

11. Libraries, Archives and Digitisation

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Summary

11.1 This chapter considers the activities of libraries and archives in the digital environment. The ALRC proposes that the flexible exception in s 200AB for libraries and archives be repealed. In the ALRC's view, the exception is not working appropriately and effectively in the digital environment.

11.2 Instead, digitisation and communication activities by libraries and archives—such as web harvesting, digitisation and communication of unpublished works—should be considered under the fair use exception proposed in Chapter 4. In the particular case of mass digitisation projects, the ALRC asks whether the *Copyright Act 1968* (Cth) should be amended to facilitate voluntary extended collective licensing.

11.3 The ALRC also proposes that certain exceptions relating to the core functions of libraries and archives—preservation copying and document supply—be retained in an amended form. The ALRC considers that retaining some specific exceptions for these purposes is justified in the interest of cultural policy and the wider public interest in education and research.

11.4 The proposed reforms will give libraries and archives more freedom to make preservation copies, and to supply electronic copies of works for study and research, subject to a number of safeguards limiting use and access.

Cultural institutions in the digital environment

11.5 In this chapter, the ALRC uses the term ‘cultural institutions’ to refer to libraries, archives, museums, galleries and public broadcasters.¹

11.6 The digital environment has continually changed the ways in which copyright materials are created, stored, preserved, published and consumed. In response to changing public expectations, cultural institutions have had to adapt their practices in order to fulfil their public missions of providing public access to cultural and historical knowledge.²

11.7 These changing practices increasingly involve the digitisation and communication of collections in ways that conflict with emerging publishing platforms. As a 2008 report into the libraries and archives exceptions in the United States highlighted:

The use of digital technologies has served to blur somewhat the traditional roles of libraries and archives and rights holders. Libraries and archives can become ‘publishers’ in the sense that they have reproduction and distribution capabilities far beyond those provided by older, analog technologies. At the same time publishers, with their newly acquired abilities to create, manage, and provide access to databases of information, can now provide some of the functions that in the past were associated primarily with libraries and archives.³

11.8 In the digital environment, two main issues face cultural institutions in fulfilling their public service missions: the preservation of materials in their collections and provision of access to the public.⁴

11.9 The importance of digitisation and access to cultural knowledge and information has been recognised in government policy. As part of the National Cultural Policy Discussion Paper, the Australian Government highlighted that ‘changing community

1 *Copyright Act 1968* (Cth) s 10 defines ‘archives’ to mean archival material in the custody of: the Australian Archives; the Archives Office of NSW; the Public Record Office; the Archives Office of Tasmania; or a collection of documents or other material of historical or public interest in custody of a body that does not operate or maintain the collection for the purposes of deriving a profit. The Act also refers to ‘key cultural institutions’ as being bodies administering libraries and archives under a law of the Commonwealth or State, or bodies prescribed by the regulations. The prescribed bodies include the Australian Broadcasting Corporation, Special Broadcasting Service Corporation and the Australian National University Archives Program: *Copyright Regulations 1969* (Cth) sch 5.

2 See A Christie, *Cultural Institutions, Digitisation and Copyright Reform* (2007), Intellectual Property Research Institute of Australia Working Paper No 9/07, 21–25 noting that digital technology has transformed libraries from traditionally holding analog works for physical access, to a 21st century-type institution that provides public access to digital representations of the cultural institutions ‘online and around the clock’.

3 *The Section 108 Study Group Report* (2008), 28.

4 Many cultural institutions in Australia have statutory obligations to develop, maintain and provide wide access to their collections. See eg, *National Sound and Film Archive Act 2008* (Cth); *Archives Act 1983* (Cth); *Australian War Memorial Act 1980* (Cth); *National Library Act 1960* (Cth).

expectations of access and service have created additional areas of common interest, including education, interpretation, regional delivery and digitisation of collections'.⁵ The final report, *Creative Australia*, emphasised that:

The digitisation of our National Collections Institutions will change significantly. The digitisation of their collections and increasing online engagement, using the potential of the NBN, will exponentially increase the value and role of our national collections in telling Australian stories.⁶

11.10 Consistent with these objectives, cultural institutions called for reforms to the *Copyright Act* to give them greater freedom to engage in:

- routine digitisation of collection material;⁷
- digitisation and making public unpublished material (for example, on a museum's website);⁸
- digitisation and communication of non-Crown copyright material that forms part of government records;⁹
- capturing and archiving Australian web content;¹⁰ and
- mass digitisation projects.¹¹

11.11 A key question for this Inquiry is whether the current exceptions for libraries and archives are working adequately in the digital environment to facilitate such uses in fulfilment of the National Cultural Policy, and whether further exceptions are required. While the ALRC's Terms of Reference refer to 'the general interest of Australians to access, use and interact with content in the advancement of education, research and culture', the ALRC recognises that reform should acknowledge and respect authorship and creation.¹²

Is s 200AB working adequately in the digital environment?

11.12 The proposition that cultural institutions require greater flexibility to make use of copyright material is not new in copyright law reform. In 2006, the Australian Government inserted s 200AB into the *Copyright Act*. The intention was to provide cultural institutions with 'a flexible exception to enable copyright material to be used

5 Australian Government, *National Cultural Policy Discussion Paper* (2011), 6.

6 Australian Government, *Creative Australia: National Cultural Policy* (2013), 100.

7 Grey Literature Strategies Research Project, *Submission 250*; National Library of Australia, *Submission 218*.

8 State Records South Australia, *Submission 255*; Grey Literature Strategies Research Project, *Submission 250*; CAMD, *Submission 236*; National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; National Archives of Australia, *Submission 155*.

9 National Archives of Australia, *Submission 155*; CAARA, *Submission 271*.

10 National Library of Australia, *Submission 218*.

11 Art Gallery of New South Wales (AGNSW), *Submission 111*.

12 See Ch 2.

for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties'.¹³

11.13 Section 200AB only applies to cultural institutions, educational institutions and users assisting those with a disability. For cultural institutions, use of copyright material is not infringement if it is:

- made by or on behalf of the body administering the library or archive;
- made for the purposes of maintaining or operating the library or archives; and
- not made partly for the purposes of the body obtaining a commercial advantage or profit.¹⁴

11.14 Importantly, any use under s 200AB is subject to the three-step test language found in the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS Agreement). In order to be protected by s 200AB the use of the copyright material must:

- amount to a special case;
- not conflict with the normal exploitation of the work or subject matter; and
- not unreasonably prejudice the legitimate interests of the owner of copyright.¹⁵

11.15 Further, the exception is only available if no other exception or statutory licence is available to the user.¹⁶

Limited application in practice

11.16 Since its introduction, a number of guidelines have been developed by various groups to facilitate the use of s 200AB.¹⁷ Despite these guidelines, it appears that the provision has been used rarely. The Australian Digital Alliance and the Australian Libraries and Copyright Committee (ADA and ALCC) has argued that adoption of s 200AB has been slow:

The provision has not been used to a great extent because it is too limited, and cultural institutions are unsure about how to use s 200AB in accordance with their institutional risk management, relationship management and other policies.¹⁸

13 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [6.53].

14 *Copyright Act 1968* (Cth) s 200AB(2)(a)–(c).

15 *Ibid* s 200AB(1)(a)–(d). Section 200AB(7) defines 'conflict with the normal exploitation', 'special case' and 'unreasonably prejudice the legitimate interest' with reference to Article 13 of the *TRIPS Agreement*. See also, E Hudson, 'Copyright Exceptions: The Experience of Cultural Institutions in the United States, Canada and Australia', *Thesis*, University of Melbourne, 2011 where she states that 'no-one who contributed to the [Fair Use] review had asked for such a provision, which is unique to Australian law'.

16 *Copyright Act 1968* (Cth) s 200AB(6).

17 L Simes, *A User's Guide to the Flexible Dealing Provisions for Libraries, Educational Institutions and Cultural Institutions* (2008), Australian Libraries Copyright Committee and the Australian Digital Alliance; Australian Copyright Council, *Special Case and Flexible Dealing Exception: s 200AB* (2012).

18 Australian Digital Alliance and the Australian Libraries Copyright Committee, *Response to the Engage: Getting on with Government 2.0 Draft Report* (2009), 9.

11.17 Submissions from cultural institutions to this Inquiry broadly confirmed this view. For example, a number of those institutions stated that they had never used s 200AB.¹⁹ One particular exception was the Australian War Memorial, which found that s 200AB, in part, addressed the conflicting requirements under its statute to digitally preserve its collection while adhering to its obligations under the *Copyright Act*.²⁰

11.18 Others have used s 200AB in a limited way to facilitate the use of orphan works. For example, the Art Gallery of NSW stated that it relied on s 200AB for the communication and publication of works in exhibitions where the author is unknown or un-contactable after a reasonably diligent search.²¹ Similarly, the Council of Australian Museum Directors (CAMD) submitted that some museums have applied, with legal assistance, the test embodied in s 200AB in order to place material online.²²

Uncertainty in the language

11.19 The ADA and ALCC submitted that its consultations with cultural institutions suggested that many viewed s 200AB as ‘a failure’. A report attached to its submission argued that s 200AB was not working in practice because:

- the incorporation of the three-step test into s 200AB has created a high degree of uncertainty as to its practical application and scope;
- s 200AB(6)(b) appears to limit its operation;²³
- the inability to circumvent technical protection measures (TPMs) for the purposes of s 200AB, combined with increasing use of TPMs on audio-visual works, has resulted in a growing number of works that fall outside the exception; and
- the uncertainty surrounding the three-step test, combined with the general culture of risk aversion, has led cultural institutions to refrain from using the exception at all for fear of facing legal challenges.²⁴

11.20 A number of submissions supported the view that incorporation of the language of the three-step test caused uncertainty, and therefore led to minimal reliance on the

19 Australian Broadcasting Corporation, *Submission 210*; State Library of New South Wales, *Submission 168*, State Records NSW, *Submission 160*; Powerhouse Museum, *Submission 137*.

20 Australian War Memorial, *Submission 188*.

21 Art Gallery of New South Wales (AGNSW), *Submission 111*.

22 CAMD, *Submission 236*.

23 That is, s 200AB does not apply if a licence is available. For example, the Council of Australasian Archives and Records Authority was not clear on ‘whether s 200AB is even applicable for government archives where s 183(1) applies: CAARA, *Submission 271*.

24 See 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: ADA and ALCC, *Submission 213*.

provision.²⁵ In particular, stakeholders highlighted uncertainty around the meaning of ‘special case’ and were concerned about ‘the effort and knowledge required to rule out all other exceptions before using s 200AB’.²⁶ Cultural institutions considered that they could not interpret the provision without legal advice.²⁷ The combination of these factors deterred cultural institutions from litigation to determine whether a use is permitted by s 200AB.²⁸

11.21 Australian copyright academics suggested that lack of case law surrounding s 200AB has entrenched a narrow interpretation of the section in practice. That is:

if no one is willing to be the test case, it makes it difficult for industry practice to emerge, not just because of an absence of law, but because the muted practice themselves can end up justifying the interpretation of the exception as limited in scope, even if such an interpretation was never intended.²⁹

11.22 On the other hand, the Australian Copyright Council argued that slow uptake of s 200AB could be attributed to cultural norms and that the law is only part of the answer. It suggested that some of the problems associated with s 200AB could be overcome through agreed industry guidelines: for example, that agreement could be reached in relation to certain, common scenarios.³⁰ A number of collecting societies agreed with this view.³¹ Copyright Agency/Viscopy argued that while there is a trade-off between ‘certainty’ and ‘flexibility’, the section:

is less ‘uncertain’ than some think. There are now a number of guides to the operation of s 200AB for libraries and other institutions. There is more commonality than difference in these guides, and we think there is scope to identify more common ground. The additional ‘confidence’ that some institutions would like can be achieved through a guide that is endorsed by representatives of both cultural institutions and organisations representing creators and publishers of content.³²

Fairness approach is familiar to cultural institutions

11.23 A number of cultural institutions called for s 200AB and for it to be replaced with something broader—like a fair use exception, or a flexible fair dealing right for cultural institutions.³³

25 R Burrell and others, *Submission 278*; CAARA, *Submission 271*; National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*; Art Gallery of New South Wales (AGNSW), *Submission 111*.

26 National Library of Australia, *Submission 218*.

27 For example, the Powerhouse Museum suggested that s 200AB ‘requires an in-house lawyer to provide us with an in depth analysis of how we could use it’: Powerhouse Museum, *Submission 137*.

28 National Archives of Australia, *Submission 155*.

29 R Burrell and others, *Submission 278*.

30 The Australian Copyright Council suggested that transparency in the guidelines could be overcome by registration of such guidelines under the *Legislative Instruments Act 2003*: Australian Copyright Council, *Submission 219*. See also, Australian Directors Guild, *Submission 226*.

31 APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; PPCA, *Submission 240*.

32 Copyright Agency/Viscopy, *Submission 249*.

33 R Burrell and others, *Submission 278*; CAARA, *Submission 271*; CAMD, *Submission 236*; National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; State Library of New South Wales, *Submission 168*; R Wright, *Submission 167*; National Gallery of Victoria, *Submission 142*; Powerhouse Museum, *Submission 137*.

11.24 In supporting a move to fair use, the ADA and ALCC argued that cultural institutions already take a ‘fairness’ approach to providing access to their collections in the digital environment.³⁴ They argued that an exception based on ‘fairness factors’, would provide more certainty than the language in s 200AB:

One theme that was repeated in discussions with stakeholders was that the language of the three-step test is not as familiar or instinctive as the language of fairness ... For example, Australians are used to assessing whether uses for research or study, or criticism or review are fair. In terms of determining the practical application of an exception based on fairness, there would also have been jurisprudence for would-be-users to draw upon.³⁵

11.25 In the educational context, Universities Australia expressed a similar view that university copyright officers have long been used to applying a fairness analysis.³⁶

11.26 Some Australian copyright academics agreed that the attitudes and behaviours of cultural institutions were ‘eminently suited to a flexible exception’, and that many had taken a ‘risk analysis’ approach in making works available.³⁷ They queried why such ‘risk analysis’ did not lead to the conclusion that s 200AB would apply, and suggested that the reason for this might be that:

institutions found it difficult to connect these considerations to the TRIPS-based language that appears in s 200AB, and had internalised the view that the ‘special case’ requirement permitted only discrete uses of copyright works. To the extent there was uncertainty with s 200AB, this related not to the underlying concepts, but the particular language used in that provision.³⁸

Fair use

11.27 In Chapter 4, the ALRC proposes that a fair use exception be introduced into the *Copyright Act*. Consequently, and for a number of reasons, the ALRC also proposes that s 200AB be repealed.

11.28 First, the ALRC considers it telling that the sectors s 200AB was intended to benefit are calling for its repeal. There was little support from stakeholders for amending s 200AB.³⁹ It is clear that the provision is not working as intended, and that the lack of uptake can be attributed to a number of factors, including: the uncertainty of the language; lack of case law and practice; lack of legal resources to interpret the provision and the risk averse nature of cultural institutions.

34 National Archives of Australia, *Submission 155*.

35 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.

36 Universities Australia, *Submission 246*.

37 R Burrell and others, *Submission 278* ‘Relevant factors that informed their analysis included the nature and age of the copied work, whether the copyright owner could be ascertained and located or, if not, the likelihood that there existed an active copyright owner, and the accessibility and commerciality of the institution’s use’.

38 *Ibid.*

39 Burrell and others considered broadening the exception to ‘all users’, but did not recommend this approach, given the problems with the current language of the provision: *Ibid.*

11.29 Secondly, the ALRC considers that cultural institutions may feel more comfortable applying a fair use test than s 200AB. Fair use requires consideration of the ‘fairness factors’, which provides a framework for balancing competing factors. Requiring cultural institutions to apply a ‘fairness’ test—for which they have some familiarity with the underlying concepts—should result in greater uptake and application and contribute to wider dissemination and access to materials in the public interest. The ALRC stresses that fair use does not mean free use. The fairness factors require consideration of the effect of the use upon the potential market for, or the value of, the copyright material.

11.30 Further, if it is accepted that the starting point for fair use is not as uncertain as s 200AB, the ALRC sees greater potential for guidelines, around the concept of fairness, to be effective.⁴⁰

11.31 Thirdly, fair use could be much more flexible in its operation than s 200AB. Fair use is not limited to any class of user or type of use. As cultural institutions’ practices change over time, the fair use framework can be applied to determine whether such practices constitute infringement.

11.32 In sum, a fair use approach should provide cultural institutions with the ability to better analyse when communication or digitisation of copyright material would be fair, taking into account the interests of rights holders.

11.33 In the event that a general fair use exception is not enacted, the ALRC proposes that the *Copyright Act* be amended to provide ‘fair dealing for libraries and archives’. In considering whether uses by libraries or archives constitute fair dealing, regard should be given to the fairness factors. This would ensure that the concept of fairness is the standard with which to consider whether uses of copyright material constitute infringement.

11.34 The ALRC considers that the fair use exception may allow cultural institutions to engage in a number of activities that they suggested were currently being impeded by the *Copyright Act*. Some of these are discussed below.

Unpublished works

11.35 A number of stakeholders called for a reduction in the term of copyright to allow the digitisation and communication of unpublished material.⁴¹ Under the *Copyright Act*, copyright subsists in a literary, dramatic, musical or artistic work until 70 years after the end of the calendar year in which the author died.⁴² If a literary, dramatic or

40 See Ch 4.

41 For example, the Australian War Memorial suggested that an ideal reform would be a ‘provision whereby an individual unpublished literary work moves into the public domain following 50 years of donation into a public institution’: Australian War Memorial, *Submission 188*. See also National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*, National Archives of Australia, *Submission 155*; Art Gallery of New South Wales (AGNSW), *Submission 111*. See *Copyright Act 1968* (Cth) s 29(1) which provides that literary, dramatic, musical or artistic works, cinematograph film or a sound recording shall be deemed to have been published, if and only if, reproductions/copies/records have been supplied to the public.

42 *Copyright Act 1968* (Cth) s 33(2).

musical work was not published before the author died, the copyright term of 70 years does not start to run until one calendar year after it is first published.⁴³ In effect, if a work is never published copyright in the work remains in perpetuity.

11.36 Under the fair use exception proposed, the fact that a work is unpublished does not rule out the case for fair use. The fair use provision in the US specifically recognises that ‘the fact that a work is unpublished shall not of itself bar a finding of fair use if such a finding is made upon consideration of all the above factors’.⁴⁴ Similarly, under the ALRC’s model, the fact that a work is unpublished is not determinative of the fair use question.⁴⁵ Whether a use is fair will be determined by the fairness factors, including the nature of the use; the amount that is copied; and the impact on any potential market for the material.⁴⁶

Harvesting of Australian web content

11.37 The National Library of Australia (NLA) called for a specific exception that would allow it to harvest and preserve Australian internet content. It advised that, despite not relying on any exception to do so, it has conducted annual harvests of Australian web material since 2005, gathering 5 billion files and 200 terabytes of data. In harvesting, the library ‘posts information for website owners on the Pandora website and places a link to this notice in the web harvest robot’s request to the targeted servers’. That is, the library does not contact the owners before harvesting the material, rather notification of the harvesting is done at the time the website is harvested.⁴⁷

11.38 The NLA noted that responses from website owners have been minimal.⁴⁸ Despite this, the NLA argued that because it has effectively copied the content without the copyright owner’s permission, it has not permitted public access to the data. However, it has responded to individual research requests to analyse the data.

11.39 To the extent that the NLA has not received many takedown requests, this might suggest that copyright holders consider such harvesting to be fair use. Use of technology to copy publicly available websites and index it for search purposes, might be considered to be a non-consumptive use as defined in Chapter 8. Whether the communication of harvested material constitutes infringement will need to be considered against the fairness factors outlined in Chapter 4. The fairness factors are more likely to support communication of publicly available material for public interest purposes such as research and study. However, communication of content on websites that are behind a ‘paywall’ or for which access would otherwise require payment of a licence, would be less likely to be fair use.

43 Ibid s 33(3). A work is considered published if it has been ‘supplied (whether for sale or otherwise) to the public’: s 29(1).

44 *Copyright Act 1976 (US)* s 107.

45 The list of illustrative uses or purposes can be found in Proposal 4–4.

46 See Ch 4.

47 The National Library of Australia advised that ‘the only way to identify and alert website owners on the scale required is through automated harvesting process’: National Library of Australia, *Submission 218*.

48 Only eleven responses were received after the first harvest and the number of responses has declined since then, *Ibid*.

Internal administration and archival purposes

11.40 The Australian Broadcasting Corporation (ABC) argued for an exception that would allow it to make copies and communicate ‘low resolution viewing copies’ of digitised works that are used by program makers searching for relevant audio or video segments. It suggested that its staff should be able to browse these archived copies on their local computers:

Such a system would not infringe the rights of non-ABC rights holders in its archived content, as none of the audio and video material it contains could be used for program-making without directly addressing those rights.⁴⁹

11.41 The National Archives of Australia called for an exception to allow archives to communicate non-Crown copyright material once it is available under the relevant archival legislation, meaning that

Copyright third party material provided to government for administrative purposes could continue to be used for purposes of public administration, including public research in government archives, without copyright infringing or requiring payment of compensation.⁵⁰

11.42 Similarly, the Council of Australasian Archives and Records Authority argued that the Act ‘does not readily facilitate/support online access to public sector information which incorporates material in which the Crown does not own copyright’.⁵¹

11.43 The ALRC considers that the above uses may fall under the illustrative purpose of ‘public administration’, outlined in Chapter 14. The ALRC considers that uses for public administration would include government uses required by statute, such as, making surveyors’ plans publicly available and releasing third party material as required by freedom of information laws. To the extent that archives or public broadcasters can be considered the Crown for the purposes of the *Copyright Act*, and where the use of third party material is required by statute, such uses are likely to fall under the rubric of ‘public administration’. However, the fact that a use falls under the illustrative purpose of ‘public administration’ alone is not determinative of the question of fair use. Regard must still be had to the fairness factors.

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

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.

49 Australian Broadcasting Corporation, *Submission 210*.

50 The National Archives of Australia pointed to ss 48, 49 of the *Copyright, Designs and Patents Act 1988* (UK) as a model: National Archives of Australia, *Submission 155*.

51 CAARA, *Submission 271*.

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.

Mass digitisation

A rights clearance problem

11.44 Cultural institutions suggested that s 200AB has not been used to facilitate mass digitisation projects. A key reason relates to the fact that uses under s 200AB must be a ‘special case’, and it is unclear whether mass digitisation would fall under this definition.⁵² The Australian Society of Archivists (ASA) suggested that s 200AB does not consider ‘the economic impact on an archive attempting to fulfil its duties to preserve and make available its collection as a whole’.⁵³

11.45 A common theme in submissions from the cultural institutions was the inability to clear rights due to lack of resources, time, or the scale of the project.⁵⁴ For example, the Powerhouse Museum submitted that:

The collections of museums and galleries are diverse and have a range of complex copyright issues that need to be dealt with on a daily basis. Most institutions don’t have access to legal services and need to spend many hours finding copyright holders and negotiating license agreements.⁵⁵

11.46 The ABC submitted that inability to quickly clear rights in relation to its archival content meant that its digitisation activities were restricted to material that:

- did not require clearance of underlying rights;
- are owned by the ABC and which require minimal clearance; and
- are digitised for uses that recoup the cost of rights clearance through sales revenue.⁵⁶

11.47 Archival institutions also expressed difficulty clearing non-Crown copyright material that form essential parts of government records.⁵⁷

52 CAMD, *Submission 236*; National Archives of Australia, *Submission 155*. The National Library of Australia also suggested that copying large volumes of material may not amount to a ‘special case’: National Library of Australia, *Submission 218*.

53 Australian Society of Archivists Inc, *Submission 156*.

54 ADA and ALCC, *Submission 213*; Australian Broadcasting Corporation, *Submission 210*; State Library of New South Wales, *Submission 168*.

55 Powerhouse Museum, *Submission 137*.

56 Australian Broadcasting Corporation, *Submission 210*.

57 CAARA, *Submission 271*; National Archives of Australia, *Submission 155*.

Overseas comparisons

11.48 In the United States, the Copyright Office is reviewing the libraries and archives provisions of s 108 of the *Copyright Act 1976* (US). In its 2011 Discussion Paper on mass digitisation, it was argued that ‘collective licensing may be an attractive option for user groups, provided that antitrust concerns can be alleviated’. In particular

Voluntary collective licensing ... may be able to provide transactional licenses that give copyright owners the ability to set prices and terms and conditions of use for specific types of licensees and for specific types of use.⁵⁸

11.49 In the United Kingdom, passage of the *Enterprise and Regulatory Reform Act 2013* (UK) will facilitate voluntary extended collective licensing. Under a new s 116B of the *Copyright, Patents and Designs Act 1988* (UK), collecting societies may ‘be authorised to grant copyright licences in respect of works in which copyright is not owned by the body or person on whose behalf the body acts’.⁵⁹

11.50 Before being authorised to engage in extended collective licensing, regulations will require collection societies to:

- demonstrate that they are significantly representative of rights holders affected by the scheme;
- demonstrate that they have the support of members in the application; and
- have in place a code of conduct to ensure minimum standards of governance transparency and protection for non-member rights holders.⁶⁰

11.51 The UK Government expects that voluntary extended collective licensing will ‘be more attractive in high-volume, low-value transactions with high administrative costs for individual clearance—such as those where collective licensing already plays a big role’.⁶¹ The scheme is intended to be voluntary, as rights holders can opt-out of the scheme and collecting societies are not obliged to apply for it. The UK Government envisages that extended collective licensing is ‘an additional tool being made available where it makes sense for the sector to do so’.⁶²

11.52 Extended collective licensing has also been pursued for mass digitisation and making available of ‘out-of-commerce works’ in Europe.⁶³ A Memorandum of Understanding (MOU) between libraries, publishers, authors, and collection societies encourages and underpins voluntary licensing agreements for digitisation of out-of-

58 United States Copyright Office, *Legal Issues in Mass Digitisation: A Preliminary Analysis and Discussion Document* (2011), 33.

59 *Enterprise and Regulatory Reform Act 2013* (UK) s 77.

60 UK Government, *Government Policy Statement: Consultation on Modernising Copyright* (2011), 10.

61 Ibid.

62 Ibid, 11.

63 The Memorandum of Understanding defines an ‘out-of-commerce’ as being when the work, in all of its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand books and antiquarian bookshops).

commerce books and journals that are part of a library's collection.⁶⁴ The MOU notes that 'legislation might be required to create a legal basis to ensure that publicly accessible cultural institutions and collective management organisations benefit from legal certainty, when under an applicable presumption, the collective management organisations represent rights holders that have not transferred the management of their rights to them'.⁶⁵

11.53 Under the principles of the MOU, the parties are to negotiate for digitising and making available works which are 'not for direct or indirect economic or commercial advantage'. The agreement should define the types and number of works covered, and level of remuneration for rights holders.

11.54 Similar to the UK proposal, licences under the European Union system will only be granted by collective management organisations 'in which a substantial number of authors and publishers affected by the agreement are members, and appropriately represented in the key decision making bodies'. Rights holders also retain the right to opt-out of any such agreement.

Licensing solutions

11.55 Collecting societies opposed further exceptions that would allow cultural institutions to engage in mass digitisation, particularly in relation to material that is commercially available, including under a licence from a publisher or collecting society.⁶⁶ For example, ARIA considered that the 'current arrangements in the *Copyright Act* facilitate digitisation projects and that the scope of the current provisions is adequate to meet the preservation requirements of public and cultural institutions' and that 'mass digitisation projects can, and should be the subject of licence agreements'.⁶⁷

11.56 Screenrights noted that s 183 provides a mechanism for state, territory and Commonwealth libraries and archives to negotiate individual payments for mass digitisation projects, but none have availed themselves of this exception. Screenrights is a declared collecting society for the licensing of broadcast material only. It argued for an extension of s 183A to provide for a declared collecting society to collect for

64 European Union, *Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out-of-Commerce Works* (2011). Signatories included: the Association of European Research Libraries (LIBER); Conference of European National Libraries (CENL); European Bureau of Library, Information and Documentation Association (EBLIDA); European Federation of Journalists (EFJ); European Publisher's Council (EPC); European Visual Artists (EVA); Federation of European Publishers (FEP); International Association of Scientific, Technical and Medical Publishers (STM); and International Federation of Reprographic Rights Organisations (IFRRO).

65 Ibid, 1.

66 APRA/AMCOS, *Submission 247*; Australian Publishers Association, *Submission 225*; Australian Society of Authors, *Submission 169*; ALAA, *Submission 129*. See Arts Law Centre of Australia, *Submission 171* 'the availability of copyrighted works on the internet will impact on the ability of creators of those works to generate revenue from those works'.

67 APRA/AMCOS, *Submission 247*; Australian Publishers Association, *Submission 225*.

uses other than copying by government to allow cultural institutions to make their collections available online, without the need for notifying each individual.⁶⁸

11.57 In light of the ALRC's proposal in Chapter 6 to repeal s 183, the ALRC considers that voluntary extended collective licensing may be considered a more appropriate mechanism for mass digitisation.⁶⁹

11.58 The Australian Copyright Council argued that 'if institutions require certainty it may be appropriate to consider some kind of extended collective licence to cover mass digitisation of material that is in copyright'.⁷⁰ Extended collective licensing was also supported by Copyright Agency/Viscopy which argued that, for institutions not covered by a government statutory licence, extended collective licensing would provide 'equitable remuneration' to rights holders:

For mass digitisation, the approach to equitable remuneration would be similar to that for other blanket licences: all uses are licensed but a global fee takes account of higher value uses and content, lower value uses and content, and uses that are zero-rated. There is a public policy question about who bears the cost of equitable remuneration. Should it be the government through its funding of the cultural institution, or should it effectively be the content owners, by forgoing any remuneration?⁷¹

11.59 Copyright Agency/Viscopy suggest that the calculation of 'equitable remuneration' would vary according to the content and the use including:

- the benefit to the cultural institution (including the benefit of not having to get copyright clearance); and
- the value and use of the content to the content owner (likely to be affected by factors such as the currency of the work; the nature of the use; and how many people can receive or view content).⁷²

11.60 The Association of Learned Professional Society Publishers submitted that extended collective licensing 'should probably only be considered for mass digitisation projects'.⁷³ It also pointed to 'other options to cover identifying and clearing appropriate rights in such large projects, such as the ARROW project'.⁷⁴

11.61 The Australia Council for the Arts also noted that 'it is worth considering whether greater digitisation and communication by public and cultural institutions is impeded by legislation or whether this is a question of resources provided to these

68 Screenrights, *Submission 215*.

69 See Ch 6, Proposal 6-1.

70 Australian Copyright Council, *Submission 219*.

71 Copyright Agency/Viscopy, *Submission 249*.

72 Ibid.

73 ALPSP, *Submission 199*.

74 The Accessible Registries of Rights Information and Orphan Works is a tool to assist in the diligent search for rights status and rights holders. See ARROW, *Website* <<http://www.arrow-net.eu/faq/what-arrow.html>> at 12 May 2013.

institutions to cover the cost of using copyright material'.⁷⁵ Professor Jock Given cautioned that

the complexity of rights-holding alone is not a sufficient reason to completely undermine rights granted to all creators at any time, in favour of open, unremunerated access to an unrestricted class of users. Law changes made to support mass digitisation projects need to provide the right base for creativity in the distant future, not just a convenient tool for easier access to already-existing material in the present.⁷⁶

Orphan works

11.62 Many mass digitisation projects may involve substantial numbers of orphan works. In Chapter 12, the ALRC proposes that remedies available to a rights holder be limited where use of an orphan work has been made following a 'reasonably diligent search'. However, it may be impracticable or impossible to conduct a 'reasonably diligent search' in a mass digitisation project. Further, the fair use exception may not always apply—much will depend on how well the project maps to the contours of the fair use and the fairness factors.

11.63 The attraction of extended collective licensing is that a user can license a multitude of works in one transaction—including orphan works—as well as those belonging to rights holders who are not part of the collective. While the problem that money collected may not reach the rights holder remains, the benefits of absolute certainty from the risk of injunctive relief may justify up-front payment. For example, Google submitted that:

If a rights holder later comes forward, there should be a way for them to be reasonably compensated, but not in a way that can kill good faith projects. No large scale project will make the necessary investment in time and money if the whole endeavour can be shut down at anytime if a rights holder later comes forward and demands punishing monetary damages or an injunction.⁷⁷

11.64 Licensing solutions could make it easier for cultural institutions to engage in mass digitisation and communication of orphan works for commercial reasons, or where public-private partnerships require agreements that allow partners to use copyright material for commercial purposes.⁷⁸ As noted in Chapter 12, if the option of voluntary extended collective licensing existed, users may wish to pursue this option rather than relying on fair use or the limitation on remedies following a diligent search.

11.65 In Chapter 6, the ALRC proposes repeal of the statutory licences for educational and government uses of copyright material in favour of voluntary licensing. Australia

75 Australia Council for the Arts, *Submission 260*.

76 J Given, *Submission 185*.

77 Google, *Submission 217*.

78 For example, 'non-profit institutions and public lending entities often forge partnerships with commercial entities, seeking the support of technology companies or similar actors to fund or implement their projects, and entering into agreements that may allow their partners to use the digital collection—including, in some instances, works protected by copyright law—for commercial purposes': United States Copyright Office, *Legal Issues in Mass Digitisation: A Preliminary Analysis and Discussion Document* (2011), 9.

has a number of established collecting societies who could grant licences for mass digitisation projects. However, these collection societies may be need to be empowered to grant licences on behalf of rights holders who are not members in order to facilitate mass digitisation projects.

11.66 The ALRC welcomes stakeholder comments on whether the *Copyright Act* should be amended to facilitate voluntary extended collective licensing for mass digitisation projects. For example, should the *Copyright Act* be amended to provide a framework that facilitates voluntary extended collective licensing, similar to that proposed in the UK?

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?

Certain exceptions should be retained

The public interest and copyright

11.67 In Chapter 4, the ALRC asks what exceptions should be retained if Australia introduces a fair use exception.⁷⁹ In the ALRC's view, the exceptions relating to preservation copying and document supply by libraries and archives ought to be retained in order to promote the public interest in research and study and the preservation of cultural heritage.

11.68 The preamble to the *World Intellectual Property Organization Copyright Treaty 1996* recognises 'the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the *Berne Convention*'.⁸⁰ Similar statements have been made at the domestic level. The Explanatory Memorandum to the 2006 amendments recognised that while the *Copyright Act* gives exclusive economic rights to copyright owners to promote creativity, these rights may need to be restricted, in some circumstances, in favour of wider public interests.⁸¹

11.69 As noted above, many public institutions have statutory obligations to preserve and provide access to material in their collections. The ALRC considers that the public interest is served by delineating clearly what libraries and archives are permitted to do with copyright material in fulfilling their core public service missions. Retaining some

79 See Ch 4, Question 4–2.

80 *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002), preamble.

81 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), 5.

specific exceptions for libraries and archives would be consistent with the approach taken in other jurisdictions, including those that have fair use.⁸²

Preservation copying

11.70 The digital environment has enabled digital preservation by libraries and archives, not only as a means to preserve ‘legacy’ works—such as old manuscripts and films—but equally those that are ‘born digital’ in the face of technological obsolescence.⁸³

11.71 The ALRC proposes that a number of provisions relating to preservation copying should be repealed. Instead, the *Copyright Act* should provide, in one provision, that libraries and archives are able to, in respect of both published and unpublished material, make ‘as many copies as is reasonable’ for preservation purposes.

Current law

11.72 There are numerous provisions in the *Copyright Act* that deal with preservation copying by cultural institutions—these are divided between copying of ‘works’⁸⁴ and ‘subject matter other than works’.⁸⁵

11.73 Under s 51A, a library or archive can make and communicate a reproduction of the work if :

- the work is in manuscript form or is an original artistic work—for the purpose of preserving against loss or deterioration or for research that is being carried out at the library or archive;⁸⁶ or
- the work is in published form but has been damaged, deteriorated, lost or stolen—for the purpose of replacing the work.⁸⁷

11.74 In relation to works held in published form, preservation copying is only available subject to a commercial availability declaration. That is, preservation copying is only permitted if, after reasonable investigation, the library or archive is satisfied that a copy (not being a second-hand copy) cannot be obtained within a reasonable time at an ordinary commercial price.⁸⁸ Further, reproductions of original artistic works can

82 See eg, *Intellectual Property Code of the Philippines*, Republic Act No 8293 (the Philippines) s 188; *Copyright Act 1967 (South Korea)* s 31; *Copyright Act 2010 (Taiwan)* art 48; *Copyright Act 1976 (US)* s 108.

83 For example, the National Library of Australia stated that in 2011, it made preservation copies of 16,235 works. See also, National Archives of Australia, *Obsolescence—A Key Challenge In the Digital Age* <www.naa.gov.au/records-management/agency/preserve/e-preservation/obsolescence.aspx> at 24 March 2013.

84 *Copyright Act 1968 (Cth)* s 10 defines a ‘work’ as a literary, dramatic, musical or artistic work. An artistic work is further defined to mean ‘an artistic work in which copyright subsists’.

85 Ibid, ss 51A, 51B deals with copying ‘works’ while ss 110B, 110BA and 112AA deal with subject-matter other than works, which includes sound recordings and cinematograph films and published works.

86 Ibid s 51A(1)(a).

87 Ibid s 51A(1)(b), (c).

88 Ibid s 51A(4)(a).

only be communicated via copy disabled computer terminals installed within the premises of the library or archive.⁸⁹

11.75 Mirror provisions can be found in s 110B in relation to reproductions of sound recordings, cinematographic films, including the commercial availability test, and the restriction of online communication to computer terminals installed within the premises of the library or archive.⁹⁰

11.76 In 2007, three further exceptions were inserted into the *Copyright Act*: ss 51B, 110BA and 112AA. These provisions allow certain ‘key cultural institutions’ to make up to three reproductions of ‘significant works’, being ‘works of historical or cultural significance to Australia’ for preservation purposes.⁹¹ They apply separately and are in addition to the provisions that apply to library and archives generally.⁹² The Supplementary Explanatory Memorandum noted that:

The policy for this exception is to ensure that key cultural institutions are able to fulfil their cultural mandate to preserve items in their collections consistent with international best practice guidelines for preservation.⁹³

UK

11.77 In the UK, authorised persons may only produce one copy of any item in the permanent collection of the library or archive, to replace or preserve the item, or to replace an item in another library that has been lost, destroyed or damaged.⁹⁴ Preservation copying is subject to a similar commercial availability test as in Australia.⁹⁵ The exception only applies to literary, dramatic and musical works and not artistic works, and sound recordings or films. Permission or licences from rights holders are necessary to make preservation copies of works not covered by the exception.

11.78 In 2006, the Gowers Review of intellectual property law recommended that the preservation exception be amended to integrate a general purposed-based exception which would permit the reproduction of all classes of copyrighted works for preservation purposes, and an exception for format-shifting of archival copies of works to ensure that records do not become obsolete.⁹⁶

89 Ibid s 51A(3A).

90 Ibid s 110B. In relation to sound recordings, the provision refers to reproduction of a ‘first record’ of a sound recording or a ‘first copy’ of a cinematograph film.

91 Ibid s 51B (deals with manuscripts, original artistic works, published work); s 110BA (deals with: first record, or unpublished record, embodying sound recording; first copy or unpublished copy of a film; published film); s 112AA (published editions of works).

92 Ibid ss 51B(1), 110BA(1), 112AA(1). The provisions define a ‘key cultural institution’ as those administering the library or archive with a statutory function of developing and maintaining the collection. Other institutions may be prescribed by the Regulations. Current institutions that are prescribed include: the Australian Broadcasting Corporation; Australian National University Archives Program and the Special Broadcasting Corporation: *Copyright Regulations 1969* (Cth) sch 5.

93 Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [76].

94 *Copyright, Designs and Patents Act 1988* (UK) s 42(1)(a) and (b).

95 Ibid s 42(2): ‘where it is not reasonable practicable to purchase a copy of the item in question to fulfil that purpose’.

96 A Gowers, *Gowers Review of Intellectual Property Law* (2006), Rec 10(a) and (b).

11.79 In response to the Hargreaves Review, the UK Government intends to amend the *Copyright, Designs and Patents Act 1988* (UK) to:

- extend preservation copying to any type of copyright work and provide that the work could be copied as many times as necessary to preserve the work;
- ensure that this permitted act cannot be undermined by restrictive contract terms; and
- retain the current restriction to works in a permanent collection for which it is not reasonably practicable to purchase a replacement, to minimise potential harm to rights holders.⁹⁷

US

11.80 In the US, the preservation copying provisions distinguish between published and unpublished works. Under s 108(b) of the *Copyright Act 1976* (US), libraries and archives may make up to three copies of an unpublished copyrighted work in their collection for the purposes of preservation and security of the deposit or research use in other libraries or archives.⁹⁸ With respect to published works, s 108(c) provides that three copies are permitted to replace a work in a collection that is lost, deteriorating, stolen or the format of which has become obsolete. However, the provision only applies where an unused replacement cannot be obtained at a fair price after reasonable effort.

11.81 In both instances, copies made in digital formats cannot be made available to the public outside library or archive premises.⁹⁹

11.82 Section 108(c) has been criticised for not allowing for pre-emptive preservation as it requires one of the triggering events to occur, and therefore is ‘ineffective as a means to preserve works that can easily be damaged or lost before preservation copies can be made’.¹⁰⁰ However, the libraries and archives provisions do not operate to limit the operation of the fair use provision under s 107, which may be invoked to reproduce more than three copies of published or unpublished works, or pre-emptive preservation.¹⁰¹

Canada

11.83 In Canada, libraries, archives and museums can make a copy of a work or other subject matter, whether published or unpublished, in its permanent collection if the work is deteriorating, damaged or lost, or is at risk of being so.¹⁰² Copying is also

97 UK Government, *Modernising Copyright: A Modern, Robust and Flexible Framework* (2012), 45.

98 *Copyright Act 1976* (US) s 108(b). The work must be in the library or archive’s collection and any copy made in digital format cannot be made available to the public outside the library or archive premises.

99 *Ibid* ss 108(b)(2), 108(c)(2).

100 Library of Congress National Digital Information, Joint Information Systems Committee, Open Access to Knowledge Law Project and SURF Foundation, *International Study of the Impact of Copyright Law on Digital Preservation* (2008), 44.

101 *Copyright Act 1976* (US) s 107.

102 *Copyright Act 1985* (Can) s 30.1(1)(a).

permitted if the library ‘considers that the original is currently in a format that is obsolete or is becoming obsolete, or that the technology required to use the original is unavailable or is becoming unavailable’.¹⁰³

11.84 Preservation copying does not apply where an ‘appropriate copy is commercially available in a medium and of a quality that is appropriate’.¹⁰⁴

Meeting preservation best practice principles

11.85 It is striking to compare the disparate and complex preservation copying provisions in the *Copyright Act* with those of other jurisdictions. The ALRC considers that the *Copyright Act* can be simplified by repealing the current preservation exceptions, and inserting one provision that would allow libraries or archives to make copies of material necessary for the purpose of preservation. This would apply to both published and unpublished material.

11.86 A number of international best practice guidelines on digital preservation suggest that more than three preservation copies are required. For example, the International Standards Organisation (ISO) contemplates a range of different archived copies, including:

- an archived master copy from which access copies are derived;
- at least one access copy that is accessible to the public or restricted audience, and multiple copies may be desirable to facilitate access through different formats or platforms;
- at least one local backup which enables the restoration of the archived copy in the event that information system is compromised; and
- at least one remote disaster recovery function in a physically separate location.¹⁰⁵

11.87 Submissions from cultural institutions argued strongly that the limit of three copies under the *Copyright Act* was inadequate to deal with digital preservation.¹⁰⁶ The ADA and ALCC called for the introduction of an exception that is ‘technology neutral, allowing as many copies to be made as is necessary to facilitate effective preservation’.¹⁰⁷ Others called for the provisions to be simplified using technology

103 Ibid s 30.1(1)(c).

104 Ibid s 30.(2)

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

106 National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; Australian Broadcasting Corporation, *Submission 210*; National Archives of Australia, *Submission 155*.

107 ADA and ALCC, *Submission 213*. Similar sentiments were echoed by State Records South Australia, *Submission 255*; Grey Literature Strategies Research Project, *Submission 250*; Australian War Memorial, *Submission 188*; Arts Law Centre of Australia, *Submission 171* National Archives of Australia, *Submission 155*; Powerhouse Museum, *Submission 137*.

neutral wording such as ‘copy’ to replace ‘reproduction’, ‘facsimile’ and ‘comprehensive photographic reproduction’.¹⁰⁸

11.88 Robert Burrell, Michael Handler, Kim Weatherall and Emily Hudson queried whether the distinction between original and published works remains tenable in the digital environment and argued that the preservation exceptions should apply to all works, whether published or unpublished. They also questioned the policy reasons for the three copy limit applying to ‘key cultural institutions’ and not other libraries and archives:

The Explanatory Memorandum did not explain why these provisions should not be available as a matter of course to all cultural institutions, and it would be difficult to argue that only key cultural institutions are the repositories of significant works.¹⁰⁹

11.89 Rights holders did not express major concerns about copying works for preservation purposes, but were concerned with controlling access to the works.¹¹⁰ ARIA, Copyright Agency/Viscopy and the Arts Law Centre of Australia argued that there is a distinction between archiving for the purposes of preservation and the potential for subsequent uses of such material, in ways that affect the ability of the owner to commercially exploit the material.¹¹¹

11.90 The ALRC considers that preservation of copyright material is in the best interests of both users and rights holders. Cultural institutions are in the best position to determine how to preserve their collections and should be free to make copies necessary to preserve copyright material. Consistent with other jurisdictions, the ALRC proposes that the commercial availability requirement be retained to ensure that there is no prejudice to rights holders.

11.91 There appears to be little utility in having different preservation exceptions addressing ‘works’ and ‘subject matters other than works’. Preservation is required of all types of copyright material. There appears to be no strong policy reason as to why the *Copyright Act* stipulates the three copy limit only for ‘key cultural institutions’. While it may be argued that these institutions have the capacity to engage in best preservation practices, that fact alone should not rule out other libraries and archives, as defined by the *Copyright Act*, that may also hold culturally significant material that requires preservation.¹¹²

108 National Library of Australia, *Submission 218*. Also supported by Grey Literature Strategies Research Project, *Submission 250*.

109 R Burrell and others, *Submission 278*.

110 Australian Publishers Association, *Submission 225*; ARIA, *Submission 241*.

111 Copyright Agency/Viscopy, *Submission 249*; ARIA, *Submission 241*; Australian Publishers Association, *Submission 225*; Pearson Australia/Penguin, *Submission 220*; Australian Copyright Council, *Submission 219*.

112 For example, s 50(10) defines a library, for the purposes of that section, to mean: ‘a library all or part of whose collection is accessible to members of the public directly or through interlibrary loans’; or ‘a library whose principal purpose is to provide library services for members of a Parliament’ or ‘an archives all or part of whose collection is accessible to members of the public’. This definition is wider than ‘key cultural institutions’.

11.92 The ALRC also agrees with rights holders that there is a distinction between preservation and the subsequent communication of such works, which should be considered separately. While the ALRC's proposals extend the preservation exceptions, the question of access is left to fair use or licensing solutions.

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.

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.

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.

Document supply for research and study

11.93 Submissions expressed divergent views on whether reforms to the exceptions relating to document supply for the purposes of research and study are needed. There is a clear tension in this area between the role of libraries to facilitate research and study and the potential effect of the exception on emerging markets for journals and publications.

Current law

11.94 Under ss 49 and 50 of the *Copyright Act*, a person may make a request in writing to be supplied with a reproduction of an article, or part of an article contained in a periodical or published work held by the library or archive.¹¹³ There are a number

¹¹³ *Copyright Act 1968* (Cth) s 49(2). Section 50(1)(a) allows an officer in charge of a library to request another library to supply an article or part of an article in contained in a periodical publication, or the

of limits to reproduction.¹¹⁴ A key limit is that where a request is made for reproduction of the whole of the work, or part of a work that contains more than a reasonable portion of the work, reproduction cannot be made unless:

- the work forms part of the library or archives collection; and
- before a reproduction is made, an authorised officer, after reasonable investigation is satisfied that the work cannot be obtained within a reasonable time at an ordinary commercial price.¹¹⁵

11.95 Where a library acquires a work in an electronic form, the library may make available the work online within the library premises in a manner such that users cannot make an electronic copy of the work, or communicate the article or the work.¹¹⁶

11.96 The supply of unpublished works is covered by s 51, under which recordings and films can be copied and supplied for research or study, or with a view to publication.¹¹⁷ Works that qualify for preservation copying under ss 51A and 110B can also be reproduced for research; however, this appears to be limited to onsite research.¹¹⁸

International comparisons

11.97 Canada, the UK, the US and New Zealand all have specific provisions allowing libraries and archives to supply users or other libraries with reproductions of works or whole works for research and study purposes. Each of these jurisdictions imposes limits on the delivery of documents.

Canada

11.98 In Canada, it is not an infringement for a library or archive ‘to do anything on behalf of a person that the person may do personally under s 29 or s 29.1’.¹¹⁹ Section 30.2 deals with copies of articles for research and study. It permits a library, archive or museum to make, by reprographic reproduction a copy of a work that is, or is contained in, an article published in:

- a scholarly, scientific or technical periodical; or

whole or part of published work other than an article contained in a periodical publication, for the purposes of supplying the reproduction to a person who has made a request under s 49. This is known as inter-library loan.

114 There are limits including that a request is not for reproduction of, or parts of two or more articles in the same periodical publication unless the articles are requested for the same research course or study: s 49(4).

115 *Copyright Act 1968* (Cth) s 49(5AB) provides that in determining whether a work could be obtained within a reasonable time, the authorised officer must take into account: the time by which the person requests requires it; the time within which a reproduction of the work at the ordinary price could be delivered to the person; and whether an electronic reproduction of the work could be obtained within a reasonable time at a reasonable price.

116 *Copyright Act 1968* (Cth) s 49 (5A).

117 *Ibid* s 51(d).

118 *Ibid* ss 51A(1)(a), 110B(1)(a) and (2)(a).

119 *Ibid* s 29 states that ‘fair dealing for the purposes of research, private study, education, parody or satire does not infringe copyright’. Section 29.1 deals with fair dealing for the purposes of criticism and review.

- a newspaper or periodical, other than a scholarly, scientific or technical periodical, if the newspaper or periodical was published more than one year before the copy is made.¹²⁰

11.99 A limitation applies to providing a copy to a person in digital form. The statute requires that the providing library take measures to prevent a person who has requested the copy from: making any reproductions, including any paper copies, except for printing one copy of it; communicating it to any other person; or using the copy for more than five business days from the day on which the person first uses it.¹²¹

The UK

11.100 Under the *Copyright, Designs and Patents Act 1988* (UK), a librarian of a prescribed library can make and supply a copy of an article in a periodical, or from a published edition a copy of part of a literary, dramatic or musical work, subject to the following conditions:¹²²

- The librarian must be satisfied that the person requires them for the purpose of research for a non-commercial purpose or private study, and will not use them for any other purpose.¹²³
- No person is furnished with more than one copy of the same article or with copies of more than one article contained in the same periodical.¹²⁴
- The person who receives the copy must pay a sum not less than the cost of the copies (including a contribution to the general expenses of the library).¹²⁵

11.101 The Australian Publishers Association (APA) highlighted an example of how these provisions are implemented by the British Library. Copies made by the British Library are made available to the client over a secure server that the client is able to access for 14 days. Clients have 30 days in which to access the file, after which it is deleted from the server. After that time, a client must make an additional payment and request. The file cannot be converted into any other format and cannot be 'cut and pasted'.¹²⁶

120 *Copyright Act 1985* (Can) s 30.2. This restriction does not apply in respect of a work of fiction or poetry or dramatic or musical work.

121 *Ibid* s 31(5.02). Further, where intermediate copies are made in order to copy the work, once given to the patron, the intermediate copy must be destroyed: s. 31(5.1).

122 *Copyright, Designs and Patents Act 1988* (UK) s 38 covers articles in periodicals and s 39 covers parts of published works.

123 *Ibid* s 38(2)(a)(i), (ii); s 39(2)(a)(i)

124 *Ibid* s 38(2)(b); s 39(2)(b).

125 *Ibid* s 38(2)(c); s 39(2)(c).

126 If a user wishes to receive an unencrypted file, they must order a licence from the relevant Copyright Licensing Agency.

11.102 The payment of a fee for reproduction of the document is separate from a ‘copyright fee’, which is payable if the customer is requesting the document for non-commercial purposes, or requires documents to be delivered within 2 hours or as an immediate download.¹²⁷

The US

11.103 Under s 108(d) of the *Copyright Act 1976 (US)*, libraries and archives can supply in response to a request, ‘no more than one article or other contribution to a copyrighted collection or periodical issue, or ... a copy or phonorecord of a small part of any other copyright work’. Under s 108(e), a library or archive can reproduce or distribute an entire work in response to a user request if it first determines that ‘a copy or phonorecord of the work cannot be obtained at a fair price’. In both instances, the library must have no notice that the work will be used for any purpose other than private study, scholarship and research.¹²⁸

11.104 There are limits to s 108(d) and (e), including a qualification that the library or archive derive no commercial gain from the reproduction.¹²⁹ Further, supply must include a notice that the work may be protected under copyright law.

11.105 The Section 108 Study Group recommended that electronic delivery of copies under s 108 (d) and (e) should be permitted only if libraries take additional measures to:

- ensure that access is provided only to the specified requesting user; and
- deter unauthorised reproduction or redistribution of the work.

11.106 The Group members agreed that adequate measures will depend on the type of work and the context of use, but there was no consensus on which measures were adequate, and whether technological protection measures should be required in any given case.¹³⁰

New Zealand

11.107 Under the *Copyright Act 1994 (NZ)*, a library or archive can supply periodicals or parts of a published work, subject to limitations. In particular, s 56A provides that a library or archive does not infringe copyright by communicating a digital copy to an authenticated user if the following conditions are met:

- the librarian or archivist has obtained the digital copy lawfully;
- the librarian must ensure that each user is informed in writing about the limits of copying and communicating under the statute;

127 British Library, ‘Document Supply Service Handbook for Business Account Management’ (2011).

128 *Copyright Act 1976 (US)* s 108(d), (e).

129 *Ibid* s 108(1).

130 *The Section 108 Study Group Report* (2008), 98.

- the digital copy is communicated to a user in a form that cannot be altered or modified; and
- the number of users who access the digital copy at any one time is not more than the aggregate number of digital copies of the work that the library or archive has purchased or for which it is licensed.¹³¹

11.108 An ‘authenticated user’ is defined as someone who has a legitimate right to use library or archive services and can access the digital copy only through a verification process.

Emerging distribution markets

11.109 A number of publishers submitted that any expansion of the library and archives exceptions relating to document supply would undermine emerging distribution and licensing models.¹³² For example, the APA argued that part of the historical rationale that underpins the document supply exceptions—such as Australia’s geographical isolation and inability to retrieve materials quickly—no longer applies in the digital environment. It argued that such ‘legacy’ provisions should be repealed.¹³³ The APA stressed there is now immediate access to authorised copies and that digital technology assists in both identifying and communicating with publishers and/or collection societies able to license the use of copyright material on behalf of publishers. It was argued that the exceptions ‘have no place in copyright legislation that supports a digital economy’.¹³⁴

11.110 Concerns relating to market effects were summarised by the International Publishers Association:

When considering any revision of the current provisions, care should be taken not to impede the growing document delivery and other online services, provided by commercial entities, including publishers themselves ... Libraries are major clients of publishers, in particular of academic publishers. In the digital environment, their digital services compete to a certain extent with publishers in serving readers. Any revised provision should not interfere with the sustainability of developing new delivery and business models, and therefore the viability of the publishing industry as a whole.¹³⁵

11.111 Publishers were concerned that ss 49 and 50 may be used, including by overseas parties, as a way of securing cheaper, or free, documents rather than purchasing or licensing such works. It was argued that the document supply provisions should only be available to users in Australia, and expressly for the purposes of private

131 *Copyright Act 1994* (NZ) s 56A.

132 Australia Council for the Arts, *Submission 260*; Australian Publishers Association, *Submission 225*; Pearson Australia/Penguin, *Submission 220*; Australian Copyright Council, *Submission 219*.

133 Australian Publishers Association, *Submission 225*. The Australian Copyright Council, *Submission 219* also highlighted that the libraries and archives provisions ‘reflect the importance of such institutions in a geographically disparate nation’ and queried ‘whether the policy basis for all these provisions remain valid in the digital economy’.

134 Australian Publishers Association, *Submission 225*.

135 International Publishers Association, *Submission 256*.

study and non-commercial research.¹³⁶ Further, communication of digital material should be limited to terminals on library premises only.¹³⁷

11.112 A further concern was that files distributed by libraries and archives were susceptible to further distribution by users on file-sharing sites. Allen & Unwin suggested that libraries ‘frequently create files without any digital security and send them to patrons as email attachments’ and that ‘requiring library patrons to warrant the file is for personal use is no real protection with a digital file’.¹³⁸

11.113 The ADA and ALCC and the NLA were aware of such concerns. The ADA and ALCC suggested that there ‘has not been any expectation on the part of libraries that these copies would be made available for wider public access, or to reduce purchasing of digital content licenses’.¹³⁹ In its submission, the NLA drew attention to a survey it conducted which showed that file sharing as a result of document supply is low.¹⁴⁰

11.114 As an alternative to the repeal of the provisions, the APA suggested that document supply could be modelled on that of the British National Library, as a solution that ‘meets the needs of the library and researchers without unduly prejudicing the interests of copyright owners’. Under this model:

- libraries are required to pay a licence fee;
- copies are required to be supplied with relevant TPMs in place (either as provided with the publication by the publisher or as may reasonably limit the uses to which the copy may be put in light of the purposes of the supply);
- copies are required to be supplied with all relevant electronic rights management information in place; and
- use is expressly limited to private study and non-commercial research.¹⁴¹

11.115 Copyright Agency/Viscopy suggested that ‘making different provisions for commercial entities would not impede their access to content’ as they could acquire works from libraries on a ‘cost recovery’ basis or on payment of a ‘copyright fee’.¹⁴² Alternatively, ‘libraries could supply the materials to corporations that are covered by a licensing solution for the use of the material’.¹⁴³ The Arts Law Centre argued that a ‘statutory licence system could be put in place to provide effective remuneration to rights holders for these uses’.¹⁴⁴

136 John Wiley & Sons, *Submission 239*.

137 Ibid; Australian Publishers Association, *Submission 225*; IASTMP, *Submission 200*.

138 Allen&Unwin Book Publishers, *Submission 174*.

139 ADA and ALCC, *Submission 213*.

140 National Library of Australia, *Submission 218*.

141 Australian Publishers Association, *Submission 225*.

142 Copyright Agency/Viscopy, *Submission 249*.

143 Ibid.

144 Arts Law Centre of Australia, *Submission 171*.

Effects on scholarship and research

11.116 Cultural institutions voiced concerns over the complexity of the document supply provisions, including their limited breadth and inefficiency in operation. The ADA and ALCC argued that:

- the 1,600 word provision is complex and difficult to administer for library staff;
- there is real uncertainty about whether libraries can fulfil document supply requests for purposes other than research and study under s 200AB; and
- the need to destroy all electronic copies sent to the user as soon as practicable has resulted in inefficiencies and increased cost for end users.¹⁴⁵

11.117 At the same time, the NLA advised that document requests in electronic form have been steadily increasing. Since the introduction of its Copies Direct service, requests from individuals have increased from 2000 in 2002 to 13,000 in 2012.¹⁴⁶

11.118 The ADA and ALCC submitted that ‘libraries, who may be the only source of material requested by a user, should be permitted to supply documents in any circumstance where the user’s purpose is recognised as legitimate under copyright law’.¹⁴⁷ The National Library suggested that a new fair use provision could allow it to provide copies for purposes which combine research and study with other uses, as it currently declines requests that do not fall squarely under research and study.

11.119 The websites of these cultural institutions also confirmed that where a request falls outside the parameters of a current fair dealing exceptions, the onus is on the individual to clear the rights.¹⁴⁸

11.120 The Independent Scholars Association of Australia (ISAA) argued that when considering issues relating to access to electronic material, the needs of ‘independent public scholars who do not have access to specialised academic support when conducting research’ should be a consideration:

From the viewpoint of ISAA members who are engaged in research (like myself) the crucial enabling factor is to have free access to academic journals and other scholarly resources, all of which are now available electronically and often, electronically only. I could not do the work required for my current project without free access to an academic library.¹⁴⁹

145 The ADA and ALCC provided some statistics in their submission: ADA and ALCC, *Submission 213*.

146 National Library of Australia, *Submission 218*.

147 ADA and ALCC, *Submission 213*.

148 See eg, National Gallery of Australia, *Reproductions and Digital Print Services* <<http://nga.gov.au/Collection/repro.cfm>> at 27 May 2013; National Library of Australia, *Do I need the Library's Permission as well as the Copyright Owner's Permission?* <<http://www.nla.gov.au/node/2260>> at 27 May 2013; State Library of Victoria, *Terms & Conditions—online copy ordering service* <www.slv.vic.gov.au/terms-conditions-online-copy-ordering> at 27 May 2013.

149 ISAA Inc, *Submission 149*.

Protection of the public interest

11.121 The debate in relation to document supply is, in many ways, one about what ought to be a legitimate role of libraries in a digital environment. In the ALRC's view, the emergence of markets providing licensed on demand access to journal articles and copyright works should not, of itself, override the wider public interest in research and education. However, there ought to be reasonable limits on document supply services to recognise the role of emerging distribution markets.

11.122 In the ALRC's view, the approaches taken in Canada, the UK, the US and New Zealand and the Section 108 Study Group recommendations have merit. The ALRC proposes that the current document supply provisions be simplified and amended to provide that libraries and archives may provide electronic copies of a work to a person for private study and research subject to limitations, including measures to ensure that:

- the person requesting the document cannot make further copies or communicate the work to other persons;
- the work cannot be altered; and
- access to the work is only provided for a limited time period.

11.123 The ALRC recognises that, in many cases, libraries are the only means by which people may be able to access certain types of copyright material and libraries should be able to continue their role in promoting research, education and study.

11.124 In the analog era, where access was limited to the physical location of the library or archive, the user had to suffer some inconvenience by travelling to the location in order to access the works. There was an incentive for the user to overcome this inconvenience by buying a copy of the work they wished to use. In the digital era—in particular with the rollout of the National Broadband Network—it is harder to justify a requirement that every user must access copies of works in the physical locations of the libraries.

11.125 However, the ALRC considers that access can be provided without impeding emerging markets for document delivery. For example, libraries could provide access to documents through a secure website to ensure that only the person who requested the document can access it. Technologies could be implemented to limit the type of use (for example, read only) and to ensure that the work cannot be altered. Limits could also be placed on the time available for the copy to be accessed, and perhaps, where the work can be accessed from (for example, only within Australia).

11.126 The ALRC invites stakeholder discussion on whether the limits proposed are appropriate and adequate for the digital environment.

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.

Technological protection measures and contracting out

11.127 Some cultural institutions raised issues relating to TPMs. The ADA and ALCC were concerned that

increasing tendency of digital content licenses to contract libraries out of existing copyright exceptions, and ways in which TPMs impede preservation and long-term access to copyright works in the public interest.¹⁵⁰

11.128 It called for ‘mirrored exceptions permitting circumvention of TPMs where an exception for digitisation or fair use or proposed legislative alternative exists’.¹⁵¹

11.129 The ALRC notes that the Australian Government Attorney-General’s Department is conducting an inquiry into whether exceptions for TPMs under the *Copyright Act* are appropriate and whether new exceptions should be added. That review is considering whether further exceptions in sch 10A of the *Copyright Regulations* that encompass ‘reproduction and communication of copyright material by libraries, archives and cultural institutions for certain purposes’ are needed.¹⁵² The Terms of Reference direct the ALRC not to duplicate work in relation to this review.

11.130 However, as discussed in Chapter 17—and consistent with the ALRC’s views in this chapter—the inherent public interest in libraries and archives exceptions requires that there be no contracting out of these exceptions. The ALRC proposes that this be the case, whether or not fair use is implemented.¹⁵³ The ALRC also notes that if limitations on contracting out are implemented, consistent amendments to TPM provisions may be justified. That is, there may be little point in restricting contracting out of exceptions, if TPMs can be used unilaterally by copyright owners to achieve the same effect.¹⁵⁴

150 ADA and ALCC, *Submission 213*.

151 *Ibid.*

152 Australian Government Attorney-General’s Department, *Review of Technological Protection Measure Exceptions made under the Copyright Act 1968* (2012).

153 See Ch 17, Proposal 17–1.

154 See Ch 17.