



Fair Use and Other Copyright Exceptions
An examination of fair use, fair dealing and other
exceptions in the Digital Age

Submission of the
Copyright in Cultural Institutions (CICI) group

July 2005

Introduction

This submission is made by the Copyright and Cultural Institutions (CICI) group, a working group of copyright and intellectual property managers representing cultural institutions (including museums, galleries, libraries, archives and research institutes) located primarily in the Australian Capital Territory.¹

CICI member institutions endorsing this submission are listed in Appendix A (the ‘Cultural Institutions’).

Background – Who we are and how copyright affects us

The Cultural Institutions are government funded organisations charged with statutory functions and /or strategic goals of preserving, managing and providing access to their collections.

Despite differences in the specific function and nature of each of the Cultural Institutions they face similar copyright issues:

- a large component of their collections is protected by copyright and in most instances they do not own the copyright in most material (except for the National Archives of Australia who has a large holding of Crown copyright material);
- a high proportion of each institution’s collection consists of unpublished and older material for which the provenance and copyright ownership of individual items is unknown;
- other than the National Library of Australia, only a small proportion of the collections are acquired and held in electronic form; and
- all institutions have a statutory or other mandate to provide public access to their collections, whether through exhibitions, public and educational programs or the provision of direct access.

A broad overview of some of the member institutions endorsing this submission demonstrates the similarities in the copyright issues faced by the Cultural Institutions:

- The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is a research institute with a Library Collection comprising of mainly literary works (manuscripts, books, pamphlets, newspaper collections) of which 14% are unpublished, and an Audiovisual Collection of which 95% is unpublished. Over 90 % of access requests to the Library Collection are related to a fair dealing purpose.
- The National Archives of Australia (NAA) operates as a repository of Commonwealth government records and is responsible for retaining and making these records available for present and future generations. Over ninety percent (90%) of the collection consists of unpublished works which are not otherwise commercially available (being either government publications or unique copies). Most copying undertaken by the NAA is for the purposes of providing access and over 90% of clients access requests relate to research and study purposes.
- The Australian War Memorial (AWM) is an archive, research library and museum of military history. It holds a diverse range of copyright material (eg, manuscripts, private letters, images and artistic works, objects and audiovisual works). It has harnessed the benefits of digital technology yet only provides online access to a small part of its collection. In 2004-05, over 2.4

¹ http://www.nma.gov.au/about_us/image_delivery_and_intellectual_property/cici/

million people used the AWM's website (for an average visit of 17 minutes) to access research material, collection information and historical information about Australian military and social history. This growing level of public access is considerable given that the AWM receives 900 000 onsite visitors per year to Canberra.

- The National Gallery of Australia (NGA) houses over 136,000 works of art, together with official and other correspondence relating to artworks in the collection including recordings of lectures and interviews with and about artists. To date, preservation copies have been made of up to 25% of its collection. The NGA relies on dumb terminals to exhibit digital images of some collection items which are unable to be publicly displayed due to space constraints in its Exhibitions Gallery and where the material is too fragile for display. The NGA also provides considerable online access to its collection: 367,547 visitors attended the NGA in 2002/03 which represented only about 33% of the total online visitors to the NGA's website. However, the NGA's online presence and its ability to maximise the benefits of digital technology have been constrained by copyright and other restrictions: for example, at the end of June 2003 only around 20% of the collection was available for viewing online.

Copyright compliance is a significant issue for the Cultural Institutions. They are potentially at risk of infringing copyright in using copyright material in exhibitions, public programs and educational programs, and of authorising copyright infringement in providing broad-based public access to collections (especially where clients do not have the necessary clearances or where they are unable to rely on an exception to infringement).

Despite the significant copyright compliance issues, as archives within the meaning of 'archive' under the *Copyright Act 1968* (the Act)², the Cultural Institutions can rely on the exceptions to infringement in Part III Division 5 and Part IV Division 6 applicable to libraries and archives. They have a keen interest in the scope and workability of these exceptions in respect of their practices and procedures, and take the opportunity provided by issue 8 of this review to comment on these exceptions.

Cultural Institutions' concerns about the scope of the Digital Agenda Amendments³

Cultural Institutions have also been actively encouraged over the last 5–10 years to embrace new technologies, particularly digital technologies, to facilitate broader and more diverse access to their collections. Many of them have embarked on considerable digitisation projects and are seeking to provide more diverse and broad based digital access to their collections.

Due to copyright limitations, particularly in respect of the limited rights available under the library and archive copying provisions to digitise and communicate all collection material, some Cultural Institutions are prevented from effectively fulfilling their statutory mandates of storing, administering, preserving and providing access to their collections.

Cultural Institutions have raised concerns about the scope, uncertainty and complexity of these exceptions to copyright exceptions in independent submissions by CICI member institutions to the Simplification Review (1998) and the Government's review into the Digital Agenda Amendments (2003). The Cultural Institutions take the

² Except for the NLA which is a 'library' within the meaning of the Act.

³ Amendments to the Act arising out of the *Copyright Amendment (Digital Agenda) Act 2000*

opportunity provided by this review to again examine, reiterate and expand on the arguments previously put to Government.

Cultural Institutions support for the copyright balance

The statutory and other mandates of the Cultural Institutions requires them to adopt a variety of roles as custodians, users, disseminators and owners of copyright material. They therefore appreciate the importance of maintaining an appropriate balance in the Act between the rights of copyright owners and the provision of reasonable access to copyright material.

Similarly, institutions are careful to earn the respect and trust of copyright owners and potential donors and depositors of collection material. Where copyright material has commercial value, institutions willingly remunerate owners for commercial activities such as producing and distributing merchandise and publications.

It is therefore only in respect of non-commercial use of collection material that Cultural Institutions make claims against the terms of reference for this submission. In respect of all claims, consideration has also been given to Australia's need to comply with its international obligations and the 'three step test' for framing exceptions and limitations to the Act.

Consolidated list of recommendations

The fair dealing and library and archive exceptions do not allow many of the Cultural Institutions to effectively and efficiently fulfil their public interest mandates, nor do they accord with the practices and procedures undertaken by the Cultural Institutions. They therefore make the following recommendations for reform to the Act against the issues raised in the Issues Paper to this Review:

Issues 1-3 – Fair dealing

Recommendation 1:

To overcome the uncertainty, narrowness and inflexibility of the current fair dealing provisions the Government should adopt a hybrid solution, which retains fair dealing but amends ss 40-43(2) and ss 103A-104 as follows:

1. [*modelled on s 107 of the US Copyright Act*] amend s 40(2) of the Act to specify that the fact that a work is unpublished shall not itself bar a finding of fair dealing if such finding is made upon consideration of all factors [ie, the factors listed in s 40(2)].
2. Rather than adopt the CLRC recommendation to apply the prescriptive set of factors in s 40(2) to all fair dealings, amend the Act to add a new 'fair use' exception [*modelled on s 107 of the US Copyright Act*] which acts as a default mechanism and a guide to determining the fairness of a proposed dealing in respect of ss 41,42, 43(2), 103B, 103C and 104.
3. [*Modelled on s 107 of the US Copyright Act*], amend the Act to specify that the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all factors [ie, the factors listed in the proposed fair use clause]

Recommendation 2:

That the Act be clarified to specify that fair dealing for criticism and review under ss 42 and 103C extends to satire, parody, pastiche and caricature.

Recommendation 3:

That ss 40, 41, 42, 43(2) and 103A, 103B, 103C, and 104 be amended to permit library and archives to undertake secondary copying (whether analogue or digital copying) of any collection material (whether 'works' or 'subject matter other than works') without remuneration to the copyright owner where the material is being copied for the purposes of supply to a client relying on fair dealing.

Issue 4 – time shifting**Recommendation 4:**

Time shifting for non-commercial purposes be included as a non-remunerable exception to copyright infringement and should extend beyond 'private copying' to time shifting undertaken by public institutions for non-commercial purposes.

Issue 5 – format shifting**Recommendation 5:**

Libraries and archives should be exempted from any private copying levy introduced on recording media or recording devices (hardware/software) in respect of any non-commercial copying they undertake.

The libraries and archives exceptions of the Act should be amended to permit cultural institutions to engage in format shifting, as specified in recommendation 10.

Issue 6 – back-up copying**Recommendation 6:**

The Cultural Institutions strongly recommend that s 47C of the Act be amended to extend the exceptions to infringement to copying and communicating all copyright material included within a computer program if such copying is undertaken for the for the purposes listed in s 47C(1)(c)(i)-(iii).

Issue 8 – other specific exceptions or statutory licences**Recommendation 7:**

The library and archive provisions should be amended to create consistency for both works and subject-matter other than works by consolidating ss48-53 (for works) and ss110A-110C (subject matter other than works) into the one section.

Recommendation 8:

The declaration requirements for both users and institutions should be reviewed to minimise the administrative burden on libraries, archives and their clients providing copies of collection material available on a non-profit basis for research and study purposes.

Recommendation 9:

The libraries and archives exceptions to copyright infringement should be amended to ensure that unpublished materials are at least treated in a similar manner to the existing provisions for both published works and published subject-matter other than works.

Recommendation 10

Sections 51A(1), 110B(1), and 110B(2) should be combined into a single provision that provides a right for archives and libraries to copy (including via digitising and format shifting) and communicate all collection items (both analogue and electronic materials) for:

- storage within a Cultural Institution;
- preservation in an accessible format (ie, a right to ‘format shift’ to overcome *format obsolescence, media decomposition* and for the purposes of ‘refreshing’ *media*);
- preservation to **prevent** deterioration or loss (irrespective of whether the material is a first copy, published or unpublished); and
- replacing a damaged, deteriorated, lost or stolen item held within a library or archives’ collection.

Recommendation 11:

The Cultural Institutions strongly support a right of libraries and archives to make back-up copies of all collection items (including in digital form) to:

- minimise the risk of deterioration to collection items;
- to enable collection material to be accessed by multiple users; and
- to allow for efficient and cost effective storage of collection items.

Recommendation 12:

The administrative purposes exceptions in the library and archives provisions should be clarified to permit libraries and archives to copy and communicate all collection material (not just published works) to ensure accurate records of collection items are maintained; to permit internal and intra-archive/library communication of collection items or other relevant material regarding a collection item; and to enable institutions to undertake core-business activities.

Recommendation 13:

The Act should be amended to permit libraries and archives to make facsimile reproductions, or to otherwise copy, communicate or publicly perform in replicate form both works and subject matter other than works for display in not-for-profit exhibitions, or for the purposes of non-commercial promotion of exhibitions.

The Act should specify that such an exception not apply where a replicate copy in an appropriate format is otherwise commercially available within a reasonable time.

Recommendation 14

The Cultural Institutions strongly support amendment to the library and archives exceptions to:

- allow electronic copies made for administrative, preservation or replacement purposes to be retained by an institution for the purposes of supplying copies in response to client access requests under the library and archives exceptions, fair dealing or any fair use exception.
- provide a right for institutions to digitise all collection material (not just material acquired in electronic form) and to reproduce, communicate and publicly perform copyright material for the purposes of making it accessible onsite to the public, staff and volunteers via 'dumb' terminals.⁴
- Allow libraries and archives to provide online (eg, internet) access to parts of their collection where the material is not otherwise commercially available or commercially viable material and provided that it is communicated in low resolution or similar form.

Recommendation 15

The Act should be amended to allow orphaned works to be copied and communicated for non-commercial purposes provided that the user has made 'reasonable efforts' to locate the copyright owner. Industry practice should form the basis of any 'reasonable efforts' test.

Recommendation 16

That the Government implement the CLRC's recommendations that:

- the Copyright Act be amended to provide that an agreement, or a provision of an agreement, that excludes or modifies, or has the effect of excluding or modifying, the operation of ss 40, 41, 42, 43A, 48A, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B, 11A, has no effect.
- it work actively to promote an international solution to private international law issues relating to agreements the subject of this reference.

⁴ the Cultural Institutions require that this term be defined in a technologically neutral way to cover both touch screens and other technologies capable of displaying collection items (whether existing now or yet to be invented).

Comments on specific issues

Issue 1

The Government seeks your view on the operation of the exceptions in the Copyright Act (particularly the fair dealing exceptions in ss 40-43(2) and ss103A-103C) in providing a balance between the interests of copyright owners and copyright users.

Issue 2

The Government seeks your view on whether the Copyright Act should be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?

Issue 3

The Government seeks your view on whether the Copyright Act should be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law.

Cultural Institutions receive access requests for copies of a range of collection material and for a variety of purposes, such as access to low resolution images (for use as a teaching aide); time-coded VHS copies of footage (eg, for the purposes of research by a documentary film maker sourcing material for inclusion in a documentary); manuscripts and other research material (for use by researchers, historians, and authors); and audio and moving image material (for inclusion in documentaries and news reports).

Requests for access through copies therefore cover a range of fair-dealing purposes, including research and study (ss 40 and 103C); criticism or review (ss 41 and 103A), and news reporting (ss 42 and 103B).

For example:

- *over 90% of client access requests received by AIATSIS, the AWM and the NAA are related to fair dealing for research and study.*
- *Other institutions, such as the NGA and the AWM receive requests for access for both research and study and criticism or review (eg, inclusion of material in commercial and non-commercial publications, media reports/reviews of exhibitions, news reports, documentaries).*

Sometimes Cultural Institutions receive requests relating to the provision of legal advice (eg, requests for documentation or other evidence to assist with legal advice regarding competing claims to copyright ownership).

As disseminators of copyright material of significant cultural heritage value, the Cultural Institutions play a central role in contributing to achieving the Government's objectives of improved education and increased public knowledge and appreciation of Australian history, art and culture; contributing to public debate; and fostering a vibrant cultural sector – all important public interests best served by a balanced copyright regime.

However, the limitations on the scope of the fair dealing exceptions (outlined below) together with the recent 20-year extension to the term of copyright protection for most works has significantly impacted on some institutions' ability to achieve their public interest mandates.

Fair Dealing

In summary, the Cultural Institutions believe the current fair dealing exceptions fail them and their clients as they are:

1. **Uncertain:** given there is no legislative guidance on determining the fairness of a dealing other than for research and study under s 40(2). Similarly, fair dealing exceptions for criticism or review and news reporting are being under-utilised by Cultural Institutions' clients. As a result, the public policy objectives of the fair dealing exceptions of promoting the free flow of knowledge, ideas and information and a general right of copyright users to comment on and critique copyright material are not being fulfilled.
2. **Limited in scope and inflexible:** the fair dealing exceptions do not appear to permit a fair dealing use of a work for the purposes of satire, parody, caricature or pastiche; or the use of new technologies to provide access to copyright material (eg, use of low resolution thumbnail images for the purposes of online review).
3. **Illogical and restrictive in only allowing individuals rather than institutions acting on their behalf to copy material for the purpose of fair dealing.**

Uncertainty in the general scope of the fair dealing exceptions

Practical application of caselaw is uncertain

Most Cultural Institutions require their clients to clear copyright with third-party copyright owners (rather than the institution doing this on their behalf). However, the Cultural Institutions have observed that the fair dealing exceptions are being under-utilised, rather than abused, by their clients due to uncertainty over the legality of a proposed use.

Fair dealing exceptions are largely uncertain because the exception requires a case by case assessment of the fairness of the dealing and the practical application of a large body of case law to define the scope of the exceptions.

To date, judicial interpretations on the scope of the exceptions have relied on dictionary definitions of 'dealing', 'research and study' and 'criticism and review' and have arguably narrowed the scope of the exceptions.⁵

⁵ As Ricketson and Creswell note there is still uncertainty whether fair dealing for criticism and review extends to satire, parody, or transformative use; whether research and study extends to research and study undertaken in commercial or governmental organisations for purposes that are clearly commercial or public in character but which are far removed from the scenario of a student writing

As a result of the narrowness and uncertainty of the exceptions, Cultural Institutions and their users are forced to refer to the copyright owner or seek independent legal advice before reproducing material – both time consuming and costly processes for most users who then either abandon their requests or seek alternative material:

For example, some of the institutions have observed that it is industry practice for documentary film makers to obtain licences to use copyright material rather than seek to rely on the fair dealing exception for criticism or review (even if they are only using a few seconds of footage which may be a fair dealing use).

In many instances Cultural Institutions provide the only available source of a particular item given the large volume of older, unpublished and unique material held in their collections. Therefore, the under-utilization of their collections results in lost educational opportunities for the general public and reduced opportunities for the creative industries to access materials for the purposes of inclusion in multi-media products, documentaries, etc.

Given the uncertainty as to the scope of the provisions, the Cultural Institutions expect those clients who do decide to risk using material in circumstances which they consider ‘fair’ to take responsibility in respect of any actions for copyright infringement. For example, some institutions require all clients to agree to indemnify the institution for any copyright infringement actions brought against the institution in relation to the client’s use of particular material. While this approach is consistent with the Government’s support for agencies to adopt appropriate risk management strategies, it is not appropriate for members of the public wishing to obtain copies of cultural heritage items from publicly funded institutions to be forced to carry the legal risk because of uncertain laws.

Uncertainty in how to balance the factors listed in s 40(2) and s 103C(2)

Despite the scope of fair dealing for research and study being more certain than fair dealing for criticism or review and news reporting (because users have recourse to the factors listed in ss 40(2) and 103C(2) for determining fairness), many Cultural Institutions have also observed that there is considerable client uncertainty over how to balance the set of factors listed in ss 40(2) and 103C(2). For example, there is a misconception that non-commercial use is necessarily a ‘fair dealing’ and will outweigh all the other factors listed in ss 40(2) and 103C(2) for determining the fairness of using material for research and study. Likewise, there are misconceptions that use of a small and ‘insubstantial’ part of material (eg, inclusion of historical footage in a documentary) is definitely unfair if used in a commercial context.

Uncertainty over dealings with unpublished works

The Cultural Institutions with large collections of unpublished works (eg, NAA, AWM and AIATSIS) are particularly concerned about the narrowness of judicial determinations suggesting that a dealing with an unpublished material is unlikely to

their thesis (see: Ricketson and Creswell: *The Law of Intellectual Property*: 2nd ed, Lawbook Co., Sydney, 2002, para 11.300).

be fair.⁶ Consequently, they are reluctant to provide clients with copies of unpublished material in situations where they cannot rely on ss 51, 52 and 110A⁷ despite the material is of particular cultural significance.

For example, the NAA holds one-off copyright material owned by third-parties in the form of private correspondence held in government files. Often this correspondence will be particularly short and may be of considerable historical significance within the context of other material held by the NAA, but will have no commercial significance of its own accord. However, the fact that it is unpublished weighs heavily against the rights of a researcher wishing to rely on fair dealing to copy and reproduce the entire letter for inclusion in a thesis or for the purposes of publication.

Similarly, largely unpublished unique records acquired in the 1920's and held by the AWM in its Private Records Collection provide a significant research tool for students, historians, publishers and the public. The AWM therefore only allows clients to copy these records under s 51 where the material meets the requirements of that section (ie, that it be unpublished, 50 years have passed since the author's death, and the material is retained in the AWM's collection and is otherwise available for public inspection).

Uncertainty – the particular case of criticism and review and news reporting

Sections 40(2) and 103C(2) lists five factors to consider in determining the 'fairness' of a dealing with a work or audio-visual item. These factors only apply to assessing a dealing for research and study but not criticism or review, or news reporting. This is in direct contrast to the 'fair use' provision of s 107 of the US Copyright Act which is open-ended but nevertheless provides greater certainty for users because the four factors guiding assessments of the fairness of any dealing applies to all proposed dealings with copyright material and not only research and study.⁸

As a result of this discrepancy, Part III Division 3 and Part IV Division 6 of the Act benefits Cultural Institutions who operate mainly as research institutes (eg, NAA, AIATSIS, NLA) despite the fact that other institutions (such as the AWM and the NGA) also hold historical, artistic and cultural material of significant interest to the creative 'industries' and the media.

⁶ In *Commonwealth of Australia v Fairfax* (1980) 147 CLR 39 it was stated that the absence of consent, express or implied, for the circulation of unpublished work for the purposes of criticism or review would ordinarily be an important factor in deciding whether there has been a fair dealing.

⁷ These sections permit the copying and communication of unpublished works 50 years after the death of the author (s 51) and unpublished films and sound recordings 50 years after they have been made (s 110A). Section 52 also permits the inclusion of the whole or part of an unpublished in a publication provided that 50 years have passed since the death of the creator, the identity of the author was unknown and the user gives a 'prescribed notice' of the intended publication of the new work.

⁸ s 107 states that the factors to be considered in determining whether a use is fair include:

- the purposes and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyright work as a whole; and
- the effect of the use upon the potential market for or value of the copyright work.

To create equality of access amongst all their clients, the Cultural Institutions' believe there is a strong need to amend the Act to provide greater legislative guidance for users in determining the fairness of a dealing for criticism or review and news reporting.

Limited scope of fair dealing for criticism or review

Kimberlee Weatherall notes that it is not clear whether fair dealing will allow transformative or creative uses of existing works such as satire and/or parody, humorous reporting of news and criticism or review, or appropriation art (artistic works that appropriate existing works and reinterpret them, or documentaries that incorporate existing material).⁹

A legal right to parody has been recognized by other jurisdictions, including the US and the EU,¹⁰ indicating a strong support at the international level for the public policy benefits, such as freedom of expression, to be gained from such an exception.

The Cultural Institutions believe that a parody work is productive and not simply reproductive; that the original work makes up only a part of the new work and that the new work does not supplant the market of the original work as it does not fulfill the original work's demand. They therefore strongly support amending the Act to clarify that under ss 42 and 103C, fair dealing for criticism or review includes a dealing with a work for the purposes of satire, parody, caricature and pastiche.

Inflexibility of current fair dealing exceptions

The Cultural Institutions strongly believe that given the current level of uncertainty around the scope of the exceptions as outlined above, that the exceptions should be retained and clarified but not changed substantially. They therefore do not support the CLRC's recommendation in the Simplification Report: Part 1 to consolidate the fair dealing provisions into the one provision.

While the Cultural Institutions seek greater certainty in the fair dealing provisions, they also believe that there is an equal need to promote flexibility in the Act. Adopting the CLRC's recommendation to apply the set of factors in s 40(2) to all fair dealing provisions would unduly constrain the scope of fair dealing for criticism or review and news reporting. It would also not provide the flexibility required to accommodate the business needs of particular industries and clients, such as the media who will often also seek access to material which may be commercially available elsewhere in order to meet required deadlines (eg, to include the material in the 6.00pm news of the day).

⁹ Weatherall, K, *Fair use, fair dealing: The Copyright Exceptions Review and the Future of Copyright Exceptions in Australia*, IPRIA Occ. Paper No. 3/05 May 2005 at 16.

¹⁰ In Europe, Article 5(3) of the EU Information Society Directive deals with exceptions to the rights of reproduction and communication to the public and allows Member States to choose to provide exceptions or limitations for cases including "use for the purpose of caricature, parody or pastiche" (Article 5(3)(k)). Similarly, US courts have considered parody to fall within fair use under s 107.

To require any fair dealing request made under ss 41 and 42 to be constrained by an assessment under s 40(2)(c) of ‘the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price’ would mean that many media clients would be forced to access material from numerous sources despite the material being available from the one institution. Industry practice therefore requires a flexible mechanism (similar to the US fair use provision) rather than a prescribed set of factors for defining ‘reasonable time’ and assessing the overall fairness of a proposed dealing.

Recommended amendments to provide for greater certainty and flexibility in the fair dealing provisions

Recommendation 1:

To overcome the uncertainty, narrowness and inflexibility of the current fair dealing provisions the Government should adopt a hybrid solution, which retains fair dealing but amends ss 40-43(2) and ss 103A-104 as follows:

1. [*modelled on s 107 of the US Copyright Act*] amend s 40(2) of the Act to specify that the fact that a work is unpublished shall not itself bar a finding of fair dealing if such finding is made upon consideration of all factors [ie, the factors listed in s 40(2)].
2. Rather than adopt the CLRC recommendation to apply the prescriptive set of factors in s 40(2) to all fair dealings, amend the Act to add a new ‘fair use’ exception [*modelled on s 107 of the US Copyright Act*] which acts as a default mechanism and a guide to determining the fairness of a proposed dealing in respect of ss 41,42, 43(2), 103B, 103C and 104.
3. [*Modelled on s 107 of the US Copyright Act*], amend the Act to specify that the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all factors [ie, the factors listed in the proposed fair use clause]

Summary of arguments in support of recommended amendments: Issues 1–3

Rather than consolidating fair dealing into a single provision (as recommended by the CLRC), retaining fair dealing in its current form and adding new exceptions (including fair use) will:

- Promote administrative certainty for the Cultural Institutions.
- Provide a flexible default mechanism for clients to access copies of items from cultural institutions where the scope of the current law is uncertain but where the provision of access to copyright material serves a strong public interest.
- Add certainty for clients relying on fair dealing for criticism or review and news reporting by enabling the list of factors which determine fairness (as they exist under s 107 of the US Copyright Act) to apply equally to fair dealing for criticism or review and news reporting while avoiding the limiting nature of s 40(2)(c) which does not provide the flexibility required to accommodate variations in industry practice in respect of sourcing copyright material.

- As an open-ended rather than prescriptive exception it will encourage the Cultural Institutions and their clients to engage in a proper risk assessment of the ‘fairness’ of a proposed use on a case by case basis. It will thereby encourage users to undertake activities which they are not currently willing to engage in for fear of infringing copyright.¹¹
- Rather than confine the parameters of fair dealing to four broad categories, a fair-use default provision will confirm to the Cultural Institutions and their clients that provided the use is fair the outer limits of fair dealing is not constrained to these categories.
- While equivalent to, but not identical to s 40(2), a fair use clause modeled on s 107 avoids the ambiguity of the phrases ‘reasonable time’ and ‘ordinary commercial price’ found in s 40(2)(c).
- A fair use clause would add certainty for clients seeking access to Cultural Institutions’ holdings of unpublished works as the fact that a work is unpublished shall not itself bar a finding of fair use if such a finding is made upon consideration of all factors listed under a fair use clause.
- A fair use clause builds flexibility into the Act for future developments in technology and copyright practice by institutions and its users without reference to Parliament for every new scenario.
- Fair use assists copyright law to adapt to market failure or market inefficiencies better than laws that provide specific exceptions for set purposes.
- A fair use clause will provide a default mechanism for Cultural Institutions’ clients who are seeking greater guidance and certainty in determining the fairness of a dealing (especially for dealings for criticism or review and news reporting).

Recommendation 2:

That the Act be clarified to specify that fair dealing for criticism and review under ss 42 and 103C extends to satire, parody, pastiche and caricature.

Advantages of a specific amendment to ss 42 and 103C:

- As Australian courts to date have been reluctant to broadly interpret the scope of fair dealing for criticism and review and news reporting, a specific amendment would be more certainty than an open-ended fair use provision which would still judicial determination of the fairness of a proposed use on a case by case basis.
- Clarifying that the scope of ss 42 and 103C extends to satire, parody, caricature and pastiche will promote important public policy interests including freedom of

¹¹ Jaszi, P. “Public Interest Exceptions in Copyright: a Comparative and International Perspective”, Washington College of Law, 2005 at 7

expression and further copyright owners' interests by creating incentives for the development of derivative works (eg, multi-media works, documentaries, music sampling etc).

- Is consistent with the three-step test: is sufficiently narrow in scope and in promoting the creation of new 'derivative works' will not conflict with a normal exploitation of the original work or the legitimate interests of the right holder. As satire, parody, caricature and pastiche refer to and promote reflection on the original work, a specific fair dealing exception for these uses is likely to promote sales of the original material.

Limited scope of fair dealing – a right for users and not cultural institutions to copy on behalf of users

Fair dealing can only be relied on as a defence to copyright infringement by the person who is undertaking the act of research, study or other use (*De Garis, 1990*). Cultural Institutions therefore independently obtain permission from the copyright owner for the purposes of providing access copies (including digital copies) to collection material. This creates an unnecessary administrative burden on the Cultural Institutions given that clients otherwise have a legitimate right to copy the material under fair dealing and that the institution will be simply on-supplying and not retaining the copy.

Although most Cultural Institutions usually obtain permission from copyright owners at the time of acquisition to copy material for the purposes of supply to clients, some material (particularly older material) was often acquired without an agreement. Therefore, in some cases the provenance of the physical item, let alone the copyright owner, is unknown and/or unlocatable. As a result, copies of many collection items cannot be provided for fair dealing purposes because Cultural Institutions can not obtain the initial permission required to make and provide access copies to clients relying on fair dealing.

The libraries and archives provisions do allow some material to be copied for the purposes of supply to a client for their research. However, these provisions are extremely narrow and only apply in limited circumstances; are relevant to only a small component of institutions' collections and do not provide institutions with rights to copy material in all situations in which clients otherwise have a right to access and use parts of copyright material on an unremunerated basis. For example:

- Sections 49 and 50 are limited to copying and communicating published material to users or to other institutions (via an inter-library loan request) for research or study. These exceptions are only of direct benefit to institutions holding large collections of **published** material. While all Cultural Institutions do hold some published materials in their collections, these provisions are of more relevance to libraries rather than cultural institutions per se who have large holdings of unpublished, non-commercial and unique items. For example,
 - *Research institutions such as AIATSIS, and repositories such as the NAA and the AWM mainly hold unpublished material (over 90% of the NAA's collection, 95% of AIATSIS' collection, and about 80% of the AWM's collection is unpublished). They therefore cannot rely on ss 49 and 50 for*

most requests despite the fact that over 90 % of their client access requests relate to research and study.

- *Other institutions who hold small documentation collections (such as the NGA's collection of official and other correspondence relating to artworks) could rely on ss 49 and 50 for the small amount of published material (eg, publicity material or press releases on exhibitions etc). While the NLA does hold a small collection of published film and recorded sound (eg, oral history recordings) there is no equivalent provision to sections 49 and 50 in Part IV Division 6 of the Act for AV material.¹²*

- Institutions receive access requests for a variety of purposes other than research or study (such as criticism or review, or for the purpose of reporting news), but cannot rely on ss 49 and 50 to make access copies of material.

It is inherently logical that an institution should be able to make a copy of collection material to supply to a client relying on fair dealing to access the copy. The institution is merely operating as a conduit to the provision of access to collection items. For institutions with large and fragile items (such as the NGA) or audiovisual material requiring particular storage conditions (such as the AWM and AIATSIS) materials are not directly accessible to clients to copy for themselves (eg, as a browsing copy) and the institution must make an access copy for supply to clients.

Extending the fair dealing exception to permit library and archives to copy material for the purposes of supply material to clients relying on fair dealing would not unreasonably prejudice the interests of the copyright owner given that the institution gains no direct benefit from making the copy (only one copy will be made and will be on-provided to the client).

Recommendation 3:

That ss 40, 41, 42, 43(2) and 103A, 103B, 103C, and 104 be amended to permit library and archives to undertake secondary copying (whether analogue or digital copying) of any collection material (whether 'works' or 'subject matter other than works') without remuneration to the copyright owner where the material is being copied for the purposes of supply to a client relying on fair dealing.

Advantages of recommendation:

- Reduces the administrative burden on institutions who have to gain permission to copy material for the purposes of on-supply to clients who otherwise have a legitimate right to access material without the permission of or a licence from the copyright owner.

¹² Section 110B allows libraries and archives to only copy AV material for onsite research and study by a client but, unlike ss 49 and 50, does not permit the material to be supplied externally to the client.

- It is far preferable to amend the fair dealing provisions as proposed given that under the library and archive exceptions institutions can only copy material on behalf of clients for research or study requests in very limited circumstances.¹³
- Provided that the user's dealing satisfies the requirements of fair dealing under s 40(2) (particularly that due consideration has been given to 'the effect of the dealing upon the potential market for, or value of, the work or adaptation' (s 40(2)(d))¹⁴, making access copies in response to user requests will not impinge on copyright owners normal exploitation of the work or their legitimate interests given that the copy is simply on-supplied to the client.

Issue 4

The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for time-shifting television and radio broadcasts – including underlying works, films, sound recordings and live performances – and if so, under what conditions.

The Cultural Institutions endorse the Australian Digital Alliance's position on time shifting as outlined at page 5 of their submission to this review:

Time shifting should be included as a non-remunerable exception to copyright infringement.

Such an exception should not exclude uses falling outside of the realm of 'private copying'. Any such restriction would unnecessarily exclude public institutions and other consumers from accessing information at convenient times and with no detriment to rights holders.

Time shifting is integral to public institutions for purposes including public seminars, classes, and presentations. The practice of copying broadcasts for such purposes has been fundamental to educational and cultural discourse. It is envisaged that time-shifting of web-casts delivered via the internet will also become increasingly relevant in the communication of information. For example, this form of technology will be able to be utilised by public institutions for purposes such as distributing recordings of speakers at its conferences to remote or 'virtual' attendees.

Time-shifting enables a broad range of consumers to access information at alternative times, as a result of use of devices purchased specifically for this purpose. Time-shifting does not interfere with copyright owners' markets as it necessarily excludes 'librarying'. Placement of any restrictions on the use of such devices for time-shifting purposes would act as a disincentive to further technological advancement which supports the dissemination of information. This has been recognised in the US, where a recent Supreme Court decision

¹³ Copying by institutions on behalf of clients is constrained by the need for the client's access request to be related to published works (or first copies of films and sound recordings under s 110B) and for research and study purposes only (as per the limitations of ss 49 and 50, and s 110B).

¹⁴ the equivalent factor under 'fair use' is 'the effect of the use upon the potential market for or value of the copyrighted work'(s 107(4), US Copyright Act).

held that “...copyright laws are not intended to discourage or to control the emergence of new technologies, including those that help disseminate information and ideas more broadly or more efficiently.”¹⁵

Time shifting enables institutions and consumers to access and disseminate information for research, and educational and cultural purposes, in dynamic and responsive ways. Time-shifting does not conflict with any ability of rights-holders’ to commercially exploit their works. Indeed, the increased exposure of works as a result of time-shifting can enhance rights-holders’ profiles thereby facilitating their ability to further exploit their works.

The Cultural Institutions have no preference as to what part of the Copyright Act such an exception should be included.

Recommendation 4:

Time shifting for non-commercial purposes be included as a non-remunerable exception to copyright infringement and should extend beyond ‘private copying’ to time shifting undertaken by public institutions for non-commercial purposes.

Issue 5

The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for format-shifting, and if so, for what materials and under what conditions.

The Cultural Institutions support an unremunerated right to undertake format shifting for non-commercial purposes related to fulfilling their public functions (eg, preservation copying, to overcome technological obsolescence and to facilitate the cost effective storage of collection items). Specific recommendations regarding format shifting are outlined in recommendation 10 as part of discussions regarding on the library and archive exceptions.

If a levy is introduced on *recording media* or *hardware/software* to compensate for a private copying exception, Cultural Institutions strongly support a specific exemption from the levy for any non-commercial copying they undertake on the grounds that:

- a levy will have a significant economic impact on the Cultural Institutions who all consume large volumes of blank media and purchase a variety of copying technology for the purposes of undertaking core-business activities (eg, preservation copying and providing public access to collection items under fair dealing, ss 49, 50 and 110B).
- As the library and archives exceptions are unremunerated any fee paid on recording media or equipment requires institutions to compensate copyright owners for rights already granted under the library and archive exceptions which do not require remuneration to the copyright owner.

¹⁵ Metro-Goldwyn-Mayer Studios Inc. et al. v. Grokster, Ltd. Et al., 454 U.S.C. (2005) per Breyer J in relation to the Betamax decision.

Recommendation 5:

Libraries and archives should be exempted from any private copying levy introduced on recording media or recording devices (hardware/software) in respect of any non-commercial copying they undertake.

The libraries and archives exceptions of the Act should be amended to permit cultural institutions to engage in format shifting, as specified in recommendation 10.

Issue 6

The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for making back-up copies of copyright material other than computer programs, and if so, for what materials and under what conditions.

Section 47 provides a limited right for institutions to make a back-up copy of a computer program (protected as a literary work) but does not permit the copying of any underlying content included in the work.

While this provision theoretically provides a right to back-up collections databases on a daily basis, there is no legal right to copy the underlying copyright 'content' (eg, thumbnail images, some audio and moving image clips, literary and dramatic works) included in most institutions' collection databases. As a result, institutions who do adopt appropriate risk management strategies of backing-up collections databases on a daily to ensure its accessibility in the case of system malfunction or other system disablement are technically breaching the law.

The Cultural Institutions endorse the Australian Digital Alliance's comment on the limitations of the scope of this provision as outlined at page 8 of their submission to this review:

'The Act should allow back-up copies to be made where there is a risk that if a back-up copy is not made, material may be lost. To the extent that the current Act puts institutions and consumers at risk of breaching copyright laws simply by taking precautions against loss of purchased or acquired material maintained in digital form, it is inconsistent with technological advancements which enable more efficient means of storing works and should be amended.'

In relation to Issue 8, the Cultural Institutions have also recommended that the library and archive provisions be amended to permit institutions to make additional back-up copies of collection items to allow for efficient and cost-effective storage and retrieval of collection items.¹⁶

Recommendation 6:

The Cultural Institutions strongly recommend that the s 47C of the Act be amended to clarify that the provision extends to copying and communicating all copyright material included within a computer programs if such copying is undertaken for the purposes listed in s 47C(1)(c)(i)-(iii).

¹⁶ See recommendation 10.

Issue 7

The Government seeks your view on whether the Copyright Act should be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances.

The Cultural Institutions do not have any specific views as whether any right for individuals to format shift or otherwise engage in private copying should be provided through a statutory licence or a general exception.

As outlined in recommendation 5, if any levy is introduced on recording media or hardware/software to compensate for a private copying exception in respect of non-commercial copying by institutions, the Cultural Institutions strongly consider that they should be exempt from any such levy for the reasons outlined on page 18.

Issue 8

The Government seeks your view on whether the Copyright Act should be amended to include other specific exceptions or statutory licences, and if so, under what conditions.

The Cultural Institutions take the opportunity provided by the review to further expand on the arguments previously put forward in independent submissions by members institutions to the Simplification and Digital Agenda Reviews in respect of the library and archive provisions.

The Cultural Institutions primarily seek certainty and clarification in relation to this area of the Act so that they can properly fulfil their statutory and other functions.

Library and archive provisions

How the library and archive provisions prevent institutions from fulfilling their public interest functions

The Cultural Institutions seek to achieve the widest possible audiences through display and exhibition of works, client access services (eg, reading rooms, auditioning booths, web sites, provision of copies of collection items from client access centres), visitor services, and public and educational programs.

The use of digital technologies to digitise all collection items for both preservation and collection management purposes and to display these works, such as via dumb terminals¹⁷, significantly increases the public accessibility of works in the Cultural Institutions' collections and enables them to fulfil their public interest missions in a timely and cost-effective manner.

¹⁷ In this submission the reference to a dumb terminal is a terminal which does not permit any form of electronic communication to other terminals or online.

The library and archive exceptions do go some way to enabling Cultural Institutions to fulfil their public interest mandates. However, the uncertainty and specific limitations on rights granted to institutions under this part of the Act impedes their ability to fulfil their functions in respect of:

- preservation and replacement copying
- best practice collection management and storage
- administration, and
- the provision of broad based public access to collections (including through the exhibition and display of copyright material).

Andrew Kenyon and Emily Hudson note that the current library and archive copying exceptions force institutions to seek consent or a licence from copyright owners to undertake core business activities which are non-commercial in nature, directly benefit users of cultural institutions, further cultural institutions public interest missions and do not unduly prejudice the rights of copyright owners.¹⁸

The Cultural Institutions' consider that the library and archive exceptions limit their ability to fulfil their statutory functions because the exceptions are:

1. they are highly complex, ambiguous and therefore uncertain (eg, lack of a definition of 'first copy' of a film; 'first record' of a sound recording or 'administrative purposes');
2. go some way to enabling Cultural Institutions to undertake copying for internal purposes relating to preservation and replacement but in the main are outdated and restrictive and do not take into account current practices of Cultural Institutions¹⁹ or the dynamic nature of new information technologies and the increasing public expectation for cultural institutions to use them;
3. limit preservation copying to only 'original material' (manuscripts, 'first copies' and 'first records'), thereby threatening the longevity of collection items which although not the original copy may be the only known available copy;
4. force institutions to adopt inefficient administrative practices (eg, destruction requirements for the provision of digital copies to clients; and declaration requirements for both clients and institutions in providing copies of material to clients under ss 49, 50 and 110B) where there is no direct threat to the copyright owner's market given the high proportion of unpublished, unique and older materials held by the Cultural Institutions and given that copies are provided on a non-profit basis;

¹⁸ Kenyon AT and Hudson E, *Copyright, Digitisation and Cultural Institutions*, The University of Melbourne Faculty of Law, Legal Studies Research Paper No 101, 2004 at p 7.

¹⁹ For example, preservation copying of all collection items not just 'original material' such as manuscripts, 'first copies' and 'first records' of audiovisual material; the need to make back-up/access copies and to format shift items.

5. do not allow institutions to make the best use of digital technologies available to them;
6. incorrectly presume that Cultural Institutions can easily obtain the permission of or a licence from the copyright owner for all activities falling outside of the scope of the exceptions when in fact for many collection items copyright owners are untraceable;
7. favour print-based material over other items (such as audiovisual material) despite Cultural Institutions holding a variety of items in their collections.²⁰

Inconsistency between works and subject-matter other than works

The CLRC in the Simplification Report: Part 1 were of the view that ‘treating works and subject matter other than works consistently will not only remove any possible confusion to users of the Act caused by different standards set for different types of copyright material but also simplify the structure of the Act and remove any unnecessary duplication’.²¹

The Cultural Institutions strongly support the CLRC’s recommendation noting, in particular, that ‘works’ and ‘subject matter other than works’ are treated inconsistently in the following areas:

- There is no general exception to allow libraries and archives to copy and communicate subject-matter other than works for administrative purposes despite this right applying to published works under ss 51A(2) and (3).
- While ss 49 and 50 provide libraries and archives with a right to make copies of published works for users or other institutions, there are no corresponding provisions permitting the copying of published subject matter other than works. Section 110B only permits a ‘first record’ sound recording and ‘first copy’ films to be copied (including digitising) for research or study purposes. However, only a small proportion of the Cultural Institutions’ collections are ‘first’ copies.

Recommendation 7:

The library and archive provisions should be amended to create consistency for both works and subject-matter other than works by consolidating ss48-53 (for works) and ss110A-110C (subject matter other than works) into the one section..

Administrative inefficiencies of declaration requirements

The amount of administration which is required for agencies to ‘document’ that they are supplying material under the ‘fair dealing’ provisions of the Act is a significant administrative burden both for clients and the Cultural Institutions.

²⁰ For example, AIATSIS, which is primarily a research institute housing unpublished print material also has an audiovisual archive and the NGA, although an art gallery, also holds a significant documentation collection.

²¹ Copyright Law Review Committee, Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners, September 1998, at para 7.21.

Clients requesting copies of the whole or part of an article or the whole or part of a published work under s 49 must furnish a written request to an institution and sign a declaration indicating that:

- they require the reproduction for research and study,
- the reproduction will not be used for any other purpose, and
- they have not already been previously supplied with a reproduction of the material by an authorised officer of the library or archives.

Similar declaration requirements apply to requests for inter-library copying under s 50. Thus, where a reproduction is made and supplied of the whole or part of a work held in electronic form or of more than a reasonable portion of a hardcopy work (other than an article) an authorised officer of the library requesting the reproduction must make a declaration setting out the particulars of the request, including the purposes for which the reproduction was requested. Institutions are then required to retain the declarations for four years (s 203A) in chronological order according to the date of the declaration (s 203D).²²

Given that copies of collection material are only being provided on a non profit basis for non-commercial purposes (research and study under ss 49 and 50) and to replace material which is lost, stolen or damaged at another institution (under s 50), it is unduly burdensome for institutions to have to comply with these declaration requirements.

Originally ss 49 was introduced to mirror the fair dealing provisions. The CLRC in the *Copyright and Contract* report noted that the Spicer Committee in 1959 considered it logical to extend a student's permission to make a copy of a work under the fair dealing provision to that of a librarian copying on behalf of a student.²³ However, the declaration requirements of s 49 significantly depart from the rights available to clients to copy material for fair dealing purposes.

The Cultural Institutions appreciate the importance of notifying clients that a copy of an item is provided under specific provisions of the Act and that clients must comply with the Act. However, it is anomalous that Cultural Institutions should be forced to require the public to verify that they will be engaging in research and study when the Act in theory provides individuals with the same right without limitation under the fair dealing provisions.

Recommendation 8:

The declaration requirements for both users and institutions under ss 49 and 50 should be reviewed to minimise the administrative burden on libraries, archives and their clients in providing copies of collection material on a non-profit basis for research and study purposes.

²² Copyright Law Review Committee, *Copyright and Contract*, 2002 at 51

²³ *ibid.*, at 49.

Inconsistency between published and unpublished materials

Currently the Act distinguishes between published and unpublished works in a way that favours 'industry' archives and libraries (those usually holding a large volume of published material) at the expense of 'collecting' institutions (such as museums, archives, galleries and research institutions) who hold large volumes of unpublished, unique and older material which is highly sought after by researchers for its historical and cultural significance.

Even cultural institutions holding predominantly published works, such as the National Library of Australia, also hold valuable unpublished material and face similar predicaments in determining the death dates of the creator of a work or the date of first publication of audiovisual material.

The Cultural Institutions note, in particular, that published and unpublished works are treated inconsistently in the following areas of the Act:

- Sections 49(1) and (2A) limit the right to copy and communicate works for research or study to published works only.
- Only published works can be copied and supplied to another institution under s 50 – thereby excluding inter-institutional supply of substantial portions of institutions' collections.
- Only published manuscripts which are not otherwise commercially available can be reproduced or communicated for the purposes of onsite research or study at an institution or another institution (s 51A(1)(a)).

Given that many manuscripts held by institutions will be unpublished, this exception is useless to most users and institutions. Arguably, the definition of manuscript under s 10(1) of the Act (ie, 'the document embodying the work as initially prepared by the author') presupposes that in many cases the manuscript will be unpublished given that it is the 'original' or initial copy of an item and not the final version (eg, there may have been subsequent versions to the original manuscript to a novel).

- The right to copy and communicate works for administrative purposes applies only to published works which are not otherwise commercially available. There is no equivalent provision for unpublished material despite Cultural Institutions relying heavily on the administrative purpose exception to undertake a variety of collection management tasks such as incidental copying for record keeping purposes (eg, inclusion of thumb-nail images on collection management databases); general record-keeping and copying material for insurance valuations.
- While ss 51 and 110A do provide Cultural Institutions with a right to copy, communicate and supply material for research and study purposes, this right is subject to the condition that 50 years must have passed since the author's death for works (s 51) or since the first publication of the film or sound recording (s110A).

For many of the Cultural Institutions, determining the death date of the author or when a film or sound recording is published is an impossible task because the provenance of many unpublished collection items is unknown at the time of acquisition. For example, museums may have acquired manuscripts or other unique items from a member of the general public who is in no way associated with the creator of the work or may have found the item at a garage sale etc. Similarly, Commonwealth, State and Territory government archives, such as the NAA and the AWM holds private papers in government files protected by copyright, however, it is often impossible to trace death dates of ordinary citizens in respect of material created mid last century.

The exclusion of a right to copy and communicate unpublished material for internal administrative purposes without referral to the copyright owner unduly prevents institutions from managing their collections in a consistent and efficient manner, particularly given the difficulties cultural institutions experience in locating copyright owners for older and unpublished material.

Recommendation 9:

The libraries and archives exceptions to copyright infringement should be amended to ensure that unpublished materials are at least treated in a similar manner to the existing provisions for both published works and published subject-matter other than works.

Clarification required of copying institutions can undertake to fulfill their public interest mandates

Currently cultural institutions are permitted to undertake some but not all the activities necessary to fulfil their mandates. Amendments are therefore required to the libraries and archives exceptions to clarify that such institutions can undertake copying (including format and time-shifting, communication and public performance) as required to fulfil their statutory mandates of preservation, storage, administration, and access.

PRESERVATION

All the Cultural Institutions engage in some form of preservation copying. Preservation copies have been made of approximately 25% of the NGA's collection and 65% of AIATSIS audiovisual collection (in contrast to 1% of its library manuscript collection). Given the high incidence of preservation copying by some of the Cultural Institutions, it is imperative that they have a legal right to make preservation copies of all material without reference to the copyright owner.

There are currently several provisions that provide for the Cultural Institutions to undertake copying and communication for preservation purposes (s 51A(1)(a) and ss110B(1)(a) & 110C(2)(a)). However, significant limitations and restrictions on these rights prevent institutions from fulfilling their preservation mandates.

Limitations on preservation and replacement copying:

Restricted to 'original' / 'first copies' of material

- Section 51A(1)(a) of the Act only allows original artistic works and works held in manuscript form (defined as the document embodying the work as initially prepared by the author) to be copied to preserve them against loss or deterioration.
- Similar provisions apply to 'first copies' of films and 'first records' of sound recordings under s 110, however, these terms are not defined.

As these provisions contain undefined terms they are confusing and their scope is uncertain. They are also generally outdated and rest on a misconception that cultural institutions hold large volume of 'original materials' and that only originals are preserved.

The limitation on 'originals' fails to recognise that there may be various editions/versions of material which, although not the original, have cultural significance and should be copied.

For example, the Director's Cut of a film may not be the original version of the film but provides considerable insight into the making of the film and imbues additional meaning to the final version.

Technically, this material could not be copied under s110B because it is unlikely to fall within the statutory definition of a 'first copy' of a film.

Similarly, the limitation on originals and first copies fails to acknowledge that there may be other copies of material that are in very limited supply. Cultural Institutions may undertake preservation copying of replicate (ie, not unique or original) material.

For example, in terms of film preservation – shellac and vinyl discs and videotape copies of material may need to be preserved onto digital form even though masters may be held elsewhere.

Copying is restricted to the making of only one copy

The CLRC in its Simplification Report: Part 1, noted that it is unclear whether the Act allows more than one copy of a work or subject-matter other than a work to be made for preservation.²⁴ The Cultural Institutions strongly believe that preservation copying should not be restricted to the making of only one copy of an item as the technical processes involved in preserving an item usually require that more than one copy be created. Continuous or repeat copying of sometimes rare and sometimes very fragile manuscript and other collections can also lead to serious deterioration of original works.

²⁴ CLRC 1998, op cit, p 121.

Right to copy published works only applies to material which is not otherwise commercially available

There are also limited rights under ss 51A(1)(b) and (c); ss 110B(1)(b) and (c); and ss 110(2)(b) and (c) to copy published works for replacement purposes provided that the material is damaged, lost, stolen or deteriorated and not otherwise commercially available. Many of these provisions are unduly restrictive and illogical. For example, section 51A(1)(c) is inherently illogical in that if a one-off work is lost or stolen from an institution it will not otherwise be available to be copied or communicated for the purposes of replacing the copy.

Limited ability to undertake replacement copying /format shift all items

In order to fulfil their functions, Cultural Institutions require a right to preserve material onto a format other than the original (including digital formats). This enables the preservation, replacement and migration of the material which is otherwise obsolete or vulnerable to media decomposition and generational loss. Without a general right to undertake this type of format shifting, institutions will not be able to provide access to some of their collection.

For example, analogue and audio systems are no longer manufactured and spare parts are increasingly difficult to obtain to support obsolete formats such as umatic tape – digital copying therefore provides the only viable solution for preservation of analogue content.

Similarly, every 5-10 years audio and video material needs to be migrated – JFormat video is now migrated from digital form because it is now impossible to get equipment and stock to enable it to be played in its original form.

However, there is no provision in the Act expressly allowing existing preservation copies or electronic works to be reproduced in a different format (either analogue or digital) as part of the technical processes of preserving material (especially audiovisual material) or should existing formats become obsolete.

This is despite the fact that preservation strategies for many formats, particularly for audio-visual formats require Cultural Institutions to produce multiple copies of material and in different formats.

For example, the National Library of Australia has embarked on a significant program of digitisation and digital mass storage of sound recordings from the Oral History and Folklore collection. This collection consists of over 37,000 hours of recorded sound, the majority of it unpublished material and in many cases representing unique, original recordings, on a range of analogue and digital carriers including cassette, reel-to-reel tape, digital audio tape (DAT) and CD-R and dating from the 1950s to the present. Through its sound preservation program, the National Library has routinely made preservation duplicates, working duplicates and duplicates for user access (under appropriate access conditions), and is currently in the process format-shifting its collection of sound recordings into digital form for digital mass storage, preservation and delivery (under appropriate access conditions). The format shift is necessary for preservation purposes, as manufacture and maintenance of professional replay equipment for analogue tape and DAT has been largely phased out around the world.

The copying outlined above may technically breach the Act if undertaken without reference to the copyright owner, despite the important public interest served in preserving unique and significant cultural heritage material and ensuring its longevity for use by future generations.

Format-shifting facilitates access to obsolete formats

The Cultural Institutions understand that format-shifting is being considered as part of Issue 7. However, they believe that format shifting by libraries and archives must be addressed separately due to the public interest benefits and specialised nature of such copying by institutions as opposed to the type of format shifting undertaken by individuals.

Given obsolescence of technology, format shifting is also necessary to ensure that material is available in a format which can be used by researchers and others wishing to access material. The AWM notes that:

“Before obsolescence we could supply copies of original film and sound on VHS tapes and audio cassettes for access purposes in the Research Center. This is fast becoming or longer possible due to problems associated with obsolescent technologies and the space required for older analogue technology. Similarly, the AWM has received collections of personal correspondence recorded on obsolescent technologies such as 1960s audio tapes and cassettes and on 5 1/4” and 3.5” floppy disks. If these collections cannot be transferred to more stable technological formats they will soon be lost forever.”

Format-shifting assists to minimise storage problems

Format shifting via the creation of high density digital material is also an effective solution to the perennial storage problems faced by cultural institutions and provides a more cost-effective means of copying onto original formats where that is still an option.

For example, the last available analog audio tapes cost over \$44 per hour, compared to 60c per hour for high resolution digital audio, or 20c per hour for CD quality.

Savings to be made through an amendment providing a legal right to format shift all collection items could be redirected to the acquisition of more copyright material or the provision of broad based access to collection material (whether through direct access, further exhibitions, public programs or educational programs) than remunerating copyright owners as a consequence of technology becoming obsolete.

Future proofing

A right to format shift would provide an effective means of allowing copyright law to keep abreast of technological change as there is an equal need to format-shift digital technologies due to program and hardware obsolescence.

Recommendation 10:

Sections 51A(1) 110B(1), and 110B(2) should be combined into a single provision that provides a right for archives and libraries to copy (including via digitising and format shifting) and communicate all collection items (both analogue and electronic materials) for:

- storage within a Cultural Institution,
- preservation in an accessible format (ie, a right to ‘format shift’ to overcome *format obsolescence, media decomposition* and for the purposes of “*refreshing*” *media*,
- preservation to **prevent** deterioration or loss (irrespective of whether the material is a first copy, published or unpublished);
- replacing a damaged, deteriorated, lost or stolen item held within a Cultural Institution’s collection

The above amendments should also permit the making of multiple copies of collection items where this is required as part of the technical process of preservation.

In order to comply with the ‘three-step’ test and to not unreasonably prejudice the legitimate interest of the rights holders, the Cultural Institutions agree that the above amendments should still be subject to a general limitation that where an item is a published and the copying or communication is for the purposes of:

- preservation to prevent deterioration or loss; or
- replacing a damaged or lost or stolen item within the archive’s collection.

An appropriate replacement copy is a copy that fulfils the role of the original collection item:

For example, despite various copies of a print being commercially available, the above amendment would enable a gallery to digitise the original copy of the print acquired directly from the artist for preservation purposes given the cultural significance of the first copy of an artwork for an institution. The AWM has also started something similar with some of the many thousands of pages of its manuscript collections for which photocopies are requested each year. Currently, about 90,000 pages are requested annually and now approximately 25% are being scanned digitally to avoid repetitive copying of at-risk collections.

STORAGE

Current limitations on back-up copying

The Act does not directly permit Cultural Institutions to make additional copies of collection items (whether for the purposes of back-up or to make access copies for supply to clients to avoid the need to repeatedly refer to original material).

Many items in the collections of the Cultural Institutions are original material susceptible to deterioration through repeated access (eg, audio-visual material, original manuscripts, older artworks and photographs) and can only be made publicly available in digital or duplicate form (as a back-up or access copy):

For example, in relation its audiovisual collection, AIATSIS makes a digital preservation copy of anything requested by a client and then makes a further access copy for the client. This is based on a risk management approach since retrieving the original copy each time would risk damage to the collection.

It is far preferable that Cultural institutions be permitted to make back-up access copies of all collection items than have to repeatedly refer to original collection items in processing access requests and risk damaging original or fragile material. It is also more administratively efficient for the purpose of processing access requests for duplicate access/back-up copies (especially in digital form) to be held onsite given that the bulk of Cultural Institutions' collections are stored offsite.

Recommendation 11:

The Cultural Institutions strongly support a right of libraries and archives to make back-up copies of all collection items (including in digital form) to:

- minimise the risk of deterioration to collection items;
- to enable collection material to be accessed by multiple users; and
- to allow for efficient and cost effective storage of collection items.

ADMINISTRATION

As noted above there is no general exception permitting cultural institutions to copy and communicate subject-matter other than works for administrative purposes despite this right applying to published works under ss 51A(2) and (3).

Most of the Cultural Institutions rely heavily on the administrative purposes exception for core business activities which are essential to the efficient operation of the institution, including:

- incidental copying for record keeping purposes (eg, inclusion of thumb-nail images on collection management databases; and copying for general record-keeping); and
- copying for insurance valuations.

Many of the institutions also rely on the administrative purposes exception to copy material for exhibitions (eg, to make a facsimile reproduction of a collection item). Some institutions, such as the NGA, even rely on ss 51A(2) and (3) to reproduce images in publications (eg, *Artonview* magazine articles). The NGA also sends 'preview' low resolution images to other institutions for the purposes of assessing material for inward and outward loans related to an exhibition.

It may be the case that some Cultural Institutions could rely on s 183 (providing a general right for the Crown to copy and otherwise use copyright material for the services of the government) in lieu of the administrative purposes exception for published works. However, the Cultural Institutions do not feel this is a valid option as the scope of s183 is very unclear and based on legal advice obtained to date, many institutions are unlikely to be considered the Commonwealth for the purposes of the Copyright Act.

Section 183 is also a poor alternative to a clarified administrative purposes exception as it requires copyright owners to be remunerated for uses which are primarily non-

commercial in nature and of no economic detriment to copyright owners but are vital to enabling Cultural Institutions to fulfil their public interest functions.

Unlike mainstream government agencies who may copy published material for research purposes related to preparing advices and reports, the Cultural Institutions are in a unique position amongst government users of copyright material in that most of their copying is 'incidental' (eg, creating thumb-nail images of all collection items for internal communication on a collections databases).

The incidental and non-commercial nature of this type of copying would not prejudice the legitimate interests of the copyright owner as it would not normally be envisaged as a use falling within the copyright owner's market. Similarly, unlike mainstream agencies, institutions have the difficult task of administering hundreds of thousands of collection items, many protected by copyright. To have to remunerate copyright owners for all incidental copying would significantly compromise the ability of Cultural Institutions to finance their operations.

Recommendation 12:

The administrative purposes exceptions in the library and archives provisions should be clarified to permit libraries and archives to copy and communicate all collection material (not just published works) to ensure accurate records of collection items are maintained; to permit internal and intra-archive/library communication of collection items or other relevant material regarding a collection item; and to enable institutions to undertake core-business activities.

EXHIBITION / PUBLIC DISPLAY OF MATERIALS

As outlined above, many of the Cultural Institutions rely on the administrative purposes exception to make facsimile reproductions or other copies of works for the purpose of exhibition / public display to prevent the risk of damage or deterioration to collection material (particularly old or fragile materials). Facsimile reproductions are often made by institutions at the request of donors and copyright owners who are concerned to protect the value of their personal and intellectual property (particularly if the exhibition is to travel between various venues):

The Cultural Institutions therefore strongly support the inclusion of a right to make facsimile reproductions, or to otherwise copy, communicate or publicly perform material in replicate form for the purposes of exhibition. Such a right would protect the interests of both the copyright owner in ensuring the longevity of the work while allowing for broad-based public access to collection items.

In its Simplification Report: Part 1, the CLRC made a similar recommendation but limited its proposal to a right to copy unpublished material only. While theoretically consistent with the above recommendation, the CLRC's recommendation should be extended to apply to all works and other subject matter given that many published as well as unpublished materials may be too old or fragile to be displayed and require copying into a replicate form.

The Cultural Institutions also seek a right to reproduce, communicate, and public perform copyright material for non-commercial purposes relating to promoting a not-for-profit exhibition given the strong public interest served by broad-based promotion of exhibitions, public and educational programs.

It is also anomalous that copying display material for the purposes of promoting not-for-profit exhibition requires the permission of the copyright owner where as the actual display of the copyright material does not involve a copyright use:

For example, the AWM has been prevented from copying collection items used in not-for-profit exhibitions (including the POW travelling exhibition 'Stolen Years' or the more recent 'Dawn of a Legend' exhibition) in promotional material, exhibition catalogues and guides.

On another occasion, letters written at Gallipoli by George D. Mitchell and used in an exhibition on the campaign were unable to be used in promotional material or supplied to newspapers who also wanted to use them in features on the 90th Anniversary of the campaign.

In order to ensure that an adequate balance is maintained between copyright owner and user interests, the Cultural Institutions agree that such a right should be limited to not-for-profit or non-commercial exhibitions and should not be able to be relied on where a replicate copy in an appropriate format is otherwise commercially available within a reasonable time.

Recommendation 13:

The Act should be amended to permit libraries and archives be provided with a right to make facsimile reproductions, or to otherwise copy, communicate or publicly perform in replicate form both works and subject matter other than works for display in not-for-profit exhibitions, or for the purposes of non-commercial promotion of exhibitions.

The Act should specify that such a right not apply where a replicate copy in an appropriate format is otherwise commercially available within a reasonable time.

ACCESS

Physical restrictions on the size and availability of exhibition and public access spaces in Cultural Institutions (eg, reading rooms and auditioning booths) means that most institutions can only provide broad-based access to no more than 1% of its collection at any one time.

However, over the past 5-10 years, governments have actively encouraged cultural institutions to move beyond their traditional role as repositories of cultural heritage to that of facilitating access to culture and information, particularly via digital means, and to constituents residing in rural and regional Australia.

To fulfil their remits, the Cultural Institutions therefore seek amendment to the Act to allow them to digitise and make all collection material (whether published or unpublished works) available on-line within their institution without remuneration or reference to the copyright owner. The Cultural Institutions also seek a limited right to provide online access to only parts of the collection where the material is non-commercially viable communicated in low resolution or similar form.

Many of these rights are already provided by ss 49(5A), 51A(3), 110B(2A), 110(2B). However, their coverage is inconsistent and the exceptions are subject to considerable limitations and restrictions which reduce their usefulness for institutions (eg, declarations must be made, copies must be notated and any electronic copies communicated must be destroyed etc).

Legislative limitations on creating digital collections and providing digital access to collections

Section 110B only permits a ‘first record’ sound recording and ‘first copy’ films to be copied (including digitising) for research or study purposes. These copies cannot be communicated within an institution for public access but can be communicated to another library or archive for research or study (including a right under s110(2B) for the other institution to display the copy of the collection item on-line within its premises).

The Cultural Institutions note that it is anomalous that an institution can communicate sound recordings and films to other institutions for research or study carried out there while they can only provide their clients engaging in research or study with analogue copies. These copies will normally have to be retrieved from offsite storage – causing considerable delays for clients and additional administration.

- Cultural Institutions are prevented from reusing electronic material made for administrative, preservation or replacement purposes to supply to clients for research or study purposes, forcing institutions to repeatedly access original works for the purposes of providing electronic copies to clients.
- The requirement to destroy electronic copies made for research and study purposes under ss 49 and 50 also effectively removes the advantages that digital works provide by requiring institutions to repeatedly access and handle original works. This may therefore inadvertently contribute to the deterioration of original material and waste considerable time and resources given that most collection material is stored remotely.

Most Cultural Institutions, other than AIATSIS, surveyed for this submission indicated that they do not comply with the destruction requirement of ss 49 and 50 due to the considerable administrative costs and inefficiencies this involves.²⁵

For example, the NGA notes that a consequence of compliance with the destruction requirements of ss 49 and 50 access to fragile, damaged, rare or very

²⁵ Results of the survey are at Appendix B

large objects sometimes has to be stopped as constant handling of the original collection items increases the risk of it being damaged. In terms of replacing the photograph after destroying it, the NGA would have to allow for at a minimum 2 weeks notice for movement of works of art around the building or from the off-site storage facility; sometimes wait for a conservation inspection, cleaning and treatment (further movement); then photograph, process, scan, edit, proof and approve proof before the image can be released to a client under ss 49 and 50. All up each access request could take around 1-1.5 months to process.

As highlighted in the Simplification Review: Part 1, any benefits of the declarations requirements under ss 49, 50, 51A and 110B of the Act for deterring copyright infringement outweigh the administrative costs associated with complying with the system (for both institutions and copyright owners) and divert resources away from more useful expenditure such as the acquisition of new copyright material.²⁶

The right of first digitisation – further limits the provision of public access to collections

One of the underlying policy rationales of the Digital Agenda Act 2000 was to ensure that '[a]s far as possible, the exceptions replicate the balance struck between the rights of copyright owners and users that has applied in the print environment'.²⁷ However, due to the right of first digitisation, the fair dealing and library and archive exceptions are narrowed in circumstances where the Cultural Institutions seek to convert copyright material from print to digital formats and to communicate this material for the purpose of providing broad-based access to their collections.

The above limitations are oppressive and inefficient and merely provide copyright owners with a right to seek payment in circumstances where no payment is required in the analogue environment.

Onsite access via 'dumb terminals'

While technologies, such as dumb terminals, are relatively small in size, their use can allow access to numerous works and provide an efficient means of providing access to collection items which would otherwise be inaccessible due to limited storage space, format obsolescence or because the items are too fragile to display.

The Cultural Institutions consider that it is inherently contradictory that hard copy / print-based works can be viewed by the public in their original form in an exhibition space without permission or remuneration to the copyright owner whereas this material cannot be reproduced and communicated to a dumb terminal for the purposes of onsite viewing/browsing without referral to the copyright owner.²⁸

The Cultural Institutions consider that an amendment permitting institutions to digitise all collection material (not just material acquired in electronic form) for the

²⁶ CLRC:1998, op cit at 106.

²⁷ Revised Explanatory Memorandum to the Digital Agenda Bill 2000, para 94.

²⁸ with the exception of an original artistic work (which has been lost or deteriorated since the preservation copy was made or the original is too unstable to be displayed) – such a work may be communicated on a dumb terminal for the purposes of display (s 51A(3A) and (3B)).

purposes of making it accessible onsite to the public, staff and volunteers via ‘dumb’ terminals²⁹ would not unreasonably prejudice the interests of the copyright owner. It is their experience that copyright owners are usually pleased to have their works displayed using digital technologies because it increases public exposure to their work and in many cases stimulates sales.

Furthermore, institutions who have relied on dumb terminals to date, such as the NGA, have found that most copyright owners have provided them with a right to copy and communicate their copyright material without remuneration. However, due to the need to pay licence fees for images controlled by VISCOPY, the NGA has only been able to afford to place 100 images on dumb terminals.

Without a right to engage digitise and communicate material onsite on an unremunerated basis, the NGA notes that it will not be able to afford to embrace the benefits of technology in order to extend access to its collection:

While the permission to publish some images on touch-screens (dumb terminals) within the NGA was provided without any request for remuneration by copyright owners, the NGA has a multimedia licence with the collecting society VISCOPY for which we pay \$5.30 per image for the use of their member artists.

The figure of \$5.30 per image also applies to all VISCOPY artists whose works is featured on the NGA’s website. Potentially, if the NGA were to put the same VISCOPY artist’s works which are currently on the website but not on the touch-screens the NGA would be paying \$7,064.90 p.a. for just the touch-screens and the additional \$7,064.90 p.a. for the same images on the website. A total licence fee of \$14,129.80 per annum.

However, to fulfill our strategic goal of ‘providing and promoting access to the national collection’³⁰ the NGA would be unable to add more to this level of ongoing access and therefore unlikely to ultimately be able to provide access to its entire collection on-line. Potentially at a minimum (and depending on how many more artists join VISCOPY) the NGA could be looking at paying approx. \$63,207.80 p.a. in licence fees for just the website (a quick search of only a few major VISCOPY artists indicates that this would amount to 11,926 works at \$5.30 each) and another \$63,207.80 p.a. for the same images on the touch-screens for onsite use only. Total licence fees could amount to a minimum of \$126,415.60 p.a. – a completely unaffordable amount in today’s limited funding climate.

Provision of access to some collection material to rural and regional Australia

It is the ultimate aim of the Cultural Institutions to be able to communicate collection material beyond their premises without referral or remuneration to the copyright owner in order to provide broad-based access to collections to rural and regional Australia. The Cultural Institutions recognise the concern that control and

²⁹ the Cultural Institutions require that this term be defined in a technologically neutral way to cover both touch screens and other technologies capable of displaying collection items (whether existing now or yet to be invented).

³⁰ NGA, Strategic Goal 5, see Appendix C

enforcement of copyright is difficult when access to material is not confined to a physical space.

Therefore, rather than seek a general right to copy and communicate *all* collection material online, the Cultural Institutions believe that copyright owner's markets are not interfered with through the provision of online access to copyright material which is not otherwise commercially available or commercially viable and provided that the copy is in low resolution or similar form. To date, most institutions have only provided online access to collection material in low resolution format (eg, thumb-nail images) to ensure that any attempt to copy this material results in poor quality reproductions which are not commercially viable.

Similarly, letters, Australian and foreign Government reports, and reports from private organisations are examples of works that contain cultural value but are not commercially viable. These materials should be able to be made available online in low resolution form, particularly given that the CLRC noted recently that there is an 'identifiable public interest in ensuring access to government copyright material'³¹.

The Act also prevents public institutions from publishing 'samples' of copyright material in their collections by making them available on the internet as low resolution thumbnail copies of images. These 'samples' enable users to browse and preview collection materials, and thereby provide access to clients who would not otherwise attend an institution because of geographical distance, disability or other circumstance. Online publication of samples also greatly increase visitor numbers to cultural institutions:

For example, in 2004-05, over 2.4 million people used the AWM's website (for an average visit of 17 minutes) to access research material, collection information and historical information about Australian military and social history. This growing level of public access is considerable given that the AWM receives 900 000 onsite visitors per year to Canberra.

The Cultural Institutions endorse the Australian Digital Alliance's comment as to the merits of a non-remunerable exception allowing institutions to provide online access to non-commercially viable copies in the form of samples of copyright material:³²

"The making of sample copies, either to facilitate access or preview material prior to purchase, should be included as a non-remunerable exception to copyright infringement. An example prevalent in many cultural institutions is the production of low resolution thumbnail copies of images. Such copies, while having no value in any commercial market for the work, greatly enhance access to works for preview or sampling purposes.

Samples provide an efficient and limited form of access to a much broader range of an institutions collection than would otherwise be possible. The growing amount of cultural information that institutions collect over time make copies such as thumbnails a logical option to resolve issues of storage

³¹ CLRC, Crown Copyright, April 2005, at xxiv-xxvi.

³² Outlined at page 9 of their submission to this review

*and access, while at the same time, not interfering with any market for the commercial exploitation of the work*³³

In many cases, such a right would also assist rights holders as previewing of works encourages purchases of commercial copies at a later date.

It is important to note that in the US the use of thumbnail images in a web search engine has been held to be fair use³⁴ as well as the use of copyright material in the ‘public interest’ where there is no negative effect on the market/value of the copyright material.³⁵ While not binding on Australian Courts, these decisions demonstrate a recognition that copyright owners’ interests are not necessarily prejudiced by the provision of online access to copyright material where the material is not otherwise commercially available or is provided in a non-commercially viable format (eg, as low resolution).

Recommendation 14

The Cultural Institutions strongly support amendment to the library and archives exceptions to:

- allow electronic copies made for administrative, preservation or replacement purposes to be retained by an institution for the purposes of supplying copies in response to client access requests under the library and archives exception or fair dealing and fair use exceptions.
- provide a right for institutions to digitise all collection material (not just material acquired in electronic form) and to reproduce, communicate and publicly perform copyright material for the purposes of making it accessible onsite to the public, staff and volunteers via ‘dumb’ terminals.³⁶
- Allow libraries and archives to provide online (eg, internet) access to parts of their collection where the material is not otherwise commercially available or commercially viable and provided that it is communicated in low resolution or similar form.

Orphaned Works

Orphaned works are those works whose authors are not locatable or not identifiable. There is currently no provision in the Act permitting orphaned works to be copied or communicated despite the copyright owners being unknown or untraceable.

Orphaned works are particularly problematic for the Cultural Institutions given that most of them hold older, unpublished, and one-off items in their collections and ‘everyday’ items without details as to copyright ownership or the provenance of the item. Many of these items have little or no commercial value but are still protected by copyright because of the low level of originality required for subsistence of copyright

³³ It is important to note here that thumbnails are deliberately provided in a low resolution format by institutions so that any attempt to copy these results in very bad quality images being produced.

³⁴ *Kelly v Arriba-Soft*, 03 CDOS 58888 (9th Cir 2003)

³⁵ *Time Inc v Bernard Geis Associates*, 293 F Supp 130 (SDNY 1968)

³⁶ the Cultural Institutions require that this term be defined in a technologically neutral way to over both touch screens and other technologies capable of displaying collection items (whether existing now or yet to be invented).

in Australia. Inability to copy orphaned works is particularly illogical when the material is not commercially viable.

For example, the NAA notes that a letter written to the government in 1917 seeking information about a relative in the First AIF who has been reported missing, is an unpublished work still in copyright in 2005. With no information other than the address of the author in 1917 is it impossible to trace descendants of the author of the letter who might be the current copyright owners.³⁷

Orphaned works can also arise because institutions often acquire material where copyright ownership is unknown and where the material is of particular historical significance. Where copyright information is supplied, often ownership details become out of date if the copyright is sold or licensed or if the company or other entity owning the copyright becomes defunct. For example, verifying the copyright status of underlying rights holders for older audiovisual material can be particularly difficult if the production company, and associated records, no longer exist.

Without a provision in the Act permitting institutions to copy or communicate orphaned works, Cultural Institutions are forced to expend a significant amount of resources in locating owners beyond what should reasonably be expected, or alternatively, refrain from using such material altogether. Some Cultural Institutions, after undertaking an exhaustive search for the copyright owner will then use the material for non-commercial purposes based on an assessment of that the risk of a copyright infringement action arising is low. However, other institutions will refrain altogether from copying the material or from providing copies to clients who cannot otherwise rely on one of the exceptions to copyright infringement.

Many orphaned works consist of older material which may be in a fragile condition and require reproduction in facsimile form for display in exhibitions, onsite display on dumb terminals or the internet. Therefore, without a legal right to use such works where the copyright owner is unlocatable or untraceable, Cultural Institutions cannot provide public access to a considerable amount of their collections which essentially become 'locked-up'. This also frustrates the development of a richer pool of public domain material which would be available for use by the creative industries. Kimberlee Weatherwell notes that the overall result of the continued copyright protection for orphaned works is that the copyright balance is not achieved:

"In general, copyright increases public access to works by giving authors incentives to create and incentives to make works available. But protecting orphan works gives no incentive for more creation or exploitation of the work. By definition, these works are not valuable to the copyright owner. But copyright stands in the way of the copyright goal of increasing public access to copyright works, because the necessary permissions for use cannot be obtained at a reasonable cost".³⁸

³⁷ This example is included in the National Archives of Australia's submission to this review (Issue 8).

³⁸ Kimberlee Weatherall, Faculty of Law, The University of Melbourne, Associate Director (Law)Intellectual Property Research Institute of Australia, Background Paper to Oral Presentation, SNAPSHOT 3, 22 May 2005) at para 3.3.1

The Cultural Institutions recommend that the copying and communication of orphaned works be exempted from copyright infringement. Such an exception must be balanced against the interests of copyright owners and only apply to:

- non-commercial uses of a work
- provided that the user has satisfied the obligation to have made ‘reasonable efforts’ to locate the copyright owner (ie, made ‘reasonable inquiries’). Industry practice should form the basis of any ‘reasonable efforts’ test.³⁹

The Cultural Institutions also endorse the ADA’s comments on alternative options for dealing with the problem of orphaned works (outlined at pp 9-11 of the ADA submission to this review), including that:

“... any system attempting to administer trust monies for all orphaned works will necessarily be complex, time consuming, and unreasonably burdensome.

Any scheme which deems unidentifiable rights holders to be members of collecting societies is equally unacceptable. If the Government does find on balance that royalties in relation to orphaned works must be held on trust for a particular period of time, such monies must be returned to institutions at the end of that period. Royalties owed to a specific rights holder, should not confer a windfall benefit on collecting societies to the detriment of public institutions.....

The ADA/ALCC would oppose:

- *Any prescribed notice period prior to the intended publication of a work as required under s 52 of the Act⁴⁰: A prescribed time-frame of notice would be unduly restrictive and inconsistent with institutional practices which require clearances within very limited time-frames for purposes such as exhibitions.*
- *Any requirement such as exists with unpublished works pursuant to section 51A currently, that copying is permitted only after 50 years post death of the author. Where a work is not commercially viable, any such limitation does not assist rights-holders, but merely operates to hinder public institutions.*
- *Introduction of a Canadian style model. The ADA/ALCC refer to the CLRC Simplification Report Part 2 which found that the introduction of a similar scheme in Australia would require a high level of administrative resources and that the costs were likely to outweigh the benefits.*
- *Introduction of a Scandinavian style model which deems collecting societies to represent all rights holders for the purpose of a licensing scheme, with the onus being on the unidentifiable rights holder to notify the collecting society if they do not want to be so represented.”*

³⁹ See results table from the survey of copyright practices by Cultural Institutions (Appendix B: Question 10) for an overview of the standard administrative practices cultural institutions follow to locate copyright owners of orphaned works.

⁴⁰ Section 52 of the Act provides for publication of whole or part of unpublished works held in libraries and archives, where the identity of the copyright owner is unknown and the author has been dead for 50 years

Recommendation 15

The Act should be amended to allow orphaned works to be copied and communicated for non-commercial purposes provided that the user has made 'reasonable efforts' to locate the copyright owner. Industry practice should form the basis of any 'reasonable efforts' test.

Copyright and Contract

The Cultural Institutions endorse the ADA's recommendation that in accordance with the recommendations of the CLRC's Copyright and Contract Report⁴¹, the *Copyright Act 1968* must make it clear that contractual provisions purporting to exclude or modify any of the exceptions to infringement provided for in the Act are unenforceable.⁴²

Otherwise, a balance between copyright owners and users (as provided through fair dealing and the library and archive exceptions) cannot be achieved in the Act if the exceptions can be easily excluded by contract.

The Cultural Institutions endorse the ADA's support for the CLRC's recommendation that the Government work actively to promote an international solution to deal with situations where private international law principles limit the application of Australian legal remedies⁴³.

Recommendation 16

That the Government implement the CLRC's recommendations that:

- the Copyright Act be amended to provide that an agreement, or a provision of an agreement, that excludes or modifies, or has the effect of excluding or modifying, the operation of ss. 40, 41, 42, 43A, 48A, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B, 11A, has no effect.
- it work actively to promote an international solution to private international law issues relating to agreements the subject of this reference.

⁴¹ Copyright Law Review Committee, *Copyright and Contract*, 2002

⁴² Australian Digital Alliance, *op cit*, at 24.

⁴³ This issue is discussed in detail in the Report at 184-199

Appendix A

CICI member institutions endorsing this submission

- Australian Digital Alliance (ADA)
- Australian War Memorial (AWM)
- National Gallery of Australia (NGA)
- National Archives of Australia (NAA)
- Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Library
- Australian Libraries Copyright Committee (ALCC)⁴⁴ endorse the recommendations made in relation to the library and archive exceptions (recommendations 7 to 15).

⁴⁴ The ALCC is a cross-sectoral committee with representatives from the following organisations:

- Australian Library and Information Association
- Council of Australian State Libraries
- Australian Government Libraries Information Network
- Council of Australian University Librarians
- National Library of Australia

Appendix B

Results of survey of CICI members of copyright issues relevant to cultural institutions

All CICI members were surveyed for the purposes of preparing this submission (questions are listed at the end of the table).

Three out of the ten member institutions responded, and responses to issues most relevant to this submission are below.

	National Archives of Australia	National Gallery of Australia	Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)
Question 1: Nature of the collection	<p>Collection comprises over 300 shelf kilometres of records (mainly literary works)</p> <p>Bulk unpublished (only 5-10% published)</p> <p>Mainly Crown copyright material but 3rd-party copyright in private correspondence found in government records.</p>	<p><u>Main collection</u> – artistic works</p> <p><u>Research / library collection:</u></p> <ul style="list-style-type: none"> - official corro - archival material inherited from artists - 1000 old audio cassettes of lectures and interviews 	<p><u>Library (14% of the library collection is unpublished works, mostly in the manuscript collection):</u></p> <ul style="list-style-type: none"> -10 000 manuscripts - over 3,500 items in The Australian Languages Collection (brings together printed material written in Australian Indigenous languages). -2000 rare books -approx 60 000 pamphlets, books, serials, rare pamphlets and serials, newspaper collections, ephemera, kits and microform <p><u>Audiovisual Archives (95% is unpublished, especially field recordings and ethnographic films)</u></p> <ul style="list-style-type: none"> -over 600,000 photographic images and other pictorial materials, including artworks and tracings of rock art and also a number of artefacts - approximately 30,000 hours of recorded sound over 3 million feet of film footage - around 15,000 hours of film soundtrack - approximately 5,000 hours of video
Questions 3&4 – How the institution relies on the administrative purposes exception for works.	<p>Don't rely on this exception</p>	<p>Rely on administrative purposes exception for works for:</p> <ul style="list-style-type: none"> - 'Artonview' magazine articles, <i>distribution of images through public relations department</i> for fair dealing uses to review and critique exhibitions, include in catalogues. -copying and supplying low res images to other venues to consider borrowing the show. - copying and supplying low res 	<p>Rely on administrative purposes exception for works for:</p> <ul style="list-style-type: none"> - facsimile reproduction for purposes of communicating about a proposed exhibition. - incidental copying for record keeping purposes.

		<p>images to potential lenders for selecting works for their exhibition.</p> <ul style="list-style-type: none"> - copying material for the purposes of inclusion in an exhibition (eg, making a facsimile reproduction) - incidental copying for record keeping purposes - copying material for insurance valuations 	
<p>Question 5 – what % of client requests are for a fair dealing use?</p>	<p>Fair dealing: over 90% of our clients require access to our collection for research or study. Maybe 8% require copies of material for publication purposes, and most of the publications are non-commercial (ie academic journals).</p>	<p>Roughly 20%, with requests coming through the public relations and curatorial sections</p>	<p>As a research institute the client base is mainly academics – over 90% of our Library access requests are for fair dealing use, and the number of enquiries in 2003-4 were approximately 2400 (2160 for fair dealing use).</p>
<p>Questions 7&8 – extent to which institution complies with requirement to destroy electronic copies of material supplied for research and study.</p>	<p>Don't destroy copies</p>	<p>Don't destroy copies because the requirement is administratively inefficient (given that similar items are requested on an ongoing basis) and costly (material has to be accessed from offsite storage).</p>	<p>The AIATSIS Library has only recently begun supplying copies of published collection material electronically. It receives around 5 requests for electronic supply of material per month. Copies are destroyed one week after supplying the material (allowing sufficient time to confirm that the client received it) and this takes about 20 minutes per month</p>
<p>Questions 10 - % of collection preserved</p>	<p>Only a very small proportion of the NAA's collection has preservation copies (less than 1%)</p>	<p>Close to 25% and growing daily</p>	<p>In the <u>library</u>, less than 1% of our collection has had preservation copies made. In the <u>audiovisual archives</u>, about 65% of the collection has had analogue preservation copies made and 5% has had digital preservation copies made. <u>Resources have just been allocated for a three year focused digitisation project.</u></p>
<p>Questions 10 - administrative efforts undertaken to trace copyright owners, especially for orphaned works.</p>	<p>If the NAA intends to publish non-Commonwealth copyright material in one of its publications we try to identify a current copyright owner using resources such as on-line telephone books: this depends on the nature of the work. We may wish to publish a letter from a private individual written in 1915 and held on a</p>	<p>Start with old Gallery files, Curator's records, call other institutions who own that artist's works, websearch, white pages for relatives and often probate searches for the last will and testament for an artist. We document them fully and also run the disclaimer in books where we have been unable to find the owner.</p>	<p>Fairly extensive steps are taken in locating known copyright owners – first using in-house resources such as our contacts database, a collection search (for more recent materials deposited by the person), file registry search, staff of the institute; then wider searches on the internet, in other collecting societies, at universities, on the white pages online and the electoral roll.</p> <p>In general there would be about 2-5 enquiries made with AIATSIS staff</p>

	in 1915 and held on a government file but still unpublished. Most of the private copyright works in the Archives are of this nature, they are not original creative works by professional artists, composers, musicians etc.		and colleagues/former colleagues/former employers of the copyright owner (usually an academic in our case) as well as the searching. Estimate the average amount of time spent would be 2-3 full days (broken up over a period) for locating one owner.
Question 11 – if copyright owners unlocatable do institutions continue to use the work	Generally, if copyright owners are unlocatable, we will use the material. We include a notice with every publication that efforts have been made to identify copyright owners and inviting anyone who thinks they have copyright to contact the Archives.	Yes, with disclaimers but generally not for commercial uses.	In cases where the copyright owners are unlocatable, the Library will take a risk management approach for general client services, weighing up the nature of the request (i.e. for return to an Indigenous community or for a researcher’s private study), the intended use of the material, the efforts taken to locate copyright owner, our knowledge of the copyright owner’s general attitude to access being given, the amount of material requested. For online exhibition, though, we are very strict about locating the copyright owner and only copyright cleared or [preferably] public domain/Institute owned material can be used.
Question 12 – whether any copyright infringement actions in relation to use of orphaned or unpublished material.	None	None	To our knowledge there have been no copyright infringement actions or complaints against us, and any complaints we may receive are more to do with Indigenous Communal Moral Rights than copyright. It is for this reason that our audiovisual archives take a cautious approach and do not place any material online at all, and the library place mainly academic resources with little Indigenous cultural material online, and any cultural material is cleared with the community first. We do not participate in Music or Picture Australia for the same reasons.

**CICI SUBMISSION ON THE FAIR USE REVIEW – SURVEY
ON COPYRIGHT ISSUES RELLEVANT TO CULTURAL INSTITUTUIONS**

General Information

1. Please provide details on the size of your collection and if possible, a statistical break-down of the nature of collection items:
 - published material,
 - unpublished - list examples of unpublished material in your collection (eg, private correspondence held in govt. files, home movies etc), and
 - artistic works, AV, sound etc.
2. Specify the sections of your institutions governing legislation mandating the intuitions requirement to preserve, manage, and provide access.

Administrative Purpose Exception

3. How do you currently rely on the “administrative purposes” exception for “works”?
4. What purposes do you think it extends to:
 - copying material for the purposes of inclusion in an exhibition (eg, making a facsimile reproduction)?
 - incidental copying for record keeping purposes (eg, inclusion of thumb-nail images on collection management databases; or general record-keeping obligations)?
 - copying material for insurance valuations?

Fair Dealing

5. What percentages of your client access requests are for fair dealing use?

Research or Study Under the Library and Archive Exceptions

6. What is the compliance costs for your organisation regarding the requirement to destroy electronic copies of collection materials provided to clients under s 49?
7. Does the requirement under s 49 to destroy the copy made for research or study prevent you providing access to collection items because the constant handling /referral to the original collection items increases the risk of damage?
8. What is the impact of complying with the commercial availability test /declaration requirement (applying where a client requests more than a reasonable portion of a published work) from your institution? Should the onus

be on the client, rather than the institution, to declare that a work isn't otherwise commercially available?

Preservation Copies

9. What percentage of your collection material have you made preservation copies of?

Orphaned Works

10. What steps does your institution take to locate copyright owners?
11. If copyright owners are unlocatable, does your institution still use copyright material?
12. What is the number of copyright infringement actions/complaints against your institution in relation to your use of orphaned or old unpublished works?
13. What is your agency's annual expenditure on licensing fees/copyright clearances / or budget allocation for clearances?
14. If the Government does introduce a statutory scheme for unlocatable owners: what are your views on whether your institution would have the capacity to pay licence fees or comply with the administration of the scheme?

Online Access

15. What percentage of the material supplied from your organisation to the Music Australia / Picture Australia projects required copyright clearances (i.e, did you rely mainly on public domain material)?
16. What measures does your institution implement to protect copyright owner's interests when providing material online without copyright clearance (ie., do you only ever provide low-res copies / digital watermarks, streaming).

Appendix C

Statutory mandates / strategic goals of the Cultural Institutions

National Gallery of Australia

Strategic Goals

KEY RESULT AREA 1: COLLECTION DEVELOPMENT

Goal 1 - Acquire premium works of art

Goal 2 - Strengthen and refine the national collection

KEY RESULT AREA 2: COLLECTION MANAGEMENT

Goal 3 - Maintain and protect the national collection

KEY RESULT AREA 3: ACCESS TO & PROMOTION OF WORKS OF ART

Goal 4 - Deliver outstanding displays and exhibitions

Goal 5 - Provide and promote access to the national collection

KEY RESULT AREA 4: PEOPLE & RESOURCE MANAGEMENT

Goal 6 - Sustain an encouraging and productive environment for all staff

Goal 7 - Refurbish and enhance the gallery's building and precinct

National Archives of Australia

ARCHIVES ACT 1983

Section 5 - Establishment and functions of National Archives of Australia

- (1) There shall be, within the Department, an organization by the name of the National Archives of Australia.
- (2) The functions of the National Archives of Australia are, subject to this Act:
 - (a) to ensure the conservation and preservation of the existing and future archival resources of the Commonwealth;
 - (b) to encourage and foster the preservation of all other archival resources relating to Australia;
 - (c) to promote, by providing advice and other assistance to Commonwealth institutions, the keeping of current Commonwealth records in an efficient and economical manner and in a manner that will facilitate their use as part of the archival resources of the Commonwealth;

- (d) to ascertain the material that constitutes the archival resources of the Commonwealth;
 - (e) to have the custody and management of Commonwealth records, other than current Commonwealth records, that:
 - (i) are part of the archival resources of the Commonwealth;
 - (ii) ought to be examined to ascertain whether they are part of those archival resources; or
 - (iii) although they are not part of those archival resources, are required to be permanently or temporarily preserved;
 - (f) to seek to obtain, and to have the custody and management of, material (including Commonwealth records) not in the custody of a Commonwealth institution, that forms part of the archival resources of the Commonwealth and, in the opinion of the Director-General, ought to be in the custody of the Archives;
 - (g) with the approval of the Minister, to accept and have the custody and management of material that, though not part of the archival resources of the Commonwealth, forms part of archival resources relating to Australia and, in the opinion of the Minister, ought to be in the custody of the Archives in order to ensure its preservation or for any other reason;
 - (h) to encourage, facilitate, publicise and sponsor the use of archival material;
 - (j) to make Commonwealth records available for public access in accordance with this Act and to take part in arrangements for other access to Commonwealth records;
 - (k) to conduct research, and provide advice, in relation to the management and preservation of records and other archival material;
 - (l) to develop and foster the co-ordination of activities relating to the preservation and use of the archival resources of the Commonwealth and other archival resources relating to Australia; and
 - (m) with the approval of the Minister, and in accordance with arrangements made with a person responsible for exempt material, to perform any of the foregoing functions in relation to that material as if that material formed part of the archival resources of the Commonwealth.
- (3) Nothing in this Part derogates from the powers and functions of the Public Service Board or any other Commonwealth institution in relation to the keeping of current Commonwealth records.

SECTION 31 – Records in open access period to be publicly available

- (1) Subject to this Part, the Archives shall cause all Commonwealth records in the open access period that are in the custody of the Archives or of a Commonwealth institution, other than exempt records, to be made available for public access.

- (2) A Commonwealth institution that has the custody of Commonwealth records in the open access period, other than exempt records, shall make such arrangements with the Archives as will enable the Archives to meet its obligations under subsection (1) in relation to those record

Australian War Memorial

Australian War Memorial Act 1980

Section 5 – Functions of Memorial

- (1) The functions of the Memorial are:
- (a) to maintain and develop the national memorial referred to in subsection 6(1) of the *Australian War Memorial Act 1962* as a national memorial of Australians who have died:
 - (i) on or as a result of active service; or
 - (ii) as a result of any war or warlike operations in which Australians have been on active service;
 - (b) to develop and maintain, as an integral part of the national memorial referred to in paragraph (a), a national collection of historical material;
 - (c) to exhibit, or to make available for exhibition by others, historical material from the memorial collection or historical material that is otherwise in the possession of the Memorial;
 - (d) to conduct, arrange for and assist in research into matters pertaining to Australian military history; and
 - (e) to disseminate information relating to:
 - (i) Australian military history;
 - (ii) the national memorial referred to in paragraph (a);
 - (iii) the memorial collection; and
 - (iv) the Memorial and its functions.
- (2) The Memorial shall use every endeavour to make the most advantageous use of the memorial collection in the national interest.

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)

Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989

SECTION 5 – Functions of Institute

The Institute has the following functions:

- (a) to undertake and promote Aboriginal and Torres Strait Islander studies;

- (b) to publish the results of Aboriginal and Torres Strait Islander studies and to assist in the publication of the results of such studies;
- (c) to conduct research in fields relevant to Aboriginal and Torres Strait Islander studies and to encourage other persons or bodies to conduct such research;
- (d) to assist in training persons, particularly Aboriginal persons and Torres Strait Islanders, as research workers in fields relevant to Aboriginal and Torres Strait Islander studies;
- (e) to establish and maintain a cultural resource collection consisting of materials relating to Aboriginal and Torres Strait Islander studies;
- (f) to encourage understanding, in the general community, of Aboriginal and Torres Strait Islander societies;
- (g) such other functions as are conferred on the Institute by this Act;
- (h) to do anything else that is incidental or conducive to the performance of any of the preceding functions.