



Australian Government

Department of Communications and the Arts

Copyright modernisation consultation paper

March 2018

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Introduction

Context and scope for this consultation

2018 marks 50 years since the passage of the *Copyright Act 1968* (the Copyright Act). Copyright continues to play an important role in Australian markets and communities. In particular, the Copyright Act provides legal rights to copyright owners and balances this with public need to access copyright materials.

In recent years, the Copyright Law Review Committee (CLRC), Australian Law Reform Commission (ALRC) and the Productivity Commission (PC) have reviewed several copyright issues in depth.

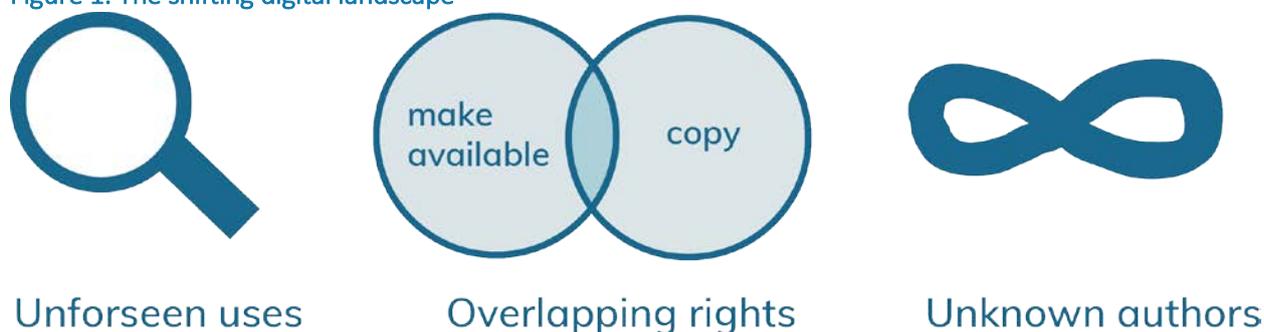
This paper begins the Department's consultation on reform options, following the Australian Government's response to the Final report of the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements (PC report).¹ It asks for views on three areas of the Copyright Act that may benefit from modernisation:

- flexible exceptions, which need to adapt over time to provide access to copyright material in special cases as they emerge
- contracting out of exceptions, which can reduce access to copyright material for users
- access to orphan works, which exist when copyright owners can't be found and users lose access to copyright materials.

As the world becomes more digital, it is easier to make, distribute and consume content—often in ways not foreshadowed in the analogue world. In the past, uses of copyright material often only triggered a single right under copyright. Now, making content available digitally involves exercising multiple overlapping copyrights including the rights to reproduce, communicate, and make available to the public.

The ease of access and creating in the digital world also amplifies existing policy issues in copyright. For example, in the analogue world it can be difficult in some cases to seek permission to use material. In the digital world, seeking permission can be even more difficult when information about the copyright owner is unreliable. Photos and text are often posted quickly, without full information about the copyright owner. When sharing content online, any metadata about the owner is often detached or replaced. This leaves many copyright works orphaned, and separated from their owners. Digital creation and reuse also creates other challenges for copyright owners seeking control, institutions and intermediaries building new business models, and copyright users seeking access.

Figure 1: The shifting digital landscape



In proposing a way forward for reform, the Department of Communications and the Arts (the Department) recognises copyright's role as part of a wider intellectual property system that is:

- **effective**—The system should be effective in encouraging additional ideas and in providing incentives that ensure knowledge is disseminated through the economy and community.
- **efficient**—The system should provide incentives for IP to be created at the lowest cost to society.
- **adaptable**—The system should adapt to changes in economic conditions, technology, markets and costs of innovating.
- **accountable**—The policies and institutions that govern the system, and the way that changes are made to them, need to be evidence-based, transparent, and reflect community values.²

Figure 2: Modernisation in the context of recent reforms



As the government's response to the PC report recognised, it is important to balance 'the interests of innovators, investors and creators with the health, economic and social welfare of consumers and Australian society as a whole.'³ Because the options are not unique to Australia, the Department welcomes insights from abroad as well as from Australia.

The government is mindful that any reforms need to comply with international, bilateral and multilateral obligations. For example, any additional exceptions would need to comply with the Berne three-step test.⁴

The issues discussed in this paper complement the issues raised in the Department's disability access and Copyright Regulations projects completed in 2017. They also complement the Department's Review of Code of Conduct for Copyright Collecting Societies and ongoing work on safe harbour reform.⁵

Consultation process

The Department is seeking views from stakeholders on the reform options and questions put forward in this paper, as well as more general responses. The Department also welcomes single, consolidated submissions from organisations or parties, capturing all views on all relevant reform options.

Please send questions about the submission process to: copyright.consultation@communications.gov.au.

The Department invites submissions by **5.00 pm AEST on Monday 4 June 2018**. Submissions may be lodged in the following ways:

Website www.communications.gov.au/have-your-say

Email copyright.consultation@communications.gov.au



Post The Director, Copyright Law Section
 Department of Communications and the Arts
 GPO Box 2154
 Canberra ACT 2601.

Submissions should include your name, organisation (if relevant) and contact details. The Department will not consider submissions without verifiable contact details.

Submissions will be treated as non-confidential information, and can be made publicly available on the Department's website, unless a respondent specifically requests its submission, or a part of its submission, is kept confidential, and provides acceptable reasons. An email disclaimer asserting confidentiality is not sufficient.

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Next steps

From April, the Department intends to meet with copyright stakeholder groups, such as peak bodies and their members, and will arrange these meetings shortly.

The Department will hold a series of roundtables on specific reform issues in late April through to the middle of May, which multiple stakeholder groups can attend. This provides an extra opportunity to identify different perspectives on these issues and find common ground. The Department expects to contact stakeholder groups with details of these roundtables in April.

This consultation will establish whether there is general support for any of the proposed copyright reform options. After consultation, the Department will advise the government on the issues covered in this paper.



Questions

Flexible exceptions

Question 1

To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

Question 2

What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums.

Contracting out of exceptions

Question 3

Which current and proposed copyright exceptions should be protected against contracting out?

Question 4

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions?
- all copyright exceptions?

Access to orphan works

Question 5

To what extent do you support each option and why?

- statutory exception
- limitation of remedies
- a combination of the above.



Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use.

Question 7

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?



Flexible exceptions

What are exceptions?

The Copyright Act grants copyright owners a number of exclusive rights to their material, and they usually have to provide permission for its use. However, there are limitations to these exclusive rights, such as a fixed duration of copyright protection.

Exceptions complement limitations by recognising particular uses which should not infringe copyright.⁶ Exceptions help balance the exclusive rights of copyright owners with the needs of the public to have access to copyright materials in certain circumstances.⁷

The exceptions framework in the Copyright Act consists of the fair dealing regime (codified from case law), exceptions for special cases such as library and archiving uses, and other exceptions for using certain copyright material in certain ways.

What is the policy problem?

Without flexible exceptions, certain copyright material could not be used to achieve some fundamental community activities and outcomes. The current fair dealing regime already recognises a range of such activities and outcomes including:

- criticism or review
- parody or satire
- reporting news
- research or study
- giving professional advice
- disability access.

Without the continued evolution of exceptions, copyright law may fail to ensure that emerging activities and outcomes resulting from changing community, technology and business standards can be achieved. Acknowledging this, copyright exceptions have been proposed, added and amended over time.

What are the reform options?

To ensure Australia's copyright exceptions framework is effective, efficient, adaptable and balanced, the government is considering the following potential options:

- additional fair dealing exceptions for new specific purposes
- a fair use copyright exception.

Option 1—Additional fair dealing exceptions

This option would add one or more exceptions so that fair dealings for additional prescribed purposes would not infringe copyright.

When the Copyright Act was first enacted, it contained only three original fair dealing exceptions used in the United Kingdom (UK) for 'research or private study', 'criticism or review' and 'reporting news'. The fair dealing regime in Australia has since evolved to reflect changing technology, community activities and international standards and multilateral treaties. As Figure 3 outlines, there is a statutory precedent for expanding the fair dealing provisions over time in Australia. However, it also illustrates that the evolution of the fair dealing regime may not be keeping pace with the exponential rate of change in contemporary society.



Figure 3: The evolution fair dealing exceptions in Australia



The option to introduce additional fair dealing exceptions tackles problems raised by stakeholders, including in submissions to the ALRC and PC. The Department is consulting on the following additional prescribed purposes that respond to those problems:

- **Quotation**—existing fair dealing exceptions do not explicitly cover all quotations of copyright material.⁸ The evolution of the ‘substantial part’ test for copyright infringement also contributes to the need for clarity around the use of quotations.
- **Non-commercial private use**—the existing ‘time and format shifting’ copyright exceptions do not adequately capture all potential non-commercial private uses.⁹
- **Incidental or technical use**—certain uses of copyright material such as through indexing or caching is required as part of the normal operations of many online service providers.¹⁰
- **Text and data mining**—the ability to extract value from data is an increasingly important feature of the digital economy.¹¹
- **Library and archive use**—the current ‘document supply’ and inter-library loan exceptions for libraries and archives are too prescriptive, outdated and not technology-neutral.¹²
- **Certain educational uses**—educational institutions sometimes can’t use the current exceptions, particularly fair dealing for research or study, despite the advent of new digital technologies and teaching practices.¹³
- **Certain government uses**—certain government uses that are of a ‘public interest nature’, and ‘not commercially available’.¹⁴ This may include use for public inquiries, uses where a statute requires public access and use of material sent to governments in the course of public business.¹⁵

There are two ways to add fair dealing exceptions. One is adding them in the Copyright Act. This has been the typical process in Australia, the UK and other countries. A second is amending the Copyright Act so the Minister can add (and later amend and remove) fair dealings exceptions to the Copyright Regulations. The Minister would need to consult on proposed exceptions, have regard to consultations when making the exceptions, and regularly review them. These exceptions would be disallowable.



Option 2—A fair use copyright exception

What is fair use?

The doctrine of ‘fair use’ is an exception to copyright infringement if the use of the copyright material is deemed ‘fair’. In the United States (US) and certain other jurisdictions, the ‘fairness factors’ to be considered when seeking a fair use exemption are the:

- purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes
- nature of the copyrighted work
- amount and substantiality of the portion used in relation to the copyrighted work as a whole
- effect of the use upon the potential market for or value of the copyrighted work.

In the US, the fair use provision also sets out certain illustrative uses that may be deemed fair, including criticism, comment, news reporting, teaching, scholarship or research. However, these uses are not presumptively fair use and other uses may still be considered fair.

This option would require legislative amendments to the Copyright Act to introduce an open-ended ‘fair use’ copyright exception. This exception would adopt the fairness factors as used in the research and study fair dealing, which are:

- the purpose and character of the dealing
- the nature of the work or adaptation
- the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price
- the effect of the dealing upon the potential market for, or value of, the work or adaptation
- in a case where part only of the work or adaptation is reproduced, the amount and substantiality of the part copied in relation to the whole work or adaptation.

This option would also introduce specific illustrative purposes that assist with the interpretation of the four ‘fairness factors’. These purposes would mirror the existing purposes for fair dealing and the additional purposes specified under ‘Option 1—Additional fair dealing exceptions’. These factors are:

- criticism or review (existing)
- parody or satire (existing)
- reporting news (existing)
- research or study (existing)
- giving professional advice (existing)
- disability access (existing)
- quotation (additional)
- non-commercial private use (additional)
- incidental or technical use (additional)
- text and data mining (additional)
- library and archive use (additional)
- certain educational uses (additional)
- certain government uses (additional).

In other jurisdictions such as the US, fair use operates within a broader copyright exceptions framework. Importantly, the existence of fair use does not negate the operation of other definite copyright exceptions.



Comparison of options and the role of case law

Fair use in the US originated in case law before it was written into the *Copyright Act 1976* (US). Case law in the US continues to play an important role in informing the boundaries of fair use through appropriate consideration of the statutory fairness factors.

Case law also plays an important role in Australia and other jurisdictions such as the UK in the interpretation of 'fair dealing' for certain prescribed purposes. The 'fairness factors' established through judicial interpretation are often termed 'common law fairness factors'.

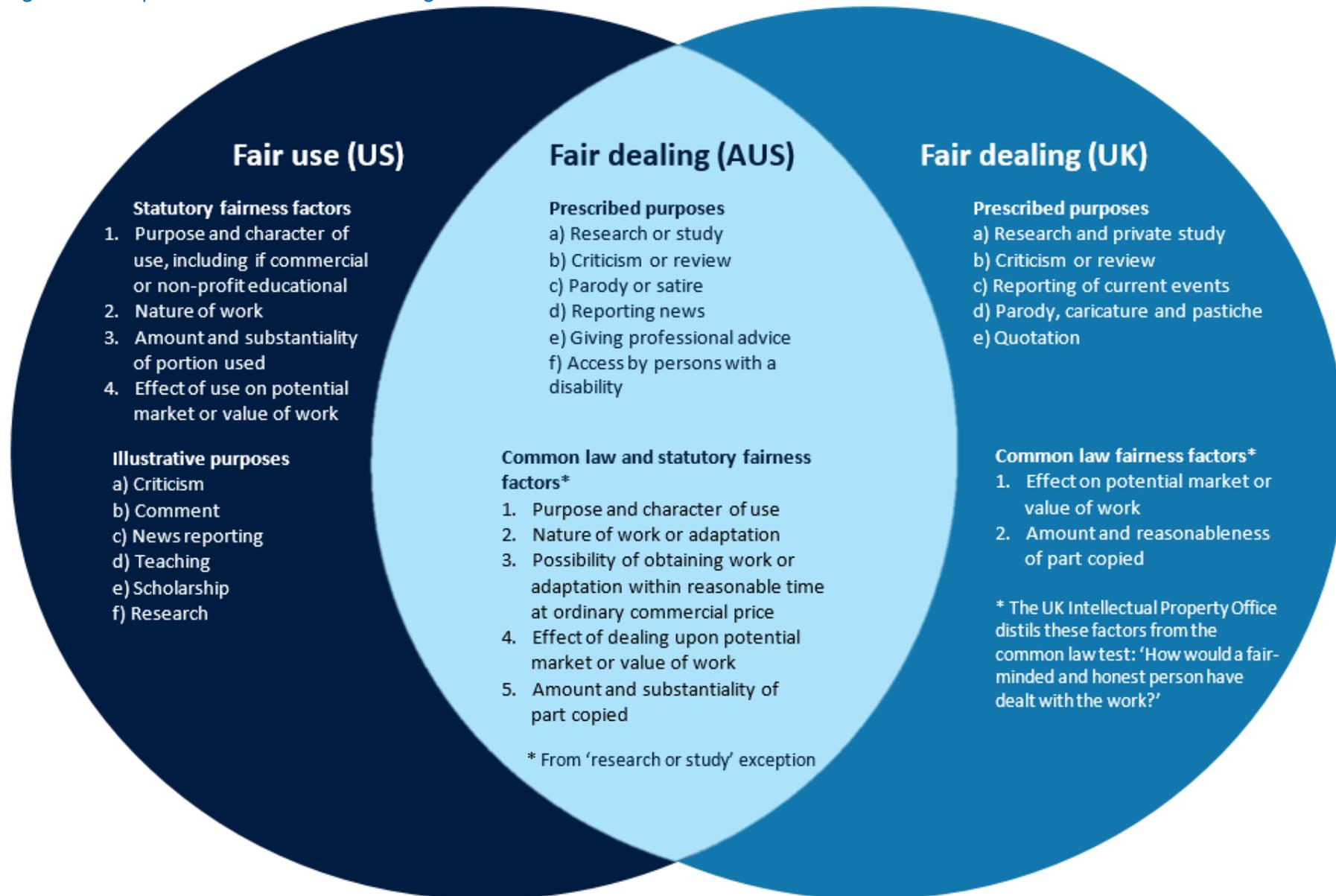
Figure 4 below sets out a brief comparison between the fair use and fair dealing regimes in the US, UK and Australia including the role of illustrative and prescribed purposes and statutory and common law fairness factors.

Illustrative purposes

As highlighted above, the fair use provision in the US Copyright Act contains six purposes that may be considered fair use. These purposes are, by definition illustrative. No particular use will always be deemed 'fair use' and each must be assessed on a case-by-case basis, considering the fairness factors.¹⁶ This approach has some similarities to fair dealing, where courts and users must also consider whether a certain use falls within one of the prescribed purposes and is fair on a case-by-case basis.



Figure 4: A comparison of fair use and fair dealing



What have previous reviews said about fair use versus additional fair dealing exceptions?

Option	Summary	What has been said
Additional fair dealing exceptions	Add additional exceptions to the existing fair dealing exceptions in the Copyright Act.	<p>This option preserves the integrity of the existing prescriptive fair dealing exceptions framework while acknowledging that additional exceptions may be required for certain new socially useful purposes.</p> <p>The ALRC recommended in the first instance, that a broad 'fair use' copyright exception be introduced in Australia. However, the ALRC recommended, that if 'fair use' is not adopted then a new 'fair dealing' exception that consolidates the existing fair dealing exceptions and provides that fair dealings for certain new purposes do not infringe copyright' should be introduced.¹⁷</p> <p>The PC recommended the introduction of 'fair use' and did not propose an alternative system of exceptions.</p> <p>The government has stated that it intends to create a modernised copyright exceptions framework that keeps pace with technological advances and is flexible to adapt to future changes.¹⁸</p> <p>The addition of fair dealing exceptions for certain new purposes is one potential option to address the policy problem.</p>
Fair use	Replace the fair dealing exceptions framework in the Copyright Act with a broad 'fair use' principles-based copyright exception.	<p>The crucial difference with the existing fair dealing framework is that fair use would not be confined to a limited set of prescribed purposes.</p> <p>Both the ALRC and the PC recommended that fair use be introduced in Australia.</p> <p>The ALRC argued that 'fair use builds on Australia's current fair dealing exceptions, retaining the focus on fairness but removing limitations to a particular type of use and clarifies that certain factors should be considered when assessing whether any type of use is fair'.¹⁹ The ALRC recommended including 12 'illustrative purposes' as examples of what may be considered fair use.</p> <p>The PC argued that 'fair use affords greater flexibility including to new and innovative copyright-dependent industries, provided those uses meet the fairness factors'.²⁰</p> <p>The government has stated that 'there are arguments that Australia's current exceptions for fair dealing are restrictive when compared with international counterparts and may not permit some reasonable fair uses of copyright material. However, this is a complex issue and there are different approaches available to address it'.²¹</p>



Questions

Acknowledging that stakeholders hold polarised views on some recommendations made by the PC, the following questions are provided for consultation on options for flexible copyright exceptions.

Question 1

To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

Question 2

What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums.
- Contracting out of exceptions.

Contracting out

What is the policy problem?

Contracting out can sometimes prevent copyright exceptions from operating as intended. Contracting out occurs when contracts include terms that may make copyright users less able to rely on copyright exceptions. For example, a contract might state that the buyer of computer software may make no copies of that software, even though there is an exception that enables that buyer to make a back-up copy.²² This is particularly a problem when a copyright exception represents a public interest that is intended to prevail in each case, such as access to works for people with disability.

The government recognises it is desirable to have the freedom to enter into a contract that allows parties to fine-tune the application of laws including copyright laws.²³ However, when parties 'contract out' of copyright exceptions, this can prevent users from making parody or satire, critiquing and reviewing or operating libraries and archives, among other uses represented by exceptions. The ALRC has described this as 'a collision between two legal principles: statutory rights reflecting public policy ... and freedom of contract'.²⁴

The Copyright Act already recognises the need to address contracting out in the context of reproduction of computer programs.²⁵ However, it currently contains no other provisions that prevent agreements excluding or limiting the operation of exceptions. The government is aware of concerns about contracting out in other contexts. Often individuals and organisations take a risk-averse approach when choosing between copyright exceptions that are not specific to the use at hand, and contract terms that explicitly set out restricted or prohibited uses.

Other areas of the law already recognise the need to address contracting out. These include Australian Consumer Law,²⁶ the National Employment Standards²⁷ and residential tenancy conditions.²⁸ These prohibitions on contracting out safeguard consumer, employee and tenant protections against private interests.²⁹ These examples provide a precedent for limiting contracting out of copyright exceptions.³⁰



The government recognises options to address the problem of contracting out are likely to be limited due to the enforceability of Australian contract terms in Australian agreements. Agreements are increasingly transacted across national borders, particularly in relation to copyright content delivered in digital formats (such as e-journals). This raises questions about whether an Australian court has jurisdiction to hear a dispute over the enforceability of some contractual restrictions. The CLRC found that where the laws of a foreign country govern agreements, remedies available under Australian law may be of limited relevance.³¹ As such, the CLRC noted any resolution of contractual conflicts regarding jurisdiction, applicable law and enforcement, need to be resolved internationally, via bilateral or multilateral agreements with foreign states.

The Department also recognises that Technological Protection Measures (TPMs) that control access to copyright works can also prevent copyright exceptions operating as intended. Such TPMs are technical locks that copyright owners use to control access to digital copies of copyright material. As the ALRC noted, 'there may be little point in restricting contracting out of exceptions if TPMs can be used unilaterally by copyright owners to achieve the same effect'.³² The Department notes some exceptions to access control TPMs exist and is considering whether further exceptions are required after this consultation.

What are the reform options?

The Department proposes two options for consultation, which would amend the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions
- all copyright exceptions.

Option 1—Make unenforceable contracting out of only prescribed purpose copyright exceptions

This option would amend the Copyright Act to make unenforceable any part of an agreement or contract restricting or preventing a use of copyright material that is permitted by any prescribed purpose copyright exception.

It would provide copyright users with more predictable copyright exceptions when explicit contract terms appear to conflict with specific copyright exceptions in the Copyright Act. This option would apply to prescribed purpose copyright exceptions, including any fair dealing purposes or any fair use illustrative purposes.³³

It would address many scenarios where contract terms entered into through a formal contract can stop individuals and organisations relying on copyright exceptions, including:

- libraries and archives wishing to supply documents to their users³⁴
- music consumers wanting to transfer legally acquired music to other devices for private and domestic use³⁵
- universities wishing to use content from journals in course packs or use online video content for uses other than 'personal use'³⁶
- consumers of software seeking to make back-up copies.

This option is intended to have a targeted impact. The rest of the contract would bind the parties to the extent it is capable of operating without the part that restricts or prevents use of certain copyright exceptions.



Option 2—Make unenforceable contracting out of all copyright exceptions

This option would amend the Copyright Act to make unenforceable any part of an agreement or contract restricting or preventing a use of copyright material that is permitted by any copyright exception. In effect, it would extend Option 1 to include all exceptions, not only prescribed purpose copyright exceptions.

This is only a relevant option if a fair use replaces the existing fair dealing exceptions (one of the options discussed in the previous chapter on ‘Flexible exceptions’).

This option would apply to all copyright exceptions, including the prescribed purpose exceptions included in Option 1 and also any fair use exceptions beyond illustrative purposes.

Under this option, a part of an agreement or a contract that conflicts with fair use, including fair uses that are unforeseeable at the time of the contract, would be unenforceable.

What have previous reviews said about contracting out of exceptions?

Option	Summary	What has been said
Make contracting out unenforceable only for prescribed purpose copyright exceptions	Amend the Copyright Act to make unenforceable any part of an agreement or contract restricting or preventing a use of copyright material that is permitted by a prescribed purpose copyright exception.	<p>The PC recommended the government ‘make unenforceable any part of an agreement restricting or preventing use of copyright material that is permitted by a copyright exception’.³⁷ The government supported this recommendation in principle.</p> <p>The ALRC made a more limited recommendation, that such contracting out should only be unenforceable in relation to fair dealing exceptions (including additional fair dealing factors) and specific libraries and archives exceptions.³⁸ This was in line with the CLRC’s earlier recommendation.³⁹</p>
Make contracting out unenforceable for all copyright exceptions	Amend the Copyright Act to make unenforceable any part of an agreement or contract restricting or preventing a use of copyright material that is permitted by any copyright exception.	<p>The PC’s recommendation to make contracting out unenforceable extended to all exceptions. The government supported this recommendation in principle.</p> <p>The ALRC recommended that ‘the Copyright Act should not provide statutory limitations on contracting out of the fair use exception’.⁴⁰ The ALRC noted that ‘limitations on contracting out [of a fair use exception] may have unintended consequences for business models for the distribution of copyright materials’.⁴¹</p>



Why don't competition and consumer laws address contracting out?

Competition and consumer laws may go some way to addressing contracting out, but would leave significant gaps.

For example, the government has supported applying competition law regulation of restrictive trade practices to intellectual property licensing.⁴² In some cases, this might limit contracting out. However, it is not clear that this would adequately address the problem. For example, not all contracting out would rise to the level of restrictive trade practices. More broadly, businesses might prevent consumers accessing copyright material through contracting out without being anticompetitive.

Consumer law currently also makes certain unfair contract terms unenforceable.⁴³ The ALRC and CLRC have found some agreements covered by non-copyright laws are not enforceable if they try to exclude or modify the copyright exceptions. The CLRC noted 'very considerable disincentives to users ever seeking to defend their rights while there are very powerful incentives for copyright owners to seek to enforce what may be objectionable terms'.⁴⁴

Other areas of law that relate to consumer law may also restrict some contracting out. Under contract law, an agreement may lack one or more key elements of a contract, so the agreement including a contracting out provision would be unenforceable. Equitable principles such as unconscionable conduct might also prevent some contracting out.⁴⁵

Questions

The following questions are provided for consultation on options for contracting out of exceptions.

Question 3

Which current and proposed copyright exceptions should be protected against contracting out?

Question 4

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- only prescribed purpose copyright exceptions?
- all copyright exceptions?



Access to orphan works

What is the policy problem?

When copyright owners become unknown or unidentifiable, their works become ‘orphaned’ and users are unable to get a licence or ask for permission to use the material.⁴⁶ Without copyright permission, orphan works remain unused or underused and individuals and society as a whole miss out on the social and cultural benefits that could be gained from accessing orphaned content.

The orphan works problem affects many copyright stakeholders:

- **Cultural and collecting institutions**, such as libraries, archives, galleries and museums, are unable to provide public access to important works. As their collections often comprise older and unpublished materials they face difficulties in both using and providing access to collection materials as required by their statutory remits.⁴⁷
- **Creators and intermediaries**, such as television broadcasters or documentary film-makers, face difficulties using orphaned material in new creations or when providing access to content.
- **Rights holders** miss financial opportunities if they are unaware of renewed interest in using their works.⁴⁸
- **The community at large**, including hobby enthusiasts, can’t re-use copyright material in new works or for personal purposes (such as including an orphaned photo in a published family history).

What are orphan works?

Orphan works can exist for many reasons. Sometimes works are no longer being sold, making it difficult to find or reach owners.⁴⁹ At other times, a writer’s name might not be attached to a letter or book or an artist’s initials or signature might be absent from a painting.

Orphan works are not unique to Australia; as the PC report noted, orphan works are a significant problem around the world.⁵⁰ Orphan works are often a source of frustration and a major gridlock, especially in the digital marketplace. This reduces the efficiency of Australia’s copyright arrangements and increases the regulatory burden on end-users.

A response to the orphan works problem needs to consider:

- Multiple solutions, as one solution may not fit all needs.
- That any solution applies only when the copyright owner genuinely can’t be found, and not when permission can and should be sought.
- Promoting certainty and security for all copyright participants. Users need to know when and in what circumstances orphan works could be used legally (such as when a ‘reasonable diligent search’ has been undertaken; a ‘presumption of orphaning’ has been established; or a ‘notice of intended use’ met). Owners need to know what remedies or restitution is available for the use of copyright, such as adequate compensation, or injunctive relief.
- Minimising transaction costs and reducing unnecessary burdens on users, particularly collecting and cultural institutions for which orphan works are a particular problem.⁵¹



What are the reform options?

Options for facilitating the use of orphan works include:

- statutory exception
- limitation of remedies
- a combination of the above.

These options are based on options proposed in Australia and abroad, and include proposals by the ALRC.⁵²

Option 1—Statutory exception

There is currently no direct exception under the Copyright Act allowing for the use of orphan works, even where a user may have searched extensively but inconclusively for the owner of a work. In many instances copyright materials are underused, particularly for proposed commercial uses of orphan works (for example, including an image in a book or archival footage in a documentary). This is despite the low level of risk that a copyright owner would surface and make a claim for copyright infringement.

This option would involve introducing a direct exception in the Copyright Act for the use of orphan works (whether as a stand-alone exception or as part of a more open-ended exception such as fair use or extended fair dealing).

Direct exceptions

A direct exception would allow for particular uses of orphan works to be prescribed, such as by the type of use (for example, non-commercial use), by the user (such as a specific exception for collecting and cultural institutions and public broadcasters, similar to what is available under the European Union's Orphan Works Directive on Certain Permitted uses of Orphan Works⁵³), or by the particular type of material that has been orphaned.⁵⁴

Such a direct exception could apply to cultural and collecting institutions when they seek to use collection items that meet a statutory presumption of orphaning. The Copyright Regulations (or another instrument) could specify the situations that qualify for this presumption, such as:

- unpublished materials with no known author or creator
- anonymous materials with no authorship or attribution details (including digital content with no identifying metadata)
- material created by government where the agency no longer exists; material in which the corporate copyright owner ceases to exist or has been deregistered
- circumstances where underlying works are orphaned.

Fair use/extended fair dealing

The ALRC noted that some uses of orphan works can be expected to constitute fair use (or a similar open-ended provision such as extended fair dealing), particularly where the use of the work is for an illustrative purpose such as 'quotation', 'research and study', 'reporting the news', 'criticism and review' and use by libraries and archives.⁵⁵ The ALRC also considered that fair use was well suited to the needs of cultural institutions, especially when they are digitising or providing access to orphan works for non-commercial purposes.⁵⁶

In terms of a commercial use of an orphan work, the ALRC also noted that while it may be unlikely to meet the fairness factors, the 'purpose and character of the use' also needs to be weighed against other factors such as whether the use is transformative and harms the market for the rights holder, so in



some cases an extended fair dealing/fair use model could be relied on for the use of older orphan works or out-of-commerce works.

Option 2—Limitation of remedies

This option would amend the Copyright Act to limit the remedies available in an action for copyright infringement, provided that a user has conducted a reasonably diligent search.⁵⁷ It would shield potential users from having to pay potentially exorbitant fees to a copyright owner who subsequently appeared and took legal action.

The PC recommended this option, and the government supported it in its response to the PC report. This option also has strong support from libraries, archives and cultural institutions, that consider it would provide a more efficient and effective way of using public works. It would 'unlock' value in cultural institutions collections and provide access to help fulfil their statutory mandates.

The ALRC also noted that many stakeholders, including some rights holders, support this option as a workable solution but raise concerns about the details.⁵⁸ Some rights owners have argued that the option should require users to provide prior notice of their proposed use of an orphan work, such as via a register of orphan works, and that owners should be able to refuse use of material or require payment of a reasonable licence fee or form of compensation.⁵⁹ Other rights holders argue that many users of orphan works are unlikely to face a claim for infringement (because of the age or type of the material) and that there are already adequate limitations on available remedies.⁶⁰ The ALRC also noted that introducing a limitation of remedies would not be new to Australian law, as damages are usually not awarded when a plaintiff was not aware and had no reasonable grounds for suspecting they had infringed copyright.⁶¹

Option 3—A combination of options 1 and 2

This proposed solution would provide for a direct exception for non-commercial use by collecting and cultural institutions alongside a limitation of liability for copyright infringement for all other uses, provided that a reasonably diligent search has been undertaken. It is a multi-pronged approach to the orphan works problem and is, in effect, a combination of options 1 and 2.

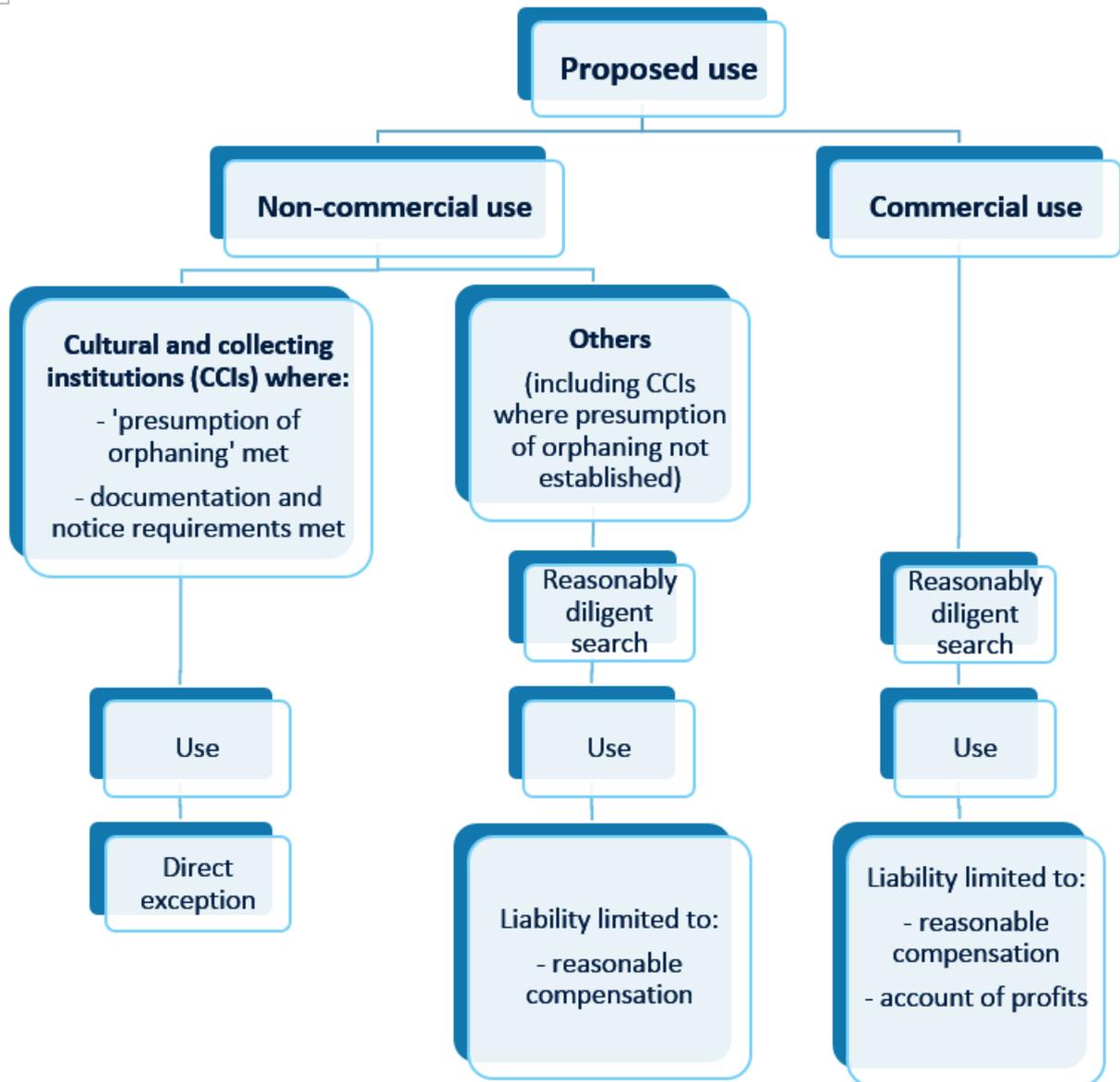
Figure 5 outlines how the model is based on considerations of the proposed use, the user and the nature of the orphaned material. Cultural and collecting institutions that can demonstrate a work should be presumed orphaned would not need to undertake a reasonably diligent search before use. For other non-commercial uses, a reasonably diligent search would reduce liability for an infringing use to 'reasonable compensation'.

While 'reasonable compensation' is not an existing remedy in the Copyright Act, the Department expects it would typically be similar to a standard licence fee and lower than damages or additional damages. For commercial uses, a reasonably diligent search could reduce liability for use to an account of profits (if profits were actually made) and a general requirement for the payment of 'reasonable compensation'.

Under this model, damages or additional damages would not be available remedies for copyright infringement of orphan works. This would apply even for commercial uses of orphan works, as a reasonably diligent search reduces the flagrancy of the infringement and the need for a court to be concerned with the nature of the infringing conduct. This model also recognises that injunctions are often unsuitable, especially for commercial or widely distributed works (such as a book or a documentary film), as it could trigger the costly removal of an orphan work from a new work or defer the release of the new work.



Figure 5: Combined model for limiting liability based on diligent search



What have previous reviews said about access to orphan works?

Option	Summary	What has been said
Limitation of remedies	This would involve amending the Copyright Act to limit the remedies available for copyright infringement provided that a user has conducted a reasonably diligent search and attributed the creator of the work, where known.	<p>The ALRC⁶² and PC⁶³ endorsed this approach, which was first formulated by the US Copyright Office in its Orphan Works Report 2006. The ALRC considered that limiting remedies would also provide some measure of certainty to users beyond 'fair use' as a proposed solution to the orphan works problem.⁶⁴ The ALRC also made the following comments on aspects of a reasonably diligent search:</p> <ul style="list-style-type: none"> • Rather than prescribe what constitutes such a search, the Copyright Act could simply provide guidance on the factors that could be considered in establishing a reasonably diligent search⁶⁵ • Possible avenues for limiting remedies where a reasonably diligent search has been conducted, could include: a financial limitation on damages (such as reasonable compensation or a cap on damages); or limiting available remedies to an account of profits or injunctive relief in lieu of damages.
Statutory exception	The use of orphan works could be authorised through a stand-alone statutory exception or referred to in an additional fair dealing purpose or fair use illustrative purpose.	Neither the PC nor the ALRC recommended the introduction of a stand-alone orphan works exception. However, the PC noted and supported the ALRC's comments that fair use provides an appropriate mechanism for dealing with orphan and unavailable works, especially by collecting and cultural institutions seeking to make valuable aspects of their collections accessible. ⁶⁶

Why do the other options not work?

The government is aware some stakeholders are of the view that existing exceptions to copyright and other mechanisms already adequately address the orphan works issue.⁶⁷ These mechanisms include:

- existing exceptions or mechanisms
- non-legislative solutions, such as risk management approaches
- centralised or extended collective licensing.

Existing exceptions or mechanisms

In its response to the PC report, the government noted that the *Copyright Amendment (Disability Access and Other Measures) Act 2017* partially resolves the issue of orphan works. It prevents unpublished works from being protected by copyright indefinitely and ensures any orphaned unpublished works enter the public domain over time.⁶⁸



Other mechanisms, such as statutory licences for government⁶⁹ and education⁷⁰ allow for some use of orphan works, as do the fair dealing exceptions⁷¹ and the ‘special cases’ provision under s 200AB.⁷² Miscellaneous exceptions allow for old unpublished works to be published and reproduced in new works.⁷³

However, the government acknowledges each existing mechanism provides only a partial solution to the orphan works problem. For example, fair dealing for research and study requires an individual assessment of the use by the end-user is typically used by clients rather than institutions or organisations themselves. Section 200AB allows educational institutions and libraries and archives to make use of an orphan work. However, this use can’t be for commercial advantage or profit and the exception is not available to external clients of these institutions.⁷⁴

Non-legislative solutions

What are non-legislative solutions for orphan works?

Non-legislative solutions to the orphan works problem include sector-specific guidelines, risk management and risk mitigation strategies. These solutions provide practical guidance in dealing with the orphan works problem, including:

- what ‘reasonable steps’ should be undertaken in searching for copyright owners of orphaned works
- the need for attribution of creators or the copyright owner (where known)
- the types of restitution that should be made available for the creator should they appear (that is, reasonable compensation depending on the use of the orphaned material or injunctive relief to prevent the ongoing or proposed use of the material)⁷⁵
- measures to prevent unauthorised downstream use of orphaned material (such as the use of copyright notices to alert copyright owners).

The Department is aware that collecting and cultural institutions, broadcasters and some organisations already considerably rely on risk management and other non-legislative solutions. For example, the National Film and Sound Archive and the Special Broadcasting Service have published orphan works risk management plans in the form of ‘statements on orphan works’.⁷⁶ Copyright owners have suggested an orphan works register or ‘notice’ as a further non-legislative solution. They have proposed this notice be provided alongside the use of orphaned material or be otherwise published (whether on an institution’s website or more formally, such as in the Government Gazette).⁷⁷

However, collecting and cultural institutions have expressed concerns that guidelines provide a short-term solution to an ongoing problem. They would prefer a more certain solution to reduce legal risks, excessive administrative costs, and variability in and across sectors.⁷⁸ They are also concerned that smaller organisations and not-for-profit groups are less able to develop and apply any risk framework than larger national or state-funded institutions.

Despite stakeholder concern that non-legislative solutions do not provide a complete solution to the orphan works problem, a further issue to consider is how these other mechanisms may complement legislative reform to improve effectiveness for government, users and owners of content. For example, how can uniform use of risk mitigation policies assist? And should users of works be required to insure against the risk of a copyright infringement claim?⁷⁹



Centralised or extended collective licensing schemes

Common law countries including the UK and Canada have adopted up-front payments to a collecting society or centralised body. These jurisdictions allow users to apply to an independent body (for example, the UK Intellectual Property Office or the Copyright Board of Canada) for a non-exclusive licence to use an orphan work, after ‘reasonable efforts’ to locate the copyright owner.

In Extended Collective Licensing schemes, a collecting society represents the rights of all copyright owners (including orphan works). This can be done by collecting societies indemnifying copyright users against legal action,⁸⁰ or by statutory licence. Unclaimed monies can be held in trust and distributed broadly to all rights holders or for designated public purposes.

Despite the use of centralised or extended collective licensing in some overseas jurisdictions, the Department does not consider it is a viable solution to the orphan works problem. Both types of licensing schemes have been considered and rejected by a range of previous reviews and there is also a lack of support for these schemes by stakeholders including consumer representatives and cultural and collecting institutions.⁸¹

Centralised or ECL schemes—outcomes of previous reviews

- The ALRC and Attorney-General’s Department Internal Orphan Works Review (2012) noted the inefficiencies and cost of operating centralised licences outweigh the benefits of minimal payments to rights-holders should they appear or be located.⁸²
- The ALRC also noted that broad redistribution of unclaimed monies used in Extended Collective Licensing schemes was inconsistent with the incentive rationale to copyright, to give authors incentive to create new works.⁸³
- The PC did not support licensing schemes as a solution to orphan works. It was concerned that licensing could result in a windfall gain to the rights holder (particularly where creators aren’t actively exploiting their creation), raise the costs to users, and reduce the benefits of enabling access to orphan works.

The Copyright Agency has publicly supported an orphan works solution that enables digitisation of materials by Australian cultural institutions, and has proposed an Extended Collective Licensing style scheme to enable digitisation of ‘orphan works’ by Australia’s cultural institutions. This would involve the Copyright Agency indemnifying any rights holders who may come forward under certain conditions. Cultural institutions would need to follow agreed guidelines (including a requirement to have undertaken a reasonably diligent search). The institution would also need to be a member of the existing statutory licence scheme under s 183A of the Copyright Act, or have been declared to be covered by the scheme under s 183(3).⁸⁴

The government acknowledges cultural and collecting institution concerns that the Copyright Agency’s proposed scheme only provides a partial solution to the orphan works problem. This is because it would only cover the copying and communication of ‘works’ (i.e. text, images and print music) and therefore could not be relied on in relation to orphaned recorded music or audiovisual material. The government welcomes further discussion between the parties to bring them closer to agreeing on a proposed solution, including the option of legislative change in the area.

In seeking to address the unique position of cultural and collecting institutions, the government is also aware of this sector’s concerns that introducing other mechanisms for dealing with orphan works may forego their ability to rely on s 200AB.⁸⁵ For example, while government use of statutory licences could be relied on by many institutions in providing broad-based access to orphan works, albeit for a fee as part of the overall statutory licence.⁸⁶ However, Department consultations with the sector indicate a general reluctance to do so due to a concern about over-reaching s 200AB(6). Section 200AB(6)(b)



provides that the right to rely on s 200AB(1) does not apply where another provision of the Copyright Act could otherwise be relied on to provide that the use would not otherwise infringe copyright.

Questions

The following questions are provided for consultation on options for access to orphan works.

Question 5

To what extent do you support each option and why?

- statutory exception
- limitation of remedies
- a combination of the above.

Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use.

Question 7

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?



The cultural and collecting institutions within the Department's portfolio

The Department has portfolio responsibility for developing policies and delivering programs that encourage excellence in the arts, help to protect Australia's cultural heritage and support public access to and participation in, arts and culture in Australia.

Through this role, the Department is aware of the ongoing concerns raised by federal cultural and collecting institutions within its portfolio (arts portfolio agencies⁸⁷), that they can't fully rely on copyright exceptions to fulfil their functions. The Department is taking the opportunity to outline these concerns in this paper. Importantly, the concerns also point to the potentially limiting effect of copyright law on the ability of publicly funded institutions to effectively function.

The Department notes its arts portfolio agencies share a key concern about the impact of copyright laws on their ability to provide broad-based access to their collections. This includes concerns over exceptions being tied to an institution's physical location, and thus preventing offsite supply of material. At other times, exceptions permit digitisation of content but not providing digitised content to users. Some arts portfolio agencies expend a disproportionate effort on copyright due diligence, especially when identifying and locating authors of works. This can discourage institutions from digitising, promoting or providing access to their collections. As a result, copyright law may inhibit them from adopting modern cultural institution practices and engaging with Australians online. The Department notes that, at least in some cases, better online access would involve non-commercial use or the use of copyright material with low commercial significance.

These issues appear to exist for national cultural and collecting institutions within and beyond the Department's portfolio. Similar institutions in state and territory portfolios also face similar issues. The chapters dealing with flexible exceptions, contracting out of exceptions and access to orphan works discuss these issues in the context of these institutions.

Specific copyright concerns of the Department's portfolio agencies

Some of the Department's arts portfolio agencies, including the National Library of Australia,⁸⁸ have argued for the introduction of a new fair use copyright exception. If fair use is not enacted, these arts portfolio agencies have requested certain other amendments to the Copyright Act, including:

- adding a fair dealing exception for libraries and archives, which may provide scope for 'off-site access' to be provided to those wishing to use and access certain digitised collections
- expanding the scope of the current fair dealing exception for 'research or study' to include situations where a person has a family connection to the work⁸⁹
- refining the current s 200AB flexible exception for libraries and archives, including by removing existing restrictions on the provision only applying to 'special cases' and where another provision of the Copyright Act could not otherwise be relied on⁹⁰
- broadening the range of libraries to which document supply provisions can apply to libraries outside Australia—this would accommodate the prevalence of overseas Australians seeking access to library material.



References

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- ¹ Australian Government (2017), [Australian Government Response to the Productivity Commission's Inquiry into Intellectual Property Arrangements](#), pg.3
- ² [Ibid](#), pg.6
- ³ [Ibid](#), pg.3
- ⁴ *Berne Convention for the Protection of Literary and Artistic Works*, art 9(2)
- ⁵ See Department of Communications and the Arts (2017), [Review of Code of Conduct for Copyright Collecting Societies](#) and Department of Communications and the Arts (2017), [Reforms to copyright safe harbours scheme](#)
- ⁶ *The Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 13
- ⁷ Department of Communications and the Arts (2016), [A short guide to copyright](#), pg. 15
- ⁸ Australian Law Reform Commission (ALRC, 2013), [Copyright and the Digital Economy](#), pg.228
- ⁹ [Ibid](#), pg.211
- ¹⁰ William Patry (2013), *Patry on Fair Use*, pg.242
- ¹¹ ALRC (2013), [Copyright and the Digital Economy](#), pg.261
- ¹² [Ibid](#), pg.280
- ¹³ [Ibid](#), pg.325
- ¹⁴ [Ibid](#), pg.331
- ¹⁵ [Ibid](#), pg.330
- ¹⁶ Productivity Commission (PC, 2016), [Intellectual Property Arrangements](#), pg.188.
- ¹⁷ [Ibid](#), pg.168
- ¹⁸ Australian Government (2017), [Australian Government Response to the Productivity Commission's Inquiry into Intellectual Property Arrangements](#), pg.7
- ¹⁹ ALRC (2013), [Copyright and the Digital Economy](#), pg.94
- ²⁰ Productivity Commission (PC, 2016), [Intellectual Property Arrangements](#), pg.174
- ²¹ Australian Government (2017), [Australian Government Response to the Productivity Commission's Inquiry into Intellectual Property Arrangements](#), pg.7
- ²² *Copyright Act 1968* (Cth), s 47C
- ²³ ALRC (2013), [Copyright and the Digital Economy](#), pg.445
- ²⁴ [Ibid](#), pg.449
- ²⁵ *Copyright Act 1968* (Cth), s 47H. See also *Copyright Amendment (Computer Programs) Act 1999* (Cth)
- ²⁶ For example, under the Australian consumer law, suppliers and manufacturers can't modify, restrict or exclude consumer guarantee rights provided for under the ACL. See Commonwealth of Australia (2016), [Consumer guarantees: A guide for businesses and legal practitioners](#). See also *Competition and Consumer Act 2010* (Cth) and Commonwealth of Australia (2016), [Unfair contract terms: a guide for businesses and legal practitioners](#).
- ²⁷ Terms in awards, registered agreements and employment contracts can't exclude or provide for an entitlement less than the National Employment Standards, and those that do have no effect. See Fair Work Ombudsman (2017), [Introduction to the National Employment Standards](#).
- ²⁸ [Section 219](#) of the *Residential Tenancies Act 2010* (NSW) prohibits contracting out of that Act (whether purporting to exclude, limit or modify the operation of this Act or the regulations or having the effect of excluding, limiting or modifying the operation of this Act or the regulations). Any such term will be considered void.
- ²⁹ ALRC (2013), [Copyright and the Digital Economy](#), pg.445.
- ³⁰ Which protect important public interest in education, the free flow of information, and freedom of expression. In addition, the library and archives exceptions are clearly for public rather than private purposes and could be easily justified as meeting the 'defined public purpose' rational. PC (2016), [Intellectual Property Arrangements](#), pg.454
- ³¹ Copyright Law Review Committee (CLRC, 2002), [Copyright and Contract](#), pg.199
- ³² ALRC (2013), [Copyright and the Digital Economy](#), pg.457
- ³³ [Ibid](#), pg.144–145. See also [Harper & Row Publishers, Inc. v Nation Enterprises \(1985\) 471 US 539](#), 561
- ³⁴ *Copyright Act 1968* (Cth), s 200AB
- ³⁵ *Copyright Act 1968* (Cth), s 109A
- ³⁶ *Copyright Act 1968* (Cth), pt VB
- ³⁷ Australian Government (2017), [Australian Government Response to the Productivity Commission's Inquiry into Intellectual Property Arrangements](#), pg.4



- ³⁸ ALRC (2013), [Copyright and the Digital Economy](#), pg.18
- ³⁹ CLRC (2002), [Copyright and Contract](#), pg.10
- ⁴⁰ ALRC (2013), [Copyright and the Digital Economy](#), pg.456
- ⁴¹ Ibid, pg.453
- ⁴² The Government supported the PC's recommendation to repeal s 51(3) of the *Competition and Consumer Act 2010* (Competition and Consumer Act). Section 51(3) provides an exception to some of the restrictive trade practices provisions of the Competition and Consumer Act in relation to intellectual property licensing. PC (2016), [Intellectual Property Arrangements](#), pg.457. Australian Government (2017), [Australian Government Response to the Productivity Commission's Inquiry into Intellectual Property Arrangements](#), pg.17
- ⁴³ For example, the Australian Consumer Law provides that terms of standard form consumer contracts (such as contracts issued on a take-it-or leave it basis with no opportunity to negotiate) can be declared to be unfair and therefore void. See *Competition and Consumer Act 2010* (Cth) and Commonwealth of Australia (2016), [Unfair contract terms: a guide for businesses and legal practitioners](#).
- ⁴⁴ CLRC (2002), [Copyright and Contract](#), pg.8
- ⁴⁵ The PC outlined alternative remedies affecting the enforceability of contractual overriding or limiting of exceptions: 1) *Common law*, which provides for invalidity of a contract that lacks proper formation (such as insufficient notice of, or assent to, the terms of online licences) or in cases where the public interest requires it (that is, on the basis that a contract term or policy defeats a statutory public purpose or policy); 2) *Consumer protection legislation*, for example, provisions of the Australian Consumer Law, which proscribe misleading or deceptive conduct and unconscionable conduct in trade or commerce, and unfair contract terms in consumer contracts; 3) *Competition legislation*, such as the s 46 of the *Competition and Consumer Act 2010* (Cth), which prohibits misuse of market power; and 4) *Equitable doctrine of unconscionable conduct*, which involves a party taking advantage of a superior bargaining position (however, the CLRC noted this remedy was most likely to succeed in cases involving severe financial consequences for an individual plaintiff). See PC (2016), [Intellectual Property Arrangements](#), pg.440
- ⁴⁶ The problem of unlocatable or unreachable copyright owners raises similar issues to unknown copyright owner. This problem can be partially dealt with by other copyright mechanisms, such as fair dealing. Limiting the scope of the analysis of the orphan works problem to unknown authors or unavailable works (rather than unlocatable copyright owners) is consistent with the definition of orphan works adopted by the PC. PC (2016), [Intellectual Property Arrangements](#), pg.193
- ⁴⁷ For example, museums have advised that orphan works are virtually invisible to the public, fostering significant gaps in knowledge and inhibiting research. ALRC (2013), [Copyright and the Digital Economy](#), pg.290
- ⁴⁸ Such as where works have been donated to cultural institutions by unrelated third parties. ALRC (2013), [Copyright and the Digital Economy](#), pg.299
- ⁴⁹ PC (2016), [Intellectual Property Arrangements](#), pg.193
- ⁵⁰ Ibid, ALRC (2013), [Copyright and the Digital Economy](#), pg.290. The US Copyright Office has noted that orphan works can inhibit productive and beneficial uses of works merely because the user can't identify and/or locate the owner and therefore can't determine whether, or under what conditions, he or she may make use of the work. US Copyright Office (2015), [Orphan Works and Mass Digitization](#), pg.35
- ⁵¹ This was raised by the ALRC as an important consideration in any reform approach on this issue. ALRC (2013), [Copyright and the Digital Economy](#), pg.296
- ⁵² ALRC (2013), [Copyright and the Digital Economy](#), pg.292
- ⁵³ [Directive 2012/28 of the European Parliament and of the Council of 25 October 2012 on Certain Permitted uses of Orphan Works, art 1\(1\)](#) (EU Directive).
- ⁵⁴ The EU Directive set out how member states can use orphan works, with national legislation to be implemented by 2014. It creates an exception for public cultural institutions—including libraries, museums, public broadcasters and public archives to copy and communicate orphan works—that undertake a diligent search in good faith. PC (2016), [Intellectual Property Arrangements](#), pg.194
- ⁵⁵ ALRC (2013), [Copyright and the Digital Economy](#), pg.300
- ⁵⁶ PC (2016), [Intellectual Property Arrangements](#), pg.197
- ⁵⁷ Australian Government (2017), [Australian Government Response to the Productivity Commission's Inquiry into Intellectual Property Arrangements](#), pg.7
- ⁵⁸ ALRC (2013), [Copyright and the Digital Economy](#), pg.302. See also Arts Law Centre of Australia (2012), [Submission to ALRC Inquiry into Copyright and the Digital Economy](#), Free TV Australia (2012), [Submission to ALRC Inquiry into Copyright and the Digital Economy](#), and Australian Screen Association et al. (2012), [Submission to ALRC Inquiry into Copyright and the Digital Economy](#). Australian Recording Industry Association (2012), [Submission to](#)



[ALRC Inquiry into Copyright and Digital Economy](#), Australian Screen Association et al. (2012), [Submission to ALRC Inquiry into Copyright and the Digital Economy](#), APRA AMCOS (2012), [Submission to ALRC Inquiry into Copyright and the Digital Economy](#).

⁵⁹ PC (2016), [Intellectual Property Arrangements](#), pg.194

⁶⁰ ALRC (2013), [Copyright and the Digital Economy](#), pg.300

⁶¹ APRA AMCOS note that s 115(3) already limits remedies for copyright infringement. This section provides that if at the time of the infringement there was no awareness, or reasonable grounds for suspecting, that the act constituting the infringement was an infringement of the copyright, then an account of profits can be awarded in lieu of damages. APRA AMCOS (2016), [Submission to Productivity Inquiry into Intellectual Property Arrangements](#)

⁶² ALRC (2013), [Copyright and the Digital Economy](#), Recommendation 13–1

⁶³ PC (2016), [Intellectual Property Arrangements](#), Recommendation 6.2

⁶⁴ ALRC (2013), [Copyright and the Digital Economy](#), pg.302

⁶⁵ Including: how and by whom the search was conducted, the search technologies, databases and registers available at the time; and any available guidelines, protocols or industry practices about conducting such a search. ALRC (2013), [Copyright and the Digital Economy](#), Recommendation 13–2

⁶⁶ PC (2016), [Intellectual Property Arrangements](#), pg.196–197

⁶⁷ Arts Law Centre (2016), [Submission to Productivity Commission IP Review](#), pg.10, APRA AMCOS (2016), [Submission to Productivity Commission IP Review](#), pg.9

⁶⁸ New copyright terms will apply to unpublished works from 1 January 2019. For unpublished works where the author has died: if the work is published before 1 January 2019 the term of 70 years after first being made public will apply. For unpublished sound recordings and films: if the material is published before 1 January 2019 the term of 70 years after first being made public will apply. The new copyright duration provisions will only apply to existing copyright material. If copyright in material has expired by 1 January 2019, it will not be revived. These amendments will help to create an incentive for copyright owners to make works public as well as reducing the overall pool of orphaned material over time.

⁶⁹ Section 183A allows for the use of any type of copyright material provided the use is by or for the services of the Commonwealth or a State, provided that reasonable compensation is paid. While scope of ‘for the services of a Commonwealth or State’ is undefined, recent decisions of the High Court decisions have adopted a broad interpretation of this provision. See for example [Copyright Agency Limited v State of New South Wales \[2008\] HCA 35](#), 62, noting that it would extend to use of copyright material in fulfilment of direct statutory obligations (even if they involved a commercial element).

⁷⁰ Educational statutory licences under Division 4 of Part IVA of the Copyright Act allows for educational institutions to copy and communicate ‘works’ so as long as an educational institution agrees to pay ‘equitable remuneration’ to a copyright collecting society. *Copyright Act 1968* (Cth), pt IVA, div 4

⁷¹ The fair dealing exceptions are outlined in the [Flexible Exceptions](#) chapter.

⁷² *Copyright Act 1968* (Cth), s 200AB

⁷³ *Copyright Act 1968* (Cth), ss 51 and 52 allow for some uses of old unpublished material in new works if the material remains unpublished 50 years after the death of the author.

⁷⁴ Collecting and cultural institutions rely on s 200AB for a range of non-commercial uses, including making collection materials available online, in public programs and in exhibitions. Department’s consultations with Copyright in Cultural Institutions group, 25 October 2017 and Australian Libraries Copyright Committee (ALCC), 6 December 2017.

⁷⁵ International Publishers Association (2007), [Joint Press Release - International Publishers and Librarians Agree on Access to Orphan Works](#), National and State Libraries Association in Australia (2011), [Position statement on reasonable search for orphan works](#)

⁷⁶ National Film and Sound Archive, [Statement on Orphan Works](#); Special Broadcasting Service (2011), [SBS Statement on Orphan Works](#)

⁷⁷ Representatives to the ALRC review who focused on the importance of an orphan works or copyright register, including the Australian Copyright Council (2012), [Submission to ALRC Inquiry into Copyright and the Digital Economy](#), Walker Books (2012), [Submission to ALRC Inquiry into Copyright and the Digital Economy](#), and the Australian Broadcasting Corporation (2012), [Submission to ALRC Inquiry into Copyright and the Digital Economy](#). See PC (2016), [Intellectual Property Arrangements](#), pg.308

⁷⁸ Department’s consultations with Copyright in Cultural Institutions group, 25 October 2017 and Australian Libraries Copyright Committee (ALCC), 6 December 2017.

⁷⁹ In many instances, general exclusions apply to any illegal conduct, which would extend to intentional or knowingly infringing copyright.



⁸⁰ Copyright Agency's view is that most, if not all, the relevant cultural institutions can take advantage of the statutory licence for governments: 'the statutory licence for governments allows digitisation of collections [by] libraries and other cultural institutions'. Copyright Agency and Viscopy (2015), [Submission to Productivity Commission Intellectual Property Arrangements Issues Paper](#).

⁸¹ Australian Digital Alliance and Australian Libraries Copyright Committee (2012), [Submission to ALRC Inquiry into Copyright and the Digital Economy](#)

⁸² ALRC (2013), [Copyright and the Digital Economy](#), pg.300

⁸³ [Ibid](#), pg.297

⁸⁴ See note 69

⁸⁵ s 200AB(6) provides that the right to rely on the exception does not apply where another provision of the Copyright Act could otherwise be relied on to provide that the use would not otherwise infringe copyright. *Copyright Act 1968* (Cth), s 200AB(6)

⁸⁶ See note 69

⁸⁷ The Department's arts portfolio agencies include the National Library of Australia, the National Film and Sound Archive, the National Gallery of Australia, the National Portrait Gallery, the Australian National Maritime Museum, the Museum of Australian Democracy and the Bundanon Trust.

⁸⁸ The National Library of Australia endorsed the ALCC's submission. ALCC (2016), [Submission to PC Inquiry into Intellectual Property Arrangements](#)

⁸⁹ A person might establish a family connection if a family member authored a diary where copyright was originally donated to an institution. A person might also establish a family connection if a family member was the subject of an oral history and the rights to the recording were retained by the interviewer.

⁹⁰ *Copyright Act 1968* (Cth), s 200AB(6)(b)

