**NATIONAL ARCHIVES OF AUSTRALIA - SUBMISSION**

**ALRC DISCUSSION PAPER 79 - COPYRIGHT AND THE DIGITAL ECONOMY**

**Introduction**

The National Archives of Australia (the Archives) is pleased to provide the following submission to the Australian Law Reform Commission’s (ALRC) Discussion Paper on *Copyright and the Digital Economy, Discussion Paper 79*.

The Archives makes this submission to ensure that its important, independent role in regard to overseeing Commonwealth recordkeeping, identifying the Commonwealth’s archival resources and preserving and making those archival resources publicly available is:

* taken into account by the ALRC; and
* not affected inadvertently by the ALRC’s recommendations.

**Summary of Key Points**

The key points of the Archives’ submission are summarised below:

* the resources held in the Archives’ collection are generally not created for commercial purposes or with the intent of publication for monetary gain. The value in the Archives’ collection lies in the evidence it provides for historical and cultural research in relation to the records of the Australian Government and government accountability;
* some of the proposed reforms to the *Copyright Act 1968* (Cth) (Copyright Act) could inadvertently restrict the ability of the Archives to fulfill its legislative role pursuant to the *Archives Act 1983* (Cth) (Archives Act);
* any restriction on the preservation and use of the Archives’ collection by the Archives will directly impact on the public;
* any usage or preservation fees and searches for non-Crown copyright will divert resources away from one of the Archives’ main functions - making its collection available to the public; and
* copyright reforms should not inadvertently inhibit public access to the archival resources of the Commonwealth or deviate from the intentions of the Australian Government’s Open Government agenda.

**The Role of the National Archives of Australia**

The objects of the Archives Act include preserving and making publicly available the archival resources of the Commonwealth.[[1]](#footnote-1) The functions of the Archives include:[[2]](#footnote-2)

* to identify the archival resources of the Commonwealth;
* to ensure conservation and preservation of the existing and future archival resources of the Commonwealth;
* to encourage and foster the preservation of all other archival resources relating to Australia;
* to encourage, facilitate, publicise and sponsor the use of archival material;
* to make Commonwealth records available for public access; and
* to develop and foster the coordination of activities relating to the preservation and use of the archival resources of the Commonwealth and other archival resources relating to Australia.

The archival resources of the Commonwealth consist of such Commonwealth records and other material as are of national significance or public interest and include records that relate to the history or government of Australia and the legal basis, origin, development, organisation or activities of the Commonwealth or of a Commonwealth institution. Archival resources can also include records created by a person who is, or has at any time been, associated with a Commonwealth institution.[[3]](#footnote-3)

**The National Archives of Australia and Copyright**

The Commonwealth owns the copyright in the majority of the Archives’ collection. The overwhelming majority of any non-Crown copyright material in the Archives’ collection documents interactions of private citizens with the government in relation to the routine business of government. After the business use of such material expires the main value of these records lies in their potential use for research including social, education, political, family, evidence and accountability based research.

It is the statutory role of the Archives to make its archival resources available for public dissemination and that includes any non-Crown copyright documentation that forms part of its archival resources.

The Archives Act provides that where access is given to a Commonwealth record in accordance with the Act no action for infringement of copyright lies, by reason of the authorising or giving of the access, against the Commonwealth or any person concerned in the authorising or giving of the access.[[4]](#footnote-4)

**The Commonwealth’s Open Government Agenda**

The role of the Archives is strongly supported and advanced by the principles of open government reinforced by the Declaration of Open Government:[[5]](#footnote-5)

*…..The Australian Government’s support for openness and transparency in Government has three key principles:*

* ***Informing****: strengthening citizen’s rights of access to information, establishing a
pro-disclosure culture across Australian Government agencies including through online innovation, and making government information more accessible and usable;*
* ***Engaging****: collaborating with citizens on policy and service delivery to enhance the processes of government and improve the outcomes sought; and*
* ***Participating****: making government more consultative and participative.*

*Effective collaboration between citizens and government requires timely sharing of the information held by Government…..*

The Report of the Government 2.0 Taskforce recommended that public sector information should be free, based on open standards, easily discoverable, understandable, machine-readable and freely reusable and transformable.[[6]](#footnote-6)

The importance of the Archives’ role in the Open Government agenda was highlighted by the
Hon John Faulkner during his tenure as Special Minister of State:

*The National Archives ensures the accountability of Government to current and future generations through its critical role in identifying, managing and preserving information of enduring national significance.*[[7]](#footnote-7)

The Archives has embraced the Open Government agenda and believes that the foundations for a democratic society rest on transparency and accountability across government.[[8]](#footnote-8) In accordance with these principles, the Archives submits that careful attention should be taken to ensure that any reforms to the Copyright Act do not inhibit the role of the Archives to preserve, use and provide access to the archival resources of the Commonwealth.

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

The Archives supports:

* the proposal to amend the Copyright Act to provide a broad and flexible exception for fair use as outlined in Proposal 4-1; and
* in particular, an exception that would provide a certain and simple basis allowing government archives to copy and communicate their collection material for the benefit of the public without infringing copyright and without payment of remuneration.

**Fair use for Government Archives**

The Archives supports a free use exception that would permit government archives to copy and communicate non-Crown copyright material held in their collections without the need to seek permission from copyright owners or payment of remuneration. This exception would be similar in intent and form to the administration exceptions in the *Copyright, Designs and Patents Act 1988* (UK),[[9]](#footnote-9) which provide an example of the sort of exception that would ensure that copyright material provided to government by third parties for administrative purposes could continue to be used for purposes of public administration, without infringing copyright or requiring payment of compensation.

**Records Management and Copyright**

In its leading role of guiding Australian Government agencies in how to manage their information and records in the digital environment, the Archives has a strong interest in ensuring that the Copyright Act does not unnecessarily limit any records and information management activities of government agencies. Governments at all levels, and the Australian Government in particular, actively participate in the development of digital economy through the use of new and innovative technologies for policy and decision-making and for the provision of services to the public.

Information and records documenting government activities constitute an important element in assuring government accountability and transparency. Under the Australian Government’s Digital Transition Policy, Australian Government agencies are moving to a digital information and records management environment. The policy sets out a number of requirements for agencies to implement. The expected outcomes are that the majority of government records will be created, received, stored and managed digitally, and, where possible, business processes will be reviewed to replace paper-based practices with the digital ones. The policy specifically encourages agencies to convert paper records, where practical, to digital formats. The Archives has also advised agencies that records created digitally after 2015 that have been identified for permanent retention will only be accepted in digital format.

The Archives considers that the proposed principles-based approach to copyright legislation will best serve Australian Government agencies in documenting their activities for business and accountability purposes in the rapidly changing global digital environment. It will, however, be important that the illustrative use of ‘public administration’ is broadly interpreted to cover all activities of government conducting the business of the government at all levels. The Archives is interested in any proposed interpretation of ‘public administration’ and any guidelines that may be released to provide further guidance to the ‘fair use’ exception.

**Proposal 4–2** The new fair use exception should contain:

(a) an express statement that a fair use of copyright material does not infringe copyright;

(b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use (‘the fairness factors’); and

(c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses (‘the illustrative purposes’).

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

(a) the purpose and character of the use;

(b) the nature of the copyright material used;

(c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and

(d) the effect of the use upon the potential market for, or value of, the copyright material.

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

(a) research or study;

(b) criticism or review;

(c) parody or satire;

(d) reporting news;

(e) non-consumptive;

(f) private and domestic;

(g) quotation;

(h) education; and

(i) public administration.

The Archives supports Proposal 4.2, 4.3 and 4.4 and makes the following comments in relation to their application.

**Illustrative Purpose - Public Administration**

The combination of the proposed fair use factors and illustrative purposes, in particular that of ‘public administration’, should be aimed at enabling executive, judicial and parliamentary institutions of government to perform their administrative duties without any breach of the Copyright Act. Chapter 14 of the Discussion Paper examines relevant examples of government activities that involve the use of third-party copyright material. The Archives believes that the activities of government agencies in managing information and records received and created in the normal course of public administration should be considered fair use. Many digital activities by their very nature involve the creation of copies. These activities may include but are not limited to:

* converting paper and other analogue records (such as photographs or videos) into digital formats for efficient access and maintenance, for example, scanning incoming correspondence or older paper-based records for incorporating into current business information systems;
* reformatting as records and data move from one business system or database into another as part of system and software upgrade processes;
* storage and management of records in the cloud;
* making datasets available on websites for re-use by the public (for example, on data.gov.au);
* saving into agency recordkeeping systems third-party material made available on websites or created through the use of social media; and
* making records available on websites under statutory obligations, such as the FOI Disclosure Log or the Information Publication Scheme.

Any activities that promote the principles of open government and facilitate government accountability and transparency should be considered fair use. The Archives considers records and information management activities, such as the examples listed above, as underpinning essential government and democratic processes.

If fair use is enacted with the current list of illustrative purposes, the Archives will be largely relying on the illustrative use of ‘public administration’ to fulfill its functions pursuant to the Archives Act. The Discussion Paper does not appear to include a proposed definition of ‘public administration’. It does however include the current definition adopted by the United Kingdom and the New Zealand copyright statutes which provide that ‘public administration’ includes the following:[[10]](#footnote-10)

* parliamentary and judicial proceedings;
* Royal Commissions and statutory inquiries;
* material open to public inspection or on official registers;
* material communicated to the Crown in the course of public business; and
* acts done under statutory authority.

The Archives assumes that ‘acts done under statutory authority’ would include acts done pursuant to the Archives Act but would seek clarification in this regard. The Archives suggests that a definition of ‘public administration’ could clearly include:

* acts done by the Commonwealth or State government under any Commonwealth or State legislation or legislative instruments.

Any reforms to the Copyright Act and in particular a ‘fair use’ exception should allow the Archives to undertake its functions pursuant to the Archives Act without risk of infringement of the Copyright Act.

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

**Records Management**

While the proposed fair use category of ‘public administration’ is likely to satisfy most of the uses associated with government information and records management, others from the list, for example, ‘research and study’ or ‘quotation’ may also fall within certain government activities.

It is not, however, clear from the Discussion Paper if conversion or reformatting of records and data, for example, when they are moved from one business system or database into another as part of system and software upgrade, will fall unequivocally within the ‘public administration’ or the
‘non-consumptive’ use discussed in Chapter 8.

Proposal 11-4 acknowledges that in the digital environment libraries and archives need to make multiple copies of copyright material for preservation purposes. However, before any digital records are transferred to an archival facility, to be useable while still in active business use by agencies they will have undergone a number of migrations or conversions. This is due to the relatively short life span of computer software and hardware in comparison to analogue media such as paper, film or tape recordings. It will be helpful to clarify whether such digital remedial processes fall within the ‘non-consumptive’ use or a separate illustrative purpose is needed.

**New Illustrative Purpose- Cultural Heritage**

The Archives requests a clear illustrative purpose for the collections of publicly funded archives that collect, preserve and make accessible culturally and historically significant material. Government archival collections often consist of non-government copyright material that they are encouraged to communicate to the public as part of their mandate. A specific fair use exception for the collections of government archives would ensure that the material of government archives continues to be made available to the public.

The Archives therefore suggests an additional illustrative fair use of:

* cultural heritage.

A definition of ‘cultural heritage’ could include ‘making accessible unique culturally and historically significant material’.

This would cover the work that government archives do in making their collections accessible to the public. The illustrative purpose could also extend to non-government institutions that collect and preserve heritage material such as local historical societies, university archives, non-profit heritage organisations etc. Their activities of making cultural heritage material widely available also benefit the public by contributing to a deeper understanding of Australia’s history, culture and democracy.

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

If fair use is enacted for ‘cultural heritage’ or a similarly worded illustrative purpose, specific exceptions for archives and libraries, in particular, s 49 could be amended and simplified. The Archives does not however propose that all archives specific exceptions be repealed as it is important for the sector to maintain its own specific exceptions as set out in Division 5 of the Copyright Act.

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

The Archives strongly supports the repeal of the statutory licensing schemes in the Copyright Act and in particular the s 183 licences prescribed for the government. The Archives has found the current statutory licences to be resource intensive and the survey requests difficult to comply with.

The Archives supports voluntary licensing for the use of copyright material by governments for government administrative purposes only. It is very important for the purpose of licensing that a clear distinction is drawn between the administrative and internal activities of the government and the role of some government agencies such as the Archives in managing and providing access to their collections of archival resources.

Any proposed licensing provisions will therefore require careful wording and consideration to ensure that they do not inadvertently cover or seek to cover the collections of government archives. Commonwealth and State governments should not be required under any circumstances to pay licence fees to comply with their legislative requirements for managing and making available their collections of archival resources.

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

The benefits of ‘fair use’ and any specific exceptions could be lost if they only operate where the use cannot be licenced. A licensing society could create a new licence and rights that may have fallen under ‘fair use’ or a specific exception could be lost. The Archives does not support this proposed amendment and supports greater certainty in relation to the proposed relationship between any licensing provisions, ‘fair use’ and specific exceptions for government archives.

As noted above, the Archives should not be required to licence the use of its collection under any circumstances. The Archives notes the current confusion created by the relationship between
ss 200AB and 183 in relation to the availability of a licence potentially overriding the availability of
s 200AB. Careful drafting will be required to ensure that the availability of a fair use exception is not overridden by licences created specifically to exclude that very availability. The introduction of flexible dealing in s 200AB has proven the difficulty for cultural institutions to consider case-by-case dealings with third-party material. It is in the national interest for publicly funded cultural institutions (including archives) to freely preserve and enable other socially beneficial uses of third party material, without the obligation to satisfy the conditions (including payment) of copyright licences.

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

The Archives supports Proposal 7-1. In addition, the Archives supports the inclusion of a further illustrative purpose for ‘cultural heritage’.

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

(a) ss 40(1), 103C(1)—fair dealing for research or study;

(b) ss 41, 103A—fair dealing for criticism or review;

(c) ss 41A, 103AA—fair dealing for parody or satire;

(d) ss 42, 103B—fair dealing for reporting news;

(e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trademarks attorney giving professional advice; and

(f) ss 104(b) and (c)—professional advice exceptions.

The Archives supports Proposal 7-2.

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

The Archives supports Proposal 7-4. Further information is provided in the Archives’ submission in relation to Proposal 11-3 below.

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

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

(a) s 43A—temporary reproductions made in the course of communication;

(b) s 111A—temporary copying made in the course of communication;

(c) s 43B—temporary reproductions of works as part of a technical process of use;

(d) s 111B—temporary copying of subject-matter as a part of a technical process of use; and

(e) s 200AAA—proxy web caching by educational institutions.

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

The Archives supports Proposals 8-1, 8-2, and 8-3 in relation to non-consumptive use.

The Archives encourages the users of documents and data to create and undertake analysis of large portions of our collection data for non-commercial purposes. The Archives supports an amendment similar to the one proposed by the UK Government to the *Copyright, Design and Patents Act 1998* (UK) to protect its website’s data from being scraped for commercial purposes:[[11]](#footnote-11)

*…it is not an infringement of copyright for a person who already has a right to access the work (whether under a licence or otherwise) to copy the work as part of a technical process of analysis and synthesis of the content of the work for the sole purpose of non-commercial research.*

**Proposal 9–1** The fair use exception should be applied when determining whether a private and domestic use infringes copyright. ‘Private and domestic use’ should be an illustrative purpose in the fair use exception.

The Archives supports the fair use exception in relation to archival material for private and domestic use. The Archives encourages the use of the archival resources of the Australian Government, which includes non-Crown copyright material, for the purposes of research, study, education, historic and cultural awareness, and personal interest. A fair use exception would more readily enable the dissemination of the outcome of original archival research between, for example, family members, and family or local history society members.

**Proposal 9–2** If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for private and domestic purposes. This should also require the fairness factors to be considered.

For the reason outlined in the Archives response to Proposal 9-1 above, if fair use is not enacted, the Archives would support a new fair dealing exception for private and domestic purposes.

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

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

The Archives supports Proposals 10-2 and 10-3.

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

The Archives supports the introduction of a ‘fair use’ exception for cultural institutions and the repeal of s 200AB of the Copyright Act. The uncertainty around the scope and application of
s 200AB means that the Archives has rarely used this provision.

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

The Archives supports Proposal 11-2. In particular, the Archives submits that specific exceptions for libraries and archives should remain part of the copyright regime. The Archives supports the availability of the ‘fair use’ exception where uses are not included in the specific libraries and archives exceptions.

The Archives suggests that in recognition and support of the role of archival institutions as providers of content that informs and educates the public and supports democratic processes that the Archives, and other government archives, should continue to have a special status in the copyright regime with the provision of special exceptions. Copyright legislation should not unnecessarily prohibit the statutory right of the public to access this information, including the access to the Archives’ collection by means of new digital technologies.

Where a specific exception is not available a ‘fair use’ exception would allow cultural institutions to consider the effect of the use upon the potential market for, or the value of, the copyright material in their collection and balance that against the public benefit of making cultural heritage material widely available. The Archives anticipates that such an exception would allow publicly funded government archives to engage with the digital environment by providing access to collections online without harm to the commercial interests of the copyright owners.

The Archives submits that a combination type proposal for the use of archives specific exceptions and/or a ‘fair use’ exception needs to ensure that it does not result in an equally or more rigid system that requires extensive case law and legal resources to interpret. It is therefore essential that access to any fair use exceptions are not constrained by specific library and archive exceptions so as to cause unnecessary uncertainty in relation to their application.

The Archives supports greater certainty in relation to the ‘fair use’ exception for this reason. The Archives notes the ALRC comments in paragraph 11.43 of the Discussion Paper and submits that they support the need for greater certainty as to the ambit of ‘public administration’ and the consideration of a ‘cultural heritage’ specific illustrative use.

The Archives currently has a specific exception in s 51AA of the Copyright Act. Section 51AA provides for the communication of works between the Archives’ central office and regional offices for administrative purposes.

Section 51AA does not however adequately deal with the multiple copying of works now required in the current digital environment. Section 51AA was introduced pursuant to the *Copyright Amendment Act 1989* (Cth). The Explanatory Memorandum for the Copyright Amendment Bill 1988 (Cth) provides the following in relation to the introduction of s 51AA:

*Clause 6 – Copying of works in Australian Archives*

*8. Cl.6 will insert a new section (s.51AA) in the Act which will extend the right to the Australian Archives to copy works held in its archival collection. New s.51AA will enable the Australian Archives to make a ‘working copy’ of a work kept in its collection from which a ‘reference copy’ (including a replacement reference copy) may be made for the Archives or, upon request, for each regional office of the Archives.*

*9. By enabling the Australian Archives to make multiple copies of works for access purposes, the new provision will overcome the administrative and practical problems caused by the present limitation under the Act (s.51A) which allows only a single copy to be made for the purposes of preservation or replacement.*

**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.

The Archives supports a new fair dealing exception for libraries and archives if fair use is not enacted. As the fair dealing exceptions are considered an exhaustive list it is very important that the functions of libraries and archives are recognised as a specific exception. Further, the Archives supports the use of the fairness factors in determining the application of the fair dealing exceptions. The Archives submits that any fair dealing exceptions should supplement unremunerated exceptions required for preservation and other internal uses of government archives.

**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?

The Archives does not support the extension of voluntary collective licensing to deal with mass digitisation projects by libraries, museums and archives. The extension of the voluntary collective licencing scheme to cover records held in government archives would not promote the intent of the Archives Act. Instead it would add to the cost of making records available to the public in circumstances where the use of those records does not prejudice the legitimate interests of the owner of the copyright.

Records in government archives are predominately non-commercial in nature and may contain a mix of copyright owners. A significant proportion of the Archives’ collection, for example, is owned by the Crown but other material, such as correspondence from individuals to government ministers, is third-party material and copyright may rest with the author. The authors, or their heirs, of such material are unlikely to be able to be traced given the age of government archival collections.

The Archives’ collection, like that of other government archives, contains records that provide evidence of government decision-making and the interaction between the government and the public. Such collections support cultural research, accountability of government and assist to establish the rights and entitlements of individuals. Access to archival records, including via the internet supports democracy, accountability and good governance. It is therefore important that the Copyright Act provides a flexible framework that allows cultural institutions to engage with the digital age and make their collections available online.

**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.

The Archives supports Proposal 11-4. The increasing online demand for access to archival material makes it imperative for archives to make extensive use of digital technology by converting
paper-based material into digital format. The records and information created in digital format is also growing exponentially with the increasing use by government of digital technology for conducting its business as part of the digital economy.

In the digital age, it is important that libraries and archives that are charged with preserving and making cultural heritage material available for public access should be permitted to make as many copies as are necessary to facilitate the effective preservation of their collections. Such institutions are guided by established preservation standards which take into account best practice in the analogue and digital environment.

The Archives notes that Proposal 11-4 is expressed around the copying process only, while the modern day preservation of digital material includes a series of activities and a number of preservation methods, for example, conversion, migration, reformatting or emulation, which ensure that digital information and records of continuing value can remain accessible and useable. The Archives suggests that the proposed amendment is reworded to cover all digital processes which may result in copies being made for preservation and related internal purposes.

**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.

The Archives supports Proposal 11-5.

**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.

The Archives does not support Proposal 11-6.

The Archives contends that government archival collections are largely unique and therefore it is unlikely that copyright material held by such archives can be commercially obtained from other sources.

Other cultural institutions may, however, be adversely affected by such a proposal in terms of the resources and financial implications of undertaking the ‘checking’ process. At the very least, any commercially available test should also consider whether the format and quality of the commercially available material is suitable for preservation.

**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.

The Archives does not support Proposal 11-7 and more specifically any proposal for the use of Digital Rights Management style access controls for materials held in the Archives’ collection.

**Not consistent with the role of the National Archives of Australia**

This proposal is in direct contradiction of the mandate of the Archives pursuant to the Archives Act to make the archival resources available for public access and to encourage and facilitate the use of archival material.[[12]](#footnote-12)

The implementation of a technology to control further communicating of non-Crown copyright material and limit the time which the material can be accessed would fundamentally hinder the Archives’ ability to meet its requirements pursuant to the Archives Act to provide access to the archival resources of the Commonwealth.[[13]](#footnote-13)

In addition this proposal would also contradict two key principles proposed as part of this discussion paper:

* Principle 3: Promoting fair access to and wide dissemination of content; and
* Principle 4: Providing rules that are flexible and adaptive to new technologies.

The Archives notes that the Proposal in 11.7(c) of limiting access to archival resources is not consistent with the role or function of archival institutions. For the Archives, any such requirement could result in a breach of the access requirements of the Archives Act. Further, the proposal would also impact the end user of archival records, for example, a member of the public who is preparing a family history tree or publication.

**Implementation of Client and Server Side software**

Digital Rights Management style controls for documents and data require infrastructure on client machines which can control and enable viewing. This usually takes the form of a plug-in or application. Additionally the format of the documents would need to be moved from a free and open viewing format to that of one which matches the control software.

Many cultural institutions would be required to invest heavily in supporting infrastructure which could monitor how, who, and when documents or data are accessed. The infrastructure would be a substantial cost in both capital and human resources. The use of proprietary software and formats could:

* require cultural institutions to lock into one standard format for all the documents types that they hold;
* hinder the ability of cultural institutions to switch access technologies into the future; and
* lead to additional costs associated with technology transition costs, retraining of staff, and resources allocated to the management of the system.

**Meeting Open Government Directives**

If Proposal 11-7 is enacted, in order to continue to meet the key objectives of the Open Government agenda, the Archives could be required to produce multiple access points for its collection such as one for non-Crown copyright and another for Crown copyright material. This situation could:

* impact on the ability of the Archives to promote and provide wide dissemination of its collection pursuant to the provisions of the Archives Act and the Open Government agenda;
* require two sets of web infrastructure, two major discovery interfaces to the collection, support and management for both, and ongoing maintenance for duplicate systems essentially serving the same purpose; and
* have a substantial impact on the public’s ability to easily research the archival resources of the Commonwealth.

**Considerations for the future of research**

The methods used for research and information discovery are changing rapidly to enable the public to undertake more in-depth and extensive analysis using technologies which rely on open formats in which documents and data can be examined. 'Closing down' documents and data into bespoke or proprietary formats would:

* greatly hinder large portions of the research community from using materials held within the Archives’ collection, particularly into the future; and
* reduce the Archives’ ability to provide meaningful access to materials held in its collection.

**Proposal 12–1** The fair use exception should be applied when determining whether a use of an ‘orphan work’ infringes copyright.

The Archives supports Proposal 12-1.

The Archives proposes that many uses of ‘orphan works’ by cultural institutions will be captured under the proposed fair use exceptions. This will be assisted by a prescriptive illustrative use for ‘cultural heritage’. The availability of the exception would assist archives when they embark on mass digitisation projects or disseminate ‘orphan works’ online pursuant to their mandates of making their collections available.

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

(a) a ‘reasonably diligent search’ for the rights holder had been conducted and the rights holder had not been found; and

(b) as far as reasonably possible, the work was clearly attributed to the author.

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

(a) how and by whom the search was conducted;

(b) the search technologies, databases and registers available at the time; and

(c) any guidelines or industry practices about conducting diligent searches available at the time.

The Archives does not at this stage support Proposals 12-2 and 12-3.

As discussed throughout this submission, government archives are required by legislation to make their collections available to the public. The determination of what is a ‘reasonably diligent search’ could have significant impacts on the ability of government archives to comply with their legislative requirements. The Archives agrees that some form of searching or criteria should be undertaken but that any requirement should be limited to certain situations. For example, the Archives does not believe that any search should be required for a letter to government that is 50 years old and with no address for the author where it is reasonable to conclude that such a person would not be able to be located.

The Archives believes that any searching that is undertaken should be limited to freely available search technologies. Any requirements to engage an external provider will be unnecessarily, costly and resource intensive for government archives. The Archives submits that any search requirements should not be tightly legislated and if they are:

* specific exceptions should be provided to all government archives;
* any further analysis of what constitutes a ‘reasonably diligent search’ should be limited to publicly available search options and not lead to payment of any kind to another body to conduct searches;
* the search should only be required to extend to that which would be reasonably be required for a work of a similar age and commercial value; and
* it should be made clear that fair use of orphan works extends to unpublished works.

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

**Proposal 13–2** If fair use is not enacted, the Copyright Act should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.
The Archives supports Proposals 13-1 and 13-2.

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

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

**Proposal 14–3** The following exceptions in the *Copyright Act* should be repealed:

(a) ss 43(1), 104—judicial proceedings; and

(b) ss 48A, 104A—copying for members of Parliament.

The Archives supports Proposals 14-1, 14-2, and 14-3 which will ensure that the Copyright Act is ‘clear on whether governments can rely on the same fair dealing exceptions as individuals and
non-government organisations’ (Discussion Paper, 14-26, p. 288). For a more detailed submission see our response to Proposals 4-1, 4-2, 4-3 and 4-4 and to questions 4-1 and 4-2. The rationale in support of fair use provisions applies equally to fair dealing exceptions, if fair use is not enacted.

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

In regards to Proposal 17-1, the Archives:

* supports limitations on contracting out libraries and archives exceptions; and
* submits that the limitation on fair use or fair dealing should be extended to use of material for ‘public administration’ and the additional proposed use of ‘cultural heritage’.
1. *Archives Act 1983* (Cth) s 2A. [↑](#footnote-ref-1)
2. *Archives Act 1983* (Cth) s 5. [↑](#footnote-ref-2)
3. Archives Act 1983 (Cth) s 3(2). [↑](#footnote-ref-3)
4. Archives Act 1983 (Cth) s 57(1)(a). [↑](#footnote-ref-4)
5. Australian Government, Department of Finance and Deregulation, *Declaration of Open Government*
(16 July 2010) <<http://agimo.gov.au/2010/07/16/declaration-of-open-government/>>. [↑](#footnote-ref-5)
6. <http://www.finance.gov.au/publications/gov20taskforcereport/index.html> Recommendation 6.1. [↑](#footnote-ref-6)
7. Address at the Launch of Information Awareness Month, National Archives of Australia, 5 May 2009. [↑](#footnote-ref-7)
8. Robin Creyke, John McMillan, *Control of Government Action* (LexisNexis Butterworths, 3rd ed 2012) 1002. [↑](#footnote-ref-8)
9. *Copyright, Designs and Patents Act 1988* (UK) ss 48, 49. [↑](#footnote-ref-9)
10. Discussion Paper 14.11. [↑](#footnote-ref-10)
11. UK Government, *Modernising Copyright: A modern, Robust and Flexible Framework* (2012), 37. [↑](#footnote-ref-11)
12. *Archives Act 1983* (Cth) s 5(h) and (j) [↑](#footnote-ref-12)
13. *Archives Act 1983* (Cth) s 31(1) [↑](#footnote-ref-13)