

Copyright and the Digital Economy

Victorian Government submission to Australian Law
Reform Commission in response to Issues Paper 42

The Secretary
Department of Treasury and Finance
1 Treasury Place
Melbourne Victoria 3002
Australia
Telephone: +61 3 9651 5111
Facsimile: +61 3 9651 5298
www.dtf.vic.gov.au

Authorised by the Victorian Government
1 Treasury Place, Melbourne, 3002



Except for any logos, emblems and trade marks, this document is licensed under a Creative Commons Attribution 3.0 licence. To view a copy of this licence, visit <http://creativecommons.org/licenses/by/3.0/au/>.

If you would like to receive this publication in an accessible format please telephone 9651 0909 or email <mailto:information@dtf.vic.gov.au>
This document is also available in PDF format at www.dtf.vic.gov.au

Contents

1.	Executive summary of submissions	1
1.1	Crown use of copyright material	1
1.2	Archives and digitisation.....	1
1.3	Orphan works.....	2
2.	Introduction	3
2.1	Background	3
2.2	State copyright policies.....	3
2.3	Scope of submission	4
3.	Crown use of copyright material	5
3.1	Contractual arrangements.....	5
3.2	Statutory licensing scheme.....	5
3.3	Question 32: Adequacy and appropriateness of statutory licence	6
3.3.1	Existing exceptions to infringement	8
3.3.2	The State's use of third party copyright to comply with its obligations.....	9
3.3.3	Material communicated to the Crown in the course of State business.....	12
3.3.4	Parliamentary proceedings and State commissions and inquiries.....	13
3.3.5	Material provided freely by copyright owner	13
3.3.6	Communication to the public.....	14
3.3.7	Reproduction and communication in the digital economy.....	14
3.3.8	Equitable remuneration	15
3.3.9	Relationship between statutory licence and contract	16
3.4	Question 33: Impact of copyright on regulatory requirements	17
3.5	Question 34: Exception for material deposited under statute.....	17
3.6	Question 52: A broad, flexible exception	17
4.	Archives and digitisation	18
4.1	Question 19: Impact of archives exceptions.....	18
4.1.1	Rationale for digitisation	18
4.1.2	The problems with digitisation under the Act.....	19
4.2	Question 20: Section 200AB of the Act.....	20
4.3	Question 21: Amendments for digitisation and communication	21
5.	Orphan works.....	22
5.1	Question 23: Impact of orphan works	22
5.2	Question 24: Amendments for orphan works	23

1. Executive summary of submissions

The following is an executive summary of the recommendations made by the State in this submission.

1.1 Crown use of copyright material

In part 3 of this submission, the State submits that:

- the statutory licensing scheme concerning the use of copyright material by the Crown in Division 2 of Part VII of the *Copyright Act 1968* (Cth) (**Act**) is appropriate
- the statutory licensing scheme has a number of inadequacies which can make its application complex, uncertain or inflexible, creating high costs and inefficiency for the State
- the Act should be amended to clarify that the statutory licensing scheme complements the exceptions to infringement so that the State can rely on the exceptions consistently with other parties
- particular uses of copyright material should not be remunerated under the statutory licensing scheme, including the State's use of copyright material:
 - permitted or required under statute
 - communicated to the Crown in the course of public business
 - in parliamentary proceedings and State commissions and inquiries
 - where a copyright owner has invited users to freely do acts of copyright, suggesting an implied licence
- the meaning of 'communication to the public' should be clarified
- the ALRC should explore whether the categories of the exclusive acts of copyright are appropriate in the digital economy
- the meaning of 'equitable remuneration' in section 183A of the Act should be clarified
- the Act should be amended to clarify that copyright acts permitted under contractual arrangements should not be paid for under the statutory licensing scheme as this would constitute double payment
- to the extent that it is anticipated that the exceptions supported by the State in this submission would be captured by a broad, flexible exception, the State would support such an exception.

1.2 Archives and digitisation

In part 4 of this submission, the State submits that:

- the Act fundamentally impedes the State body administering archives, the Public Records Office Victoria (**PROV**), in digitising records and making them available online
- section 200AB of the Act provides no assistance to PROV in conducting their business for the services of the State

- the Act should be amended to allow greater digitisation and communication of works by or on behalf of PROV.

1.3 Orphan works

In part 5 of this submission, the State submits that the current legislative regime for orphan works poses significant restrictions to the use of, access to and dissemination of records by PROV and should be amended.

2. Introduction

2.1 Background

In August 2012, the Australian Law Reform Commission (**ALRC**) published the *Copyright and the Digital Economy Issues Paper (Issues Paper)*, inviting responses to a series of questions to assist in its inquiry on whether the exceptions and statutory licences in the Act are adequate and appropriate in the digital environment.

The State of Victoria creates, uses and stores a vast amount of copyright material. Much of the copyright material used by State departments and agencies is subject to a statutory licence or an exception to copyright infringement. These and other aspects of copyright law can be complex, uncertain or inflexible, creating high costs and inefficiency for the State in its endeavours to meet its obligations under the Act. These problems are worsening in the digital economy.

The State welcomes the opportunity to re-examine copyright law in the evolving digital economy through this submission to the Issues Paper.

2.2 State copyright policies

Two intellectual property policies were implemented by the State in August 2012: the *Intellectual Property Policy Intent and Principles (IP Policy)* and the *DataVic Access Policy*.

The IP Policy is the State's policy on its objectives and management of intellectual property. The overarching intent of the IP Policy is that the State:

- grants rights to its intellectual property, as a public asset, in a manner that maximises its impact, value, accessibility and benefit consistent with the public interest; and
- acquires or uses third party intellectual property in a transparent and efficient way, while upholding the law and managing risk appropriately.

Of specific relevance to this submission is Principle 2 of the IP Policy which provides that:

The State deals with third party intellectual property in a manner that:

- a) avoids infringing the intellectual property rights of others and complies with the law; and*
- b) provides equitable remuneration to intellectual property owners (whether directly or through collecting societies) in a manner consistent with the responsible spending of public moneys.*

The DataVic Access Policy provides direction on the release, licensing and management of State datasets so that they can be used and reused by the community and industry to support research and education, promote innovation, support improvements in productivity and stimulate growth in the Victorian economy.

2.3 Scope of submission

The Victorian Government approaches this submission from its position as a user of copyright material owned by third parties.

While the Issues Paper covers a wide range of policy issues relating to copyright and the digital economy, this submission is confined to outlining the State's position on the statutory licensing scheme for Crown use of copyright material and the issues impacting on PROV, including management of archives and orphan works.

The State notes that a separate submission to the ALRC, on behalf of the education sector, has been made by the Copyright Advisory Group, an advisory committee to the Standing Council on School Education and Early Childhood. The State Department of Education and Early Childhood Development is represented on the Copyright Advisory Group. The State recognises that education institutions deal with a unique set of copyright issues and this submission does not seek to address those issues.

3. Crown use of copyright material

The State, in performing acts comprised in third party copyright, generally does so on the basis of:

- a contract between the State and the copyright holder; or
- the statutory licensing scheme contained in Division 2 of Part VII of the Act for the services of the Crown.

3.1 Contractual arrangements

The State often enters into agreements with copyright holders for use of copyright material. For example, a department may contract to copy and communicate an educational program to a group of employees.

The State is party to a significant number of agreements with publishers and subscription services for access to online material. These contracts usually operate to allow State employees to access online databases of copyright material, for a specific period of time.

In the past, the reproduction by photocopier of hard copy material such as books and articles was the most common copyright act made of copyright material. The ubiquity of computers, the amalgamation of publishers and the increasing prevalence of subscriptions to online publications means that State employees have less cause to make hard copies of copyright material. Because subscription agreements usually allow material to be downloaded or printed, much of the copying that does take place is pursuant to the terms of contracts with specific copyright holders.

Statutory bodies sometimes reach what are known as ‘voluntary’ licences with collecting societies to make payment for certain types of acts for specified copyright material. Such a licence only applies to copyright material owned by persons that are members of the collecting society and that have agreed to be party to the licence. For example, Copyright Agency offers a “GovCopy” licence to agencies that are not entitled to the protection of section 183(1) because they are not considered ‘the State’.

3.2 Statutory licensing scheme

The State is subject to the statutory licensing scheme in Division 2 of Part VII of the Act. This enables the State to do acts comprised in the copyright in third party material without first obtaining permission to do so, provided that those acts are done for the services of the State. Under the scheme, the State must either:

- inform the copyright owner of the doing of the act and agree terms with the owner for the doing of the act (sections 183(4) and (5)), or
- in the case of reproductions, where a declared collecting society is operating, pay equitable remuneration to the collecting society in relation to those reproductions (section 183A).

Copyright Agency Ltd (**Copyright Agency**) and Audio-Visual Copyright Society Ltd (**Screenrights**) are the collecting societies declared for the purposes of section 183A of the Act. Copyright Agency is declared for literary, dramatic, musical and artistic works other than computer programs and works included in a sound recording or cinematograph film. Screenrights is declared to collect for sound recordings, cinematograph films, television or sound broadcasts and a work that is included in one of these classes.

Where a collecting society has been declared as the relevant collecting society for the purposes of Division VII under section 183A, notification of and payment to copyright owners is not required under sections 183(4) and 183(5) of the Act.

Section 183A(2) requires the State to pay equitable remuneration to the relevant collecting society in relation to the copies made in the relevant period. The method of working out equitable remuneration must take into account the estimated number of copies made, informed by a sampling system.

The State is party to agreements with Copyright Agency and Screenrights under section 183A. The negotiation of these agreements is a complex process, in large part because of the difficulty of designing and implementing an appropriate sampling system that provides a sound representation of the copying practices of the State, while also excluding copies made under other arrangements or duplicated due to technological advancements with little difference to the real use of the material.

3.3 Question 32: Adequacy and appropriateness of statutory licence

Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

As discussed in the Issues Paper,¹ copyright law reflects a balance of competing interests. On the one hand, there is “the protection of commercial activities designed to exploit material for profit”,² and, on the other, the public interest and economic benefit in “the encouragement of learning and dissemination and knowledge”.³ The Act provides strong protection of copyright owners’ interests, but this is balanced, for example, by the expiration of copyright after specific time periods, the fair dealing exceptions and the statutory licensing scheme in Division 2 of Part VII of the Act.

The State makes extensive use of third party copyright material. As stated by academic John Gilchrist:⁴

Governments generate large amounts of information from material supplied to them in their regulatory, statistical, research, law enforcement, management, budgetary, fiscal and other governing roles and also receive large amounts of copyright information and material voluntarily. Information is regularly reproduced into data

¹ Issues Paper, pages 12-13.

² Issues Paper, page 12.

³ P Hugenoltz and R Okedii, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Final Report (2008).

⁴ Mr John Gilchrist is a Senior Lecturer in Law at the University of Canberra.

*bases, evaluated, dissected and manipulated to produce new information of value to the community or to a segment of it.*⁵

When the State uses copyright material belonging to others in the course of delivering services to the public, it is in a different position to other users of copyright. The State's use is not for commercial ends or for private benefit. Rather, it is ancillary to the State's service delivery to the public. These services drive broader social and economic benefits to the community.

By providing that the State may use third party copyright material without infringing copyright, the statutory licensing scheme makes it more efficient for the State to deliver these fundamental services to the public.

If this provision were removed, the State would be required to take the impractical step of seeking permission from copyright owners prior to using their material. This would amount to a significant and costly administrative burden that could substantially slow the day to day practices of the State, occupying resources that could be used to deliver services. Furthermore, the State would likely need to negotiate with collecting societies to establish voluntary licences such as Copyright Agency's 'GovCopy' licence.⁶ As noted earlier, such licences only apply to copyright material owned by persons that are members of the collecting society and that have agreed to be party to the licence.⁷

Against these considerations, the State recognises that its use of third party copyright material may impact on the benefits that the Act seeks to protect in favour of the copyright owner. In such circumstances, the State contends that it is appropriate to reach terms with copyright owners for the use of their material. The statutory licence reflects a balance between the public interest in the State's use of copyright material (by providing an exception to infringement) and the private interests of copyright owners (by requiring the State to reach terms with affected owners).

The Crown's use of copyright material for the services of the State is unique. It is appropriate that the State receives the benefit of a distinct arrangement under the Act recognising that position.

While the State considers the existence of the statutory licence to be appropriate, the scheme has a number of inadequacies which can make its application complex, uncertain or inflexible, creating high costs and inefficiency for the State. Some inadequacies arising from the licence scheme are present irrespective of advances in the digital economy, while others are worsening in the digital economy. The ALRC's inquiry provides an opportunity to examine the inadequacies, discussed in further detail below including:

- the application of existing free use exceptions to the licence is unclear (part 3.3.1)
- use of material under statute should not be remunerable (part 3.3.2)
- use of material provided to the State in the course of public business should not be remunerable (part 3.3.3)

⁵ John Gilchrist, "Crown use of copyright material", (2010) 9 *Canberra Law Review* 36, page 6.

⁶ See www.copyright.com.au/assets/documents/licences/GovCopy%20Licence%20FAQs.pdf.

⁷ When the State uses any copyright material owned by a person that is not a member of the collecting society, or has not agreed to be party to the licence, it would need to obtain permission directly from the owner prior to using the material.

- use of material in parliamentary proceedings and State commissions and inquiries should not be remunerable (part 3.3.4)
- use of material provided freely by the copyright owner should not be remunerable (part 3.3.5)
- the meaning of communication to the public is unclear (part 3.3.6)
- the ALRC should explore whether the categories of exclusive acts of copyright are appropriate in the digital economy (part 3.3.7)
- the meaning of “equitable remuneration” in section 183A is unclear (part 3.3.8)
- the relationship between the statutory licence and contractual arrangements is unclear (part 3.3.9).

3.3.1 Existing exceptions to infringement

Some State uses of copyright material satisfy the parameters of the fair dealing and other exceptions to infringement in the Act. For example, an officer of the State may reproduce a reasonable part of a copyright work for the purposes of research, as contemplated by the fair dealing exception in section 40 of the Act. However, the relationship between acts that fall within these exceptions and the statutory licence in Division 2 of Part VII is unclear.

Broadly, there are two views on this question:

- that the exceptions to infringement do not apply where the State uses copyright material for its services under section 183(1), or
- that section 183(1) complements the exceptions to infringement so that the State can rely on them consistently with other parties.

There are a number of arguments for each view.⁸

The State submits that if the former view set out above was correct, it would put the State at a disadvantage compared to most non-government copyright users, such as corporations and individuals, who are entitled to rely on the exceptions to infringement by not remunerating copyright owners for specified copyright acts.

The State’s previous and current agreements with copyright collecting societies for the payment of equitable remuneration under section 183(1) do not exclude payment for copyright acts that would normally be allowed under an exception to infringement.

In *Copyright Agency Ltd v State of New South Wales* [2008] HCA 35 (**Copyright Agency v NSW**), the High Court stated that:

11. The State did not suggest that any of the fair dealing provisions (ss 40-42) or other provisions in Pt III, Div 3 (ss 43-44F) which provide that certain acts do not constitute an infringement, had any application to the uses of the survey plans described below. In cases where these provisions do apply, Pt VII, Div 2 respecting Crown use and equitable remuneration is not engaged.

⁸ See John Gilchrist, “Crown use of copyright material”, (2010) 9 *Canberra Law Review* 36, pages 6-16. The author helpfully summarises the arguments for both views.

This is consistent with the latter view set out above: that fair dealing complements the statutory licence. However, given that NSW did not argue that the exceptions applied, this statement is *obiter dicta*.

The State submits that the latter position – as outlined by the High Court and preferred by some academics⁹ – should be clarified in the Act to avoid any doubt as to the interaction between the statutory licence and free use exceptions.

3.3.2 The State's use of third party copyright to comply with its obligations

As submitted earlier, the State's flexible use of third party copyright material is necessary to achieve its role in service delivery to the public. However, recent and likely future changes to the methods by which that State uses copyright material mean that the statutory licence is not adequate in the digital economy. This is in part due to the differences in treatment of copyright material that is 'communicated' rather than 'reproduced'. As stated by Gilchrist:

Increased engagement with the community online and internal transfer of agency information will increase. These practices may test the effectiveness of relying on an implicit licence from the provider of information and the present defences to infringement under the Copyright Act. In particular, the High Court decision in Copyright Agency Limited v New South Wales and the changing technology in the way we communicate, raise the question whether there is any need for express special defences permitting certain public uses of copyright material deposited or registered in accordance with statutory obligations under State or federal law, outside the operation of s 183.¹⁰

The State supports this view. The State's IP Policy and DataVic Access Policy reflect the State's emphasis on the free flow of information to the public to support research and education, promote innovation, support improvements in productivity and stimulate growth in the economy.

Below, the submission describes the existing position for copyright acts done pursuant to statutory obligations. It then sets out three key examples of the issue – surveyors' plans, freedom of information and public records. Finally, it submits a proposal for an exception relating to uses under statute.

3.3.2.1 Existing position

The existing position is that copyright acts done pursuant to statutory obligations and powers fall within section 183 of the Act. In *Copyright Agency v NSW*, the High Court held that:

...there is nothing in the express terms of s 183(1) (or its history) which could justify reading down the expression "for the services of the... State" so as to exclude

⁹ See Enid Campbell and Ann Monotti, "Immunities of Agents of Government From Liability for Infringement of Copyright" (2002) 30 *Federal Law Review* 459 and John Gilchrist, "Crown use of copyright material", (2010) 9 *Canberra Law Review* 36, pages 6-16.

¹⁰ John Gilchrist, "Crown use of copyright material", (2010) 9 *Canberra Law Review* 36, pages 43-44.

*reproduction and communication to the public pursuant to express statutory obligations.*¹¹

The result of this, as reflected in that case, is that the State must make payment to copyright owners for its use of copyright material under section 183 regardless of whether the use is permitted or required under statute.

3.3.2.2 Surveyors plans

In *Copyright Agency v NSW*, the High Court held that, under the statutory licensing scheme, the New South Wales Government is required to make payment for particular copyright acts associated with providing survey plans to the public under statutory requirements. The forthcoming Copyright Tribunal decision will determine the basis on which to calculate the amount to be paid by NSW.

In this State, various proposed changes to land boundaries are subject to statutory requirements for the preparation of survey plans and the lodgement of those plans with the State. For example, under the *Subdivision Act 1988* (Vic) and the *Subdivision (Registrar's Requirements) Regulations 2011* (Vic), survey plans prepared for the purposes of subdivision are required to be prepared and signed by a licensed surveyor.

The Registrar of Titles is required to record information contained in and provided with a survey plan in the Register of Land.¹² This register is kept online. Members of the community may access the information in the register, including survey plans, either freely or upon paying a small fee to recover the costs of providing this service, depending on the information sought.

Currently, there is no payment by the State to surveyors or collecting societies for the copyright acts associated with complying with various statutory requirements in relation to survey plans. Given that the fees for access to survey plans are calculated on a cost-recovery basis, any additional cost imposed on the State in the form of copyright fees is likely to be passed on to users of the plans. A large proportion of those users are surveyors.

The State submits that there is a clear public interest in providing survey plans to the public, and in particular to surveyors, at low or no fee. There is little public interest in remunerating the authors of such works through the statutory licence, particularly given that a large proportion of the authors are also users, and the surveyors are generally remunerated at the time of creating the survey.

3.3.2.3 Freedom of information

Another area in which statutory requirements result in payments under section 183(1) of the Act is freedom of information.

Many of the documents requested from the State under the *Freedom of Information Act 1982* (Vic) (**FOI Act**) include copyright owned by third parties. Common examples include correspondence from the public and submissions made to the State in response to public consultation.

The FOI Act provides every person with a legally enforceable right to obtain access to documents of agencies and official documents of Ministers, except for exempt documents.

¹¹ At paragraph 90.

¹² *Transfer of Land Act 1958* (Vic), section 27A; *Subdivision Act 1988* (Vic), section 27H and *Subdivision (Registrar's Requirements) Regulations 2011* (Vic), regulation 29.

Section 23 of the FOI Act sets out a number of ways in which access to a document may be provided, including providing for inspection or providing a copy. Most requests for access seek copies of the relevant documents, and, as a rule, this is more efficient for the State than providing for inspection. Accordingly, the usual practice of the State in providing access is to provide a copy of the requested documents.

Section 23(3)(c) of the FOI Act provides that if the form of access requested by the applicant would involve an infringement of copyright subsisting in a person other than the State, access in that form may be refused and access given in another form. This section would not normally be engaged by copying under the FOI Act given the presence of section 183(1) of the Act.

The *Freedom of Information Act 1984* (Cth) provides immunity to the Commonwealth for breach of copyright in giving access or making publication under that Act.¹³ No compensation is contemplated by this provision and it acts independently and irrespective of section 183 of the Act. The State's FOI Act contains no similar provision, and, being state legislation, cannot propose to override the *Copyright Act* for constitutional reasons.

Given the significant public interest in access to information enabled by the FOI Act, the State submits that it should not be required to pay copyright owners under the statutory licensing scheme for actions taken to comply with the FOI Act.

3.3.2.4 Public records

Another example of an area in which the statutory licence requires payment for statutory functions is the State's obligation to retain and provide access to public records, which is discussed in more detail in part 4 of this submission.

3.3.2.5 Proposal

The State submits that State uses of copyright material permitted or required under statute should not be remunerated under the statutory licensing scheme. Such uses should fall within a fair dealing or fair use exception¹⁴ or otherwise be expressly excluded from payment under the statutory licence (for example, by excluding them from sections 183(5) and 183A).

The UK provides a model for such exceptions. The *Copyright, Designs and Patents Act 1988* (UK) (**UK Act**) provides express exceptions for the following aspects of public administration:

- Material open to public inspection or on official register (section 47)
- Public records (section 49), and
- Acts done under statutory authority (section 50).

Section 47 of the UK Act provides a free use exception for certain material open to public inspection pursuant to a statutory requirement or on an official register. As long as the authority of the person responsible for the requirement or register is given, copyright is not infringed where:

- factual information in a literary work is copied for a purpose which does not involve the issuing of copies to the public (section 47(1))

¹³ See sections 90-92. Immunity requires access to have been given or publication to have been made in good faith in the belief that it was required under the Act.

¹⁴ See discussion in part 3.6 below.

- material is copied or issued to the public for the purpose of enabling the material to be inspected at a more convenient time or place or otherwise facilitating the statutory requirement (section 47(2)), and
- information about matters of general scientific, technical, commercial or economic interest is copied or issued to the public for the purpose of disseminating that information (section 47(3)).

An exception along similar lines in the Australian context would be likely to resolve the issues identified in relation to surveyors plans above.

Section 49 of the UK Act provides a free use exception for public records, which is discussed in more detail in part 4 below.

Section 50 of the UK Act provides that where the doing of a particular act is specifically authorised by an Act of Parliament, the doing of that act does not infringe copyright (unless the Act provides otherwise).

The State submits that each exception is broadly appropriate in the Australian context.

3.3.3 Material communicated to the Crown in the course of State business

The State receives significant quantities of material from the public in the course of its business. For example, every month the State receives thousands of letters and emails from members of the public. An author owns copyright in their letter.

The practice in many State departments is for incoming correspondence to be scanned and saved into an electronic digital records management system. Sometimes, the original record is kept for a period of time, as a safeguard against poor scanning, and then destroyed. In the course of preparing a response, the responsible officer may print the letter and/or email it to other officers, departments or agencies to assist in preparing a response. Thus, preparing the response will always involve an initial copy and may involve a number of other copyright acts. If the original letter needed to be shared between officers in preparing the response, rather than using digital technology to efficiently circulate the letter received, it would significantly slow the process of responding.

It may be argued that such practices are undertaken pursuant to an implied licence given by the party that communicates the material to the State. However, the existence of such a licence is uncertain, particularly in the broader context of the *Copyright Agency v NSW* decision, where the High Court declined to imply a licence and emphasised that the circumstances in which it would do so are limited.¹⁵

Section 48 of the UK Act provides an exception to infringement in relation to material communicated to the Crown. It applies where a work is communicated to it in the course of “public business”, by the owner or with their licence. Public business is defined as any activity carried on by the Crown. In this case the Crown may, for the purpose for which the work was communicated to it, or any related purpose which could reasonably have been anticipated by the copyright owner, copy the work and issue copies of the work to the public without infringing any copyright in the work. However, it may not do so if the work has previously been published.

¹⁵ See, for example, paragraphs 92 and 93, in which the High Court held that a licence will only be implied where there is a necessity to do so.

The UK provision is flexible and would remove the uncertainty as to whether material communicated to the State may be used under an implied licence.

The State submits that its use of material communicated to the Crown in the course of State business should not be remunerated under the statutory licensing scheme. For example, such uses should fall within a fair dealing or fair use exception¹⁶ or otherwise be expressly excluded from payment under the statutory licence.

3.3.4 Parliamentary proceedings and State commissions and inquiries

Existing statutes and common law provide some immunity for copyright infringement in relation to parliamentary proceedings.¹⁷ Whether these immunities apply to any given copyright act is often complex.

The Act currently provides some exceptions for copying by parliamentary libraries. Sections 48A and 104A provide that copyright is not infringed where a Parliamentary library makes use of copyright material (for example, by copying it) to assist a member of Parliament. This exception is limited in scope.

The UK Act provides that copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings, or reporting such proceedings (section 45). The UK Act also provides that copyright is not infringed by anything done for the purposes of the proceedings of a Royal Commission or statutory inquiry. “Statutory inquiry” means an inquiry held or investigation conducted in pursuance of a duty imposed or power conferred by or under an enactment.

The Act contains a similar provision to the UK Act in relation to judicial proceedings. Section 43(1) provides that copyright is not infringed by anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding.

Parliamentary proceedings and State commissions and inquiries are fundamental to democracy. It is not in the public interest for the State to pay a copyright owner for such uses. The existing exceptions are contained within common law and a number of different instruments, and may not be sufficiently wide to cover all copyright acts required for the purposes of those proceedings and inquiries.

Accordingly, the State submits that its use of copyright material in parliamentary proceedings and State commissions and inquiries should not be remunerated under the statutory licensing scheme. Such uses should fall within a fair dealing or fair use exception¹⁸ or otherwise be expressly excluded from payment under the statutory licence. Section 43(1) of the Act may provide an appropriate model.

3.3.5 Material provided freely by copyright owner

State departments and agencies make extensive use of websites in the course of providing services of the State. Many websites invite users to freely do acts comprised in the copyright

¹⁶ See discussion in part 3.6 below.

¹⁷ See *Constitution Act 1975* (Vic), section 19(1); *Bill of Rights 1689* (England), article 9; *Parliamentary Committees Act 2003* (Vic), section 50.

¹⁸ See discussion in part 3.6 below.

in certain material without intending to charge for those acts. For example, websites often provide users with a link inviting them to ‘print’ an article. Another example is material provided under a Creative Commons licence.

If the statutory licensing scheme has the effect that the State must reach terms with the owner of such material (section 183(5)) or pay equitable remuneration to a copyright collecting society (section 183A) this would put the State at a disadvantage compared to members of the public, who may do the invited acts comprised in copyright freely.

The State submits that its use of copyright material on terms offered freely by a copyright owner, particularly on websites, should not be remunerated under the statutory licensing scheme. Such uses should fall within a fair dealing or fair use exception¹⁹ or otherwise be expressly excluded from payment under the statutory licence.

3.3.6 Communication to the public

The statutory licensing scheme applies to the State’s doing of any acts comprised in copyright. Under section 31 of the Act, this includes communicating a work to the public. Section 10 defines “communicate” as follows:

communicate means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter, including a performance or live performance within the meaning of this Act.

Accordingly, under section 183(5), the State is required to reach terms with copyright owners for making communications to the public of their works.

While it seems that the definition of “communicate” would capture sending a copyright work by email attachment or uploading it to a website,²⁰ the scope of the right “to communicate [a] work to the public” remains unsettled in Australian law and creates uncertainty in applying the statutory license afforded to the Crown.

The State submits that the meaning of communication *to the public* should be clarified. For example, would an officer of the State emailing a copyright work to another officer of the State be a communication “to the public”? Would placing a copyright work on a departmental intranet?

3.3.7 Reproduction and communication in the digital economy

The Act provides for various exclusive acts of copyright, including reproduction and communication. In the digital economy, the distinction between some of these acts is less apparent. For example, the acts of emailing a document containing third party copyright material, and printing that same document, may be regarded as two separate acts of copyright with separate corresponding obligations under the statutory licensing scheme.

¹⁹ See discussion in part 3.6 below.

²⁰ Andrew Christie and Eloise Dias, “The New Right of Communication in Australia”, *Intellectual Property Research Institute of Australia*, Working Paper No. 01.05, February 2005, pages 22-24.

The State submits that it may be valuable to consider whether the concepts of reproduction and communication could be technology neutral, and more easily understandable to users of copyright material. This may also provide an opportunity to explore the boundaries of what constitutes a copyright act, including the issue of temporary or incidental copyright acts.

3.3.8 Equitable remuneration

Section 183A(2) requires the State to pay collecting societies “equitable remuneration” in relation to the copies made by the State using a method either agreed between the State and a society, or determined by the Copyright Tribunal.

Whether agreed or determined by the Tribunal, the method for working out the equitable remuneration must take into account the estimated number of relevant copies. The estimate must be determined using a sampling system (section 183A(3)). Section 183C gives collecting societies the power to carry out sampling on State premises.

The Act does not define “equitable remuneration”.

The Copyright Tribunal has previously considered the amount to be paid under section 183(5), which requires “the terms for the doing of the act” to be agreed between the State and the copyright owner or fixed by the Tribunal. In *In the Matter of an Application by Seven Dimensions Pty Ltd* (Federal Court Of Australia Copyright Tribunal) No. CT 1 of 1995, the Tribunal held that, in determining the amount to be paid under section 183(5), regard will be had to the market rate and the Tribunal will assume that the parties were in an arm’s length bargaining situation.

Given the different formulations of section 183(5) (which requires “terms”) and 183A(2) (which requires “equitable remuneration”), this judgment may be of limited value in assessing the meaning of equitable remuneration. While it may be that equitable remuneration requires payment broadly consistent with market rates, the State’s view is that the presence of the word “equitable” implies a wider ranging inquiry.

The meaning of equitable remuneration has been considered by the Copyright Tribunal in the context of the statutory licence for educational institutions.²¹ In the case of *Copyright Agency Limited v Department of Education of New South Wales* (1985) 4 IPR 5, Sheppard J noted that difficulty of the task of setting the fee.²²

In *Copyright Agency Limited v Queensland Department of Education* (2002) 54 IPR 19, Finkelstein J held that equitable remuneration was not the same as the remuneration that would be established in an ordinary market exchange between buyers and sellers, given the purpose of the copying and the public benefit of the statutory licence.

The State supports this view. The assessment of equitable remuneration should take into account the public interest in the State providing services to the community using taxpayer funds. As recognised in Principle 7 of the State’s IP Policy, the State is not in the business of

²¹ *Copyright Agency Limited v Department of Education of New South Wales* (1985) 4 IPR 5; [1985] ACopyT 1; *Copyright Agency Limited v University of Adelaide* (1999) 151 FLR 142; 42 IPR 529; [1999] ACopyT1; *Copyright Agency Limited v Queensland Department of Education* (2002) 54 IPR 19; [2002] ACopyT 1

²² At 40.

commercialising intellectual property and the uses made of copyright material under section 183(1) are incidental to the State's role of service delivery.

It may also be beneficial for the definition of equitable remuneration to take into account the different types of copyright material used and the different reasons for use. As discussed in parts 3.3.2 to 3.3.5 above, some State uses of third party copyright material should not be remunerated under the statutory licence. Examples include uses in relation to freedom of information requests and the copying of correspondence to the State for the purposes of responding more efficiently.

The State suggests that the ALRC consider defining the meaning of equitable remuneration in section 183A of the Act. The definition should emphasise that equitable remuneration is not solely to be determined by reference to market value but include consideration of the public interest in the State's use of copyright material. If the copyright acts set out in parts 3.3.2 to 3.3.5 above are not captured by a fair dealing or fair use exception, remuneration for such acts may be excluded in the definition of equitable remuneration.

If equitable remuneration is defined, section 183(5) should also be amended to provide that equitable remuneration is to be paid by the State for its use of copyright material where that section applies. This would provide for consistent approaches to the payment amount under the statutory licence whether or not a collecting society was declared for the relevant use.

3.3.9 Relationship between statutory licence and contract

As described in parts 3.1 and 3.2 above, there are two broad ways in which the State is entitled to do acts comprised in third party copyright: under contract from copyright owners and under the statutory licensing scheme in Division 2 of Part VII of the Act. But the legal relationship between the statutory licensing scheme and contracts is unclear.

On one view, every State use of third party copyright material for the services of the State would fall within section 183(1) of the Act, regardless of whether the copyright owner's permission was given prior to the use. Thus, contracts between the State and copyright owners would be considered arrangements under section 183(5) of the Act.

This could mean, for example, that sampling under section 183A should include all copying of third party copyright material undertaken by the State, regardless of whether it was already approved by the copyright owner under a contractual arrangement.

The alternative view is that where there is a contract between the State and a copyright owner for the use of the copyright material, the statutory licence does not apply to acts that fall within the contract. Section 183(1) provides an exception to infringement, but there is no engagement of the exception where a copyright owner has already given permission. Thus, section 183(5) would also not apply, given that there has not been "an act comprised in a copyright ... done under subsection (1)".

This view would mean that sampling under section 183A should exclude all copying of third party copyright material already permitted under contractual arrangements.

The State should not be required to pay twice for the use of copyright material, and this is unlikely to have been the intention of Parliament. Further, it should be open for a copyright owner to reach agreement with the State that he or she will not be paid for the use of particular material. The State submits that the Act should be amended to clarify that

copyright acts permitted under contractual arrangements should not be paid for under the statutory licensing scheme.²³

3.4 Question 33: Impact of copyright on regulatory requirements

How does the Copyright Act 1968 (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

See part 3.3.2 above and, in particular, the examples of surveyors' plans (part 3.3.2.2), freedom of information (part 3.3.2.3) and material communicated to the Crown in the course of public business (part 3.3.3).

See also the issues around public record-keeping in part 4 below.

3.5 Question 34: Exception for material deposited under statute

Should there be an exception in the Copyright Act 1968 (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?

For the reasons outlined in part 3.3 above, the State submits that public uses of copyright material permitted or required under statute should not be remunerated under the statutory licensing scheme. This would include copyright material deposited or registered in accordance with statutory obligations.

3.6 Question 52: A broad, flexible exception

Should the Copyright Act 1968 (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

A broad, flexible exception to copyright infringement, as discussed in the Issues Paper, may capture the copyright acts discussed in this part of the submission. For example, public uses of copyright material deposited or registered in accordance with statutory obligations may fall within a broad exception.²⁴ Such an exception has the benefit of being technology neutral and adaptable to future changes in the digital economy.

Accordingly, to the extent that it is anticipated that the additional exceptions supported by the State in this part of the submission would be captured by a broad, flexible exception, the State would support an exception.

²³ The State does not take a position on whether an agreement that excludes or modifies the fair dealing provisions of the Act should be enforceable.

²⁴ See CENDI Copyright Working Group, *Frequently Asked Questions About Copyright: Issues Affecting the U.S. Government*, CENDI/2008-1, 8 October 2008, <http://www.cendi.gov/publications/04-8copyright.html>, part 5.1.1.

4. Archives and digitisation

This chapter responds to the questions in the Issues Paper regarding libraries, archives and digitisation, to the extent that they affect PROV. Issues impacting on libraries are outside the scope of this submission.

4.1 Question 19: Impact of archives exceptions

What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

PROV, constituted under the *Public Records Act 1973* (Vic), is the State archives. Its objectives include maintaining public records and ensuring that they are accessible to the State and the public. For example, PROV has a statutory duty to cause reasonable facilities to be available to the public for inspecting and obtaining copies of public records.²⁵

Usually, a public record that has existed for 25 years and is no longer required to be readily available will be transferred to PROV.

PROV is crucial to good records management by the State, ensuring good governance, efficiency, transparency and accountability.

The most significant practice of PROV in the digital environment is its digitisation and online access program. Digitisation is impeded by the Act and not sufficiently enabled by the libraries and archives exceptions.

4.1.1 Rationale for digitisation

The rationale for PROV to digitise the historical records in its care has two main aspects: preservation and access.

Digitisation serves to preserve records. Some records are frequently requested, and the repeated handling of the originals causes deterioration. Other records are physically fragile and easily damaged. PROV digitises these records to provide digital surrogates. This also serves as a disaster recovery strategy, preventing records from being destroyed by an act of God.

Digitisation, when coupled with providing the digital records on the internet, also serves to improve access to records so that users do not need to travel to a single location. The availability of records on the internet also makes research far more efficient, given that it can be completed at any time and with the assistance of searches.

There is a public expectation that cultural collections will be digitised and made available online, and a clear public interest in doing so. This is reflected in State policies and priorities,²⁶ including the DataVic Access Policy,²⁷ with its goal to enable public access to

²⁵ Section 11(1) of the *Public Records Act 1973* (Vic).

²⁶ State of Victoria, *Collections Management in Cultural Agencies: Victorian Auditor-General's Report*, October 2012, chapter 2.4.3 and chapter 3.

support research and education, promote innovation, support improvements in productivity and stimulate growth in the State's economy.

4.1.2 The problems with digitisation under the Act

The fundamental problem in attempting to undergo a digitisation project is that the Act requires each copyright work to be considered separately for the purpose of an exception to infringement, while digitisation requires thousands of works to be dealt with collectively.

A significant proportion of the records held by PROV include third party copyright material. For example, letters, submissions and reports received in the course of public business are often subject to copyright owned by a third party. The archives also include every will in respect of which there has been a grant of Probate in the State, which are also subject to copyright. Comprehensive record-keeping requires these records to be kept in context, including during any digitisation process.

The vast majority of this material is likely to be unpublished for copyright purposes, meaning that copyright protection is indefinite.²⁸ This means that the issues identified below in relation to digitisation apply to material that otherwise would be well beyond the timeframe of copyright protection that applies to published works, such as material from the 19th century.

Digitisation and providing access to historical records online inevitably involves a number of acts comprised in third party copyright. Scanning an original document is a reproduction, while uploading it to the internet involves a communication and in some contexts may risk authorisation of copyright infringement by website users. Copying a digital document into another form is also a reproduction. Accordingly, the Act significantly hampers PROV in its ability to digitise its collection, and provide wider access to its material.

Unlike the *Archives Act 1983* (Cth), the *Public Records Act 1973* (Vic) does not provide protection against actions for infringement of copyright by the giving of access.

PROV could attempt to rely on the statutory licence for Crown use of copyright material in Division 2 of Part VII of the Act to digitise records. However, the statutory licence would

²⁷ Discussed at part 2.2 above.

²⁸ The decision of the Full Federal Court in *Copyright Agency Ltd v New South Wales* [2007] FCAFC 8 at [148] held that publication of surveyors plans occurred when the surveyor provided them to a client, or at the time they were communicated to the relevant Council. This decision, which was not the subject of the appeal to the High Court, may mean that that some materials held in cultural and collecting institutions may have been published, on the basis that publication "may extend to the handing over of materials to a public authority (including archives, museums etc.) by persons with authority to do so": see Anne Fitzgerald and Kylie Pappalardo, *Copyright Law and Intellectual Property - Report to the Government 2.0 Taskforce: Project 4*, December 2009. However, this is not clear: see Judith Bannister, "Public Access to Copyright Works Submitted to Government" 36 FLR 381 at page 389. Even accepting this principle is an accurate statement of the law, it will continue to be difficult to establish whether materials in the State's records were 'deposited' in that sense. Third party material may have been collected by the State, rather than deposited with it. This will be an issue where the addition of material to PROV's collection pre-dates the establishment of the current statutory office or authority responsible for the archives or collection.

require terms to be reached with the copyright owner (section 183(5)) or equitable remuneration to be paid to a declared collecting society (section 183A) for the acts comprised in copyright done during digitisation. A mass digitisation project could thus be prohibitively expensive. Further, where section 183(5) applies, identifying the copyright owner of each record and ensuring that they have been compensated would be prohibitively onerous, given that many copyright owners are ordinary community members who have been dead for many decades or defunct companies.

The libraries and archives exceptions described on page 42 of the Issues Paper do not assist PROV, primarily because the exceptions require a number of specific tests to be applied to each record or provision of access. This is a significant administrative burden which prevents mass digitisation.

For example, the exception relating to unpublished works²⁹ only applies more than 50 years after the death of the author. The date of death of an author is often extremely difficult for PROV to identify, particularly when the author was an ordinary community member. Further, the relevant officer must be satisfied that the copy or communication is for the purpose of research, study or publication. This is difficult to achieve in practice and prevents records from being placed online in reliance on this exception.

Another example is the exception relating to the preservation of manuscripts, artistic works and sound recordings.³⁰ This exception allows for copying and communication within the archive for preservation or replacement, but requires a case by case assessment of whether a given record falls within the section, including by requiring PROV to know the date of death of the author. The exception does not extend to making records available online and does not apply to works authored by an organisation. In the case of published works, it requires an authorised officer makes a declaration that he or she is satisfied that copy cannot be obtained in a reasonable time at a commercial price.³¹

These hurdles prevent mass digitisation and online access and are essentially unworkable.

4.2 Question 20: Section 200AB of the Act

Is s 200AB of the Copyright Act 1968 (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

By virtue of section 200AB(6), section 200AB would appear not to apply where section 183(1) applies. Accordingly, it provides no assistance to PROV in conducting its business for the services of the State.

²⁹ Section 51(1) of the Act.

³⁰ Sections 51A and 110B of the Act.

³¹ Section 51A(4).

4.3 Question 21: Amendments for digitisation and communication

Should the Copyright Act 1968 (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

For the reasons given in part 4.1 above, the State submits that the Act should be amended to allow greater digitisation and communication of works by or on behalf of PROV.

In considering the possible approaches, it should be noted that the archives are records held by government. Most records have no commercial value and, consistent with the State's IP Policy, the State is not in the business of making a commercial return on the records.

Any changes to the Act must not allow the commercial exploitation of copyright owned by another person.

The State submits that unpublished material should attract a similar period of copyright protection as published material, consistent with the approach in other jurisdictions such as the USA and UK. There are a number of potential approaches to which the copyright term of such works could be calculated. The preferred basis should be easily identifiable – for example, from the date or approximate date of creation of the document rather than the date of death of the author. This would allow PROV to digitise older works without infringing copyright.

The State further submits that the Act should be amended to ensure that a government body administering archives may, without infringement or payment:³²

- reproduce or communicate a work housed within its archives for its own internal purposes
- rely fully on the provisions of the Act applicable to other archives and libraries, including section 200AB, without recourse to section 183
- make available, online, all records which are open to public inspection
- take all actions necessary to preserve access to records.

Specific fair dealing exceptions or a broad, flexible exception that captured these acts would be appropriate.

Relevant to the third bullet point above, section 47 of the UK Act provides a free use exception for certain material open to public inspection pursuant to a statutory requirement or on an official register. Section 49 of the UK Act provides that material which is comprised in public records and open to public inspection may be copied, with the authority of the relevant officer, without infringement. These provisions may provide an appropriate model for an exception in the Act.

³² See also John Gilchrist, "Accessing and Reusing Copyright Government Records", Vol 10 No 2 QUTLJ (2010), pages 226-228.

5. Orphan works

This part responds to the questions regarding orphan works, to the extent that they affect PROV.

5.1 Question 23: Impact of orphan works

How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

Orphan works present a significant operational and administrative problem to PROV. As with digitisation, the fundamental problem faced by PROV in relation to orphan works is that the Act requires each copyright work to be considered separately, while PROV is required to deal with thousands of works collectively.

As discussed at part 4.1.2 above, a significant proportion of the records held by PROV include at least some third party copyright material. This includes letters, submissions, reports and wills. The vast majority of these records are likely to be unpublished for copyright purposes, and therefore attract indefinite copyright protection.³³

In providing this material to the public online, PROV is required to seek permission from the owner and reach terms under sections 183(4) and 183(5) of the Act. PROV does not seek to rely on these sections in doing so because the owner cannot be found.

In some cases, the original authors of this material cannot be identified. This is often the case with records where the original author's name is illegible, where the original author has a common name or where an organisation uses an unofficial name.

Where the original authors can be identified, they are often ordinary people and companies. If the original author has died (or, in the case of a company, been wound up), it may be difficult to identify the current owner of the copyright. Ownership may be in multiple hands, through the operation of the author's will, and the wills of the author's descendants. This is a significant problem with historical records held by PROV, where the original author may have died or a company has become defunct many decades in the past.

Accordingly, orphan works negatively affect the ability of PROV to use and disseminate State records, particularly historical records. They have a particularly negative impact on the ability of the archives to make digitised records available, as discussed in part 4.1 above.

³³ Regarding indefinite protection and the impact of existing exceptions to infringement, see part 4.1.2 above. .

5.2 Question 24: Amendments for orphan works

Should the Copyright Act 1968 (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

The State submits that the Act should be amended to create a new exception for the use of orphan works. Such an exception should provide for archives to make available all orphan works which are open to public inspection and take all actions necessary to preserve access to orphan works.

The State suggests that caution be exercised in considering a collective licensing scheme for orphan works. It may be difficult to design an equitable and efficient licensing scheme given that the copyright owners of orphan works held in government archives are unlikely to be represented by copyright collecting societies. Consequently, any payment to a collecting society would not be passed to the actual owners of the orphan works.

Currently, copyright fees are not charged to users of PROV. If such fees were required under a collective licensing scheme, it is likely that this cost would be passed on to users, without a reasonable prospect of the unknown copyright owner ever being remunerated.