704. \_org\_National Library of Australia

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Submission on behalf of: National Library of Australia

Proposal 4-1:

The National Library warmly welcomes the Discussion Paper’s proposal for a broad Fair Use provision. The four Fairness Factors provide reasonable limitations on the use of works, and the library considers that it can work effectively within these bounds, while continuing to negotiate agreement from rights holders for uses that would not be considered ‘fair’. The Library also welcomes the technologically-neutral wording of the provisions.

In particular the Library welcomes the Fair Use provisions as supporting the Library in digitising material such as unpublished manuscript material from the 19th and early 20th centuries, publications by not-for-profit organisations and out-of-print government-published maps.

Proposal 4-2:

Proposal supported.

Proposal 4-3:

Proposal supported.

Proposal 4-4:

Proposal supported.

Question 4-1:

Question 4-2:

Proposal 6-1:

Question 6-1:

Proposal 7-1:

Proposal supported.

Proposal 7-2:

Proposal 7-3:

Proposal 7-4:

Proposal supported.

Proposal 8-1:

Proposal 8-2:

Proposal 8-3:

The Library suggests that some further explanation of the term ‘non-consumptive use’ would be helpful. Proposal 8-3 notes that:

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.

There is potential for ‘trade on’ to be misinterpreted as a reference to a commercial transaction and for ‘creative and expressive’ to be misinterpreted as a reference to material with artistic and literary content rather than, for example, scientific content. A possible alternative definition might emphasise the characteristics of consumptive use as a use in which a human being reads, looks at, listens to or otherwise engages with the content of material.

Proposal 9-1:

Proposal 9-2:

Proposal 9-3:

Proposal 9-4:

Proposal supported

Proposal 9-5:

Proposal 10-1:

Proposal 10-2:

Proposal supported.

Proposal 10-3:

Proposal supported.

Proposal 11-1:

Proposal supported.

Proposal 11-2:

Proposal supported.

Proposal 11-3:

Proposal supported.

Question 11-1:

The National Library of Australia welcomes the ALRC’s recognition of the high resource costs of rights clearance in large digitisation projects and the Commission’s detailed consideration of possible solutions. The Library considers that it would be worth exploring a voluntary extended collective licensing (VECL) scheme to facilitate some mass digitisation programs by libraries, museums and archives.

Such a scheme may have some advantages, and raises some possible issues, from the National Library’s perspective.

Advantages:

·         It would avoid the need to contact rights owners individually and would thus have the potential to streamline rights clearance in some large digitisation projects

·         It would allow market forces to balance the workflow benefits to the Library with the financial benefits to collecting societies and the rights owners they represent.

Issues:

·         Funding constraints in libraries, museums and archives. These would limit the extent of the market; uptake might be low.

·         Unsuitability of VECLs to many large digitisation projects. A sampling of possible future digitisation projects by the National Library suggests that only a small proportion of them might be suitable for VECL. The collections sampled are listed below.

·         Concerns about fairness and effectiveness. The libraries, museums and archives sector is largely government-funded. Governments are traditionally wary of any payment program in which payments may be diverted from the intended recipients to others. An ‘extended’ licensing agreement with a collecting society, by definition, involves diversion of the payments due to some rights owners to other rights owners.

·         The risk that such a scheme could be highly complex in practice, outweighing the apparent efficiency benefits for all parties.

**Proposed framework**

To retain the advantages while attempting to address the issues, the National Library suggests the following framework for consideration:

Voluntary

·         Rights holders should be able to opt out. The National Library is aware that a small proportion of the rights owners represented in its collections have made a conscious decision not to use a collecting society; in the Library’s view such decisions should be respected.

·         Collecting societies should not be obliged to participate in the scheme.

·         Libraries, galleries, archives and museums should not be obliged to participate in the scheme. In the National Library’s view it is critical that the existence of the voluntary extended collective licensing option should not diminish in any way the ability of these organisations to rely upon the Act’s Exceptions.

Transparent and targeted

To address concerns about fairness and effectiveness, the scheme should

·         Include obligations that maximise the likelihood that payment will reach the individual rights owners involved. For example, the libraries, galleries etc should provide information on the works to be digitised and their rights owners where known; the collecting societies should make a diligent and transparent attempt to contact any rights owners they do not currently represent.

·         Provide for an escrow-style arrangement under which funds not distributed to the relevant individual rights owners after a certain period were returned to the library, gallery, archive or museum (plus reasonable interest and minus reasonable costs).

Administratively simple

Consultation with stakeholders on the detail of the proposed legislation would help avoid unnecessary complexity and identify aspects that may be left to market forces. For example, creator life dates would help a collecting society to identify rights owners. The extent of life date data provided by a library, gallery etc may be greater for some digitisation projects than others. This would presumably be a factor taken into account by a library and a collecting society when negotiating with each other i.e. the detail of the information provided could be left to market forces.

Moral rights

For avoidance of doubt, it may be useful for any new legislation on voluntary extended collective licensing agreements to make it clear that such agreements cannot in any way diminish a creator’s moral rights.

**Consideration of material held by the National Library of Australia that might be suitable for Voluntary Extended Collective Licensing**

The National Library would be unlikely to seek a Voluntary Extended Collective Licence in the following types of large digitisation projects:

-          Personal papers in the Library’s Manuscript Collections. Although this material is unpublished and thus in perpetual copyright and the number of rights holders, as correspondents, can be in the hundreds or thousands in any one collection, the Library has digitised such collections in the past by relying on a range of factors, including Section 51 of the current Act, negotiation with rights holders and risk management. The proposed Fair Use provisions will reduce the Library’s risks in digitising these collections; VECLs would not be necessary.

-          Collections where, although there may be multiple rights holders, there is a predominant single rights holder. These include manuscript collections from organisations such as missionary societies and professional associations and published material such as a newspaper or a magazine. In such collections, there are often high numbers of other potential rights holders – the individuals represented in the manuscript collections, or the journalists, photographers and advertisers in a newspaper or magazine.  Records of rights agreements between the predominant rights holder and other potential rights holders may never have existed, or be difficult to locate. In such cases, the National Library negotiates permission to digitise with the predominant rights holder (e.g. the missionary society, professional association or publisher) and shares with that rights holder the risks inherent in the existence of other potential rights holders. In the Library’s experience in digitising such material, contact from other potential rights holders has been rare, and has always been resolved. The proposed Fair Use provisions will reduce the Library’s risks in digitising these collections; VECLs would not be necessary.

-          Collections of material in which the copyright would have a very low market value, such as collections of advertising leaflets and other ephemera or  photographs by amateur photographers. Digitisation of such collections would often be supported by the proposed Fair Use provisions, particularly Fairness Factor (d) ‘the effect of the use upon the potential market for, or value of, the copyright material’. The Library would be very unlikely to consider seeking a VECL for such material.

The National Library may seek a Voluntary Extended Collective Licence in the following types of large digitisation projects:

-          Performing arts collections. The Library has a number of collections of playscripts, libretti, and music scores, often compiled by a performing arts company. The number of rights owners is large, particularly when one considers the range of roles involved - composer, arranger, lyricist, publisher etc. The plays and music are often popular works; their rights holders can reasonably expect continuing income from their use. The rights holders are often well-known and traceable i.e. the material would not fall within the proposed orphan works provisions.

-          Complex collaborative digitisation projects.

There are also some collections in which the factors for and against use of a VECL are evenly balanced. These are included in the examples below.

**Four step test**

In considering whether a large digitisation project might be suitable for a VECL, the National Library would apply a four-step test:

(1)   Are the works are mostly in copyright?

(2)   Is there a sufficiently high number of rights owners for rights clearance work to be a major impediment to the project?

(3)   Would the proposed ‘Fair Use’ exception be unlikely to apply; a quick way of testing this is to ask ‘Would the rights owners have a reasonable expectation of earning income from their works?’

(4)   Would most of the rights owners be traceable i.e. are the works Non-Orphans?

If all four answers are ‘Yes’, the National Library would consider a VECL.

**Examples List A.**

The National Library does not have firm plans to digitise most of the material listed below; these are examples of material that could be considered for large digitisation projects in future. The projects most likely to be suitable for a VECL are listed first.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|   | **Type of material** | **Date range** | **Number of rights holders** | **Applicability of proposed Fair Use provisions** | **Applicability of Proposed Orphan Works provisions** | **Applicability of proposed VECL provisions** |
| Jingles | Words and music for several hundred Australian advertising jingles, collected by APRA | 1930s to 1960s | Composers, lyricists and commission-ing advertisers: hundreds | Fairness factors (a) and (b) may apply – not for profit purpose, would facilitate research or study. For Factor (d) – the jingles would generally have been produced by people earning an income from their work and with a strong interest in licencing any further uses; on that criterion, Fair Use would not apply. | The extent of diligent searching  by the National Library required to cover all potential rights owners would be prohibitive and would make it unlikely that the Library would rely on the proposed Orphan Works provisions | A VECL would be a useful and likely option because of the very commercial nature of the content, the lack of a single publisher and because in this case the relevant collecting society (APRA/AMCOS) may be the only source of  contact details for many of the rights holders. |
| Records of JC Williamson (Firm) | Mainly playscripts, opera libretti, music scores some of which are annotated, also publicity material, financial papers, correspondence, contracts, scrapbooks, photographs. 86 shelf metres of material | 1874-1976 | Estimated to be in the thousands | Correspondence and financial papers: should meet Fairness Factors (a) purpose of public good, facilitates research and study (b) material’s nature is non-commercial and unpublished (c) not applicable and (d) no potential market.In-copyright playscripts, scores and libretti – there is a potential market for this content, would thus not fall under Fair Use.    |  In-copyright playscripts, scores and libretti – most works have identified creators, who are probably traceable | VECL might be useful for in-copyright playscripts, music scores and libretti. |
| Material relating to the 1967 referendum | A multi-library project by National and State Libraries Australia – size of the digitisation project still being scoped | Mainly 1960s | Photographers, poster artists, publishers, people and organisations as writers of leaflets – probably hundreds. | Fairness factors (a) and (b) may apply – not for profit purpose, would facilitate research or study, high public interest in the 50th anniversary in 2017.Fairness factor (c) not applicable. Fairness factor (d) – can assume that most of the creators were motivated more by public policy issues than by an expectation of income from commercial use of their work and would welcome the digitisation project | The extent of diligent searching required to cover all potential rights owners would be prohibitive and would make it unlikely that the Library would rely on the proposed Orphan Works provisions | The complexity of rights clearance in a multi-library project suggests that this may be suitable for VECL. The number of works to be digitised – not yet determined – will be a major consideration. |
| Zines | Works, mainly on paper, generally self-published, very short print runs, sold or swapped at Zine Fairs, subject matter includes social issues such as racism, bullying, womens’ roles. NLA holds over 1500 titles. | Mainly 1990s to date | Over 1000 | Fairness Factor (b) The social-purpose nature of the content suggests that some zine creators would welcome the broader audience available through a National Library digitisation project.  (d): though the works were produced for a market, the market size was small, prices were low and availability was short-lived. | Approx 37% are anonymous or pseudonymous; plus an unknown % of the named rights holders would probably be untraceable with a diligent search. Diligent searching would be high effort. It is unlikely that the Library would rely on the proposed Orphan Works provisions. | The Library might use a risk management approach or VECL. Risk management could involve contacting a sample of Zine creators to assess their views. If the sample generally agreed the use was fair, the Library might proceed, and use methods such as pre-project publicity to the Zine community, and/or a take-down on request policy to further manage risk.If the sample showed that some zine creators had continuing expectation of earning income from their work , the library may seek a VECL. |
| Postcards in the Library’s Pictures Collection | Postcards | 1955 to approximately 2005 | Photographers and graphic artists – estimated in the thousands.Postcard publishers - number not known at this stage. | Fairness factors (a) and (b) may apply – not for profit purpose, would facilitate research or study. For Factor (d) – the photographers & graphic artists would generally have been produced by people earning an income from their work and with an interest in licencing any further uses; on that criterion, Fair Use is unlikely to apply. | The extent of diligent searching required to cover photographers and graphic artists would be prohibitive and would make it unlikely that the Library would rely on the proposed Orphan Works provisions | The Library would initially consider a risk management approach by seeking the agreement of the postcards’ publishers. The number of publishers and the diversity of agreements between them and photographers etc may, however, be found to be high. In that case, a VECL may be useful. |
| Major Australian metropolitan newspapers | Newspapers | 1955 to 1980s | Publishers: several i.e. a manageable number.Journalists, advertisers, writers of letters to the editor and other contributors; estimated tens of thousands. | Fairness factors (a) and (b) may apply – not for profit purpose, would facilitate research or study.Digital copies could have a potential market; on that criterion, Fair Use is unlikely to apply | The extent of diligent searching required to cover all journalists, photographers, advertisers etc would be prohibitive and would make it unlikely that the Library would rely on the proposed Orphan Works provisions | The Library would be more likely to use a risk management approach than VECL. A key factor would be the agreement of the publisher. Other risk management  strategies could include staged release of the digitised material and/or a take-down on request policy. |
| David Daw photographic Collection | Approx 10,000 35 mm photographic transparencies and around 2000 photographic prints, collected by David Daw, on aviation topics | 1950s to date | Photograph-ers: thousands | Fairness factors (a) and (b) may apply – not for profit purpose, would facilitate research or study.Fairness factor (d): the photographs are largely the work of amateur photographers and aviation enthusiasts who provided the photographs at no charge to the collector. Their expectation of income from these works is probably negligible. | The extent of diligent searching required to cover all potential rights owners be prohibitive and would make it unlikely that the Library would rely on the proposed Orphan Works provisions | The Library would rely on Fair Use rather than a VECL for this collection. |

**Examples List B.** The National Library has commenced work on these digitisation projects, generally to a feasibility and costing stage

|  | **Type of material** | **Date range** | **Volume of rights holders** | **Applicability of proposed Fair Use provisions** | **Applicability of Proposed Orphan Works provisions** | **Applicability of proposed VECL provisions** |
| --- | --- | --- | --- | --- | --- | --- |
| Dutch-language newspapers published in Australia; five in-copyright titles identified | Newspapers | 1951 to almost-current issues | Five publishers.Estimate for journalists: dozens.Estimate for advertisers and other contributors -hundreds | Fairness Factors (a) and (b) may apply – the project is supported by the National Library of the Netherlands and would presumably be supported by the Dutch-Australian community i.e. the rights-holders and the potential users would have some interconnections; the project would facilitate research and study. Fairness factor (c): not applicable. Fairness Factor (d):  uncertain – there could be a market for digitised copies of back issues of these newspapers, but the market may not be large enough to attract interest from a commercial digitiser | Publishers – contactable.Journalists and others – diligent search effort would be high; the Library would probably not rely on the Orphan Works provisions | Not applicable in the National Library’s view. The Library would proceed based on risk management (in which permission from the publishers would be a key factor), and support from the Fair Use provisions. |
| Australian Economic History Review | Academic and business journal | 1956 to 1996 (after which digitised issues are available commercially) | One publisher.Contributors: estimated, from sampling, 1040 | Fairness Factor (b) may apply – the project would facilitate research and study. Fairness factor (c): not applicable.Fairness Factor (d): Digital copies could have a potential market; on that criterion, Fair Use is unlikely to apply | Publisher – contactable.Journalists and others – diligent search effort would be high; the Library would probably not rely on the Orphan Works provisions | Not applicable in the National Library’s view. The Library would proceed based on risk management (in which permission from the publishers would be a key factor), and support from the Fair Use provisions. |
| Overseas Trading | Magazine published by Australian commonwealth government under various agency names | 1947 to 1986 | One publisher during this period – a government agencyContributors: estimated over 1000, but most appear to have been writing as government employees and thus would have relinquished their copyright to their employer | Fairness factors (a) and (b) would probably apply. Initial purpose of the magazine was non-profit. Government publications can be assumed to have a public good purpose. Digitisation would facilitate research or study.Fairness factor (c): not applicable.Fairness Factor (d): Intention of publisher and creators appears to have been non-commercial. | Publisher – contactable.Unlikely to need to contact contributors. | Not applicable - The Library would proceed based on risk management (in which permission from the publisher would be a key factor), and support from the Fair Use provisions |

Proposal 11-4:

The National Library welcomes the proposal (11-4) for a new exception to permit libraries and archives to make preservation copies without a limit on the format and number of such copies. This will allow the National Library to meet the preservation aspects of its obligation under the National Library Act 1960 to maintain a national collection of library material.

The National Library has a suggestion on wording if the Proposal 11-4 is enacted.  The proposal states that the ‘... exception should not limit the format’.  The Library interprets this to mean that there should be no limit on any subsequent re-formatting or migration that may be necessary for a preservation purpose, as well as no limit on the format of the first preservation copy made of a work. The Library suggests that the preservation exception in its final, enacted, form should retain this broad wording, to ensure that it supports any reformatting (for instance from PDF format to a format which may replace PDF in the future) that is required to ensure that preservation copies remain fit for purpose.

[[1]](%22%20%5Cl%20%22_ftnref1%22%20%5Co%20%22) National Library of Australia. Digital Preservation Policy 4th Edition (2013) -  <http://www.nla.gov.au/policy-and-planning/digital-preservation-policy>, section 2.

[[2]](%22%20%5Cl%20%22_ftnref2%22%20%5Co%20%22) <http://www.archives.gov/records-mgmt/initiatives/temp-opmedia-faq.html>

[[3]](%22%20%5Cl%20%22_ftnref3%22%20%5Co%20%22) National Archives UK: “All types of floppy disk (3.5, 5.25” and 8”) are now obsolete and should not be used. Due to their vulnerability, susceptibility to accidental erasure, and short life span (often less than five years), flexible magnetic disks have never been suitable for long- term data storage, and data stored on these should be copied to more recent media immediately.” - Adrian Brown, Head of Digital Preservation Research, National Archives, August 2008 - [www.nationalarchives.gov.uk/documents/information-management/removable-media-care.pdf](http://www.nationalarchives.gov.uk/documents/information-management/removable-media-care.pdf)

Proposal 11-5:

The National Library welcomes proposal 11-5; repeal of these scattered and over-detailed sections will make the law more technology-neutral and easier for all parties to understand.

Proposal 11-6:

The National Library has a number of concerns about Proposal 11-6.

11-6 would perpetuate the problem of deterioration and damage to paper-based works.

The aim of preservation copying is to make a copy that will have a better chance of survival than the original. For most works on paper, libraries now prefer to create digitised copies, stored on a management system on a secure server, for preservation purposes. Paper based items, as they are first produced, are in their best condition and represent the closest physical form to the intentions of their designers, artists or publishers. As such the ideal time for the digital capture is at this beginning of the items’ existence, before time brings colour changes, deterioration of acidic paper, embrittlement, tears, mould or insect damage.  Proposal 11-6, however, would have the effect of preventing the National Library from making a digital preservation copy if the original were still commercially available.

The alternative envisaged by the proposal is purchase by the Library of multiple copies. Although additional copies of a paper-based publication could be set aside to receive less wear and tear than the first copy, they would very likely still have the same paper and binding as the first copy.  In this sense, proposal 11-6 would not only prevent the National Library from making a digital preservation copy of paper publications, it would extend the scale of the paper-based preservation problem.

11-6 would have the unintended effect of encouraging delays in preservation copying.

One solution for a library wishing to make a digital preservation copy rather than acquire a second copy of an item as required by the proposal, would be to wait until the item was no longer commercially available. Clearly, the most effective time to make a preservation copy is early, before deterioration can occur. A delay in effective preservation copying would not serve the interests of any of the parties with an interest in copyright material.

11-6 would prevent effective preservation copying of digital material.

The Library defines the primary objective of digital preservation activities as maintaining the ability to meaningfully access digital collection content over time[[1]](%22%20%5Cl%20%22_ftn1%22%20%5Co%20%22). The concerns listed above are magnified and extended in relation to digital material. CDs, floppy disks and similar media have a finite life span. The life span can vary, depending on storage conditions, burning processes, types of carrier substrates and other factors. The U.S. National Archives and Records Administration estimates that the useful life of CDs and DVDs can be as little as two to five years[[2]](%22%20%5Cl%20%22_ftn2%22%20%5Co%20%22) and the National Archives of the United Kingdom makes a similar estimate for floppy disks[[3]](%22%20%5Cl%20%22_ftn3%22%20%5Co%20%22). Acquisition of a second copy on such media duplicates the problem in the same way as acquisition of a second copy of a publication on acid paper. In the case of digital publications, the problem is magnified by the near-certainty of hardware and software obsolescence.  Hardware that can read 5¼ inch floppy disks is, for instance, now rare. In the future, software that can read formats such as PDF and TIFF may be unobtainable. The development of new hardware and software occurs at a rapid pace; the desirability of making a preservation copy as early as possible in the life of ‘born-digital’ copyright material is even greater than it is for paper-based material.

In addition, the only effective way to manage collections of digital material from diverse sources is to copy the material into a secure system which has been designed for preservation of digital material. As part of this copying process, each digital publication is analysed and metadata such as file format and date of creation is extracted and kept. This will allow a library to monitor the content for preservation risks and take bulk preservation actions when needed. Such large-scale management is the only effective way to preserve collections of digital publications; Proposal 11-6 would prevent, where the publication was commercially available, the copying that is necessary for such management.

Arguments in support of 11-6

The National Library is aware of three arguments that might support Proposal 11-6.  The first is the ‘lost sale’ argument i.e. that it is against a rights owner’s interests for a library to create a preservation copy when the library could have purchased a second copy.  This argument may rest on a misunderstanding of the difference between a preservation copy and an access copy. Where libraries expect an item to receive high use, they frequently purchase a second or additional copies to service that use. In the National Library’s case these are designated as NL (‘L’ for Lending) copies. The National Library is aware that educational and public libraries also buy multiple copies of high use material. This practice is a matter of common sense; it benefits rights owners, libraries and library users, and needs no legislation to enforce it.  It is true that some libraries may consider purchasing a yet further copy, to set aside from normal use. Such copies, for the reasons outlined above (acid paper, technical obsolescence etc) are not effective preservation copies; they are reduced-access copies.

The second argument in support of Proposal 11-6 is that some publishers can provide second copies in digital format, and that if a library sees digital format as the effective format for preservation copying, it should purchase the commercially-available digital version. As an example, Proposal 11-6 might require a library that was seeking to preserve a run of newspapers to buy a digital copy of those newspapers from their publisher.  This argument, however, fails to take into account the following issues:

- Most digital publications are designed for immediate access rather than for long-term access which means that they are often in a file format that is not suitable for long term preservation.

- The digital copies offered by some publishers differ in content from the original publications. For instance they may include additional material, or exclude advertisements. They are thus not true copies, and cannot serve the purpose of preservation copies.

- The digital copies offered by some publishers are available only by subscription. Proposal 11-6 would oblige a library to postpone any effective preservation copying until the subscription service was no longer offered.

A third argument might be that the current Copyright Act has similar requirements to Proposal 11-6, and that libraries appear to have managed their preservation programs within the current Act’s requirements. The National Library’s copying programs, however, have managed by focussing on out-of-copyright material and by risk management. For instance, in the Library’s program for digitisation of Australian newspapers, managed collaboratively with Australian state libraries, only out-of-copyright newspapers have been digitised.  As the Library continues its preservation copying work, the focus will move to more recent publications. For example, future preservation copying is likely to include some publications from smaller Pacific nations. Lower quality paper and bindings, and the fact that many of these nations lack the resources to preserve their own publications, will make preservation copying of even quite recent Pacific publications a priority.

Examples of the National Library’s reliance on risk management include the Library’s preservation copying of manuscript items from the 19th century and earlier (these are in perpetual copyright). The time-pressure of obsolescence of electronic publications on CDs etc has led the Library to take the risk of creating preservation copies of over 2000 digital publications in the Library’s collections, with no complaints received from rights owners during the 6 years this copying has been taking place.

**In summary**, as the Library completes its projects for digital preservation copying of older material, the commercial availability caveat of the current Act and Proposal 11-6 will become serious impediments to the preservation program.  In particular, it is not an overstatement to say that enforcement of the caveat would cripple the National Library’s programs for preservation of born-digital material. The National Library submits that proposal 11-6 should not be included in the new preservation exception.

[[1]](#_ftnref1) National Library of Australia. Digital Preservation Policy 4th Edition (2013) -  <http://www.nla.gov.au/policy-and-planning/digital-preservation-policy>, section 2.

[[2]](#_ftnref2) <http://www.archives.gov/records-mgmt/initiatives/temp-opmedia-faq.html>

[[3]](#_ftnref3) National Archives UK: “All types of floppy disk (3.5, 5.25” and 8”) are now obsolete and should not be used. Due to their vulnerability, susceptibility to accidental erasure, and short life span (often less than five years), flexible magnetic disks have never been suitable for long- term data storage, and data stored on these should be copied to more recent media immediately.” - Adrian Brown, Head of Digital Preservation Research, National Archives, August 2008 - [www.nationalarchives.gov.uk/documents/information-management/removable-media-care.pdf](http://www.nationalarchives.gov.uk/documents/information-management/removable-media-care.pdf)

Proposal 11-7:

The National Library welcomes the Discussion Paper’s intention to retain the current library and archive exceptions, and the proposals to repeal s200AB and introduce a Fair Use exception. The combined effect of these proposals will allow the Library to respond positively to a higher proportion of document supply requests.

The National Library has, however, a number of concerns about the new procedures proposed in 11-7. The proposal presumably addresses a perceived problem of unauthorized re-use of documents supplied by libraries under the Act’s current exceptions.  This is a problem of which the scale or even existence is not, to our knowledge, supported by evidence.

There is, however, some evidence that perceptions can be addressed through better information.  An organisation representing major international publishers sought detailed information about the National Library’s supply of copies from those publishers’ journals to libraries and direct to end users, claiming they exceeded what was permitted under applicable copyright exceptions and offering a “publisher backed solution”. After being sent spreadsheets for one year’s transactions in the relevant subject areas (1034 copies supplied to end users and 5346 to libraries, including approximately 468 copies of out-of- copyright material) the publisher concluded “as you indicated the quantities of deliveries … was not so material as to warrant a licensing solution”[[1]](#_ftn1)

[[1]](#_ftnref1) National Library of Australia internal file R13/38463.

The Library also has the following specific concerns.

(a)   Preventing the user from further communicating the work

The Library is concerned that (a) appears to overrule the principles of Fair Use proposed elsewhere in the Discussion Paper.  For example, the recipient of a copy of a journal article supplied by the Library may wish to quote from the article in a publication, or to communicate part of that article to a research colleague for research or study purposes. These actions could be permitted under the proposed Fairness Factors but, if the document had been supplied electronically by a library, measure (a) would make it practically impossible for the recipient to exercise their Fair Use rights.

The Discussion Paper refers, in 11.101, to the submission of the Australian Publishers Association which reports that documents supplied electronically by the British Library ‘cannot be cut and pasted’. Copying and pasting of insubstantial portions of a document is a common practice for the purposes of research or study – purposes which the Copyright Act, commendably - supports.  Restricting a common method of achieving these purposes, i.e. copying and pasting, appears to be inconsistent with the intentions of the Act.

Given the inconsistencies with permitted exceptions in both the current Act and the proposed Fair Use provisions, the Library submits that measure (a) be excluded from the new Act.

(b)   Ensuring that the work cannot be altered

This can be achieved with current technology by delivering the work as a secured or ‘protected’ PDF. The National Library does have the capability to do this. However, such protection would prevent copying and pasting, making it more difficult for researchers, students and reviewers to quote from works, as mentioned above.

The Library submits that if measure (b)  is enacted despite its inconsistency with the Act’s support for research, study and other fair uses, the wording be changed to wording along the lines of ‘must take reasonable measures to minimize the likelihood that the work may be altered’.

(c)     Limiting the time during which the copy of the work can be accessed

The National Library currently deletes from its server any requested electronic copy that has not been collected by its requester after two weeks. The Library does this to comply with section 49 7A d of the current Copyright Act[[2]](#_ftn2).  If measure (c) refers to access on the supplying library’s server, it would unnecessarily duplicate section 49 7A d in the current Act.  If for some reason the ALRC sees a need to reword this measure in the revised Act,  the Library has no objections to it in a broad sense, but would prefer the insertion of ‘reasonable’  e.g. …’must take reasonable measures to limit the time during which the copy of the work can be accessed’ .

If measure (c) intends to oblige libraries to include software in supplied copies that makes those copies unreadable on a recipient’s computer after a certain time period, the Library submits that this measure should be excluded from the Act.  The benefits to the community of research and study are often increased if researchers and students are able to assess and absorb content over a period of time. And the Act should have no interest in whether Australians are fast or slow readers.

(d)   Overseas experience shows that Proposal 11-7 would be high in cost and limited in its benefits

High costs:

The development by the British Library of a document supply system which included restrictions similar to Proposal 11-7 cost 6 million pounds[[3]](#_ftn3).  The high costs of such a development can be justified for the British Library which supplies over 500,000 copies a year; the benefits of such economies of scale are not available to the National Library of Australia.

Upgrading the Library’s infrastructure to reflect the kind of secure access provided by the British Library, taking into account the number of documents supplied electronically by the National Library in a typical year and the cost of implementation of BLDSS (nearly £6 million) places a value on document delivery of the kind envisaged by proposal 11-7 over the first year of $460 per document if the costs were spread evenly over documents supplied electronically by the National Library under sections 49 and 50 of the Act. The costs would increase to more than $600 per document if the costs were spread over only those documents supplied under section 49 of the Act (Proposal 11-7 appears to be limited to documents supplied under section 49 and to exclude those supplied under section 50). Even if amortised over a period of five or ten years, these additional costs would be substantial when compared to the current price to requesters, for most supplied documents, of $16.50.

There would be other hidden costs. The measures proposed in 11-7 would presumably apply only to works in copyright. If measures (a) and (b) were enacted, the National Library of Australia would be obliged to choose between implementing the measures for all electronically-delivered documents, thus placing unnecessary restrictions on out-of-copyright works, or separating its document delivery into two streams, which would reduce efficiency and increase costs.

Limited benefits:

According to the British Library’s Annual Report, implementation issues with the new document supply system, supporting DRM among other features, contributed to a significant drop, to 67%, in the document supply fulfillment rate in 2012/2013[[4]](%22%20%5Cl%20%22_ftn4%22%20%5Co%20%22).

The experience for users of the British Library’s document supply service is complex. See for instance the Library’s instructions on how to install, test and trouble-shoot the most-used version of their required plug-in software[[5]](%22%20%5Cl%20%22_ftn5%22%20%5Co%20%22).

Users have expressed dissatisfaction at the time limit implemented by the British Library, and the Library is seeking to change the time limit: ‘[the document] … self-destructs after 14 days, this is currently under review and we hope to get changed soon to 3 years minimum[[6]](%22%20%5Cl%20%22_ftn6%22%20%5Co%20%22)’.

Users have also expressed some dissatisfaction with the method – use of plug-in software – by which the British Library enforces restrictions on its electronically-supplied documents.   The British Library has responded to these concerns by changing its recommended software rapidly, from Adobe Digital Editions to FileOpen, but recognizes that there are continuing issues with firewalls’ preventing effective passage of encrypted documents. The British Library is now investigating a third option, a ‘plug-in-less DRM’[[7]](%22%20%5Cl%20%22_ftn7%22%20%5Co%20%22).

It is possible for a user to print a document supplied electronically by the British Library[[8]](%22%20%5Cl%20%22_ftn8%22%20%5Co%20%22). A user could print a document and then scan it, thus bypassing the digital rights management plug-in. This is a further example of the extent to which the benefits of Proposal 11-7 would be limited – in this case the limitation is to the benefits that rights owners presumably see in requiring users to use such plug-ins.

(e)    Proposal 11-7 is more restrictive than overseas models

Canada:

On pages 241-242, the Discussion Paper refers to Canadian legislation and says that

 A limitation applies to providing a copy to a person in digital form. The statute requires that the providing library take measures to prevent a person who has requested the copy from: making any reproductions ... communicating it [etc]

The National Library’s interpretation of the Canadian legislation differs. The Canadian Act[[9]](%22%20%5Cl%20%22_ftn9%22%20%5Co%20%22) as we read it only requires  a library supplying a document directly to a person to inform the person that the document must only be used for research or study (30.2 4 b). The more pro-active measures - preventing reproduction, further communication etc - only apply when a library is supplying a document via a requesting library (30.2  5.02). If our interpretation of the Canadian Act is correct, it is less restrictive than Proposal 11-7.

United Kingdom:

Our understanding of the UK legislation[[10]](%22%20%5Cl%20%22_ftn10%22%20%5Co%20%22) is that it does not contain any measures similar to the proposed measures (a), (b) and (c). Although the British Library has implemented some measures like the ones proposed, it does not appear to have been required by legislation to do so.

United States:

Our understanding is that the current US copyright law does not contain these measures. The somewhat similar measures recommended by the Section 108 Study Group[[11]](%22%20%5Cl%20%22_ftn11%22%20%5Co%20%22) in 2008 have not been enacted. We also interpret the Study Group’s recommendations as less restrictive e.g. their equivalent of measure (a) talks of deterrence rather than prevention.

New Zealand:

Our understanding is that the New Zealand legislation does not contain measures restricting further communication, or a time limit.

In summary, the Library submits that Proposal 11-7 would be inconsistent with the Discussion Paper’s proposals for Fair Use, addresses issues which are not at this stage substantiated by evidence, would be impractical and ineffective, and would be more restrictive than overseas legislation.

[[1]](#_ftnref1) National Library of Australia internal file R13/38463

[[2]](#_ftnref2) S 49 7A d: ‘as soon as practicable after the reproduction is communicated to the person, the reproduction made under subsection (2) or (2C) and held by the library or archives is destroyed’

[[3]](#_ftnref3) <http://www.bl.uk/bldss>

[[4]](%22%20%5Cl%20%22_ftnref4%22%20%5Co%20%22) British Library Annual Report and Accounts 2012/2013 – Key performance indicators page 16, and footnote 15 - <http://www.bl.uk/aboutus/annrep/2012to2013/annualreport201213.pdf>

[[5]](%22%20%5Cl%20%22_ftnref5%22%20%5Co%20%22) <http://www.bl.uk/reshelp/atyourdesk/docsupply/help/receiving/deliveryoptions/electronic/fileopen/fileopenpowerpointdemodec09%202.pdf>

[[6]](%22%20%5Cl%20%22_ftnref6%22%20%5Co%20%22) Andy Appleyard, Head of BL Information Services & Customer Services, to Margarita Moreno, Manager, Document Supply Service, National library of Australia, email 28 June 2013, NLA file R13/55790

[[7]](%22%20%5Cl%20%22_ftnref7%22%20%5Co%20%22) Andy Appleyard, Head of BL Information Services & Customer Services, to Margarita Moreno, Manager, Document Supply Service, National library of Australia, email 28 June 2013, NLA file R13/55790

[[8]](%22%20%5Cl%20%22_ftnref8%22%20%5Co%20%22) See, for example FAQ  1.4 at <http://www.bl.uk/reshelp/atyourdesk/docsupply/help/bldss/faq/index.html>. Also confirmed in Andy Appleyard, Head of BL Information Services & Customer Services, to Margarita Moreno, Manager, Document Supply Service, National library of Australia, email 28 June 2013, NLA file R13/55790

[[9]](%22%20%5Cl%20%22_ftnref9%22%20%5Co%20%22) <http://laws-lois.justice.gc.ca/eng/acts/C-42/FullText.html>

[[10]](%22%20%5Cl%20%22_ftnref10%22%20%5Co%20%22) Copyright, Designs and Patents Act 1988 (UK) s 38 and 39

[[11]](%22%20%5Cl%20%22_ftnref11%22%20%5Co%20%22) Referred to in the Discussion Paper, 11.105,

Proposal 12-1:

The National Library considers that proposal 12-1, along with the proposed Fair Use provisions, will provide workable solutions to many of the issues of providing access to Orphan Works, and will allow more orphan works to be digitised and made accessible to the public. Digitisation by libraries of more orphan works will provide the opportunity for people associated with a work to see the work online and to provide more information about it, which may lead to attribution of some anonymous works, an outcome which benefits all parties.

Proposal 12-2:

The National Library suggests that proposal 12-2 would benefit from clearer wording in section (b):

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.

At present the wording could be interpreted to mean that works that did not contain clear attributions, such as a letter signed ‘with best wishes – R’, would fall outside the Orphan Work provisions.  Changing (b) from passive to active voice should remove any possible confusion. For instance: ‘as far as reasonably possible, the person making the copy attributed the work to its creator’.

Proposal 12-3:

Proposal supported.

Proposal 13-1:

Proposal 13-2:

Proposal 13-3:

Proposal 14-1:

Proposal supported.

Proposal 14-2:

Proposal supported.

Proposal 14-3:

Proposal 15-1:

Proposal 15-2:

Question 15-1:

Proposal 15-3:

Question 15-2:

Proposal 16-1:

Question 16-1:

Proposal 16-2:

Question 16-2:

Question 16-3:

Proposal 17-1:

The National Library broadly welcomes Proposal 17-1, but has some concern that the narrowing of its application ‘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’ may unintentionally undermine the Fair Use reforms proposed elsewhere in the Discussion Paper.  In Proposal 4-2, the Discussion Paper outlines a ‘non-exhaustive list of illustrative uses or purposes that may qualify as fair uses’. In Proposal 17-1 the Discussion paper selects only some of these illustrative uses for protection against contracting out. The suggestion in 17-1 that some of the illustrative fair uses are more worthy than others is inconsistent with 4-2.

The National Library thus suggests that Proposal 17-1 should read:

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.

  If 17-1 were revised in this way, the proposal would:

* help ensure the consistent application of Exceptions which have been included in the Act for reasons of fairness and public interest
* provide a clearer legal picture than the current uncertainty about the extent to which consumer protection legislation and competition legislation may apply to such contracts.

The practical effect of the proposal will be limited by the fact that, if enacted, the provision would apply only to contracts to which Australian law applies. The National Library has entered into some Australian-law contracts for the supply of electronic resources, and can provide copies of these contracts to the ALRC on request. The limitations imposed by these contracts range from a blanket restriction on supply to anyone outside the National Library, to restrictions which focus on the number of articles supplied to any one requester or on the purpose (e.g. permitted for research or study, but not for criticism or review).

Despite the limited immediate practical effect, the National Library supports Proposal 17-1, with the amended wording as suggested above.

Additional comments?:

The National Library welcomes the ALRC Discussion Paper. In examining the proposals, the Library has found the ALRC's overall approach to be well balanced, objective and thoroughly-researched.

The National Library welcomes the Discussion Paper's helpful comments on the Library's Whole Domain Harvest.

In addition to our comments on specific issues, the National Library of Australia endorses the submission of the ALCC/ADA (Australian Libraries Copyright Committee/Australian Digital Alliance).

File 1:

File 2: