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Dear Ms Haipola

Submission on Guiding Questions and Exposure Draft: Copyright Amendment (Disability Access and Other Measures) Bill 2016

The release of the Exposure Draft is welcomed by the National Film and Sound Archive of Australia (NFSA) which is a corporate Commonwealth entity and body corporate established by the National Film and Sound Archive of Australia Act 2008 (Cth) (NFSA Act) to be the Commonwealth’s primary agency for supporting a national collection of audiovisual and related material (the National Audiovisual Collection).

This submission is structured according to the Guiding Questions with the intention of assisting the Australian Government to reform the Copyright Act 1968 (Cth) (the Act) in ways that enable the NFSA “to develop, preserve, maintain, promote and provide access” to the National Audiovisual Collection consistently with the NFSA Act and the expectations which stakeholders have of galleries, libraries, archives and museums. It should be read in conjunction with the submission of Copyright in Cultural Institutions (CICI).

The position of the NFSA in this and other consultations about the reform of content regulation is most strongly influenced by the NFSA being a copyright user. The NFSA does not own or control the vast majority of copyright subsisting in the currently over 2 million items in the National Audiovisual Collection. However, the NFSA also has an interest in copyright law reform as a copyright owner or controller of copyright in some collection items including the Film Australia Collection (inherited through machinery of government changes in 2011).
The NFSA has prepared this submission without the benefit of a draft Explanatory Memorandum explaining the proposed changes in full. This submission and the related submissions it refers to are informed by the experience of staff either working at the coalface with the National Audiosvisual Collection and its stakeholders or advising on the implications of copyright and related rights for collection development, administration, preservation, research and other access activities.

Disability access

Q 1: Do you think the proposed provisions are sufficiently clear and will operate effectively to meet the objective of ensuring access to accessible format copies of works?

Q 2: Do you prefer the terminology ‘organisation assisting a person with a disability’?

A 1 & A 2: It is understood that new ss 113E and 113F may operate so that cultural institutions like the NFSA, which may not have previously satisfied the definitions to be “institutions assisting persons with an intellectual disability or a print disability” but may generally have “one of its principal functions, the provision of assistance to persons with a disability”, will be able to rely on the new exception for newly defined “institutions assisting persons with a disability”. The new terminology is consistent with the use of “key cultural institution” in s 113L.

If there is an expectation or right for the NFSA to rely on the provisions, it would be preferable if they operated as specific exceptions, to allow dealings with copyright subject matter for administrative, preservation and research purposes, without “libraries” and “archives” having to first check “the effect of the dealing upon the potential market for, or value of, the material”. “Libraries” and “archives” do not have quite that level of burden when they deal with unpublished “sound recordings” and “cinematograph films” for research purposes in accordance with ss 110A and 110B. Rather, it is more limited to undertaking a simple commercial availability test (if the works are published). The proposed new s 113J exception for the purpose of research might also allow “libraries” and “archives” to assist “persons with a disability” to the extent they may be undertaking research, without having to examine the market. Although the proposed test does exist in the “fair dealing” exceptions in ss 40 and 103C for research and study by individuals, it is reminiscent of some of the difficulties with applying the current “flexible dealing” exception in s 200AB to specific purposes of cultural institutions. The problems for cultural institutions are well documented; for example, see NFSA submission to Australian Law Reform Commission, ALRC Discussion Paper 79 (DP 79) Copyright and the Digital Economy, 6 August 2013 (ALRC #750) at page 19.

- It would be desirable for the Explanatory Memorandum to explain how far the new provisions extend to cover institutions with general functions of providing access to their collections.
- It would be desirable for the Bill to provide that dealings with copyright subject matter can be undertaken to provide assistance to persons with an intellectual or print disability without the institutions having to undertake more than a commercial availability test.
- The terminology “institution assisting a person with a disability” is suitable.

1 Previous related submissions on the reform of content regulation include:
- NFSA submission to Australian Law Reform Commission, ALRC Issues Paper 42 (IP 42) Copyright and the Digital Economy, 14 December 2012 (ALRC #279)
- NFSA submission to Attorney-General’s Department, Consultation Paper: Extending Legal Deposit, 20 April 2012
- NFSA submission to Attorney-General’s Department, Consultation Paper: Revising the Scope of the Copyright ‘Safe Harbour Scheme’, 23 November 2011
Print Disability Radio Licence Scheme

Q 3: Will the proposed exception allow providers of print disability radio to continue operating as they currently do?

- The NFSA does not express a view at this time.

Preservation copying

These comments are provided in relation to the proposed new sections:

- for "libraries" and "archives" to deal with copyright subject matter for:
  - administrative purposes (s 113K);
  - preservation purposes (s 113H);
  - research purposes (s 113J); and
- for "key cultural institutions" to deal with copyright subject matter for preservation purposes (s 113M).

While the proposed provisions do offer some efficiency over the current exceptions for the same activities, there are concerns about some restrictions and limitations.

The position of the NFSA is that there should be specific provisions to allow:

- acquisition;
- administration and discoverability;
- preservation;
- research and other access activities.

This was outlined in the NFSA submission to Australian Law Reform Commission, ALRC Discussion Paper 79 (DP 79) Copyright and the Digital Economy, 6 August 2013 (ALRC #750) at pages 20-21.

The proposed new provisions do not expressly provide for acquisition or discoverability and the restrictions on the use of a "preservation copy" and a "research copy" are particularly burdensome for any cultural institutions like the NFSA which, in accordance with the definition of "archives in s 10(4), "do not maintain or operate the collection for the purpose of deriving a profit".

The restrictions in ss 113J(2)(d) and (113M(2)(d) on the use of a “preservation copy” made in reliance on the new provisions is not practical to the extent that it requires a “library” or “archives” to prevent any person accessing it from copying or communicating it. This places a substantial cost burden on institutions such as the NFSA, as it requires them to have separate terminals or software for such access. The NFSA does not own or operate ‘dumb terminals’ at its access centres. Rather, it has auditioning booths with a range of viewing material (VCRs, 35mm film table, DVD player etc). This is because, historically, multiple access copies were made in these analogue formats (e.g. various copies of a 35mm film) and the NFSA does not have the available resources to make a digital copy when there is a perfectly adequate analogue viewing copy available due to obsolescence of both formats and the equipment available to view the material. For example, magnetic tape technology used for audio from the mid 1940s and video from the mid 1950s are now obsolete, with the NFSA holding over 40 different magnetic formats across video and audio. This means that the NFSA needs to maintain high quality open reel and cassette audio tape recorders and professional broadcast quality video tape recorders in its access centres in order to enable its clients to view older material of this genre.
Even with the operation of ‘dumb terminals’ or other equipment with copying and communication functions disabled, due to the prevalence of personal handheld devices such as mobile phones and digital cameras with high quality recording capability, the efforts taken by cultural institutions to implement the ‘dumb terminals’ could be wasted if users are going to use these other methods to make unauthorised dealings. It is possible that unauthorised dealings could fall within other exceptions in the Act but for the restrictions on dealing with a “preservation copy” and a “research copy”.

Another accessibility issue is that the section does not properly cater for contemporary practices such as online research or the development of innovative access models (such as made possible via the National Broadband Network) which could allow digital delivery of material on a closed circuit or password protected platform. It would be desirable if the Bill provided for a “library” or “archives” to make copyright dealings with a “research copy” (in whole or in part), to give offsite access to researchers who are not attending a library or archive in person to undertake their research. This would enable access to the National Audovisual Collection more easily by rural and remote Australia and thereby enable the NFSA to better fulfil its statutory mandate.

If any restrictions must apply to dealings with a “preservation copy” or a “research copy”, it is preferable for these to be implemented through “libraries” and “archives” having to notify users rather than the institution having the burden of actively controlling the “copy”. There are precedents for this in existing exceptions for managing onsite clients of “libraries” and “archives” (e.g. see reg 17A) and to offsite clients of educational and other institutions (e.g. see reg 23JLA).

Q 4: Should the proposed preservation provisions apply to a library or archives that forms part of an educational (or other type of) institution if its collection is not available to the public?

A 4:

Firstly, the definition of “archives” existing in ss 10(1) and 10(4) means that the preservation activities of “archives” are currently, and will under the proposed new provisions be, confined to collections which are “of historical or public interest” and “not maintained or operated for the purpose of deriving a profit”.

Secondly, it is important to note that the proposed preservation exceptions are:

- s113H, for “archives” and “libraries”, provided that all or part of them is “accessible to members of the public” (or the library is a Parliamentary library), in accordance with s 113G; and
- s113L, for “key cultural institutions”, whose collections need not be accessible to members of the public.

If any institutions whose collections are not available to the public were able to preserve collections from which they are not currently restrained by the Act from deriving a profit, it is likely that many “libraries” and “archives” would expect any such right to extend equally to them so that they have the flexibility not to “make their collections accessible to the public” and, more relevantly, to maintain some or part of their collections “to derive a profit”.

As the NFSA satisfies the definition of “archives” and “key cultural institution”, this question about preservation is not of major concern. However, if there was any intention to extend the exceptions available to “libraries” and “archives” for administrative purposes and research purposes to cover private institutions, this would be undesirable as a matter of fairness to “key cultural institutions” which do not necessarily have access to the exceptions for administrative purposes and research purposes. Were the exception for research purposes extended, it would increase the potential for inter-“library” and inter-“archive” research activities.

- There is not enough information available about the intention of the proposal in order to express a definitive view.
• Any views about whether other institutions should be given access to the exceptions available to “libraries”, “archives” or “key cultural institutions” will be determined by, among other things, whether the other institutions must deal with their collections in the same way.

Educational Measures

Q 5: Does the proposed statutory licence appropriately extend the coverage of broadcasts to the types of broadcast content used by educational institutions?

A 5:

It is difficult for the NFSA to comment on the range of uses of copyright content by “educational institutions” in order to state whether some might not be captured by the broad coverage of s 113 P.

The NFSA, as an owner of some copyright subject matter including the Film and Australia Collection, is a beneficiary of royalties received from the “equitable remuneration” paid by “educational institutions”.

The National Audiovisual Collection includes the Film Australia Collection which includes 5000 titles in the form of film, tape, digital files, stills and related rights management documentation which provide a documentary record of Australian life, dating back to material held by its predecessor agencies including the Film Division of the Department of Information and the Commonwealth Film Unit formed in 1946.

• It is desirable for the range of uses covered by the statutory licence to be broad, provided that voluntary licensing permitted by new s 113T is retained so that nothing in the new sections affect the rights of a copyright owner to voluntarily license copyright subject matter to an educational institution; this provision is necessary to have in all statutory licensing arrangements.

• It is also desirable for the statutory licensing arrangements which provide for the payment of “equitable remuneration”, from which royalties are paid to “archives” who are copyright owners, to confirm that they are not inconsistent with the requirements in s10(4) that “archives” are “not maintained or operated for the purpose of deriving a profit”.

Q 6: Does the Copyright Tribunal have adequate jurisdiction to determine all necessary matters?

A 6:

• The NFSA does not have a view about matters in which the Copyright Tribunal of Australia might not have adequate jurisdiction.

Q 7: Will the proposed statutory licence reduce the administrative burden on parties to the licence?

A 7:

• The NFSA is not an “educational institution” and therefore is not a licensee. However, as a copyright owner, it is too early for the NFSA to know the views of the declared copyright collecting societies and to determine the administrative burden of the statutory licence on either the societies or copyright owners like the NFSA.
Q 8: Do the proposed transitional provisions adequately protect current arrangements for the life of their term?

Q 9: While the transitional provisions provide that existing notices, agreements and determinations will continue, the new provisions would govern these existing arrangements. Are there any arrangements that the new provisions should not apply to?

A 8 & 9:

The intention of the transition provisions is not clear and needs to be stated in the Explanatory Memorandum.

It appears that they might have the intention of applying the “new law” retrospectively to some copyright dealings undertaken in reliance on the “old law”.

If the “old law” will apply until the date of commencement of the relevant provisions, the copyright dealings undertaken in reliance on the “old law” would be defensible.

If the “new law” will apply from the date of commencement of the relevant provisions, the copyright dealings undertaken in reliance on the “new law” would be defensible.

It is noted for checking that the transitional provisions do not mention the current arrangements for copyright dealings for administrative purposes including s 51A(2).

- It seems that the only advantage to applying the “new law” retrospectively is where it permits dealings that were not permitted under the “old law”. It is highly desirable to enable the transitional provisions to do this, particularly in the application of s 113H, 113J, 113K, 113L and 113M.

Safe harbour

The NFSA has previously expressed support for the introduction of a “safe harbour” scheme that would limits the liability of the NFSA for dealings with third party copyright subject matter online.

The NFSA supports provisions which would limit its liability for any infringing copyright material in relation to user-generated and other content posted by third parties on websites and infrastructure hosted by the NFSA. This will enable the NFSA to better engage with its audiences and for its audiences to also better engage with collection content in fulfilment of its statutory mandate to promote and make its collection accessible to as wide an audience as possible.

To date the NFSA does not run ongoing programmes encouraging the posting of user-generated content, such as hosted by other agencies such as the Australian Broadcasting Corporation open: https://open.abc.net.au/. However, it has run a few specialised projects and competitions inviting user-generated content (including Test of War 2 and Canberra’s Calling to You3), however, in both instances the NFA needed to apply strict terms and conditions on entries to manage risks associated with potential for claims for authorisation of copyright infringement.

2 The Test of War competition offered young composers (aged 18–26) the opportunity to create a soundtrack for a five-minute clip of a silent film of Australia’s first naval battle in the First World War, between HMAS Sydney and German raider SMS Emden: http://www.nfsa.gov.au/testofwar/

3 http://www.nfsa.gov.au/whats-on/canberra-calling-you/submissions/ and http://www.nfsa.gov.au/whats-on/canberra-calling-you/materials-download/- in relation to this project the NFSA limited the content available for re-use to material in the public domain as a means of minimising any risks associated with authorising copyright infringement
Term of protection

Q 10: The current proposal only applies to the duration of copyright in works. This could be extended to films and sound recordings. With this in mind, and given that the Act currently does not use the concept of the date of ‘making’ a film or sound recording for the purposes of determining duration, views are sought on the common industry understandings of when a commercial film or sound recording is made.

A 10:

There is no obvious reason for concern about applying the concept of the date of “making” to new rules which determine the duration of copyright in a “sound recording” and a “cinematograph film”. It would achieve consistency with the proposed new rules for “works” and has the potential to partially solve problems that the NFSA and other cultural institutions face when dealing with “orphan works”.

It is understood that industry practice is to recognise that copyright can subsist in the components or stages of a “sound recording” or “cinematograph film”, separately from the copyright in the finished “sound recording” or “cinematograph film”, from the date they are made. For example, the rushes or out-takes created for a film are protected separately from the finished film. This appears consistent with existing provisions in the Act (e.g. ss 89, 90, 110A).

- There is no concern about using the concept of the date of “making” in new rules for the duration of “sound recording” or of a “cinematograph film” to determine when copyright expires.
- The NFSA is not aware of an industry understanding of “making” of a “sound recording” or of a “cinematograph film” that is inconsistent with the concept already used in the Act (e.g. ss 89, 90, 110A).
- See further comments in the submission of Copyright In Cultural Institutions (CICI).

Closing remarks

The NFSA appreciates the Department’s consideration of this submission and would be pleased to assist further.

Any questions about the NFSA’s participation may be directed to Adam Flynn, Principal Legal Counsel, by phone on 02 6248 2056 or by email at adam.flynn@nfsa.gov.au.

Yours sincerely,

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