12. Libraries and Archives

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Summary

12.1 This chapter considers uses of copyright material by libraries and archives in the digital environment. The *Copyright Act* contains specific exceptions for libraries and archives that relate to preservation copying and document supply. A flexible dealing exception is also contained in s 200AB.

12.2 The ALRC recommends that 'library and archive use' be an illustrative purpose of the fair use exception recommended in Chapter 4. The ALRC also recommends that, if fair use is not enacted, the *Copyright Act* be amended to introduce a new fair dealing exception, including 'library and archive use' as a prescribed purpose. The chapter discusses how such an exception might be framed.

12.3 As a consequence of fair use or the new fair dealing exceptions, the current flexible dealing exception in s 200AB for libraries and archives should be repealed.

12.4 The ALRC also recommends that the exceptions relating to preservation copying and document supply for research and study be retained, with some amendments. The retention of these exceptions is justified on public interest grounds and to reduce unnecessary transaction costs. These exceptions should not limit the operation of fair use, or the new fair dealing exceptions.

Cultural institutions in the digital environment

12.5 In this chapter, the ALRC uses the term ‘cultural institutions’ to refer to libraries[1] and archives[2] (including museums, galleries and public broadcasters) as defined in the *Copyright Act*. These cultural institutions have an important public interest role in maintaining collections and providing access to cultural and historical knowledge.[3]

12.6 The digital environment has changed the ways in which copyright materials are created, stored, preserved and published by cultural institutions.[4] In particular, the digitisation of collections has been recognised in government policy. The Australian Government’s report, *Creative Australia: National Cultural Policy,* emphasised that:

> The way in which we engage with the collections of our National Collecting 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.[5]

12.7 During the Inquiry, cultural institutions sought reform to the *Copyright Act* that would give them greater freedom to engage in:

- routine digitisation of collection material;[6]
- digitisation and provision of access to unpublished material (for example, on a museum’s website);[7]

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1 A library is defined in various exceptions in the *Copyright Act*. For example, for the purposes of s 49, a library is defined as ‘a library all or part of whose collection is accessible to members of the public directly or through inter-library loan’. This is a broader concept than ‘key cultural institutions’ which are defined as 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 *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. This may include museums: s 10(4).

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

4 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 non-digital 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.

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

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

7 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*.

- digitisation and communication of non-Crown copyright material that forms part of government records;[8]
- capturing and archiving Australian web content;[9]
- mass digitisation projects;[10] and
- use of orphan works.[11]

12.8 The fact that cultural institutions require greater flexibility to use copyright material in the digital environment is not a new consideration to copyright law reform in Australia. There was substantial debate during the Inquiry as to whether the current flexible dealing exception in s 200AB, discussed below, is adequate or whether it should be replaced by fair use.

Fair use

12.9 A move towards an open ended fair use exception, or the new fair dealing exception, would better achieve the objectives of ensuring that cultural institutions can continue to fulfil their public interest missions, while at the same time respecting authorship and creation. The following section explains why s 200AB should be repealed in favour of fair use.

Repeal of s 200AB

12.10 Section 200AB was inserted into the *Copyright Act* in 2006 to enable copyright material to be used for 'certain socially useful purposes', while remaining consistent with Australia's obligations under international copyright treaties.[12] The provision sought to give cultural institutions, educational institutions and users assisting those with a disability some of the 'benefits of fair use'.[13]

12.11 In respect of cultural institutions, s 200AB provides that 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 archive; and
- not made partly for the purposes of the body obtaining a commercial advantage or profit.[14]

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8 CAARA, *Submission 271*; National Archives of Australia, *Submission 155*.
9 National Library of Australia, *Submission 218*.
10 Art Gallery of New South Wales (AGNSW), *Submission 111*.
11 See Ch 13.
12 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [6.53].
13 *Debates*, House of Representatives, 19 October 2006, 1 (Philip Ruddock MP, Commonwealth Attorney-General). Reforms relating to education and people with disability are considered elsewhere in this Report: Chs 14 and 16.
14 *Copyright Act 1968* (Cth) s 200AB(2)(a)–(c).

12.12 The exception is only available if no other exception or statutory licence is available to the user.[15]

12.13 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). That is, 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.[16]

12.14 The ALRC's examination of s 200AB has revealed that the section has not provided the intended benefits to cultural institutions. Many cultural institutions viewed the exception as a 'failure', and many have never relied on it.[17]. The evidence received from cultural institutions was consistent with field research by Dr Emily Hudson, which suggests that s 200AB 'operates on the margins, mostly as a de facto orphan works provision'.[18]

12.15 The failure of s 200AB can be traced to the inherently uncertain language of the three-step test.[19] In particular, stakeholders suggested that uncertainty surrounding the meaning of 'special case',[20] 'conflict with the normal exploitation', and 'unreasonably prejudice the legitimate interest' has not instilled confidence in the use of the provision.[21] Some suggested that the choice of language has turned the three-step test into a six[22] or an eight-step test.[23]

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15 Ibid s 200AB(6).

16 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*.

17 ABC, *Submission 210*; State Library of New South Wales, *Submission 168*, State Records NSW, *Submission 160*; Powerhouse Museum, *Submission 137*. Only a couple of stakeholders indicated that they had expressly relied on s 200AB. The Art Gallery of NSW also stated that it had 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: Art Gallery of New South Wales (AGNSW), *Submission 111*. See also, Australian War Memorial, *Submission 188*.

18 E Hudson, 'Implementing Fair Use in Copyright Law' (2013) 25 *Intellectual Property Journal* 201, 225.

19 NFSA, *Submission 750*; R Burrell, M Handler, E Hudson, and K Weatherall, *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*.

19 National Library of Australia, *Submission 218*.

20 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278* argued that cultural institutions had 'internalised the view that the special case requirement permitted only discrete uses of copyright works', and thus precluded mass digitisation.

21 See, eg, Copyright Advisory Group—Schools, *Submission 231*.

22 Ibid.

23 ADA and ALCC, *Submission 213*. 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, 4 suggesting that copyright advisers needed to answer eight questions in determining whether s 200AB applies.

12.16 Moreover, section 200AB is intended to benefit user groups that are 'risk averse', lack legal resources, and that are rarely involved in litigation.[24] The reluctance of cultural institutions to use s 200AB has meant that no domestic case law has emerged. This has entrenched a narrow interpretation of the section in practice:

> 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.[25]

12.17 At the international level, there has only been one decision interpreting art 13 of the TRIPs Agreement to guide users on the language of s 200AB. A Dispute Resolution Panel of the World Trade Organisation held that the US contravened its obligations under art 13 by exempting retail and restaurants from liability for public performance of musical works by means of communication of radio and television transmissions.[26] Academics have suggested that it is unclear how the narrow and restrictive reading of the provision by World Trade Organization Panel would apply to uses by libraries, archives or educational institutions.[27]

12.18 It may have been inevitable that an ambiguous framework unsupported by case law, when targeted at institutions that are generally risk averse and have little access to legal advice, would be doomed to failure.[28]

12.19 Cultural institutions uniformly supported repeal of s 200AB in favour of fair use.[29] There was little support for amending the provision.[30] For the reasons stated below, the ALRC rejects arguments that the problems associated with s 200AB would also arise under fair use.

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24 See ADA and ALCC, *Submission 213*; National Gallery of Victoria, *Submission 142*.

25 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

26 World Trade Organization, *Panel Report on United States–Section 110(5) of the US Copyright Act*, WT/DS160/R (2000).

27 Professor Jane Ginsburg has commented that the WTO Panel interpretation of the 'normal exploitation' limb of the test may result in 'even traditionally privileged uses such as scholarship ... [being] deemed normal exploitations, assuming copyright owners could develop a low transactions cost method of charging for them': J Ginsburg, 'Towards Supranational Copyright Law? The WTO Panel Decision and the 'Three-Step Test' for Copyright Exceptions' (2001) *Revue Internationale du Droit d'Auteur* 1.

28 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*.

29 R Burrell, M Handler, E Hudson, and K Weatherall, *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*. The Australian Copyright Council did not support the introduction of fair use, but agreed that if fair use was introduced, s 200AB should be repealed: Australian Copyright Council, *Submission 654*.

30 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: R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

12.20 The primary contention of those against the repeal of s 200AB in favour of fair use is that flexibility would come at the cost of uncertainty.[31] For example, the collecting society APRA/AMCOS argued that s 200AB

> is now said to be unusable—its flexibility causes so much uncertainty that its intended beneficiaries are paralysed. The result of a similarly flexible and technology neutral exception available to the public at large must either be a similar paralysis, or energetic acceptance resulting in litigation—neither an attractive outcome.[32]

12.21 The ALRC does not agree that flexibility has caused problems for the application of s 200AB. Rather, the evidence from cultural institutions accords with the view that s 200AB 'has failed not because it is a standard, but because it is an overly complex and ambiguous standard':

> The particular drafting of s 200AB has served to oust intuitive understandings and industry norms, and put in their place a series of concepts that neither institutional users nor their professional advisors feel confident to interpret.[33]

12.22 In the ALRC's view, fair use would not suffer from the same level of uncertainty. First, the fair use model requires consideration of the fairness factors, which are based on existing factors found in the current fair dealing provisions. Cultural institutions suggested that considerations of fairness are familiar and instinctive to them, and they would therefore be more willing to apply fair use.[34]

12.23 Secondly, users and courts can be guided by existing international case law, particularly from the US, when interpreting fair use.[35] US cultural institutions have confidence in relying on fair use, even in the absence of robust case law in the library and archives context:

> ... libraries look for guidance in fair use cases from other contexts, such as *Field v. Google*, *A.V ex rel. Vanderhye v iParadigms* and *Perfect 10, Inc v Amazon.com, Inc*, with the understanding that analogous fact patterns would likely favour libraries even more than commercial defendants given their socially beneficial missions.[36]

12.24 Rights holders also suggested that s 200AB could be amended or improved through agreed industry guidelines.[37] Copyright Agency/Viscopy argued that while there is a trade-off between 'certainty' and 'flexibility', s 200AB is less uncertain than some think and considered that additional confidence can be achieved through guidelines. However, the ALRC notes that existing guidelines have been developed by

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31 For example, the Australian Copyright Council, *Submission 654* suggested that 'cultural institutions would be at least unhappy with fair use as they are with s 200AB' for the same reasons.

32 APRA/AMCOS, *Submission 664*.

33 E Hudson, 'Implementing Fair Use in Copyright Law' (2013) 25 *Intellectual Property Journal* 201, 225.

34 ADA and ALCC, *Submission 213*; National Archives of Australia, *Submission 155*. Universities Australia expressed a similar view that university copyright officers have long been used to applying a fairness analysis: Universities Australia, *Submission 246*.

35 See Ch 5.

36 American Library Association and Association of Research Libraries, *Submission 703*.

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

various groups to facilitate the use of s 200AB with limited success.[38] This appears to indicate that the fundamental ambiguity of the language used in s 200AB cannot be resolved by the use of guidelines.

12.25 In contrast, the ALRC foresees greater potential for effective guidelines around the concept of fairness because the starting point is less uncertain.[39] Indeed, the experience of American libraries and archives suggests that guidelines have been effective in guiding and providing more confidence to cultural institutions in their fair use practices.[40] Fair use guidelines and industry practice in other sectors have proved successful, and the ALRC sees no reason why this should not be the same for cultural institutions.

12.26 In Chapters 14 and 16, the ALRC notes similar problems relating to s 200AB as it applies to educational use and uses assisting people with disability. Those chapters also argue that fair use is preferable to s 200AB.

Illustrative purpose

12.27 The arguments for having an illustrative purpose for 'library and archive use' mirror those for introducing fair use more generally, as described in Chapter 4. Australian copyright law should continue to recognise the needs of cultural institutions to use copyright material, particularly where the uses have little or no effect on the potential market for, or value of, the copyright material. In the ALRC's view, the case for a flexible exception remains as strong now as it did in 2006, when s 200AB was introduced.

12.28 An illustrative purpose of 'library and archive use' would provide a legislative signal to cultural institutions that fair use is intended to emerge as a meaningful part of institutional practices. Given the risk averse nature of cultural institutions, an illustrative purpose is necessary to prevent some of the pitfalls of s 200AB and encourage cultural institutions to make socially beneficial uses of copyright material.

12.29 The fact that a use is made by a library or archive does not necessarily make the use fair. Uses by library and archives that facilitate other illustrative purposes such as research or study, or provide access to people with disability, would more likely to be fair use.[41] Similarly, uses that are transformative or 'non-expressive' might in the circumstances constitute fair use.[42] The assessment in each instance will need to be determined in accordance with the fairness factors.

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38 See 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).

39 See Ch 4.

40 American Library Association and Association of Research Libraries, *Submission 703*.

41 See Ch 16.

42 See Ch 11.

Where fair use might apply

12.30 Fair use is expected to cover uses that are not covered by specific exceptions relating to preservation and document supply, discussed below. This section briefly highlights how fair use might apply in relation to certain uses made by cultural institutions.

Mass digitisation

12.31 Fair use may allow cultural institutions to undertake mass digitisation projects in some instances. For example, in *Authors Guild v Hathi Trust*, the District Court for the Southern District of New York found that the defendant's mass digitisation of works in its collections to allow its members to conduct full text searches across the entire collection and to allow print-disabled patrons to access the collection to be fair use.[43] The use of copyright material was found to be transformative in that it provided access for print-disabled individuals, a purpose that was not served by the original work.[44] The provision of access for print-disabled individuals did not have a significant impact on a market.[45]

12.32 In the ALRC's view, mass digitisation projects are more likely to be fair use where they facilitate research and study, are transformative in nature, use material in the public domain, or are undertaken for non-commercial reasons.

Extended collective licensing

12.33 In the Discussion Paper, the ALRC asked whether voluntary extended collective licensing (VECL) should be pursued to help cultural institutions engage in mass digitisation projects.[46] Cultural institutions were opposed to VECL for a number of reasons. First, some suggested that materials that they might seek to digitise have little or no economic value (such as war diaries, government records, correspondence from individuals to government) that would warrant licensing.[47]

12.34 Secondly, a number of institutions were concerned to preserve their relationships with creators and their descendants, arguing that VECL would detract from rights holders' ability to give direct licences.[48]

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43 *The Authors Guild Inc v HathiTrust*, WL 4808939 (SDNY, 2012), 23.

44 Ibid, 16.

45 Ibid, 21.

46 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Question 11–1.

47 For example, the National Library of Australia submitted that only a small proportion of its future mass digitisation projects would be suitable for VECL: National Library of Australia, *Submission 704*. See also NSW Government and Art Gallery of NSW, *Submission 740*; CAMD, *Submission 719*; National Archives of Australia, *Submission 595*.

48 NSW Government and Art Gallery of NSW, *Submission 740* suggested that VECL could take negotiating power away from artists and could jeopardise relationships between the institution and the artist or their estate. See also Australian War Memorial, *Submission 720*.

12.35 The Copyright Licensing Agency (CLA), noted that VECL was not 'necessarily a panacea to the issue of mass digitisation', and that

> the uses to which such digitised collections could be put, the fees to be payable for such usage, and the restrictions imposed to prevent any undermining of the creative industries are matters requiring a fuller discussion and an greater understanding of user needs and intentions.[49]

12.36 Burrell and others noted that, while collective licensing may be one way to facilitate mass digitisation, they queried whether VECL was suitable, arguing that

> [extended collective licensing] has the potential to implicitly reject the role for fair use which we believe would be conceding too much in terms of the capacity for a general exception to cover some aspects of large scale digitisation.[50]

12.37 Others noted that, if VECL were to be introduced, appropriate protection for rights holders would need to be considered, including the ability to opt out.[51]

12.38 The ALRC considers that VECL is not necessary to facilitate mass digitisation by cultural institutions. The combination of reforms recommended in this Report, including fair use, a limitation on remedies for the use of orphan works, and the expansion of the preservation copying provisions for cultural institutions, provide an adequate framework to cover mass digitisation projects.

12.39 If there are limited instances where cultural institutions consider VECL to be appropriate, the ALRC considers that other options may be pursued. For example, as noted by Australian copyright academics, 'there are already examples of blanket licenses being negotiated between Australian cultural institutions and copyright collectives for online uses of works'.[52] Rights holders suggested that blanket licensing, especially for musical works, was working well in allowing users to communicate material online.[53] Copyright Agency/Viscopy submitted that blanket licences commonly provide for 'indemnity for content that are not expressly excluded, rather than requiring licensees to check the mandate in each case'.[54] These options may be more efficient than VECL, as highlighted in Chapter 13.

12.40 This does not mean, however, that VECL is not suitable for other contexts. In the UK, ECL will become available to help streamline rights clearance where direct licensing is not possible. However, a collection society must apply and demonstrate that it represents a 'significant number of rights holders in relation to the woks covered by the scheme and has the support of those members of the application'. In effect, ECL will only be available where there is strong existing support for collective licensing.[55]

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49 The Copyright Licensing Agency, *Submission 766*.

50 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*. See also NFSA, *Submission 750*.

51 NFSA, *Submission 750*.

52 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

53 APRA/AMCOS, *Submission 247*

54 Copyright Agency/Viscopy, *Submission 249*.

55 Intellectual Property Office, *Factsheet—Orphan Works Licensing Scheme and Extended Collective Licensing* (2013).

Unpublished works

12.41 A number of stakeholders called for a reduction in the term of copyright to allow the digitisation and communication of unpublished material.[56] Works that are never published risk remaining in copyright in perpetuity and their productive uses may be lost to users and copyright holders.[57] For example, the National Library of Australia (NLA) estimated that there are 2,041,720 unpublished items in its collection, use of which would support the 'general interest of Australians to access, use and interact with content in the advancement of education, research and culture'.[58]

12.42 The fact that a work is unpublished does not rule out the case for fair use. Guidance can be taken from the US fair use provision, which 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'.[59] Similarly, under the ALRC's model, the fact that a work is unpublished does not determine the fair use question. 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.

Harvesting of Australian web content

12.43 The NLA called for a specific exception that would allow it to harvest and preserve Australian internet content. It advised that, despite having no exception to rely on, it has conducted annual harvests of Australian web material since 2005, gathering five 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. Notification of the harvesting is done at the time the website is harvested.[60]

12.44 The NLA noted that responses from website owners have been minimal.[61] Despite this, the NLA reported that because it has effectively copied the content without the copyright owner's permission, it has not permitted public access to the data.

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56 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*.

57 *Copyright Act 1968* (Cth) s 33(2) provides that 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. If a literary, dramatic or 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. Section 29(1) 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.

58 ADA and ALCC, *Submission 586*.

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

60 National Library of Australia, *Submission 218*.

61 Ibid. Only 11 responses were received after the first annual harvest and the number of responses has declined since then.

12.45 Fair use may be used to facilitate such activities. 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. Having regard to the fairness factors, permitting access for non-commercial reasons such as research or study, or allowing 'data mining' of the pages may also be fair use.[62]

Fair dealing for library and archive use

12.46 The ALRC also recommends that, if fair use is not enacted, the *Copyright Act 1968* (Cth) should be amended to introduce a new fair dealing exception that would combine the existing fair dealing exceptions and introduce new prescribed purposes, including 'library and archive use'.[63] This new fair dealing exception should supplement, and not replace, specific exceptions relating to preservation copying and document supply.

12.47 The exception would require consideration of whether the use is fair, having regard to the same fairness factors that would be considered under the fair use exception. Applying the fair use or amended fair dealing to library or archive uses should, therefore, produce the same result.

12.48 If the new fair dealing exception is implemented, consideration may need to be given to how 'library and archive use' should be further defined. One option is to define library or archive use in similar terms to s 200AB. That is, uses made 'by or on behalf of the body administering a library or archive' for the 'purpose of maintaining or operating the library or archives (including operating the library or archive to provide services of a kind usually provided by library or archives)'. The ADA and ALCC submitted that 'a fair dealing provision should ensure that it covers the needs of the users, scholars, researchers, and creators looking to make use of library and archive collections'.[64] Others suggested a more inclusive definition of 'library and archive' to take into account 'cultural heritage'[65] or the 'public interest purposes of cultural institutions'.[66]

12.49 The Australian Government may wish to consult stakeholders further on the appropriate definition of 'library or archive use' for the purposes of the new fair dealing exception, noting in particular the *National Cultural Policy*, which recognises the need to ensure both dissemination and access to cultural material, as well as adequate protection for copyright owners.

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62 See Ch 11.
63 See Ch 12.
64 ADA and ALCC, *Submission 586*.
65 For example, the National Archives of Australia submitted that 'cultural heritage' could be an illustrative purpose of fair use to cover institutions 'making accessible unique culturally and historically significant material': National Archives of Australia, *Submission 595*.
66 ADA and ALCC, *Submission 868*.

Recommendation 12–1 Section 200AB of the *Copyright Act* should be repealed. The fair use or new fair dealing exception should be applied when determining whether uses by libraries and archives infringes copyright.

Preservation copying

12.50 While the ALRC recommends the introduction of a flexible fair use exception, it also recommends that some specific exceptions be retained and that certain new specific exceptions be introduced. These specific exceptions should not limit the application of fair use. The exceptions reflect the existence of strong public policy reasons for protection, and in some instances, recognition that the case for fair use is so strong that requiring an assessment of fairness factors would be redundant, and possibly serve to increase transaction costs.[67]

12.51 The ALRC considers that preservation activities undertaken by cultural institutions should be covered by such an exception. Preservation activities—as distinct from providing access to copyright material—would in most instances be fair use. Preservation of copyright material is in the interest of both users and copyright holders and does not affect the copyright holder's ability to exploit the market of his or her work. Further, preservation ensures the protection of Australian heritage and promotes the public interest in research and study and access to cultural and historical material.

Current law

12.52 There are numerous provisions in the *Copyright Act* that deal with preservation copying by cultural institutions. These are divided between copying of 'works'[68] and 'subject matter other than works'.[69]

12.53 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 the purpose of research that is being carried out at the library or archive;[70] or
- the work is in published form but has been damaged, deteriorated, lost or stolen—for the purpose of replacing the work.[71]

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67 See, eg, NFSA, *Submission 750* suggested that leaving preservation copying to fair use risks the potential for such activities to be licensed in the future, eroding the protection provided by fair use. This may have unintended consequences of reducing preservation activities due to licensing costs.

68 *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'.

69 Ibid, ss 51A, 51B deal 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.

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

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

12.54 Preservation copying of works held in published form is only permitted 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.[72] Further, reproductions of original artistic works can only be communicated via copy-disabled computer terminals installed within the premises of the library or archive.[73]

12.55 Mirror provisions can be found in s 110B in relation to reproductions of sound recordings, and 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.[74]

12.56 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.[75] They are in addition to the provisions that apply to library and archives generally.[76] 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.[77]

Current exceptions are outdated

12.57 The exceptions are a good example of how prescriptive and rigid rules are inadequate for the digital environment. Stakeholders suggested that the limit of one copy for preservation purposes or three copies for a 'key cultural institution' no longer meets best practice preservation principles.[78] Aside from 'legacy' works—such as old manuscripts and films—libraries and archives must also preserve materials that are 'born digital' in the face of 'technological obsolescence'.[79] Best practice preservation

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

73 Ibid s 51A(3A).

74 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.

75 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 (deals with published editions of works).

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

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

78 National Library of Australia, *Submission 218*; ADA and ALCC, *Submission 213*; ABC, *Submission 210*; National Archives of Australia, *Submission 155*.

79 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.

principles in relation to digital material require numerous copies to be made in multiple formats.[80] For example, the ADA and ALCC suggested that effective preservation may require a 'variety of processes including reformatting, migration and emulation'.[81] Similarly the National Film and Sound Archive (NFSA) argued:

> 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.[82]

12.58 Stakeholders supported a more technologically-neutral exception that would not limit the number of copies and which would allow for format shifting.[83]

12.59 Australian copyright academics 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. There appears little utility in having different preservation exceptions addressing 'works' and 'subject matters other than works' and different considerations for 'original' and 'published' works. As noted above, preservation of all copyright material is required in the interests of both users and copyright holders.

12.60 Recent copyright reviews in other jurisdictions have also recognised the need to give libraries and archives greater freedom to undertake preservation of copyright material. In the UK, the Government will implement recommendations from the Hargreaves review to allow libraries, archives and museums to copy any item for preservation purposes.[84]

12.61 Similarly, the Copyright Review Committee (Ireland) recommended that the *Copyright and Related Act 2000* (Ireland) be amended to allow heritage institutions to undertake format shifting for the purposes of preservation.[85] In Canada, libraries and archives are permitted to make copies of works, whether published or unpublished, in its permanent collection if the work is deteriorating, damaged or lost, or is at risk of being so.[86] Copying is also permitted if the library 'considers that the original is

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80 For example, International Standards Organisation contemplates a range of different archived copies, including: an archived master copy; an access copy; at least one backup copy which enables restoration in the event that a system is compromised; and at least one remote master copy. 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.

81 ADA and ALCC, *Submission 868*.

82 NFSA, *Submission 750*.

83 ADA and ALCC, *Submission 213*. See also 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*.

84 See Intellectual Property Office, *Factsheet—Research, Libraries and Archives* (2013). The current provisions in the *Copyright, Designs and Patents Act 1988* (UK) only allow libraries and archives to make preservation copies of certain works, but not artistic works, sound recordings or films.

85 Copyright Review Committee (Ireland), Department of Jobs, Enterprise and Innovation, *Modernising Copyright* (2013), 176.

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

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'.[87]

12.62 The ALRC recommends that the *Copyright Act* be amended to consolidate and streamline existing preservation copying exceptions into a single exception that would permit libraries and archives to make use of copyright material necessary for the preservation of published and unpublished works in their collections. As a consequence, a number of existing exceptions should be repealed. These recommendations are consistent with the ALRC's framing principles for reform and ensure that libraries and archives are able to preserve copyright material in the interests of both users and copyright holders.

Commercial availability requirement

12.63 In the Discussion Paper, the ALRC proposed that any new preservation copying exception should include a requirement that does not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.[88] Cultural institutions uniformly opposed this proposal.[89]

12.64 Many suggested that commercial copies are not the same as preservation copies. Commercially available digital works may not be in a format or quality that is suitable for preservation. For example, the NFSA submitted:

> 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.[90]

12.65 The ADA and ALCC argued 'if the work is in an unstable format then purchasing another copy simply means acquiring another problem of the same kind'.[91] Others suggested that buying a copy of the work may not be appropriate where a work is a 'limited edition work'. For example, the Art Gallery of NSW suggested that

> in many cases preservation copying is needed to preserve a particular edition, or a particular copy with annotations or other features. The commercial availability of different editions, or copies without those features, does not assist.[92]

12.66 Cultural institutions suggested that a consequence of a commercial availability requirement may be that libraries and archives delay undertaking preservation activities until such time as a work is no longer commercially available, by which time the work

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87 Ibid s 30.1(1)(c).

88 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 11–6.

89 ADA and ALCC, *Submission 868*; NFSA, *Submission 750*; National Library of Australia, *Submission 704*; CAARA, *Submission 662*; National Archives of Australia, *Submission 595*.

90 NFSA, *Submission 750*.

91 ADA and ALCC, *Submission 586*.

92 NSW Government and Art Gallery of NSW, *Submission 740*.

may have deteriorated.[93] The NLA suggested 'the ideal time for digital capture' of a paper based item is at the beginning of the item's existence.[94]

12.67 Some stakeholders suggested that if a commercial availability requirement is to be retained, it ought to consider whether the format and quality of the available material is suitable for preservation.[95] This would be consistent with similar provisions in other jurisdictions, where the commerciality requirement only applies if the commercial copy can 'fulfil the purpose' of preservation or is 'of a medium and quality appropriate' for preservation.[96]

12.68 However, others argued that commerciality should not be a relevant factor because preservation, of itself, involves no market harm.[97] The ABC considered that commercial availability 'incorporates the commercial sector, for which the preservation of cultural material is generally not an objective or driver of behaviour, into the process of preserving cultural heritage'.[98] Similarly, the Pirate Party echoed that preservation is 'not a normal or consumptive' use of a copyright work:

> It seems irrelevant to restrict preservation to prevent commercial disadvantage when there is no market value in preserved content. Preservation copies do not prejudice the ability of the copyright holder to derive profit from commercial sales: it is only when content becomes unavailable that preserved copies become relevant.[99]

12.69 Preservation may be beneficial to rights holders who do not foresee the need or do not have the resources to preserve material to an archival standard. The NFSA suggested that 'collection material is frequently used to develop new commercial release'[100] and that reduced preservation of material 'disadvantages rights holders, as it decreases the likelihood that their material will be available into the future'.[101]

Distinguishing between preservation and access

12.70 Rights holders did not express major concerns about copying works for preservation purposes, but were concerned with subsequent access to the works in

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93 ADA and ALCC, *Submission 586*.

94 National Library of Australia, *Submission 704*. Similarly, the NFSA argued that it may be important to make a high quality photographic copy of a drawing as soon as possible after acquisition to ensure there is copy in another medium against which decay, such as fading of pigments, can be measured.

95 NFSA, *Submission 750*; NSW Government and Art Gallery of NSW, *Submission 740*; National Archives of Australia, *Submission 595*.

96 The *Copyright, Designs and Patents Act 1988* (UK) s 42(2) restricts preservation copying to cases where it is not 'reasonably practicable to purchase a copy to fulfil that purpose'. In Canada, preservation copying is not permitted where an appropriate copy is commercially available in a medium and of a quality that is appropriate: *Copyright Act 1985* (Can) s 30.1(2).

97 Australian Society of Archivists Inc, *Submission 630* arguing that simply preserving the material does not affect the ability of the owner to commercially exploit the material. See also, Pirate Party Australia, *Submission 689*.

98 ABC, *Submission 775*.

99 Pirate Party Australia, *Submission 689*.

100 For example, the NFSA advised that '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': NFSA, *Submission 750*.

101 Ibid.

ways that affect the ability of the copyright holder to exploit the material.[102] For example, the Arts Law Centre of Australia supported an exception provided that the new 'preservation copying exception operates within commercial licensing arrangements that may be in place for the material for the reproduction and communication to the public of material held by libraries and archives'.[103]

12.71 While the ALRC's recommendations extend the preservation exceptions, the question of access is left to fair use, new fair dealing, or licensing solutions. In the case of fair use and new fair dealing, the fairness factors provide a framework in which to consider competing interests, including licensing solutions that are being offered.

Who benefits from the exception

12.72 A question that arises if the current exceptions are to be streamlined into one exception is who should benefit from the exception. The current exceptions distinguish between libraries and archives from 'key cultural institutions'. Burrell and others questioned the policy reasons for the three-copy limit applying to 'key cultural institutions' and not other libraries and archives, because it is difficult to argue that only key cultural institutions are the repositories of significant works.[104]

12.73 The ALRC agrees that the new preservation exception should apply not just to 'key cultural institutions'. One option is for the exception to be available to libraries, archives and museums that do not operate for profit and hold collections that are accessible to the public. This would be consistent with other jurisdictions that have libraries and archives exceptions. For example, the *Copyright Act* 1985 (Can) defines a 'library, archive or museum' to mean

- an institution, whether or not incorporated, that is not established or conducted for profit or that does not form part of, or is not administered or directly or indirectly controlled by, a body that is established for profit, in which is held or maintained a collection of documents and other materials that is open to the public or to researchers; or
- any other non-profit institution prescribed by regulation.[105]

12.74 This is already recognised to some extent in the *Copyright Act*. An archive is defined in s 10(4) to include 'a collection of documents or other material of historical significance or public interest that is in the custody of a body, whether incorporated or unincorporated, is being maintained by the body for the purposes of conserving and preserving those documents or other material and the body does not maintain and operate the collection for the purposes of delivering a profit'.[106]

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

103 Arts Law Centre of Australia, *Submission 706*.

104 R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 278*.

105 *Copyright Act 1985* (Can) s 2.

106 *Copyright Act 1968* (Cth) s 10(4). An explanatory note to the section states that museums and galleries are bodies that could have collections covered by the definition of 'archives'.

Recommendation 12–2 The exceptions for preservation copying in ss 51A, 51B, 110B, 110BA and 112AA of the *Copyright Act* should be repealed. The *Copyright Act* should provide for a new exception that permits libraries and archives to use copyright material for preservation purposes. The exception should not limit the number or format of copies that may be made.

Document supply for research or study

12.75 In the Discussion Paper, the ALRC proposed that certain access limits be placed on document supply by libraries and archives.[107] Following further consideration, the ALRC decided not to proceed with these proposals.

Current law

12.76 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.[108] There are a number of limits to reproduction.[109] 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'[110] 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.[111]

12.77 Where a library acquires a work in an electronic form, the library may make the work available 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.[112]

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107 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 11–7.

108 *Copyright Act 1968* (Cth) s 49(2). Section 50(1)(b) 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 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 interlibrary loan.

109 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).

110 'Reasonable portion' is defined in s 10(2) and (2A) of the Act, and is taken to be 10% of the number of pages in a published edition or where a work is divided into chapters, no more than a single chapter of the work.

111 *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. The ADA and ALCC submitted that this requirement extends to materials that are available electronically: ADA and ALCC, *Submission 868*.

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

Emerging distribution markets

12.78 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.[113] For example, the Australian Publishers Association (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.[114] 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 that are 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'.[115]

12.79 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'.[116]

Limits on document supply

12.80 In the Discussion Paper, the ALRC proposed that some limits could be placed on document supply by libraries and archives, including measures to: prevent users from further communicating the work; ensure that the work cannot be altered; and limits on the time in which the work could be accessed.[117]

12.81 Cultural institutions opposed such limits on the basis that they:

- place unreasonable burdens on cultural institutions compared to others who provide content to third parties;[118]
- would restrict fair use of copyright material amounting to de facto contracting out of fair use;[119]

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

114 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'.

115 Australian Publishers Association, *Submission 225*.

116 Allen & Unwin, *Submission 174*.

117 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 11–7.

118 R Xavier, *Submission 816*; NFSA, *Submission 750*; Australian Parliamentary Library, *Submission 694*; CAARA, *Submission 662*;

119 NFSA, *Submission 750*.

- amount to a tax on technology that would deter digital use;[120] and
- are inconsistent with the mandate of cultural institutions to provide access in the public interest of research and study.[121]

12.82 Many cultural institutions stressed that they would not be in a position to implement the ALRC's proposals due to lack of funding[122]and the need to make a massive overhaul of infrastructure.[123] For example, ADA and ALCC went into some detail in their submission about the different systems that are used provide document delivery and emphasised that moving from open systems to proprietary systems would be expensive.[124]

12.83 Cultural institutions suggested that it should be sufficient for libraries and archives to notify the user of his or rights under the *Copyright Act*.[125] The ADA and ALCC noted concerns in relation to piracy, but 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'.[126] It argued that:

> While we understand the legitimate worries of copyright holders about piracy, considering that document supply requests are either of non-commercially available material (so are not damaging markets) or of a small portion, it seems unlikely that they would be used for piracy ... Indeed, there was no evidence we noted in the submissions to this inquiry that linked document supply to systematic piracy.[127]

12.84 The NLA drew attention to a survey it conducted showed that file sharing as a result of document supply is low.[128] For the financial year 2012–2013, the NLA refused 13% of document supply requests for copyright reasons:

> With the increasing capacity of internet searches and efficient distribution portals, it is becoming increasingly easy to ascertain whether a work is available at an ordinary commercial price and within a reasonable time. If it is, and the user has requested more than a 'reasonable portion' they will be directed to the commercially available source. In these cases, libraries are often acting as pointers to direct business to publishers and authors.[129]

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120 ADA and ALCC, *Submission 868* argued that users requesting a copy of a print item face more restrictions in requesting the item in digital format than were the library to photocopy the item and post a paper copy to their address.

121 Ibid.

122 Ibid; NFSA, *Submission 750*; CAARA, *Submission 662*; Australian Society of Archivists Inc, *Submission 630*.

123 ALIA and ALLA, *Submission 624*; National & State Libraries Australasia, *Submission 588*; ADA and ALCC, *Submission 586*.

124 ADA and ALCC, *Submission 868*. The National Archives of Australia also suggested that a move to 'bespoke or proprietary formats' reduces the ability of the archives to provide meaningful access to its collection.

125 Association of Parliamentary Libraries of Australasia, *Submission 650*; Museum Victoria, *Submission 522*.

126 ADA and ALCC, *Submission 213*.

127 ADA and ALCC, *Submission 868*.

128 National Library of Australia, *Submission 218*.

129 ADA and ALCC, *Submission 868*.

12.85 After further consideration, the ALRC agrees that the limits proposed are unreasonable and would have a negative impact on research and study, particularly for people who do not have physical access to a library. From the view of copyright holders, the 'reasonable portion' and market availability requirements compare favourably with other jurisdictions.

Supply for purposes beyond research and study

12.86 Cultural institutions also called for a more liberal interpretation of research and study, to take into account situations where a user might request a document for any fair use or fair dealing purpose. For example, the supply of sheet music for someone learning to play a piece may not be research or study, and therefore, not supplied.[130]

12.87 On the other hand, copyright holders called for the document supply provisions to be limited to 'non-commercial research' and 'private study'—consistent with the way similar provisions are framed in other jurisdictions.[131]

12.88 The ALRC does not consider that the document supply exception should be expanded beyond research or study, nor further confined to private research or non-commercial research. As Professor Sam Ricketson and Chris Creswell observed:

> the purpose of the person requesting the reproduction under s 49 is linked only to the individual research and study fair dealing defence in s 40: it does not extend to any of the other purposes that are covered by the fair dealing defences in ss 41 to 43.[132]

12.89 The link between the document supply exception and the research and study fair dealing should be retained in the interest of certainty. If either fair use, or the new fair dealing exception for library and archive use is implemented, that may provide some scope for document supply beyond research and study, subject to the fairness factors.

Simplification

12.90 While the exception should be retained, it would benefit from substantial redrafting and simplification. Cultural institutions voiced concerns over the complexity of the document supply provisions, including their limited breadth and inefficiency in operation. The ADA and ALCC suggested that:

- the 1,600 word provision is complex and difficult to administer for library staff; 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.[133]

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130 National Library of Australia, *Submission 218*.

131 Australian Publishers Association, *Submission 225*. See eg, Intellectual Property Office, *Factsheet—Research, Libraries and Archives* (2013). Amendments to the UK legislation following the Hargreaves Review will allow libraries and archives to supply a single copy, but only for non-commercial research and private study. Similarly, a single copy of a work can be supplied in Canada for private research or study: *Copyright Act 1985* (Can) s 31.2(4).

132 S Ricketson and C Creswell, *Law of Intellectual Property, Copyright, Designs and Confidential Information* Thomson Reuters Australia, [11.270].

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

12.91 The ALRC agrees that s 49 is unnecessarily complex and would benefit from simplification. In implementing the ALRC's recommendations, the Australian Government may wish to also consider amendments to simplify the document supply provision in s 49, along with the associated exceptions in s 50 (interlibrary loan). The ALRC notes that guidance can be sought from other jurisdictions with similar exceptions, which display much clearer drafting.

Technological protection measures and contracting out

12.92 Some cultural institutions raised issues relating to temporary protection measures (TPMs). The ADA and ALCC were concerned about the

> 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.[134]

12.93 The ADA and ALCC called for 'mirrored exceptions permitting circumvention of TPMs where an exception for digitisation or fair use or proposed legislative alternative exists'.[135]

12.94 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 for 'reproduction and communication of copyright material by libraries, archives and cultural institutions for certain purposes' are needed.[136] The Terms of Reference direct the ALRC not to duplicate work in relation to this review.

12.95 However, as discussed in Chapter 20—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. For the reasons stated in that chapter, the ALRC recommends that contracting out of fair use should be possible, but if fair dealing is implemented, there should be limits on contracting out of fair dealing and specific exceptions for libraries or archives.

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134 Ibid.

135 Ibid.

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