AUSTRALIAN COPYRIGHT COUNCIL

Response to Discussion paper - Exposure Draft Copyright Amendment (Access Reform) Bill 2021& Review of Technological Protection Measures Exceptions

Submission by Australian Copyright Council

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The Australian Copyright Council acknowledges the Traditional Custodians of the lands on which our Redfern office is located, the Gadigal people of the Eora nation and the Traditional Owners of Country throughout Australia. We pay our respects to all Elders past, present and emerging. We honour the great creative and cultural expression of First Nations People.

EXECUTIVE SUMMARY

The Australian Copyright Council (**ACC**) appreciates the opportunity to comment on the Copyright Amendment (Access Reform) Bill 2021 (**Exposure Draft**) and accompanying Discussion Paper (**Discussion Paper**), released by the Department of Transport, Regional Development and Communications (**DITRDC**) on 21 December 2021. Several matters in the Exposure Draft give rise to concern – in particular, proposed changes to:

- the licensing and unremunerated use regime for **educational institutions,** including changes to ss 28 and section 106 of the *Copyright Act 1968* (Cth) (**Act**)
- the **libraries' exceptions**
- the **government licensing** regime,
- process for changing the provisions relating to **technological protection measures** (**TPMs**).

The introduction of a new exception for **fair dealing for quotation** and the creation of a scheme for **orphan works**, also raise serious questions of their intended consequences.

The specifics of the proposed changes to existing provisions of the Act and the breadth of the introduction of the proposed limited liability scheme for the use of orphan works, do not appear to be aimed at repairing any clearly identified gap or perceived deficiencies of *access* to copyright works. Further, they do not appear to be in line with Ministerial intention. The ACC is extremely concerned that the reforms will, in breach of Australia's international obligations and protocols (including in relation to the Indigenous material), undermine the efficacy of the current working statutory and legislative framework and the resulting fair and proper remuneration of copyright creators and owners.

1. About the Australian Copyright Council

The ACC is a small, independent, not-for-profit organisation dedicated to promoting understanding of copyright law and its application. We work to foster collaboration between content creators and consumers, representing the peak bodies for professional artists and content creators working in Australia's creative industries and, Australia's major copyright collecting societies.[1]

The ACC is a unique organisation:

- it is the only dedicated copyright expert organisation in Australia
- its focus is on copyright as it applies to all art forms
- it provides advocacy, advice and information on copyright issues, and
- it is a membership-based organisation, representing over a million creators.

The ACC has 25 affiliate member organisations, several which are making separate submissions to the Discussion Paper. These affiliate members represent over a million writers, musicians, visual artists, designers, photographers, directors, performers, choreographers, producers, publishers, record labels and architects working in the Australian creative industries.

As part of its services, the ACC provides free written legal advice to those who fall within its guidelines[2] including the staff of libraries and educational institutions.

[1] See Appendix 2 for a list of ACC current affiliate members.

[2] See Appendix 3.

2. Introduction

The Discussion Paper outlines the context of the reforms:

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

The ACC understands that the Minister recognises that 'copyright matters more than ever'[3] and its critical importance to the economic and cultural fabric of Australia. The economic contribution of the copyright industries may be viewed in the last PwC report commissioned by the ACC The economic contribution of Australia's copyright industries.[4]

In this context, ACC's overarching concern is that the reforms essentially interpret 'access' or 'reasonable access' to require that copyright material be available to users for free – conflating 'access' with 'free access'. 'Access' and payment for the use of copyright material are not (and should not be seen as) mutually exclusive concepts.

The Discussion Paper summarises the reform measures in the Exposure Draft as principally being in five areas – reflected in Schedules 1 through 5 – with additional amendments in Schedules 6 to 10 of the Exposure Draft which are stated to be aimed at streamlining procedural aspects of the Act and updating references and improving language consistency.

As such, we will focus our submissions on the following Schedules in the Exposure Draft:

Schedule 1—Orphan works

Schedule 2—Fair dealing for quotation

Schedule 3—Libraries and archives etc.

Schedule 4—Education

Schedule 5—Use of copyright material by the Commonwealth or a State

We also highlight some concerns about Schedule 7 Regulations relating to technological protection measures.

These concerns were raised in the ACC's meetings with DITRC and in response to DITRDC's November 2020 paper, 'Copyright access reforms – Summary of key measures' (**DITRDC paper**) and in the DITRDC information sessions held on 14 and 15 December 2020 and outlined in the DITRDC Copyright access reforms – Copyright owner feedback document dated December 2020/January 2021 (**DITRDC feedback paper**). The ACC's response to the DITRDC paper, Response to Copyright Access Reforms summary of key measures dated 2 March 2021 (**ACC 2021 Response**) is Appendix 1 to this submission. That document sets out (Annexure 1, Part 1) the Australian historical and policy development of copyright and copyright exceptions, and Australia's key international obligations. Some parts of the ACC 2021 Response are also included in the body of this submission.

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[3] Speech to the Australian Digital Alliance: Copyright in 2020 | Paul Fletcher MP, Member for Bradfield.

[4] https://www.copyright.org.au/pwc2020.

3. Impact on Indigenous Cultural and Intellectual Property rights[5]

The access reforms, as a whole, should also be considered in terms of the impact they will have on Indigenous Cultural and Intellectual Property (**ICIP**) rights.

ICIP rights are Indigenous People's rights to their heritage and culture. Further, Indigenous people are to be the interpreters of their knowledge. Heritage includes all aspects of cultural practices, traditional knowledge, and resources and knowledge systems developed by Indigenous people as part of their Indigenous identity.

Many copyright works and materials held by archives, galleries and libraries hold Indigenous knowledge but the copyright is owned by Indigenous people.

For many works created by indigenous artists, proper records were not kept of the Indigenous creators. Documents like old language resources may have been published, but the publishers may no longer be contactable.

Australia has stated it will comply with the United Nations Declaration on the Rights of Indigenous Peoples[6] (**the Declaration**).

Article 31 of the Declaration[7] includes rights to traditional knowledge, traditional cultural expression (known in Australia as ICIP). That is, Indigenous people have the right to maintain, develop and control their ICIP. Free prior informed consent for use is a cultural practice.

There are cultural sensitivities around accessing content that is held in libraries and archives that is published, but not published with involvement and consent of Indigenous people. The need for cultural considerations when accessing is important.[8] Historically, collection materials about Indigenous people were collected at a time where there was lack of protocols, and awareness of ICIP rights.

To recognise ICIP rights, there are developed Australian protocols relating to access and use of ICIP:

- Australian Society of Authors, More than Words[9]
- Australia Council for the Arts – First Nations Cultural and Intellectual Property in the Arts[10]
- Screen Australia – Pathways and Protocols: A filmmaker's guide to working with Indigenous people, culture and concepts[11]
- National Museum of Australia – Indigenous Cultural rights and Engagement Policy[12]

Other organisations and institutions in recognition of the importance of ICIP that have initiatives in place include:

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[5] For more information, see Terri Janke, *True Tracks: Indigenous Cultural and Intellectual Property Principles for putting Self-Determination into practice*, UNW Press, Sydney 2021.

[6] Declaration on the Rights of Indigenous Peoples | (humanrights.gov.au)

[7] https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

[8] See Aboriginal and Torres Strait Islander Library and Research Network - https://atsilirn.aiatsis.gov.au/protocols.php

[9] https://www.asauthors.org/products/asa-resources-and-guides/more-than-words

[10] https://australiacouncil.gov.au/investment-and-development/protocols-and-resources/protocols-for-using-first-nations-cultural-and-intellectual-property-in-the-arts/

[11] https://www.screenaustralia.gov.au/about-us/doing-business-with-us/indigenous-content/indigenous-protocols

[12] https://www.nma.gov.au/about/corporate/plans-policies/policies/indigenous-cultural-rights-and-engagement

- national and state libraries that have been working on protocols and considering these issues with Indigenous Advisory Groups and Indigenous engagement staff to assist with these issues.[13]
- the Australian Institute of Aboriginal and Torres Strait Islander Studies (**AIATIS**) access conditions for Indigenous content, to guard against disclosure of culturally sensitive material[14]
- the National Film and Sound Archives access conditions around sacred, secret and culturally sensitive materials[15]
- educational institutions, especially universities, ICIP management approaches in their policies[16], and
- Victorian schools have protocols when teaching includes Indigenous content for example, some old resources are not appropriate for teaching and Indigenous people should be consulted on the use.[17]

In the context of the continued development of these protocols and initiatives, the ACC highlights some of the issues of the proposed reforms as they affect Indigenous copyright material.

[13] See also NSLA – Culturally Safe Libraries https://www.nsla.org.au/resources/cslp-collections

[14] See 'Can I access collection items' in Frequently asked questions (FAQ) | AIATSIS https://aiatsis.gov.au/about/connect-us/frequently-asked-questions-faq and aiatsis-access-and-use-policy-2018.pdf.

[15] See Collection Ownership and Copyright | NFSA https://www.nfsa.gov.au/collection/using-collection/copyright.

[16] See too, AIATSIS code of ethics https://aiatsis.gov.au/research/ethical-research.

[17] See Teaching Aboriginal and Torres Strait Islander culture https://www.education.vic.gov.au/school/teachers/teachingresources/multicultural/Pages/koorieculture.aspx

4. Australia's international obligations – exceptions[18]

Any changes to Australia's copyright exception framework must operate within the context of Australia's existing international obligations. Australia is a party to several international conventions. For the purposes of this submission, the focus is on the Berne Convention (**Berne**).

Australia became a party to Berne in 1928.[19]

4.1 Article 9(2) of the Berne Convention and Australia's obligations

Article 9(2) of Berne, mandates the threshold to be met by any copyright exception:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

While this article only applies to the reproduction right, following the TRIPs Agreement[20], it was extended to all exclusive rights:

> Members shall confine limitations or exceptions to exclusive rights to *certain special cases* which *do not conflict with a normal exploitation of the work* and *do not unreasonably prejudice the legitimate interests of the right holder*. [21] [*emphasis added]*

There is therefore a three-step test when considering the introduction of any limitation or exception to the exclusive rights of a creator/copyright owner. The proposed limitation or exception:

- is to apply in certain special cases
- must not conflict with a normal exploitation of the work, and
- must not unreasonably prejudice the legitimate interests of the creator/copyright owner

This 'three step test' is the 'central plank underlying exceptions to copyright in international law' and is 'the prism through which all exceptions need to be viewed.'[22]

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[18] See Appendix 1 para 5.

[19] Australia joined the Berne Convention on 14 April 1928. See WIPO-Lex, *WIPO-Administered Treaties*.

[20] *Agreement on the Trade-Related Aspects of Intellectual Property Rights,* opened for signature 15 April 1994, 1869 UNTS 299 (**TRIPS**).

[21] Ibid article 13.

[22] Australian Copyright Council, Submission No 654 to Australian Law Reform Commission, *Copyright and the Digital Economy Discussion Paper* (July 2013) 4-5 (**ACC Digital Economy Submission**) 8, quoting Professor Sam Ricketson as the leading international scholar on the three-step test. See for example, Sam Ricketson, *The Berne Conversion for the Protection of Literary and Artistic Works 1886-1986* (International Bureau of Intellectual Property, 1987) (**Ricketson, The Berne Convention**).

4.1.1 'in certain special cases'

This phrase has two elements: 'certain' and 'special'.

'Certain' indicates that 'the use in question must be for quite a specific purpose: a broad kind of exemption would not be justified.'[23]

Ricketson notes that 'any exception that is made under this provision should be clearly defined and should be narrow in its scope and reach.'[24]

4.1.2 provided that such reproduction does 'not conflict with a normal exploitation of the work'

There is no guidance in Berne as to the definition of 'normal exploitation'. The Report of the Main Committee states that photocopying of a 'very large number of copies' for a particular purpose, as an example of a use that would conflict with the normal exploitation of a work.[25]

In addition to existing uses of a work, a consideration of potential uses which are of 'considerable or practical importance' must also be done in evaluating normal exploitation.[26]

These considerations must be dynamic to allow for changes in technology for example, to allow for the possibility 'that an exception may come into conflict with a normal exploitation as technology and circumstance of use change.'[27]

4.1.3 does 'not unreasonably prejudice the legitimate interests of the author'

Ricketson notes that this element is premised on the assumption that *any* exception would prejudice the author's interests[28] and can only be considered after the first two elements 'have been satisfied.'[29]

The standard of 'unreasonably prejudice' is meant to be determined by national laws and remains a flexible standard.[30] Ricketson's analysis is that the three-step test was intended to allow either absolute exceptions or compulsory licences, 'depending essentially on the number of copies made.'[31]

Therefore, as a party to Berne, any exceptions that are enacted in Australia's national law must comply with the three-step test.

Article 9(2) does not affect the operation of other specific exceptions in Berne: Articles 2*bis*(2),10 and 10*bis*.[32]

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[23] Ibid.

[24] Ibid 31.

[25] Ibid 37.

[26] Ibid.

[27] Ibid.

[28] Ricketson, The Berne Convention (n 22) 483.

[29] Sam Ricketson, *The three-step test, deemed quantities, libraries and closed exceptions* (Centre for Copyright Studies Ltd, 2002) (**Ricketson Paper)** 41.

[30] Ricketson, The Berne Convention*:* (n 22) 484.

[31] Ibid.

[32] Ibid 482.

4.2 Other exceptions in international law

4.2.1 Article 2*bis* Berne Convention

Article 2bis allows for copyright exceptions to be drafted into national laws for political speeches, speeches delivered during legal proceedings, and lectures, addresses and other works of the same nature which are delivered in public.[33]

This is in line with the public interest in having such material freely available.

4.2.2 Article 10 Berne Convention

Exceptions for quotations and illustrations for teaching are provided for in this article.

Article 10(1) states:

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

Three limitations on the quotation exception are imposed by the Berne Convention:

(i) the work must have been lawfully published

(ii) the quotation must be 'compatible with fair practice'. WIPO notes that the consideration of fairness is the responsibility of national courts.[34]

(iii) the use must be 'justified by the purpose' – which will also be determined by national courts and influenced by the specific national legislation.[35]

Article 10(2) provides:

> It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

While there is no explicit requirement for works to be published under Article 10(2), the other two conditions from article 10(1) also apply.

Where use is made of works in accordance with article 10(1) or 10(2), the source must be acknowledged and the author's name provided (if known from the source).[36]

The three-step test (as detailed above) functions to preserve and protect the exclusive rights of copyright owners. Under international obligations, Australia is obliged to restrict the scope of limitations and exceptions to these exclusive rights, and the three-step test provides cumulative criteria that must be met by any limitations or exceptions to any rights held by copyright owners.

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[33] **Berne Convention** art 2*bis.*

[34] World Intellectual Property Organisation, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (Guide 1978) 59 (**WIPO Guide**)

[35] Ibid.

[36] Berne Convention art 10(3).

4.2.3 WIPO Copyright Treaty (WCT)

Also relevant to the Exposure Draft reforms – being under the banner of 'Access Reform' – is the WIPO Copyright Treaty (WCT), 'a special agreement under the Berne Convention which deals with the protection of works and the rights of their creators in the digital environment'.[37]

The WCT expressly recognises the 'profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works', as well as recognising the 'need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention'.

In addition to the rights recognised by the Berne Convention, creators are granted certain economic rights relating to the sale and/or commercial rental of their works. Notably, the WCT also recognises the exclusive right, under Article 8, of:

> authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Read in this light, the proposed reforms, in particular the proposed amendments in Schedule 3 Libraries and archives etc and Schedule 4 Education, raise serious questions about whether Australia would be complying with its international obligations under Berne and other treaties, should these reforms be enacted into law.

[37] See WIPO Copyright Treaty (WCT).

5. Exposure Draft Schedule 1 - Orphan works

Schedule 1 of the Exposure Draft outlines the establishment of a limited liability scheme which allows **all uses** (including commercial use) of literary, dramatic, musical and artistic works, and films, by **all users**, where:[38]

- the copyright owner/s cannot be identified or contacted after a 'reasonably diligent search' has been undertaken within a 'reasonable period before' use, and
- the author has been attributed if it is 'reasonably practicable'.

The proposed scheme is problematic for reasons including:

- it essentially allocates a 'zero' value to an 'orphan work' (from the perspective of the creator and creative industries)
- it displaces the current risk assessment approach of use of an orphan work and gives the user immunity for infringement
- although the title to new section 116AJA refers to a '[l]imitation on remedies', the provisions of that section serve to exclude or limit *liability* relating to the use of orphan works – there are important and significant differences between a 'limitation on remedies' approach and a 'limitation of liability' approach [see 7.2 below].
- where the identity of the copyright owner/s later becomes known to the user:
  - the user will:
    - not be liable for past use
    - be able to continue to use the work upon 'reasonable terms' as agreed with the copyright owner.
  - if there is no agreement as to the terms for continuing ('current') use, the parties may go to the Copyright Tribunal.

    This is a problematic option for the individual creator with little or no means.
  - the parties to an application to the Copyright Tribunal are the user and copyright owner and for the purpose of obtaining an 'order fixing the terms for the doing of the act'. Therefore, the option of the copyright owner refusing to allow the use (on any terms) does not appear to be available.

- the educational institutions and governments statutory licences will not apply to their use of orphan works[39].
- the use of 'orphan' works may have particularly adverse and unintended consequences for Indigenous art – specifically, given the difficult issues as to provenance that arise in relation to some Indigenous works. Further consideration needs to be given to the impact the proposed scheme for orphan works may have on the unique cultural and social rules

[38] Exposure Draft section 116AJA(1) refers to 'copyright material' which is defined under s10 of the Act as 'anything in which copyright subsists'. Section 116AJA(1)(e)(i) narrows the field to 'work (within the meaning of Part IX)'. Copyright Act section 189 defines a work as 'a literary work, a dramatic work, a musical work, an artistic work or a cinematograph film.' It is unclear what the policy rationale is behind the decision to use the Part IX definition of 'work' in the proposed framework.

[39] Exposure Draft section 113P(7).

(in Indigenous communities) that determine who may paint certain stories and the special responsibilities (of artists) over the stories.[40]

- because the provisions do not allow for the refusal to grant permission to use a former orphan work it will encourage the non-compliance with Indigenous consent and consultation protocols as outlined in **3. Impact on Indigenous Cultural and Intellectual Property rights**, above.
- the proposed definition of an 'orphan' work is overly broad and seeks to cover not only works where the identity of the copyright owner cannot be ascertained (following a 'reasonably diligent' search) but also works whose copyright owner is known but 'cannot be contacted'.
- whilst the context of the reforms is framed as 'a significant issue for Australia's cultural institutions, as they hold huge amounts of orphaned material in their collections'[41], the proposed reforms allow access to 'orphan works' for all users (not only 'cultural institutions').
- it does not specifically address the issue of jurisdiction to make explicit the requirement that the communication of an 'orphan work' is authorised only in Australia (for example, if the communication is on a website, online access is limited to users based in Australia).

The proposed scheme becomes a quasi-compulsory licence for which a copyright owner cannot seek payment for past use and all the risk and costs associated with negotiation of a fee for continuing use is placed on the copyright owner.

The scheme also allocates a 'zero' monetary value to 'orphan' works whilst seeking to provide access to those works for 'socially and creatively beneficial reasons'. If orphan works have a 'value' to our society and for that reason access is to be allowed, why (in terms of public policy) should payment not be made for the use of those works?

It is important to note that there are no provisions under the Act that compel a copyright owner to assign, license or otherwise deal with their material. Copyright owners are free to choose if and how they deal with their copyright material. The rights of creators should be treated with the same regard as the rights of owners of tangible property.

The proposed scheme for orphan works also does not acknowledge or attribute any relevance to the limited duration of copyright. In the ACC's submission, the limited 'life' of the exclusive rights granted to creators and copyright owners is an important factor that should be considered.

Section 33 of the Act for example, sets out the duration of literary, dramatic, musical, and artistic works (both published and unpublished) where 'the identity of the author of the work is not generally known'. The result is that such works fall into the public domain after the expiry of that period and can be freely used by anyone.

The collection of 'orphan works' held by cultural institutions such as national and state libraries, the National Library of Australia, and the National Film and Sound Archive (to which reference is made in the Discussion Paper[42]) can therefore be appropriately managed (by those institutions) under the current Act by maintaining appropriate details of the works in their collection, including the expiration of the duration period for any works whose author is not known.

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[40] Issues around the copying/reproduction of Indigenous art have been discussed in cases such as *Milpurrurru* v *Indofurn Pty Ltd* [1994] FCA 975; *John Bulun Bulun & Anor* v *R & T Textiles Pty Ltd* (1988) 41 IPR 513.

[41] Discussion Paper p 7.

The document at Appendix 4 provides a brief comparison and summary of the treatment of 'orphan' works in similar jurisdictions (UK, Canada, European Union) and under the orphan works policies of three Australian public institutions – National Film and Sound Archive of Australia (NFSA), SBS, and NSLA (National and State Libraries Australasia). While there are differences in the detail in how orphan works are dealt with in those other jurisdictions (and policies), common to each is:

- payment or compensation for use of an orphan work
- restrictions on users and/or uses of the orphan work
- some sort of publicly available record or register of orphan work material that has been used
- narrower range of copyright material that may be categorised as 'orphan' works (when compared to definition in the Bill, as currently drafted).

5.1 Statutory licences and proposed orphan work scheme

Whilst the ACC routinely advises members of the general public on orphan works[43], it is rare for the ACC to advise educational institutions in relation to the use of orphan works. This is because orphan works are covered by the statutory licence available to educational institutions and there is therefore currently no issue with the use of an orphan work by an educational institution for educational purposes.

The Exposure Draft adds a new exception related to Orphan Works at the end of the current section 113P (Copying and communicating works and broadcasts). Section 113P is in Pt IVA (Uses that do not infringe copyright), Division (Educational institutions – statutory licence) of the Act.

Section 113P provides for an exception for copying and communicating works (subsection 1) and broadcasts (subsection 2) if the body administering the educational institution agrees to pay equitable remuneration to a collecting society.

The proposed addition of a new section 113P(7) provides that subsections (1) and (2) of section 113P do not apply to an act comprised in the copyright in copyright material if the act is covered by the new section 116AJA (orphan works) or 116AJB (former orphan works).

This addition of subsection (7) to section 113P will therefore have the effect of removing all remunerated uses of orphan works, or of former orphan works by educational institutions.

The copyright owner of a work that is deemed an orphan work by an educational institution (after a reasonably diligent search) will have no mechanism to be compensated for past use of the orphan work.

Under the proposed reforms in the Exposure Draft, the creator/copyright owner of an orphan work who comes forward will not be entitled to any remuneration from the relevant collecting society, but simply have the option to fix terms contractually with the user or to proceed to a costly and time-consuming Copyright Tribunal application. An individual creator is unlikely to take this course of action.

Given these barriers to seeking compensation, the lack of injunctive relief for future use of an orphan work, and the fact that no remuneration need be paid for past use of orphan works, the Exposure

[43] The ACC produces a fact sheet 'Orphan Works' available at www.copyright.org.au.

Draft provisions (as drafted), run the risk of diminishing any chance of remuneration to a creator by anyone for use of that creator's former orphan work.

Additionally, the proposal to remove orphan works from coverage by the statutory licence has the very real potential to:

- increase administrative costs on educational institutions as they carry out searches to ascertain whether a work may be an 'orphan' work (rather than simply relying on the statutory licence for the use of that work).
- stifle, rather than encourage, the use of a broad spectrum of works by educational institutions as focus shifts to efforts to reduce costs
- diminish public perception of the value that we, as a society, place on creative works and the creative industries by the removal of orphan works from statutory licences in tandem with the scheme's proposal that there be no payment for use of orphan works (in situation where an act of infringement takes place before the copyright owner of assumed 'orphan work' is identified)

If a given situation is truly one of an orphan work (often it is one that is actually in the public domain), the ACC advocates a risk management approach.

Further, the approach of not requiring any payment for the use of orphan works (or for 'past' use where the copyright owner is later identified) is inconsistent with the ALRC recommendation 'to limit the remedies available in an action for infringement of copyright' for orphan works. It is also inconsistent with the way in which comparable jurisdictions (UK, Canada, European Union) have sought to address the issues around use of 'orphan' works or the approach taken in the orphan works policies of institutions such as the NFSA, SBS and NLSA. See Appendix 4. Payment for the use of orphan works does not detract from the stated policy intent to '[a]llow wider use of all orphaned copyright material … held by our cultural and educational institutions'[44].

5.2 ACC's position

The ACC does not oppose the establishment of an orphan works framework that makes proper remuneration available to creators either if the owner of the orphaned work comes forward or through a pool for the collective benefit of creators. However, insofar as these reforms are directed at 'access', it should be noted that the Australian system already provides access to orphan works. Any proposed scheme should therefore be aimed at addressing any identified 'gaps' to access for clearly articulated and justified public policy reasons.

Orphan works are caught within all exceptions under the Copyright Act, including the fair dealing defences and section 200AB. They are also subject to statutory licences and other blanket licensing arrangements. As a result, the ACC believes that legal disputes relating to orphan works are rare where appropriate risk management strategies are adopted and 'found' owners are responded to.

In the ACC's view, liability for the use of orphan works (under the current framework) is further limited by the following:

- limitation of actions legislation, where relevant (under such legislation an action cannot be taken following the expiry of a specified 'limitation' period -- for most civil claims, 6 years)

[44] Discussion Paper p 10.

- the informal resolution of concerns raised by the owners of works believed to be orphaned will result in, if dealt with quickly:
    - an aggrieved creator/owner acting in an unreasonable manner in relation to compensation facing the risk of significant costs penalties if they pursue the matter by way of formal proceedings not having accepted any reasonable offers, and
    - little to no risk of injunctive proceedings being sought (given that there may be nothing to injunct)
- the damages principles established by, for instance, section 115 of the Act which effectively prevent the likelihood of undue or inflated compensation, and
- the fact that all works will enter the public domain eventually.

The ACC refers to its previous submissions on the structure of any orphan works law reform; that the focus of any scheme should be on a limitation of *remedies* and that such limitations should only apply[45]:

(a) non-commercial uses of orphan works (a distinction made in, for example, the UK scheme)

(b) to certain designated organisations engaged in, to adopt the words of the ALRC, 'socially productive uses of orphan works', and

(c) in a way that still allows for 'reasonable compensation' to be paid (equivalent to any standard fees in the relevant industry), noting that that even the relevant European Union Directive requires fair compensation[46] to be paid for prior uses once a rightsholder puts an end to orphan works status.

If reforms are to be introduced, it is the ACC's position is that:

- it should be expressly stated that the limitation of liability will cease to apply once the owner of an orphan work is identified.
- the scheme should include 'fair compensation' for 'past use' (i.e. use prior to the identity of the copyright owner becoming known) whether that is via a licensing scheme (as is currently in place in Canada and the UK) or some other method. Making works categorised as 'orphan works' free to use is inconsistent with the principles in (and Australia's obligations under) certain international treaties and trade agreements.
- the scheme should restrict 'downstream' uses of the material by subsequent individuals/entities of that material.
- a provision similar to section 132APC of the Act which restricts the circumvention of an access control technology protection measure should be included in the reforms to make it unlawful to remove metadata on electronic publications.
- works whose copyright owner is known but 'cannot be contacted', should not be included in the definition of an 'orphan' work. To do so is inconsistent with the approach to 'orphan' works in comparable countries (UK, Canada, European Union) that have an orphan works scheme. In Canada, for example, the term 'unlocatable owners' is used (not 'orphan' works) and it is made clear that the works whose owner cannot be contacted are excluded

[45] ACC 2021 Response at para 9.

[46] Directive 2012/28/EU. The licensing schemes for orphan works of Canada and UK offer an alternative approach to the issue of payment for orphan works.

from the scheme (and users must seek to reach agreement with the copyright owner for the use of the copyright work).

- the inclusion (within the ambit of 'orphan' works) of works whose copyright owner simply cannot be contacted also fails to acknowledge that there may be compelling and legitimate reasons (for example, serious illness) why a copyright owner may not be able to be contacted at a particular point in time and/or within a 'reasonable time'.

  In circumstances (where a copyright owner is known but cannot be contacted), if any presumption is to be made, it is the ACC's submission, that the presumption should be that the owner does not authorise the use of the work. To assert (as is set out in the Discussion paper) that in such instances that 'the user may reasonably expect that the copyright owner is not actively exercising their exclusive rights and the work is orphaned'[47] is a very serious incursion on the rights of creators and copyright owners that is not supported (in the ACC's submission) by the stated policy reasons for the reforms, noting that there are no positive obligations on creators to share and/or disseminate their work.

- specify the jurisdiction for the use of orphan works (in the same way as the orphan work frameworks for Canada and UK limit licensing of orphan works to their particular jurisdiction).

- create and maintain a publicly accessible register of orphan works, setting out details of works that have been the subject of a 'reasonably diligent search'[48]. Such a register will facilitate (and increase the chances of) works being reunited with their owners.

- the proposed scheme for orphan works does not acknowledge or attribute any relevance to the limited duration of copyright. In the ACC's submission, the limited 'life' of the exclusive rights granted to creators and copyright owners is an important factor in considering where the 'balance lies' as between creators and users.

  Section 33 of the Act sets out the duration of literary, dramatic, musical, and artistic works (both published and unpublished) where 'the identity of the author of the work is not generally known'. The result is that such works fall into the public domain after the expiry of that period and can be freely used by anyone. The collection of 'orphan works' held by cultural institutions such as national and state libraries, the National Library of Australia, and the National Film and Sound Archive (to which reference is made in the Discussion Paper[49]) can therefore be appropriately managed (by those institutions) under the current legislation by maintaining appropriate details of the works in their collection, including the expiration of the duration period for any works whose author is not known.

In relation to the 'factors [that] need to be considered when deciding whether a reasonably diligent search has been conducted':

- contacting the relevant collecting society must be an explicit requirement of any 'reasonably diligent search'

- in terms of the nature of the copyright material, the ACC submits that the example given in relation to the 'type of work' (i.e. 'whether it was created for personal consumption or without an expectation of commercial return') is not an appropriate or relevant factor. Apart

[47] Discussion Paper p 12.

[48] Such a register is part of the orphan works framework in the UK: https://www.orphanworkslicensing.service.gov.uk/view-register

[49] Discussion Paper p 11.

from the difficulty of determining the creator's intentions for the work (at the time it was made), it is not clear why (from a public policy perspective) a potentially 'less diligent' search is to be made for a work created for 'personal consumption' than a work created with 'an expectation of commercial return'. The evolution of the 'value' and 'significance' attached to works cannot be dismissed.

- the ACC is not aware of any situation where urgent use of a work is required. Nor is the ACC aware of a situation where a person's safety or welfare has been at risk and the use of an orphan work in a broadcast, for example, has been necessary to protect that person. Materials that describe lifesaving methods are readily available and their provenance and licensing arrangements are clear. If a copyright owner were to sue over unauthorised use in such circumstances, the ACC would expect damages would be non-existent or minimal and costs consequences would follow.

ACC case study

A school sought advice to photograph the art on sheet music dating from 1900 - 1970 for the purposes of advertising an external event.

Given that the reproduction fell outside educational purposes and so outside the statutory licence, each artistic work had to be looked at on a case-by-case basis. That approach is necessary to ascertain whether the artwork may be an 'orphan' work or whether it may, for example, be in the public domain (duration of copyright having expired).

The introduction of the proposed scheme will not serve to improve access nor ease the administrative burden of users having to conduct a search in each case

5.2.1 ACC response to Question 1.1

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

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

The ACC's position is that the following preliminary issues must be resolved/clarified prior to any consideration of the matters that a Tribunal should have regard to in an application 'to fix reasonable terms' for ongoing use of a former orphan work:

- make it clear in the legislation that a use of an 'orphan' work must immediately cease if the copyright owner comes forward[50]. As currently drafted, the legislation potentially permits the use of copyright material (formerly categorised as an 'orphan work') to continue until agreement is reached as to terms for its continuing use. That therefore means that it is the copyright owner that must bear the risk, cost and stress associated with an application to the Tribunal. That approach does not, in the ACC's submission, achieve the right balance between the 'rights of copyright owners to manage and protect their content with the public interest to access that content'.[51]
- explicitly provide that the Copyright Tribunal cannot fix terms for the ongoing use of a former orphan work if the creator/copyright owner does not wish to grant permission (on any terms) for the specified continuing use of the work.

Subject to the two concerns outlined above being satisfactorily addressed, the matters that should be included in an application to the Copyright Tribunal to fix reasonable terms for ongoing use of a former work include:

(i) details identifying the copyright material

(ii) the relationship of the applicant to the work

(iii) if the applicant is the user of the copyright material, what searches were conducted as part of their 'reasonable diligent search' prior to using the former orphan work

(iv) the nature of the use of the work prior to the copyright owner coming forward, including the date the work was first used and the duration of the 'prior' use

The matters outlined in (i) and (ii) above are similar to the matters outlined in Part 11, Division 3 Subdivision B of the Copyright Regulations 2017.

[50] A licensing framework for use of 'orphan works' addresses possible user concerns as to whether they can (once a copyright owner is identified) continue to use the work as such frameworks provide for the issue of a licence for a specific period of time (for which a fee is paid by the user). Refer to Appendix 4.

[51] Discussion Paper p 6.

6. Exposure Draft Schedule 2 - Fair dealing exception for quotation

Schedule 2 of the Exposure Draft (and Discussion Paper) outline a new 'fair dealing for quotation' exception to '[s]upport the use of excerpts of copyright material by our public institutions and researchers'.[52]

The listing of eligible entities in section 113FA(1)(a) covers:

- libraries and archives
- educational institutions
- government, and
- at subsection (vii) provides for an exception for a dealing by 'a person or organisation for the purpose of research'.

'Research' is not defined, although the Discussion Paper says that the ordinary meaning should apply.[53]

The proposed exception:

- is not limited to 'non-commercial' uses of a quotation.
- is to apply where 'the quotation is for a commercial purpose in relation to a product or service, but the quotation is immaterial to the value of the product or service'[54]
- includes 'a quotation of the whole or a part of the copyright material'[55]
- permits quotation from any copyright material, for the purpose of, but not limited to, explanation, illustration, authority or homage'. Note that 'copyright material' is a 'work' within the meaning of Part IX.[56]

In contrast to the existing fair dealing exceptions in the Act, this proposed exception is not clearly limited by reference to the type of user nor the type of use – it is not purpose driven as are all other existing fair dealing exceptions.

6.1 Existing framework for the use of 'quotation'

Under the current legislative framework, there are numerous avenues for users to use 'quotations' of works, including:

- where an appropriate licence eg. statutory licence or other voluntary licence, is obtained;
- where the fair dealing is for the purpose of:
  - criticism and review (in which the concept of quotation is already inherent, and in certain instances even substantial quotes may be caught within the terms of the defence)
  - reporting news
  - parody or satire, or

[52] Discussion Paper p 17 and Exposure Draft, new Part IVA, Division 2A, sections 113FA

[53] Discussion Paper p 16.

[54] Exposure Draft section 113FA(1)(b).

[55] Exposure Draft section 113FA(1).

[56] Exposure Draft section 113FA(1)(d)(i).

- research or study.

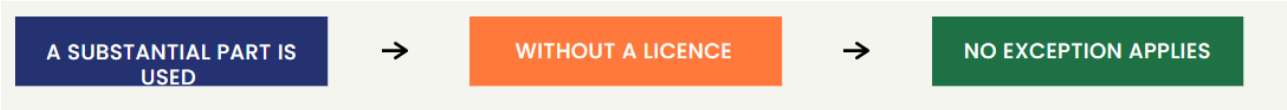
There may also be other instances of significant quotation including:

- incidental use of artistic works in broadcasts
- the use of a quotation which is less than a 'substantial part' of the work or other subject matter, and
- ways to refer to works or other subject matter without reproducing aspects of the works eg. by way of descriptions or synopses.

It has been demonstrated that the current regime allows for flexibility and policy decisions may be made by rightsholders that allow for quotation of copyright material, where needed (to address perceived 'gaps' for public policy reasons). Examples of this include the 2016 policy decision of the Australian Publishers Association that 'its members should allow their book covers to be used by libraries to promote library programs, library collections and connect readers with books and authors' as an example of how quotation of copyright material could occur without fear of infringement and without a fair dealing quotation exception.[57]

6.2 ACC's position

An overarching concern of the ACC in relation to the introduction of a fair dealing for quotation exception (as currently drafted) is the potential negative impact of this general fair dealing exception on the operation of the current copyright law framework. That is, the approach to infringement under the current framework is as follows:



As we understand it, there is no intention for that approach to be amended and (as noted below) a 'fair use' exception has been expressly rejected.

The ACC's concern is that an unintended consequence of introducing a fair dealing for quotation exception (as currently drafted) would be to remove the significance of the use of 'substantial part' in considering infringement. That is, the continuing role of 'substantial part' becomes unclear in a regime that allows reproduction of the whole of copyright material, in circumstances where:

- the use of a 'quotation' may be commercial
- the type of user that may rely on the fair dealing exception for quotation is not specified, and
- the type of use that may be made of the quotation is not stated – not purposive in nature.

The key themes previously noted in the DITRDC feedback paper, highlighted the concern that the proposed exception may operate 'more like a fair use exception'.[58] These concerns remain as the potential practical consequence (intended or unintended) of the reforms despite the Discussion Paper noting that 'fair use' per se has been rejected:[59]

> A change to fair use would represent a significant departure from Australia's current copyright system of fair dealing and specific exceptions. It would risk introducing ambiguity

[57] ACC 2021 Response para 10.3.2.

[58] DITRIC feedback paper p 3.

[59] Discussion Paper p 8.

> or uncertainty, which may be difficult and costly to resolve, and in some cases lead to litigation or people simply abandoning use of creative content.

The ACC reiterates its submissions on the topic of a fair dealing exception for non-commercial quotation, especially that,

> [t]he only basis for such a defence would seem to be for authorising, on an unremunerated basis, the use of a substantial part (or a work in its entirety) in situations not already covered by the significant protections applicable to quotations in many instances.[60]

The proposed fair dealing for quotation provisions introduce uncertainty and increase administrative costs in that they require an assessment of 'non-commercial purpose' and 'immaterial commercial value'. How is such 'value' to be assessed and by whom? Further, how is it proposed that the moral rights of the creator be considered and respected? For example, is a use that is assessed as of 'immaterial commercial value' to be permitted notwithstanding that a creator may consider such use to be a derogatory treatment of their work or otherwise in breach of their moral rights? Further, they are unique issues that must be addressed in considering 'materiality' when using ICIP materials.

The Exposure Draft (whilst not including a definition of 'quotation') explicitly refers to the 'quotation of the whole or a part of the copyright material'.[61] That is inconsistent with the stated policy intent (as set out in the Discussion Paper) for the use of 'excerpts' of copyright materials and, in the ACC's submission, the ordinary meaning of 'quotation'.

The Exposure Draft's provisions also go beyond the stated policy intent in that they do not clearly limit the type of user who can rely on the 'fair dealing for quotation' defence to 'public institutions and researchers'.

The Discussion Paper emphasises that the new exception will not be limited to a specific purpose(s) by noting that it will 'not [be] limited to, explanation, illustration, authority or homage'. Again, the lack of specificity ('not limited to') in relation to use, increases uncertainty and the potential to harm the interests of creators and copyright owners. What other uses are envisaged and what are the public policy reasons supporting the inclusion of those uses within this proposed exception?

The Discussion Paper notes that an example of the type of person who might use quotations of copyright materials (for the purpose of research) includes academics, teachers, students, and 'documentary makers'. The latter example seems out of place, as:

- the purpose of making a documentary cannot be assumed to be 'research', in the same way that the work of academics, teachers, students and 'organisations that are engaged in scientific, medical or industrial research' (referred to in the Discussion Paper) are generally assumed to be.
- a documentary maker is, by definition, making a new work which presumably has some commercial value, even if funded by government or not-for-profit entities.

To avoid uncertainty, the drafting could be narrower and more precise in the Bill and supported by relevant and narrow examples in the Explanatory Memorandum.

The ACC submits that the drafting of section 113FA narrowly specify the purpose for a non-commercial quotation, for example 'to illustrate or support an argument or point of view'. The *purpose*

[60] ACC 2021 Response para 10.3.2.

[61] Exposure Draft section 113FA(1).

of a fair dealing is the fundamental component – for example, for the purpose of criticism or review or the purpose of parody or satire.

There is no 'purpose' innate to quotation *per se* – quotation is a mechanism by which copyright material can be used by an individual or body other than the copyright owner. By tailoring the drafting of section 113FA to narrowly specify the purpose for a quotation, the new provisions will align with the existing fair dealing mechanisms in the Act and establish a boundary around the exemption for a quotation for the purpose of research that will preserve fairness. By specifying that a quotation must, for example, be for the purpose of illustrating a point or supporting an argument, as suggested above, expansive and variable uses of this exception will be avoided and the rights of copyright owners protected as a result.

Other key considerations suggest that a fair dealing quotation defence should not be introduced include:[62]

(i) where necessary, policy decisions may be made by rightsholders that allow for quotation of copyright material, where needed.

(ii) because of the inherent nature of different copyright material and the different uses such material is put to, 'a specific quotation defence may work better for some types of copyright material than others.'

For example, literary works may be suited to a quotation defence but how would 'quotation' operate for artistic works? In addition, licensing models exist for quotation of other copyright material such as music and film sampling.

The ACC repeats its submission that the concept of 'substantial part' (an intrinsic element of the current copyright framework)[63] is a more appropriate vehicle to address the competing interests than a specific quotation exception.

In addition, the ACC says that any amendments must carefully define 'quotation' to provide adequate protection for creators, which may be balanced against freedom of expression. It re-states its suggestion to ensure this balance is appropriately addressed by:

- defining quotation as an 'extract' relied upon for certain defined intents (although further consultation would be required to ascertain appropriate intents), and
- introducing appropriate fairness factors.

As outlined, ascertaining the *purpose* for which a quotation might be used is central to ascertaining the appropriateness of amending this legislation. The exceptions currently allowed under the Act are purposive in nature, and all inherently allow quotations to be used for pre-defined and socially approved purposes.

The ACC considers that fairness factors should be informed by the three-step test outlined in the Berne Convention.[64] Fairness would *not* be achieved if:

(i) the use of a quotation is covered by the offering of a licence that would be unreasonable to decline

(ii) the dealing involves the reproduction of a work as a whole. This cannot be a true quotation. It would also significantly undermine copyright protections for items such as photographs,

[62] ACC 2021 Response para 10.3.2.

[63] Copyright Act section 14.

[64] See this submission at **5. Australia's international obligations – exceptions.**

paintings, and other artistic works, as well as other short written works such as short poems, prose, and song lyrics

(iii) there is a failure to sufficiently acknowledge the creators, and

(iv) the dealing involves a commercial purpose where it would therefore be appropriate to seek a commercial licence (even, for example, the use of thumbnails and book covers featuring artistic works).[65]

This section if it were to be enacted, should mirror section 40(2) purpose of research or study factors, that is:

(i) the purpose and character of the dealing

(ii) the nature of the copyright material

(iii) the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price

(iv) the effect of the dealing upon the potential market for, or value of, the copyright material, and

(v) in a case where part only of the copyright material is reproduced – the amount and substantiality of the part copied taken in relation to the whole work.[66]

Of the specific factors above, the ACC notes that (i), (ii), (iv) and (v) are listed as factors to be considered in the Exposure Draft.

It would also be advisable to require a sufficient acknowledgement (as defined in the Act) of the quotations, which would mirror the fair dealing exception for criticism or review.

New section 113FA(5) is an example provision. The first three examples listed as subsections (a) through (c) are uncontroversial, however the example provided in subsection (d) "a quotation for the purpose of homage", might give rise to significant ambiguities in practice. The notion of a homage might be read as categorically different to the purpose of explaining, illustrating, or citing to authority. It introduces an element that brings with it issues around subjective interpretation.

The ACC emphasises the danger of a fair dealing quotation defence, 'will introduce further unremunerated and unlicensed use of creators' works'.[67]

The ACC emphasises that if such a defence were to be introduced that it:

- be restricted to carefully defined purposes identified by further consultation
- be consistent with Article 10 of the Berne Convention, and extend to:
    - works only, and
    - only works which have already been lawfully made available to the public
- apply to use of extracts only (never the entirety of a work) used for a pre-defined purpose, and where no more is used than necessary to achieve that purpose
- specifically require sufficient acknowledgment of the source and author of a work unless there are reasonable grounds for not doing so,
- be subject to the five fairness considerations set out in the Act in relation to research or study, and

[65] ACC 2021 Response para 10.3.2.

[66] Exposure Draft s 113FA(2).

[67] ACC 2021 Response para 10.3.2.

- include a presumption against the use of the defence where a licence is available, which is rebuttable where there are reasonable grounds for not doing so.[68]

ACC case study

A PHD student completed their thesis and wanted to make it commercially available as a book. It contained hundreds of quotes.

The threshold question for each of these quotes under current law would be whether each quote is a substantial part of the quoted work.

The next question would be whether even if substantial, it falls within one of the existing fair dealing exemptions – in this case criticism and review is most likely to be relevant (the student having presumably availed themselves of the research and study exception in preparation of the thesis).

The introduction of a fair dealing exception for non-commercial quotation would not serve in this instance. This use would fail the commerciality test. The inclusion (within this proposed fair dealing exception) of a 'quotation [that] is immaterial to the commercial value of the product or service in which it is used' is, in the ACC's submission, unlikely to assist in this scenario and would instead increase uncertainty and administrative costs. For each quote (of the 'hundreds') used, an assessment would need to be made as to whether its value to the book is 'immaterial'. It is not clear whether the cumulative effect of the quotes is to be considered – i.e. whilst each individual quote may be considered 'immaterial', the collective value of the quotes may be substantial or at least not 'immaterial' to the commercial value of the book.

6.2.1 ACC response to Question 2.1

Question 2.1: Quotation: Unpublished material

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

The ACC reiterates its primary submission that a fair dealing exception for quotation is unnecessary. If it is to be introduced, it should be subject to the considerations set out above at 5.2.

The ACC submits that it would be inappropriate for any fair dealing for quotation exception to be extended to apply to unpublished material. To do so is an incursion on the fundamental and exclusive rights granted to a creator and copyright owner under the Act and a breach of Article 10 of the Berne Convention. Further, the application of such an exception to works of First Nations creators is likely to be a breach of the United Nations Declaration on the Rights of Indigenous Peoples as outlined in **3. Impact on Indigenous Cultural and Intellectual Property rights, above.**

[68] ACC 2021 Response para 10.3.2.

7. Exposure Draft Schedule 3 - Library and archives etc

7.1 Proposed changes to library and archive provisions

The Exposure Draft repeals Part III Division 5[69] replacing it with several sections including[70]:

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

The Exposure Draft extends the copying of works held in libraries or archives, 'to all types of copyright material and for remote online access'[71]. This is provided that:

- 'copyright material acquired in hardcopy form is only digitised and made available online if an electronic copy cannot be obtained within a reasonable time at an ordinary commercial price[72] (other than preservation and research copies)', and
- 'reasonable steps' are taken to mitigate against copyright infringement in accessing the material.

[69] Copyright Act ss 48-53.

[70] Discussion Paper p 23 with heading reflecting those in the Exposure Draft.

[71] Exposure Draft section 113KC and Discussion Paper, p 20

[72] Exposure Draft section 113KD(11).

Although not articulated in the Exposure Draft, 'reasonable steps' are said to include:[73]

- measures to limit access to registered library users with password protection
- being available for viewing only, and
- together with an appropriate attribution to the author and copyright notice.

This is a considerable extension of the current section 49(5A) of the Act which permits libraries and archives that have acquired Part III material only, in digital form (eg. an eBook or an article from the internet), to make that material available online to users only within the library premises.

Further, the purposes of supply now include a person's 'private or domestic use'[74] in addition to the currently permitted 'research or study'.[75]

Amendments are also proposed to section 113H which would enable libraries and archives to make preservation and research copies available to be accessed online, at the library or archive or offsite.[76]

In brief, these changes mean that *all* copyright material – 'works' (published or not) including literary, artistic, musical, dramatic and 'subject matter other than works' ie. films, sound recordings and broadcasts, may be digitally copied by libraries and archives, even where digital copies do not exist, and then communicated to library and archive users.

7.2 ACC's position

7.2.1 Section 10(1) – expanded definition of library

Currently there are definitions of library in section 49(9), applying to section 49 (Reproducing and communicating works by libraries and archives for users), section 50(10), applying to section 50 (Reproducing and communicating works by libraries or archives for other libraries or archives) and section 113G (Libraries) which applies to Part IVA, Division 3, the entire subdivision A.

The proposed definition of library is to be inserted into section 10(1) and widens the application to include parliamentary libraries.

It is important to note that the new definition may apply to libraries conducted for profit or those that operate within commercial organisations provided that they are 'accessible to members of the public', even indirectly by 'interlibrary loans'.

It is conceivable then, that a 'library' may be created for profit purposes and seek to rely on the unremunerated exceptions proposed in the Exposure Draft.

We have had the opportunity to view a draft of the Copyright Agency's submission to the Discussion Paper and support their views.

7.2.2 Section 113KC – making copyright material available online

Section 113KC(1) provides for an exception for an authorised officer of a library or archives making electronic copyright material acquired by the institution, available online (whether at the premises of

[73] Discussion Paper, p 27. See response to Discussion Paper Q 3.1 below.

[74] Exposure Draft section 113KD(2).

[75] Copyright Act section 49(1)(b)(i).

[76] This is currently limited to libraries/archives premises under Copyright Act ss 113H & 113J.

the library or archives, or 'on the internet'[77]) provided that 'reasonable steps [are taken] to ensure that a person who accesses the copyright material does not infringe copyright in the copyright material.' [78]

Section 113KC(2) provides for an exception for an authorised officer of a library or archives making an electronic copy of hardcopy copyright material acquired by the institution, available online (whether at the premises of the library or archives, or 'on the internet'[79]) provided that 'reasonable steps [are taken] to ensure that a person who accesses the copyright material does not infringe copyright in the copyright material. This is subject to a 'commercial availability' check.

We note that 'acquired' is not defined and so, there is no condition that the library/archives purchase the copyright material for a fair commercial price. Perhaps it is intended to cover donations of material, but this is unclear.

7.2.3 Section 113KC(2) – commercial availability test

Section 113KC(2)(d) outlines that the authorised officer must satisfy themselves that after 'reasonable investigation', an electronic copy of the copyright material cannot be obtained within a reasonable time an at an ordinary commercial price. The investigation does not have to be 'exhaustive, only reasonable in the individual circumstances.[80] .

Before an authorised officer:

- makes an electronic copy of hardcopy copyright material[81], or
- supplies (including electronically) the whole or more than a 'reasonable portion' of requested copyright material [82]

they must undertake a 'commercial availability' check.

Section 113KD(11) outlines that for the purposes of **Section 113KD**(9)[83], the authorised officer, must consider:

(a) the time by which the person requesting it requires it

(b) the time within which a copy (not being a second-hand copy of the work) could be provided to the person

(c) whether an electronic copy can be obtained within a reasonable time at an ordinary commercial price.

The Discussion Paper outlines some circumstances when material may not be regarded as being commercially available in electronic form. These include when:

- eBook licences are not available to Australian libraries and archives, or

[77] Exposure Draft section 113KC(1)(a).

[78] Exposure Draft section 113KC(1)(b).

[79] Exposure Draft section 113KC(1)(a).

[80] Discussion Paper p 24.

[81] Exposure Draft section 113KC(2)(d).

[82] Exposure Draft section 113KD(9)

[83] It is not clear whether it is intended that these factors should be also considered for section 113KC(2)(d).

- a copy cannot be purchased individually – for example when it is part of a subscription service or box set.

This has the effect of undermining any licensing arrangements a copyright owner may have with a distributor or their ability to enter such arrangements, impacting once again on a creator's ability to exploit their work according to their wishes.

By way of illustration, section 113KD would allow an authorised officer of a library or archives to make an electronic copy of copyright material in circumstances where a creator/copyright owner may have plans to (or may be in the process of) producing an eBook or electronic copy of their copyright material but it is not yet available.

There is no positive obligation on creators and owners to make copyright material available in any format. The Explanatory Draft essentially imposes an obligation on copyright owners to make their material commercially available in electronic format. If a hard copy of the copyright material is commercially available, why (from a public policy perspective) is that considered to be insufficient (for the user) to the extent that it is considered appropriate to undermine the rights of the copyright owner rather than directing the requester/user to the purchase of the commercially available hard copy?

7.2.4 Section 113KD – supply of copies to persons

'Private and domestic use'[84]

It is not clear what 'current ambiguity' there is in relation to the existing 'research or study'[85] requirements. Further it is not clear what the expansion of the purposes of supply to include 'private and domestic use' is intended to capture – general interest or creative development may fall within 'research or study'.

Using the dictionary definition of 'research' – 'diligent and systematic enquiry or investigation into a subject in order to discover facts or principles' – and 'study':[86]

> (i) application of the mind to the acquisition of knowledge, as by reading, investigation or reflection.
> (ii) the cultivation of a particular branch of learning, science, or art …
> (iii) A particular course of effort to acquire knowledge…
> (iv) a thorough examination and analysis of a particular subject…

the examples outlined in the Discussion Paper – copying and supplying a copy of sheet music for someone learning to play a piece for personal enjoyment or a newspaper article of personal interest[87] could also fall under the research or study provision. The same may be said of family historians using material.

[84] Exposure Draft section 113KD(2).

[85] Discussion Paper p 24.

[86] Both from *Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Limited* (1991) 20 IPR 605; (1990) quoting the Macquarie Dictionary at [25]-[26],[32]-[33].

[87] Discussion Paper p 24.

'Reasonable portion'

The reference to 'reasonable portion' comes from section 40 of the Act in reference to the fair dealing for the purpose of research or study. Section 40 has been amended over time, including the removal of 'private' from research or 'private study' in 1980.[88]

The Exposure Draft repeals the section 10(2), (2A) and (2B) definitions, and section 40(5) and replaces them with provisions which encapsulate electronic forms of works.

Given the Schedule 3 amendments apply to all copyright material, it is not clear how the references to 'reasonable portion' would apply to Part IV subject matter particularly given the limitations outlined in sub-section 113KD(10) and sub-section 113KE(3).

7.2.5 Impact of proposed changes to library and archives exceptions

Libraries and archives already 'have specific exceptions that entitle them to copy and communicate material in their collections for users and other libraries' and that 'enable them to use material for preservation, research, and administrative purposes'.[89] These existing unremunerated exceptions allow libraries and archives to use:

- copyright material for preservation purposes and administration of the collection, and
- original copyright material in their collection for research purposes.[90]

The effect of the proposed unremunerated extensions will mean that copyright creators and owners, including owners of film and sound recordings, who have not yet made their material available digitally or indeed who do not wish to do so, will have their rights to digitise and disseminate their material, removed.

Although the Discussion Paper says that 'the Bill will not allow libraries and archives to become quasi-e-book or streaming services, or displace their acquisition of commercial products where they are available,'[91] the proposed changes do, in fact, place libraries and archives in a position where they may dictate the release of copyright material which may impact on the commercial return for creators and other copyright owners. This is especially significant at a time where a digital lending right is not available to Australian creators and publishers.[92] The ACC is not aware of lending right schemes available for creators and copyright owners of Part IV material.

The ACC does not regard the extensions as compliant with Berne's three-step test as they have the potential to significantly impact on the 'normal exploitation' of copyright material, unreasonably prejudicing the legitimate interests of creators.

[88] see ACC 2021 Response para 7.1.

[89] see ACC 2021 Response para 11.1.3.

[90] see ACC 2021 Response para 11.1.3.

[91] Discussion Paper p 27.

[92] For a detailed discussion of the Digital Lending Right, see the ACC affiliate, Australian Society of Authors (ASA) discussion at https://www.asauthors.org/campaigns/digital-lending-right/digital-lending-right.

7.2.6 The international position

In the case of libraries and archives as detailed above, sections 113KC and 113KD contain significant broadening of exceptions in terms of making copyright material available online and supplying copies of copyright material to persons upon request.

Additionally, section 113KE, provides that a library or archives may supply copies of copyright work that it makes to another library or archives with a commercial availability test; and section 113KF allows a library or archives to retain and make available to the public, copies of copyright works made for individual persons under sections 113KD and KE.

Such expansions of the existing library and archive exceptions clearly violate the Berne three-step test.

The stated policy intent in the Discussion Paper, to open wider community access to a broader range of cultural and educational material held in collections and in addition to reduce the regulatory burden on libraries, does not rise to the level of a 'special case' for the purposes of the three-step test.

The reforms as drafted in Schedule 3 run the risk of giving libraries and archives free rein to become electronic publishers of copyright material. The lack of any detailed 'special case' to legitimise such an exception, and the clear conflict with the way copyright owners normally exploit their works, result in these reforms failing both the first and second steps of the three-step test. Even in the instance where the reforms could be argued to pass these two steps, with no providing for equitable remuneration for copyright owners – and in fact, a diminishing of the equitable remuneration currently available to copyright owners under statutory or voluntary licence schemes – the proposed new exceptions unreasonably prejudice the legitimate interests of the rightsholders and would therefore fail at the third step.

7.2.7 ACC Response to Question 3.1

Question 3.1: Libraries and archives: Online access – 'Reasonable steps'

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

The new section 113KC(1)(b) specifies that the library/archives must take 'reasonable steps' to prevent infringement by their users. This is noting that 'main responsibility for non-infringement of copyright will remain with the person accessing the material.'[93]

Given that access will no longer be restricted to the premises of a library or an archives, and indeed material made available 'on the internet', the ACC supports the limiting of access to registered library members with password protection for viewing only, in addition to author attribution and a copyright warning/notice. Even this, however, does not factor in that these changes impose a significant burden on creators. For example, if a library provides (under this provision) copies of copyright material to 10 different users (in response to 10 separate requests), the only option available to a creator who becomes aware of an infringement by a user is to pursue the user, even if it may have been possible for steps to be taken by the library/archives (at time of providing copy) to prevent that infringement. Where there are multiple infringements in relation to

[93] Discussion paper p 22.

the same work, the creator/copyright owner must pursue each of those users. This is not practical and unfair to shift all the 'cost' to the creator/copyright owner.

Technological protection measures (TPMs)

It should be noted that libraries currently have wide powers under section 116N(8) of the Act and regulation 40 of the Regulations, to circumvent technological protection measures. The 2017 amendments to the TPM exceptions were aimed at mirroring the then new exceptions implemented by the amendments. That is, where it is not an infringement of copyright to use material in a certain way under an exception specified in the Copyright Act, neither will there be an infringement of a TPM if the material has such TPM protection.[94]

This coupled with the proposed Schedule 7 changes, may lead to further circumvention of TPMs further impacting on the rights or creators and owners.

7.2.8 ACC Response to Question 3.2

Question 3.2: Libraries and archives: Illustrations

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

Section 53 is currently located in Part III (Copyright in original literary, dramatic, musical, and artistic works), Division 5 (Copying of works in libraries or archives). The copying and communication of works under that Division is directed at specific purposes:

- assisting members of Parliament in the performance of their duties (section 48A),
- for users for the sole purpose of research or study (section 49)
- for other libraries for the above purposes and their collection (section 50).

The rationale underpinning these current provisions is therefore user access for specific purposes.

In contrast, the exceptions in the current Subdivision A of Division 3 of Part IVA (where the proposed replacement provision, section 113K, is to be placed) are directed at 'public libraries, parliamentary libraries, and archives' for the *purposes* of preservation, research or administration of their collection. That is, the rationale underpinning the latter provisions is the public interest in ensuring that the management of the institution's collection is supported.

The ACC's concern is that there may be unintended consequences in the effective conflation of the purposes of the Part III and Part IVA exceptions and these unintended consequences will have a negative impact on creators/copyright owners.

Illustration of application of section 113KK

An art catalogue may have artist monographs which in many cases have images that are not available anywhere else. For example, full catalogues of artists' works and drawings, reference photographs, photographs of obscure exhibitions with works in situ.

[94] See also Copyright Regulations 2017 reg. 40.

The practical effect of section 113KK (as currently drafted) is to expressly ensure that every image in an art catalogue (which often only have a short essay or even an introduction) could be:

- **made available online** – if the library officer thought that acquiring an artist's hi-definition photo e-book catalogue (if such a thing starts to become normal) was either too hard (through Amazon or similar, or in some TPM-style format that's hard to acquire), or even too expensive. The whole catalogue then goes online.
- **supplied to persons** making a simple oral request, with no written warranty about not sharing online.
- **Supplied to other libraries** (thus distributed even more, and setting up more distribution nodes)
- **retained as an electronic version** of the artist's catalogue by the library

In the case where a library or archives has **unpublished artist catalogues** – like a Catalogue Raisonne (a catalogue of artwork with explanations) of an artist's entire body of work that was prepared by their studio or estate, or where an artist gifts their papers to a university library - the proposed new provision would appear to allow (or at least not prohibit) that to be made available online.

8. Exposure Draft Schedule 4 - Education

8.1 Educational use existing framework [95]

Currently, Australian educational institutions enjoy a comprehensive framework of legislative and licensing support which enables them to utilise copyright material for a variety of purposes. That framework includes:

- the broad statutory licence regimes which provide protection to educational facilities, enabling different types of content and use to be valued differently[96]
- direct licensing arrangements
- the public performances of literary, dramatic and musical works, and sound recordings and cinematograph films shown in a classroom setting for an educational purpose are currently permitted under section 28, and
- as long as its criteria are met, section 200AB is also likely to apply to many instances of use by educational institutions.

Given that existing comprehensive legislative framework, the ACC's experience suggests that there is little practical need for an expansion of the educational institutions exceptions. The ACC frequently advises those in the education sector (for profit and not for profit). It is rare that a use falls outside of the comprehensive licences available or one of the existing exceptions. If the use does go beyond the framework, then it is usually a non-educational use such as a showing film for a fundraiser.

8.1.1 Section 28 – performance and communication of works or other subject-matter in the course of educational instruction

Section 28 was originally intended to cover the communication and performance of a work, such as a play, poem, or song. The communication of audio recordings or films or communicating copyright material 'made merely to facilitate' performances, playing or showing, is also provided for in section 28.

8.1.2 Section 200 – use of works and broadcasts for educational purposes

Section 200 of the Act allows for teachers or students to copy the whole or part of a work during education, if it is not done through a machine or to make multiple copies.

The legislature's original intention for section 28 (then clause 27) and section 200 (then clause 196) was made clear in the second reading speech in 1967:

> There are a number of provisions in the Bill relating to the use of copyright material for educational purposes. Generally, these provisions will enable the ordinary course of instruction to proceed without requiring the permission of the copyright owner for the use of copyright material, but *they do not authorise any reproduction or use of copyright material which would affect the proper interests of the copyright owner.* Thus, clause 27 permits a copyright work to be performed

[95] See ACC 2021 Response para 12.

[96] See ACC 2021 Response para 12.3.

> in the classroom, and clause 196 permits reproduction of a work by a teacher or student otherwise than by the production of multiple copies. [*emphasis added*]

Between these two sections, schools have access to two unremunerated exceptions when delivering copyright materials in a classroom. Any act of copying a work that falls outside these two sections will be covered by the statutory licensing scheme or through voluntary licensing schemes.

8.2 New section 113MA: Use of copyright material in the course of educational instruction

The Exposure Draft repeals section 28 replacing it with section 113MA. Section 113MA is wider than section 28 in that it:

(i) widens the application of the provision to:

(a) all copyright material, and

(b) any mode of presenting, displaying or otherwise causing material to be seen or heard in a class, through any means of technology

(ii) permits the copying of copyright material where it is made to facilitate performance or communication

(iii) confirms that external and remote teaching falls within the section provided that, 'reasonable steps' are taken to limit access to copyright material',

(iv) permits people other than teachers and students before whom the performance can take place, including

(v) others involved in the student's education or welfare eg. family.

Section 113MA(2) – 'a person taking part in the giving or receiving of educational instruction'

This provision is intended to widen the audience currently permitted in the classroom to include:[97]

- those assisting a student in the classroom
- a tutor, or work placement supervisor of the student, or
- a guest speaker from the community or industry invited to speak to the class.

This is a considerable broadening of section 28.

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

We note the policy reasons for necessitating the temporary recording/making material available of lessons containing copyright material and the limitations outlined.

[97] Discussion Paper p 30

8.3 ACC's position – section 113MA

The ACC has made submissions noting the important policy reasoning for educational exceptions to the exclusive rights of copyright owners. The ACC recognises the many reasons behind this importance, most fundamentally because the Australian educational sector complements and bolsters the creative sector.[98]

The ACC 2021 Response outlines the history of section 28[99], including its expansion over time to include:

- sound recordings section 28(4), and
- communication to the public. [100]

As we outline[101], the exception is necessarily a narrow one because it is directed to the *performance* of copyright works as part of teaching, and not about the dissemination of copyright works as learning materials. That dissemination is the subject of the statutory licence, and voluntary licences where required. Extending the operation of section 28 in the form of section 113MA to the dissemination of copyright materials which 'facilitate' performance, effectively extinguishes the copyright in that copyright material for classroom use. It is not clear why the *reproduction* of material in a class context should now be made freely available, that is, not remunerated. This is not a question of access. The ACC is deeply concerned about the impact that this would have on the creation and publication of Australian educational material.

It follows that the ACC does not support the broadening of section 28 as outlined in its proposed repeal and replacement by proposed section 113MA. The amendments are unnecessary considering the present statutory framework and extensive negotiated licences. More specifically, the current framework *does* allow for access to the copyright work (through the statutory licence). The proposed changes are not directed at *access* but on *payment for access*. It is clear that activities of educational institutions which may otherwise be licensed would be captured by these provisions. This cannot be masked as an issue of access – the use of materials in this way, both in the physical and online classrooms, has been demonstrated as being covered under the existing licences offered by the collecting societies. The proposed changes will undermine the statutory licence schemes which are bolstered by further flexibility for educational institutions in the Act such as currently included in ss 28 and 200AB.[102]

The changes will also undermine commercial arrangements between copyright owners and educational institutions. These changes will have a harmful impact on copyright owners' ability to earn income, and are likely to result in the reduced production of quality published Australian educational materials.

The repeal of sections 28, 200 and 200AAA and introduction of sections 113MA, 113MB and 113MC look to be an attempt to deal with the changing nature of education in response to COVID-19. However, these changes unnecessarily broaden the rights that educational institutions already have available to them while copyright owners bear the financial costs.

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[98] ACC 2021 Response para 12.3.

[99] ACC 2021 Response para 7.4.

[100] *Copyright Amendment Act 2006* (Cth) Sch 8(1B)

[101] ACC 2021 Response para 7.4.

[102] ACC 2021 Response para 12.3.1.

During the initial stages of the pandemic in 2020 (and continuing), collecting societies and other creator collective organisations clarified that the available educational licences applied to the digital classroom or made informed decisions based on sound policy which supported education.[103]

To clarify the current scope of the provisions, the ACC supports the addition of a note to the existing section 28 to include virtual classrooms and a person or carer assisting in remote learning in a virtual classroom. However, the additional rights provided for by sections 113MA, 113MB and 113MC are unnecessary and go beyond the legislative intention of the Act regarding educational use of copyright material.

8.3.1 International obligations & section 113MA

The proposed repeal of sections 28 and 200 (200 being replaced verbatim with the new section 113MB) and the new section 113MA intended to replace section 28 clearly, fails to pass the three-step test.

There is no clear 'special case' put forward which would justify the expanded exceptions in the new section 113MA. Section 28 clearly puts forward a special case - it applies in the clearly defined and limited circumstances of:

- performance in class or otherwise in the presence of an audience directly connected to the institution, and
- by a teacher giving or a student receiving, instruction
- where the instruction is not for profit.

The new section 113MA grants a far broader exception to situations 'in the course of giving or receiving educational instruction' where the use may include reproduction in addition to performance.

While there may be some indications that the COVID-19 pandemic and the temporary shift to virtual classrooms are relevant to the proposed reforms, it is unclear what the 'special case' situation for a new set of exceptions would be, that could not be met by simply deeming virtual classrooms as classrooms under the Act. This occurred in 2020 when collecting societies and other creator groups worked to make clear that licences already in place covered the shift to the virtual classroom, discussed above.

Section 113MA also fails at the second step of the Berne test. Copyright owners license their works to educational institutions in the normal exploitation of their work – indeed, licensing to schools is one of the most important economic mechanisms by which a creator can monetise their work. Displacing this licensing is a highly impactful on the market for a creator's work, and directly conflicts with the normal exploitation of the work - the second condition of the three-step test.

Consideration should also be given not only to users whose *current* use of copyright materials would become free as a result of the broadened exceptions, but also those who might commence using the copyright materials once the use becomes free, further eroding the potential market for a creator's work.

The broad definition of 'educational institution'[104] in the Act includes private professional training or general education institutions so allowing these types of organisations to freely use copyright

[103] See for example, Copyright Agency's explanation of the statutory licence How the licence works - Copyright Agency https://www.copyright.com.au/licences-permission/educational-licences/private-education-providers/how-the-licence-works/ and the updated arrangement the Australian Publishers Association (APA), the Australian Society of Authors (ASA) made in relation to Storytime https://www.asauthors.org/news/an-update-on-the-school-storytime-agreement.

[104] Copyright Act section 10.

materials for commercial education purposes not only greatly diminishes a creator's market, but also effectively subsidises the private education institution at the expense of the creator. As such, any exception which eliminates the capacity of creators to receive remuneration from educational institutions (an important source of revenue for creators in Australia) clearly unreasonably prejudices the legitimate interests of the creator, and so fails the third step of the test.

8.4 Amendment of section 106 - Registered charities' sound recording exception

The proposed amendment to section 106 exempts:

- educational institutions, libraries or archives that operate as not-for-profit entities (which are not charities), and
- other not-for-profit organisations (which are not charities) that are involved in the advancement of religion, education and social welfare,

from infringing copyright when playing sound recordings in public. This change is intended to allow, among others, both public and private educational institutions to play sound recordings for extra-curricular activities, for example, during school concerts, assemblies, and graduation ceremonies without remuneration to the owners of sound recordings.

By way of background, section 106 was amended in 2012 by the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth). The focus of this Act was to make arrangements for transition to the national regulatory scheme (for registered charities) which was established by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

The changes made to the Copyright Act by the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* were therefore intended to be consequential changes to the passing of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). Specifically, the following amendment was made to section 106(1)(b):

> Omit "club, society or other organization that is not established or conducted for profit and the principal objects of which are charitable or are otherwise concerned with the advancement of religion, education or social welfare", substitute "registered charity".
>
> [item 170, Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012 (no. 169, 2012) - Schedule 2]

The unintended consequence of that amendment was that private educational institutions that are registered charities are able to rely on the section to play sound recordings in public without remuneration to copyright owners.

8.5 ACC's position – section 106

The ACC does not support the proposed extension of s 106. The unintended consequence resulting from the 2012 amendments should be rectified so that section 106 has a narrower focus. There is no public policy reason why educational institutions (private or public) or the GLAM sector should be exempt from remunerating the copyright owners of sound recordings.

The ACC submits that section 106 should be drafted in line with section 46, which provides a simple exception to the performance of works at premises where persons resides or sleeps. This approach avoids any significant damage to creators where voluntary licensing schemes are removed, and allows for consistency within the Act by mirroring similar exceptions.

The addition of section 106(2)(c) creates difficulties for copyright owners who wish to challenge the use of proceeds received when an admission is charged to a place where a recording is to be heard. By strictly stipulating that proceeds are to be applied otherwise than for the purpose of the educational institution, library or archive, the only recourse available to copyright owners in the event of a dispute would be to conduct an internal audit of an organisation's account to trace the proceeds of the admission charge.

We have had the opportunity view a draft submission of the Phonographic Performance Company of Australia Limited (PPCA) and support their submission in relation to section 106.

8.5.1 ACC Response to Question 4.1

Question 4.1: Education: Online access – 'Reasonable steps'

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

Under sections 116AN(8) and 116AN(9) of the Act (and regulation 40 of the Regulations) libraries and educational institutions are already permitted to circumvent TPMs in a wide variety of circumstances. This coupled with the proposed Schedule 7 changes, may lead to widespread circumvention of TPMs in situations where access to protected material is covered by statutory or other licence.

The proposed section 113MA(2)(d) specifies that the body administering the educational institutions must take 'reasonable steps' to prevent infringement by those taking part in educational instructions.

If these provisions are enacted in this form, which we oppose, then then the minimum protections would include:

- the limitation of access via username and password to currently enrolled students, in a closed environment and not on a publicly available internet page
- ensuring that material may only be used for the purposes of the lesson,
- ensuring TPMs are reinstated where possible, and
- a designated copyright warning/notice for each use is displayed.

Because TPMs are one aspect of access, which the ACC says is not in issue, it is imperative to also address the issue of *payment* for access currently provided for under the statutory licence but which will be removed by these proposed reforms (as outlined above).

9. Exposure Draft Schedule 5 - Use of copyright material by the Commonwealth or a State

9.1 Government statutory licensing

The proposed reforms include:

- the repeal of sections 183A,183B & 183C and replacing them with new corresponding sections broadening their scope to 'communication' of copyright material[105]
- the removal of the:
  - requirement for the completion of sampling surveys
  - requirements relating to payment arrangements, and
  - related sampling/inspection powers.
- making clear that governments have 'the option of dealing directly with copyright owners'[106], this would apply even if the use of copyright material falls within the scope of the collective licensing arrangements.
- confirming that the statutory licence does not apply where copyright material is used by a government under an exception in the Act or would not otherwise constitute an infringement of copyright, that, is that the statutory licence becomes a 'safety net',[107] an option of last resort.

9.2 ACC's position[108]

Whilst the ACC is supportive of the proposal to extend the government licensing regime to include communication, the ACC notes the Act already affords governments extensive privileges for the use of copyright works and gives them the ability to 'become owners of copyright in circumstances where others would not.'[109]

This provides governments with significant bargaining power when it comes to dealing with copyright owners, including collecting societies. It is difficult to understand the public policy behind the practical effect of the provisions which is to permit governments to opt out of dealing with the relevant collecting societies. The ACC's concerns regarding this 'opt out' proposal include:

- the inequality of bargaining power as between the government (with the resources available to it) and an individual creator/copyright owner
- increased administrative costs of government dealing with numerous individual copyright owners (as opposed to a collecting society) – these administrative costs are ultimately borne by the public (as taxpayers). Is the government's objective here to reduce the amount paid to copyright owners (through direct negotiation) so that these increased administrative costs are offset by 'savings' made in payments to copyright owners?
- it fails to acknowledge the benefit to government (and any other user) of the reciprocal arrangements that collecting societies have with corresponding collecting societies in other jurisdictions – this allows the use of material from across jurisdictions through a single licence.

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[105] Exposure Draft section 183B(1)(b)(ii).

[106] Discussion Paper p 35.

[107] Discussion Paper p 35.

[108] See ACC 2021 Response para 14.

[109] See ACC 2021 Response para 14.3.

9.2.1 ACC Response to Question 5.1

Question 5.1: Government: Use of incoming material

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

Section 183G does not make clear what 'material provided to the Commonwealth or State' means. On the face, it includes all copyright material however it comes into their possession without limitation.

It should be noted that even when the government is not obtaining a 'commercial advantage', there may be a commercial disadvantage to a copyright owner.

We have had the opportunity to view the draft submissions of Copyright Agency and Screenrights and support their views on this question.

10. Explanatory Draft, Schedule 7 – Regulations relating to technological protection measures

Australia is a party to several international conventions and agreements, which gave rise to the current TPM provisions of the Act. The major TPM legislative developments are listed below[110]:

Year	Instrument	Item
1996	WIPO Copyright Treaty - Article 11 - Obligations concerning Technological Measures	signatories are to provide 'adequate legal protection and effective legal remedies' against circumventing TPMs
2000	*Copyright Amendment (Digital Agenda) Act 2000*	• Prohibition against circumvention of technological protection measures and encrypted broadcasts • Prohibitions against tampering with rights management information
2001	'Cracking Down on Copycats', report of the House of Representatives Committee on Legal and Constitutional Affairs	**Recommendation 3: technological protection devices** The Committee recommends that industry be encouraged to develop technological protection devices that are used to protect copyright material. The Committee further recommends that the Copyright Act be amended so as to provide legal sanctions against the removal or alteration of technological protection devices.
2005	House of Representatives Standing Committee on Legal and Constitutional Affairs Review of technological protection measures exceptions [111]	Proposed exceptions to TPM infringement under the AUSFTA
2005	Australia–United States Free Trade Agreement **(AUSFTA)** Article 17.4.7	Provides definition of 'Effective Technological Measures' and 'Rights Management Information', infringement and exceptions.
2006	*Copyright Amendment Act 2006*	Updates the *Copyright Act 1968* to reflect the obligations under AUSFTA.

[110] See ACC's Response to the Productivity Commission Draft Report: Right to Repair June 2021.

[111] House of Representatives Committees – laca protection report.htm – Parliament of Australia (aph.gov.au)

2012	Attorney-General's Department, Review of Technological Protection Measure Exceptions made under the Copyright Act 1968	Completed in 2015. Made public September 2017. Reviews whether existing TPM exceptions are appropriate and invited submissions on whether new exceptions should be added.
2017	*Copyright Legislation Amendment (Technological Protection) Regulations 2017* [112]	Updated the 1969 Copyright Regulations to *Copyright Regulations 201 7* (procedural only)

Article 11 of the WCT provides:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Chapter 17 of the AUSFTA) deals with intellectual property rights.[113] Article 17.4.7 of the AUSFTA requires that 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures' must be provided for in our legislative framework.

Copyright regulation 40 allows for the circumvention of TPMs for a wide variety of uses including:

- reproducing and communicating works by libraries and archives for users under ss 49(6), (7) or (7B)
- reproducing and communicating works by libraries or archives for other libraries or archives under s 50(4)
- copying and communicating unpublished sound recordings and cinematograph films in libraries or archives - section 110A
- using copyright material for preservation, research or administration by libraries and archives – Part IVA Division 3
- educational institutions' use under the statutory licence of Part IVA Division 4
- making of a copy of the sound recording for purpose of broadcasting - section 107

Section 249(4)(a) and 249(8)(a) require a submission to have been made to the Minister as a condition of the Minister recommending changes to regulations (including regulation 40). It therefore provides transparency (and therefore a safeguard) for any changes to the regulations regarding the circumvention of TPMs.

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[112] Consultation on copyright laws opens | Department of Infrastructure, Transport, Regional Development and Communications

[113] Chapter Seventeen - Intellectual Property Rights | Australian Government Department of Foreign Affairs and Trade (dfat.gov.au)

In a practical sense, the existence of access-control TPMs, provide a framework for the protection of copyright material safeguarding the time and financial investments of copyright owners. These protections have become of critical importance with the ease of digital dissemination of copyright content. This highlights the importance of having a scheme which protects copyright material and shows that the balance to consumers and others is already struck.[114]

10.1 ACC's position

The ACC does not support the removal of safeguards currently in the Act in section 249 which enable the expansion of further exemptions to override access control to technological protection measures (TPMs).

The ACC has seen a draft of the Joint Submission of the Australian Film/TV Bodies (of which, ANZSA is an ACC affiliate) and supports their position in relation to this Schedule 7 - Regulations relating to technological protection measures

Conclusion

Thank you for considering this submission. If the Department requires further information, please let us know.

We look forward to our continuing work with you.

Eileen Camilleri
Chief Executive Officer
Australian Copyright Council

25 February 2022

[114] ACC 2021 Response to the Productivity Commission Draft Report: Right to Repair 23 July 2021 para 4.8.

Appendix 1

AUSTRALIAN COPYRIGHT COUNCIL

Response to Copyright Access Reforms summary of key measures

Submission by Australian Copyright Council

2 March 2021

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EXECUTIVE SUMMARY

The Australian Copyright Council (**ACC**) was provided with a copy of the November 2020 Department of Transport, Regional Development and Communications (**DITRDC**) paper, 'Copyright access reforms – Summary of key measures' (**DITRDC paper**). A number of matters in the paper give rise to concern, in particular, proposed changes to:

- section 28 of the Copyright Act
- section s 200AB of the Copyright Act
- the educational licensing regime
- the libraries' exceptions, and
- government licensing regime.

The introduction of new exceptions for:

- quotation, and
- 'freely available material'

also raise questions of their intended consequences.

Some of these concerns were discussed in the DITRDC information sessions held on 14 and 15 December 2020 and outlined in the DITRDC Copyright access reforms – Copyright owner feedback document dated December 2020/January 2021 (**DITRDC feedback paper**).

The issues outlined above and the breadth of the introduction of the limited liability scheme for the use of orphan works, appear aimed not to repair any gap or perceived deficiencies of access to copyright works but rather seem to be an attempt to undermine the efficacy of the current working statutory and legislative framework and the resulting fair and proper remuneration of copyright creators and owners.

In Part 1 of this submission, we set out the Australian historical and policy development of copyright and copyright exceptions, and Australia's international obligations. In Part 2, the proposed 'access' measures are analysed in the context of these developments and obligations, alongside examples of actual enquiries received by the ACC over the last year.

Part 1 - Australian historical and policy development of copyright, exceptions and international obligations

1. About the Australian Copyright Council

The ACC is a small, independent, not-for-profit organisation dedicated to promoting understanding of copyright law and its application. We work to foster collaboration between content creators and consumers, representing the peak bodies for professional artists and content creators working in Australia's creative industries and, Australia's major copyright collecting societies.[1]

The ACC is a unique organisation:

- it is the only dedicated copyright expert organisation in Australia;
- its focus is on copyright as it applies to all art forms;
- it provides advocacy, advice and information on copyright issues;
- it is a membership-based organisation, representing over a million creators.

The ACC has 30 affiliate member organisations, a number of which are making separate submissions in response to the DITRDC and DITRDC feedback papers. These affiliate members represent over a million writers, musicians, visual artists, designers, photographers, directors, performers, choreographers, producers, publishers, record labels and architects working in the Australian creative industries.

As part of its services, the ACC provides free written legal advice to those who fall within its guidelines[2] including the staff of libraries and educational institutions.

2. Copyright Access Reforms summary of key measures

The proposed reforms include[3]:

(i) the introduction of a limited liability scheme for use of **orphan works**

(ii) a **new quotation fair dealing exception**

(iii) **library and archives exceptions reforms**

- (a) online access to collection materials
- (b) 'contracting out' of exceptions
- (c) extension of inter-library/user request supply provisions

(iv) **education exceptions reforms**

- (a) broadening of the classroom teaching exception - s 28
- (b) removal of limitations on use of 'special cases' exception - s 200AB
- (c) restoration of the exception allowing charitable and quasi-charitable bodies to play sound recordings
- (d) new exception for use of 'freely available' materials

(v) **government statutory licensing scheme reforms**

- (a) changes to the collective licensing arrangements
- (b) new exception for use of incoming correspondence

[1] See Appendix 1 for a list of ACC current affiliate members.
[2] See Appendix 2.
[3] DITRDC paper.

A number of our affiliates will be making detailed submissions regarding the consequences of the proposed reforms for certain creator groups. The ACC is deeply concerned that the proposed reforms will seriously adversely impact the businesses of those creators, and notes that many of the reforms are squarely contrary to government's stated policy response to the many reviews of copyright legislation that have taken place over recent years[4]. These reforms seek to diminish the exclusive rights of the copyright owner in a number of material respects, in favour of educational institutions and government.

The ACC receives many enquiries regarding the nature and scope of copyright protection and exceptions. The 'examples' set out in the DITRDC feedback paper bear little resemblance to the kinds of enquiries the ACC receives on a day to day basis. They appear to be hypothetical, academic situations put forward to test the limits of the existing laws or a list of what is proposed to be included in the legislation.

The purpose of this document is to set a number of the proposed reforms in a legal context, having regard to the history of and policy behind, the *Copyright Act 1968* (Cth) (**the Act**) and Australia's international, bilateral and multilateral obligations. We also look at examples of actual queries which the ACC received in the last year and how the existing copyright framework was able to address the concerns of the enquirer.

3. The history and theory - the exclusive rights of the copyright owner

Exclusive rights allow the rightsholder to exploit their rights in relation to a copyright work 'to the exclusion of all other persons'.[5]

The Act divides protection of copyright material into two parts – Part III works and Part IV subject matter other than works.

The first owner of the copyright in Part III works is the author,[6] and for Part IV works (except for published editions where it is the publisher), it is the maker.[7]

Part III[8] works include:

- **literary works** such as journal articles, novels, screenplays, poems, song lyrics, computer programs and compilations
- **artistic works** such as paintings, drawings, cartoons, sculpture, craft work, architectural plans, buildings, photographs, maps and plans
- **dramatic works** such as choreography, screenplays, plays and mime pieces, and
- **musical works**, that is, the music itself, separately from lyrics.

Part IV[9] works include:

- **cinematograph films** - the visual images and sounds in a film, video or DVD are protected separately from any copyright in works recorded on the film or video, such as scripts and music

[4] See Appendix 3.
[5] *Copyright Act 1968* (Cth) s 10 (**Copyright Act**) in reference to exclusive licences. References are to the Copyright Act unless otherwise specified.
[6] s 35.
[7] ss 97-100AE.
[8] ss 31-83.
[9] ss 84-113C.

- **sound recordings -** the actual recording itself is protected by copyright, in addition and separate to, for example, the music or story that is recorded
- **broadcasts** - TV and radio broadcasts, separate from the copyright in the films, music and other material broadcast, and
- **published editions** - the typographical arrangements, is protected separately from the copyright in works reproduced in the edition such as poems or illustrations or music.

Owners of **Part III works** enjoy the follow exclusive rights:[10]

literary, dramatic or musical works	• reproduce the work in a material form • publish the work • perform the work in public • communicate the work to the public, and • make an adaptation of the work.
artistic works	• reproduce the work in a material form • publish the work • communicate the work to the public
literary works (other than a computer programs), musical or dramatic works	• to enter into a commercial rental arrangement of the work reproduced in a sound recording
computer programs	• to enter into a commercial rental arrangement.

Whilst owners of **Part IV subject matter other than works** have the right to:

sound recordings[11]	• make a copy • cause the recording to be heard in public • communicate the recording to the public, and • enter into a commercial rental arrangement the recording
cinematograph films[12]	• make a copy of the film • cause the film to be seen and/or heard in public, and • communicate the film to the public.
television and sound broadcasts[13]	• for television broadcasts visual images - to make a film of the broadcast, or a copy of the filmed broadcast; • for sound broadcasts, or the sounds of television broadcast - to make a sound recording of the broadcast, or a copy of the sound recording, and • for television and sound broadcasts - to re-broadcast it or communicate it to the public otherwise than by broadcasting it.
published editions of works[14]	• a facsimile copy of the edition

[10] s 31.
[11] s 85.
[12] s 86.
[13] s 87.
[14] s 88.

So, Part IV material has generally fewer rights and fewer exceptions. This reflects Australia's international obligations[15] but also that the commercial exploitation of Part IV subject matter other than works, is different to Part III.

The ownership of copyright material, and therefore of the exclusive rights comprised in the copyright, can be transferred as a result of employment contracts or commercial assignments. Exclusive rights are extinguished at the end of the term of copyright protection (unless there is a contractual provision to end them sooner).

Globally, copyright, and the grant of exclusive rights, is underpinned by two fundamentally different value systems: natural law and social utility.[16]

Natural law considers that the author's act of creating a work warrants the granting of a property right to protect it. In contrast, copyright, as considered from a social utilitarian perspective, benefits society economically and culturally because it encourages the creation of works, which are valuable commodities in society.[17]

3.1 Justifying exclusive rights: natural law

Natural law theories consider that copyright law recognises what already exists following the act of creating a work.[18] That is, the act of creation justifies the granting of exclusive rights[19] because 'a person has a natural property right in the creations of his *(sic)* mind.'[20] The creator is central in these justifications for the grant of exclusive rights. This sentiment is also expressed in the Universal Declaration of Human Rights which states that '[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which *(sic)* is the author.'[21]

The influence of natural law justifications for copyright is more prominent in civil European systems, for example France, whose Intellectual Property Code opens with the following statement regarding copyright:

> The author of a work of the mind enjoys over this work, by the sole fact of his *(sic)* creation, an exclusive right of intangible property and enforceable against all.[22]

3.2 Justifying exclusive rights: social utility

This system looks to the 'overall welfare of society constitut[ing] the centre of gravity'; copyright protection and any limitations must be shown to benefit society.[23] Without the grant of exclusive

[15] See Appendix 3.
[16] Martin R. F. Senftleben, *Copyright, Limitations and the Three-Step Test. An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International, 2004) 6 (**Senftleben**).
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Staniforth Ricketson, *The Law of Intellectual Property* (The Law Book Company Limited, 3rd ed, 1988) p 6 (***The Law of Intellectual Property***)
[21] Universal Declaration of Human Rights | United Nations art 27(2).
[22] *Code de la propriété intellectuelle* [Intellectual Property Code] (France) art L111-1.
[23] Senftleben (n 16) 13.

rights to the copyright owner, there is less incentive for creators to create as they are not assured a stable return for their expenditure of time and effort.[24]

The World Intellectual Property Organisation (**WIPO**) in its 2013 Economic Research Working Paper stated that the absence of assurance of a stable return for a creator's time and effort was a 'market failure' which the introduction of a copyright system remedied.[25] Exclusive rights to copyright mean creators receive rewards for their efforts and so are incentivised to create more works and the supply of cultural work to society is guaranteed. This is ensured in two ways:

(i) as creators are incentivised to create the quality, quantity and diversity of material, society is improved,[26] and
(ii) by introducing appropriate exceptions to exclusive rights to grant essential access to copyright works.

3.2.1 How do exclusive rights encourage creators to create?

An important incentivising factor in copyright law is the certainty of reward for effort afforded to creators. Their rights are protected by law.[27] In this way, copyright echoes the historical development of the concepts of private property where 'a high level of productivity depend[ed] on arrangements which assure to every labourer a predictable amount of the fruits of his labour'.[28] This is discussed further in the Australian context at **3.3 Australia's position – the balance: history and policy.**

Exclusive rights also allow the copyright owner control over the work at an economic level.[29] An owner can control how and when their work is reproduced, communicated, adapted or translated, which allows them to generate profit. Such control is an expression of the right to exclude others from one's property, which is fundamental to ownership of private property. As such, an owner's control over their work is a justification for the exclusive rights of copyright itself; to permit owners of copyright only non-exclusive rights would be in direct opposition to the rights of owners of real property. Furthermore, a copyright system that operates on the grant of exclusive rights generates the marketplace where works are to be traded: not only does it establish the 'general rules' for their trade, it also transforms them into 'economic goods' which are more profitable to trade in.[30] This is because the demand for such goods outweigh the supply.[31]

3.2.2 How is social utility generated within a copyright system?

As suggested above, the logical consequence of more people in a society creating works is that the quality, quantity and diversity of such works will be increased and will result in significant

[24] Senftleben (n 16) 13; Sacha Wunsch-Vincent, 'The Economics of Copyright and the Internet: Moving to an Empirical Assessment Relevant in the Digital Era', (Working Paper No 9, World Intellectual Property Organisation, 2013) 2 (**WIPO Working Paper No 9**).
[25] Ibid.
[26] Ibid.
[27] *The Law of Intellectual Property* (n 20*)* 7.
[28] Senftleben (n 16) 13.
[29] WIPO Working Paper No 9 (n 24) 2-3.
[30] World Intellectual Property Organisation, *Guide on Surveying the Economic Contribution of the Copyright Industries* (2015) (**WIPO Guide 2015)** [73].
[31] Ibid [82]-[94].

cultural benefits for that society.[32] A 'considerable national asset' is created.[33] Benefits to a society are also provided by exceptions to the exclusive rights of owners that exist in copyright systems. This is discussed below at **4. The theory of exceptions in copyright law**.

3.3 Australia's position – the balance: history and policy

As an Anglo-American copyright system (as opposed to a European civil copyright system), Australia's copyright law leans heavily on the utilitarian justification for exclusive rights to owners. In the 2018 Copyright Modernisation Consultation Paper (**Modernisation Paper**), the then Department of Arts and Communications outlined that the Australian intellectual property system, of which copyright in part, should be effective and efficient, in that,

> [t]he system should be effective in encouraging additional ideas and in providing incentives that ensure knowledge is disseminated through the economy and community' and that '[t]he system should provide incentives for IP to be created at the lowest cost for society.[34]

However, *reward for use* of copyright material and *reward as incentive* to create, are different. The function of copyright law should provide not only a safeguard for creators to ensure that they receive 'just reward for the benefit [they have bestowed on the community'[35] but also 'to encourage the making of further creative works'.[36]

Establishing a system that benefits Australian society economically and culturally is a clear objective. However, it is misleading to consider only the economic and cultural benefits rationale for exclusive rights as Australia's national law and international obligations demonstrate a regard for the natural law justifications as well. The introduction of moral rights protections in 2000 is one such example.

Moral rights were introduced to recognise that a work is an extension of a creator's personality and, as such, both the work and the creator's relationship to the work must be acknowledged and respected.[37]

Moral rights are personal rights, as distinct from the economic rights. Moral rights remain with the creator of a work even after the exclusive rights to the work's copyright are transferred. This system reflects a more author-centric perspective of copyright law.
On an international level, Australia's ratification[38] of the Berne Convention for the Protection of Literary and Artistic Works (1886) (**Berne Convention**)[39], shows an endorsement of natural law theories as part of the foundation for copyright protection in Australia, as the preamble highlights

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[32] WIPO Working Paper No 9 (n 24) 2; *The Law of Intellectual Property* (n 20) 7.
[33] Stephen M. Stewart, *International Copyright and Neighbouring Rights* (Butterworths & Co (Publishers) Ltd, 2nd ed, 1989) 3 (***International Copyright and Neighbouring Rights***).
[34] Department of Communication and the Arts, 'Copyright Modernisation Consultation Paper' (March 2018) 5 (**Modernisation Paper**), quoting Commonwealth, 'Australian Government Response to the Productivity Commission's Inquiry into Intellectual Property Arrangements' (2017) (**Government's Response to the Productivity Commission**) 3.
[35] Attorney-General Copyright Law Review Committee, Parliament of Australia, '*Consider What Alterations are Desirable in the Copyright Law of the Commonwealth'* (1959) (**The Spicer Report**) [13].
[36] Ibid.
[37] Australian Copyright Council *Moral Rights* (June 2014) 3, referencing S. Ricketson, *The Law of Intellectual Property: Copyright, Designs & Confidential Information,* LBC Information Services, 1999, at [10.0].
[38] Australia joined the Berne Convention on 14 April 1928. See WIPO-Lex, *WIPO-Administered Treaties*.
[39] *The Berne Convention,* opened for signature 1886, 828 UNTS 223 (entered into force 14 April 1928) (**Berne Convention**)

the rights of authors: '[t]he countries of the Union, being equally animated by the desire to protect…the rights of authors'.

Australian copyright law seeks to balance the interests of copyright owners with the interests of consumers of copyright material. In the Second Reading Speech for the Copyright Amendment (Digital Agenda) Bill 2000, Senator Ian Campbell stated

> The central aim of this bill, therefore, is to ensure that copyright law continues to provide incentives for the creation and production of content in the digital environment whilst at the same time, allowing reasonable online access by students, teachers, researchers, libraries, schools, universities, galleries and museums.[40]

It is the 'reasonable online access' which is key and, the ACC says, this access must be properly remunerated.

4. The theory of exceptions in copyright law

Internationally, several broad themes have emerged as general bases for justifying exceptions to the exclusive rights granted to owners of copyright. The guarantee of freedom of expression, including its corollary right to receive information, the right to privacy, education, religious activities, prevention of interference with the judicial, legislative and executive functions of a state, and the regulation of industry practice and competition are, and have been, strong reasons for exceptions to a copyright owner's exclusive rights to be introduced.[41]

It is important to consider how the two theories underlying the grant of exclusive rights present different perspectives on the role of copyright exceptions and therefore how the reason(s) justifying an exception would be utilised in different copyright systems.

4.1 How does a natural law approach affect the introduction of exceptions?

In a strictly natural law perspective, copyright encompasses 'broad exclusive rights' which 'encompass all conceivable ways of using a work'.[42] An exception in this conception of copyright law must possess a justification (such as the right to privacy or education) strong enough to warrant a derogation of a 'theoretically all-embracing right'.[43] Ricketson and Creswell describe such justification as 'unusual or extraordinary circumstances, with the onus being upon those seeking the exception, to establish their case in the clearest and most unambiguous way.'[44]

4.2 How does a social utility approach affect the introduction of exceptions?

In a utilitarian model, both copyright protection and the limitation of that protection must be justified by reference to the expected utility conferred on society by the protection or limitation.

In a copyright framework such as Australia's, as creators must demonstrate that protecting their interests will benefit Australian society as a whole (as opposed to protection being assumed as a

[40] Commonwealth, *Parliamentary Debates,* House of Representatives, 28 June 2000, 1624-5 (Ian Campbell) (**2000 Second Reading Speech**).
[41] Senftleben (n 16) 22.
[42] Ibid.
[43] Ibid.
[44] Lawbook Co, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, vol 2 (at Service 98) [11.5]

result of their creative process), protection is therefore restricted to those benefiting interests. So limitations, are often broader and more flexible while the protections themselves are more limited. For example, the exclusive rights afforded under the Act are described as 'limited monopoly privileges' by the ALRC,[45] and the fair dealing exceptions broader and more flexible to allow the maximum benefit to society. is because the balancing act between the interests of creators in being able to control and exploit their work and interests of users to be able to access copyright material is tempered with considerations of social utility on both sides.

Because exclusive rights must possess social utility to exist under a utilitarian model, when they are perceived to impinge on freedom of expression or industry practice for example, not only are there considerations strengthening the arguments to limit the exclusive rights for that reason, there is an undermining of the justification for the grant of the exclusive rights themselves.

Exclusive rights are therefore more vulnerable to limitation in copyright systems like those in Australia and the USA and the interests of creators are often lost amongst the primacy of considerations of social utility and benefit.[46]

An example of where the Australian copyright framework seeks to balance these interests is the statutory licensing scheme.

The statutory licences are a key element of the Australian copyright framework in that they support broad use with limited compliance costs and ensure creators are properly compensated. 'Statutory licences restrict the ability of a copyright owner to exclude others from making certain uses of their copyright material, but recognise the right of the copyright owner to be remunerated for that use'.[47] So, statutory licences provide compensation to creators for the lost opportunity to be able to negotiate their own terms; remuneration for the 'forced taking' or compulsory acquisition from the copyright owner.[48] 'Free' exceptions are necessarily more limited and require more compliance, because the 'unreasonable prejudice' is not offset by any compensation.

So, the continued use of statutory licences and the prevention of other exceptions (such as the flexible exception contained in s 200AB and the performance and communication of works and subject matter during educational instruction in s 28) from circumventing their use, is crucial to safeguard the appropriate balance of competing interests in Australian copyright law and to ensure Australia respects its international obligations in relation to exceptions.

5. Australia's international obligations - exceptions

Australia is a party to a number of international conventions.[49] For the purposes of this submission, the focus is on the Berne Convention (**Berne**).

Australia became a party to Berne in 1928.[50]

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[45] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Final Report*, Report No 129 (2016) p 123 [4.236].
[46] See for example the ALRC's recommendation for the introduction of a fair use exception, Australian Law Reform Commission, *Copyright and the Digital Economy,* Report No 122 (2014) pp 123-159.
[47] Australian Copyright Council, Submission No 654 to Australian Law Reform Commission, *Copyright and the Digital Economy Discussion Paper* (July 2013) 4-5 (**ACC Digital Economy Submission**).
[48] S. Ricketson and C. Creswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* LBC Information Services, 1999 - (loose-leaf), [12].
[49] See Appendix 2 of this paper.
[50] WIPO Treaties (n 38). WIPO-Lex (n 38).

5.1 Article 9(2) of the Berne Convention and Australia's obligations

In this context, Article 9(2) of the Berne Convention mandates the threshold to be met by any proposed copyright exception:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

While this article only applies to the reproduction right, following the TRIPs Agreement[51], it was extended to all exclusive rights:

> Members shall confine limitations or exceptions to exclusive rights to *certain special cases* which *do not conflict with a normal exploitation of the work* and *do not unreasonably prejudice the legitimate interests of the right holder*.[52] (*emphasis added*)

The 'three step test' is the 'central plank underlying exceptions to copyright in international law' and is 'the prism through which all exceptions need to be viewed.'[53]

5.1.1 'in certain special cases':

This phrase has two elements: 'certain' and 'special'.

'Certain' indicates that 'the use in question must be for quite a specific purpose: a broad kind of exemption would not be justified.'[54]

Ricketson notes that 'any exception that is made under this provision should be clearly defined and should be narrow in its scope and reach.'[55]

5.1.2 provided that such reproduction does 'not conflict with a normal exploitation of the work'

There is no guidance in Berne as to the definition of 'normal exploitation'. The Report of the Main Committee states that photocopying of a 'very large number of copies' for a particular purpose, as an example of a use that would conflict with the normal exploitation of a work.[56]

In addition to existing uses of a work, a consideration of potential uses which are of 'considerable or practical importance' must also be done in evaluating normal exploitation.[57]

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[51] *Agreement on the Trade-Related Aspects of Intellectual Property Rights,* opened for signature 15 April 1994, 1869 UNTS 299 (**TRIPS**). See Appendix 3.
[52] Ibid art 13.
[53] ACC Digital Economy Submission (n 47) 8, quoting Professor Sam Ricketson as the leading international scholar on the three-step test. See for example, Sam Ricketson, *The Berne Conversion for the Protection of Literary and Artistic Works 1886-1986* (International Bureau of Intellectual Property, 1987) (**Ricketson, The Berne Convention**).
[54] Ibid.
[55] Ibid 31.
[56] Ibid 37.
[57] Ibid.

These considerations must be dynamic to allow for changes in technology for example, such that it may 'possible that an exception may come into conflict with a normal exploitation as technology and circumstance of use change.'[58]

5.1.3 does 'not unreasonably prejudice the legitimate interests of the author'

Ricketson notes that this element is premised on the assumption that *any* exception would prejudice the author's interests[59] and can only be considered after the first two elements 'have been satisfied.'[60]

The standard of 'unreasonably prejudice' is meant to be determined by national laws and remains a flexible standard.[61] Ricketson's analysis is that the three step test was intended to allow either absolute exceptions or compulsory licences, 'depending essentially on the number of copies made.'[62]

Therefore as a party to Berne, any exceptions that are enacted in Australia's national law must comply with the three step test. Any proposed reforms, including those suggested in the DITRDC paper must therefore be:

- a certain special case,
- that does not conflict with the normal exploitation of the work, and
- that does not unreasonably prejudice the legitimate interests of the copyright owner.

Article 9(2) does not affect the operation of other specific exceptions in Berne: Articles 2*bis*(2),10 and 10*bis*.[63]

6. Other exceptions in international law

6.1 Article 2*bis* Berne Convention

This article allows for exceptions to copyright to be drafted into national laws in respect of political speeches, speeches delivered in the course of legal proceedings, and lectures, addresses and other works of the same nature which are delivered in public.[64]

This is in line with the public interest in having such material freely available.

6.2 Article 10 Berne Convention

Exceptions for quotations and illustrations for teaching are provided for in this article.

Article 10(1) states:

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and

[58] Ibid.
[59] Ricketson, The Berne Convention (n 53) 483.
[60] Sam Ricketson, *The three-step test, deemed quantities, libraries and closed exceptions* (Centre for Copyright Studies Ltd, 2002) (**Ricketson Paper)** 41.
[61] Ricketson, The Berne Convention*:* (n 53) 484.
[62] Ibid.
[63] Ibid 482.
[64] **Berne Convention** art 2*bis.*

> their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

Three limitations on the quotation exception are imposed by the Berne Convention:

(i) the work must have been lawfully published
(ii) the quotation must be 'compatible with fair practice'. WIPO notes that the consideration of fairness is the responsibility of national courts.[65]
(iii) the use must be 'justified by the purpose' – which will also be determined by national courts and influenced by the specific national legislation.[66]

Article 10(2) provides:

> It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

While there is no explicit requirement for works to be published under Article 10(2), the other two conditions from article 10(1) also apply.

Where use is made of works in accordance with article 10(1) or 10(2), the source must be acknowledged and the author's name provided (if known from the source).[67]

6.3 Article 10bis Berne Convention

Article 10*bis* contains two exceptions to copyright:

> (1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.
>
> (2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

Both are of 'great importance' to the news media industries.[68]

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[65] World Intellectual Property Organisation, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (Guide 1978) 59 (**WIPO Guide**)
[66] Ibid.
[67] Berne Convention art 10(3).
[68] WIPO Guide (n 65) 61.

In relation to article 10*bis*(1), the adoption of the exception by countries is optional and if it is adopted, any reservations of creators must be respected.[69]

Article 10*bis*(2) contains two important protections to ensure that the exception is not abused:

(i) the work must be 'seen or heard in the course of the event' so preventing later additions of works such as an overlay of music or spoken poetry, and
(ii) 'the extent of the inclusion must be justified for the informatory purpose.'[70] That is, news coverage of a music concert cannot justify the reproduction of the whole of the artist's musical work for the purpose of covering the concert: an extract is enough.

The two subsections afford different 'latitudes' to national laws.[71] Article 10*bis*(1) allows them to 'permit the reproduction,' while article 10*bis*(2) states nations may 'determine the conditions'. The latter allows national legislation to permit abiding use of copyright material without the consent of the copyright owner(s) being obtained,[72] or remuneration being paid to them.[73]

7. History of exceptions in the Copyright Act

The history of the Copyright Act's development can be seen in the timeline in Appendix 3 of this submission.

This submission focusses on the exceptions which are affected by the DITRIC paper namely the:

- fair dealing exceptions
- the libraries exceptions: ss 49(5A), 47H, 49, 50, 51 & 110A, and
- the education exceptions: s 28 & s 200AB.

7.1 History of the fair dealing exceptions

The fair dealing exceptions with respect to literary, dramatic, musical and other artistic works are located in *Copyright Act 1968* (Cth) Part III ss 40-43. The fair dealing exceptions for subject matters other than works are in Part IV ss 103A-104.

The following key amendments have been made to these exceptions during the history of the Act.

Copyright Act 1968 **(Cth)**	• The inclusion of the fair dealing exceptions for the purposes of research or private study, criticism or review and reporting news.[74] • Only applied to Part III works.[75]
Copyright Amendment Act 1980 **(Cth)**	• Section 40 fair dealing exception for the purposes of research or private study amended by: ○ removing the word 'private'[76]

[69] Ibid.
[70] WIPO Guide (n 65) 63.
[71] Ibid.
[72] Ibid.
[73] *International Copyright and Neighbouring Rights* (n33) 127
[74] *Copyright Act* as in force 1968-1973 ss 40-42.
[75] Ibid.
[76] Ricketson, *The Law of Intellectual Property* 242.

	○ by the addition of subsection (2) which provides factors that the court must consider in deciding whether there is 'fair dealing', subsections (3)-(4) which deem certain dealings to be fair.[77] • Section 43 - reproduction for the purposes of judicial proceedings amended with the addition of subsection (2) which provides that a fair dealing with a Part III work is not infringement of the copyright in the work if it is for the purpose of giving professional advice by a legal practitioner or patent attorney.[78]
***Copyright Amendment Act 1986* (Cth)**	• Introduced s 41, the exceptions of fair dealing for the purpose of criticism or review and for the purpose of reporting news with respect to any 'audio-visual item'.[79] The new exceptions were intended to 'extend fair dealing into the audio-visual area'.[80] • Section 100A was also inserted into the Act which defines 'audio-visual item' as a sound recording, cinematograph film or a sound or television broadcast, [81] for the purposes of the new audio-visual fair dealing exceptions.[82]
***Copyright Amendment Act 1989* (Cth)**	• Section 103C exception of fair dealing for the purpose of research or study with respect to audio-visual items was introduced.[83] • Section 40 - fair dealing for the purpose of research or study with respect to Part III works amended by the addition of subsection (1A) which provides that a fair dealing with a literary work other than lecture notes does not infringe copyright if it is for the purpose of an approved course of study or research by an enrolled external student of an educational institution.[84]
***Copyright Amendment (Digital Agenda) Act 2000* (Cth)**	• The aim of this Act was to ensure that copyright law facilitates creative endeavours and production in an online context, while also ensuring reasonable online access for users including schools, universities, researchers and cultural institutions.[85] • Section 40 fair dealing exception for the purpose of research or study with respect to Part III works amended. • The definition of 'reasonable portion' in relation to deemed fair dealings under this exception amended to extend to published literary and dramatic works in electronic form.[86] • The purpose of the amendment was to ensure that the reasonable portion test applies to literary and dramatic works in an online as well as offline context.[87] The amendment does not apply to a literary work that is a computer program or database or musical works.[88]

[77] Ricketson, *The Law of Intellectual Property* p 243.
[78] Ricketson, *The Law of Intellectual Property* p 247.
[79] Explanatory Memorandum, Copyright Amendment Bill 1986 (Cth) 14 (**1986 Explanatory Memorandum**)
[80] Ibid.
[81] Ibid 13-14.
[82] Ibid.
[83] *Copyright Amendment Act 1989* (Cth) s 12 (**1989 Amendment**) s 12
[84] Ibid cl 6.
[85] **2000 Second Reading Speech** (n 40) 1624-5
[86] Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth) 28 (**1999 Explanatory Memorandum**).
[87] Ibid.
[88] Ibid.

Copyright Amendment Act 2006 **(Cth)**	• Introduction of exception of fair dealing for the purpose of parody or satire for both Part III works (s 41A) and Part IV subject matter (s 103AA).[89] The government's aim in introducing this exception was to facilitate free speech and 'Australia's fine tradition of satire' by ensuring that comedians and cartoonists can use copyright material for parody or satire.[90] • The Act also amended the exception of fair dealing for the purpose of research or study by clarifying what amounts to a 'reasonable portion' in respect of deemed fair dealings (s 40(5)).[91] The purpose of this amendment was to clarify and increase certainty in the application of this exception.[92]

7.2 The history of the educational statutory licence

The provisions regarding the statutory licence for educational institutions are located in Part IVA Division 4 of the Act. The following key amendments have been made to these provisions during the history of the Act:

Copyright Amendment Act 1980 **(Cth)**	The statutory licence for copying by educational institutions was introduced following the Report of the Copyright Law Committee on Reprographic Reproduction (**the Franki Committee**)[93] in 1976.[94] The use of copyright materials by educational institutions, and the value of the educational statutory licence, have been the subject of many court and Copyright Tribunal decisions. The statutory licence provides a balance between the needs of educational institutions to have access to copyright material, and the needs of the copyright owners to be remunerated for that use.
Copyright Amendment Act 1989 **(Cth)**	• The previous provisions regarding the statutory licence were repealed and provisions for a new statutory licensing scheme were inserted. • The key difference in the new scheme was that institutions could choose to participate on the basis of sampling or actual materials copied as determined by full record-keeping.[95] • The amendments also provided for a statutory licence allowing educational institutions to make copies of radio or TV broadcasts.

[89] *Copyright Amendment Act 2006* (Cth) ss 9A-9B (**2006 Amendment**).
[90] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 2006, 2 (Philip Ruddock).
[91] Explanatory Memorandum, *Copyright Amendment Act 2006* (Cth) 112 **(2006 Explanatory Memorandum**).
[92] Ibid.
[93] Copyright Law Committee, Report on Reprographic Reproduction (1976) (**the Franki Report**)
[94] Commonwealth, *Parliamentary Debates,* House of Representatives, 9 September 1980, Second Reading Speech 1010- 1013 (Robert Viner) **Copyright Amendment Bill 1980**
[95] 1986 Explanatory Memorandum (n 83).

***Copyright Amendment (Digital Agenda) Act 2000* (Cth)**	• Extension of the statutory licence for educational institutions to cover electronic copying, reproduction and communication of copyright material to students for educational purposes.[96] • One of the objects of this Act was to ensure that educational institutions can access copyright material online on reasonable terms taking into account the advantages of public access and payment of adequate remuneration to copyright owners.[97] The government considered such exceptions to be 'vital to promoting innovation in the information economy' and key to facilitating the development of online learning opportunities.[98]
***Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth)**	• This Act repealed the previous statutory licence provisions and introduced the educational statutory licence in its current form in Part IVA Division 4. • The amendments enable negotiation between collecting societies and educational institutions regarding the amount of equitable remuneration to be paid by educational institutions and removed the record-keeping obligations of the previous scheme. • The changes also facilitated the use of copyright material in examinations provided online.[99] • The amendments reflected a consensus between the education sector and copyright owners, and were intended to simplify the educational statutory licence, provide more flexibility for negotiation between educational institutions and collecting societies and reduce burdensome record-keeping requirements.[100]

7.3 The history of s 200AB

The exception in s 200AB enables libraries, archives and educational institutions to use copyright material if the Berne three-step test is satisfied:

(i) that the circumstances of the use amount to a special case
(ii) the use does not conflict with a normal exploitation of the copyright material, and
(iii) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.

This exception was introduced by the *Copyright Amendment Act 2006* (Cth) and was intended to 'enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties'.[101]

[96] 1999 Explanatory Memorandum (n 90).
[97] *Copyright Amendment (Digital Agenda) Act 2000* (Cth) s 3(d) (**2000 Amendment**).
[98] 2000 Second Reading Speech (n 40).
[99] Explanatory Memorandum **Copyright Amendment (Disability Access and Other Measures) Bill 2017** 32; Copyright Act s 200(1A).
[100] Ibid 8.
[101] 2006 Explanatory Memorandum (n 91) [6.54]

7.3.1 'Special case'

The reference to 'special case' is to ensure that uses are narrow both quantitatively as well as qualitatively.[102]

7.3.2 'Normal exploitation of the work'

To avail themselves of s 200AB, a user must ensure that by using the copyright material, they do not enter into 'economic competition' with the copyright owner 'depriving copyright holders of significant or tangible commercial gains.' In addition, 'forms of exploitation which, with a certain degree of likelihood, could acquire considerable economic or practical importance may also be considered.[103]

7.3.3 'Unreasonably prejudice the legitimate interests of the copyright owner'

The legitimate interests include both economic and non-economic interests of the copyright owner.[104]

The requirement that the use not unreasonably prejudice the legitimate interests of the owner of the copyright appears in the statutory licence (s 113P(d)) and in s 200AB. The policy underpinning the statutory licence, since the Franki Committee Report, has been to acknowledge that large scale use of copyright material by educational institutions, without remuneration, *does* prejudice those interests.

Currently, s 200AB will *not* apply if the use is not an infringement of copyright because of the operation of another provision of the Act (ie. an existing free exception, or a statutory licence). By removing this provision, the entitlement of copyright owners to remuneration for use at scale in the education sector is also removed. It seems logical that the interests of copyright owners will be prejudiced as a result, contrary to Australia's Berne obligations.

7.4 The history of s 28

The original 1968 Copyright Act included s 28, a 'free use' exception for the performance of works in the course of education instruction.[105] It stated:

> Where a literary, dramatic or musical work
>
> (a) is performed in class, or otherwise in the presence of an audience; and
> (b) is so performed by a teacher in the course of his giving educational instruction, not being instruction given for profit, or by a student in the course of his receiving such instruction,
>
> the performance shall, for the purposes of this Act, be deemed not to be a performance in public if the audience is limited to persons who are taking part in the instruction or are otherwise directly connected with the place where the instruction is given.

[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Copyright Act as at 1968 s 28.

By virtue of s 28(4), the exception was extended to the use of sound recordings and cinematograph films.

In 2006, three subsections were inserted into s 28 which deemed certain types of *communications* of works and subject matter other than works *not* to be 'a communication to the public'.[106]

'The policy underpinning s 28 is that performances of copyright materials in the classroom, to students in the course of instruction, should not give rise to a right of remuneration for the copyright owner.'[107] This is because they are deemed not to be 'in public'. The exception is a narrow one, and on its face is directed towards the performance of copyright works as part of teaching, not about the dissemination of copyright works as learning materials. That dissemination is the subject of the statutory licence, and voluntary licences where required. It should be noted that performances and communications that are not in or to the public, are not acts comprised in the copyright in works. Extending the operation of s 28 to the dissemination of copyright materials, would effectively extinguish the copyright in those works for classroom use. The ACC is concerned about the impact that this would have on the creation and publication of Australian educational material.

8. The copyright reviews

To provide current context, the history of copyright reviews in Australia can be seen in Appendix 3. For the purposes of this paper, reference is made to the two significant ones of the last 5 years:

- the 2015 Productivity Commission inquiry into Intellectual Property Arrangements, and
- the 2018 Copyright Modernisation consultation.

We look at the proposed reforms, in the context of these two inquiries, where relevant.

8.1 Productivity Commission

In October 2015, the government asked the Productivity Commission to undertake a public inquiry into the Australian intellectual property legislative framework, including copyright.[108]

The Productivity Commission released its final report on 20 December 2016,[109] making a number of recommendations that are relevant to the current proposed copyright reforms including:

- Recommendation 5.1 – dealing with contracting out of the Act's exceptions
- Recommendation 6.1 – regarding fair use, and
- Recommendation 6.2 – orphan works.

8.2 Copyright Modernisation consultation

In March 2018, the then, Department of Communication and the Arts, in marking 50 years since the enactment of the Copyright Act, sought to consult on the Productivity Commission's 2016 Final Report following the government's August 2017 response[110] to the final report.

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[106] 2006 Amendment (n 93) Sch 8(1B)
[107] 2006 Explanatory Memorandum (n 101) 131.
[108] Productivity Commission, 'Intellectual Property Arrangements' (September 2016) (**Productivity Commission Report**). See also Productivity Commission, 'The Issues Paper'.
[109] Ibid.
[110] Government's Response to the Productivity Commission (n 34).

Submissions were sought on, among other things, Recommendations 5.1, 6.1 and 6.2 of the Productivity Commission's 2016 Final Report.

Part 2 - the proposed access measures

Measure 1: Orphan works limited liability scheme

9. Orphan works

9.1 DITRDC proposal

The DITRDC proposal outlines the establishment of a limited liability scheme which allows all uses (including commercial use) of all copyright material where:[111]

- the copyright owner cannot be identified or contacted after a reasonably 'diligent search' has been undertaken within a 'reasonable period before, or as soon as practicable after, use', and
- the creator has been 'clearly attributed' if it is 'reasonably practicable'.

It is not clear how a user is able to identify a work as being an orphan work if the 'reasonably diligent search' is conducted after the use. This concern was addressed in the DITRDC feedback paper.[112]

The proposed scheme is problematic for reasons including:

- where the 'identity of the copyright owner/s becomes known to the user:
  - the user:
  - will not be liable for past use
  - will be able to continue to use the work upon 'reasonable terms' as agreed with the copyright owner. If there is no agreement, the parties may go to the Copyright Tribunal.

- if the user fails to comply with agreed terms, the copyright owner may 'seek an injunction against future use of their copyright material (but not to prevent the use of an entire new work developed in good faith using excerpts or whole parts of their material).'
- the educational institutions and governments statutory licences will not apply to their use of orphan works.

As a result of a copyright owner's inability to prevent future use, the scheme becomes a quasi-compulsory licence for which a copyright owner cannot seek payment for past use.

9.2 Productivity Commission

The introduction of such a schedule was flagged by the Government in its response[113] to the Productivity Commission's recommendation:[114]

[111] DITRIC paper (n 3) 10.
[112] Ibid 2.
[113] Government's Response to the Productivity Commission (n 34) 7.
[114] Ibid 7.

6.2 The Australian Government should enact the Australian Law Reform Commission recommendations to limit liability for the use of orphan works, where a user has undertaken a diligent search to locate the relevant rights holder.

The ALRC recommendation[115] was however, a limitation on remedies (as opposed to a limitation on liability):

Recommendation 13-1
The Copyright Act should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:

(a) a reasonably diligent search for the rights holder had been conducted and the rights holder had not been found; and
(b) as far as reasonably possible, the user of the work has clearly attributed it to the author.

Recommendation 13-2
The Copyright Act should provide that, in determining whether a reasonably diligent search was conducted, regard may be had to, among other things:

(a) the nature of the copyright material;
(b) how and by whom the search was conducted;
(c) the search technologies, databases and registers available at the time; and
(d) any guidelines, protocols or industry practices about conducting diligent searches available at the time.

9.3 Copyright modernisation consultation

The Copyright modernisation consultation paper then asked for submissions in answer to the following questions in relation to orphans works:

Question 5: To what extent do you support each option and why?

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

Question 6: In terms of limitations of remedies for the use of orphan works, what do you consider is the best way to limited 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.

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?

[115] ALRC Report 122, *Copyright and the Digital Economy Final Report* (November 2013) 16.

9.4 ACC's position

In relation to orphan works, the ACC's previous submissions were, and remain, that before further consultation on legislative amendments occurs, other non-legislative options should be explored, and that a specific fair dealing exception for orphan works is unnecessary and inconsistent with the principle that a work can no longer be considered orphaned once 'found'.[116]

The Australian system already protects orphan works in some respects. Orphan works are caught within all exceptions under the *Copyright Act*, including fair dealing defences and s 200AB, and are subject to statutory licences and other blanket licensing arrangements.[117] The ACC also believes that legal disputes in relation to orphan works are rare where appropriate risk management strategies are adopted and 'found' owners are responded to.[118]

In the ACC's view, liability for the use of orphan works is further limited by the following:

- limitations of actions legislation, where relevant;
- the informal resolution of concerns raised by the owners of works believed to be orphaned will result in, if dealt with quickly:
  - an aggrieved creator/owner acting in an unreasonable manner in relation to compensation facing the risk of significant costs penalties if they pursue the matter by way of formal proceedings not having accepted any reasonable offers; and
  - little to no risk of injunctive proceedings being sought (given that there may be nothing to injunct);
- the damages principles established by, for instance, s 115 of the Act which effectively prevent the likelihood of undue or inflated compensation; and
- the fact that all works will enter the public domain eventually.[119]

The ACC refers to its previous submissions on the structure of any orphan works law reform; that the focus of any scheme should be on a limitation of remedies and that such limitations should only apply[120]:

56.3.1 to non-commercial uses of orphan works (a distinction made in, for example, the UK scheme);

56.3.2 to certain designated organisations engaged in, to adopt the words of the ALRC, 'socially productive uses of orphan works';

56.3.3 in a way that still allows for 'reasonable compensation' to be paid (equivalent to any standard fees in the relevant industry), noting that that even the relevant European Union Directive requires fair compensation to be paid for prior uses once a rightsholder puts an end to orphan works status;

56.3.4 following further consultation as to the factors (i.e. steps) that need to be taken before the limited liability protections might apply – that is, what might constitute a

[116] Australian Copyright Council, *Submission in Response to the Copyright Modernisation Consultation Paper* (July 2018) [56] (**ACC 2018 Modernisation Submission**).
[117] Ibid [54-55].
[118] Ibid [55].
[119] Ibid [55.4].
[120] Ibid [56.4].

reasonably diligent search – with the ALRC's recommendations being used as a starting point, namely:

(1) the nature of the copyright material;
(2) how and by whom the search was conducted;
(3) the search technologies, databases and registers available at the time; and
(4) any guidelines, protocols or industry practices about conducting diligent searches available at the time;

but with further appropriate factors drawn from consultation, including:

(5) the size of the audience to which the orphan work may have been distributed;
(6) the purpose of the use; and
(7) the provision of a sufficient acknowledgment in the circumstances, that is, an appropriate level of information that may in the future assist in locating the rightsholder.[121]

If reforms are to be introduced, it should be expressly stated that the limitation of liability will cease to apply once the owner of an orphan work is identified. It should also restrict 'downstream' uses of the material by subsequent individuals/entities of that material. The ACC also submits that a provision similar to s 132APC which restricts the circumvention of an access control technology protection measure, should be included in the reforms to make it unlawful to remove metadata on electronic publications.

9.5 ACC example

A school sought advice to photograph the art on sheet music dating from 1900- 1970 for the purposes of advertising an external event.

Given that the reproduction fell outside educational purposes and so outside the statutory licence, the question was one where each artistic work had to be looked at on a case by case basis.

Whilst the ACC routinely advises members of the general public on orphan works[122], it is rare for the ACC to advise educational institutions in relation to orphan works use for educational purposes as educational institutions are covered by the statutory licence which cover orphan works. If a given situation is truly one of an orphan work (often it is one that is actually in the public domain), the ACC advocates a risk management approach.

The 'Flexibility where a work is urgently needed' example outlined in the DITRDC feedback paper[123] would seem to be such a rare – indeed, unlikely - situation that a stand-alone scheme to address it is not warranted.

The ACC is not aware of any situation where a person's wellbeing has been at risk and the use of an orphan work in a broadcast ahead of a search, has been necessary to protect that person. Indeed, it is difficult to imagine such a situation, and the ACC asks that more information about that

[121] Ibid [56.3].
[122] The ACC produces a fact sheet 'Orphan Works' available at www.copyright.org.au
[123] DITRDC paper (n 3) 2.

example be shared so that it can be properly responded to. Materials that describe lifesaving methods are readily available and their provenance and licensing arrangements are clear. If a copyright owner were to sue over unauthorised use in such circumstances, the ACC would expect damages would be non-existent or minimal and costs consequences would follow.

Measure 2: Quotation fair dealing exception

10. Fair dealing exception for non-commercial quotation

The DITRDC paper outlines a 'new quotation fair dealing exception' to 'support intellectual commentary and public interest or personal research'.[124] The key themes noted in the DITRDC feedback paper, highlight the concern that the proposed exception may operate 'more like a fair use exception'. [125]

Whilst we understand that 'fair use' per se is not being explicitly considered as part of the current reforms, particularly in light of Minister Fletcher's public statement:[126]

> Some argue for a more flexible approach, including a US style fair use approach. However, I am concerned that such an approach would bring greater ambiguity or uncertainty, impose additional time and cost burdens on both users and copyright owners and lead to either increased litigation or, alternatively, risk averse behaviour by users - with the result that content is not used. In my view, there is a better case for more specific and targeted reforms

it is discussed however, in the context of a number of proposed reforms.

10.1 Productivity Commission

In recommendation 6.1, the Productivity Commission recommended that the government implement a fair use exception in Australian.

The government in response[127], resolved to consult further.

10.2 Copyright modernisation consultation

In relation to this recommendation, the Copyright modernisation consultation paper asked for submissions in answer to the following questions:

> **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?
>
> **Question 2:** What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

[124] DITRIC paper (n 3) 2.
[125] Ibid 3.
[126] Hon. Paul Fletcher MP, 'Speech to the Australian Digital Alliance: Copyright in 2020', (Speech, Digital Alliance, 6 March 2020)
[127] Government's Response to Productivity Commission (n 34) 7.

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums (**GLAM**).

10.3 ACC's position

10.3.1 Fair use

The ACC has made several public submissions outlining its opposition to fair use.[128] Among ACC's concerns[129] are:

- attempts to 'moderate all competing copyright interests with a 'one size fits all' solution, a fair use doctrine will necessarily introduce significant legal uncertainty into the Australian legal system';
- the notion of fairness should also involve predictability. The less specific the drafting of a defence or exception, the less certainty involved in the applicability of that exception in preference to relying on a licence;
- it would be unwise to simply import a section from an American statute in the context of the Australian experience and legal system, noting that Australian courts are not bound to follow American decisions; and
- there is a stronger likelihood that a broad fair use exception will allow those in breach to simply claim 'fair use' thereby placing an even greater onus on rightsholders to litigate.

Section 200AB and the GLAM proposals are discussed at **11. Libraries and archives and 12. Education exceptions reforms** of this submission**.**

10.3.2 Fair dealing exception for non-commercial quotation

The ACC reiterates its submissions on the topic of a fair dealing exception for non-commercial quotation, especially that,

> [t]he only basis for such a defence would seem to be for authorising, on an unremunerated basis, the use of a substantial part (or a work in its entirety) in situations not already covered by the significant protections applicable to quotations in many instances.[130]

Under the current legislation, there are numerous avenues for users to use 'quotations' of works, including:

- where an appropriate licence eg. statutory licence or other voluntary licence, is obtained;
- where the fair dealing is for the purpose of:
  - criticism and review (in which the concept of quotation is already inherent, and in certain instances even substantial quotes may be caught within the terms of the defence);
  - reporting news;

[128] See, for example, the following ACC submissions: *Submission to the Australian Law Reform Commission: Response to Copyright and the Digital Economy Discussion Paper* (July 2013); *Submission in Response to Productivity Commission Draft Report on Intellectual Property Arrangements* (June 2016); *Submission to Government in Response to the Productivity Commission Final Report* (February 2017) and the ACC 2018 Modernisation submission (n 116).
[129] ACC 2018 Modernisation submission (n 116) [6].
[130] ACC 2018 Modernisation submission (n 116) [16].

- parody or satire; or
- research or study.

There may also be other instances of significant quotation including:

- incidental use of artistic works in broadcasts;
- the use of a quotation which is less than a 'substantial part' of the work or other subject matter; and
- ways to refer to works or other subject matter without reproducing aspects of the works eg. by way of descriptions or synopses.[131]

Other key considerations suggest that a fair dealing quotation defence should not be introduced include:

(i) where necessary, policy decisions may be made by rightsholders that allow for quotation of copyright material, where needed.

Examples of this include the 2016 policy decision of the Australian Publishers Association that 'its members should allow their book covers to be used by libraries to promote library programs, library collections and connect readers with books and authors' as an example of how quotation of copyright material could occur without fear of infringement and without a fair dealing quotation exception.[132]

(ii) as a result of the inherent nature of different copyright material and the different uses such material is put to, 'a specific quotation defence may work better for some types of copyright material than others.'[133]

Literary works are best suited to a quotation defence but how would 'quotation' operate for artistic works?[134] In addition, licensing models exist for quotation of other copyright material such as music and film sampling.[135]

The ACC repeats its submission that the concept of 'substantial part' would be a more appropriate vehicle to address the competing interests than a specific quotation exception.[136]

In addition, the ACC says that any amendments must carefully define 'quotation' to provide adequate protection for creators, which may be balanced against freedom of expression.[137] It re-states its suggestion to ensure this balance is appropriately addressed:

- first, define quotation as an 'extract' relied upon for certain defined intents (although further consultation would be required to ascertain appropriate intents); and
- second, introduce appropriate fairness factors.[138]

As stated previously,

[131] Ibid [13].
[132] ACC 2018 Modernisation submission (n 116) [14].
[133] Ibid [15].
[134] Ibid [15].
[135] Ibid.
[136] Ibid.
[137] Ibid [17].
[138] Ibid.

> … ascertaining the *purpose* for which a quotation might be used is central to ascertaining the appropriateness of amending this legislation. The exceptions allowed above are purposive in nature, and all inherently allow quotations to be used for pre-defined and socially approved purposes.[139]

The ACC considers that fairness factors should be informed by the three-step test outlined in the Berne Convention.[140] Fairness would not be achieved if:

(i) the use of a quotation is covered by the offering of a licence that would be unreasonable to decline;
(ii) the dealing involves the reproduction of a work as a whole. This cannot be a true quotation. It would also significantly undermine copyright protections for items such as photographs, paintings, and other artistic works, as well as other short written works such as short poems, prose, and song lyrics;
(iii) there is a failure to sufficiently acknowledge the creators; and
(iv) the dealing involves a commercial purpose where it would therefore be appropriate to seek a commercial licence (even, for example, the use of thumbnails and book covers featuring artistic works).141

General fairness considerations are open to interpretation and there is a real possibility that the absence of specific factors will be interpreted as there being no burden to consider them. The following factors should be used as a starting point and applied stringently:[142]

(i) the purpose and character of the dealing
(ii) the nature of the work or other subject matter
(iii) the possibility of obtaining the work or other subject matter within a reasonable time at an ordinary commercial price
(iv) the effect of the dealing upon the potential market for, or value of, the work or other subject matter, and
(v) the amount and substantiality of the part copied taken in relation to the whole work or other subject matter.

Of the specific factors above, the ACC notes that (i),(ii), (iv) and (v) are listed as factors to be considered in the DITRIC summary.

The ACC emphasises the danger of a fair dealing quotation defence, 'will introduce further unremunerated and unlicensed use of creators' works'.[143]

The ACC emphasises its conclusion on a fair dealing quotation defence as stated in its previous submissions that if such a defence were to be introduced that it:

> 23.1 … be restricted to carefully defined purposes identified by further consultation;
> 23.2 … :
> 23.2.1 [be] consistent with Article 10 of the Berne Convention, extend to:
> (1) works only; and

[139] Ibid [18].
[140] Ibid [19]. See also this submission at **5. Australia's international obligations – exceptions.**
[141] ACC 2018 Modernisation submission (n 116) [20].
[142] Ibid [22].
[143] Ibid [21].

(2) only works which have already been lawfully made available to the public;

23.2.2 apply to use of extracts only (never the entirety of a work) used for a pre-defined purpose, and where no more is used than necessary to achieve that purpose;

23.2.3 specifically require sufficient acknowledgment of the source and author of a work unless there are reasonable grounds for not doing so;

23.2.4 be subject to the five fairness considerations set out in the Act in relation to research or study; and

23.2.5 include a presumption against the use of the defence where a licence is available, which is rebuttable where there are reasonable grounds for not doing so.[144]

10.4 ACC example

A PHD student completed their thesis and wanted to make it commercially available as a book. It contained hundreds of quotes.

The threshold question for each of these quotes under current law would be whether each quote is a substantial part of the quoted work.

The next question would be whether even if substantial, it falls within one of the existing fair dealing exemptions – in this case criticism and review is most likely to be relevant (the student having presumably availed themselves of the research and study exception in preparation of the thesis).

The introduction of fair dealing exception for non-commercial quotation would not serve in this instance. This use would fail the commerciality test.

It is not clear how the introduction of a new quotation will ameliorate the need to make the threshold assessment of substantially and consideration of the fairness factors[145] . Further, the delineation between non-fiction works and other works appears to add a layer of unnecessary complication, and its policy basis is unclear.

Measure 3: Libraries and archives exceptions reforms

11. Libraries and archives

11.1 Online access to collection materials

Section 49(5A) of the Act permits libraries and archives that have acquired published material in digital form eg. an eBook or an article from the internet, to make that material available online to clients within the library premises. This provision only applies to Part III works.

[144] Ibid [23].
[145] DITRDC paper (n 3) 3.

11.1.1 The DITRDC paper

The DITRDC paper outlines that s 49 is to be extended to 'all types of copyright materials (including audio-visual and unpublished materials, and whether in electronic form or physical form that requires digitisation), and for online access either at or outside the premises.'[146] This is provided that:

- it is not inconsistent with licences in place
- where it is a physical material to be digitised – an electronic copy of the material cannot be obtained 'a reasonable time at an ordinary commercial price for this purpose,' and
- 'reasonable steps' are taken to mitigate against copyright infringement in accessing the material.

'Reasonable steps' are said to include:[147]

- measures to limit access to registered members with password protection
- being available for a limited time and for viewing only, and
- other appropriate protections to prevent infringement such as water marks or offering lower quality resolution copies, together with an appropriate attribution to the author and copyright notice.

Amendments are also proposed which would enable libraries and archives to make preservation and research copies available to be accessed online, at the library or archive or offsite.[148]

11.1.2 Productivity Commission & Copyright modernisation

The Productivity Commission and Copyright modernisation consultation discussion of libraries is outlined under **11.2 'Contracting out'.**

11.1.3 ACC's position

Libraries and archives already 'have specific exceptions that entitle them to copy and communicate material in their collections for clients and other libraries', 'enable them to use material for preservation, research, and administrative purposes', and 'will not be held liable for 'authorising' copyright infringement on their copying machines, so long as they have warning notices in place near copying equipment.'[149]

The exceptions for collecting institutions allow them to use copyright material for preservation purposes, original copyright material in their collection for research purposes, and copyright material for administration of the collection.[150]

Further, the safe harbour provisions in Division 2AA of Part V of the Act have been extended to libraries and archives by virtue of s 116ABA. A body administering a library is deemed a service provider if 'all or part of the collection comprising the library is accessible to members of the public directly or through interlibrary loans' or the library's principal purposes is 'to provide library services

[146] Ibid
[147] Ibid.
[148] This is currently limited to libraries/archives premises under ss 113H & 113J.
[149] ACC 2018 Modernisation submission (n 116) [39].
[150] Ibid [40].

for members of a Parliament'.[151] Similarly, bodies administering archives, key cultural institutions or an educational institution are deemed service providers. The remedies available against these bodies in instances of copyright infringement that relate to the carrying out of certain online activities are limited, if the statutory conditions are met.[152]

To purport to conflate and extend Part III and Part IV exceptions[153] may risk non-compliance with Berne's three step test.[154]

11.2 'Contracting out'

11.2.1 DITRDC proposal

The DITRDC proposal outlines for the 'Clarification around 'contracting out' of exceptions.'

11.2.2 Productivity Commission

The Productivity Commission recommended:

> **Recommendation 5.1** The Australian Government should amend the Copyright Act 1968 (Cth) to:
> - make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception
> - permit consumers to circumvent technological protection measures for legitimate uses of copyright material.

The Government stated that it supported this recommendation in principle saying:

> The Government recognises the inefficiencies and uncertainty that can arise from agreements which seek to exclude or restrict legal copyright exceptions and wants to ensure that statutory rights to fairly deal with copyright material are protected.
>
> As outlined by the Productivity Commission, a move to restrict contracting out of exceptions is likely to have little effect if technological protection measures (TPMs) are unilaterally used to override exceptions.[155]

11.2.3 Copyright modernisation consultation

In relation to this recommendation, the Copyright modernisation consultation paper asked for submissions in answer to the following questions:

> **Question 3:** Which current and proposed copyright exceptions should be protected against contracting out?

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[151] Copyright Act s 116ABA.
[152] Ibid s 116AA.
[153] See **3. The history and theory - the exclusive rights of the copyright owner** in this submission.
[154] See **5.1 Article 9(2) of the Berne Convention and Australia's obligations** in this submission and further **11.3.2 ACC's position**
[155] Government's Response to Productivity Commission (n 34) p 4.

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?

11.2.4 ACC's position

It has long been the position of the **ACC** that:

- there is no need for any copyright exceptions to be protected against contracting out, especially in light of the framework of Australian contract and consumer law;
- as Australia is a net importer of copyright material, it is unlikely that the governing law of such contracts will be Australian; and
- contracting amendments are likely to create uncertainty in transactions involving copyright.[156]

The ACC has said:

> 45.1 While certain contracting out prohibitions have already been enacted in the area of consumer protection – and with good reason – introducing such prohibitions in the area of copyright law, where creators more often than not have limited bargaining power, will further weaken a creator's ability to seek meaningful value and control consistent with the intended purpose of the Act and the long-standing principle that individuals have a freedom to contract (subject to countervailing public policy grounds);
>
> 45.2 Noting the intent of the Copyright Modernisation Review, there should be an acknowledgment that, particularly in an increasingly digital and cross-jurisdictional marketplace, it is fundamental to business that contracts can be freely entered into. Contracting out restrictions could impact on some start-up tech companies who may benefit from flexible licensing arrangements, and introduce uncertainty that causes harm (by way of expense, complexity or otherwise) to not only creators, but all parties involved in the transaction;
>
> 45.3 The three-step test underpinning copyright exceptions in international law may not be complied with if contracting out prohibitions conflict with the normal exploitation of a creator's work(s); and
>
> 45.4 Irrespective of the arguments in favour of prohibiting contracting out of copyright exceptions, there are bound to be clear situations where contracting out provisions should not be invalidated. For instance, it would seem non-sensical to allow exceptions to the use of copyright material in breach of non-disclosure or confidentiality, especially where access to that content was only granted on that basis.[157]

[156] ACC 2018 Modernisation submission (n 116) [44].
[157] Ibid [45].

11.3 Extension of inter-library/user request supply provisions

11.3.1 DITRDC paper

The DITRDC paper proposes that sections 49, 50, 51 and 110A be extended to allow libraries and archives to fulfil supply requests from the general public for copies of collection items in a variety of formats, including photographs, maps, posters and oral histories for 'private and domestic use', and seeks to remove the obligations and sanctions in the Act's client-supply provisions.

The DITRDC paper suggests that supply for private and domestic use will, like the current supply for research and study, be subject to a uniform 'commercial availability' test where more than a 'reasonable portion' is requested (unless the request is for an article contained in a periodical publication or the request is made by a parliamentary library, which are currently not subject to the commercial availability test), and provision of a copyright notice.[158]

11.3.2 ACC's position

The proposal to include all copyright material (that is works *and* subject matter other than works) is problematic for a number of reasons and any changes must be sure to prohibit collecting bodies' ability to become 'quasi-streaming or e-book services'.[159] Owners of copyright material cannot be in a position where the reproduction and communication by libraries undermine plans for exploitation in other formats where the material isn't currently available in that format.

11.3.2.1.1 Expansion of client supply provisions to include 'private and domestic use'

It is assumed that the definition of 'private and domestic use' in the proposed changes, will continue to be defined as 'private and domestic use on or off domestic premises'.[160] What is actually 'private and domestic use' however, will need to be clarified according to reasonableness principles.

The ACC notes that are already exceptions in the Act which allow for copying for private use – the 'format shifting' provisions. These allow for the copying of material provided that the owner makes the copy and from an original, non-infringing copy.[161]

Thought should be given to how the proposed expansion of the client supply exceptions will sit in relation to these existing exceptions. For example, section 109A allows the copying of sound recordings for private and domestic use. However, these copies may only be made by someone who already owns a copy of the sound recording.

It is likely that the proposals will also impact the scope of section 113J. Currently, this section only allows for copies of original material made by the library to be used at the library/archive premises, or another library/archive, and if an electronic research copy has been made, that electronic copy can only be accessed at the library.

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[158] DITRDC paper (n 3) 4.
[159] Ibid
[160] Copyright Act s 10.
[161] See Copyright Act s 43C for books, newspapers and periodicals, s 47J for photographs, s109A for sound recordings, s 110AA for films and s 111 broadcasts.

11.3.2.1.2 Removal of record keeping obligations and sanctions for breaching those obligations

The DITRDC paper provides that that if the client supply exceptions are to be extended to include supply for 'private and domestic use', the person requesting the copy must make a statement to the effect that they require the copy for the purpose of research or study, or for a private and domestic purpose, and that they will not use the copy for any other purpose.[162]

The ACC notes that this seems to be in conflict with the proposal to remove the obligation for libraries and archives to make and keep any declarations under section 49 and 50.[163]

The ACC supports the view that the obligations to obtain declarations remain to provide as much safeguard for copyright owners as possible.

11.3.3 ACC example

A library sought to copy a DVD which was no longer commercially available for a client.

As s 49 is limited to works, the library could not copy it under that section for this purpose. In the absence of obtaining permission directly from the copyright owner, this is a situation where s 200AB could arguably be invoked subject to the following factors:

- there was no other exception available to make the copy
- the purpose being for maintaining or operating the library
- the use was non-commercial,
- the use did not conflict with normal exploitation – that is, could a copy be purchased? The answer in this situation being, no.

The ACC further advised that whilst there was no requirement under s 200AB to mark the copy, it would be prudent to do so.

So, notwithstanding ss 49 & 50 being restricted to works, the current regime amply enables libraries to supply and users to obtain material.

Measure 4: Education exceptions reforms

12. Education exceptions reforms[164]

The DITRDC proposal seeks to amend s 28:

(i) to widen its application to:
  (a) to all copyright material, and
  (b) to any mode of presenting, displaying or otherwise causing material to be seen or heard in a class, through any means of technology,

[162] DITRDC paper (n 3) 5.
[163] Ibid.
[164] Ibid 6.

(ii) to permit the 'incidental' copying of copyright material where it is made to facilitate a s 28 performance or communication.
(iii) to confirm that external and remote teaching falls within the section provided that, ''reasonable steps' are taken to limit access to copyright material',
(iv) to permit people other than teachers and students before whom the performance can take place, to include other persons involved in the student's education or welfare eg. family.

In relation to s 200AB, it is proposed that the limitations of the section under subsections 200AB(6) and (6AA) be removed[165].

12.1 Productivity Commission

The Productivity Commission did not explicitly deal with either s 28 or s 200AB.

12.2 Copyright modernisation consultation

The Copyright modernisation consultation paper asked,

Question 2

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

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

12.3 ACC's position

Education is a central consideration in international copyright law and is one of the oldest policy reasons for exceptions to the exclusive rights of copyright owners.[166] The ACC recognises the many reasons behind this importance, most fundamentally because the Australian educational sector complements and bolsters the creative sector.[167]

The educational sector is currently able to use three exceptions in the course of providing their usual educational services:

(i) reproduction
(ii) communication, and
(iii) public performance.[168]

12.3.1 Educational use existing framework

Currently, 'there are broad statutory licence regimes in place in Australia that provide certain protections to educational facilities',[169] which enable 'different types of content and use to be valued differently'.[170]

[165] Ibid 7.
[166] Senftleben (n 16) 23.
[167] ACC 2018 Modernisation submission (n 116) [34].
[168] Ibid [36].
[169] Ibid [35.1].
[170] Including being valued at "zero"; Ibid [35.2].

In addition to the statutory licence regime, educational institutions and organisations have access to direct licensing arrangements.

Public performances of literary, dramatic and musical works, and sound recordings and cinematograph films shown in a class setting for an educational purpose are permitted under s 28.

As long as its criteria are met, s 200AB is also likely to apply to many instances of use within education institutions.

In addition to the comprehensive legal framework, in the ACC's experience, there is little practical need for an expansion of education statutory licensing scheme. The ACC rarely advises the education sector that use is not allowed by one of the exceptions outlined above, and if it does, these uses are usually non-educational uses such as showing films as fundraisers or publishing certain content online.[171]

The ACC does not support the broadening of s 28 nor the removal of the s 200AB limitations. The amendments are unnecessary in light of the present statutory framework and extensive voluntary negotiated licences The changes will undermine the statutory licence schemes which are bolstered by further flexibility for educational institutions in the Act such as included in ss 28 and 200AB.[172]

The changes will also undermine commercial arrangements between copyright owners and educational institutions. These changes will have a harmful impact on copyright owners' ability to earn income, and are likely to result in the reduced production of quality published Australian educational materials.

The ACC makes the following submissions in relation to any changes to the educational use framework:

(i) the ACC believes that s 200AB does not currently prevent the education sector from working with industry groups, for example, for the purpose of furthering education instruction, as subsection (3) covers a use that 'is made or on behalf of a body administering an education institution.'[173]

(ii) it must be explicit in any amendment, that any change is not intended to replace the remunerated licensing of copyright material for educational purposes.[174] At the least, there should be a presumption against the use of the defence where a licence is available, which may be rebuttable where there are reasonable grounds for not doing so.[175]

(iii) any changes should be limited to 'educational institutions' rather than for 'educational purposes'.[176] To use the latter would extend the unremunerated use of copyright material significantly.

(iv) the five fairness considerations set out in s 40(2) the Act in relation to research or study should also apply to such an exception.

[171] Ibid [37].
[172] Also mentioned in the ACC 2018 Modernisation submission (n 116) [38.1].
[173] Ibid [38.3] and [38.4.1].
[174] See also, ACC 2018 Modernisation submission (n 116) [38.4.2].
[175] Ibid [38.4.2].
[176] Ibid [38.4.3].

To frame the 'the broad ambit of the statutory licence' as *inhibiting* educational institutions' reliance on s 200AB is to misunderstand the original intention of the provision.[177] By its very nature, the section is to be used in a special case, where no other exceptions or arrangements apply.

12.4 ACC example

During the initial stages of COVID, the ACC received many email requests for information including educational institutions. The ACC worked with affiliates to provide standard, current information.[178] There were no follow up requests for legal advice following the sharing of the information.

13. New exception for use of freely available materials

It is proposed that a new exception be introduced allowing the use by educational institutions, libraries, archives and governments of 'freely available materials' where:[179]

- the educational institution, library, archives or government has a 'reasonable expectation' that the material is lawfully freely made available to the public for dissemination and communication
- the use is for the educational institution, library, archives or government's purposes
- the use is not made partly for the purpose of obtaining a commercial advantage or profit, and
- if it is reasonably practicable, the copyright material has been clearly attributed to the author.

13.1 Productivity Commission

The issue of freely available online material was discussed by the Productivity Commission, in the context of the introduction of a fair use scheme.[180]

13.2 Copyright modernisation consultation

This was not explicitly canvassed in the modernisation paper.

13.3 ACC's position

The ACC notes that the use is proposed to be for the purposes of the educational institution, library, archives or government rather than specific purposes as outlined in existing fair dealing exceptions for example, 'educational purposes'. This will result in a significantly broader ambit of use.

The ACC generally advises that just because something is 'freely available' on the internet does not mean it is free to use. Many items available on the internet are placed there without the licence of the copyright owner; many others have express licence terms attached; and while communicating copyright material without licence terms may be ill advised, it cannot act to extinguish a copyright owner's rights.

[177] DITRDC paper (n 3) 7.
[178] Available on the ACC website at Covid and Copyright.
[179] DITRIC paper (n 3) 8.
[180] See the summary Intellectual Property Arrangements (n108) 28.

The policy underpinning this proposal can only be to dilute the remuneration payable under the statutory licence.

Currently, if the statutory licence applies to a use, s 200AB cannot. The proposal to repeal sub-section 6 of s 200AB would mean that the statutory licence would be relegated to the 'safety net' after all other avenues had been exhausted. This is a complete departure from the findings of the Franki Committee, and a long way from the policy objectives of the existing legislation.

This change, if implemented, would result in a greater burden being placed on those who teach using copyright materials, to ensure that the materials being used are 'freely available' rather than have the peace of mind that they are covered under statutory licence while copyright owners are appropriately remunerated. This proposal does not facilitate access (the statutory licence already achieves that); its only consequence is the reduction of remuneration for copyright owners. The statutory licence regimes do not inhibit educational institutions – they actually provide protection to them,[181] and enable 'different types of content and use to be valued differently'.[182]

13.4 ACC example

Although the ACC routinely advises people and organisations on the idea of 'freely available' vs free to use, we do not generally advise educational institutions in this space, as they have the security of having the statutory licence in place and therefore do not need to check each use.

Measure 5: Changes to government statutory licensing scheme

14. Government statutory licensing

The proposed reforms include:[183]

- the broadening of the licensing arrangements under section 183A to include 'communication' and 'performance' (visual or aural presentation) of copyright materials.
- the removal of the:
  - requirement for sampling surveys to be conducted to determine 'equitable remuneration' (section 183A),
  - requirements relating to payment arrangements (section 183B) and
  - related sampling/inspection powers (section 183C).
- giving governments 'the option of dealing directly with copyright owners even if the use of copyright material falls within the scope of the collective licensing arrangements'.
- confirming that the statutory licence does not apply where copyright material is used by a government under an exception in the Act or would not otherwise constitute an infringement of copyright.

14.1 Productivity Commission

The Productivity Commission made no specific recommendation in relation to government licensing.[184]

[181] ACC 2018 Modernisation submission (n 116) [35.1].
[182] Including being valued at "zero"; Ibid [35.2].
[183] DITRIC paper (n 3) 10.
[184] Intellectual Property Arrangements (n108) 162.

14.2 Copyright modernisation consultation

The modernisation review looked that the widening of permitted government use of material either under the introduction of additional fair dealing exceptions or under fair use, where the use is of 'a public interest nature' and the material not commercially available eg. use in public enquiries.[185]

14.3 ACC's position

The Copyright Act already affords governments privileges in relation to the use of copyright works as governments 'are entitled to rely on very wide-ranging exceptions to copyright infringement compared to other copyright users'[186] giving them the ability to 'become owners of copyright in circumstances where others would not.'[187]

This provides governments with significant bargaining power when it comes to dealing with copyright owners, including collecting societies.
Even though the Act currently requires governments in such situations to notify copyright owners as soon as possible after the use, this is subject to a 'public interest' caveat. In situations where copyright owners are notified and appropriate remuneration is not agreed, their only recourse is the Copyright Tribunal, which is often seen as an uncertain and expensive process for most Australian creators.[188]

The government statutory licence is subject to no restrictions other than the requirement to notify and pay. The ACC does not understand the need for the proposed amendments, noting that the Copyright Tribunal has jurisdiction over the remuneration payable under the licence.

Conclusion

Thank you for considering the terms of this paper. If the Department requires further information, please let us know.

Eileen Camilleri
Chief Executive Officer
Australian Copyright Council

2 March 2020

[185] Modernisation Paper (n 34) 10.
[186] Note, the very wide definition of "for the services of the Commonwealth or a State" in s 183 of the Act.
[187] ACC 2018 Modernisation submission (n 116) [10].
[188] ACC 2018 Modernisation submission (n 116) [11].

Appendix 1

AFFILIATES OF THE ACC

as at 2 March 2021

As at the date of this response, the Australian Copyright Council members are:

1. Aboriginal Artists Agency Ltd
2. APRA|AMCOS
3. Ausdance National
4. Australia New Zealand Screen Association
5. Australasian Music Publishers Association Ltd
6. Australian Cinematographers Society
7. Australian Directors Guild
8. Australian Guild of Screen Composers
9. Australian Institute of Architects
10. Australian Institute of Professional Photography
11. Australian Music Centre
12. Australian Photographic Judges Association
13. Australian Publishers Association
14. Australian Recording Industry Association
15. Australian Screen Directors Authorship Collecting Society Limited
16. Australian Society of Authors
17. Australian Society of Travel Writers
18. Australian Writers Guild
19. Authentic Design Alliance
20. Christian Copyright Licensing International
21. Copyright Agency
22. Design Institute of Australia
23. Media Entertainment & Arts Alliance
24. Musicians Union of Australia
25. National Association for the Visual Arts
26. National Tertiary Education Union
27. Phonographic Performance Company of Australia
28. Illustrators Australia
29. Screen Producers Australia
30. Screenrights

Appendix 2

ACC Guidelines

A core part of the Australian Copyright Council's (ACC) activities is our free written legal advice service. This unique service is targeted primarily to those working in the creative industries and members of our affiliate organisations. Staff members of the organisations listed below are also eligible:

- educational institutions
- arts and cultural organisations
- libraries
- museums
- galleries
- archives.

Appendix 3
Australian Copyright Legislation timeline[189]

Year	Inquiry/report	ACC Submission	Legislative change*	Major changes	International
1905			Copyright Act 1905		
1912			Copyright Act 1912		
1928				Australia joins the Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
1959	Spicer Committee: review of Australia's copyright law				
1968			Copyright Act 1968	• Rights for film producers, broadcasters and publishers • Rights for most copyright owners over broadcasting and cable transmission • Establishment of the Copyright Tribunal to determine disputes relating to certain licence schemes • Additional non-infringing uses by educational institutions and libraries • Rights in relation to false attribution	
1969			Copyright Act 1968 in force		
1976	Report of the Copyright Law			Photocopying	

[189] Based on Copyright Agency, Copyright Timeline (Web Page Copyright Timeline - Copyright Agency at https://www.copyright.com.au/archive-about-copyright/copyright-timeline/

Year	Inquiry/report	ACC Submission	Legislative change*	Major changes	International
	Committee on Reprographic Reproduction, October, 1976.				
1980			Copyright Amendment Act 1980	• New exceptions allowing photocopying by educational institutions, subject to payment • New exceptions for libraries	
1983			Copyright Amendment Act 1983		
1984	CLRC: meaning of 'publication'		Copyright Amendment Act 1984	• Copyright protection for computer programs	
1985	CLRC: Churches				
1986			Copyright Amendment Act 1986		
1987	• CLRC: Performers' rights				
1988	• CLRC: Importation • CLRC: Moral Rights				
1989			Copyright Amendment Act 1989	• Recording of TV and radio programs by educational institutions, subject to payment • Rights for performers regarding recording and broadcasting of live performances	
1990	• CLRC: Conversion damages • PSA: book prices				

Year	Inquiry/report	ACC Submission	Legislative change*	Major changes	International
1991			Copyright Amendment Act 1991	Some parallel importing of books allowed	
1992				Australia accedes to 1961 Rome Convention	Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations
1993			Copyright Amendment (Re-Enactment) Act 1993		
1994	• CLRC: Journalists • CCG: Highways to Change			• Rental right for sound recordings and computer programs established	
			Copyright (World Trade Organization Amendments) Act 1994		GATT[190]/TRIPS[191]
1995	• CLRC: Computer software • Simpson: collecting societies				

[190] General Agreement on Tariffs https://verdragenbank.overheid.nl/en/Treaty/Details/006960.html
[191] Agreement on Trade-Related Aspects of Intellectual Property Rights https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

Year	Inquiry/report	ACC Submission	Legislative change*	Major changes	International
1996					WIPO 'internet' treaties
1998	CLRC: Simplification of the Copyright Act Part 1		• Copyright Amendment Act (No. 1) 1998 • Copyright Amendment Act (No. 2) 1998	• Parallel importation of sound recordings (CDs) allowed	
1999	• CLRC: Simplification of the Copyright Act Part 1 • NCC: s51(3) of TPA		Copyright Amendment (Computer Programs) Act 1999	• New non-infringing uses of computer programs, including decompilation to produce an interoperable product	
2000	• CLRC: Copyright Tribunal • IPCRC: IP and competition		• Copyright Amendment (Digital Agenda) Act 2000 • Copyright Amendment (Moral Rights) Act 2000	• Right of communication to the public established • Educational institutions and libraries allowed to make certain uses of digitised material • Prohibition against circumvention of technological protection measures and encrypted broadcasts • Prohibitions against tampering with rights management information • Regulation of Internet service provider liability for infringements by their clients • Moral rights for copyright authors established	
2002	• CLRC: Copyright and Contract • Myer Committee: report on visual arts and crafts				

Year	Inquiry/report	ACC Submission	Legislative change*	Major changes	International
2003			Copyright Amendment (Parallel Importation) Act 2003	• Parallel importation of items containing computer games or electronic literary/musical material etc. allowed	
2004	• Phillip Fox: Digital Agenda review • JSCT review of AUSFTA • Senate Committee review of AUSFTA • Department for the Arts: resale royalty discussion paper		• US Free Trade Agreement Implementation Act 2004 • Copyright Legislation Amendment Act 2004		Australia–US Free Trade Agreement
2005	• CLRC: Crown copyright • AGD: fair use	Submission to HSCLCA on Inquiry into Technological Protection Measures exceptions	Copyright Amendment (Film Directors' Rights) Act 2005	• Extension of the terms of copyright protection from 50 to 70 years after author's death • Extended performers' rights • Film directors' entitlement to receive share of retransmission income	
2006	LACA: technological protection measures		Copyright Amendment Act 2006 (Cth)	• New exceptions for time-shifting, format-shifting and space-shifting for private use • New fair dealing exception for parody or satire • New exceptions for educational institutions, libraries, galleries and museums • Prohibitions on circumventing technological protection measures and encrypted broadcasts extended • Criminal penalties for copyright infringement extended	

Year	Inquiry/report	ACC Submission	Legislative change*	Major changes	International
2007	Department of the Arts Discussion Paper on Legal Deposit				
2008	• Cutler: review of Australia's innovation system • CMC: Building a creative innovation economy				
2009	• Government 2.0 Taskforce • PC: parallel importation of books • Government White Paper on Innovation • Department of Communications: Digital Economy Future Directions	• Submission on Resale Royalty Right for Visual Artists Bill 2008 • Submission to Productivity Commission on Parallel Importation of Books	Resale Royalty Right for Visual Artists Act 2009		
2010	• PC: Bilateral and Regional Trade Agreements		Convergence Review submission		
2011	• BISG report				
2012	• Department of Communications: Convergence Review				WIPO Beijing Treaty on Audio-visual Performances

Year	Inquiry/report	ACC Submission	Legislative change*	Major changes	International
	• Consultation Paper Extending Legal Deposit				
2013	• National Cultural Policy • BICC report • ALRC report: Copyright and the Digital Economy report				WIPO 'Marrakesh' treaty for visually impaired
2014	• AGD: Online Copyright Infringement Discussion Paper	• Submission to Marrakesh Treaty Implementation Options Paper			
2015	PC: Intellectual Property Arrangements	• Submission in Response to PC Issues Paper on IP Arrangements • Submission in Response to the Final Report of the Competition Policy Review	Copyright (Online Infringement) Act 2015	• New provisions for site-blocking of overseas websites that have the primary purpose of infringing copyright	
2016		Comments on Exposure Draft of Copyright Amendment (Disability and Other Measures) Bill			

Year	Inquiry/report	ACC Submission	Legislative change*	Major changes	International
2017		Submission in Response to Review into Efficacy of Copyright Collecting Society Code of Conduct	Copyright Amendment (Disability Access and Other Measures) Act 2017	• New exceptions for disability access and libraries and archives • New framework for educational statutory licensing	
2018	• Copyright Modernisation Consultation Paper • Review of the Copyright Online Infringement Amendment • Consultation Paper – Exposure Draft - Copyright Amendment (Service Providers) Regulations 2018 • Roundtable on Incidental and Technical Uses of Copyright	• Submission in Response to CMCP • Submission in Response to Review of Copyright Online Infringement Amendment • Submission in Response to Copyright Amendment (Service Providers) Regulations 2018 • Submission in Response to Review of Copyright Collecting Societies Code • Submission in Response to ACCC Draft Copyright Guidelines to assist	• Copyright Amendment (Online Infringement) Act 2018 • Copyright Amendment (Service Providers) Act 2018		

Year	Inquiry/report	ACC Submission	Legislative change*	Major changes	International
		Copyright Tribunal in Determination of Copyright Renumeration			
2019	• Review of the Code of Conduct for Australian Copyright Collecting Societies • ACCC Guidelines to Assist the Copyright Tribunal in the Determination of Copyright Remuneration			• Changes in duration of copyright for unpublished works	
2020	Copyright Access reforms announced			Reforms announced including the introduction of: • broadened exceptions for libraries and educational institutions • limited liability orphan works scheme	

* comprehensive list of amendments in *Copyright Act, 1968* (Cth) Endnote 3: Legislative History

ACRONYMS

AGD	Attorney General's Department
ALRC	Australian Law Reform Commission
AUSFTA	Australia-US Free Trade Agreement
BICC	Book Industry Collaborative Council
BISG	Book Industry Strategy Group
CCG	Copyright Convergence Group
CLRC	Copyright Law Review Committee
CMC	Cultural Ministers Council
GATT	General Agreement on Tariffs and Trade
IPCRC	Intellectual Property and Competition Review Committee
JSCT	Joint Standing Committee on Treaties
LACA	House of Representatives Legal and Constitutional Affairs Committee
NCC	National Competition Council
PC	Productivity Commission
PSA	Prices Surveillance Authority
TRIPS	Trade Related Aspects of Intellectual Property
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Appendix 2

AFFILIATES OF THE ACC -

as at 25 February 2022

As at the date of this response, the Australian Copyright Council members are:

Aboriginal Artists Agency Ltd

APRA|AMCOS

Ausdance National

Australia New Zealand Screen Association

Australasian Music Publishers Association Ltd

Australian Cinematographers Society

Australian Guild of Screen Composers

Australian Institute of Architects

Australian Music Centre

Australian Publishers Association

Australian Recording Industry Association

Australian Screen Directors Authorship Collecting Society Limited

Australian Society of Authors

Australian Writers Guild

Big Studio Movie Licence

Christian Copyright Licensing International

Copyright Agency

Design Institute of Australia

Illustrators Australia

Media Entertainment & Arts Alliance

National Association for the Visual Arts

National Tertiary Education Union

Phonographic Performance Company of Australia

Screen Producers Australia

Screenrights

Appendix 3

ACC Guidelines

A core part of the Australian Copyright Council's (ACC) activities is our free written legal advice service. This unique service is targeted primarily to those working in the creative industries and members of our affiliate organisations. Staff members of the organisations listed below are also eligible:

- educational institutions
- arts and cultural organisations
- libraries
- museums
- galleries
- archives.

Appendix 4

Orphan works – treatment in other comparable countries, orphan works policies

Country (or organisation with orphan works policy)	**How 'orphan work' defined**	**Permitted users** (entities that have access to OW)	**Permitted uses of orphan works**	**Payment, compensation for 'past' use** (prior to copyright owner coming forward)	**Payment for continuing use** (once rightsholder comes forward)	**Other relevant matters**
UK (licensing scheme) https://www.gov.uk/guidance/copyright-orphan-works#overview [explanatory video] https://www.youtube.com/watch?v=5OHbM5gApv8	Copyright owner cannot be traced or is unknown	Anyone – from private individuals to a museum	Commercial or non-commercial	Licence required. Must apply for license (and pay a fee for that licence – application fee and licence fee paid).	If rightsholder comes forward, they are paid the licence fee. Licence fee held for 8 years by IPO (Intellectual Property Office, UK) The IPO's 'Guidance for rightsholders' doc notes (in circumstances where rightsholder comes forward) 'if the work has been licensed as an orphan, that licence will continue for the remainder of its term, but new orphan works licences will not be issued that cover those rights within that work.	Licence available applies only for use in the UK, non-exclusive, for up to 7 years, can be renewed. Register of licences 'under consideration', 'granted' and 'refused' is maintained (and can be searched). Orphan works register.

Country (or organisation with orphan works policy)	**How 'orphan work' defined**	**Permitted users** (entities that have access to OW)	**Permitted uses of orphan works**	**Payment, compensation for 'past' use** (prior to copyright owner coming forward)	**Payment for continuing use** (once rightsholder comes forward)	**Other relevant matters**
					Any new uses of the work will be up to you, as the right holder, to grant permission in respect of the right you own.'	
Canada Copyright Board of Canada (CBC) (licence scheme) https://cb-cda.gc.ca/en/unlocatable-owners/general-information https://cb-cda.gc.ca/en/unlocatable-owners	Owner of copyright is not found. Scheme applies to 'unlocatable owners'. CBC website specifically states '…Board only issues a licence if the owner cannot be found. However, one cannot consider as untraceable an owner who has been identified but who cannot be contacted to give permission to use his work. In such a case, it is up to the requester to make arrangements with the owner and to agree with him in order to obtain authorization for the use of the work.'	Any person can apply for a licence	Licence (non-exclusive) will specify authorised uses, start and expiration date of licence, amount of fees to be paid	The Board usually orders that the royalties be paid directly to the collective society which would normally represent the copyright owner. The amounts paid are administered for the benefit of the members, and the copyright owner may collect the royalties (no later than 5 years after the expiration of the licence).		Applies to published works only. 'Reasonable efforts' made to locate the copyright owner, with collecting societies expected to 'be the starting point of any research'. Licences issued only valid in Canada.

Country (or organisation with orphan works policy)	**How 'orphan work' defined**	**Permitted users** (entities that have access to OW)	**Permitted uses of orphan works**	**Payment, compensation for 'past' use** (prior to copyright owner coming forward)	**Payment for continuing use** (once rightsholder comes forward)	**Other relevant matters**
European Directive 2012/28/EU https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF https://en.wikipedia.org/wiki/Orphan_Works_Directive	'works and other subject-matter which are protected by copyright or related rights and for which no rightsholder is identified or for which the rightsholder, even if identified, is not located'	'publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations'	'…to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection.'	Rightsholders that put an end to the orphan work status of a work … should receive fair compensation for the use that has been made of their works' 'Member States should be free to determine the circumstances under which the payment of such compensation may be organised, including the point in time at which the payment is due.'	'Rightsholders should be entitled to put an end to the orphan work status in the event that they come forward to claim their rights in the work …'	Pre-condition to categorisation of a work as an 'orphan work' is 'diligent search', such search to be carried out prior to using the work, records of searches to be maintained, register of use made of work, also to include any change of states, contact details for organisation that has used the work (and register to be publicly available)
SBS (orphan works policy) https://www.sbs.com.au/aboutus/orphan-works-policy	'copyright material for which the rightsholder cannot be identified, or is identifiable but cannot be found, after a reasonable good faith search by the user.'	SBS	Not specified other than to note that in some instances, SBS can rely on existing exceptions in copyright Act.	See 'Payment for continuing use' column.	'If a rightsholder comes forward, SBS will negotiate in good faith with the rightsholder to obtain their permission or discuss the rightsholder's wishes.'	Risk management approach. 'minimise orphan works by implementing a centralised rights management process to capture all rights metadata in archival and new content in digitised form '.

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						'A "good faith, reasonable search" to be carried out, record of searches maintained with program records and made available to rightsholder who later emerges. Use of an 'orphan works' notice
NFSA (orphan works policy) https://www.nfsa.gov.au/collection/using-collection/copyright#:~:text=NFSA%20title%3A%20790366%20Orphan%20works%20are%20works%20which,deal%20with%20many%20orphan%20works%20in%20our%20collection.	'…works which are, or are likely to be, protected by copyright but it has been impossible to identify, locate or contact the copyright owner.' 'For audiovisual collections, orphan works include sound recordings or films where copyright may have expired in the work as a whole, but rights subsist in the underlying works (such as in the script or music	NFSA notes that it is committed to lobbying for reform 'to facilitate use of orphan works through a general exception for the use of orphan works for non-commercial purposes and a cap or limitation on liability for the commercial use of orphan works;'	[*in practical terms, issues only arise re commercial use*] '…the NFSA has a mission to develop, promote and provide access to the national collection of audiovisual heritage. This dictates that, in considering the orphan works problem, the NFSA must weigh up the public interest imperatives and social benefits of making these works available against the	See notes in 'Permitted users' column		NFSA refers to '..works where the owner has no interest in exploiting them and has no objection to their being used or does not wish to claim or exercise ownership?'. NFSA experience that copyright owners do not deny permission or charge where use is non-commercial. NFSA can also rely on 'fair dealing' exceptions or s 200AB exception.

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	accompanying the film).'		rights of copyright holders who may or may not approve of such use'.			
NSLA (National and State Libraries Australasia), orphan works policy. Position statement: Reasonably diligent search for orphan works | National and State Libraries Australasia (nsla.org.au)	'Orphan works are in-copyright works where the creator cannot be identified and/or located, which makes obtaining permission to use impossible.'	Institutions and individuals seeking to use orphan works	'Any use of an orphan work will be non-exclusive and will seek to provide clear and adequate attribution of the rights owner, if known.'	See next column	'If the copyright owner appears at a later date, restitutions may be provided in appropriate circumstances, however, these will take into account the creative efforts and investment made in good faith by the user of the work.'	A 'reasonably diligent search' to be conducted prior to use 'Use of orphan works will respect any protocols relating to Indigenous materials.'