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Australian Law Reform Commission
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RE: ALRC REVIEW - COPYRIGHT AND THE DIGITAL ECONOMY

Please find attached a submission by State Records of South Australia to the above Review.

Should you require further information please contact me on 08 8204 8766.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Terry Ryan".

Terry Ryan
DIRECTOR, STATE RECORDS

Submission from State Records of South Australia to the Australian Law Reform Commission regarding the Issues Paper on Copyright and the Digital Economy

Following is a submission by State Records of South Australia. The submission does not respond to every topic raised in the Issues Paper but focusses on our key relevant areas of business as they relate to the review; namely, Archives, digitisation and Crown use.

Promoting fair access and wide dissemination of copyright works as a framing principle.

1. Guiding Principles for Reform

Question 2.	<i>What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?</i>
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Principle 4, as defined within the Issues paper, is the most important principle in terms of the archives - *Promoting fair access to and wide dissemination of content – Reform should promote fair access to and wide dissemination of information and content.*

The complexity and piecemeal nature of the Act makes the provision of access to information difficult for both the public and archival institutions.

Simplification and consolidation of exceptions would make the legislation easier to interpret and use by both the community and government.

2. Libraries, Archives and Digitisation

Question 19	<i>What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?</i>
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The digital environment has presented archival institutions with the ability to preserve fragile and priceless records, while at the same time providing greater access to wider communities. Records within the collection are used by the community and business for family and general history, personal entitlements, study and legal proceedings. Expectations are that more and more information will be digitised and provided online, this is clearly in the public interest.

Groups of records held within the archives tell the story of interactions with government by both businesses and private individuals. When kept in-situ they provide a valuable and comprehensive resource for the above purposes. Removing any part of the record, including, any third party material, means that the essence of the interaction is lost.

The records to which people seek access are historical in nature, and are subject to specific access restrictions through State legislation, with the aim being to provide the widest access at the earliest time.

The key issue is that the vast majority of the third party material held within the records is unpublished and copyright therefore applies indefinitely.

Locating the owners or successors of this historic material prior to digitising is a task so large and impractical due to the passing of time and the lack of information about the individual concerned that it brings digitisation to a standstill. The libraries and archives exceptions as

described in the issues paper do not change this position, primarily because the exceptions require a number of specific tests to be applied to each record or provision.

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

The purpose for which the material was created is one factor that is not considered within the Act. It is suggested that the authors of the third party material held within the collections, which includes letters, submissions, reports dating back to the 19th Century, would not at the time of creation have expected to be paid for the use of their information, particularly for non-commercial purposes.

The inclusion of a provision with the Act that establishes a copyright expiry date for unpublished material held in an archive, ie x years after creation, would assist archives in providing improved access to the historical records within their collections without infringing copyright.

Question 20 *Is s 200AB of the Copyright Act 1968 (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?*

The application of this Section of the Act is unclear. It is considered too complex and would require a legal opinion for each use. It is also unclear whether this section of the Act is even applicable for Government Archives where Section 183(1) applies.

Question 21 *Should the Copyright Act 1968 (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?*

Yes, for the reasons outlined in the response to Question 19.

In considering the possible approaches, it should be borne in mind that records are the transactions with government. They are not prepared for the purpose of generating a commercial return in and of themselves. Most records have no commercial value and the State is not in the business of making a commercial return on the records.

With the above in mind, it is considered that the inclusion of a copyright expiry date for unpublished material ie x years after creation should be considered.

Question 22 *What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?*

Issues defined within the response to Questions 19 and 21 above are relevant to this question.

3. Orphan Works

Question 23 *How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?*

Issues defined within the response to Questions 19 and 21 above are relevant to this question.

Question 24 *Should the Copyright Act 1968 (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?*

No. It is considered that this approach would be impractical, inequitable and economically inefficient. The provision of a specific timed exception, for works held within the archives.

4. Crown use of copyright material

Question 32 *Is the statutory licensing scheme concerning the use of copyright material for the Crown in Div 2 of pt VII of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not how should it be changed?*

It is considered appropriate and necessary that a licensing scheme be in place, which enables governments to efficiently undertake their day-to-day public administration business while providing an avenue for remunerating the owners of any third party material that they use in undertaking their business.

Div 2 of pt VII of the Act facilitates these arrangements for government however, in relation to its actual effectiveness and adequacy as it currently exists, there are a number of areas that would benefit from review and or clarification.

These issues and suggested improvements are detailed below.

4.1. Method for working out use and equitable remuneration (sampling systems)

Section 183A of the Act requires that, where a collecting society has been declared as the relevant collecting society for a particular category of copying, governments must enter into a remuneration agreement with that collecting society. The remuneration is determined using an agreed sampling system that includes a mechanism for identifying the estimated number of copies made for the services of government for the relevant period.

Developing a sampling system to identify levels of copying (preferably from our perspective to a detailed level that facilitates a user pays approach), particularly for print and electronic publications, takes a significant amount of time and has continued to be extremely difficult and costly. This applies to both the digital and non-digital environments.

While relevant remunerable copying volumes are decreasing as a result of direct licensing with owners and the adoption of systems such as the Australian Governments' Open Access Licensing Framework (AusGOAL), the burden and cost of implementing adequate sampling is not.

Collecting societies continue to believe that there is significant remunerable copying being undertaken and they continue to question compliancy and the accuracy of results of sampling surveys. This means that they require that complex and time consuming surveys and implemented to capture a very small amount of remunerable copying – estimated to be under 3% of all government copies/uses made.

The current system is so ineffective that negotiations between government and collecting societies often come to a standstill delaying payments to any copyright owners for years at a time.

Differing views in relation to the following are constant sticking points that delay sampling and subsequent payment of remuneration to copyright owners:

- the purpose of the sampling system, ie to collect volume only or distribution data as well;
- which exceptions (if any) are relevant
- the breadth of sampling required
- accuracy and validity of data collected
- how the value of a particular media is determined

Recommendation that Section 183A be amended to include a definition of equitable remuneration and an efficient and effective method of working out equitable remuneration payable, which includes a definition of 'excluded copies' that includes relevant free exceptions.

4.2. Application of free use, fair use and other exceptions

Various free and fair use exceptions exist within the Act that are relevant and important to government in relation to their use of 'works' (see Table 1 below). Reaching agreement about whether these exceptions can be applied to copying under Section 183 is another sticking point in negotiations between governments and collecting societies.

Collecting societies have in the past argued that governments should not be entitled to rely on exceptions such as the fair dealing exceptions in Division 3 of Part III, and Division 6 of Part IV.

Clarification within the Act in relation to this matter would assist in speeding up the process to remunerate owners of copyright material.

Recommendation that the Act specify which exceptions can be applied to copying under Section 183.

Table 1: Exeptions of importance to governments in relation to their use of "works" (and by extension "subject-matter other than works"). This includes copying/ communication:

1. of insubstantial parts of works (section 14)
2. under section 40 (research or study)
3. under section 41 (criticism or review)
4. under section 42 (reporting news)
5. under section 43 (judicial proceedings or professional advice)
6. under section 44 (inclusion of works in collections for use by places of education)
7. under section 44B (labels for containers of chemical products)
8. under section 47C (back up copy of computer programs)
9. under section 47D (reproducing computer programs to make interoperable products)
10. under section 48A (Parliamentary libraries for members of Parliament)
11. under section 49 (libraries and archives for users)

12. under section 50 (libraries and archives for other libraries and archives)
13. under section 51 (unpublished works in libraries and archives)
14. under section 51A (libraries and archives for preservation etc)
15. under section 51 B (preservation copies of significant works in key cultural institutions' collections)
16. under section 53 (illustrations accompanying articles and other works)
17. Copying Australian legislation and judgements under section 182A

4.3. Management/acknowledgment of direct license contracts

With the move towards working more in the digital environment, more and more government business is undertaken online. Many copyrighted items that would previously have been copied from hardcopy eg journals and magazines are now accessed online under direct licensing contracts with the publishers.

These contracts enable governments to tailor licences to meet their use requirements and negotiate rates directly with the owners.

The relationship between direct licencing contracts and the Section 183 statutory scheme is not adequately described and there are times when both the copyright owner and the collecting society are paid for the same material.

Recommendation that the Act be amended to clarify that copyright acts permitted under direct licensing contracts should not be paid for under the 183A statutory licensing scheme.

4.4. Management/acknowledgement of implied licences

Currently the Act does not adequately recognise the purpose or intent of the author in creating and/or promoting their work. In many instances the author of the work has made it available for non-commercial use by putting it in the public realm on the internet eg blogs and web pages and using AusGOAL classifications and would not expect to receive remuneration for their work being used. Further, it could be argued that other authors are providing an implied licence through the provision of icons accompanied by the words 'print', 'email', 'download' or 'share' on their web pages.

Additionally, authors communicate to governments in the course of general public business including through letters and emails and provision of information through consultative forums. This information may be shared or copied within a department to reach an outcome in relation to the purpose for which the information was provided – eg to get an answer to a query from a range of officers.

It could be argued that the author of the material has given an implied licence for this material to be used for the purpose for which it was provided and therefore would not expect copyright to be applied and any payment provided.

Recommendation that a definition of the meaning of an implied licence in the copyright environment be included within the Act.

4.5. Acknowledgement of non-commercial nature of government business/ Commercial rates required for non-commercial usage

Section 183 of the Act provides governments with the versatility that it needs to undertake its business efficiently and effectively without the fear of infringing copyright. Whilst there are

certainly instances where remunerable copying is undertaken, the current statutory scheme does not take account of the fact that government's use of copyright material is not for commercial gain, but rather to deliver services in the public interest. Material obtained and/or used enables governments to deliver the services that they have been charged with delivering to and by the public in an informed, efficient and effective manner.

The current approach in terms of equitable remuneration with collecting societies doesn't allow for any consideration or exclusion in relation to the actual use of specific third party material by government.

Recommendation: that clarification or acknowledgement of the non-commercial use of government copying be considered.

Question 34 Should there be an exception in the Copyright Act 1968 (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s183?

4.6. Exceptions under other statutory requirements

Under Section 183A, governments are required to pay collecting societies for copying that has been done. Whilst there are some exceptions within the Act that may apply, there are many instances where copying done to meet a statutory obligation under other legislation is being captured and remunerated through sampling systems.

This can include provision of copies of information to third parties under freedom of information legislation, making copies of plans and other documents available for public viewing / consultation under state legislation and management of access to public records etc.

In these instances it is necessary for governments to provide or copy material to meet their statutory requirements and it is considered that this should not be remunerable and that provision needs to be made within the Act to allow for these requirements.

This may include

- freedom of information
- records of parliamentary proceedings
- Records of royal commissions and statutory inquiries
- Material open to public inspection or on official register
- Material communicated to the Crown in the course of public business
- Public records
- Acts done under statutory authority.

Recommendation that an exceptions relating to making copies to comply with obligations under other legislation and for the purposes described above be considered for inclusion in the Act

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