

C[©]OPYRIGHTAGENCY

**Submission to Copyright
Modernisation Consultation**

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1 INTRODUCTION

Copyright Agency remains committed to sensible changes to the copyright system that produce outcomes that are beneficial to all Australians. These include the long-term sustainability of Australian creative output, support for Australia’s creative industries, and access to ideas and information.

The Committee whose report preceded the current Copyright Act said the objectives of copyright law are to:

- *give to the author of a creative work his just reward for the benefit he has bestowed on the community;*
- *encourage the making of further creative works; and*
- *ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.¹*

These objectives have not changed. What has changed, as noted in the consultation paper, are the means by which creative works can be created, distributed and consumed.

Copyright ‘modernisation’ means ensuring that the objectives of the copyright system continue to be met, including when people use new means to create, distribute and consume creative works.

While the development of new technology and consumer behaviour means that it is appropriate to update the copyright system, it is important that this is done in a manner that does not undermine these fundamental objectives. It is also important that the copyright system facilitate innovation consistent with these objectives

The copyright system comprises a number of elements that include legislation, court decisions and business practices. Changes can be introduced via new business practices (e.g. broadly agreed guidelines). It may not be necessary to amend the legislation.

There are areas in which the ideal application of the copyright system is hotly contested. This is particularly the case for relatively new forms of business that rely on content inputs, but whose revenue is derived from something other than direct sale of content, such as sale of customer data.

There are other areas in which stakeholders from different sectors are broadly agreed that improvements could be introduced. These include the activities of cultural institutions aimed at enabling more Australians to view the contents of their collections, both for formal research as well as general interest.

¹ Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations in the Copyright Law of the are Desirable in the Copyright Law of the Commonwealth (1959), known as the Spicer Report, at [13]

2 ABOUT COPYRIGHT AGENCY

Copyright Agency is a not-for-profit copyright management organisation that manages copyright licensing arrangements for writers, artists and publishers. It collects and distributes more than \$100m a year in copyright fees and royalties. It is affiliated with similar organisations in other countries, enabling the licensed use of content from other countries in Australia, and revenue to Australian creators from the use of their content in other countries.

3 OUTLINE OF THIS SUBMISSION

We first set out a summary of our position regarding ‘flexible exceptions’ generally, and regarding some specific areas identified by the Department of Communications and the Arts for review. We then respond to the questions in the consultation paper, followed by our response to models developed by the Department for participants at the roundtables to consider with their constituencies. The appendix sets out proposed principles for digitisation of orphan works in cultural institutions that were provided to library representatives in July 2017.

4 SUMMARY OF POSITION

The government has identified a number of areas in which there is potential for agreement among stakeholders for changes to the copyright system to enable better outcomes. We summarise here Copyright Agency’s position.

4.1 Concept of ‘flexible exceptions’

There has been much debate about how the copyright system could be ‘future-proofed’ so that its application to new forms of activity, enabled by technological developments, continues to produce outcomes that are consistent with its objectives.

One key element of the copyright system is the identification of outcomes whose benefit to Australian society overall justifies special treatment. Examples include:

- research that builds on other people’s work;
- education of Australians;
- access to news; and
- critical commentary on other people’s work, ideas and society more generally.

These outcomes can be delivered using a variety of tools that can change over time due to technological advances. In a broad sense, the policy decisions underpinning the copyright system should be focused on the outcomes rather than the tools, and the copyright system should enable the outcomes irrespective of the tools.

For example, the Copyright Act includes special provisions to enable education. They include a statutory licence that allows copying and sharing of content by any means. While the licence was originally introduced to allow teachers to photocopy for their students, it now also allows other forms of copying and sharing such as learning management systems, email, digital photographs and student tablets.

The objective of ‘flexible exceptions’ is to allow socially desirable outcomes (that, generally, do not change much over time), using mechanisms that will change over time. It is the role of Parliament to determine the socially desirable outcomes that justify special treatment.

Innovation is not an outcome in itself; it is a means to an end. The copyright system should enable innovation that produces socially desirable outcomes. But the fact that an activity can be characterised as ‘innovative’ does not, of itself, mean it deserves special treatment.

It is also the case that many broad claims are made by some advocates about the Copyright Act inhibiting certain forms of innovation are made with little or no supporting evidence. The existing regime, in many cases, in fact facilitates innovation across a broad range of sectors as it provides a reward to companies and individuals who invest and take risk on new content.

Innovation is also reliant on access to talented labour, a business environment that encourages risk taking and access to capital by business seeking to build new products.

4.2 Government use

The immunity for governments provided by the Copyright Act is extraordinarily broad, particularly when coupled with the provisions that give governments first ownership of copyright in material that they commission or first publish. For example, governments are entitled to copy and distribute entire publications that are available for purchase. Immunity on this scale is not granted by copyright legislation in other countries to governments, nor by Australian legislation to anyone other than governments.

Given this extensive immunity, there are provisions that entitle content creators to fair compensation (or, in some cases, other remedies) in certain circumstances.

The functioning of the arrangements associated with the immunity would be improved by:

1. enabling the Copyright Tribunal to 'declare' a collecting society for communication as well as for copies: this would remove the burdensome requirement for governments to notify every rightsholder each time a communication occurs, and to negotiate terms for each use; and
2. simplifying the legislation to enable matters currently prescribed in the legislation to instead be determined by agreement or (if agreement cannot be reached) by the Tribunal.

We maintain the view that the immunity granted by Part VII Division 2 allows activities that may not be 'remunerable', and that 'equitable remuneration' may be zero in certain cases. For example, we agreed with the NSW government that administrative uses of registered survey plans were not remunerable, but that the government's commercial sale of survey plans (including via brokers) was remunerable.

The Tribunal has also taken a practical approach to 'incidental' uses. In its determination regarding survey plans, the Tribunal said:

.. whilst it is true that each electronic sale of a plan involves – particularly in the case of plans supplied through information brokers – multiple acts of uploading, storage and sending, there is no reason to treat these as other than what they, in substance, are: i.e. the provision to a single user of a copy of a plan.

The experience with managing the application of Part VII Division 2 to surveyors' plans demonstrates:

- the flexibility regarding valuation of activities under the current framework;
- that classes of activity can be agreed or determined (by the Tribunal) as 'non-remunerable' if appropriate;
- there is therefore no need to designate certain activities done for government purposes as 'non-remunerable'; and
- doing so may not only become quickly outdated (as activities change over time), but also lead to confusion.

The current proceedings in the Copyright Tribunal between the NSW Government and Copyright Agency include the identification of government activities that are not 'remunerable' for various reasons. Copyright Agency will be in a better position to work with

government representatives from other states and territories on 'clarity' regarding this issue once those proceedings are resolved.

4.3 Quotation

The Berne Convention (Article 10) enables countries to have copyright exceptions in their domestic legislation that allow people to make quotations, provided:

- the work has been made public;
- the extent of use does not exceed that justified by the purpose;
- the use is compatible with fair practice; and
- the source of the work, and the author's name, are included.

Australia's exceptions for criticism, review, parody, satire and reporting the news are examples of how Article 10 has been implemented in countries that are party to the Berne Convention.

Copyright Agency is open to further exploring a new exception that is consistent with Article 10. We have set out the key elements in our response to the consultation model for quotation below.

4.4 Educational use

Australia has had a flexible exception for education since 2006: s200AB. While the drafting of the provision is complex, the education sector has developed workable guidelines to apply it in practice: see, for example, the [Smartcopying guide](#),² which says that s200AB can apply if:

- the material is not available for purchase or under licence within a reasonable time;
- the extent of use does not exceed the teaching purpose for the material;
- access to the content is limited to the students who need to have access to it;
- steps to prevent further copies being made have been taken; and
- the content is not from a pirated source (e.g. an illegally shared film).

This is a reasonable and helpful guide for teachers. It is not necessary for them to read and understand the legislation itself.

The main complaints by the education sector about s200AB are:

1. the drafting is hard to understand;
2. it does not apply to educational activities by entities other than educational institutions; and
3. it does not apply to activities that are already allowed by the education statutory licence (that is, it does not provide a basis for a discount from licence fees paid under the statutory licence).

We are open to exploring ways in which (1) and (2) could be addressed. Section 200AB applies to activities done 'on behalf of' a body administering an educational institution, so would cover things like parents assisting students with reading, and extra-curricular activities associated with a school such as a music program or languages program.

On (3): s200AB was intended to enable activities that are not currently enabled by other mechanisms, including licensing arrangements (under the statutory licence, or otherwise). The factors for determining equitable remuneration under the statutory licence are set out in the Regulations. They include factors that are the same as those for fair dealing in s40(2). The

² [http://www.smartcopying.edu.au/docs/default-source/Info-Sheets-PDFs/updated-\(2018\)-flexible-dealing-information-sheet80E6FE6D2238.pdf](http://www.smartcopying.edu.au/docs/default-source/Info-Sheets-PDFs/updated-(2018)-flexible-dealing-information-sheet80E6FE6D2238.pdf)

legislative framework clearly allows the parties to agree, and the Tribunal to determine, that 'equitable remuneration' can be zero in certain circumstances.

We are currently in negotiations with representatives from the school sector, and representatives from the university sector, for new agreements that will commence in January 2019. Once those negotiations are complete we will be in position to explain how the licensing arrangements, including fees and reporting on usage, were reached.

4.5 Orphan works

There are different issues that apply to orphan works:

1. in the collections of cultural institutions; and
2. that other people may want to use (e.g. a book publisher or film maker).

All exceptions in the Copyright Act (including statutory licences) apply to orphan works. For example, the education statutory licence enables teachers to use content from any source (including copies of copies) without having to worry about where the content originated from or who the rightsholders are. That is part of the value of the statutory licence.

There are different mechanisms for enabling uses of orphan works where special exceptions don't already apply, but people generally agree on the following elements:

1. a search process that is proportionate to the use (including the size of the audience and the value to the user);
2. the inclusion of any identifying information that is reasonably available to the user (which may enable others to identify the source of the content);
3. an entitlement for a rightsholder who comes forward to be reasonably compensated; and
4. withdrawal or takedown on request of a rightsholder, where reasonable.

Cultural institutions are in a special position because they:

- are publicly funded and not-for-profit;
- have a unique societal role of:
 - documenting and preserving aspects of Australian heritage and culture for future generations of Australians; and
 - enabling Australians to see and hear items in the collections; and
- undertake 'mass digitisation' projects that may involve a hybrid of 'orphan' and non-orphan works; and
- are sometimes covered by (or eligible for) blanket licensing arrangements that can allow the use of orphan works (as part of the blanket coverage, with other material).

Cultural institutions should thus be considered as a special class in policy considerations about orphan works.

In July 2017, we provided library representatives with a draft memorandum of understanding to enable digitisation of orphan works in cultural institutions. It is set out in the Appendix.

There are different mechanisms to enable digitisation under the current copyright system. They include s200AB, risk management policies and processes, and existing agreements with governments that cover cultural institutions. We recognise, however, that the government is interested in exploring legislative changes that could facilitate copying and sharing of orphan works in cultural institutions, and we have set out our response to the government's consultation models below.

4.6 Libraries and other cultural institutions

Library representatives say that they want specific exceptions for certain activities, but also want a ‘flexible’ exception.

Like the education sector, the library sector has had a flexible exception (s200AB) since 2006.

While some libraries and cultural institutions are using this flexible exception, often as part of their risk management policies, others are using it less. This is associated with an institution’s knowledge and experience, and risk appetite.

The cultural institutions’ main concern with s200AB seems to be the application of the ‘special case’ requirement of the ‘three-step’ step. The other two factors (that the use does not conflict with a normal exploitation of the work, and does not unreasonably prejudice legitimate interests of rightsholder) are similar to factors for fair dealing in s40(2), which representatives say they prefer.

We are open to exploring ways in which:

1. the specific exceptions could be simplified; and
2. the flexible exception could be clarified.

We have elaborated on each below.

4.7 Ministerial power to introduce new ‘purposes’ by regulation

The consultation paper refers to the possibility of ‘amending the Copyright Act so the Minister can add (and later amend and remove) fair dealings exceptions to the Copyright Regulations’. We strongly oppose this.

The societal outcomes that justify special treatment in copyright legislation should be determined by Parliament, and subject to the scrutiny and process of Parliament. Enabling a Minister to introduce new exceptions by regulation would likely increase rather than decrease uncertainty.

The Copyright Act previously included a provision in the Copyright Act that required the Attorney-General to determine the royalty rate for recorded music. It was repealed because, according to the Explanatory Memorandum, the requirement was considered ‘inherently undesirable and an inappropriate role for the Government to play’.

5 RESPONSES TO QUESTIONS IN CONSULTATION PAPER

We have set out here our responses to the questions in the consultation paper. We also address each of these issues in our summary of position above, and in our responses to the models for further consultation below.

5.1 Flexible exceptions

Question	Response
<p>Question 1</p> <p>To what extent do you support introducing:</p> <ul style="list-style-type: none"> • additional fair dealing exceptions? What additional purposes should be 	<p>We remain open to exploring better ways to enable important societal outcomes that have already been recognised by Parliament, such as Australians’ access to content for education. We are also open to</p>

<p>introduced and what factors should be considered in determining fairness?</p> <ul style="list-style-type: none"> • a ‘fair use’ exception? What illustrative purposes should be included and what factors should be considered in determining fairness? 	<p>exploring whether there are other important societal outcomes that may require similar recognition and special provisions.</p> <p>The focus should be on the outcomes, not the technological (or other) means by which those outcomes are achieved.</p> <p>It is the role of Parliament, not the Courts, to decide which outcomes have sufficient societal importance that they justify special treatment.</p> <p>The US ‘fair use’ exception is not the right approach for Australia, for a range of reasons that we have set out in submissions to previous inquiries.</p>
<p>Question 2</p> <p>What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:</p> <ul style="list-style-type: none"> • section 200AB • specific exceptions relating to galleries, libraries, archives and museums. 	<p>We remain open to changes that would simplify and update provisions such as s200AB, and specific exceptions for galleries, libraries, archives and museums.</p>

5.2 Access to orphan works

Question	Response
<p>Question 5</p> <p>To what extent do you support each option and why?</p> <ul style="list-style-type: none"> • statutory exception • limitation of remedies • a combination of the above. 	<p>A statutory exception for digitisation of orphan works by cultural institutions could be appropriate given the special societal role of cultural institutions, provided it meets the principles adopted by National and State Libraries Australasia (listed below). In other scenarios (including people’s use of material that they source from cultural institutions), limitation of remedies is more appropriate.</p>
<p>Question 6</p> <p>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:</p> <ul style="list-style-type: none"> • 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 	<p>The appropriate remedy for a rightsholder whose work has been treated as ‘orphan’ will vary according to the circumstances, including the extent and purpose of the use.</p>

<ul style="list-style-type: none"> allowing for an account of profits for commercial use. 	
<p>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?</p>	<p>Yes, the issues for collecting and cultural institutions require specific consideration, because of the societal role of these institutions, and because their digitisation programs may involve both 'orphan' and other material.</p>

6 RESPONSES TO MODELS FOLLOWING ROUNDTABLES

We set out here our responses to the models circulated by the Government following the roundtables.

6.1 Government

The immunity for governments provided by Part VII Division 2 of the Copyright Act already covers all the activities that are listed in the model.

Governments negotiate fair compensation under s183A with Copyright Agency and with Screenrights. The current agreements with Copyright Agency set a flat rate per government employee, which is negotiated taking a large range of factors into account. This includes categories of activities that may not be 'remunerable' for a range of reasons, including direct licensing arrangements and the nature of the activity.

Copyright Agency can accept notifications by governments of communicated works under s183(4), and negotiate terms under s183(5). This is encompassed in some agreements between Copyright Agency and governments.

In other cases, governments must notify rightsholders individually under s183(4), and negotiate terms under s183(5). We have no information about how governments currently meet these obligations. It would be useful if governments provided information about this, to better understand the practical consequences of the obligation for both governments and for the rightsholder they notify.

A more efficient solution, both for governments and rightsholders, would be to enable the Copyright Tribunal to 'declare' a collecting society for uses other than government copies. Governments would still be able to seek direct permissions from rightsholders if they chose, but would be relieved of the burden of notifying rightsholders and negotiating terms in other cases.

The provisions could also be simplified in a manner similar to the simplification of the statutory licence for education.

6.2 Quotation

There needs to be clarification of what 'quotation' entails. Otherwise, the exception could be argued to allow the use of more than a substantial part of work (including the use of entire works) in any circumstances. This has the potential to delay licensing arrangements and resolution of disputes.

Article 10 of the Berne Convention enables 'quotation' from other peoples' work for a *purpose*: it provides that the extent of the use should not exceed that justified by the purpose (but leaves national governments to determine appropriate purposes in the context of their various legal frameworks).

That raises the question of what socially desirable purposes (apart from those already catered for, such as criticism, review and reporting news) justify the use of other people's content without the permissions otherwise required.

Commentary on the purposes of quotation, including by the Australian Law Reform Commission (ALRC), usually refers to the use of someone else's work (often an excerpt) in a new work, to support a point or argument made in the new work. There are obvious similarities with the existing exception for criticism or review, which allows critique of someone else's work, as well as ideas associated with the work, and other matters such as the circumstances in which the work was produced or has been used.

There are options for how an exception allowing 'quotation' could be aligned to socially desirable purposes that we would be happy to explore.

Acknowledgement of the source of the content and its author should be a condition of any new exception, consistently with the current exception for criticism or review, and Article 10 of the Berne Convention. It is both an indicator of good faith on the part of the user, and key to acceptance of a new exception by creators and rightsholders. The 'parallel' moral rights provisions do not produce the same outcome for a number of reasons. These include that Article 10 requires both the source of the work *and* the author's name, which will often be different things (and may affect different people).

6.3 Educational use

We are open to simplifying and updating the flexible exception for education introduced in 2006, s200AB. This provision is intended to, and does, enable uses of content for education that would otherwise require permissions.

The statutory licence for education provides coherent blanket coverage for copying and sharing of text, images, print music and broadcast content that would otherwise require permission. There is no need for additional exceptions for activities that are already allowed by the statutory licence. The statutory licence clearly allows the parties to agree, and the Tribunal to determine, different valuation for different content and activities, including that equitable remuneration in some cases is zero.

Introducing new exceptions for activities already covered by the statutory licence would undo the simplification achieved by the 2017 amendments.

The statutory licence is available to education institutions when permission would otherwise be required. Permission may not be required if, for example, the activity is allowed under a 'direct' licence from the copyright owner (e.g. a use of Commonwealth material under the Commonwealth's intellectual property policy).

6.4 'Illustration for instruction'

The model circulated by the Department proposes a new exception allowing 'illustration for instruction'. This appears to be based on an exception in UK legislation, and may have been put forward because the UK exception can allow 'illustration for instruction' in institutions other than 'traditional' education institutions if the use is:

- for a non-commercial purpose;
- by a person giving or receiving instruction (or preparing for giving or receiving instruction);
- accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise); and
- a fair dealing

The definition of ‘educational institution’ in the Australian legislation applies to a range of bodies other than ‘traditional’ education institutions. However, the notes from the roundtable say that one of the ‘limitations’ of s200AB raised by cultural, collecting and educational institutions is that it doesn’t apply to ‘uses with parents, non-educational institutions such as NASA, private sector or non-governmental organisations or use by clients or patrons of cultural and collecting institutions’.

It would be useful for us to understand more about these activities in order to consider a potential extension of s200AB to some activities of institutions other than education institutions. It seems to us, however, that many of the institutions listed would have licensing arrangements in place already that would allow the activities covered by the UK exception. We also noted above that s200AB covers activities done on behalf of bodies administering educational institutions.

6.5 Technical and incidental use, including text and data mining

We remain unclear about the activities that people are refraining from doing because of the current copyright framework.

Text and data mining can be done in education institutions under the current framework. In some cases, terms of use for subscriptions specifically allow text and data mining. In others, the education statutory licence allows copying of content for educational purposes, provided it does not unreasonably prejudice the legitimate interests of copyright owners. Fair dealing for research or study can also cover text and data mining: it clearly allows the copying of entire works provided the fairness factors are met.

We disagree that an exception is warranted merely because a use is ‘non-expressive’ or ‘non-consumptive’. A user may derive commercial or business benefits from uses that could be characterised as ‘non-expressive’ or ‘non-consumptive’, and such activities can be covered by licensing arrangements.

6.6 Libraries and archives: new exception

The model has many of the features of s200AB. It would apply to the same entities (body administering a library or archives) and the same purpose (maintaining or operating a library or archive), and it has ‘fairness’ factors that are similar to the factors in s200AB.

The key differences between the model and s200AB are that there are no explicit requirements that the use is:

1. a ‘special case’;
2. not for commercial advantage or profit; and
3. not covered by another exception (including a statutory licence).

While we think that a workable guide to ‘special case’ could be developed if s200AB were to remain as is, it is not an essential element of a revised version of s200AB. However, (2) and (3) should remain, given the breadth of ‘body administering a library’, and the library sector’s stated preference for ‘clarity’ regarding ‘standard’ activities.

The term ‘library’ is not defined in the Copyright Act, and appears to refer to a collection of books, periodicals and/or other material. The ‘body administering’ may be a for-profit entity. The exceptions relating to preservation and unpublished works apply to all libraries. The exceptions relating to document supply (to clients or other libraries) only apply to libraries open to the public (which can be owned by for-profit entities).

6.7 Libraries and archives: modernising existing exceptions

The model proposes that ss 49 and 50 be extended to allow supply:

1. for 'personal use' as well as for research or study;
2. of audiovisual items as well as 'works'; and
3. of recent unpublished material.

None of these extensions can be characterised as 'modernisation', and none would be conditional upon 'fairness'. In addition, each would currently be allowed under s200AB in circumstances where the s200AB criteria apply. The 'flexible' exception (either the current s200AB or an amended version) is a more appropriate mechanism for additional activities like these.

There is scope, however, to simplify and update the current provisions.

We have no objection to the detailed requirements for documentation and compliance associated with these exceptions being set out in the Regulations rather than the Act.

6.8 Orphan works: direct exception for limited use

The model does not seem to meet all the principles adopted by National and State Libraries Australasia (NSLA), which are based on principles agreed by the International Federation of Library Associations (IFLA) and the International Publishers Association (IPA):³

- A reasonable search should be undertaken to find the copyright owner before a work is used;
- The user of an orphan work must provide a clear and adequate attribution to the copyright owner, if known;
- If the copyright owner reappears, appropriate restitutions should be made;
- Any restitutions against the use of a previously orphaned work, should take into account the creative efforts and investment made in good faith by the user of the work; and
- The use of the orphan works should not be exclusive.⁴

In particular:

- the NSLA principles refer to 'restitution', and the IFLA/IPA principles say a 'rightsholder should be entitled either to reasonable remuneration for the user's use of the previously orphaned work or, in the case of noncommercial uses by nonprofit institutions, such as libraries, to expeditious termination of the unauthorised use': this suggests that the model should include takedown as an option in appropriate circumstances (not just compensation for future use); and
- the NLSA principles refer to information about the *copyright owner* (rather than the author, who may be a different person).

At least some cultural institutions are currently using s200AB to manage orphan works in a manner similar to that set out in the model.

If a specific exception for orphan works is to be introduced, s200AB will still have scope for application in scenarios other than the use of orphan works.

³ <https://www.ifla.org/publications/iflaipa-joint-statement-on-orphan-works>

⁴ https://www.nsla.org.au/sites/default/files/publications/NSLA.reasonable_search_orphan_works.pdf

6.9 Orphan works: limitation on remedies

It is not clear why the remedies for commercial use are limited in the way set out in the proposal. Similarly, a rightsholder should be able to get a takedown in appropriate circumstances, even if the use is non-commercial.

The obligation to include any identifying information should apply to information about the source, the copyright owner and the author (who may be different to the copyright owner).

APPENDIX: ORPHAN WORKS PROPOSAL

The following is a draft Memorandum of Understanding provided by Copyright Agency to the Australian Libraries Copyright Committee (ALCC) in July 2017, for consultation with its members and other relevant stakeholders.

Introduction

Australian content creators and cultural institutions have a shared commitment to enabling digitisation of 'orphan works' in institutions' collections, so that they can be viewed online by Australians around the country.

An 'orphan work' is a work for which a copyright owner cannot be identified and located.

A 'cultural Institution' is a library, archive, gallery or museum that is principally funded from public sources such as taxes and owns an organised collection of items that is accessible to the public.

This Memorandum of Understanding (MOU) sets out a framework for enabling digitisation of orphan works.

The Signatories are listed in the Appendix.

Framework

The Signatories agree that the following framework applies to digitisation of orphan works by Cultural Institutions:

- **Search:** If there is a reasonable prospect that a copyright owner may be identified and located, the institution will conduct a reasonable search for a copyright owner before a work is used;
- **Attribution:** The institution will provide, with the work, any information available to the institution relevant to the copyright status of the work;
- **Compensation:** A copyright owner may receive fair compensation for the use of their work;
- **Takedown:** An institution will remove a work from online availability upon a reasonable request by a copyright owner, having regard to any creative efforts and investment made in good faith by the institution; and
- **Non-exclusivity:** If an institution determines that a work is 'orphaned', any other institution may also use that work.⁵

Orphan Works Digitisation Guide

Representatives of content creators and cultural institutions, in consultation with the Department of Communications and the Arts, will develop a simple, workable Orphan Works Digitisation Guide (the Guide) for cultural institutions. The Guide will assist consistency among the institutions, and confidence (particularly for those institutions that are more risk-averse).

- the reasonable steps for different types of material and use (this could be presented as a decision tree);
- the activities covered;

⁵ This framework is based on principles developed by NSLA and on a joint statement by IFLA and IPA: http://www.nsla.org.au/sites/www.nsla.org.au/files/publications/NSLA.reasonable_search_orphan_works.pdf, http://www.ifla.org/files/assets/ifla-ipa/statements/joint-ifla_ipa-press-releaseJune2007.pdf; <http://www.ifla.org/publications/iflaipa-joint-statement-on-orphan-works>

- conditions associated with activities (e.g. information to recipients about use of the material; takedown process for material published online);
- notification process for uses of orphan works; and
- process if a rightsholder comes forward.

The Guide can be reviewed from time to time to take into account technological and other developments.

Matters covered in the Guide

The Guide will include the following matters.

Reasonable search

Reasonable steps to identify and locate a copyright owner are affected by a range of factors relating to:

- the information available to the user; and
- the type of use.

Factors affecting the information available to the user include:

- whether there is any attribution associated with that material;
- the age of the material; and
- the availability of search tools and services.

The size of the 'audience' for the use affects what steps are reasonable. For example, the implications of making a single copy for a library client for personal use are quite different to publishing that same material online. The steps should therefore be proportionate to the use.

Search is not required for some material, having regard to the nature of the material and the use. For example, this is likely to be the case for very old material for which no information relevant to copyright ownership is available.

The Guide will set out reasonable steps for different types of materials.

Notification

The Guide will set out how institutions will notify Copyright Agency of orphan works digitised under this arrangement. This will enable:

- use of those orphan works by other institutions;
- reporting on the scheme; and
- in some cases, rightsholders to check if their works have been used as 'orphan works'.

6.9.1 Attribution

The cultural institution should ensure that:

- any information reasonably available to the institution about any creator and/or any copyright owner for the material is apparent to the audience for the material; and
- any information about a creator or copyright owner embedded in a digital file is maintained.

Fair compensation

Copyright Agency will provide reasonable compensation to any rightsholder in a 'work' who comes forward with a reasonable claim, provided the cultural institution has followed the Guide.

The claim process will be set out in the Guide.

Takedown

Cultural institutions will adopt and implement a notice and takedown process, similar to that adopted by the National Library of Australia for Trove.

The Guide will set out the steps for that process.

Steps to inhibit unauthorised 'downstream' use

Cultural institutions will take reasonable steps to inhibit unauthorised use of material made available or published by the institution. This particularly applies to commercial use and to publication other than by a cultural institution.

The Guide will set out reasonable steps.

Indigenous intellectual property

Cultural institutions will follow any applicable protocols for dealing with Indigenous intellectual property.

The Guide will include references to applicable protocols.

Conditions associated with acquisition

An institution's use of some content may be affected by conditions associated with the acquisition of the content by purchase or donation. For example, an institution may have acquired documents with a condition that they not be made available to the public before a specified date. The documents may include orphan works (e.g. letters to the donor whose writer cannot be identified or located).

Examples of 'orphan works'

Examples of 'orphan works' given by cultural institutions include:

'Unpublished' material	'Published' material
<ul style="list-style-type: none"> • diaries of colonial immigrants; • letters of First World War servicemen and women; • church records of baptisms, marriages and burials; • wage ledgers of pastoral companies; • minutes of societies; • amateur photographs; • pictures; • manuscripts; • oral histories 	<ul style="list-style-type: none"> • maps; • 'ephemera' such as menus, programs and tickets