

**ABC Public Submission
to the Copyright
Modernisation
Consultation Paper
July 2018**



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01

Executive Summary

The Australian Broadcasting Corporation (ABC) **supports** the introduction into the *Copyright Act 1968 (Cth)* of the following **additional fair dealing exceptions** for the purpose of:

- **quotation** – to assist with current affairs reporting and factual content;
- **incidental or technical use**;
- **operating a library, archive or key cultural institution**;
- **governmental or political discussion** – to assist with current affairs reporting and factual content.

Any fair dealing exception for **educational use** and **government use** must preserve the statutory licence that provides remuneration from Screenrights and Copyright Agency Limited to producers of content.

As s200AB is deficient, the ABC supports the **introduction of a specific public broadcaster exception** to ensure the ABC's internal content management activities, which are of no commercial value, do not breach the Act.

The ABC does **not support the introduction of a fair use exception**. Instead the ABC advocates a hybrid model which supports the retention and extension of the current exceptions, statutory licences and fair dealing defences, along with an open ended s200AB exception.

The ABC **recommends** specific changes to the provisions affecting galleries, libraries, archives and key cultural institutions which would **allow the ABC to provide remote access to the ABC's digitised archive for 'research' purposes** to all Australians.

The ABC **supports** the proposal to **prevent** parties from **contracting out** of copyright exceptions and fair dealing provisions.

The ABC supports the introduction of a direct exception or hybrid regime to manage **orphan works** based on a diligent search and reasonable compensation.

02 Introduction

The ABC acknowledges the work of the Department of Communications and the Arts in putting together the Copyright Modernisation Consultation Paper (**Paper**) and welcomes the opportunity to respond to the questions contained in the paper.

The ABC has previously outlined its position on copyright law reform in the following submissions:

- Australian Broadcasting Corporation, Submission to the Productivity Commission Intellectual Property Arrangements Draft Report, June 2016.
- Australian Broadcasting Corporation, Submission No. 775 to the Australian Law Reform Commission, *Copyright and the Digital Economy*, August 2013.
- Australian Broadcasting Corporation, Submission to The Department of the Attorney General, *Fair Use and Other Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age*, July 2005.

This submission should be read in conjunction with those submissions. The ABC does not intend to re-prosecute its position in responding to the questions set out in the Paper. Arguments in support of the ABC's position set out below can be found in these submissions.

03

Flexible Exceptions

Question 1 (i)

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?

1(i).1 Additional Fair Dealing Exceptions

The ABC supports the introduction into the *Copyright Act 1968* (Cth) (the **Act**) of the following additional fair dealing exceptions for the purpose of:

- quotation, but in addition to the retention and modernisation of s45;
- if necessary, incidental or technical use;
- operating a library or archive, or key cultural institution, but only if ss39A, 48-53, and 113G-113M are retained and updated; and
- governmental or political discussion.

Educational Use: The ABC submits that any fair dealing exception for educational use must be subject to and retain the relevant statutory licences in Division 4 – Educational Institutions – Statutory Licence in Part IVA.

Government Use: The ABC submits that any fair dealing exception for government use must retain and be subject to the relevant statutory licence set out in s183. Section 183 should be updated to ensure the declared collecting society can distribute for communication to the public as well as for copying.

This submission speaks from the ABC's own experience where these fair dealing exceptions would counterbalance inequality in bargaining power, promote efficiency and freedom of expression, and encourage innovative uses of copyright material, without unfairly impeding the interests of copyright holders.

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1(i).2 Fair dealing for the purpose of Quotation

The ABC supports a separate fair dealing exception for the purpose of quotation, but in addition to the retention and modernisation of s45 – *Reading or recitation in public or for a broadcast*.

The quotation exception in the *Copyright, Designs and Patents Act 1988* (UK) (**UK CDPA**) provides a useful guide for how a quotation exception could be drafted in Australia. The ABC submits that an Australian quotation exception should not be limited in the scope of its application to ‘works’ only. Rather, by requiring the dealing to be fair and the five fairness factors at ss40 and 103C to be considered before the exception can apply, unfair exploitative quotations of works and other subject matter would be prevented.

We do not advocate amending the existing fair dealing for criticism or review to include quotation.

The ABC supports a model which includes the five fairness factors from ss40 and 103C as follows:

- the purpose and character of the dealing;
- the nature of the work or other subject matter;
- the possibility of obtaining the work or other subject matter 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 other subject matter; and
- in a case where part only of the work or other subject matter is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

The ABC supports a model which relates to all copyright material including audio and audio-visual material. We note the UK provision clearly applies to all types of copyright material. Audio-visual works are not excluded. We acknowledge the existing market for licensing of audio-visual material – so called *clip licensing*. The ABC is both a buyer and seller in this market. However, as a public broadcaster the ABC has a remit to provide services which *inform* under s6 of the *Australian Broadcasting Corporation Act 1983 (Cth)*. In trying to achieve this objective, the ABC has dealt with copyright owners of audio-visual material who would not license excerpts of their material for an ordinary commercial price; and others because they did not wish to participate in public interest, factual programming where the subject matter was in conflict with their own interests. We submit that the five fairness factors would prevent the distortion of the clip licensing market without restraining freedom of expression.

We note that ‘quotation’ is not defined in the UK CDPA. However, we believe the definition of quotation should be defined in order to quarantine its use and to avoid uncertainty. Quotation in the Macquarie Dictionary means:

quotation

noun 1. that which is quoted; a passage quoted from a book, speech, etc.

03 Flexible Exceptions

2. the act or practice of quoting.
3. *Commerce*
 - a. the statement of the current or market price of a commodity or security.
 - b. the price so stated.
4. the statement of the current odds being offered in betting.

quote

verb (quoted, quoting)

–*verb* (t) **1.** to repeat (a passage, etc.) from a book, speech, etc., as the words of another, as by way of authority, illustration, etc.

2. to repeat words from (a book, author, etc.).

3. to bring forward, adduce, or cite.

4. to enclose (words) within quotation marks.

5. *Commerce*

a. to state (a price).

b. to state the current price of.

–*verb* (i) **6.** to make a quotation or quotations, as from a book or author.

–*noun* **7.** a quotation.

8. → **quotation mark.**

9. an estimate of costs given in advance of work being done.

–*phrase* **10.** **quote unquote**, (a formula used in speech to indicate that the words which follow, or have just preceded, would be in quotation marks if written): *his brand of quote unquote comedy.*

© Macquarie Dictionary Publishers, 2017

It is usual practice for the courts to refer to the Australian dictionary for the ordinary and natural meaning of a term. Given the numerous definitions set out above, and their literary bent, for clarity in law the term “quotation” should be defined. We suggest:

“Quotation” means an extract which provides authority or illustrates.

This definition is beyond an application to literary works. It also makes clear that the whole of the work cannot be used. Alternatively, there could be a direction in the text of the legislation which makes it clear it applies to all works, subject matter other than works and performances.

The copyright material ought to have been already made available to the public.

Sufficient acknowledgement of the original work or other subject matter should be required.

We do not support the removal of s45 which is a specific copyright exception for broadcasters. This exception is not subject to a fairness test but is a clear exception to copyright infringement. Please see our recommendations for amendments to this section below at page 14.

03 Flexible Exceptions

1(i).3 Incidental or Technical Use

We consider the scope of ss43A, 43B, 111A and 111B appropriately balances the interests of copyright owners and users in allowing for temporary reproduction of copyright works and other subject matter for technical and incidental use, particularly in that the provisions contemplate temporary reproduction for or on behalf of users and communicators of such work and subject matter.

However, if there are concerns that these provisions are so broad as to permit unintended uses of works and subject matter which would otherwise require authorisation, potentially causing harm to established content sales and licensing markets, then the ABC would support a separate fair dealing exception for the purpose of incidental or technical use, in place of ss43A and 43B, and 111A and 111B, provided such an exception is cast in similar terms to the existing exceptions.

In relation to such a fair dealing the ABC supports a model which:

- relates to all copyright material;
- includes the five fairness factors from ss40 and 103C as follows:
 - the purpose and character of the dealing;
 - the nature of the work or other subject matter;
 - the possibility of obtaining the work or other subject matter 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 other subject matter; and
 - in a case where part only of the work or other subject matter is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

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1(i).4 Library and Archive and Key Cultural Institution Use

The ABC supports a separate fair dealing exception for library and archive and key cultural institution use, but only if ss39A, 48-52 and 113G – 113M are retained and updated:

39A – Infringing copies made on machines installed in libraries and archives

49 – Reproducing and communicating works by libraries and archives for users

50 – Reproducing and communicating works by libraries and archives for other libraries and archives

51 – Reproducing and communicating unpublished works in libraries and archives

52 – Publication of unpublished works kept in libraries and archives

113G – Libraries

113H – Preservation

113J – Research

113K – Administration of Collection

113L – Meaning of Key Cultural Institution

113M – Preservation

Please see pages 13-14 for suggested updates.

The ABC supports a fair dealing model which includes the five fairness factors from ss40 and 103C as follows:

- the purpose and character of the dealing;
- the nature of the work or other subject matter;
- the possibility of obtaining the work or other subject matter 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 other subject matter; and
- in a case where part only of the work or other subject matter is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

The ABC supports a model which relates to all copyright material.

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1(i).5 Governmental and Political Discussion

The ABC supports the introduction of a fair dealing exception for the purpose of governmental and political discussion.

This fair dealing exception would assist current affairs reporters and documentary makers when they are not able to rely on fair dealing for reporting news but the matter relates to governmental or political issues and is in the public interest. It would avoid the situation in *Commonwealth v John Fairfax & Sons Ltd [1980] HCA 44* where material in the public interest was not able to be used under fair dealing for reporting news. This exception would be consistent with the obiter of his Honour, Mason J, in that case; it would also assist the ABC to meet its charter obligation to inform under s6 of the ABC Act.

For the same policy considerations which support the exception for fair dealing for reporting news, this fair dealing exception should not include the five fairness factors.

This exception should relate to all copyright material.

1(i).6 Educational Use

The ABC submits that any fair dealing exception for educational use must be subject to and retain the relevant statutory licences in Division 4 – Educational institutions – Statutory Licence in Part IVA. The educational statutory licence provides the ABC with a significant source of funding for the creation of content. In conjunction with its co-production partners, the ABC and the production sector rely on the income stream from this statutory licence to finance content and the businesses of independent producers.

1(i).7 Government Use

The ABC submits that any fair dealing exception for government use must retain and be subject to the relevant statutory licence set out in s183. This is a significant source of income for the ABC.

Section 183 should also be updated to be technology neutral and flexible to ensure the declared collecting society can distribute for communication to the public as well as for copying.

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Question 1 (ii)

To what extent do you support introducing a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

The ABC does not support a 'fair use' exception. See:

Australian Broadcasting Corporation, Submission No. 775 to the Australian Law Reform Commission, *Copyright and the Digital Economy*, August 2013.

The ABC does not propose that the fair dealing provisions and free exceptions should be abolished in favour of fair use.

The ABC considers a hybrid model simplifies and future proofs the Act. That is, a model where specific fair dealing and free exceptions are articulated, but where there is also a residual open ended exception for developing uses of copyright material where the use does not conflict with the normal exploitation of the material and does not unreasonably prejudice the legitimate interests of the copyright owner.

This exception might take the form of s200AB which meets the three step test, but drafted without limiting its use to libraries and archives and educational institutions. If it were open-ended this might allow the law to adapt to developed practices which do not unfairly interfere with copyright holders' interests, and provide flexibility within the Act.

The ABC does not believe this new exception should replace all or some existing exceptions.

For further discussion on section 200AB please see below at page 11.

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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.

2 Section 200AB

Section 200AB provides a flexible exception for “special case” uses of copyright material that is consistent with Australia’s obligations under international treaties.

In practice, s200AB remains untested in Australia. Section 200AB appears to be viewed as having a reasonably narrow application, and there is a general reluctance to rely on it. See:

Weatherall, Kimberlee, ‘Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia’s Recent Copyright Reforms’, Melbourne University Law Review, Vol 31, 2007, 967. Hudson, Emily and Kenyon, Andrew T, ‘Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives’, University of New South Wales Law Journal, Volume 30(1), 12. Hudson, Emily, ‘Implementing Fair use in Copyright Law: Lessons in Australia’, Intellectual Property Journal, Vol 25(3), November 2013, 201. Hudson, Emily, ‘Fair use and section 200ABC: What Overseas Experience Teaches Us About Australian Copyright Law’, VALA 2010 Conference Paper.

In our view s200AB could not be relied on by the ABC to digitise collections which might assist the ABC providing content to its audiences. It seems clear it is only available for one off uses, and not available for use across a collection. The Explanatory Memorandum to this provision anticipates that it would not permit copying on a grand quantitative scale. It said the provision:

is intended to enure (sic) that the use is narrow in a quantitative as well as qualitative sense.

Copyright Amendment Bill 2006 (Cth) Explanatory Memorandum at 110

Given this narrow application, the ABC would prefer an express public broadcaster exception as set out below. This is because in managing its collection of content, the ABC has to handle copyright material in great volumes and not individual pieces of copyright. The ABC is simply not resourced to do this assessment on a case by case basis given the volume of copyright it manages daily.

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2 Public Broadcaster Exception

To ensure the ABC's internal program management activities do not technically breach copyright, the ABC proposes the following exception to copyright infringement:

Copyright is not infringed by the making or use by the Australian Broadcasting Corporation, for the purpose of maintaining supervision and control over works and other subject matter broadcast or communicated to the public by the Australian Broadcasting Corporation.

This is modelled on the equivalent BBC exception under s69 of the UK CDPA, which provides:

69 Recording for purposes of supervision and control of broadcasts and other services.

Copyright is not infringed by the making or use by the British Broadcasting Corporation, for the purpose of maintaining supervision and control over programmes broadcast by them or included in any on-demand programme service provided by them, of recordings of those programmes.

3 Specific Exceptions Relating to Libraries, Galleries, Archives and Museums

If the provisions relating to libraries, archives and key cultural institutions are to be maintained in Part IVA Division 3 Libraries and Archives, which the ABC believes they should be, then the ABC advocates the following changes which would provide the same library and archives provisions to the ABC's collections as a key cultural institution.

A more significant issue for the ABC is the ability of cultural institutions to provide wider access to their archives. As the fundamental purpose of archives is to ensure the continued availability of the cultural and historical works that they contain, it is important that legitimate users of archives be able to search and browse their contents. In an age of networked communications, it is not only possible to make digital archives available for searching and browsing remotely, but users are likely to increasingly request or expect to be able to do so.

The ABC would like to provide public access to its digitised archives. Not having a digital archive that is searchable by remote users is a lost opportunity for potential re-use and limits the ABC's role as a unique cultural repository.

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Proposal

First Position:

We recommend:

- Renaming Division 3 as – ‘Division 3 – Libraries and archives and Key Cultural Institutions’.
- Removing the heading ‘Subdivision A – Public libraries, parliamentary libraries and archives’.
- Replacing the expression ‘library or archives’ where it appears in sections 113H and 113J and 113K, with ‘library or archives or Key Cultural Institution’.
- Removing the heading ‘Subdivision B – Key cultural institutions’.
- Amending the definition of ‘key cultural institution’ to remove circularity as follows:

S113L Meaning of key cultural institution

A ~~library or archives~~ body is a key cultural institution for the purposes of this Act if ~~the body administering it:~~

(a) it has, under a law of the Commonwealth or a State or Territory, the function of developing and maintaining the collection comprising the library or archives; or

(b) it is prescribed by the regulations for the purposes of this paragraph.

- Deleting section 113M.
- To permit remote browsing for the purpose of research, we submit the words in section 113J should be changed as marked up below:

113J Research

(1) An authorized officer of a library or archives or Key Cultural Institution does not infringe copyright in copyright material by using the material if:

(a) the material forms part of the collection comprising the library or archives or Key Cultural Institution; and

(b) the library or archives or Key Cultural Institution holds the material in original form; and

(c) the use is for the purpose of research carried out at that or another library or archives or Key Cultural Institution, or at another location via an online service provided by that library or archives or Key Cultural Institution.

(2) An authorized officer of a library or archives or Key Cultural Institution does not infringe copyright in copyright material (the **research copy**) by making the research copy available to be accessed at the library or archives or Key Cultural Institution if:

03 Flexible Exceptions

(a) subsection (1) applied to the making of the research copy because it was done for the purpose of research carried out at the library or archives or Key Cultural Institution, or at another location via an online service provided by that library or archives or Key Cultural Institution; and

(b) the research copy is in electronic form; and

(c) the body administering the library or archives or Key Cultural Institution takes reasonable steps to ensure that a person who accesses the research copy at the library or archives or Key Cultural Institution, or at another location via an online service provided by that library or archives or Key Cultural Institution does not infringe copyright in the research copy.

Second position:

If the above proposal is not acceptable, we submit that a new s113N be included to add a similar *Research* provision for Key Cultural Institutions on the same basis as s113J, and then amended to permit remote online access.

Other Recommended Amendments to the Library and Archive Provisions

Additionally, we submit that the following provisions be amended to reference Key Cultural Institutions:

39A – *Infringing copies made on machines installed in libraries and archives*

49 – *Reproducing and communicating works by libraries and archives for users*

50 – *Reproducing and communicating works by libraries and archives for other libraries and archives*

51 – *Reproducing and communicating unpublished works in libraries and archives*

52 – *Publication of unpublished works kept in libraries and archives.*

4 Amendment to s45 – Broadcaster Exception

Amendments should also be made to s45 – *Reading or recitation in public or for a broadcast* to ensure that it also captures the digital media services of the ABC and other broadcasters. An example of how ‘digital media service’ could be defined is contained in s3A of the *Australian Broadcasting Corporation Act 1983* (Cth):

*For the purposes of this Act, **digital media service** means:*

(a) *a service that delivers content to persons having equipment appropriate for receiving that content, where the delivery of the service is by means of digital electronic communications; or*

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(b) *a service that allows end-users to access content using digital electronic communications;*

but does not include:

(c) *a broadcasting service; or*

(d) *a datacasting service.*

The ABC can provide further detail and suggested drafting in relation to this issue if required.

04

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?

This submission will answer questions 3 and 4 together.

The ABC supports amendments to prevent contracting out of copyright exceptions.

The ABC has been left in a worse position for having entered into a contract with a rights holder, where that contract restricts fair dealing, compared with its fellow media organisations who have no such contract and are able to fair deal with that content across platforms.

Common examples of this situation include:

- **Interviews**
- **Major Events**
- **Sport**
- **Exclusive Access Arrangements**

04 Contracting Out of Exceptions

Proposal

First Position:

Language regarding contracting out/contract override should be included in all exceptions to copyright infringement.

Second position:

Language regarding contracting out/contract override should be included in these specific exceptions to copyright infringement:

- Fair dealing: ss40-42 and ss103A – 103C;
- Reading or recitation in public or for a broadcast: s45;
- Reproduction for purpose of broadcasting: s47;
- Reproduction for purpose of simulcasting: s47AA;
- Exceptions in ss65 – 73;
- Making of a copy of the sound recording for purpose of broadcasting: s107;
- Copying and communicating unpublished sound recordings and cinematograph films in libraries or archives: s110A;
- Making of a copy of a sound recording or cinematograph film for the purpose of simulcasting: s110C.

Third position:

At a minimum, the ABC proposes that language regarding contracting out/contract override be included in each of the fair dealing exceptions in ss40-42 and ss103A-103C.

Suggested Language

The ABC suggests the following language:

To the extent that a term of an agreement purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright of a [work][subject matter other than a work] which has been made available to the public prior to the date of the act, that term is unenforceable.

This language is based on provisions in the UK CDPA.

To allay the concerns of rights holders and moral rights holders, the ABC proposes that the operation of this provision should be limited to copyright material which is in the public domain, that is “made available to the public”.

05

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?

This submission will answer questions 5, 6 and 7 together.

Proposal

First Position:

The ABC's preferred position is a statutory exception to deal with orphan works for both commercial and non-commercial purposes as follows.

The exception covers all types of copyright material including works and other subject matter.

The exception extends to the exercise of all rights.

The exception is based on the following definitions:

05 Access to Orphan Works

An 'orphan work' is copyright material where:

- if there is a single rights holder in the work or other subject matter, the rights holder has not been identified or located through a diligent search, or cannot be contacted after being identified or located through a diligent search;
- if there is more than one rights holder in the work or other subject matter, at least one of the rights holders cannot be identified or located through a diligent search, or cannot be contacted after being identified or located through a diligent search.

'Reasonable compensation' is compensation that is equivalent to any standard fees in the relevant industry. Reasonable compensation should be the ordinary commercial price of the relevant licence for the work or other subject matter of a rights holder who was willing and able to license the work. In the event of a dispute, the Copyright Tribunal should be conferred with jurisdiction to determine what is reasonable compensation.

The party must undertake a diligent search.

The term diligent search should not be defined. Instead, the ABC recognises that the following principles recommended by the Australian Law Reform Commission in 2014 (Recommendation 13-2) is a useful guide to assessing whether a diligent search had been conducted:

- the nature of the copyright material;
- how and by whom the search was conducted;
- the search technologies, databases and registers available at the time; and
- any guidelines, protocols or industry practices about conducting diligent searches available at the time.

The party must maintain records of its diligent search.

There should be no express requirement to comply with the moral right of attribution. To do so would unnecessarily duplicate the existing legal obligations in Part IX of the Act. The moral right of attribution will be enforceable in its own right by a rights holder of an alleged orphan work.

Ideally, there should be no remedy where a diligent search has been undertaken. This is because firstly, investors in the production of content expect contractually that material will be clear for all uses past and present, and that there will be no liability on the producers of that content which will detract from the return on their investment. Secondly, errors and omissions insurers in the film and television industry will unlikely insure a production where the chain of title is not clear for past and future use. Therefore, if it is considered unfair for there to be no remedy, then that remedy should be limited to reasonable compensation for **future use** of the work only, with resort to the Copyright Tribunal if reasonable compensation cannot be agreed.

05 Access to Orphan Works

Second Position:

The ABC recognises the interests of copyright owners particularly where young copyright material has become unintentionally orphaned through dissemination on social media. The ABC supports as its second position the combination of a statutory exception and limitation of remedies which promotes use of legitimate orphan works, while protecting copyright owners.

The ABC supports the hybrid model set out below as a second position.

The ABC supports a separate approach for collecting and cultural institutions, including a direct exception to legalise the non-commercial use of orphaned material by this sector.

The ABC recommends the following definitions:

An 'orphan work' is copyright material where:

- if there is a single rights holder in the work or other subject matter, the rights holder has not been identified or located through a diligent search, or cannot be contacted after being identified or located through a diligent search;
- if there is more than one rights holder in the work or other subject matter, at least one of the rights holders cannot be identified or located through a diligent search, or cannot be contacted after being identified or located through a diligent search.

'Reasonable compensation' is compensation that is equivalent to any standard fees in the relevant industry. Reasonable compensation should be the ordinary commercial price of the relevant licence for the work or other subject matter of a rights holder who was willing and able to license the work. In the event of a dispute, the Copyright Tribunal should be conferred with jurisdiction to determine what is reasonable compensation.

The issue which the ABC grapples with the most is the definitions of 'commercial purpose' versus 'non-commercial purpose'. The ABC is concerned that a definition of 'commercial purpose' relating to 'direct commercial advantage or profit' is too broad. Most of the ABC's non-commercial activities are not-for-profit, yet they may be viewed by some as giving the ABC a 'direct commercial advantage' when compared with others in the market place. We believe the notion of 'commercial' should be tied to monetary gain and profit. The word 'direct' assists.

We recommend that the legislation rather than the Explanatory Memorandum clarify that non-commercial includes uses where a fee is charged on a cost recovery basis.

Part 1 - Direct Exception

The ABC advocates the following direct exception model as a second position:

The use must be for non-commercial purposes if it can be defined.

The use must be by or on behalf of a library, archive or Key Cultural Institution.

The exception covers all types of copyright material, including works and other subject matter.

The exception extends to the exercise of all rights. This would encompass the right to reproduce for the purpose of digitisation, making available and communicating copyright material.

05 Access to Orphan Works

Diligent search should not be defined. Instead the ABC recognises that the following principles recommended by the Australian Law Reform Commission in 2014 (Recommendation 13-2) is a useful guide to assessing whether a diligent search had been conducted:

- the nature of the copyright material;
- how and by whom the search was conducted;
- the search technologies, databases and registers available at the time; and
- any guidelines, protocols or industry practices about conducting diligent searches available at the time.

The library or archive or Key Cultural Institution must maintain records of diligent searches.

There should be no express requirement to comply with the moral right of attribution. To do so would unnecessarily duplicate the existing legal obligations in Part IX of the Act. The moral right of attribution will be enforceable in its own right by a rights holder of an alleged orphan work.

The remedy should be limited to reasonable compensation for the future use of work only.

The Explanatory Memorandum should clarify that:

- the exception would not permit institutions to provide orphan works to third parties in reliance on the exception, such as providing orphaned collection items in a new work, for example, a book compilation or a documentary.
- the exception is not intended to change copyright liability arising from pre-existing and continuing uses of any orphan work at the commencement of this exception.
- for works of joint-authorship or with multiple rights holders, an institution must seek, as far as practicable, the permission of all known and contactable rights holders before relying on the exception.

The ABC does not advocate the repeal of any current exceptions for libraries, archives and Key Cultural Institutions if the Parliament enacts this exception.

Part 2 – Limitation on remedies

In addition to the direct exception above, the ABC also advocates the following limitation on remedies for use of an orphan work in other circumstances. This would, to a limited extent, assist media organisations, documentary makers and other producers of factual content, who use audio and audio-visual material as well as multi-media digital works.

For the same reasons noted above at page 20 relating to investors and errors and omissions insurers, we strongly believe the remedy for an injunction or account of profits should not be available where a diligent search has been undertaken.

05 Access to Orphan Works

The ABC recommends:

- A limitation on remedies available in an action for copyright infringement of an orphan work if a diligent search has been undertaken.
- There should be no additional compulsion to comply with the moral right of attribution, as the provisions of Part IX will continue to operate in any case.
- For a use of an orphan work for non-commercial purposes, remedies should be limited to reasonable compensation for future use of the material only.
- For use of an orphan work for commercial purposes, remedies should be limited to reasonable compensation for past and future use of the material only.
- The rights holder should not be entitled to an injunction to prevent future use of the material where it has been incorporated into a work or other subject matter in good faith at the time it was a legitimate orphaned work regardless of whether the use is for commercial or non-commercial purposes.
- The diligent search should preclude an account of profit for past use, but allow a claim for reasonable compensation for future use.
- The ABC submits that this model should apply to all types of orphaned copyright material, including works and other subject matter.
- The term ‘diligent search’ should not be defined, but the principles recommended by the ALRC (Recommendation 13-2) should guide the court’s assessment of whether a diligent search had been conducted:
 - the nature of the copyright material;
 - how and by whom the search was conducted;
 - the search technologies, databases and registers available at the time; and
 - any guidelines, protocols or industry practices about conducting diligent searches available at the time.

06

Final Note on Performer's Protection

The ABC recommends that any legislation introducing any new fair dealing exceptions into the Act also consider relevant corresponding amendments to Part XIA – *Performers' Protection*, particularly s248A.