 26-30 - available at

<http://www.aph.gov.au/~media/02%20Parliamentary%20Business/24%20Committees/244%20Joint%20Committees/JSCOT/2015/16Jun2015/2015%20ATNIA%208Agreement%20between%20Australframework%20for%20the%20participation.pdf?la=en>

<sup>18</sup> See

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/16\\_June\\_2015/Treaties\\_being\\_considered](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/16_June_2015/Treaties_being_considered)

<sup>19</sup> National Interest Analysis [2015] ATNIA 9 with attachment on consultation Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled (Marrakesh, 27 June 2013) [2014] ATNIF 15, para 33 - available at

<http://www.aph.gov.au/~media/02%20Parliamentary%20Business/24%20Committees/244%20Joint%20>

*Recommendation:* That the government move quickly to ratify Marrakesh and replace the Part VB Division 3 and s200AB(4) with a fair dealing exception for providing access to material for people with a vision impairment.

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

The s200AB “flexible dealing” exception was introduced in 2006 and, 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>20</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>21</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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[Committees/JSCT/2015/16Jun2015/2015%20ATNIA%20Agreement%20between%20Australframework%20for%20the%20participation.pdf?la=en](#)

<sup>20</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>21</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>22</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>23</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>24</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>25</sup>

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

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<sup>22</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>23</sup> The ALCC does not necessarily endorse this restrictive interpretation of s200AB, but notes that it is common in the community.

<sup>24</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>25</sup> Ibid 2-3

language of 'fairness', which Australians are already used to assessing for the fair dealing provisions.<sup>26</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>27</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>28</sup>

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

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<sup>26</sup> Ibid

<sup>27</sup> Ibid 4.

<sup>28</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.

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>29</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>30</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>31</sup>

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

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<sup>29</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>30</sup> Policy Australia, op cit, p.10

<sup>31</sup> Policy Australia, op cit, p.10

*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>32</sup>

## 2. Private interventions restricting exceptions

### TPMs prevent the use of material

Where exceptions do cover a particular use, libraries can still be prevented from making that use if the material is protected by a technological protection measure (TPM). Australia's anti-circumvention provisions (ss132APA-132APE) prohibit the circumvention of a TPM, as well as the supply of a tool whose primary purpose is the circumventing of a TPM. This ban applies even if the use you plan to undertake once the TPM is circumvention is legal eg because it is covered by an exception, or because the material protected by the TPM is in the public domain.

A small list of exceptions to the ban on circumvention is provided in the regulations, which prescribe circumstances in which it is legal to circumvent a TPM. These include:

- the document supply and interlibrary loan provisions (ss49-51)
- the preservation exceptions (ss52, 110A and 110B)
- the Part VB statutory licence for educational institutions; and
- the statutory licence for providing access to people with a print disability.<sup>33</sup>

However, s200AB is not included on this list – meaning that any use under this provision cannot be undertaken when a TPM is in place. Neither are the fair dealing exceptions (ss40-42), or the private copying exceptions (ss44C, 109A and 110AA).

The Australia United State Free Trade Agreement (AUSFTA), which prompted the introduction of the TPM provisions in Australia, requires that Australia conduct a review process every few years to add new exceptions to this list.<sup>34</sup> However the government has not undertaken this review process regularly – the last call for submissions was in 2012, and no response has yet been issued.

Moreover, these TPM exceptions are made ineffective by the fact that they are limited to acts of circumvention, and do not allow the supply of circumvention tools. This means that it is still illegal for anyone to supply the software or hardware needed to perform the circumvention or to provide a service to do so as a contractor. The assumption seems to be that library and archives staff will have the skills to undertake this circumvention themselves. This is clearly

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<sup>32</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

<sup>33</sup> Copyright Regulations (1969) Schedule 10A

<sup>34</sup> Australia US Free Trade Agreement (2005) 17.7(e)(viii) available at <http://dfat.gov.au/about-us/publications/trade-investment/australia-united-states-free-trade-agreement/Pages/chapter-seventeen-intellectual-property-rights.aspx>

unrealistic and even nonsensical when the complexity and specialist skills required to circumvent a TPM are considered.

*Recommendation:* That the anti-circumvention provisions be amended to include exceptions for all library and archive uses under the Act, and to allow supply of circumvention tools for legal acts of circumvention.

### **Licences being used to exclude exceptions**

All of the above issues are compounded by the frequent practice of using licences to limit or exclude exceptions in the Act. The practical reality for libraries is that a large number of licences attached to electronic resources seek to limit or eliminate entirely the library and archive exceptions. For example, in the ADA/ALCC submission to the ALRC, the National Library of Australia noted that 79% of digital products (e-books, databases, aggregator licences) purchased by the Library prohibited document supply.<sup>35</sup> The law in Australia is currently unclear as to whether copyright or contract takes precedence in such cases. Due to this uncertainty, lack of expertise among library and archives officers and the need to maintain relationships with publishers, industry practice is to follow the licences. This is an endemic problem within the library sector, and significantly undermines the usability of electronic materials just as publishers and libraries are seeking to move towards digital.

In 2008 the British Library looked at 100 contracts offered to the Library to determine whether they allowed for archiving, printing, downloading and electronic copying, fair dealing, access for the visually impaired, interlibrary loan and any other exceptions.<sup>36</sup> Many of the agreements were silent on a number of these issues; notably, only two of one hundred agreements considered access for visually impaired persons, 8 were silent on ILL, and only 25 agreements considered other exceptions. Of those contracts that considered archiving, 23 agreements permitted archiving, while 19 did not. Many of the clauses prohibiting archiving contained phrases such as “On termination of this Agreement the Institution will destroy and will procure that all Authorised Users destroy all content supplied through the Service stored on any digital information storage media, including but not limited to system servers, hard disks, diskettes and back up tapes.”<sup>37</sup> Only one agreement prohibited printing; however, 47% of the agreements did not allow for the extent of use, including printing, that would be available under the UK fair dealing provisions.

On the local level, in 2012 Swinburne University of Technology Copyright Manager Robin Wright conducted similar research locally and identified “a number of areas where the terms of licensing agreements for electronic access could potentially have an impact on the delivery of

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<sup>35</sup> The figure is much lower for one-off purchased databases at 7%. See ADA/ALCC first submission (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.77

<sup>36</sup> British Library, Analysis of 100 Contracts Offered to the British Library <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=691> and <http://pressandpolicy.bl.uk/content/default.aspx?NewsAreaId=316>.

<sup>37</sup> Ibid, 3 reference 6.

library services.”<sup>38</sup> In Ms Wright’s research, the contractual treatment of three particular areas of allowed use for libraries was examined:

- interlibrary loans (ILL) - the study notes that all the licences examined “contained terms that could potentially have an impact on libraries delivering ILL”.<sup>39</sup> Of the licences examined, six of the ten either prohibited ILL or required that material only be used in ways specified by agreement, ruling out ILL by default. Some agreements even contained specific wording excluding inter-library loans eg “[f]or avoidance of doubt, this agreement does not permit interlibrary loans or document delivery.”<sup>40</sup>
- educational use - many agreements provided permission for educational institutions to supply hardcopy reproductions of material in limited amounts. However, it was unclear as to whether the amounts specified would be more or less than would be permitted under existing Australian law. Five of the agreements specifically excluded inclusion of material in course packs, with one stating that course packs could only include material with “prior written permission of the publisher, who may set out further terms and conditions for such usage.”<sup>41</sup> This language effectively places the educational institution outside the scope of the Part VB statutory licence that would otherwise govern educational copying in Australia.
- fair dealing: of the licences examined, none referred specifically to Australian fair dealing, although some referred to US fair use. Others had different permissions that may be more or less useful than fair dealing depending on the circumstance. For example, one agreement granted permission to quote “up to an aggregate of 250 words from any single text.”<sup>42</sup>

The study concluded that the ways in which eBook licences limit libraries’ ability to use exceptions in the Copyright Act has the potential to fundamentally affect the ways in which libraries deliver services to their users.<sup>43</sup> It noted that “the move toward licensed access to electronic resources is having a major effect on the operation of libraries worldwide.”<sup>44</sup> Library staff need to become better skilled, and perhaps undertake legal training, to understand and identify terms and conditions that affect Australian copyright exceptions. The variety of content licences accompanying digital acquisitions make it difficult to create a centralised workflow for contracts. Each contract must be reviewed individually to determine the level of access that can be provided. In relation to ILL, “the range of different approaches taken by suppliers will limit Australian libraries’ confidence in their ability to use material held in eBook format when delivering such services, even if some agreements would permit it.”<sup>45</sup>

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<sup>38</sup> Robin Wright, ‘Libraries and licensing: the eFuture will need legal as well as technical skills’ (Paper presented at VALA2012, Melbourne, 9 February 2012), 1.

<sup>39</sup> Ibid, 4.

<sup>40</sup> Ibid, 4.

<sup>41</sup> Ibid, 6

<sup>42</sup> Ibid, 7.

<sup>43</sup> Ibid, 8.

<sup>44</sup> Ibid, 7, quoting Charles Hamaker ‘Ebooks on Fire, Controversies Surrounding Ebooks in Libraries’ (2011) 19:10 Searcher <http://www.infotoday.com/searcher/dec11/Hamaker.shtml>.

<sup>45</sup> Ibid, 4.

Other problems that may arise noted by Wright include:

- “some electronic material not being available for delivery to clients in certain formats or via services that would have previously been permitted under exceptions in Australian law;
- potential for the breach of licence terms if all material is delivered using existing services such as in course packs for students; and
- client confusion about how they can use different material held in a library’s collection”<sup>46</sup>

Finally, Wright notes the need to recognize that many licences are now negotiated by consortia that do not necessarily understand the specific needs of individual libraries,<sup>47</sup> meaning that the provisions contracting out of exceptions may be beyond the control of individual libraries. Additionally, in general, suppliers of agreements surveyed were aggregators rather than the content owners, which may give individual libraries even less freedom to negotiate less restrictive agreements.<sup>48</sup>

Both the CLRC (2002)<sup>49</sup> and the ALRC (2013)<sup>50</sup> have looked at this issue in detail and found that the contracting out of exceptions in relation to electronic works was widespread. As the CLRC put it: “there is evidence that agreements are being used to exclude or modify the copyright exceptions. It is the Committee’s view that, should such agreements be enforceable, there would be a displacement of the copyright balance in important respects.”<sup>51</sup> The CLRC therefore recommended that the: “Copyright Act be amended to provide that an agreement, or a provision of an agreement, that excludes or modifies, or has the effect of excluding or modifying [the majority of the exceptions] of the Act, has no effect.”<sup>52</sup> The ALRC similarly recommended that the library and archive exceptions, should be protected from contracting out.<sup>53</sup> The government is yet to respond to these recommendations.

The 2011 Hargreaves Review of Intellectual Property in the UK also emphasised the need to preserve exceptions from interference with contract:

Applying contracts in this way means a rights holder can rewrite the limits the law has set on the extent of the right conferred by copyright. It creates the risk that should Government decide that UK law will permit private copying or text mining, these permissions could be denied by contract. Where an institution has different contracts with a number of providers, many of the contracts overriding exceptions in different

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<sup>46</sup> Ibid, 8.

<sup>47</sup> Ibid, 2.

<sup>48</sup> Ibid, 3.

<sup>49</sup> Copyright Law Review Committee, Copyright and Contract, 2002

<sup>50</sup> ALRC Copyright and the Digital Economy Report (2013) Chapter 20 available at <http://www.alrc.gov.au/publications/20-contracting-out>

<sup>51</sup> Copyright Law Review Committee, Copyright and Contract, 2002, <http://www.austlii.edu.au/au/other/clrc/2/2.html> at 2.05

<sup>52</sup> Copyright Law Review Committee, Copyright and Contract, 2012, <http://www.austlii.edu.au/au/other/clrc/2/2.html> at 7.49

<sup>53</sup> ALRC Copyright and the Digital Economy Report (2013) Recommendation 20-1 available at <http://www.alrc.gov.au/publications/recommendations>

areas, it becomes very difficult to give clear guidance to users on what they are permitted. Often the result will be that, for legal certainty, the institution will restrict access to the most restrictive set of terms, significantly reducing the provisions for use established by law. Even if unused, the possibility of contractual override is harmful because it replaces clarity (“I have the right to make a private copy”) with uncertainty (“I must check my licence to confirm that I have the right to make a private copy”). The Government should change the law to make it clear no exception to copyright can be overridden by contract.<sup>54</sup>

*Recommendation:* That amendments be made to the Copyright Act to protect all exceptions provided by the Act against contracting out.

### **Libraries prevented from accessing electronic works**

In a related issue we note that a number of publishers currently refuse to sell ebooks to libraries and archives, presumably because they would prefer consumers purchase the ebook than borrow it from a library. Where ebooks are available to institutions, they are frequently priced significantly higher than the consumer pays. Global growth in the ebook market give hope that this may be changing - for example, Penguin Random House have recently announced more desirable ebook terms for libraries in Canada and the US.<sup>55</sup> However, for the time being it represents a frustrating limitation on Australian libraries, which restricts their ability to provide materials to their clients efficiently and in the format they desire. It particularly affects those with disabilities, who often rely on electronic versions to make the work accessible to them at all. Although the ALCC has no specific recommendation in relation to this, we felt it was a concerning trend within the market that should be brought to the attention of the Commission.

## **3. Untradeable materials**

### **Orphan works**

Orphan works present a particular problem for libraries and archives seeking to provide access to their collections. These are works whose copyright owners cannot be located or contacted, so permissions cannot be granted. This means they can only be used within the confines of the current exceptions – eg supplied to people for research and study, or used for the purpose of running the library under s200AB. This essential undermines the main bargain of copyright - monopoly rights with extremely limited exceptions are ok because you can always ask permission.

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<sup>54</sup> Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 51.

<sup>55</sup> See discussed further in Vinjamuri, David, *The Wrong War Over eBooks: Publishers Vs. Libraries*, *Forbes*, 11 December 2012 at <http://www.forbes.com/sites/davidvinjamuri/2012/12/11/the-wrong-war-over-ebooks-publishers-vs-libraries/>. In the last few days Penguin Random House have announced new ebook terms for libraries and Canada and the US which may indicate these policies are beginning to shift - see Enis, Matt, *Penguin Random House Announces New Ebook Terms of Sale for Libraries*, *Library Journal*, 3 December 2015, [http://lj.libraryjournal.com/2015/12/technology/ebooks/penguin-random-house-announces-new-ebook-terms-of-sale-for-libraries/#\\_](http://lj.libraryjournal.com/2015/12/technology/ebooks/penguin-random-house-announces-new-ebook-terms-of-sale-for-libraries/#_)

The provision of a solution to allow broad reuse of orphan works should be non-controversial. These are generally materials which are otherwise not available, and by definition they have no commercial market. Any benefit to be obtained from this work by the copyright owner has already been obtained - the only value left in the work is the value to be obtained by society through its reuse. Their release would result in huge body of material being unlocked for the public benefit.

However, as per our submission to the ALRC with the ADA, the ALCC does not support the use of a statutory licence to manage orphan works.<sup>56</sup> The ADA provides more detail on this issue in their submission to the Commission. However, in summary, statutory licences are not appropriate for orphan works for the following reasons:

- most orphan works are not commercially available and many (in particular unpublished material) were not produced with any commercial intent in mind. Attempts to broadly commercialise orphan works through a licensing scheme therefore provides a windfall to copyright owners at the cost of cultural institutions and the community. The British Library has gone so far as to say that creating markets where they did not exist is distorting of culture.<sup>57</sup>
- Experience in other countries – particularly Canada and the UK – has shown that the costs of administering a statutory licence for orphan works is likely to outweigh the benefits gained from the schemes for creators.<sup>58</sup>
- These costs also act as a substantial drag on use of the scheme. Neither country has seen significant take up of the collective licensing scheme, nor significant funds distributed to copyright owners as a result of it.

Applying an upfront cost to the use of orphan works without any real prospect that this money will reach the copyright holder essentially amounts to a tax on users such as cultural institutions, educators, private individuals and other creators for the benefit of the collecting society. One cultural institution, responding to an ADA/ALCC request for feedback on the possibility of a statutory licence for orphan, described it as:

collecting societies trying to insert themselves as the gatekeepers of access to orphan works... it wouldn't be about achieving something in the public's interest, access to culturally or historically important works. It wouldn't even be in the rights holder's interests, because they don't know who they are! It would all be about what's in the collecting society's interests.

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<sup>56</sup> This is the approach taken in the UK and Canada. See, for example Intellectual Property Office, *Orphan Works: Review of the first twelve months*, (2015) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/480742/orphan-works-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480742/orphan-works-review.pdf)

and Katz, Ariel, 'The Orphans, The Market, and the Copyright Dogma: A Modest Solution to a Grand Problem (July 27, 2012). 27(3) *Berkeley Technology Law Journal*, 2012. Available at SSRN:

<http://ssrn.com/abstract=2118886>

<sup>57</sup> British Library, Response to UK Government Consultation on Copyright <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=1423>

<sup>58</sup> The ADA provides significant evidence for this claim in their submission to the ALRC. See ADA submission to the Inquiry pp.12-14

There's an inherent lack of logic here - collecting money, or giving a licence for use 'in case' a rights holder can be found. Why not introduce remedies for rights holders who do come forward and identify themselves as owners of the work? That seems in the interests of both rights holders and public institutions.<sup>59</sup>

*Recommendation:* A legislative solution should be introduced in Australian copyright law with respect to orphan works which does not require upfront payment to facilitate this use. This could be either through a specific exception, a limitation on liability,<sup>60</sup> or the introduction of an open-ended flexible exception such as fair use.

### **Unpublished works**

A related issue is unpublished works. Currently, in Australia, unpublished works remain in copyright in perpetuity. This is completely unjustifiable under the economic theory of copyright law – without an end to the artificial monopoly copyright applies it is impossible for society to ever gain the flow-on benefits from these works.

However, for libraries and archives, it is the practical problems this creates that are of most concern. Many unpublished works are also orphan works for which permissions cannot be obtained – in fact, after several hundred years it is almost inevitable that the rights holder will eventually be unidentifiable or uncontactable. Perpetual copyright terms therefore mean that these works remain locked away, unable to be used, forever.

The Australian Library and Information Association (ALIA) ran a campaign titled “Cooking for Copyright” last year to draw attention to this issue.<sup>61</sup> This campaign focused on recipes contained in old unpublished works from the collections of Australia’s National and State Libraries, such as a recipe for carrot marmalade used by Captain Cook. In an exercise of mass civil disobedience, the libraries published these materials online and encouraged people to cook the recipes and share a picture of the results over social media. The publication was almost certainly in breach of copyright law, as it did not fall within any of the fair dealing exceptions and is unlikely to be classified as “for the purpose of maintaining or operating the library or archives”, a requirement of s200AB. The campaign was designed to raise awareness of the absurdity of Australia’s current law, which would mean these materials, which would have fallen into the public domain decades or even centuries ago if they had been published, will remain in copyright forever.

*Recommendation:* The terms for unpublished works should be harmonised with those of published works.

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<sup>59</sup> See ADA/ALCC first submission (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.54

<sup>60</sup> The Library of Congress, for example, has suggested amendments which would limit the liability of institutions where they make use of orphan works. See Library of Congress Copyright Office, Orphan Works and Mass Digitization: A Report of the Register of Copyrights, June 2015, <http://copyright.gov/orphan/>

<sup>61</sup> See <https://fair.alia.org.au/cookingforcopyright>

## ATTACHMENT A

### Examples of Beneficial Reuses of Digitised Materials

The below examples have been collected by the Australian Library and Information Association for a separate project. More examples and the raw data can be provided on request.

#### **KEEPING INDIGENOUS LANGUAGES AND CUSTOMS ALIVE: Ara Irititja (<http://www.irititja.com/>) and National Film and Sound Archive**

The Ara Irititja Project is a model for Indigenous archives in Australia and internationally. It shows how to deal respectfully with cultural heritage and it supports the maintenance of first languages. The National Film and Sound Archive identifies and digitises relevant holdings in consultation with the Indigenous communities and provides copies to those communities. The community is involved in both the provision of access to this material by third parties and the identification of highly sensitive cultural recordings which require specific community control. In some instances repatriated material provides the only known record of customs since lost to those communities.

#### **RESOURCES FOR SCHOOLS: National Archives of Australia ([www.naa.gov.au](http://www.naa.gov.au))**

For the National Archives' *Discovering Anzacs* website, members of the public are encouraged to add their own family photographs and stories to the site and to transcribe the original, digitised service records. More than 100,000 contributions have been made since the site's launch in October 2014 and there have been nearly 7.5 million page views.

The *Learn* section on the site supported by the Department of Veteran Affairs, is for use in the school classroom and by the general community featuring video tutorials to support the interpretation of the digitised service records, an interactive timeline, a school and community toolkit with lesson plans and worksheets, and tips and tools for creating an exhibition for Anzac Day in school or the community.

#### **HELPING PEOPLE UNCOVER THEIR FAMILY HISTORIES: State Library of Queensland**

The State Library of Queensland's *ANZAC 100: Memories for a New Generation* features 27,000 soldier portraits, originally published in *The Queenslander* newspaper. Through this project, family members were able to see the first high quality picture of an indigenous serviceman from their family – Soldier Valentine Hare. <http://www.abc.net.au/news/2015-04-23/wwi-aboriginal-soldiers-service-records-return-before-anzac-day/6416726>

#### **RENOVATING HISTORIC HOMES: Lilydale & District Historical Society ([www.lilydalehistorical.com.au](http://www.lilydalehistorical.com.au))**

Lilydale & District Historical society has more than 4000 images in its collection. They have sold licensed copies to media companies in Australia and overseas, and "locally, our images and research have helped secure the future of two of Lilydale's oldest homes, both now being lovingly restored by their owners who also proudly hang our images of their homes in pride of place. Both the owners and our community benefit from the retention of the homes and their place in our local history."

Digitisation of the image collection has created an important revenue stream to cover the society's property rent; displays; additional equipment such as scanners, printers, computers and the internet.

## **ATTACHMENT B**

### **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 them 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>62</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>62</sup> Pamela Samuelson, 'Unbundling Fair Use' (2009) 77:5 Fordham Law Review 2537, 2618.