AUSTRALIAN
DIGITAL ALLIANCE

Australian Libraries
Copyright Committee

Copyright Amendment (Disability Access and Other Measures) Bill 2016
Exposure Draft

Joint submission to the Department of Communications and the Arts

by the Australian Digital Alliance and the Australian Libraries Copyright Committee

February 2016

Introduction

The Australian Libraries Copyright Committee (ALCC) and Australian Digital Alliance (ADA) welcome the opportunity to provide comments on the exposure draft of the Copyright Amendment (Disability Access and Other Measures) Bill 2016.

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- Australian Library and Information Association
- National and State Libraries Australasia
- Council of Australian University Librarians
- National Library of Australia
- Australian Government Libraries Information Network
- National Archives of Australia
- Council of Australian Archives and Records
- Australian Society of Archivists
- Australian School Library Association

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, technology companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that appropriately balances the interests of rights holders with the interests of users of copyright material.

Summary

We strongly support the policy reforms proposed by the Bill. We feel these are important changes that provide significant benefits for Australian consumers and businesses. They will particularly benefit the cultural, educational, disability and technology sectors.

We have comments and recommended changes regarding the exact drafting decisions for some of the proposed reforms, which are detailed below. We also strongly support extending the new provisions for determining the term of unpublished and orphaned works to audiovisual materials, which we do not see as warranting different treatment than either their published counterparts, or traditional works.

As outlined in the ADA's submission to the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements, we believe that a number of other amendments are needed to ensure we have a fully efficient, effective and appropriately balanced copyright law in Australia.[1] The amendments contained in this exposure draft however will have make a measurable improvement to a number of outstanding problem areas.

[1] See the ADA submission to the PC review at http://www.pc.gov.au/__data/assets/pdf_file/0006/195009/sub108-intellectual-property.pdf

A. Disability provisions

We strongly support the disability access amendments proposed by the Bill. We believe they enhance Australia's response to the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* (the Marrakesh Treaty). The Marrakesh Treaty is groundbreaking and important, as the first treaty to comprehensively recognise the rights of users in the copyright space alongside those of copyright owners. As the National Interest Analysis (NIA) presented to the Joint Standing Committee on Treaties (JSCOT) states:

> Ratification and implementation of the treaty is in Australia's national interest. It provides equitable access to information to people who are print disabled while balancing the commercial interests of rights holders. Ratification of the Treaty by Australia will mark an important advance to help overcome the significant barriers that limit the availability of print accessible literature to people who are blind and vision impaired and that precludes these Australians from full participation in society.… Early ratification of the Treaty provides an opportunity for Australia to be a global leader in facilitating access to accessible format works.

As well as directly assisting those with a disability towards equality of access to content, the proposed amendments will enhance the operations of institutions assisting those with a disability. Every day Australian disability organisations, universities, schools and libraries assist thousands of Australians to access books and other works by converting them into formats that they can comprehend. Often working with limited resources, human and financial, increased efficiency in compliance and administration means more resources are available to make three dimensional children's books or to digitise university readings so they are compatible with text-to-speech converters.

The proposed amendments enhance Australia's Marrakesh implementation and ensure that our disability provisions are international best practice.

Institutional exceptions

We support the proposal to replace the current free statutory licence with an exception for institutions assisting persons with a disability.

Statutory licences can be a useful vehicle for organisations where mass use of copyright material is required. We acknowledge the long supportive commitment from the Copyright Agency to make uses free of charge, and to assist organisations to reduce the administrative burden of compliance. However, the fact remains that the drafting of the provisions as statutory licences rather than exceptions decreases their efficiency, with all parties being limited in their ability to streamline the administrative and record keeping requirements set in the Act and Regulations.

For uses that see no transfer of payment to rightsholders, these administrative requirements are simply surplus costs borne by non-profit organisations. Redrafting the provisions as an exception better reflects the policy intention, to ensure that people with a print disability are able to access a similar range of content as other citizens. The importance of equality of access for Australians with a disability should be paramount to bureaucratic considerations. The technology neutral language gives the new provisions a flexibility to harness changes in technologies, so that we should not have to return to the drafting table for each technological innovation in conversion and delivery techniques.

The proposed provision also better reflects both the wording and the intent of the Marrakesh Treaty than the current limited provision.

Fair Dealing Exception

Similarly, we believe that the proposed fair dealing provision for access by persons with a disability provides significant advantages over the existing s200AB. Our members have indicated in the past that they find the s200AB provisions confusing and difficult to apply. The proposed fair dealing provision will be a significant improvement as:

- it explicitly removes a number of restrictions contained in s200AB that cause frequent confusion and prevents people from making use of the existing exception; and
- the overarching test of "fairness" it applies is more intuitive for the ordinary person.

Evidence for these statements can be found in a report by Policy Australia commissioned by the ADA in the lead up to their submission to the Australian Law Reform Commission's (ALRC) Copyright and the Digital Economy Inquiry examining the cultural sector's attitudes to s200AB, and querying whether the Australian education, library and cultural sectors would be better off under fair use.[2] Policy Australia considered that s200AB has not benefited Australian educational institutions, libraries and cultural institutions as expected because:

- Particular drafting choices made in the incorporation of the three step test into s200AB, such as the "special case" requirement, have created a high degree of uncertainty as to its practical application and scope. Policy Australia highlighted the difficulty for trained copyright officers and legal advisers to confidently advise on the scope and application of section 200AB, let alone library staff without legal training.
- Section 200AB(6)(b) provides that the exception does not apply to any use that "because of another provision of this Act...would not be an infringement of copyright assuming the conditions or requirement of that other use were met." There is debate as to the effect of this provision, and whether it precludes the use of the provision for activities that share some characteristics of a permitted activity but fall outside of the scope of the specific exception. An example would be activities that fall outside the scope of the library document supply provision (s49) such as document supply for personal enjoyment, or criticism and review. Policy Australia noted that it appears to narrow the scope of the exception to a significant extent. It also means that staff must complete all the steps needed to determine whether one of the other exceptions applies before they even move on to assessing its compliance with s200AB. This requires a great deal of expertise and is extremely time consuming, significantly increasing the compliance costs and discouraging all but the most confident of institutions from taking advantage of the provision.
- The uncertainty caused by s200AB's drafting, combined with a general culture of risk aversion, has led institutions to refrain from using the exception for fear of facing a legal challenge. A number of anecdotal examples are provided in the Policy Australia report where institutions have felt they cannot make use of s200AB, even though on the face of it the use in question may fit within its boundaries.

A number of stakeholders commented that the language of s200AB was not as 'familiar or instinctive' as the language of 'fairness', which Australians are already used to assessing for other fair dealing provisions. Indeed, some institutions the ADA and ALCC have spoken to indicate they already take a "fairness" approach to providing access to their collections.

[2] Policy Australia, *Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?* Report prepared for the Australian Digital Alliance/ Australian Libraries Copyright Committee available at http://www.alrc.gov.au/sites/default/files/subs/213._org-attachment_adaandalcc.pdf

Policy Australia found that:

> It does appear from the evidence provided in consultations that despite their generally risk averse nature, educational institutions, libraries and cultural bodies would be more likely to use an exception that required them to engage in a fairness risk assessment. This, in our view, is significant. There would be little point seeking to replace s200AB with a provision such as fair use if the institutions intended to benefit from such an exception were no more likely to use it than they have been to use s200AB. Our consultations suggest that this would not be the case.

They concluded that Australian cultural and educational institutions would fare better under a provision incorporating concepts of "fairness".[3] The concept is already familiar to the Australian population and courts through the existing fair dealing exceptions, with many decisions providing guidance as to its meaning. It is also more natural and intuitive than the three step test used by s200AB. Most importantly, it is not a "free for all" exception, but provides a balanced approach which requires the court to take into account the rights of copyright owners in deciding whether a use is permitted.[4]

Recommendations

Application of fair dealing to third party activities.

The case of *De Garis v Neville Jeffress Pidler Pty Ltd*[5] established the default rule for Australia that a fair dealing provision cannot be undertaken by third parties. This means, for example, that you cannot copy material for someone else's research and study under the fair dealing exception for research and study - the purpose in question must be your own.

Therefore, as currently worded, it is highly possible that a court would find that the new fair dealing 'for the purpose of access by persons with a disability' is limited to transactions undertaken by persons with a disability ie not by institutions or other third parties assisting them.

We believe that a narrowing of the provision in this way would be an unintended consequence of the amendments, as previous statements from the government on the proposed fair dealing exception noted it is intended for "use of copyright material ***by and for*** individuals with a print disability and undeclared institutions" (emphasis added).[6] If the narrow reading was applied it would have significant detrimental effects. It would substantially reduce the utility of the exception for the disability community, as many dealings to assist persons with a disability are conducted by third parties, such as primary caregivers, rather than the person themself. Such third parties would now be unable to provide access to material, a significant reduction from the current provisions as s200AB applies to institutions, individuals assisting those with disabilities and people with a disability.

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[3] The Australian Digital Alliance would like to clarify that it would still prefer an open ended flexible dealing provision such as fair use of a series of closed fair dealing exceptions. However, we feel that even closed fair dealing provisions are preferable to the complexities of s200AB.

[4] See more discussion of the benefits of a "fairness" based exception in the ALRC's Copyright and the Digital Economy Report, available at http://www.alrc.gov.au/publications/copyright-report-122

[5] (1990) 95 ALR 625, available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/1990/218.html?stem=0&synonyms=0&query=title(De%20Garis%20and%20Neville%20)

[6] Attorney General's Department, National Interest Analysis at 33 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/16_June_2015/Treaties_being_considered

However, this potential problem can be easily avoided by simply tweaking the current wording of the exception to make it clear that it is intended to apply to third party dealings. We therefore recommend rewording the exception in line with the NIA to read "A fair dealing with copyright material **for or by** a person with a disability does not infringe copyright in the material if the dealing is for the purpose of **one or more** persons with a disability having access to copyright material." We also recommend inclusion of language in the EM making it clear that this fair dealing is intended to apply to third party uses.

Commercial Availability Test

We are also concerned that the new s113F exception for institutions assisting people with a disability is still subject to the "commercial availability" test.

Our understanding is that there is some uncertainty as to whether this exception prevents institutions from undertaking cost-saving practices such as creating permanent or semi-permanent (ie available for a number of weeks) archives of popular materials for which they receive multiple requests. Some argue that the test requires the institution to re-check commercial availability each time the material is requested by a user, potentially undermining such practices.[7] We are concerned that the language used in the stakeholder consultation document that an institution would be required to "seek to purchase" material in the required format before relying on the exception could be read in this manner ie to require an institution to inquire as to commercial availability each and every time that a copy was supplied. This would prevent institutions both from undertaking proactive archiving as described above, and from accessing repositories that already exist internationally, such as the US Bookshare service.

The provision would prove more useful to the sector if a note were included in the legislation or the EM to make it clear that the commercial availability test is not required each time the same material is supplied to a person. The note should make it clear that the test need only be conducted the first time the material is converted, or again in the future if the institution becomes aware of or has reason to suspect that availability status of the material may have changed. Becomes aware of could include notification from publishers or copyright owners. If this is not possible, it could also be possible to address this issue with guiding principles; however a regulatory solution would be preferable.

B. Preservation Copying

We support the replacement of the current multiple, inconsistent and confusing exceptions for "preservation and other purposes" (ss51A and 110B) with separate preservation (s113H), research (s113J) and administration (s113K) exceptions. This is in line with the recommendations from the ALRC's *Copyright and the Digital Economy* Inquiry.

These provisions replace a complex mess of out-of-date, unworkable provisions with a simple new system which will help librarians to do their jobs in the digital age. We particularly commend that these new exceptions:

- are uniform for all materials – the current provisions in the Act are more permissive for unpublished works and more restrictive for audiovisual works;
- remove restrictions on number of copies and formats which had previously prevented best practice reservation. This will allow Australian libraries and archives to meet international best practices for

[7] See, for example, the Australian Copyright Council's Print Disability Copyright Guidelines, p.15 file:///C:/Users/User/Documents/ADA/print-disability-copyright-guide.pdf

preservation, which require the creation of at least three copies across multiple formats. For example, International Standards Organisation contemplates a range of different archived copies, including: an archived master copy; an access copy; at least one backup copy which enables restoration in the event that a system is compromised; and at least one remote master copy.[8] Similarly the previous restrictions on formats and processes (making a "copy") were obsolete in a digital environment where the preservation of content requires content to be migrated, emulated and reformatted in digital format.

- remove the commercial availability test – as one member of our organisation commented in our research for the ALRC submission, applying the commercial availability test for preservation "fundamentally misunderstands the nature of preservation." Best practice requires that preservation copies of an item be made at the point of acquisition to ensure best quality and protect against damage or loss. For example, Australia's largest digitisation of cultural heritage to date has been the Australian Newspaper Plan, "an ambitious, ongoing program designed to collect and preserve every newspaper published in Australia, guaranteeing public access to these important historical records".[9] The guidelines for this plan encourage transfer of newspapers to microfilm and/or digital format as soon as possible after acquisition due to the risk of deterioration, a particular risk for print newspapers due to the unstable acidic nature of newsprint. Preservation copies made at point of acquisition are also an important tool to track stability and deterioration of the work as time goes on, something that is precluded with a commercial availability at point of acquisition
- retain the ability to use preservation copies for document supply and interlibrary loan and to provide onsite electronic access.

Recommendations

Definition of library

The new definition of "library" for the proposed exceptions (s113G) replicates the narrow definition currently used for document supply and interlibrary loan (ss49-50). This means that the new exceptions only apply to collections that are accessible to the public. The existing preservation, research and administration exceptions are not limited in this manner.

This has the effect of significantly narrowing the application of the exceptions, meaning they may not apply to a large number of institutions which can currently use them. This has a particularly strong effect on institutional archives, specialist university archives, and many collections in museum/gallery hands. Examples of collections that will be excluded by this new language include historical societies, RSL clubs and sporting clubs.

We are unaware of any complaints that have been made about such institutions having access to the preservation, research and administration exceptions, and do not believe it is controversial among copyright owner groups. We believe this new restrictive language may be an unintended consequence of efforts to tidy and introduce more uniformity across the Act. However, retaining this proposed definition would greatly curtail the scope of the new exceptions, and risk the loss of a large amount of archival material held in small and private collections.

[8] International Standards Organisation, Reference Model for an Open Archival Information System (OAIS) Recommended Practice (IOS 14721:2012), (2012), 8. See also United Nations Educational, Scientific and Cultural Organisation, Guidelines for the Preservation of Digital Heritage (2003), 93.

[9] See http://www.nla.gov.au/australian-newspaper-plan

There is no history of preservation, research or administrative copying being contingent on general public access. Indeed, the act of preservation is so fundamental to the maintenance of an archival collection and so unlikely to affect the copyright owner's commercial interests[10] that preservation exceptions are generally entirely uncontroversial, with little or no restrictions. It is understandable for access provisions such as ss49 and 50 to be limited to libraries and archives that are open to the public – these activities could affect the copyright owner's market, and so there is an argument that they should be more limited in their scope. In contrast, the Australian preservation exceptions (both current and as proposed in the Bill) are explicitly separate from these public access provisions to ensure they do not impact the existing markets for copyright works.

It is not realistic to require all organisations that carry small collections that are not open to the public to apply to become a Key Cultural Institution. This would represent a great administrative burden, both on the institutions themselves and on the Minister who would be required to approve these requests, and would would be contrary to the government's red tape reduction agenda. It is simply adding a level of expensive bureaucracy that seems entirely unnecessary, as these institutions are already accessing the current preservation exceptions without negative consequences that we are aware of.

We also note that "Archives" is already well defined by s10(4) of the Act, and it seems unnecessary and inappropriate to introduce an additional, narrower provision here.

We therefore recommend the removal of s113G entirely, leaving the provision to be governed by the definition of archive in s10(4) and the ordinary meaning of library. This would align it with the existing provisions, retaining the status quo which to our knowledge is operating to everyone's satisfaction. This is by far our preferred approach to addressing this issue

However, if a strong reason is found to justify the need for a definition beyond that of archive already included in s10(4) of the Act, we request that a broader definition be adopted which does not require the collection to be open to the public. This broadening should apply to both s113G(a) (libraries) and s113G(c) (archives).

Remove separate provisions for Key Cultural Institutions

We note that if the above recommendation is accepted and the new s113G definition of library was eliminated or broadened, it would seem unnecessary to retain the separate exception for "Key Cultural Institutions." This exception previously allowed such institutions to make a larger number of preservation copies than an ordinary library or archive. However, as the restriction on number of copies has been removed from the standard preservation provision, there now seems to be no benefit to retaining it – all institutions should be able to undertake best practice preservation under the s113H exception.

This would help to simplify the Act. It would also help to remove confusion caused by the Key Cultural Institution provision's "historical or cultural significance to Australia" requirement and how it interacts with the collection mandates of Australia's major cultural institutions. The National Film and Sound Archive (NFSA), for example, has a significant amount of overseas titles in its collection which might not meet the

[10] Our members point out that purchasing another copy of the work is not preservation – it is the acquisition of a new work (or, the replacement of a work). For example, if the work is in an unstable or inaccessible format (eg a CD-R or newspaper) then purchasing another copy simply means acquiring another problem of the same kind.

conditions of s113M. Section 6-8 of the *National Film and Sound Archive Act 2008* doesn't restrict their collection to material of cultural significance to Australia only, rather they have a "national interest" test.[11] It is not clear whether this replicates, overlaps with or is entirely separate from the s113M test, and therefore which of these materials could be preserved under it. The requirement in s113M(1)(a) that the material forms part of a Key Cultural Institution collection means that the material would have already met the statutory or other requirements governing each institution's collecting principles and this in itself should provide enough justification for copying and further use for preservation purposes.

Taking this and our arguments above into account, we believe that with a broadened s113J provision that applies to all libraries and archives there is no longer a need for s113M and that it is superfluous and unduly restrictive.

If the government does not choose to adopt this recommendation, our members would like clarification in the Explanatory Memorandum for the Bill on when a Key Cultural Institution may be able to rely on ss113H-K, particularly given that there is a drafting note under s113L exception which states without further explanation "In some cases, Subdivision A will also apply to the library or archives".

Confusing language

We would like to raise a concern about the readability of the language in the current provisions. Since distributing the document to our members for comment we have received several queries about the effect of the identical language in subsections 113H(2)(a) and (b); 113J(2)(a) and (b); and 113M(2)(a) and (b) ie:

> (a) the preservation copy was made by using other copyright material; and
> (b) subsection (1) applied to that use of the other copyright material;

On our reading of these subsections they are merely meant to cumulatively mean "a copy made under subsection (1)." However, this is not how they are interpreted by librarians, teachers and other lay people, who see them as having legal force that specifically restrict the provision (although no one seems to be able to say exactly how). We also note that under our reading the subsections merely repeat the reference to "preservation copy" immediately preceding them.

We understand that the inclusion of these two lines may from a purely grammarian point of view make the provision more precise. However, we feel they are unnecessary and confusing for the ordinary person, substantially reduce the readability of the provision and are likely to cause ongoing issues with interpretation. We therefore propose that this confusing language be removed as unnecessary for the drafting of the provisions. We recommend the replacement of the current cumbersome provisions with shorter and more simply worded provisions that read:

> An authorized officer of the library or archives does not infringe copyright in copyright material by using a copy made under subsection (1) (the preservation copy) if:
>
> (a) the preservation copy is in electronic form; and
> (b) the preservation copy is made available to be accessed electronically at the library or archives in such a way that a person accessing the preservation copy:

[11] In performing its functions under s 6 of the NFSA Act (which include to develop, preserve, maintain, promote and provide access to a national collection of programmes and related material) the NFSA is required under s.8, amongst other things, to place an emphasis on the historical and cultural significance of programmes and related material and to also use every endeavour to make the most advantageous use of the national collection in the national interest.

(i) cannot copy it electronically; and
(ii) cannot communicate it to the public.[12]

Onsite access provision

Further to the comments above, we commend the retention of an exception to permit onsite access to preservation and research copies of works in the proposed ss113H, 113J and 113M provisions. It is important that onsite access to preservation and research copies is retained, as it allows members of the public to have access to delicate works without the works being subjected to unnecessary handling and potential damage.

However, we recommend the removal of the requirement in these provisions that libraries may only provide access to preservation and research copies on a computer terminal that prevents the user from electronically reproducing or communicating the work. This places a substantial burden on institutions, as it requires them to have separate terminals or software for such access. This is costly and difficult to comply with. Nor does it take into account the significant issue of obsolescence of both formats and the equipment available to view the material.[13] As a result, only the largest institutions, such as the National Library of Australia, are able to meet this requirement. The provision is therefore under-utilised, and smaller institutions are not able to provide a similar level of onsite access to materials.

We propose this requirement be instead replaced with a limitation similar to that provided s49(7A)(c), which requires libraries to notify users of limitations on copying the material when they provide access to it. This replicates the current approach taken to photocopiers provided in library premises ie rather than asking the library to physically prevent illegal copying, the onus is placed on members of the public to ensure they are not infringing in their use of the machine. Preservation copies are most likely to be provided onsite for delicate and at risk (ie old and out of print) works, while photocopiers can be used to copy even the most popular and commercially viable works. It therefore seems illogical to think that a higher level of responsibility rests on libraries to prevent further reproduction of preservation copies than it does to prevent copyright infringement on photocopying machines.

We would recommend that the notice provided to individuals should specify that the material provided may only be further reproduced or communicated in circumstances permitted by the Copyright Act eg if the activity is a fair dealing for research and study. This would be a far more logical and appropriate line to draw. This could be done by replacing the proposed ss113H(2), 113J(2) and 113M(2) the following language (based on the new language recommended above and the current s49(7A)(c)):

> An authorized officer of the library or archives does not infringe copyright in copyright material by using a copy made under subsection (1) (the preservation copy) if:
>
> (a) the preservation copy is in electronic form; and

[12] Note that this proposed language does includes a number of other changes intended to ensure grammatical efficiency and increase the readability of the provisions. It is also based on the existing limits of the provision - it should not be read as changing our recommendation below that the requirement for a dumb terminal should be removed.

[13] For example, as highlighted by the NFSA in its Deadline 2025 Collection at Risk paper (available at: http://www.nfsa.gov.au/2025/) magnetic tape technology used for audio from the mid 1940s and video from the mid 1950s are now obsolete which means that in many cases specific analogue based viewing equipment such as high quality open reel and cassette audio tape recorders and professional broadcast quality video tape recorders need to be made available in its access centres in order to view older material.

(b) the preservation copy is used by being made available to be accessed at the library or archives; and
(c) before or when the preservation copy is provided to the person, the person is notified in accordance with the regulations:
    (i) that the preservation copy has been made under this section and that the article or work might be subject to copyright protection under this Act; and
    (ii) that the preservation copy may only be reproduced or communicated in accordance with the provisions of this Act; and
    (iii) any other matters prescribed.

C. Educational Statutory Licences

We support the move to simplify the statutory licences for educational institutions and remove many onerous administrative requirements that undermine the ability of parties to negotiate suitable and flexible solutions for licence management.

We support the replacement of the current statutory licences for copying and communication of broadcasts and other material by educational institutions (Parts VA and VB) with a single new simplified statutory licence (proposed Part IVA Division 4). We also welcome the affirmation of the right of copyright owners to grant voluntary licences to educational institutions.

Recommendations

We endorse the comments and recommendations of the National Copyright Unit, COAG Education Council regarding the drafting specifics of these provisions.

D. Safe Harbour Provisions

We strongly support the proposed changes to extension of the existing ISP safe harbours to other online service providers such as universities, schools, libraries, and user services such as Facebook and Youtube.

This fixes what we believe to be a long-running “error” in how Australia implemented the Australia - US Free Trade Agreement (AUSFTA). This error has restricted the application of the safe harbour provisions in the Australian Copyright Act to commercial ISPs (“carriage service providers”). This is in direct contrast to the approach taken in all other countries that have ratified a free trade agreement which includes this safe harbour language – including the US, Japan, Chile, South Korea and Singapore – all of which have adopted an approach that applies the safe harbours to the broader category of providers of online services.

This puts Australian organisations at a significant disadvantage to their international counterparts and is a disincentive for businesses to set up in Australia. It also means that Australia is arguably in breach of its obligations under the AUSFTA. However, most importantly, it is clear that Australia will be in breach of its obligations under the Trans Pacific Partnership (TPP) if it chooses to ratify the new trade agreement without first correcting this error. This is because the TPP includes new language in the definition of “service provider” which makes it even more clear that the safe harbours are intended to apply to all

organisations providing third party hosting and linking services, and not just to those providing network connections.[14]

If Australia does not correct this error in this Bill, it will therefore be required to introduce the same amendments separately before ratifying the TPP, in direct contrast to statements by the government that the TPP does not require changes to Australia's IP laws.

We understand that some media reports have attempted to paint this amendment as merely benefiting large multinational technology corporations. However, we point out that this is patently untrue – by far the largest category of beneficiaries of this provision will be universities, schools and libraries.

We also know that in the past opponents to the extension of the safe harbour provisions have argued that this reform should not be implemented without also introducing changes to Australia's authorisation liability doctrine. However, we strongly oppose the linking of authorisation and safe harbours. The proposal is based on a fundamental misunderstanding of the nature and history of authorisation law in Australia. The safe harbour scheme is not a quid-pro-quo for authorisation liability, which existed long before the internet - or even photocopiers - were invented. It is merely intended to provide an incentive in the form of certainty and limited financial liability for service providers who assist rights holders by complying with the safe harbour conditions (notice and takedown etc). This language can be seen in the AUSFTA and the TPP provisions relating to the safe harbours. In any event, Australian authorisation law is already as broad as - or broader than - the equivalent law in the US, Singapore and Korea. Expanding it further in Australia is therefore illogical and would put us further out of line with international norms, putting our intermediaries at risk and counteracting the positive effect of the safe harbour extension.

Recommendations
We endorse the government's approach in drafting these provisions, and have no additional comments or recommendations.

E. Copyright Term for Unpublished and Orphan Works

We strongly support the proposed changes which would end perpetual copyright for unpublished works and provide assistance in determining terms for orphan works where their authors are unknown.

These amendments will significantly improve the health of the public domain in Australia and will free large swathes of currently unusable works for reuse. Unpublished and orphaned works make up large portions of our national collection, and currently can be accessed or used only in rare cases. For example, in August 2015, the ALCC conducted an informal survey of 14 Australian universities (over 20 collections covering roughly 1/3 of the university sector) to establish the incidence of unpublished works in their collections. Cumulatively, the universities surveyed reported that their collections included over

[14] Art. 17.11.29(xii) of the AUSFTA states that "for the purposes of the functions referred to in clause (i)(B) through (D), service provider means a provider or operator of facilities for online services or network access" while Art.18.81 of the TPP states that internet service provider includes "a provider of online services undertaking the functions in Article 18.82.2(c) or Article 18.82.2(d) [ie hosting and linking]. The TPP definition removes the "operator of facilities" and "network access" language, which seems to reference ISPs, and directly links the definition to the activities undertaken by the organisation, so that any organisation that is providing hosting and linking services should now be covered. This change seems to be a deliberate decision to clarify the operation of the definition during the TPP negotiation process, as similar language is not included in the South Korean or Chilean USFTAs.

12.9km of unpublished works, or approximately 103,904,000 pages. The National and State Libraries Australasia (NSLA) also surveyed its members regarding unpublished orphan works prior to the ALRC Review and found that library collections comprised between 10% - 70% of unpublished orphan works, dependent on the type of works collected.

The decision to remove perpetual copyright for unpublished works better aligns with the underlying tenets of intellectual property law. Intellectual property is supposed to provide creators with a monopoly over exploitation of their work for a limited time, to allow them recoup the costs of creating the work and make such profit as they can extract in a reasonable amount of time. However, this monopoly is supposed to finish after a certain amount of time to ensure the work can be accessed and used to further human knowledge. Thus intellectually property encourages the both creation of new works and their broad dissemination for the good of society. The existence a category of works for which copyright is eternal goes against the very core of this reasoning, and is anathema to a functional intellectual property system.[15]

We particularly applaud the innovative approach taken to orphan works the authors of which are unknown in the proposed amendments. As the authors of such works cannot, by definition, be contacted for permission, and their death date is not known, they currently remain unusable in perpetuity (or until such time passes as libraries are willing to "guess" that they would now be in the public domain). Being able to determine a clear and certain copyright end date for such works means that for the first time, the subcategory of orphan works the authors of which are unknown will be able to be used with confidence in Australia. Unfortunately, works whose authors are known but which have still been orphaned (eg because the authors are uncontactable or unwilling to take responsibility for them) will still be problematic. But the current proposals are a good start.

Recommendations

Audiovisual works

There does not seem to be a clear argument why similar changes cannot be extended to audiovisual works. Leaving audiovisual works out of the amendments will mean significant sections of Australia's national collections are left locked up, unuseable, indefinitely. This will particularly affect the collections of the National Library of Australia, the National Film and Sound Archive, the National Archives, the Australian War Memorial, the Australian Broadcasting Corporation and the Australian Institute of Aboriginal and Torres Strait Islander Studies, which all have extensive collections of unpublished audiovisual works. If the proposed term reforms are not extended to audiovisual works, these institutions will continue to encounter great costs and risk when attempting to provide access to or make use of these works. Conversely, we are unaware of any stakeholders who will suffer significant damage from the release of these materials - which, by definition, are not being commercially exploited.

Including audiovisual materials in the extension would ensure that a consistent approach is taken for all materials across the Act. It would be odd to introduce reforms for one category of materials but not another, and would be out of line with the government's simplification agenda.

Following the lead of the current terms for published audiovisual works, we propose not linking the term of unpublished and orphaned audiovisual works to knowledge of the "author." Taking this into account and

[15] See, for example, the discussion of the purpose of copyright in the Productivity Commission's issues paper, available at http://www.pc.gov.au/inquiries/current/intellectual-property/issues.

removing consideration of authors from the mix, we do not believe that the government needs to go beyond the language already used for unpublished and orphaned works in the proposed new provisions ie - if an audiovisual work is unpublished, its term should be 70 years after the year in which it was made, regardless of whether the author is known. These terms can apply to all unpublished audiovisual works - the question of whether they are orphaned does not enter into it.

We understand that it may seem difficult to define the point at which an unpublished audiovisual work was made. However, we do not believe that it is necessarily substantially more difficult than determining the point of completion of other unpublished works. If a collection object comprises raw film footage, it is 'made' when that footage was shot - with a first draft manuscript, it is when the manuscript was physically written. If a collection item is a partly-edited audiovisual work, it is 'made' when the editing process ceased, creating the particular version that is currently being held - so too with a written manuscript, which can also be subject to multiple editing stages; it is when the particular version being held by the institution was completed that it was made. If there is any doubt, there are clear international standards for when films are considered "made" that can be drawn on by users or courts to to assist with determining particular cases.

We would welcome meeting with the Department of Communications staff to discuss specific concerns and examples re the determination of term for unpublished audiovisual works, to ensure that all potential avenues for releasing this valuable pool of works for public use have been examined.

F. Technological Protection Measure (TPM) provisions

The Bill includes a note at the start of the proposed Part IVA which states "Regulations made for the purposes of paragraph 116AN(9)(c) may provide for a person to circumvent an access control technological protection measure if doing so does not infringe copyright (including because of this Part)."

We hope that this indicates that new TPM exceptions will be introduced into the *Copyright Regulations 1969* as part of the Bill's implementation. At a minimum, the current TPM exceptions need to be translated across to the new provisions, to ensure the disability, education and cultural sectors retain the access to materials they currently enjoy. These amendments must be made in order to allow Australia to ratify the Marrakesh Treaty, and must be operative before ratification occurs.

However, we would prefer that the opportunity be taken to complete the review of the TPM measures started by the Attorney-General's Department in 2012.[16] These reviews are required under the terms of the AUSFTA every four years, making the conclusion of the review severely overdue.[17]

Submissions to that review outlined a number of additional exceptions that were required to ensure that TPMs did not prohibit legitimate uses of copyright material. If new TPM exceptions were introduced to cover the full range of activities envisaged by the note (eg all activities that do not infringe copyright, or even just all activities permitted by proposed Part IVA) this would significantly expand the circumstances in which TPMs can be legally circumvented in Australia. This would be of great benefit to disabilities

[16] Australian Government Attorney-General's Department, Review of Technological Protection Measure Exceptions made under the Copyright Act 1968 (2012)
[17] See Australia United States Free Trade Agreement, 2005, Art. 17.4.7(e)(viii)

groups, libraries, tech companies and private individuals. At a minimum, we would like to see new TPM exceptions apply to all the fair dealing provisions in the Act.