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BY EMAIL  
FOR PUBLICATION

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Dear Ms Haipola

**Submission on Copyright Modernisation Consultation Paper (March 2018)**

Copyright in Cultural Institutions (CICI) welcomes the release of the Copyright Modernisation Consultation Paper (the Paper)<sup>1</sup> and the sponsor organisations<sup>2</sup> of this submission appreciate the opportunity to comment to the Department of Communications and the Arts (the Department).

CICI is a special interest group concerned about content regulation affecting cultural institutions. Its work in copyright practice includes the publication of the *Statement of Principles regarding the use of section 200AB of the Copyright Act (1968): an industry standard and user guide for the cultural sector* (September 2010). CICI has also made submissions on law reform, as have individual cultural institutions experienced in managing IP challenges.

In addressing the questions raised in the Paper, this submission considers the activities of galleries, libraries, archives and museums (referred to below as 'GLAMs' or 'cultural institutions'). CICI appreciates the Paper's specific reference to cultural and collecting institutions and the acknowledgment that GLAMs or cultural institutions cannot rely on existing copyright exceptions to discharge their functions. CICI is pleased to note that some aspects of this submission reflect amendments requested by the Department's arts portfolio agencies as referenced in the Paper.

**Flexible exceptions**

<p>Question 1 To what extent do you support introducing:</p> <ul style="list-style-type: none"><li>• additional fair dealing exceptions? What additional purposes should be introduced</li></ul>	<p>CICI strongly supports the suggestion of additional fair dealing exceptions. Cultural institutions are charged with specific functions, generally by statute. However, in its current form the Copyright Act limits the ability of a publicly funded organisation with limited resources to fully discharge its functions. An effective, efficient and</p>
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<sup>1</sup> <https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation>

<sup>2</sup> See last page.

<p>and what factors should be considered in determining fairness?</p> <ul style="list-style-type: none"> <li>• a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?</li> </ul>	<p>adaptable solution is to add an <b>additional fair dealing exception for use by cultural institutions</b>.</p> <p>CICI notes that this proposal addresses problems previously raised by stakeholders that certain government uses that are of a public interest nature and not commercially available need to be excepted under the Copyright Act.</p> <p>The current bundle of fair dealing exceptions, which have been implemented for sound public policy reasons, leave a gap for the activities of GLAMs. In a civilised society that values and supports cultural endeavour by the specific creation and financial support of cultural institutions, providing an additional exception limited to cultural institutions (publicly funded organisations) that operate for purposes such as promoting cultural works, exhibiting, archiving, conserving and loaning would address the difficulties.</p> <p>Factors relevant to fairness could be centred around the:</p> <ul style="list-style-type: none"> <li>• an institution's public nature – the extent to which the institution supports the public benefit by providing public access to cultural material;</li> <li>• context of the use – does it support or further the functions of the cultural institution;</li> <li>• purpose and character of the use, including whether the use supports or furthers the non-profit functions of the cultural institutions;</li> <li>• nature of the copyright protected work;</li> <li>• amount and substantiality of the portion used in relation to the copyright protected work as a whole;</li> <li>• effect of the use upon the potential market for or value of the copyright protected work.</li> </ul> <p>The following examples demonstrate some of the constraints imposed on cultural institutions by the existing framework:</p> <ul style="list-style-type: none"> <li>• A museum established by statute to promote and exhibit films to the public decides to curate an exhibition focussing on a particular topic in connection with films. Many short excerpts from existing films are identified as being required for the exhibition. The context of the use in the exhibition does not clearly satisfy the requirements of any of the fair dealing exceptions – e.g. each of the excerpts are not specifically being critiqued and not all are being used for satirical purposes. The museum is unable to confidently rely on section 200AB – e.g.</li> </ul>
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	<p>uncertainty exists around the application of other exceptions and statutory licences, it might not be a special case and it might not be non-commercial as exhibition entry fees may be charged. The ability of the museum to curate and present the best possible exhibition is significantly constrained by the need to seek copyright licences for the large number of excerpts that it wishes to include. The time and cost of individually licensing such excerpts is prohibitive.</p> <ul style="list-style-type: none"> <li>• A museum creates content in connection with an exhibition, education program or other mission-centric public output (e.g. an instructional video or booklet). Such content uses excerpts from existing copyright-protected works. While the context of the use supports the function of the museum and does not impact on the potential market for the underlying works, the context of the use does not attract the protection of any of the existing fair dealing defences and fees will be charged for attendance at the exhibition, education or public program meaning that the museum may obtain a profit and cannot confidently rely on s.200AB. As a result, the ability of the museum to deliver the exhibition, education program or other output is constrained by the need to seek copyright licences or produce content that does not meet objectives.</li> </ul> <p>CICI is of the view that an <b>additional fair dealing exception for use by cultural institutions</b> will provide for an effective, efficient, adaptable and accountable remedy to the limitations cultural institutions experience. For legislative certainty, CICI supports an additional fair dealing exception to the Copyright Act, rather than by Ministerial amendments to the Regulations.</p>
<p>Question 2 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"> <li>• section 200AB</li> <li>• specific exceptions relating to galleries, libraries, archives and museums</li> </ul>	<p><b>Section 200AB</b> CICI prefers a fair dealing exception for cultural institutions than the current section 200AB. Such an exception could replace section 200AB, depending on the terms.</p> <p>However, if a fair dealing exception for cultural institutions is not possible then, at a minimum, section 200AB should be amended to:</p>

	<ul style="list-style-type: none"> <li>• remove or amend the ‘special case’ condition as this condition creates uncertainty for cultural institutions;</li> <li>• remove the condition that the exception only be available if no other exception or statutory licence is available to the user as this condition also creates uncertainty, requires a high level of expertise and is time consuming to apply; and</li> <li>• remove the requirement that the use not be ‘partly for the purpose of obtaining a commercial advantage or profit’ as this requirement means that s200AB may be unavailable to not-for-profit cultural institutions who charge entry fees. For many cultural institutions this condition of s.200AB is a key inhibitor to being able to rely on the exception.</li> </ul> <p><b>Technological Protection Mechanisms</b></p> <p>To enable cultural institutions to realise the full benefit of any new fair dealing exceptions, the Copyright Act should also be amended to allow cultural institutions to circumvent technological prevention measures (TPMs) to the extent that the proposed use of the copyright material would otherwise be permitted by fair dealing exceptions. In August 2012 CICI provided a submission to the Attorney- General’s Department regarding its review of TPM exceptions made under the Copyright Act. In that submission CICI identified that copyright exceptions and licences without a corresponding exception for circumvention of TPMs do not deliver the intended public benefits.</p>
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**Contracting out**

<p>Question 3 Which current and proposed copyright exceptions should be protected against contracting out?</p>	<p>The Copyright Act should operate so that cultural institutions can lawfully and efficiently rely on all applicable copyright exceptions without needing to be concerned about potentially conflicting contractual obligations.</p> <p>Cultural institutions rely on fair dealing exceptions as well as specific libraries and archives exceptions. A contract purporting to prevent a cultural institution from using material in a way that would otherwise be permissible under the Copyright Act undermines the utility of the exception that would otherwise have been relied upon.</p> <p>Our preference is for the Copyright Act to provide that any term of an agreement which restricts or prevents the doing of any act by a cultural institution, which would otherwise be permitted by the Act, is unenforceable.</p>
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	<p>For example, a cultural institution may be a party to many licences attached to items forming part of its collection. Those licences will often contain a clause that prohibits the cultural institution from using the licensed work in a way that is not expressly contemplated by the licence itself. Such clauses can limit the cultural institution's ability to use works in their collection in ways that would otherwise be permitted by the Copyright Act. In addition, each licence needs to be reviewed individually to identify restrictions, which can operate to restrict a use otherwise permitted under an exception.</p>
<p>Question 4 To what extent do you support amending the Copyright Act to make unenforceable contracting out of:</p> <ul style="list-style-type: none"> <li>• only prescribed purpose copyright exceptions?</li> <li>• all copyright exceptions?</li> </ul>	<p>The Copyright Act should be amended to make it clear that an agreement, or a provision of an agreement, that purports to have the effect of excluding a cultural institution's ability to rely on any copyright exception, will be unenforceable against that institution.</p>

### **Access to orphan works**

<p>Question 5 To what extent do you support each option and why?</p> <ul style="list-style-type: none"> <li>• statutory exception</li> <li>• limitation of remedies</li> <li>• a combination of the above</li> </ul>	<p>CICI supports a combination of introducing a statutory exception specifically for cultural and education institutions' use of orphan works (particularly for non-commercial uses) as well as a limitation on remedies, for commercial use of orphan works.</p> <p>Cultural institutions have a legislative obligation to share and make accessible the material in their care and need flexibility within the Copyright Act to do so.</p> <p>In addition, the costs of preserving and storing materials within the collections of cultural institutions are a significant cost. Allowing use of orphan works (otherwise unavailable) would provide a return on investment for publicly funded cultural institutions,</p>
<p>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:</p> <ul style="list-style-type: none"> <li>• restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)</li> <li>• capping liability to a standard commercial licence fee</li> <li>• allowing for an account of profits for commercial use</li> </ul>	<p>CICI supports a restricted liability solution to the use of orphan works alongside a requirement to conduct a due diligence search in accordance with the ALRC Report recommendation 13.2.</p> <p>The restricted liability solution might see injunctive relief for the non-commercial use of orphan works and reasonable compensation for the commercial use of orphan works. This would allow cultural institutions to feel more comfortable in making orphan works accessible.</p> <p>Often the orphaned material has little or no commercial value. Non-commercial use by cultural institutions would</p>

	not conflict with the normal exploitation of the material nor prejudice the interests of the copyright holder.
<p>Question 7</p> <p>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>It is important to recognise that material held in the collections of cultural institutions, most often assessed as orphan, is archival material predominantly created before the 1970s. Material is not assumed to be orphaned simply because copyright holders do not respond to emails or phone calls (although this happens a lot) but because former production companies have ceased to trade, producers have disappeared, intellectual property rights have not been transferred, and no chain of title can be established.</p> <p>Collecting and cultural institutions have a legislated remit to provide access to the material in their care. A significant amount of this material is orphan works. Without legislative relief this material remains “locked up” even from non-commercial use by cultural institutions.</p> <p>Therefore, CICI supports the introduction of a specific direct exception for the use of orphan works by collecting and cultural institutions.</p>

## Sponsorship and further information

The cultural institutions associated with CICI look forward to participating in this and future review processes. Further information may be requested from the relevant sponsoring institution or by contacting Elizabeth Beal ([elizabeth.beal@acmi.net.au](mailto:elizabeth.beal@acmi.net.au) or 03 8663 2274).

This submission is sponsored by:

Australian Centre for the Moving Image (ACMI), National Gallery of Australia (NGA), National Archives of Australia (NAA), Art Gallery NSW, National Library of Australia, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), National Film and Sound Archive (NFSA), National Museum Australia, Museums Victoria (MV), Arts Centre Melbourne.

The logo for the Australian Centre for the Moving Image (ACMI), featuring the lowercase letters 'acmi' in a bold, black, sans-serif font.The logo for the National Gallery of Australia (NGA), featuring the letters 'NGA' in a large, bold, red, sans-serif font, with the full name 'National Gallery of Australia' in a smaller, black, sans-serif font to the right.The logo for the National Archives of Australia (NAA), featuring the letters 'NAA' in a large, bold, blue, sans-serif font, with the full name 'NATIONAL ARCHIVES OF AUSTRALIA' in a smaller, black, sans-serif font below it.The logo for Art Gallery NSW, featuring the words 'ART GALLERY NSW' in a white, serif font, centered within a solid black square.The logo for the National Library of Australia, featuring a stylized black and white illustration of a classical building facade with columns, above the words 'NATIONAL LIBRARY OF AUSTRALIA' in a black, serif font.The logo for the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), featuring a red and white stylized circular emblem above the words 'AIATSIS' in a black, serif font, with the full name 'AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES' in a smaller, black, sans-serif font below it.The logo for the National Film and Sound Archive (NFSA), featuring a black silhouette of a swan's head and neck inside a white circle, with the letters 'NFSA' in a black, sans-serif font above it.The logo for the National Museum Australia, featuring the words 'national museum australia' in a black, sans-serif font, with a stylized black and white graphic element below the text.The logo for Museums Victoria (MV), featuring a stylized, thick, black outline of the letter 'M'.The logo for Arts Centre Melbourne, featuring a stylized black and white graphic of a building's facade, with the words 'Arts Centre Melbourne' in a black, sans-serif font to the right.The logo for the Australian Performing Arts Collection, featuring a black circular graphic element with the words 'AUSTRALIAN PERFORMING ARTS COLLECTION' in a black, sans-serif font inside it.

All sponsors reserve the right to make separate submissions, which may include specific examples.