

Dear Honourable Members of the Committee,

Re: Response to Question on Notice from Senator Lundy:

1. The ADA and ALCC understand that the intention of the Government throughout the fair use review was to improve and update copyright laws so that the essential functions of libraries and cultural institutions (preservation and facilitation of access by the public), which many such institutions are mandated to undertake in accordance with their founding statutes, would be improved, particularly in light of new practices that have developed in the digital environment.
2. This Bill does not do that; the library and cultural sectors are seriously concerned that whatever the policy intentions of the Government may be, the result of the legislation will be that many practices which cultural institutions undertake in order to fulfil their mandates, will remain technically in breach of the law.
3. For example, the provision in relation to key cultural institutions is not consistent with best practices for preservation in the digital environment. Institutions are required to make several copies (usually via automated back-up copying processes which make 4-5 or more copies of valuable digital databases) in order to ensure that their collections are not put at risk of loss, destruction or degradation. The single copy restriction is completely inconsistent with the function of institutions in preserving Australia's cultural heritage and is particularly problematic in the digital environment.
4. The key cultural institutions provisions are limited by a commercial availability test. This makes the provisions completely unworkable. Valuable databases within cultural institutions are required to be backed up in accordance with best practices regardless of whether certain items are still commercially available or not. Similarly, institutions may need to format-shift items in order to ensure that their collections do not become inaccessible because the formats within which items are held in have become obsolete. Once materials are no longer commercially available, or have been destroyed or stolen, if they have not been preserved prior to that point, it will no longer be possible to preserve them.
5. The current preservation provisions similarly put currently institutional practices outside of the law. Preservation by definition must be undertaken prior to items being lost or stolen. The copyright Act does not allow this for materials other than manuscripts and original artistic works. Other items can only be copied after they have been lost or stolen, which is unhelpful. (See section 50)
6. The narrowing of fair dealing for research and study will seriously disadvantage libraries and cultural institutions and particularly their clients, who will not be able to copy rare or out of print materials to take away with them for research or study purposes, despite the fact that those materials are not commercially available. This will particularly impact upon institutions such as Archives, which hold mainly (if not solely) items which are non-commercially available items. Thus, whereas now, users may be able to go to an Archive and copy a whole of a non-commercially viable work, these laws will change that and instead enforce a 10% cap. (Although we understand the Government's intention is unclear here)
7. The narrowing of the Commercial availability test to require cultural institutions to take into account electronic materials is detrimental to the functions of cultural institutions and misunderstands the curatorial value of original formats. For example, watching a 35mm film is different to watching a DVD. Equating the two is not appropriate and the commercial availability test should not be amended.
8. The library and cultural sector welcome flexibility to Australian copyright law, however we believe that s 200AB is unnecessarily limited by the 'partly for a commercial advantage' test which is unclear in meaning. Institutions often may compete with each other for collection items, although with no view to actually making any profit from their activities. Such activities,

which are fundamental to the activities such institutions are mandated to undertake, should not preclude use by institutions of the provision.

9. Additionally, the requirement that the provision be limited to 'certain special cases' within the scope of the special cases of education, library and archive uses, parody and satire and uses for people with disabilities, confuses the meaning of the provision. This additional limitation is not required by the 3 step test or indeed the AUSFTA.

10. The AUSFTA does not require a more restrictive interpretation of the 3 step test than the meaning given to the test at international law. Australian citizens should not be subject to such additional restrictions which are not required by the AUSFTA or TRIPS, particularly given that Australia is a net importer of IP.

Specific suggestions for amendments:

The library and cultural sectors seek at least the following amendments:

- In relation to the Key Cultural institution provisions (51B, 110BA) - the single copy restrictions and the commercial availability tests must be removed; The provision is already limited to preservation purposes;
- In relation to s 200AB, the commercial advantage requirement must be removed, this may potentially make the provision unworkable (it is at least unclear);
- In relation to 200AB the 'certain special cases' requirement should also be removed seeing as it complicates the meaning of the provision - and the provision is already limited to certain special cases, being 'library & archive uses';
- The preservation provision should be amended to allow preservation of materials in cultural institutions prior to such items being lost/stolen/degraded. Otherwise this defeats the very purpose of preservation;
- the commercial availability test should not be changed to incorporate whether an item is available electronically;
- These amendments will make the provisions more clear & less confusing

Ultimately, the ADA and ALCC believe that deferral of this legislation is preferred to passing without proper consideration and amendment to the contents.

Please do not hesitate to contact me should the Committee require clarification of any points made herein.

Kind Regards,

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