**Submission in response to the ALRC Discussion Paper Copyright and the digital economy**

**Australian Society of Archivists**

**Introduction**

The Australian Society of Archivists (ASA) thanks the ALRC for producing the discussion paper on Copyright and the Digital Economy and for the opportunity to provide further submissions on it.

**Fair use**

The ASA supports the introduction of the concept of fair use into Australian copyright law, and its general replacement of the current rights to use copyright material.

The introduction of ‘fair use’ will provide a structured way of considering uses of copyright material that have not been covered by copyright law. For example,

* the use of copyright material within recordkeeping systems within an organisation in order to conduct the business of that organisation.
* the provision of copies of copyright material where required by statute.

We support the proposed introduction of an exemption for preservation purposes (Proposal 11-4). We agree that the current exemptions are unworkable and place irreplaceable material at risk of loss.

However, we would prefer the exemption to allow reasonable ‘preservation processes’ rather than simply cover copies. The focus on copies, rather than processes, also does not allow for future development of preservation techniques for digital records affected by technology obsolescence where making a copy is not the sum of the preservation processes that are required, or may be required in the future.

The ASA is concerned that the effect of a general exemption for preservation (Proposal may be nullified by Proposal 11-6, which prohibits preservation copying if a commercially available copy is available. As discussed in 11.86, many of the copies will be for the purpose of recovery from corruption, or loss due to system failure, error, or malicious action. Application of Proposal 11-6 would mean that if the material was commercially available, each of these copies would need to be purchased. Similarly, if it was necessary to format-shift the work, this would not be allowed if the material could be commercially obtained (irrespective of whether or not the commercial copy was in a suitable long term preservation format).

The point of Proposal 11-4 is to allow libraries and archives to take the necessary actions to preserve works without infringing copyright. Simply preserving the material does not affect the ability of the owner to commercially exploit the material, and so it does not seem that Proposal 11-6 is necessary to protect the rights of the owners.

**Orphan works**

Orphan works are a particular problem for archives for the following reasons:

Fundamental archival principles require archives to publish the full record. To publish the portion where copyright is clear, but omit the ‘other side of the story’, would be to destroy the integrity of the record.

Copyright never expires on unpublished works, hence there is no easy date before which material could assumed to be out of copyright. Even a letter penned in 1856 is in copyright and might have a copyright owner.

A significant portion of an archive are orphans. The copyright of anything received by an agency is owned by the creator, and once in an archive is likely to be an orphan. This is partially because of the age of the material – the creator is likely to be dead, or the organisation ceased. But it is also because the creators are ordinary people and organisations. These  are much harder to track down than the relatively small number of published authors or publishers.

Archival material is unique. This limits the effectiveness of databases of copyright searches. If one library has conducted a diligent search for the copyright holder of a book, then other libraries with a copy of that book could use the results of that search. If one archive conducts a search for the copyright holder of a letter, however, this is of little use to other archives because no other archive will hold that letter.

The two specific suggested approaches in the Discussion Paper are 1) limitation of remedies where a reasonably diligent search has been conducted, and 2) extended collective licensing. Both of these approaches have issues when applied to archives.

**‘Reasonably diligent search’**

It would not be possible to conduct a search for most authors of archival material that would be considered a ‘reasonably diligent search’. This is acknowledged in the discussion paper in 12.75, and the Discussion Paper in 12.76 suggests the use of extended collective licensing.

In theory, a reasonably diligent search for an archival author would resemble a search for any author of an orphan work. It would be necessary to try and identify whether the author was still living, and, if not, who inherited the literary rights to their work.

However, authors of archival material are ordinary Australian individuals, companies, and organisations. This raises the following issues in making a reasonably diligent search:

Scale. Just about everyone is represented as an author in a significant State collection. For example, PROV holds the wills of everyone who died in Victoria. Conducting a reasonably diligent search for the current rights holders in order to digitise this collection would involve identifying the current rights holders for every deceased person in Victoria.

Lack of clear author identity. Authors are frequently identified only by a name (which may not be their official name) and address. This makes it difficult to identify a unique individual in order to start a search for the current holders.

Lack of clear transmission of ownership. Archival authors are not professional authors, hence it is unlikely that ownership of literary rights would be explicitly identified in wills. Consequently even if an archive identified the descendants, they may not know whether they hold the necessary rights.

Age of material. Most archival material is unpublished, hence it might be necessary to trace ownership through many generations. The age enormously expands the scope of the necessary search.

Mechanisms such as registers of orphan works would not be of assistance, as items in an archive are normally unique. This is different to published work where copies are held by many institutions. Once one institution conducted a search, other institutions that held a copy of the work could use the results of the search.

**Extended collective licensing**

While an ECL is a very attractive solution to the problem of orphan works and mass digitisation, it is difficult to see how it would be effective.

The core issue with applying extended collective licensing to an archival collection is that there is no collecting agency that represents the authors in an archival collection.

In both the UK (11.50) and Europe (11.54) the proposed extended collective licensing will require the collecting society to be significantly representative of rights holders affected by the scheme. This is not just because the decision to grant an ECL might diminish the rights of holders, but it is important for equity purposes. Funds collected from an ECL should pass back to the rights holders.

Unfortunately, there is no collecting society that is representative of the copyright holders of archival material, which would mean that archives could not make such deals with current collecting societies. Again, this is because the creators of archival material are ordinary people and organisations, and the age of the material means that copyright will have devolved to their descendants. This would make it very difficult for collecting societies to be representative of the copyright holders. Current surveyors, for example, are not representative of the current copyright holders of the material of long dead surveyors. In general, living published authors are not representative of the descendants of ordinary people.

In answering question 11-1, it is difficult to identify a mechanism that would allow an ECL to be negotiated for an archival collection due to the equity issue.

**Limiting copyright on unpublished works**

As an alternative to an ECL, an alternative is to treat published and unpublished works similarly, and to expire copyright after a period of time.

This is an approach taken in both the UK and US:

* In the UK (<http://www.ipo.gov.uk/types/copy/c-duration/c-duration-faq/c-duration-faq-unpublished.htm>) , the term of protection for works created after 1 January 1996 does not depend on whether the work is published. There are transition clauses for older material.
* In the US (<http://copyright.cornell.edu/resources/publicdomain.cfm>) unpublished and unregistered works have a copyright period of 70 years after the death of the author, or 120 years from the date of creation for anonymous works, corporate authorship, or where the date of death is not known.

This is similar to the existing Div 5, S51, which gives an archive the right to provide a copy of an unpublished work that it holds and is open to public inspection, provided the author has been dead for 50 years. As it stands, this has three issues:

The section does not apply to works authored by an organisation.

It requires an archive to know the year of death for the author. The original authors are ordinary Australians for whom it is difficult to reliably identify the date of death.

This right is qualified by a requirement that the officer in charge of the archive must be satisfied that the person requesting the copy requires it for research, study, or with a view to publication. This approval step means that an archive cannot electronically communicate unpublished works over the internet.

**TPMs**

The use of TPMs should not prevent the copying of material for preservation purposes. In addition, it should not be allowed to remove(or control) access via a TPM to material held in an archive.