

6 August 2013

BY EMAIL

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Dear Ms Wynn

Submission on ALRC Discussion Paper 79 (DP 79) Copyright and the Digital Economy

The National Film and Sound Archive of Australia (NFSA), a statutory authority and body corporate established by the *National Film and Sound Archive of Australia Act 2008* (Cth), is Australia's national audiovisual archive, responsible for collecting, preserving and providing access to the nation's moving image and recorded sound heritage (the National Audiovisual Collection).

Although many functions of Australia's cultural institutions are recognised in the *Copyright Act 1968* (Cth), the NFSA considers that copyright reform is essential for the sustainability of cultural institutions with statutory mandates to perform functions directed towards national heritage conservation and cultural development in the public interest.

The NFSA made a submission on IP 42 and has considered the ALRC's reform proposals presented in Discussion Paper 79 (DP 79)¹ released on 5 June. The NFSA is grateful to the Australian Law Reform Commission (ALRC) for the opportunity to participate in the consultation process, including at the roundtable meeting held by the ALRC on 12 April.

This submission on DP 79 represents the views of the NFSA and is informed by numerous discussions with other cultural institutions about the likely implications of the proposals. The NFSA is not represented by any other party in this Inquiry.

As the proposals are extensive, with alternative options throughout, and while the outcomes of related reviews in which NFSA has commented are pending,² the NFSA would be pleased to provide clarification and further comments to assist the ALRC with its report.

¹ <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy>

² Notably, but not limited to, Extension of the legal deposit scheme, Revising the Scope of the Copyright Safe Harbour Scheme, and Review of Technological Protection Measure Exceptions, in which submissions were made directly by NFSA and jointly through Copyright in Cultural Institutions at

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NFSA, National Audiovisual Collection and the Inquiry

NATIONAL FILM AND SOUND ARCHIVE OF AUSTRALIA (NFSA)

The NFSA has its origins in the National Historical Film and Speaking Record Library – as part of the then Commonwealth National Library in 1935. Today it has similar functions to other cultural institutions established and governed by their own statutes. It has a broad mandate of social and economic significance to Australia. The *National Film and Sound Archive of Australia Act 2008 (Cth)* relevantly provides³:

Functions

(1) The functions of the National Film and Sound Archive of Australia are to:

- (a) develop, preserve, maintain, promote and provide access to a national collection of programs and related material; and
- (b) support and promote the collection by others of programs and related material in Australia; and
- (c) support, promote or engage in:
 - (i) the preservation and maintenance of programs and related material that are not in the national collection; and
 - (ii) the provision of access to programs and related material that are not in the national collection; and
- (d) support and promote greater understanding and awareness in Australia of programs; and
- (e) undertake any other function conferred on it by any other law of the Commonwealth.

...

Considerations governing the performance of functions

(3) In performing its functions, the National Film and Sound Archive of Australia is, as far as practical, to:

- (a) place an emphasis on the historical and cultural significance of programs and related material; and
- (b) use every endeavour to make the most advantageous use of the national collection in the national interest; and
- (c) apply the highest curatorial standards; and
- (d) promote the efficient, effective and ethical use of public resources.

As the Commonwealth's primary agency for supporting a national collection of audiovisual material and related material within the NFSA's custody, the NFSA has a wide remit to undertake activities within Australia and overseas, including in relation to material which is not within its custody, in ways that encourage greater public engagement with film and sound media and which promote the National Audiovisual Collection.⁴

The benefits the NFSA has provided since 2008 through its more than 200 staff working at offices in Canberra, Sydney and Melbourne, to copyright owners, creators, production companies, distributors, cinemas, film societies, researchers, government departments, teachers, students, cultural institutions and the public, have been largely funded by annual appropriations of approximately \$25 million from the Australian Government. The NFSA has grown the number of its access centres to have a presence in each state and territory since 2011, including at the Australian Mediathque within the Australian Centre for the Moving Image in Melbourne and at the libraries of the Northern Territory, Queensland, South Australia, Tasmania and Western Australia.

The NFSA's Information Publication Scheme web pages provide further information.⁵

<http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/CurrentIssuesReformsandReviews/Pages/default.aspx>

³ s 6 *National Film and Sound Archive of Australia Act 2008 (Cth)*.

⁴ Explanatory Memorandum, National Film and Sound Archive Bill 2008.

⁵ <http://www.nfsa.gov.au/about/information-publication-scheme/>

NATIONAL AUDIOVISUAL COLLECTION

The National Audiovisual Collection includes moving image, recorded sound and associated documents and artefacts of cultural significance. Works range from commercially released documentaries and feature films and recordings; websites relevant to the audiovisual industry; news broadcasts; television and radio productions of all genres including advertisements; independently produced works; home movies on all formats; international productions which have influenced and been experienced by Australians; and unpublished works including oral histories and field and music performance recordings of cultural or historic interest.

The NFSA currently holds almost 2,000,000 collection items. These date as far back as Australia's earliest known surviving film *Patineur Grotesque* (1896)⁶ and include contemporary items such as sound and video recordings of the Australian artist Gotye, the winner of three Grammy Awards for his hit song *Somebody That I Used To Know* and whose light harp is engaging visitors to play 'visual music' in the NFSA's Gallery in Canberra in 2013.⁷

An estimated 1.1 million items have been accessioned, with information on more than 700,000 of these items available via the NFSA's online Search the Collection facility.⁸

The development of the National Audiovisual Collection usually occurs through voluntary donation, voluntary deposit, deposit as a condition of government production funding or through preservation. The recent commitment⁹ of the Australian Government to extend the existing legal deposit arrangements for the National Library of Australia to cover electronic "library material" and for a new scheme for audiovisual material for the NFSA is relevant to the Inquiry.

Acquisition has also occurred through machinery of government changes. The Film Australia Collection – a diverse range of more than 5000 titles of Australian documentary and educational programs, spanning a century of the nation's film production – was transferred along with copyright ownership to the NFSA in 2011.

As a consequence of the relatively short history of the world's film and recorded sound culture, the relatively long duration of copyright protection and the unpublished nature of many items, copyright still subsists in the vast majority of items in the National Audiovisual Collection and other material of relevance to the NFSA's mandate. The duration of the copyright in an item could be as long as the life of the creator plus 70 years for works, 70 years from the end of the year of first publication of subject matter other than works, or indefinitely for unpublished subject matter.¹⁰ The vast majority of copyright subsisting in items in the National Audiovisual Collection and other material of relevance to the NFSA's functions is not owned or controlled by the NFSA.

ALRC INQUIRY

The Inquiry is relevant to the NFSA for many reasons. The NFSA is a government agency which owns and uses copyright. Most relevantly it is a cultural institution and an intermediary between copyright owners, copyright collecting societies, copyright creators and both public and private end users including other cultural institutions. As a user, the NFSA is subject to the *Copyright Act 1968* (Cth) among a raft of legislation regulating "content", as material is known generically in the digital environment.

While there are many similarities between the situation of the NFSA and other cultural institutions in regards to dealing with collection items and related material, the nature of copyright in audiovisual material of relevance to the NFSA's mandate and the form of the material, compared with museum artefacts and gallery art works for example, makes the NFSA heavily reliant on copyright exceptions and licences to fulfil its functions.

⁶ *Patineur Grotesque* (1896), *australianscreen online*, <http://aso.gov.au/titles/historical/patineur-grotesque/>

⁷ Gotye@NFSA, <http://www.nfsa.gov.au/gotye-at-nfsa/>

⁸ <http://colsearch.nfsa.gov.au/nfsa/search/search.w3p>

⁹ Creative Australia, National Cultural Policy, March 2013, p 100, <http://creativeaustralia.arts.gov.au/assets/Creative-Australia-PDF-20130417.pdf>

¹⁰ s 33; Div IV, Part IV *Copyright Act 1968* (Cth)

Comments on the Framing Principles for Reform

PRINCIPLE 1: ACKNOWLEDGING AND RESPECTING AUTHORSHIP AND CREATION

The Terms of Reference for this Inquiry refer to “the objective of copyright law in providing an incentive to create and disseminate original copyright materials”. If the reference to originality is one of prerequisites for the subsistence of copyright, it is important to note that the *Copyright Act 1968* (Cth) provides for copyright protection of works originating from an author¹¹ whereas subject matter other than works do not have the same originality requirement. This contrasts to the copyright law in the US and the UK. Notwithstanding this technical distinction, it is understood from Principle 2 and the ALRC’s proposals that the exceptions under review relate to all copyright materials in which copyright subsists in Australia, not merely protected works which are necessarily original.

The NFSA respects authorship and creation of all subject matter. Even if a copyright exception or licence may be available for public use of material, it is preferable to seek permission or to notify copyright owners who are creators or active producers or distributors of that material. This is important for maintaining and nurturing relationships with NFSA’s stakeholders and for supporting the industry. It also serves as a means of maintaining and updating the extensive information that the NFSA holds about the copyright ownership of items in the National Audiovisual Collection.

PRINCIPLE 2: MAINTAINING INCENTIVES FOR CREATION OF WORKS AND OTHER SUBJECT MATTER

The NFSA agrees that it is important for copyright reform to maintain incentives for creation through the appropriate recognition of property rights, provided always that exceptions provide for cultural institutions with statutory mandates to collect, preserve, maintain and make the content accessible in the future but before copyright expires, so that the maximum social benefits can be attained.

The NFSA considers that moral rights of creators, although out of scope of review in the Inquiry, are an additional non-economic incentive for the creation of new copyright material. It is also relevant to note that, in the digital economy, the internet offers the potential for individuals to create and disseminate their creations through low cost business models which generally offer more flexibility than traditional models have offered for creators to retain ownership and control of their copyright.

The NFSA also considers comments about variations between industries to be particularly relevant to the industries that the NFSA interacts with. For this reason, it would not be unreasonable for different subject matter to receive special treatment. For example, it may be appropriate for old published or unpublished material of all types to be preserved and made accessible, whereas recently produced government-financed films might only be able to be preserved for the immediate term and not made accessible for many years.

PRINCIPLE 3: PROMOTING FAIR ACCESS AND WIDE DISSEMINATION OF CONTENT

The NFSA strongly supports comments to the effect that cultural benefits are important elements of the digital economy which cannot be measured by purely financial indicators.

However, before fair access and wide dissemination to content other than ephemeral content can be promoted, it needs to be created and it needs to be maintained in order to exist. The NFSA is concerned that the proposals do not adequately address the important role that cultural institutions play in these stages of the evolution of content.

The client of cultural institutions is posterity. Most of the activity of cultural institutions is directed towards acquiring, preserving and making accessible culturally significant material

¹¹ s32 *Copyright Act 1968* (Cth)

long after its initial purpose or commercial life. In the absence of any obligation on creators, producers, financiers or disseminators to undertake these activities, it is publicly funded cultural institutions which make it possible to access and disseminate content in the future.

PRINCIPLE 4: PROVIDING RULES THAT ARE FLEXIBLE AND ADAPTIVE TO NEW TECHNOLOGIES

While copyright law which is technologically neutral and practical is desirable, one of the challenges of this Inquiry is that there is no certain vision of the future digital economy and how it will link with the traditional economy. Cultural institutions are necessarily reactive and proactive in their approaches to changes in markets and technologies, to ensure that their collections are representative, relevant and usable. This necessity further supports the case for exceptions which enable cultural institutions to undertake their core functions, regardless of the market factors at play at any given moment in time during the subsistence of copyright in the relevant material. Such exceptions would not necessarily be flexible and adaptive in a legal sense; they would always need to provide certainty of application.

One vision for the future of content in the digital economy was expressed by Microsoft founder, Bill Gates, in his seminal essay of 1996. It is both endearing and enlightening in 2013.

"...

Some reluctance on the part of advertisers may be justified, because many Internet users are less-than-thrilled about seeing advertising. One reason is that many advertisers use big images that take a long time to download across a telephone dial-up connection. A magazine ad takes up space too, but a reader can flip a printed page rapidly.

As connections to the Internet get faster, the annoyance of waiting for an advertisement to load will diminish and then disappear. But that's a few years off.

A major reason paying for content doesn't work very well yet is that it's not practical to charge small amounts. The cost and hassle of electronic transactions makes it impractical to charge less than a fairly high subscription rate.

But within a year the mechanisms will be in place that allow content providers to charge just a cent or a few cents for information. If you decide to visit a page that costs a nickel, you won't be writing a check or getting a bill in the mail for a nickel. You'll just click on what you want, knowing you'll be charged a nickel on an aggregated basis.

This technology will liberate publishers to charge small amounts of money, in the hope of attracting wide audiences.

Those who succeed will propel the Internet forward as a marketplace of ideas, experiences, and products—a marketplace of content."¹²

Another more recent vision, of an entirely corporate sponsored existence where even access to content in one's brain is subject to contracts, pay walls and remunerated copyright licences, as presented by Tom Scott in the form of a digital afterlife,¹³ would definitely be a change in the extreme.

It is not surprising that the advertising model that has successfully supported analogue media appears to be well adapted and is developing in the digital economy.

If microlicensing becomes the way of the future for accessing and disseminating content, the NFSAs submit that unremunerated copyright exceptions would still be essential to provide the certainty that publicly funded cultural institutions require to continue their functions, to offer their social and economic benefits when dealing with material in the digital environment.

¹² Bill Gates, Content is King, 1 March 1996, originally published at <http://www.microsoft.com/library/errorpages/smartererror.aspx?aspxerrorpath=http%3a%2f%2fwww.microsoft.com%2fen-us%2fnews%2fexec%2fbillg%2fwriting%2fdefault.aspx> ; now archived by the Internet Archive Wayback Machine at

<http://web.archive.org/web/20010126005200/http://www.microsoft.com/billgates/columns/1996essay/essay960103.asp> ; as cited by Craig Bailey <http://www.craigbailey.net/content-is-king-by-bill-gates/>

¹³ Tom Scott, Welcome to Life, <http://www.tomscott.com/life/>

Since the release of the DP 79, the Australian Government has released an update to its National Digital Economy Strategy which includes Digital First – an initiative to make priority government transactions end-to-end digital by 2017.¹⁴ The strategy acknowledges that legislation specific to agencies may require review.¹⁵ The NFSA welcomes this approach so that individual cultural institutions which are expected to actively participate in the digital economy have the full support of the Australian Government to do so. The NFSA also notes that the *Copyright Act 1968* already makes specific reference to some Commonwealth agencies (including the National Archives of Australia, the National Library of Australia, the Australian Broadcasting Corporation and the Special Broadcasting Service) and provides that the availability of some exceptions is subject to any regulations governing collections in cultural institutions.¹⁶

These comments are also relevant to the Policy Context of the Inquiry (see further below).

PRINCIPLE 5: PROVIDING RULES CONSISTENT WITH AUSTRALIA'S INTERNATIONAL OBLIGATIONS

The NFSA welcomes the ALRC's approach to exploring proposals which are consistent with Australia's international obligations and/or proposals which require reconsideration of how those obligations such as the 'three-step test' from the *Berne Convention for the Protection of Literary and Artistic Works* (last amended 1979) should be interpreted in the digital age.

In relation to international obligations to support the advancement of society, the NFSA notes that in addition to Australia having international obligations in relation to copyright and trade, it has also made international commitments to support archives, including through provisions for effective preservation and access activities.

The Universal Declaration on Archives was developed by the International Council on Archives (ICA) and adopted in 2011 by the United Nations Educational, Scientific and Cultural Organization (UNESCO), of which Australia has been a member since 1946.¹⁷

UNIVERSAL DECLARATION ON ARCHIVES¹⁸

Archives record decisions, actions and memories. Archives are a unique and irreplaceable heritage passed from one generation to another. Archives are managed from creation to preserve their value and meaning. They are authoritative sources of information underpinning accountable and transparent administrative actions. They play an essential role in the development of societies by safeguarding and contributing to individual and community memory. Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens' rights and enhances the quality of life.

To this effect, we recognize

- the unique quality of archives as authentic evidence of administrative, cultural and intellectual activities and as a reflection of the evolution of societies;
- the vital necessity of archives for supporting business efficiency, accountability and transparency, for protecting citizens' rights, for establishing individual and collective memory, for understanding the past, and for documenting the present to guide future actions;
- the diversity of archives in recording every area of human activity;
- the multiplicity of formats in which archives are created including paper, electronic, audiovisual and other types;
- the role of archivists as trained professionals with initial and continuing education, serving their societies by supporting the creation of records and by selecting, maintaining and making these records available for use;

¹⁴ Advancing Australia as a Digital Economy: Update to the National Digital Economy Strategy, 12 June 2013, <http://www.nbn.gov.au/nbn-benefits/national-digital-economy-strategy/>

¹⁵ Ibid p 48

¹⁶ s 110A(b)

¹⁷ UNESCO adopts declaration on archives, http://www.unesco.org/new/en/dakar/about-this-office/single-view/news/unesco_adopt_universal_declaration_on_archives/

¹⁸ <http://unesdoc.unesco.org/images/0021/002134/213423e.pdf>

- the collective responsibility of all – citizens, public administrators and decision-makers, owners or holders of public or private archives, and archivists and other information specialists – in the management of archives.

We therefore undertake to work together in order that

- appropriate national archival policies and laws are adopted and enforced;
- the management of archives is valued and carried out competently by all bodies, private or public, which create and use archives in the course of conducting their business;
- adequate resources are allocated to support the proper management of archives, including the employment of trained professionals;
- archives are managed and preserved in ways that ensure their authenticity, reliability, integrity and usability;
- archives are made accessible to everyone, while respecting the pertinent laws and the rights of individuals, creators, owners and users;
- archives are used to contribute to the promotion of responsible citizenship.

Explanatory Note 6 states:

The adoption of the Universal Declaration on Archives by UNESCO will emphasize the importance of including wide public access to archives as an essential component of knowledge societies and of culturally and linguistically diverse communities. This endorsement by the General Conference also highlights the key role of archives and records management in combating corruption and in enhancing good governance as a whole.

Its status is recognised as a UNESCO declaration, which is a solemn instrument that is resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.¹⁹

Complementing this commitment are position statements by archives and representative bodies on the standards which should apply to the activities of archives. The position of the International Federation of Film Archives (FIAP), of which the NFSA has been a member since 1962 is that:

DECLARATION ON FAIR ACCESS²⁰

...

1. FIAP affiliates, in accordance with international copyright and intellectual property laws, declare their right to acquire and preserve motion pictures and related promotional and historical materials for their cultural, historical, and aesthetic significance.
2. The primary mission of FIAP affiliates is to preserve and exhibit their collections, and engage in activities that advance public access, awareness, and scholarship.
3. FIAP affiliates are the leading repositories for the historical research information and cataloging records essential to preserving the international motion picture heritage.
4. FIAP affiliates are committed to maintaining the highest standards for acquiring, preserving, restoring, and exhibiting the motion pictures and related promotional and historical materials in their collections.
5. In order to achieve their mission, FIAP affiliates require the support of the motion picture industry and the national and international bodies responsible for making the laws and conventions regarding intellectual property.
6. FIAP recognizes the rights of owners of motion picture copyrights and other forms of intellectual property to obtain information about the collection holdings of its member archives.

¹⁹ Introduction to the standards-setting documents of UNESCO, http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html

²⁰ <http://www.fiafnet.org/uk/members/Fair%20Use.html>

7. FIAF recognizes the access rights of legitimate rights-holders to the archival motion pictures and related promotional and historical materials preserved by its affiliates, on the basis of fair compensation and due recognition.

8. FIAF supports the owners of motion picture copyrights and related intellectual property in their efforts to combat piracy and other forms of illegal use.

9. FIAF supports efforts to clarify the legal status of "orphan" motion pictures and related promotional and historical materials for the purpose of preservation and public access.

10. As a principle of "fair access", FIAF affiliates declare their right to engage in the following archive-related activities, without the payment of fees to outside organizations:

- exhibition on their premises
- loans to other affiliates
- use in their own publications and promotional activities

of the motion pictures and related promotional and other historical materials in their collections.

The NFSA makes these observations in the knowledge that there are many countries which for various reasons do not have archives offering administrative transparency and accountability or preservation of the collective memory as good as that enjoyed in Australia. In 2012 the NFSA was fortunate to be able to contribute to the preservation of the culture and history of the Democratic Republic of Timor-Leste by preparing a collection profile, containing information about audiovisual items held by the NFSA, as a gift from the Australian Government to mark the tenth anniversary of the independence of Timor Leste.²¹

The NFSA considers that archives of all types require the support of copyright exceptions for their sustainability and to deliver as many social benefits as possible, including after copyright has expired. For material where copyright still subsists, the NFSA is always cognisant that there will be material which when used publicly will be in direct conflict with the economic interests of the copyright owner and therefore should be limited by exceptions or the requirement to have a licence. However, there are many uses by archives which will not directly conflict with the interests of the copyright owner and in fact serve to benefit the creator and the owner in the long term.

²¹ A connection with Timor-Leste, <http://www.nfsa.gov.au/blog/2013/04/24/connection-timor-leste/>

Comments on the Policy Context of the Inquiry

Much has been said of the cultural and economic bases for copyright and the need for balance. The NFSA makes some observations in relation to cultural policy and competition.

The Australian Government has defined the digital economy as “the global network of economic and social activities that are enabled by information and communications technologies”²² and has observed the work of the Organisation for Economic Co-operation and Development (OECD) when reviewing related public policy.²³ An analysis of policies of countries of the OECD has suggested a symbiotic relationship between infrastructure, skills and content, meaning that online content serves an important developmental role in the cycle of the digital economy.²⁴ In 2006 the OECD concluded that “content is expected to provide a new impetus for the digital economy, encouraging innovation, raising the level of skills, triggering dynamic developments and innovations in existing industries and creating new markets... Today many OECD countries perceive the digital content industries as important elements for international competitiveness.”²⁵

There is historical evidence suggesting that content has been a powerful strategic tool offering economic and social benefits long before the emergence of the digital economy. Charles Dickens accused an undercapitalised American publishing industry of pirating the literary works of his own and other British authors. The copyright law of the US did not protect European authors and publishers until the 1880s. Since ratifying the Universal Copyright Convention in 1952 and providing broader reciprocal copyright protections, the US has been seen to enjoy competitive advantages through the control of multinational content industries, with its power in the music industry having global implications for society and culture.²⁶ The country has been a net exporter of copyright, with recent contributions by copyright industries exceeding those for many major industry sectors, despite financial crisis and recession.²⁷ The NFSA notes, without wishing to comment on any geopolitical implications, there is research suggesting that the transnationalisation of culture or *transculture* achieved by multinational music companies is strategically aligned with research by the Pentagon National School of War, stating that:

²² Department of Broadband, Communications and the Digital Economy, Australia's Digital Economy: Future Directions (2009), p 2, http://www.dbcde.gov.au/__data/assets/pdf_file/0006/117681/DIGITAL_ECONOMY_FUTURE_DIRECTION_S_FINAL_REPORT.pdf

²³ For example, in Australia's Digital Economy: Future Directions (2009) and in Government 2.0 Taskforce, Issues Paper (2009), <http://gov2.net.au/blog/2009/07/23/official-issues-paper-released/index.html> http://www.dbcde.gov.au/__data/assets/pdf_file/0006/117681/DIGITAL_ECONOMY_FUTURE_DIRECTION_S_FINAL_REPORT.pdf citing Organisation for Economic Co-operation and Development, Digital Broadband Content 19 May 2006, <http://www.oecd.org/internet/interneteconomy/36854975.pdf>

²⁴ Organisation for Economic Co-operation and Development, Digital Broadband Content 19 May 2006, p 6, <http://www.oecd.org/internet/interneteconomy/36854975.pdf> citing Lorentzen, E, *Norway's strategy for electronic content*.

²⁵ Organisation for Economic Co-operation and Development, Digital Broadband Content 19 May 2006, p 6, <http://www.oecd.org/internet/interneteconomy/36854975.pdf>

²⁶ R Wallis & K Malm, *Big sounds from small peoples – The music industry in small countries*, 1984, p 7.

²⁷ S Siwek, *Copyright Industries in the US Economy, The 2011 Report*, prepared for the Intellectual Property Alliance, <http://www.iipa.com/pdf/2011CopyrightIndustriesReport.PDF>

"On this ever-smaller globe of ours, all societies, all cultures are engaged in an inevitable competition for predominance and survival. Those who will fashion tomorrow's world are those who are able to project their image (to exercise the predominant influence and a long range influence)... If we want our values and our life style to be triumphant we are forced to enter a competition with other cultures and other centres of power. For this purposes the multinational company offers considerable leverage. Its growing arsenal with its foreign bases works for us 24 hours a day. It is a fact of osmosis which does not only transmit and implant entrepreneurial methods, banking techniques and North American commercial relations, but also our judicial systems and concepts, our political philosophy, our mode of communication, our ideals for mobility, and a way of contemplating literature and art appropriate to our civilisation."²⁸

If Australia, a net importer of copyright,²⁹ is competing anywhere near this level in the digital economy, it is even more important for the regulation of content industries to support cultural experiences, innovation, and entrepreneurship. Importantly, for a country with established cultural institutions like Australia's, "the broader content industry includes cultural institutions that foster, create and maintain digital content; businesses that produce content; and allied industries that provide or require content, with growing linkages between cultural institutions, creative industries, digital content products and other industry sectors".³⁰ It is submitted that the other industries include all levels of the education sector, promoting innovation, employment and development across society.

Despite the demand for content, influenced by technology, industry and government³¹, there are tensions between the *Copyright Act 1968* and the respective enabling legislation of publicly funded institutions which limit how cultural institutions can contribute to Australia's digital economy in the fulfilment of their statutory mandates. These tensions adversely affect the capacity, efficiency and risk exposure of cultural institutions seeking to fulfil their functions and powers for the public benefit.

In considering compromises necessary to achieve copyright balance in the digital age, it will be important to recognise, as the ALRC has started to do through proposals addressing specific activities of cultural institutions, copyright is part of a cultural policy which delivers more than economic benefits from the exploitation of the copyright. The NFSA urges both the ALRC and the Australian Government to consider that " ... like the physical health of a nation, its cultural health cannot be left entirely to market forces simply because markets cannot be relied upon to work unaided."³²

The risk of not providing legislative support for cultural institutions to undertake their statutory functions is a loss of cultural records. By way of example, the NFSA maintains a list of lost films.³³ Some of the challenges of dealing with audiovisual material were described by the

²⁸ J Collins, 'Etats-Unis et transnationales américaines; retour à l'envoyeur', *Politique Aujourd'hui* Nos 1-2, January-February 1975, p 33 citing the Pentagon School of War, translation quoted in R Wallis & K Malm, *Big sounds from small peoples – The music industry in small countries*, 1984, pp 7-8.

²⁹ *The Economic Contribution of Australia's Copyright Industries 1996-97 to 2010-2011*, Prepared by PwC for the Australian Copyright Council (2012), p 31.

³⁰ Organisation for Economic Co-operation and Development, *Digital Broadband Content* 19 May 2006, pp 7-8, <http://www.oecd.org/internet/interneteconomy/36854975.pdf>

³¹ NFSA submissions to the Office of the Australian Information Commissioner, Issues Paper 1- Towards an Australian Government Information Policy (7 March 2011) http://nfsa.gov.au/site_media/uploads/file/2011/06/09/NFSA-submission-to-OIAC-070311.pdf and to the Attorney-General Department, Draft Guidelines on Licensing Public Sector Information for Australian Government Agencies (2 March 2011) http://nfsa.gov.au/site_media/uploads/file/2011/06/09/Submission-Guidelines-on-licensing-PSI-020311.pdf

³² Ruth Towse 2000, 'Cultural economics, copyright and the cultural industries', *Society and Economy in Central and Eastern Europe*, Vol 22, No 4, pp 107-126. <http://www.lib.uni-corvinus.hu/gt/2000-4/towse.pdf>

³³ <http://nfsa.gov.au/collection/film/australias-lost-films/>

Australian Film Commission, a predecessor of the NFSA, in its 2005 submission to the Attorney-General Department's *Issues Paper Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age*, and are still relevant today.³⁴ The NFSA's recent experience is that there is currently born-digital media at risk of loss due to legislative, technical and resource limitations.³⁵ The NFSA's submission on IP 42 cross references similar risks and problems encountered by the NFSA and the NLA at the acquisition stage and calls for copyright exceptions to better safeguard culture.

³⁴ While much of that submission is still relevant to the current Inquiry, see in particular page 17, 10. *Recommendation 1.3(d): Access*, http://afcarchive.screenaustralia.gov.au/downloads/policies/fu%20sub_final.pdf

³⁵ Somaya Langley, Trevor Carter, Matthew Davies, *Managing Multi-Platform Materials: Selected Case Studies*, presented at the 19th Symposium on Electronic Art, Sydney, 7-16 June 2013, publication forthcoming in The University of Sydney e-repository (October 2013).

Comments on Proposals and Questions

PROPOSALS AMONG OTHER CONSIDERATIONS

Based on an analysis of the proposals and mindful of related reviews, the NFSA's preferred model of content regulation would likely take the form illustrated below. Each step represents an obligation or immunity to be considered when dealing with copyright subject matter. Steps marked with an asterisk (*) are outside the scope of or have limited coverage in this Inquiry.

OTHER CONTENT REGULATION*

including Technological Protection Measures, Electronic Rights Management Information, Freedom of Information, moral rights, Indigenous Cultural and Intellectual Property Rights, privacy, classification/censorship, others



CONTRACT

contracting parties may agree on permissions and restrictions
permissions may be a voluntary licence
restrictions are subject to statutory exceptions (e.g. use by cultural institution)
Proposal 17



COPYRIGHT DURATION EXPIRED*

user no longer liable / owner no longer has enforceable rights



STATUTORY COPYRIGHT EXCEPTIONS

purpose based exceptions specific to copyright dealing and/or user
plus open-ended exceptions for all or cultural institutions
user's liability limited / owner's enforcement rights limited
Proposals 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16



EXTENDED COPYRIGHT SAFE HARBOUR SCHEME*

user host's liability limited / owner's enforcement rights limited



COPYRIGHT ORPHAN WORKS 'REASONABLY DILIGENT SEARCH'

user's liability limited / owner's enforcement rights limited
Proposal 12



COPYRIGHT LICENCE

may be implied, voluntary, subject to conditions
(any restrictions subject to statutory exceptions)
Proposal 6, 11, 13, 15



COPYRIGHT INFRINGEMENT*

user manages infringement / owner may enforce rights



NO USE

no risk / no benefit

PROPOSALS IN FOCUS

National Audiovisual Collection and related material

The NFSA submits that all of its internal dealings with the National Audiovisual Collection and related material should be subject to expanded specific free exceptions.

It also submits that a number of external dealings which add value to the National Audiovisual Collection and related material should be subject to free exceptions.

Access by end users by request should be subject to specific provisions for cultural institutions and fair use or fair dealing exceptions, the reliance on which may sometimes be limited by the existence of voluntary licences or the commercial availability of items.

Other subject matter

The use of other material by NFSA should be subject to other content regulation (e.g. FOI) and fair use or fair dealing, reliance on which may sometimes be limited by the availability of voluntary licences in the market place.

4. THE CASE FOR FAIR USE IN AUSTRALIA

Proposal 4-1 The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.

While it is encouraging that the ALRC is considering a case for significant change to statutory exceptions in Australia, the NFSA is concerned that this market-dependent solution may promote licensing to stimulate the digital economy, to the detriment of any parties like cultural institutions who are already heavily reliant on specific exceptions for uses which are not intended to compete directly with the interests of the copyright owner or creator. This would be an even worse outcome than the 's200AB experiment' which created much complexity and uncertainty for cultural institutions who, on one interpretation, are precluded from flexible dealing to undertake their core functions if any licence exists. There is unlikely to be any test case to provide judicial scrutiny of the provision.

The NFSA is not convinced that a fair use exception could offer the desired level of certainty when the explanation in the DP 79 of the operation of a fair use exception includes (*emphasis added*):

13.53 Under a fair use exception, *if a use of copyright material can be licensed, this will generally weigh against a finding of fair use*. The availability of a licence is a relevant consideration in determining whether a use is fair. It would be considered under the fourth fairness factor, 'the effect of the use upon the potential market for, or value of, the copyright material'. *This is a very important factor to consider, and should ensure that a fair use exception does not unreasonably damage educational publishing and other markets for educational resources*.

13.54 *However, the availability of a licence does not settle the question of fairness; it is not determinative. All of the fairness factors must be considered under the ALRC model.*

For these reasons, the NFSA's position is that existing specific exception should be retained and expanded but that an open ended exception may supplement these exceptions. This would ensure that, for example, making a back-up copy of a computer program³⁶ would always be possible to proactively protect against the loss of data, including for conserving data which can only be accessed through proprietary systems. The nature of audiovisual material and its interaction with the digital economy justifies having specific exceptions which are broader than they currently are, at least for cultural institutions.

At the same time, the NFSA considers that, to the extent that fair use would enable access to the National Audiovisual Collection and related material by end users who would not otherwise have access, Proposal 4-1 has merit.

The NFSA, as an intermediary providing access to a third party (e.g. a broadcaster), whether or not that party has obtained a licence, desires certainty that it will not be liable for infringement or authorisation of infringement. This is an issue addressed in DP 79 Chapter 5.

Further in regards to third party access, although the Attorney-General Department's inquiry into Revising the Scope of the Copyright Safe Harbour Scheme³⁷ is out of scope for this Inquiry, the NFSA is still interested to see if this approach would offer a more appropriate solution for minimising liability when seeking to legitimately provide public access online. In that inquiry the NFSA suggested that elements of the Safe Harbour Scheme could be implemented, as a measure of efficiency, to limit the remedies available against "service providers" alleged of contravening various forms of content regulation.

³⁶ s47C *Copyright Act 1968*

³⁷ <http://www.ag.gov.au/Consultations/Pages/RevisingtheScopeoftheCopyrightSafeHarbourScheme.aspx>

Given that Proposal 11-7 would impose unreasonably strict obligations on a cultural institution to restrict the ability of a requesting user to communicate, alter and continue accessing the material after a set time, it is difficult to understand how Proposal 4-1 and Proposal 11-7 are both proposed as solutions.

Related comments are provided under Proposals 11-2, 6-1, 7-1 and 11-7.

Proposal 4-2 The new fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').

See comment against Proposal 4-3.

Proposal 4-3 The non-exhaustive list of fairness factors should be:

- (a) the purpose and character of the use;
- (b) the nature of the copyright material used;
- (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

If fair use is enacted, NFSA suggests that, to the extent possible:

Proposal 4-3 (c) consider the amount of and/or the appropriateness of how the subject matter is used; and

Proposal 4-3 (d) consider whether the use directly competes with that of the rights holder, rather than whether it affects a *potential market*.

NFSA supports the list of fairness factors but is concerned about the ability to create false markets for copyright subject matter, including where it was never intended for commercial exploitation, if item (d) is not amended as suggested above.

It is important to make sure the fairness factors are suitable both for works and other subject matter. For example, making a copy of a film for research and study is likely to require copying the whole item, a criticism or review of a visual artwork is more likely to use the whole item, but a criticism or review of a book is likely to use smaller proportions of the item. Rather than just considering the 'amount and substantiality', a factor might be whether the use of the material is appropriate for the purpose, for example, it may be fair to include the whole artwork in a review but not a large size high resolution copy.

Proposal 4-4 The non-exhaustive list of illustrative purposes should include the following:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) non-consumptive;
- (f) private and domestic;
- (g) quotation;
- (h) education; and
- (i) public administration.

Question 4-1 What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?

It would be preferable if the non-exhaustive list of illustrative purposes included a broad purpose of cultural enrichment or similar.

Recall the NFSA's preference that specific exceptions for cultural institutions are retained or expanded. Those exceptions should provide for collection development, preservation, maintenance, administration, research, education and cultural enrichment activities undertaken internally by or on behalf of the NFSA. See Proposal 11-5 and 11-7.

Question 4-2 If fair use is enacted, the ALRC proposes that a range of specific exceptions be repealed. What other exceptions should be repealed if fair use is enacted?

If fair use is enacted specific exceptions should still be available for cultural institutions. See Proposal 11-5 and 11-7.

6. STATUTORY LICENCES

Proposal 6-1 The statutory licensing schemes in pts VA, VB and VII div 2 of the Copyright Act should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.

Regardless of the future of statutory licensing and voluntary extended collective licensing, the NFSA submits that a specific exception is justified for the acquisition, preservation and internal collection management by cultural institutions – one that is not subject to statutory or voluntary licences. The reforms which the NFSA considers necessary to commercialise the availability tests are provided in response to Proposal 11-6.

NFSA invests considerable resources into the preservation, storage and safeguarding against format obsolescence of collection items, it is difficult to justify expenditure on 'licensing' the preservation and management of the collection (which does not compete with the economic interests of copyright holders) on top of the significant amount already expended in caring for this material.

NFSA's preservation and collection management activities enable Australian's screen and sound culture to be preserved and rights holders are able to commercialise their material into the future without themselves investing in a rigorous archival standard of preservation. The NFSA more than promotes the material, it frequently refers clients to rights holders to seek licences for the use of their material.

In any situations where licensing is necessary, the Act should provide for voluntary in place of statutory licensing. As noted earlier, the NFSA has existing relationships with copyright owners and copyright collecting societies to be able to negotiate licences. It is the NFSA's strong position that orphan works should not be managed in this way.

Many but not all public uses of collection material will need to be assessed against the fair use or fair dealing criteria and may often require copyright licences. See further at Proposals 11-4 and 11-6.

Question 6-1 If the statutory licences are repealed, should the Copyright Act be amended to provide for certain free use exceptions for governments and educational institutions that only operate where the use cannot be licensed, and if so, how?

No, free use exceptions for governments and educational institutions should not only operate where the use cannot be licensed. Limiting access to free use exceptions would make copyright law more restrictive than it currently is for cultural institutions (many of whose status as emanations of the Crown for the purposes of s 183 *Copyright Act 1968* is uncertain) and

more restrictive than fair use would be for other users, including commercial entities. It's unreasonable that cultural institutions would be disadvantaged in this way.

If a cultural institution is 'government' for the purposes of the proposed new copyright exception, it would not be desirable if licensing crept into areas previously considered 'fair' under free use exception, creating false markets of material which was never intended to have a commercial value, or a commercial value from its "exploitation" in a collection management system for example. The costs, both financial and in staff time, of licensing and reporting on uses that would otherwise be permissible under free exceptions would have unintended consequences on cultural institutions' preservation and other activities.

As stated in DP 79, paragraph 6.97:

Like all other users of copyright material, educational institutions and governments should not need to pay for uses of copyright material that would otherwise not infringe copyright because they are covered by an exception. If governments and educational institutions were required to pay for licences for these uses, then they would be paying for uses that others, including commercial enterprises, do not have to pay for.

If the proposal became a recommendation, it would need to cater for the use by the institution of material in which copyright has expired and all other variations to the licensing scenario. (See illustration above).

7. FAIR DEALING

Proposal 7-1 The fair use exception should be applied when determining whether a use for the purpose of research or study; criticism or review; parody or satire; reporting news; or professional advice infringes copyright. 'Research or study', 'criticism or review', 'parody or satire', and 'reporting news' should be illustrative purposes in the fair use exception.

The NFSA notes the decision in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* (2012) 37 SCC (Canada), [1] and queries whether reform of the existing fair dealing exceptions is warranted to achieve greater benefit from fair dealings exceptions operating in the *Copyright Act 1968*. If the intention is to make the fair dealing exceptions open-ended, attention is drawn to comments on Proposal 4-1, including about the steps in s200AB. The NFSA does not favour open-ended exceptions unless they complement specific closed exceptions.

If changing all current fair dealing exceptions to consider the fairness factors in Proposal 4-3 would not make the fair dealings more restrictive than they are at present, they may offer more flexibility. However, if the existence of a licence may determine that a criticism or review is no longer 'fair', the effects of this proposal would be most unwelcome.

Provided that the proposal would not jeopardise the availability of the exceptions, it seems preferable to reform the "fair" exception using the existing fair dealings as a familiar starting point for ease of terminology and as a starting point for interpretation in Australia.

Proposal 7-2 The *Copyright Act* should be amended to repeal the following exceptions:

- (a) ss 40(1), 103C(1)—fair dealing for research or study;
- (b) ss 41, 103A—fair dealing for criticism or review;
- (c) ss 41A, 103AA—fair dealing for parody or satire;
- (d) ss 42, 103B—fair dealing for reporting news;
- (e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and
- (f) ss 104(b) and (c)—professional advice exceptions.

See Proposal 7-1.

Proposal 7-3 If fair use is not enacted, the exceptions for the purpose of professional legal advice in ss 43(2), 104(b) and (c) of the *Copyright Act* should be repealed and the *Copyright Act* should provide for new fair dealing exceptions 'for the purpose of professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney' for both works and subject-matter other than works.

See Proposal 7-1.

Proposal 7-4 If fair use is not enacted, the existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should all provide that the fairness factors must be considered in determining whether copyright is infringed.

See Proposal 7-1.

8. NON-CONSUMPTIVE USE

Proposal 8-1 The fair use exception should be applied when determining whether uses of copyright material for the purposes of caching, indexing or data and text mining infringes copyright. 'Non-consumptive use' should be an illustrative purpose in the fair use exception.

Many of the internal copyright dealings undertaken by cultural institutions is non-consumptive in that collection items are not consumed as they are subjected to preservation copying for example. Acquisition, preservation and management of digital materials by cultural institutions requires the creation of cache or 'processing' copies of digital files being created. There is no way this copying could be reduced without significantly impacting digital collection management processes.

The NFSA considers that specific exceptions for cultural institutions are necessary to cover their internal use of collection items and related material. However, a fair use exception for non-consumptive use could offer broader benefits, especially in relation to organising and indexing items.

A non-consumptive use exception could cover temporary copying now and other processes which either are or are expected to become standard industry practice. The non-consumptive uses involved in acquisition, preservation and collection management in no way compete with economic interests of copyright holders. Australian law should be updated to reflect the general consensus that some copying is essential in the digital environment and should not require permission, reporting or remuneration of rights holders as technology changes.

However, see the NFSA's comment in relation to Proposal 4-1 and licensing. For Proposal 8-1 to be effective, the existence of a microllicence for example should not preclude reliance on the exception.

Proposal 8-2 If fair use is enacted, the following exceptions in the *Copyright Act* should be repealed:

- (a) s 43A—temporary reproductions made in the course of communication;
- (b) s 111A—temporary copying made in the course of communication;
- (c) s 43B—temporary reproductions of works as part of a technical process of use;
- (d) s 111B—temporary copying of subject-matter as a part of a technical process of use; and
- (e) s 200AAA—proxy web caching by educational institutions.

See Proposal 8-1.

Proposal 8–3 If fair use is not enacted, the Copyright Act should be amended to provide a new fair dealing exception for 'non-consumptive' use. This should also require the fairness factors to be considered. The Copyright Act should define a 'nonconsumptive' use as a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.

See Proposal 8-1.

10. TRANSFORMATIVE USE AND QUOTATION

Proposal 10–1 The *Copyright Act* should not provide for any new 'transformative use' exception. The fair use exception should be applied when determining whether a 'transformative use' infringes copyright.

No stated position

Proposal 10–2 The fair use exception should be applied when determining whether quotation infringes copyright. 'Quotation' should be an illustrative purpose in the fair use exception.

Quotation should either be covered by a fair use exception, or there should be a new fair dealing exception for quotation.

Proposal 10–3 If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.

Quotation should either be covered by a fair use exception, or there should be a new fair dealing exception for quotation.

11. LIBRARIES, ARCHIVES AND DIGITISATION

Proposal 11–1 If fair use is enacted, s 200AB of the *Copyright Act* should be repealed.

These comments are informed by the common experiences of fellow cultural institutions during the 's200AB experiment' as well as by submissions on IP 42.

Yes s 200AB should be repealed, provided that specific provisions for cultural institutions are maintained or expanded and any revised fair dealing or new fair use provision does not replicate the problems of s 200AB.

As Policy Australia explains in its report on the effectiveness of s 200AB, the exception was intended to "operate like a US style fair use exception to provide more flexibility than is available under existing exceptions and statutory licences in the *Copyright Act*".³⁸ This has not been delivered.

The requirement of s 200AB that the use must be for the purposes of maintaining a library or archive and also a special case makes its application confusing from the start. What uses that are for the purposes of maintaining a library or archive, which are not already covered by a copyright exception, would be a special case? Which wouldn't?

³⁸ Policy Australia, *Flexible Exceptions for the Education, Library and Cultural Sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?* (2012), Report prepared for Australian Digital Alliance/Australian Libraries Copyright Committee. attached to ADA and ALCC Issues Paper Submission 213, <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc#org>

200AB requires that the use not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interest of the rights holder. Again, the similarity of these two requirements, imported directly from the TRIPS Agreement, makes their application convoluted. When would a use conflict with the normal exploitation of the work but not unreasonably prejudice the legitimate interest of the rights holder?

A key barrier to the use of s 200AB is that the exception is stated as only being available if no other exception or statutory licence is available. See Proposal 6-1 and Question 6-1 for comments on the s 183 statutory licence "for the services of the Crown".

Any new exceptions for libraries and archives need to be clear that the existence of a licence does not automatically preclude reliance on a specific libraries/archives exception. The problematic 'special case' requirement should also be removed. If not, any introduced exception for libraries and archives will not operate effectively.

Some external uses should also be quarantined to make cultural collections discoverable without the burden of licensing; again, copyright owners benefit from their material being known as held by cultural institutions. A large range of external uses may need to be subject to fair dealing or fair use assessment and licensing but only where use by the cultural institution directly competes with the existing or anticipated uses by the copyright owner.

Proposal 11-2 The fair use exception should be applied when determining whether uses of copyright material not covered by specific libraries and archives exceptions infringe copyright.

The NFSA is cautious of fair use being applied to internal functions. It agrees that there should be specific libraries and archives exceptions that do not have to be assessed against fair use principles. Specific libraries and archive exceptions are vital.

Acquisition

Collection development was addressed in the NFSA's submission to IP 42.

Preservation

Even if general fair use or fair dealing exceptions are introduced, there is value in maintaining specific preservation exceptions to facilitate the activities of cultural institutions and to provide some continuity rather than having to assess preservation activities against evolving and market-influenced understandings of 'fair use'. Preservation is discussed further in response to Proposals 11-4 and 11-6.

Administration and discoverability

The collections of cultural institutions would benefit if there were specific exceptions for acquisition, preservation, administration and other internal uses of collection items. Although the ALRC has proposed adding public administration as an illustrative purpose for 'fair use', collection administration by cultural institutions is very different to governmental administration.

The NFSA supports the ABC's proposal for an exception that would enable copying and communication of 'low resolution viewing copies' of digitised works that can be accessed by staff (DP 79 para 11.40). However the NFSA suggests drafting in more general terms, so that it is technology neutral, for instance "copying and communicating collection material within cultural institutions for the purposes of administering and making collection items discoverable". The NFSA proposes some public extension of this use so that publicly funded

institutions can make their collection items publicly discoverable, possibly subject to the application of Technological Protection Measures and watermarks to deter infringement.

Onsite access

NFSA recommends the introduction of a specific copyright exception to guarantee the provision of onsite access to collections, regardless of the format. Cultural institutions would still consider donor and rights holder wishes, including Indigenous Cultural and Intellectual Property holders and may restrict access accordingly.

Most collection material in Australia's national cultural institutions can be displayed in public without requiring copyright permission or a licence, for example displaying an artwork or object. However the very nature of audiovisual material, where in order to display the object (e.g. the film, the sound recording, the website) means it must be screened, performed or communicated to be displayed. Moreover, depending on the original material, the item must often be copied to a different format, in order for it to be used. Screening, performing and communicating audiovisual material in Australia is generally subject to seeking permissions or paying licence fees to either distributors or collecting agencies, or in many instances both. This means the NFSA is almost always required to undertake expensive research and clearance or pay for licences simply to show its collection to Australian taxpayers.

The NFSA only includes material in the Australian Mediatheque where a licence is available, which many rights holders have been happy to provide. If a rights holder cannot be contacted, or if for whatever reason, does not agree, the item is not included (except in the rare case that they may be a low risk orphan).

This limits the amount and variety of material that can be accessed in the spirit of the NFSA's enabling legislation.

There are a number of exceptions in New Zealand's *Copyright Act 1994* that allow film, television and radio archives to publically play collection material without infringing copyright, subject to the availability of a licence, including section 57 'Playing or showing sound recordings or films'. The New Zealand Film Archive website states that the institution can present material publically without copyright clearance if presented by a Film Archive staff member.

The NFSA considers that an exception like this for the NFSA to use items from the National Audiovisual Collection and related materials would be appropriate. This would extend to the showing in the NFSA's Arc Cinema of heavily subsidised not-for-profit film screenings and at other locations arranged by the NFSA.

The NFSA also considers it appropriate to explore the adaption of this exception to using internet streaming technology available on the National Broadband Network to show collection items around Australia, including to remote communities.

The supply to the public for research or study will be discussed further in response to Proposal 11-7.

General access though cultural institution as intermediary

As intermediaries, cultural institutions operating in a digital economy with a fair use exception will be under increased pressure to provide digital content to individual clients. When a client or the NFSA wants to use material for which copyright clearance cannot be obtained (e.g. clearance cannot be obtained for the item and/or for underlying rights or the presumed rights holder is unable to confirm that they hold rights) NFSA has to make a difficult decision

about whether to accept the risk presented to the organisation by potentially infringing copyright. It is common for the NFSA not to provide material, even if a client is willing to take the risk of using it.

Further to this and the comments on Proposal 4-1, section 30.2(1) of the Canadian Copyright Law provides that a library, archive or museum will not infringe copyright where it undertakes, on behalf of a patron, an activity that such person may do personally as a fair dealing for the purposes of research, private study, criticism or review. This specific exception for cultural institutions is preferable in the view of the NFSA, over the option of open ended exceptions which may not be used confidently for the same reasons that many cultural institutes are risk averse in their reliance on s 200AB.

An alternative would be that if a general fair dealing exception for libraries and archives (or fair use) was introduced, the action of copying and supplying material to a client who declares that their use would not infringe copyright should be assessed against the exception. Cultural institutions would ideally have some form of immunity from legal action if a client provides inaccurate information.

Proposal 11-3 If fair use is not enacted, the Copyright Act should be amended to provide for a new fair dealing exception for libraries and archives. This should also require the fairness factors to be considered.

See NFSA's response to Proposal 11-2.

Question 11-1 Should voluntary extended collective licensing be facilitated to deal with mass digitisation projects by libraries, museums and archives? How can the Copyright Act be amended to facilitate voluntary extended collective licensing?

Voluntary extended collective licensing should not be introduced to facilitate mass digitisation projects. Digitisation of collection material should be covered by a specific libraries and archives exception. Digitisation by cultural institutions to preserve and manage their collections is beneficial to both rights holders and the general public. It ensures appropriate preservation and management of their material in public collections. In some cases, the option is to digitise or perish. And, importantly, the NFSA is not aware of any instances of copyright owners objecting to, or requesting fees for the digitisation of their material for preservation purposes.

The monetary and resource cost of licensing (including licence fees, staff resources for reporting, etc) would act as a disincentive to digitise collection material. Licensing digitisation is an added cost to both publically funded institutions and collecting societies with very little benefit for rights owners of the material digitised. It is not efficient for collecting societies to monitor and investigate digitisation of collection items and the internal management of digital files (see NFSA response to Proposal 8-1).

Copyright will still subsist in digitised copies made. Public uses of digitised collection material should be assessed against fair use, fair dealing or other relevant exceptions. If the uses are not fair they should be able to be licensed either directly with copyright owners or with collecting societies.

It must be emphasised that blanket licensing is no substitute for research and consultation, especially by a cultural institution with expertise in their collection and relationships with their stakeholders. Cultural institutions have very varied collections. The broad methods that collecting societies use to determine funds distribution to their members is unlikely to reflect the uses actually made by cultural institutions. There are multiple licences offered by collecting societies that do not require reporting of works used at all. Although these licences

involve less administration for users and the collecting society, they offer no control to the rights owners of the material used.

If extended licensing is introduced, creators and copyright owners should be given the ability to opt out, even though this makes extended licensing less attractive. Creators and rights holders should have a say in the use of their material. For example, many artists do not want their photographic works made available online. Some may request particular conditions or acknowledgements for use.

If extended licensing includes orphan material, it seems appropriate for collecting societies to search for and provide payment to the copyright holder. Fees collected should be returned to the licensee after a set period (e.g. 4 years) if the rights holder is not located.

NFSA believes that reliance on exceptions, direct licencing with rights holders, introduced orphan works provisions and expanded safe harbour provisions would be a more effective and appropriate way to manage digitisation and communication of collection material than extended collective licensing.

Any introduction of extended licensing for online uses must not interfere with a cultural institution's ability to use material under copyright exceptions, for instance under the exception for criticism or review. The existence of an extended licence should not make reliance on an exception less fair.

Proposal 11–4 The *Copyright Act* should be amended to provide a new exception that permits libraries and archives to make copies of copyright material, whether published or unpublished, for the purpose of preservation. The exception should not limit the number or format of copies that may be made.

NFSA supports the introduction of a new exception that permits cultural institutions to make copies of any copyright material for the purposes of preservation, without limits on format or number.

Current copyright exceptions for preservation and access do not meet the NFSA's or the public's needs. The exceptions are unnecessarily complex and confusing, for instance outlining different requirements for 'works' and 'subject matter other than works'. In drafting the new exception, provisions for works and subject matter other than works should be harmonised. NFSA supports ALRC's use of the term 'copyright material' in the review process. This term, or a similarly medium neutral term could be incorporated into drafting new/amended exceptions. Consistent and format neutral terms should also be used when referring to copies or copying.

Preservation of their collections is fundamental to cultural institutions. Preservation of material by cultural institutions is in the best interests of the public and the copyright holder. Preservation benefits future generations, as their cultural history may otherwise become unavailable.

Any opposition by rights holders or their advocates may be due to some misunderstanding as to the purpose of preservation and what preservation by a cultural institution involves. Preservation activities are separate, but interconnected to acquisition and access.

NFSA defines preservation as the practices and procedures necessary to ensure permanent accessibility (with a minimum loss of quality) of the visual or sonic content of the materials. This includes passive preservation such as keeping the material in an ideal environment and not subjecting it to any mechanical risk through use, and active preservation, which includes technical selection, conservation, housekeeping and collection control procedures (such as

maintenance of technical records, surveillance, labelling etc.), technical restoration, rejuvenation, duplication and quality control.

Preservation benefits rights holders themselves. Many rights holders don't foresee the need, or are unable, to preserve their material at an archival standard. NFSA collection material is frequently used to develop a new commercial release. Creators and rights holders often source copies of their copyright material from the NFSA as these tend to be the best preserved (or sometimes only) copies in existence from which new masters could be derived to enable commercial distribution. This has included films, TV shows, albums but also ephemera like posters (for exhibition, inclusion in publications, etc).

Broadcasters, particularly commercial networks, do not preserve all their own broadcasts. The reduced collection and preservation of broadcasts (or any other material) by cultural institutions disadvantages rights holders, as it decreases the likelihood that their material will be available into the future.

Much of Australia's audiovisual culture is now born-digital. NFSA acquiring and preserving born-digital material automatically means making copies. This may come in the form of a link from an FTP site (somewhere to download the files from the Internet) or on a physical carrier (such as an external harddrive, or USB thumbdrive or data CD). Transferring these files automatically means 'making a copy', however it is inappropriate for the content to be retained on physical carrier as these have very short lifespans (perhaps of no more than 10 years and data may have already been on these carriers for a while before being received by the NFSA). To mitigate the risk of losing significant collection material that is acquired, the NFSA must be able to transfer (copy) this digital content, and then undertake appropriate management and preservation of the digital collection materials.

For complex digital content, there are interdependencies between many different files of different types. We may be able to preserve the raw files (the bitstream) but might also need to keep a "representation" of what the content was like, as it is too complex to reconstruct for access purposes. For example, we might have to provide a 'fly through' or a 'walk through' of an interactive audiovisual website.

Activities necessary for effective digital preservation necessarily overlap with the exclusive rights of the copyrights holders. Items selected for digital preservation may be subject to back up copying, format shifting, remote storage, quality control and administration, which can also involve reproducing, communicating or performing copyright material. This full range of activities needs to be covered by the proposed exception.

Proposal 11–5 If the new preservation copying exception is enacted, the following sections of the Copyright Act should be repealed:

- (a) s 51A—reproducing and communicating works for preservation and other purposes;
- (b) s 51B—making preservation copies of significant works held in key cultural institutions' collections;
- (c) s 110B—copying and communicating sound recordings and cinematograph films for preservation and other purposes;
- (d) s 110BA—making preservation copies of significant recordings and films in key cultural institutions' collections; and
- (e) s 112AA—making preservation copies of significant published editions in key cultural institutions' collections.

If a new preservation copying exception is enacted, sections of the Copyright Act specifically concerning preservation should be repealed. A range of exceptions specifically for cultural institutions (libraries and archives exceptions) should remain, but be redrafted and consolidated for clarity and to suit both works and subject matter other than works. See for example sections 50, 51, 110B.

NFSA supports ALRC's use of the term 'copyright material' and 'subject matter' throughout this review process to encompass both works and subject matter other than works. This term, or a similarly medium neutral term should be incorporated into drafting of exceptions. NFSA also recommends that exceptions use consistent and technology-neutral terms that reflect uses of all copyright material (e.g. use of the word 'copy' instead of 'reproduction', 'facsimile' etc).

Any reference to a 'request in writing' should be format neutral so that there's no question whether digitally received requests/declarations are valid.

Amendments should state that copies made by a cultural institution to facilitate a user or another institutions request should not have to be destroyed, however the use of these copies should be limited to uses permitted by the *Copyright Act* (i.e. you could use the digitised copy made of an item to facilitate future research requests, you wouldn't have to digitise the original again). Voluntary licences would be required for uses of copies not covered by copyright exceptions, unless it was orphan or other conditions applied e.g. extended Safe Harbour Scheme.

Rather than requiring cultural institutions to apply complex technological protection measures to supplied material, it would be more reasonable if the institution should only have notify user of their obligations under law. Protection measures would limit users' ability to rely on other copyright exceptions (e.g. they could not copy an extract for the purposes of criticism or review). Please see NFSA's response to Proposal 11-7 for more detail on the ALRC's proposal to amend section 49 *Reproducing and communicating works by libraries and archives for users*.

Section 51 *Reproducing and communicating unpublished works in libraries or archives* is not mentioned in ALRC's proposal 11-5, however NFSA recommends introducing amendments to permit reliance on the exception, where the death date of the creator is unknown, 70 years after the (end of the year of) creation of the copyright material.

Section 51A *Reproducing and communicating works for preservation and other purposes* is specifically recommended by the ALRC for repeal. However this exception explicitly includes administrative purposes, as well as preservation. Administration of a cultural institutions collection needs to be explicitly maintained as a copyright exception. Some cultural institutions have governmental functions while others do not, so the 'public administration' illustrative purpose is not sufficient. As mentioned earlier in this submission, it may be appropriate for consideration to be given to the powers of institutions on a case by case basis.

If sections 49, 50 and 51 are amended to include all copyright material and appropriate exceptions for preservation and administration are introduced, NFSA supports the repeal of the following sections of the Copyright Act:

- s 51B Making preservation copies of significant works in key cultural institutions' collections
- s 110A Copying and communicating unpublished sound recordings and cinematograph films in libraries or archives
- s110B Copying and communicating sound recordings and cinematograph films for preservation and other purposes
- s 110BA Making preservation copies of significant recordings and films in key cultural institutions' collections
- s 112AA Making preservation copies of significant published editions in key cultural institutions' collections

NFSA recommends the amendment/introduction of preservation, administration and limited public access exceptions specifically for cultural institutions. Please refer to the response to Proposal 11-2.

Proposal 11-6 Any new preservation copying exception should contain a requirement that it does not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.

Any redrafting of library and archive preservation exceptions should not contain a commercial availability test. If a commercial availability test is maintained the test should also consider whether the format and quality of the commercially available material is suitable for preservation.

Automatically restricting preservation though a commercial availability test makes the exception more restrictive than a general fair use or fair dealing exception for libraries and archives would be. Fair use/dealing considers the effect of an activity on the market or value of copyright material, but it is not the only factor to be considered, nor does the existence of a commercial copy or licence preclude reliance on the exception (Discussion Paper paragraph 13.54).

As discussed in response to Proposal 11-4, preservation activities by cultural institutions are for the benefit of the public and for copyright holders. Preservation of copyright material by a cultural institution is likely to increase the potential market or value of copyright material rather than adversely impact it.

The purpose and impact of preservation activities is distinct from the subsequent communication of copyright material that has been preserved.³⁹ External access to preserved collection material or providing copies to external parties should be subject to other exceptions and permissions or licensing where appropriate.

The current wording of the commercial availability test, restricting preservation of “copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price” suggests a misunderstanding of why and how preservation is undertaken by cultural institutions.

NFSA tends to acquire material in commercial formats as a last resort, when this is the only way to acquire culturally significant material. Commercial copies are intended to be efficient to mass produce and distribute widely, not to ensure the highest quality or long-term survival of their content. It is rare that commercially available copies will be in a format and quality appropriate for preservation.

In the move to online distribution, quality and sustainability of commercial formats has actual decreased, for example CD audio compared to MP3. So attempting to preserve collection material by acquiring commercially available digital formats would not achieve the goal of minimum loss of quality for heritage formats such as film.

Digital files or streams are usually low-bit rate and are often made available in less sustainable, proprietary formats (intended to require certain software and acceptance of certain terms and conditions for access e.g. Apple's ALAC audio format)⁴⁰. No digital (or physical) format will remain in production indefinitely. There will always be a sunset date beyond which commercial media and the software/hardware to support it will not be available. We are already facing the potential loss of cultural assets due to deterioration and

³⁹ ALRC recognised this in DP 79 paragraph 11.92.

⁴⁰ Propriety formats also raise issues relating to the contracting out of exceptions. See NFSA response to Proposal 17-1.

technical and skills obsolescence. This is an immediate threat - we estimate that for some formats we have less than five years to complete preservation before losing that content forever. For any effective preservation or long term sustainability of content, digital material has to be converted to standard, widely supported 'baseband' formats. NFSA could not ensure collection material was preserved or accessible in future if we were reliant on commercially produced formats.

Introducing new preservation exceptions that retained the same commercial availability test would counteract efficiency gained by the NFSA through reforming the limits on the number and format of preservation copies. This supposed protection for the short term commercial interests of copyright owners will ultimately compromise the ability of future generations to access their audiovisual history and culture. It also reduces the future earning power of copyright owners. Spending archive resources on commercial availability tests and acquiring and maintaining commercial formats diverts resources that could have been spent on efficiently preserving cultural assets.

There is precedent for more appropriate commercial availability tests in international preservation exceptions. For example, UK copyright law restricts replacement copying "to cases where it is not practicable to purchase a copy to *fulfil that purpose*" [emphasis added].⁴¹ Also in Canadian copyright law the exception for libraries, archives and museums to copy for management and maintenance of collections does not apply where an "appropriate copy is commercially available *in a medium and of a quality that is appropriate*" [emphasis added].⁴² NFSA interprets these exceptions as better reflecting a higher standard of preservation practice than is supported by the *Copyright Act 1968*. For example, the availability of a commercial DVD copy of a movie would not have any bearing on the preservation copying of the physical film copy (or the Digital Cinema Print, etc) of the movie held in the collection, as the copy available for purchase is not a reasonable substitute for preservation purposes.

NFSA and other cultural institutions should be able to make preservation decisions based on curatorial and archival expertise. Separate exceptions for preservation by cultural institutions should remain. If they are incorporated as part of a general fair use or fair dealing exception, there is the potential the preservation activities by other organisations could be licenced in future, and collecting societies could use this as an argument that preservation by cultural institutions is not fair, as there is a market for licensing. This could have the unintended impact on reducing preservation activities due to licensing costs.

The NFSA does not tend to preserve copyright material in commercial formats as it is rare that these commercially available copies will have the quality or longevity appropriate for preservation. Undertaking preservation, at least how NFSA and similar institutions approach it, does not equate to the loss of a sale of a commercial copy.

Cultural institutions generally are committed to acquiring and preserving original materials in the best quality they can obtain. This is particularly the case for unique artefacts, such as works of art, an unpublished manuscript or a home movie. In this case there is no alternative to preserving the original – a copy of the original is simply a 'copy' and not a substitute for the original.

It is also important to note that in many cases preservation copying is time critical and an essential part of the preservation. For example – it may be important to make a high quality photographic copy of a drawing as soon as possible after acquisition to ensure there is a copy in another medium against which decay, such as fading of pigments, can be measured.

⁴¹ Copyright, Designs and Patents Act 1988 (UK) s 42(2), cited in ALRC Discussion Paper paragraph 11.77 footnote 95.

⁴² Copyright Act 1985 (Can) s 30.1(2) also cited in ALRC Discussion Paper paragraph 11.84.

For objects that have been commercially produced, preservation copying is just as important. For example, just because a video recording was made of an Australian television broadcast, that does not mean that multiple copies of the program are still in existence. Many Australian television broadcasts have not survived, as early broadcasts preceded recording technologies. The majority of TV materials held by the NFSA are on archaic video formats, such as 2 inch or 1 inch video tape. The NFSA, along with a handful of other international archives, is the only place where re-engineered components and specialist methods enable the content to still be retrieved from such media. Preservation copying of these works is essential to even identify the content on the tapes - which often have rudimentary labelling. Only after copying is it possible to be certain what is on the tape and then to research whether any other copies of the work/s exist, much less whether they can be commercially obtained. For example, a tape deposited with the NFSA from a commercial broadcaster might contain a number of segments. The tape box might be only labelled with the date on which it was recorded. If it was a news program it might contain material recorded in an Australian TV studio, advertisements and segments comprising or containing material obtained from an international news syndicator. The advertisements and commercially acquired segments may, or may not, be also archived elsewhere. Television broadcasts might also contain other programs, such as dramas, movies or music that have also been distributed in other media e.g. as film prints for cinema or made for home consumption as home video on VHS or DVD, or recordings on record, cassette, CD or downloadable media. However these versions may not be the same as the TV version and are also unlikely to be of a high quality or to be able to be preserved.

The issue of material requiring preservation copying and transfer to a new format in order to even retrieve the content of recordings does not only relate to 'old' analogue material. There are many redundant audio-visual formats - including the 'industry standard' but short lived Digital Audio Tape (DAT) that dominated the film and recording industry production for a few years in the 1990s. The issue of recordings in formats that are not playable is increasing rapidly in the digital era with the plethora of short-lived, experimental and proprietary formats.

Finally, it is also important to understand that archives and libraries will always seek to preserve the best quality components available of a work, where there is more than one copy available. Commercially available copies are usually poor quality components not suitable for preservation. Further, contemporary commercial copies, such as DVDs or downloadable files, may be protected by Technological Protection Measures, making them unsuitable for copying. That is why many of Australia's film, television and sound recording producers wish to deposit their original 'master' copies for safe-keeping with the NFSA. The NFSA preserves these and provides original or restored components back to rights owners and their estates for releasing in new formats.

For example, the NFSA's preservation and restoration work feeds the Australian distribution industry through providing quality film components for the cinema exhibition and re-release of classic Australian titles. The NFSA loans high quality or restored film components to distributors for DVD, Blu-ray and online distribution. These include many iconic works such as Fred Schepisi's *The Chant of Jimmie Blacksmith* and *The Devil's Playground* - which were re-released to the international market through the Australian distributors' partnership with a US organisation - Gillian Armstrong's *High Tide*, James Ricketson's *Blackfellas* and *The Killing of Angel Street* and Peter Weir's *Picnic at Hanging Rock*.

For these, like many other relatively recent Australian colour films, only faded or scratched copies were still available. Through its collaboration with Kodak/Atlab and Deluxe/Kodak⁴³, at-risk colour film heritage has been seen as its filmmakers intended and high quality prints can now be screened to a new generation of cinemagoers.

⁴³ <http://www.nfsa.gov.au/collection/film/film-partnerships/>

"Some parts of our cultural heritage are able to withstand the passage of time. Unfortunately colour film prints can simply disappear before our eyes, fading to ghost-like images that bear no resemblance to their original form, as I discovered for myself last year when screening a print of my 1977 film "Backroads". The National Film and Sound Archive of Australia, Kodak and Atlab have all taken a significant step towards preserving Australia's vanishing past for future generations to see."

Phillip Noyce

With the rapid shift in cinema exhibition from 35mm film to Digital Cinema Prints (DCP), and TV to high definition, a new wave of work is now required, with the NFSA needing to create or to provide the best quality components so that high resolution digital cinema prints and HD scans of works can be made.

Last financial year the NFSA returned original components for a number of collection items to enable their rerelease as DVDs or creation of DCPs for screening.

Classic Australian television is also still available to audiences because of the work of the NFSA. For example, working with Umbrella, the NFSA has assisted with four DVD sets of the landmark series *Number 96*, which marks its 40th anniversary this year. At the end of the process we will have transferred 128 episodes from the original 2" video tape (many having been 'baked' in order to retrieve that content from decaying media) simultaneously achieving preservation, access, cultural and commercial outcomes. The NFSA also partnered with Audio Go, UK to release the Dick Barton vintage radio serial – originally recorded on fragile steel & shellac transcription disks - on CD and online.

So it is clear that without the NFSA undertaking preservation copying in the first place, substantially fewer Australian titles would be 'commercially obtained within a reasonable time at an ordinary commercial price'.

It should also be noted that even when audiovisual works are released, or rereleased, the nature of the distribution industry is such that they are rarely available for more than a few years before they disappear from the market again.

Proposal 11–7 Section 49 of the *Copyright Act* should be amended to provide that, where a library or archive supplies copyright material in an electronic format in response to user requests for the purposes of research or study, the library or archive must take measures to:

- (a) prevent the user from further communicating the work;
- (b) ensure that the work cannot be altered; and
- (c) limit the time during which the copy of the work can be accessed.

As noted in relation to Proposal 4-1, it would be unreasonable to place bigger burdens on cultural institutions than exist for other parties providing content to third parties.

Section 49 should be amended to harmonise provisions all copyright material, rather than the current exceptions that differentiate between works and subject matter other than works.

The measures proposed are much too onerous for cultural institutions to apply to the provision of copyright material in all electronic formats. In most cases we provide 'electronic format' material to be used for research or study on CD or DVD. NFSA does not have access to technology that would enable us to prevent communication or limit access to material made available on disk.

The measures proposed involve cultural institutions policing unreasonable conditions on user's actions. Measures (a) and (b) would limit the user's ability to make 'fair use' of the material supplied, exceptions they otherwise may be able to rely on if a library or archive didn't supply the material. For instance, users could not copy an extract to use for the purpose of criticism or review. These measures are equivalent to 'contracting out' the ability to rely on exceptions.

Measure (c) limiting the time during which the copy can be accessed will likely be detrimental to a user's research. For example, research for a substantial publication, such as a book, can take years to undertake. It may require re-examining source material multiple times as research raised new information and perspectives. It would be preferable if users could access material for as long as it is necessary for their research or study. If limits are to be placed on the time the material can be accessed, then users should be able to request access material multiple times (they currently have to declare that they haven't been supplied with the material previously).

Rather than being required to take these measures, a cultural institution should be required to inform users of their rights and responsibilities under copyright law. Ultimately a cultural institution has no control over what clients do with material once it has left the institution. Even if technological protection measures are applied to supplied/communicated copies of collection material, there will always be ways users can bypass these. The measures would just disadvantage clients that are less technologically savvy.

Provision of a whole collection item may still remain subject to a commercial availability test, preferably a redrafted test that considers whether a copy can be commercially obtained within a reasonable time at an ordinary commercial price *and of appropriate format and quality for the purpose*. See NFSA's response to Proposal 11-6.

There should be broad consideration of what constitutes research or study. It should not be limited to academic research or exclude self-directed study. Research or study should not have to be the sole purpose, but a major purpose. The National Library of Australia stated in its submission on IP 42 that it has declined to provide copies of print music (that was commercially unavailable) due to uncertainty whether the study and practice of music was 'study or research' for the purposes of section 49, even when the use had no intention of publically perform the work, just to perform it as part of their own musical study. It would be preferable if there was clarification to ensure that cultural institutions are not unduly denying access.

Online communication of the whole of a collection item could require reasonable measures to limit access to the requesting client e.g. password protection and to limit the time in which the material is accessible (we currently don't have the ability to do this, but believe it is achievable). Streaming technology is likely to offer better controls.

Cultural institutions should be able to make multiple copies if this is required to communicate or supply the work to the user (e.g. scanning a copy of a page into a computer and email copy to client has already created at least 3 copies – scanned copy, copy in email sent, copy in email received).

It is a waste of public resources to have to destroy copies made to facilitate research provision (both digital and hardcopy provision).

Distributors of copyright material argue that existing provisions limit their markets. However if the particular item is available at a reasonable time/price the exception is not applicable (DP 79 para 11.109). Perhaps an option could be to apply an amended commercial availability test to the provision of all copyright material under section 49, noting that if the requested material (an article, single chapter, extract, etc.) is not able to be purchased individually, and is only available through purchase of a more substantial item or service (e.g. subscription, box set), it should be assumed the requested material is not commercially available.

12. ORPHAN WORKS

Proposal 12-1 The fair use exception should be applied when determining whether a use of an 'orphan work' infringes copyright.

Yes, a fair dealing exception for libraries/archives, or fair use if introduced, should be used in determining whether use of an orphan infringes copyright. When use of an orphan is considered to infringe copyright, remedies should be limited as outlined in Proposal 12-2.

Under the *National Film and Sound Archive Act 2008*, the NFSA has a mission to develop, promote and provide access to the national collection of audiovisual heritage. NFSA rarely owns copyright of material in the national collection and is therefore obliged to observe the rights of a large number of copyright holders.

While copyright protection is automatic, identification of the copyright holder is not. Even if copyright information was obtained upon acquisition (which is not always possible) this information will likely become out of date over the duration of copyright. In the case of audiovisual materials, where material is often donated or deposited by someone other than the rights owner, identifying rights owners becomes even more difficult. This is true for audiovisual subject matter produced for commercial consumption through exhibition, broadcast and distribution, as well as for material made for more personal or artistic intent. For example older film works may have come into the collection through film collectors or as materials have been offered by closing film housing facilities such as cinemas or laboratories. In these instances, information about rights will need to be researched. The same is true of video materials that have entered the collection, often in bulk, as a result of offers from broadcasters. While some programs held by a broadcaster may have been produced by the broadcaster, such as news or game shows, broadcasters may have held physical copies of some works because they have a licence to broadcast the programs from the producer. Any of these works may also include segments of material, such as archive footage, that have been licenced from yet another rights owner.

Another complicating factor is that the Australian media production environment has, since the turn of the century, been characterised by short-lived companies, mergers and takeovers. Even where copyright information is supplied on acquisition, ownership details may become out of date if the copyright is sold or licensed or if the company or other entity owning the copyright becomes defunct. 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. So the work in identifying, much less contacting rights owners is extremely complex and time consuming.

When it comes to dealing with the copyright originally owned by now deregistered companies, including special purpose vehicle (SPV) production companies, the passive approach which the Australian Securities and Investment Commission (ASIC) takes to identifying and administering these assets makes it very difficult to determine how to treat some orphan works. It is understood that when ASIC responds to applications made under section 601AE(2) or section 601AF of the *Corporations Act 2001* for ASIC to deal with deregistered company property, the onus is on the applicant to identify deregistered company property and provide proof that it vests in ASIC or the Commonwealth.

These factors lead to a large proportion of orphan works in the NFSA collection – many of high cultural, historic and educational value. This category of orphan works must be considered independently to the issue of digital sharing of images, where copyright holder information is separated from the work through online sharing e.g. Facebook, Pinterest, etc.

Use of orphan works is often in the public interest, as the example below demonstrates. However, use of orphan works is often deemed too risky by cultural institutions, even when there would be public benefit. To reduce the risk there should be a limit on the remedies payable by users of material believed to be orphan.

NFSA does not support a licensing system for the use of orphan works, based on the following:

- Cultural institutions are often the best placed to locate information about copyright holders – if we can't find them, it is unlikely that a copyright collecting society will be able to find them. It's likely that anyone interested in the rights status of orphans will rely on the records held by cultural institutions (including online databases) as a starting point for copyright holder searches;
- By the very nature of an orphan work, there is no copyright holder to pass fees on to;
- If orphan works can be used under a fair dealing exception, cultural institutions should be able to avail themselves of this exception without anyone creating a false market for the material being used;
- The management of risk by cultural institutions is preferable to complicating the situation further (and increasing administrative cost) by involving additional parties.

Example – Orange 1927 silent film

A rare silent film of Orange from 1927 was donated to the NFSA by a projectionist who found the film in a cupboard when helping to clear out an Orange cinema when it ceased operations in 1964⁴⁴. The nitrate negative of the film is the only known copy in existence. The 35-minute film captures a unique insight into Orange life and businesses between the two World Wars. Information supplied by the donor suggested that it may have been made for or by Edwin Passlow, who was proprietor of the Theatre Orange and from a prominent family from Orange.

The NFSA made a decision to treat the film as a dramatic work because of its unique character and the existence of a series of intertitles (even though these were spliced onto the end of the film as a series rather than being inserted into various segments of the film).⁴⁵ The intertitles were clearly intended to be intercut with the relevant images, suggesting that the film is more likely to be a dramatic work – that is '...a cinematograph production where the arrangement, the acting form or the combination of incidents represented gives the work an original character'⁴⁶. As a dramatic work, the film would be in copyright until the death date plus 70 years of the unknown director or scriptwriter (whoever died last) of the film. That is, it is likely that the film is still in copyright.⁴⁷

It is expected that the community of Orange would like to make more use of the film, including releasing it on DVD. It has been difficult to explain to the community that the unknown copyright holder may still control the use of the film. The NFSA has not made a decision about releasing the reconstructed film as yet, copyright concerns being one factor.

⁴⁴ <http://nfsa.gov.au/blog/2012/07/27/rare-local-footage-screened-orange/>

⁴⁵ There is also an argument that because the intertitles were not inserted into the film, thus enhancing a unique character, the title could be treated as actuality footage (protected a series of photographs prior to May 1, 1968) which would mean copyright has expired.

⁴⁶ s 222 *Copyright Act 1968*

⁴⁷ It is unclear as to whether an edited print of the film has ever been made public or 'published'- that is if 'copies of the film have been sold, let on hire or offered or exposed for sale or hire, to the public' . If it has not, then copyright in the film continues to exist indefinitely.

Proposal 12–2 The *Copyright Act* should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:

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

There should be a limit on remedies if use of an orphan infringes copyright, considering a 'reasonably diligent search' and reasonable attribution of creator are undertaken.

Example – 1950s film

A museum requested an excerpt of a short dramatic film made in Sydney in the late 1950s to be featured in an exhibition. There is no copyright information in the NFSA collection database or in the footage itself. The family of the now deceased man who produced and directed the film was contacted. The family confirmed he made the film, but were unsure who would have owned copyright. The family were interested in granting permission for the museum to use the film, but as they were so unsure about who would have held copyright, NFSA would not supply the film. The family may investigate rights further, however until rights are resolved the film will not be able to be used.

The NFSA considers that examples like this film should be treated so that use by the NFSA and the client museum would not impose liability on them after the NFSA or the museum has undertaken searches.

Proposal 12–3 The *Copyright Act* should provide that, in determining whether a 'reasonably diligent search' was conducted, regard may be had, among other things, to:

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

The 'reasonably diligent search' should consider the freely accessible search technologies and registers available, including the databases of cultural institutions. "Diligent search" could be agreed and adopted by the cultural sector as industry standard.

It is recommended that the 'diligent search' requirement include consideration of databases including the NFSA's Search the Collection facility which is updated as information becomes available through the NFSA's research and from information received from the public and stakeholders.

13. EDUCATIONAL USE

Proposal 13–1 The fair use exception should be applied when determining whether an educational use infringes copyright. 'Education' should be an illustrative purpose in the fair use exception.

No stated position.

Proposal 13–2 If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.

No stated position.

Proposal 13–3 The exceptions for education in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* should be repealed.

No stated position.

14. GOVERNMENT USE

Proposal 14–1 The fair use exception should be applied when determining whether a government use infringes copyright. 'Public administration' should be an illustrative purpose in the fair use exception.

Public administration should either be covered by a fair use exception, or there should be a new fair dealing exception for public administration. As in our response to question 6-1, free exceptions should be available to government entities, including cultural institutions, regardless of whether there is a licence available.

Collecting societies have argued that licensing would be more efficient for government, cost agencies less than the compliance costs of free exceptions and that 'zero rate' licences could be offered for some uses (Copyright Agency/Viscopy, see discussion paper paragraph 14.24). However we do not believe licensing all uses is an appropriate solution, in particular for cultural institutions dealing with the material they hold.

Cultural institutions' uses of copyright material are often very different to other government entities. Their use is centred on preservation, administration and access of collection material. The government statutory licences offered by collecting societies do not take into account the different purposes and requirements of cultural institutions. Cultural institutions have unmatched expertise and information about their own collection. Cultural institutions are best placed to decide how licensing should be approached. Broad formulas used by collecting societies to determine funds to be distributed to their members are unlikely to reflect the uses actually made by cultural institutions.

Even considering the potential efficiencies of blanket licensing there are still administration costs in reporting uses to collecting societies. Uses made under free exceptions should not require reporting to collecting societies, which would be an added administration cost to both government and collecting societies with no clear benefit for rights holders.

Perhaps a solution would be for individual agencies to decide whether it is in their interest to broadly licence uses, rather than assess uses against exceptions. This shouldn't be decided on a whole of government basis or by a one-size-fits all legislative approach because agency's needs can be very different. This is evident on viewing enabling legislation.

Public administration has not been well defined and it will be unclear whether/when this exception may apply to cultural institutions. Similar issues already exist in the applicability of Part VII div 2 of the Copyright Act to cultural institutions. A copyright system including both free exceptions for cultural institutions (that can be accessed regardless of whether statutory licences or extended licences exist) and voluntary licensing is more relevant and practical for the NFSA. However, the NFSA would definitely consider other solutions serving the interests of copyright owners and the NFSA.

Proposal 14–2 If fair use is not enacted, the Copyright Act should provide for a new exception for fair dealing for public administration. This should also require the fairness factors to be considered.

See response to Proposal 14-1. NFSA agrees that public administration should either be covered by a fair use exception, or there should be a new fair dealing exception for public administration.

Proposal 14–3 The following exceptions in the *Copyright Act* should be repealed:
(a) ss 43(1), 104—judicial proceedings; and
(b) ss 48A, 104A—copying for members of Parliament.

No stated position.

15. RETRANSMISSION OF FREE-TO-AIR BROADCASTS – CONSIDER APPROACH

Proposal 15–1

Option 1: The exception to broadcast copyright provided by the *Broadcasting Services Act 1992* (Cth), and applying to the retransmission of free-to-air broadcasts; and the statutory licensing scheme applying to the retransmission of free-to-air broadcasts in pt VC of the *Copyright Act*, should be repealed. This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

Option 2: The exception to broadcast copyright provided by the *Broadcasting Services Act*, and applying to the retransmission of free-to-air broadcasts, should be repealed and replaced with a statutory licence.

No stated position.

Proposal 15–2 If Option 2 is enacted, or the existing retransmission scheme is retained, retransmission 'over the internet' should no longer be excluded from the statutory licensing scheme applying to the retransmission of free-to-air broadcasts. The internet exclusion contained in s 135ZZJA of the *Copyright Act* should be repealed and the retransmission scheme amended to apply to retransmission by any technique, subject to geographical limits on reception.

No stated position

Question 15–1 If the internet exclusion contained in s 135ZZJA of the *Copyright Act* is repealed, what consequential amendments to pt VC, or other provisions of the *Copyright Act*, would be required to ensure the proper operation of the retransmission scheme?

No stated position

Proposal 15–3 If it is retained, the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* should be clarified.

No stated position

Question 15–2 How should the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* be clarified and, in particular, its application to internet protocol television?

No stated position

16. BROADCASTING - CONSIDER APPROACH

Proposal 16–1 The *Copyright Act* should be amended to ensure that the following exceptions (the 'broadcast exceptions'), to the extent these exceptions are retained, also apply to the transmission of television or radio programs using the internet:

- (a) s 45—broadcast of extracts of works;
- (b) ss 47, 70 and 107—reproduction for broadcasting; *Proposals and Questions 17*
- (c) s 47A—sound broadcasting by holders of a print disability radio licence;
- (d) s 67—incidental broadcast of artistic works;
- (e) s 109—broadcasting of sound recordings;
- (f) s 135ZT—broadcasts for persons with an intellectual disability;
- (g) s 199—reception of broadcasts;
- (h) s 200—use of broadcasts for educational purposes; and
- (i) pt VA—copying of broadcasts by educational institutions.

No stated position

Question 16–1 How should such amendments be framed, generally, or in relation to specific broadcast exceptions? For example, should:

- (a) the scope of the broadcast exceptions be extended only to the internet equivalent of television and radio programs?
- (b) 'on demand' programs continue to be excluded from the scope of the broadcast exceptions, or only in the case of some exceptions?
- (c) the scope of some broadcast exceptions be extended only to content made available by free-to-air broadcasters using the internet?

No stated position

Proposal 16–2 If fair use is enacted, the broadcast exceptions in ss 45 and 67 of the *Copyright Act* should be repealed.

No stated position

Question 16–2 Section 152 of the *Copyright Act* provides caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings. Should the *Copyright Act* be amended to repeal the one per cent cap under s 152(8) or the ABC cap under s 152(11), or both?

No stated position

Question 16–3 Should the compulsory licensing scheme for the broadcasting of published sound recordings in s 109 of the *Copyright Act* be repealed and licences negotiated voluntarily?

No stated position

17. CONTRACTING OUT

Proposal 17–1 The *Copyright Act* should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect. These limitations on contracting out should apply to the exceptions for libraries and archives; and the fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

Ideally, no contracts should preclude reliance on copyright exceptions, especially where the exception serves the public benefit delivered by cultural institutions.

There should be limits on contracting out of exceptions for cultural institutions. Acquisition, preservation and internal collection management by cultural institutions should not be limited by contractual terms. Similarly, other uses of copyright material which would otherwise be fair, should not be limited by contractual terms.

For some copyright material there is no choice of source. Licensors, especially large or multinational companies may offer standard terms and not be willing to negotiate. The value of publically funded collections should not be eroded by any such commercial arrangements with potentially perpetual duration. Nor should acquisition and preservation decisions be based on contract terms rather than cultural significance.

Closing remarks

A meeting of the NFSA and the Commissioner is scheduled on 8 August 2013 when additional details about the NFSA's position will be provided.

The NFSA appreciates the ALRC's consideration of this submission and looks forward to assisting the ALRC further in this Inquiry.

Any questions about the NFSA's participation may be directed to Adam Flynn, Principal Legal Counsel, by phone on 02 6248 2056 or by email at adam.flynn@nfsa.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Michael Loebenstein', is written over a light blue rectangular background.

Michael Loebenstein
Chief Executive Officer