



Copyright in Cultural Institutions Group (CICI)

**Submission to the Senate Standing Committee on Legal
and Constitutional Affairs**

Copyright Amendment Bill 2006

October 2006

1. Executive Summary

The Copyright and Cultural Institutions Group (CICI) makes this submission further to its submission to the Fair Use and Other Copyright Exceptions Review (the Fair Use Inquiry), recognising the need for amendment to the *Copyright Act 1968* (the Act) to enable cultural institutions to fulfil their statutory mandates of preserving, managing and providing access to their collections. CICI member institutions endorsing this submission are listed in **Appendix A** (the ‘Cultural Institutions’).

The Cultural Institutions have concerns about the contents of the *Copyright Amendment Bill 2006* (the Bill), and seek to highlight the following in its submission:

- The new exceptions for libraries and archives, on the whole, do not work, and the Cultural Institutions seek amendments to enable them to fulfil their statutory functions. (See further paras 3.02-3.08)
- The Cultural Institutions applaud the intent behind the new significant works exceptions (ss 51B, 100BA and 112AA), which seek to bolster the ability of cultural institutions to undertake core business functions of preservation as required by their statutory mandates. However, there is a lack of certainty in terms/terminology used throughout these provisions which undermine their usefulness. The limitation on one copy/reproduction does not accord with the technical processes of preservation. The provision is also limited in that it restricts institutions from providing external digital access to collection material, including to regional, rural and remote clients. (See further paras 3.09-3.18)
- The Cultural Institutions support the principle behind s 200AB of creating an open-ended, flexible exception which institutions can rely on for a range of purposes. It is likely to allow institutions to undertake a range of internal activities such as copying for preservation and administrative purposes. However, there is uncertainty as to whether the provision could be relied on for a range of external uses (such as providing rural, regional and remote clients with digital access to collection material). Reliance on the test is also likely to be costly for institutions. (See further paras 3.19-3.40)
- The ‘no commercial advantage’ test in s 200AB(2)(c) appears to be an additional conditional not required by international law and doubles-up on the TRIPS three-step test. (See further paras 3.32-3.34)
- As we understand it, the current interpretation of the three-step test by the Australian Government goes beyond what is required by countries who are party to the agreement. (See further paras 3.26-3.27)
- The current provision for fair dealing is heavily restricted. It appears that the narrowing of the reasonable portion test will mean that users will get less freedom to copy and otherwise use published material for research and educational purposes. This will affect institution’s ability to adequately provide access to their collections and will increase the administrative burden on institutions. (See further paras 3.41-3.45)

- In its current form time shifting is too narrow and should apply to cultural institutions. (See further)
- Institutions have not had enough time to review the enforcement provisions which are lengthy (around 80 pages). The introduction of strict liability offences may capture certain activities undertaken by cultural institutions in fulfilling their statutory functions and may deter legitimate uses within cultural institutions and impede their ability to comply with their statutes. Penalties are high and disproportionate to the economic value of many collection items (particularly where items are everyday one items such as letters, personal dairy entries, and unpublished personal works such as home movies). Due to the nature of many collection items (with many institutions holding copyright material with more than one layer of copyright such as sound recordings, films, published editions), multiple infringements are likely. (See further para 3.53)
- The Cultural Institutions note that the issue of orphan works, legal deposit and whether the exceptions to copyright can be overridden by contract (copyright and contract) have not been dealt with by these amendments. We understand that orphan works and legal deposit are to be dealt with separately by the Government. The Cultural Institutions would seek that these matters be dealt with as a matter of priority.

A consolidated list of recommendations in relation to the above concerns is provided in the Schedule. (See further pp 23-25).

In summary, this submission seeks to argue that the Cultural Institutions' mandates require them to adopt a variety of roles as custodians, users, disseminators and owners of copyright material. Institutions are always careful to earn the respect and trust of copyright owners and potential donors and depositors of collection material. The Cultural Institutions seek to comply with the law and where copyright material has commercial value, institutions willingly remunerate owners for commercial activities such as producing and distributing merchandise and publications.

Amendments to the Act arising out of the Australia-United States Free Trade Agreement (AUSFTA), such as the extension to the copyright term, have made it difficult for institutions to both comply with the law and fulfil their statutory mandates within the budgets allocated to them by the Government.

Many of the proposed exceptions introduced by this Bill are flawed, for the reasons stated above. They do not allow institutions to properly undertake core business activities with certainty such as preservation and the provision of access to collections as required by their governing statutes. Without further amendment to the exceptions and enforcement provisions along the lines of the recommendations made in this submission, the proposed amendments, if implemented, will result in institutions failing to fulfil their statutory mandates and may result in extra funding bids from Government.

2. Introduction

2.01 This submission is made by the Copyright and Cultural Institutions Group (CICI), a working group of copyright and intellectual property managers representing cultural institutions (including museums, galleries, libraries, archives and research institutes) across Australia.¹

2.02 CICI member institutions endorsing this submission are listed in **Appendix A** (the 'Cultural Institutions').

2.03 CICI previously made a submission in July 2005 to the Attorney General's Department on its Issues Paper Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age (available at: http://www.nma.gov.au/about_us/copyright_and_reproductions/cici/news_and_information/2005/). Reference is made throughout this submission to the earlier submission.

2.04 CICI thanks the Committee for the opportunity to comment on the *Copyright Amendment Bill 2006* (the Bill).

Background – who we are and how copyright affects us

2.05 The Cultural Institutions are government funded organisations charged with statutory functions and /or strategic goals of preserving, managing and providing access to their collections.

2.06 Despite differences in the specific function and nature of each of the Cultural Institutions they face similar copyright issues:

- large components of their collections are protected by copyright and in most instances they do not own the copyright in most material (except for the National Archives of Australia (NAA) who has a large holding of Crown copyright material);
- a high proportion of each institution's collection consists of unpublished and older material for which the provenance and copyright ownership of individual items is unknown;
- while many institutions hold works of considerable cultural and historical value, the economic value of these items is often low (particularly for everyday, one off items such as letters, personal dairy entries; functional items such as coins and props; and unpublished personal works such as home movies). However, the costs to institutions of preserving, maintaining and storing such items is significant;
- other than the National Library of Australia (NLA), only a small proportion of the collections acquired are held in electronic form; and
- all institutions have a statutory or other mandate to provide public access to their collections, whether through exhibitions, publications, public and educational programs or the provision of direct access.

¹ http://www.nma.gov.au/about_us/image_delivery_and_intellectual_property/cici/

2.07 As libraries or archives within the meaning of ‘archive’ under the Copyright Act, the Cultural Institutions can rely on the exceptions to infringement in Part III Division 5 and Part IV Division 6 applicable to libraries and archives.

3. Copyright Amendment Bill 2006 – comments and recommendations

3.01 It is against this background that the Cultural Institutions make the following recommendations. In relation to each issue and set of recommendations, further comments and examples in support of the recommendations are outlined in Appendices to this submission.

1. New extended dealings (s 200AB) and significant works exceptions (ss 51B, 100BA and 112AA)

3.02 The Cultural Institutions welcome in principle the range of measures in the Bill designed to clarify the exceptions for libraries and archives and to provide greater flexibility for institutions to use copyright materials for the purposes of preserving, maintaining and administering their collections.

3.03 The Cultural Institutions also welcome the flexibility provided by the new extended dealings exception (s 200AB) and note that it is intended to provide institutions with a means to address the broad range of anomalies in the current exceptions for libraries and archives. Anomalies include the lack of a commensurate exception in Part IV of the Act to the Part III exception allowing subject matter other than works to be copied for administrative purposes. We note that the extended dealings provision will, in particular, enable institutions to legally undertake copying-related activities essential to the effective management of their collections on a day to day basis (such as copying and communication for internal administrative and preservation purposes).

3.04 However, the Cultural Institutions note that limiting s 200AB to only permit uses of copyright material by libraries and archives which do not involve deriving a commercial advantage unduly limits the test and the overall flexibility it is meant to provide. This condition also goes beyond the TRIPS three-step test which Australia is required to comply with under international law and, as we understand, Australia’s obligations under the Australia-United States Free Trade Agreement (AUSFTA). Many cultural institutions undertake limited commercial activities. These do not make money as a whole often and any money made over and above cost recovery is used to further publish and otherwise make collection material accessible in furtherance of their objectives. In undertaking these activities, the Cultural Institutions do not seek to compete with external publishers.

3.05 It is the Cultural Institutions' understanding that s 200AB (extended dealings provision) and ss 51B, 100BA and 112AA (significant works exceptions) are designed to respond to the sector's concerns for *both*:

- increased flexibility to undertake a diverse range of activities *related to* their statutory functions (such as copying for internal administration purposes) AND
- increased certainty that copying essential to the fulfilment of core business activities of preserving, maintaining and making collections accessible can be undertaken legally.

3.06 The Cultural Institutions note, in particular, that the Explanatory Memorandum to the Bill states that the purpose of the significant works exceptions are to 'enabl[e] Cultural institutions to more effectively preserve their collections and give the public access to items of cultural and historical significance to Australia'.

3.07 The Cultural Institutions believe that both these provisions only partially achieve the Government's stated policy objectives and do not provide them with certainty that copying essential to the core business activities of preserving, maintaining and making collections accessible can be undertaken legally.

3.08 The Cultural Institutions believe that the provisions are currently uncertain under the proposed drafting, as outlined below. As a result there will be costs for institutions who will need to obtain legal advice or engage in costly litigation.

Significant works exceptions (ss 51B, 100BA and 112AA)

'the function'

3.09 Under ss 51B(1)(a), 1110BA(1)(a), and s 112AA(1)(a), only libraries and archives which have *'the function'* under a law of the Commonwealth, State or Territory of developing and maintaining a collection can avail themselves of the rights under these provisions. The reference to *'the function'* suggests that developing and maintaining a collection needs to be the primary/sole function of the institution. It is unclear whether institutions with multiple functions fall within the provision, and as a result this drafting may limit the ability of such institutions to rely on this provision and undertake the range of activities which cultural institutions can undertake.

For example, under s 5 of the Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has a statutory mandate to establish and maintain a collection consisting of materials relating to Aboriginal and Torres Strait Islander studies but is also, amongst other functions, required to operate as a research institute in Aboriginal and Torres Strait Islander studies.

‘single reproduction/copy’

3.10 The current drafting restricts copying to the making of a ‘single reproduction/copy’ and limits the right to copy published works to only works which are not commercially available elsewhere. These conditions prevent cultural institutions from meeting the technical challenges in adequately undertaking preservation copying and maintaining a collection in accordance with international best practice and professional standards in archival and collection management (such as the UNESCO Guidelines for the Preservation of Digital Heritage)². The Government has addressed similar problems facing consumers, by responding to their criticisms regarding the impracticality of limiting the right to watch material copied for time-shifting purposes to a right to watch once only.³ Cultural institutions face the same practical and technical problems as consumers and should be treated no differently. For example, a number of copies of collection items are made just for the purpose of viewing material. **See Appendix B for further explanation and examples of how copying for preservation, archival and conservation purposes often involves the making of more than one copy.**

3.11 The Cultural institutions note that as a result of the AUSFTA, the definition of copy under s 10(1)(4) and (5) of the Act was extended to include temporary reproductions (ie, any form of storage whether or not the copy can be reproduced). Therefore the ‘single reproduction/copy’ limitation in the ‘significant works’ exceptions could automatically be met in the case of temporary copies made during digital copying – rendering the provision useless in terms of making actual preservation or access copies of collection items.

Distinguishing between different categories of materials

3.12 The current structure of the provisions distinguishes between a ‘first copy’, ‘first record’, ‘published’ and ‘unpublished’ materials and thereby creates artificial distinctions between collection materials. It is unclear whether ‘first copy’ and ‘first record’ is referring to the first copy (ie, master copy) of a film or sound recording ever made or is a reference to the first copy or record that an institution has ever obtained. Such distinctions do not accord with archival and collection management practice whereby any item within a collection is treated as an original copy and hence a ‘first copy’. Arguably, first copies of a sound recording or film could be either in a published or unpublished form, making the distinction between the different types of works necessarily redundant.

Commercial availability test

3.13 Restricting the right to copy original artistic works and published materials to only where another copy is not otherwise commercially available (as required by ss 51B(3), (4)(a); ss 101BA(3), (5); s 112AA(2)) will prevent institutions from meeting international standards and best practice in back-up and preservation copying. Ideally, collection items should be copied before they deteriorate or are damaged and to ensure that the quality of the original remains high. However, the current wording for the exception does not allow for prospective

² http://portal.unesco.org/ci/en/ev.php-URL_ID=8967&URL_DO=DO_TOPIC&URL_SECTION=201.html

³ See press release of Attorney General, the Hon. Philp Ruddock MP, issued 22 September 2006 at: http://www.ag.gov.au/agd/WWW/ministerruddockhome.nsf/Page/Media_Releases_2006_Third_Quarter_1852006_-_22_September_2006_-_Fairer_deal_for_public_on_copyright

/preventative preservation copying. Published material which is not copied because a replacement copy is commercially available will also be placed at risk of damage and further deterioration. Institutions seeking to comply with the law will therefore be forced to place valuable collection items at risk of damage and deterioration.

3.14 The additional requirement to give consideration to whether the material is available electronically presupposes that a digital version will be an adequate substitute for an original or hard copy version. Often high resolution copies of some types of material, such as film, are not digitally available and it is difficult and costly to preserve material of lower technical quality. The condition will also prevent institutions from preserving a work in the original format (or a format as close as possible to the original) in which it was acquired so that the item can be experienced in a form as close as possible to the way it was intended to be seen/heard/experienced by the creator.

Limited right to copy/reproduce, no further right to communicate

3.15 The exceptions are of limited use in enabling institutions to fulfil their access mandates as they prevent the further communication of copies lawfully made under the provisions (such as via a dumb terminal⁴ located within the institution or by communicating electronic copies of works to regional, rural and remote clients for research and study). Given that only a small percentage of institutions' collections can be displayed at any one time, the use of dumb terminals and similar technologies is an important means by which institutions can provide broad-based access to their collections to help fulfil their functions.

Narrowly restricted to publicly funded institutions

3.16 The Cultural Institutions are also concerned that the provisions may unfairly limit the right to copy to only publicly funded institutions that have a statutory mandate under Commonwealth, State or Territory laws to develop and maintain a collection. Regional institutions (such as local historical societies) and private and semi-private galleries and museums also hold works of historical and cultural significance to Australia and undertake similar activities and face the same copyright challenges in preserving, maintaining and providing access to their collections as the larger publicly funded institutions. Institutions who undertake activities related to developing and maintaining a collection should be able to avail themselves of equivalent rights.

3.17 Similarly, many of the publicly funded institutions also rely on regional and private institutions for loans of collection items to include in exhibitions. Without an equivalent right to copy collection items for preservation and other purposes, the quality and longevity of collections held by these institutions will suffer, and this will impact on the quality and availability of items which can be drawn upon by publicly funded institutions for exhibition and other purposes. It will also limit the ability of collecting institutions to fulfil their mandate.

⁴ A dumb terminal is a terminal/computer which prevents the end-user from further communicating the work or from printing out or otherwise copying the content of the communication. For example, the NGA relies on dumb terminals to exhibit digital images of some collection items which are unable to be publicly displayed due to space constraints in its exhibitions, galleries and where the material is too fragile for display.

3.18 Recommendation 1:

The Cultural Institutions therefore make the following recommendations for amendment to ss 51B, 100BA and 112AA

- 1. The provision should not be limited to state/national institutions and should be extended to any library or archive or activity of national significance.**
- 2. To remove uncertainty as to whether the exception applies to cultural institutions with multiple statutory functions the reference in ss 51B(1)(a), 1110BA(1)(a), and s112AA(1)(a) to ‘the function’ should be changed to ‘a function’. The NMA, NGA, NLA, AIATSIS, NAA, and the AWM [ie, the institutions endorsing this submission as listed in Appendix A] should be expressly deemed as qualifying ‘key institutions’ to which the section applies.**
- 3. The distinction between different categories of works (ie, manuscripts, original artistic works, works, films, sound recordings and published editions) and between ‘first copy’, ‘first record’, ‘published’ and ‘unpublished’ material should be removed. This should be replaced with a right for institutions to copy any items held in their collections (provided that the material is of historical or cultural significance to Australia as per the definition in s 51B(1)(b), s110BA(1)(b), s112AA(1)(b)).**
- 4. In recognition of the fact that the technical process of preservation and conservation often involve the making of more than one copy of an item, the limitation on ‘single copy’, ‘single reproduction’, a ‘comprehensive photographic reproduction’ and a ‘single facsimile copy’ should be removed and replaced with a general right to copy/reproduce.**
- 5. The ‘commercial availability’ test for original artistic works and published works, sound recordings, films and published editions and the requirement to consider whether an electronic copy can be obtained within a reasonable time at an ordinary commercial price should be removed. This test doubles-up on the WPPT three-step test (ie, the 2nd and 3rd steps) and is inappropriate in some circumstances.**
- 6. Subsections 51B, 100BA and 112AA should be extended to permit the further communication of legitimate copies made under these provisions and under the current library and archive exceptions both within the institution and to rural, regional and remote clients for research and study purposes.**

Extended dealings (s 200AB) exception

3.19 The Cultural Institutions understand that s 200AB(1) and (2) are meant to provide a flexible default mechanism for institutions to rely on in the event that proposed copying falls outside the current exceptions or the proposed new significant works exception.

3.20 While welcoming the flexibility the provision is intended to provide, the Cultural Institutions note that the inclusion of the three-step test and the further restriction on copying to copying which *‘is not made partly for the purpose of the body obtaining a commercial*

advantage’ (s 220AB(2)(c)) imposes unnecessary complexity and confusion for institutions seeking to rely on the exception. It may also make the practical use of the provision difficult.

Three-step test

3.21 The application of the three-step test on a case by case basis to use of works by cultural institutions is unclear given that the conditions have no basis in our local jurisprudence. There is also a lack of any meaningful consensus amongst academic commentary regarding the ambit of the test and there is a diversity of views as to the interpretation of this test.⁵

3.22 Also, cultural institutions have no experience of this test and there are no guidelines and no precedents as to how the test applies to specific uses by institutions. There will be significant compliance costs for institutions if they seek to use the provisions. Institutions may also seek legal advice about the application of the test to specific circumstances and may have to develop internal and/or sectoral-specific guidelines to assist with applying the test in certain situations. It wouldn’t seem economical for institutions to get international law advice for each activity that they intend to undertake in reliance on the provision.

3.23 Until such time as a body of case law develops around the application of the provision in specific cases, institutions will need to adopt a risk management approach to certain uses of copyright material. However, given that Cultural Institutions may be subject to liability under the proposed enforcement provisions for the use of some copyright materials, such as the use of orphan works,⁶ institutions may be reluctant to rely on these provisions where the copyright status of the work is uncertain (see further part 5, paras 3.55-3.64).

Examples of uncertainty over the application of the three-step test to certain uses of copyright materials by cultural institutions

3.24 The Cultural Institutions wish to use copyright material for a range of purposes. There is uncertainty as to whether all uses would satisfy the three-step test based on what we understand to be the Australian Government’s current understanding of how this test should be interpreted at international law. This is particularly the case in relation to activities involved in providing external access to collection items such as:

- reusing electronic material made for administrative, preservation or replacement purposes to supply to clients for research or study purposes,
- copying, communicating or publicly performing, in replicate form, collection items for display in not-for-profit exhibitions, or for the purposes of non-commercial promotion of exhibitions,
- providing online (eg, internet) access to parts of collections or exhibitions in low resolution or similar form (eg, thumbnail images),

⁵ For a strict interpretation of this test see: Sam Ricketson, *The three-step test, deemed quantities, libraries and closed exceptions*, The Centre for Copyright Studies, 2002 at 127-128. This can be viewed at: <http://www.copyright.org.au/pdf/ccs/CCS0202.pdf>. For criticisms of the three-step test see David Brennan, *The Three-Step Test Frenzy – Why the TRIPS Panel Decision might be considered Per Incuriam (2002)* Faculty of Law, the University of Melbourne Public Law and Legal Theory Working Paper No.22. This can be viewed at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=299543.

⁶ Works in which there is difficulty in locating or identifying the copyright owner – see US Copyright Office Report into Orphan Works. See: www.copyright.gov/orphan.

- providing access to collection items via dumb terminals,
- publishing postcards and other materials and selling images of items from the collection on postcards, tea-towels and in exhibition catalogues or other products to promote non-commercial exhibitions,
- copying, communicating and otherwise using orphan works where an institution has made reasonable efforts to locate the copyright owner.⁷ **See Appendix C (2) for further details about how orphan works affects institutions and their ability to fulfil their access mandates.**

3.25 Despite this uncertainty, providing access to collection materials in one of the above ways is the most efficient means by which institutions can provide broad-based access to their collections, particularly given that collection items would otherwise be inaccessible due to limited storage and exhibition space, format obsolescence or because the items are too fragile to display. Furthermore, over the past 5-10 years, governments have actively encouraged cultural institutions to move beyond their traditional role as repositories of cultural heritage to that of facilitating access to culture and information, particularly via digital means, and to constituents residing in regional, rural and remote Australia. In order to meet its mandates and the Government's digital agenda objectives it is imperative that institutions have a legal right to undertake one or more of the above forms of copying. **See Appendix C (1) for further details as to how the use of dumb terminals can both satisfy Institutions' access mandates as well as facilitate copyright owners' interests.**

Uncertainty in determining a 'special case'

3.26 The drafting of s 200AB(1)(a) suggests that the first step is satisfied by the circumstances of the use amounting to a 'special case' within the certain special case of use by libraries and archives. However, the Cultural Institutions understand that the first step of the three-step test requires consideration of whether the exception is clearly defined and limited in its field of application, not whether the 'use' within the exception amounts to a special case. Thus it is ambiguous as to whether use by a library or archives *in itself* amounts to a special case (as we understand is required by TRIPS), or whether additional requirements need to be demonstrated to show that the library or archive's use amounts to a 'special case'. If the later interpretation applies, then many activities which have been held to satisfy the US 'fair use' exception and therefore to be compliant with the TRIPS agreement, may not be able to be argued before the courts in Australia. For example, in the US it has been held that the use of use of 'thumbnail' images (small reproductions) in a web search engine is a fair use within the meaning of s 107 of the *US Copyright Act 1976*.⁸

3.27 Many cultural institutions in Australia seek to be able to place thumb nail images of collection items on their websites to allow a greater range of collection items to be viewed and to provide greater accessibility to the collection to rural, regional and remote Australia. However, under the current drafting, such a use may not be considered to be a 'certain special case' within the certain special cases of use by libraries and archives. The Cultural

⁷ See submissions to and report of the US Copyright Office into its review of orphan works: www.copyright.gov/orphan.

⁸ [Kelly v Arriba-Soft](#), 03 CDOS 58888 (9th Cir 2003).

Institutions therefore suggest that either s 200AB(1)(a) is deleted, or that a deeming provision is included that clearly says use by libraries and archives is a 'special case'.

Uncertainty in determining 'normal exploitation' of a work

3.28 Institutions face uncertainties over determining the meaning of 'normal exploitation' under the second step of the three-step test. To date, there have been real disagreements over whether the use of technologies such as dumb terminals and the like (which are unique to institutions and are not a form of current exploitation /income for copyright owners) are nevertheless uses which could acquire economic and practical importance for copyright owners. They should therefore be said to fall within the scope of the copyright owner's right to control:

For example, while most copyright owners have provided the National Gallery of Australia (NGA) with a right to copy and communicate their copyright material without remuneration on a dumb terminal located within the gallery's premises, the collecting society, VISCOPY, have contested that the inclusion of images in dumb terminals for images in which they control the rights is a copyright use which falls within the sphere of their market. As a result the NGA has only been able to afford to place 100 image on dumb terminals, despite the fact that the use of images in this way is a non-commercial use which ultimately benefits copyright owners as it increases public exposure to their work and in many cases stimulates sales.⁹

3.29 Similarly, other institutions have found that that there is disagreement over whether copying display material for the purposes of promoting not-for-profit exhibition requires the permission of the copyright owner. This is despite the fact that the actual display of the copyright material does not involve a copyright use and the promotional material is related to a not-for profit exhibition.

For example, the Australian War Memorial (AWM) has been prevented from copying collection items used in not-for-profit exhibitions (including the POW travelling exhibition 'Stolen Years' or the more recent 'Dawn of a Legend' exhibition) in promotional material, exhibition catalogues and guides.

3.30 As noted by the Cultural Institutions in its submission to the Fair Use Inquiry, the current library and archive exceptions provide cultural institutions with extremely limited rights to embrace the benefits of digital technology to provide access to collection material.¹⁰ The Cultural Institutions will therefore need to rely heavily on s 200AB to provide digital access to their collections. As a matter of principle, the Cultural Institutions believe that it is inappropriate for publicly funded institutions to have to rely on a risk management approach which leaves them open to the possibility of litigation in order to undertake activities essential to fulfilling their statutory mandates. The Cultural Institutions seek to have certain exceptions which lower costs so that they can clearly comply with the law.

⁹ For further details about this example, see the CICI's submission to the Fair Use Inquiry, pg 35 (available at: http://www.nma.gov.au/about_us/copyright_and_reproductions/cici/news_and_information/2005/).

¹⁰ See the CICI's submission to the Fair Use Inquiry for an overview of the limitations on the right to communicate pp 32-37.

3.31 As noted above (at paras 3.15 and 3.18) the Cultural Institutions therefore seek an extension to ss 51B, 100BA, and 112AA to permit copies made under these provisions to be able to be communicated within an institution for non-commercial purposes. Such an amendment will provide them with certainty that they can fulfill their legislative mandates in this way.

‘No commercial advantage’ test

3.32 The Cultural Institutions understand that under s 200AB, the legislation requires that copyright material used by a library or archive ‘is not made partly for the purpose of the body obtaining a commercial advantage’ (s 200AB(2)(c)).

3.33 The Cultural Institutions raise the following concerns about this condition/limitation:

- The scope of the condition in its present form is uncertain, and may preclude institutions from relying on the exception for activities which involve charging.
- The ‘no commercial advantage condition’ is inconsistently applied to different categories of materials with no clear public policy justification.
- The ‘no commercial advantage condition’ is an additional condition which appears to not be required by the TRIPS three-step test and is necessarily superfluous, particularly given that this condition could possibly restrict the range of activities institutions can lawfully undertake.

The no commercial advantage condition is not required by TRIPS

3.34 The Cultural Institutions recommend the removal of subsection 2(c) of s 200AB given that an assessment of the impact of a use of an item on the copyright owner’s interests is already covered by the second and third steps of the three three-step test (ie, by the requirement to give consideration to whether the use of the work will ‘conflict with a normal exploitation of the work’ and whether it will ‘unreasonably prejudice the legitimate interests of the copyright owner’).

Inconsistent application of the no commercial advantage to different uses of materials

3.35 The Cultural Institutions note that under s 200AB(5) that copyright will not be infringed by the use of works and other subject matter for the purposes of parody and satire. Unlike s 200AB(2) this provision does not require consideration to be given to whether any commercial advantage will be derived from the satire or parody. The Explanatory Memorandum to the Bill explains this discrepancy as being ‘in recognition that a parody and satire may take place in the commercial media or other commercial setting’.

3.36 The Cultural Institutions often make similar use of works and subject matter in a commercial setting in ways which do not impinge on the copyright owner’s interests. For example, selling images from the collection on tea-towels on a cost-recovery basis does not unreasonably conflict with the copyright owner’s market. Instead, such activity seeks instead to promote the work of the creator and in many cases increases sales of their work in the commercial market.

3.37 The Cultural Institutions therefore recommend that like satire and parody, the use of copyright material by libraries and archives not be subject to a requirement that the use 'is not made partly for the purpose of the body obtaining a commercial advantage'.

Uncertainty as to whether the condition allows charging by institutions

3.38 The operations of the Cultural Institutions frequently involve charging fees related to recovering costs for services involved in accessing, maintaining and storing material. It is unclear whether this would be precluded by s 200AB(2)(c) which requires that the use of the copyright item 'is not made partly for the purpose of the body obtaining a commercial advantage'. The Cultural Institutions believe that legitimate cost recovery should be distinguished from charging for commercial advantage, given that any monies made over and above cost recovery are directed back into the maintenance of the collection. Furthermore, institutions who may make a profit on one or two items (such as tea-towels and postcards) should not be precluded from relying on the provision.

3.39 The Explanatory Material indicates that the condition does 'not necessarily preclude a cost recovery charge'.¹¹ However due to the rules of statutory interpretation the Cultural Institutions recommend that in the event that subsection 2(c) is not removed as suggested above, that the current wording be clarified to include express permission for institutions to engage in charging.

3.40 Recommendation 2:

- 1. That s 200AB(1)(a) is deleted, or that a deeming provision is included that clearly states that use by libraries and archives is a 'special case'.**
- 2. That s 200(2)(c) (the commercial advantage test) be removed.**
- 3. In the event that subsection 2(c) is not removed as suggested above, that the wording in the legislation be clarified to include express permission for institutions to engage in charging.**

2. Changes to the definition of 'reasonable portion' under fair dealing (new s 40(5)) and library and archive provisions (new ss 49 (5AA) and 50(7BA))

3.41 The Cultural Institutions strongly oppose the narrowing of the definition of 'reasonable portion' in determining:

- A. the fairness of a dealing with published works for research and study purposes under ss 10(2) and (2A); and
- B. in determining whether more than a reasonable proportion of a work has been supplied to a client under s 49 for the purpose of research or study or to another library under s 50 for the purpose of an inter-library loan.

¹¹ *Copyright Amendment Bill 2006: Explanatory Material for Exceptions and other Digital Agenda Review Measures*, September 2006, 6

3.42 Limiting the reasonable portion test to mean only 10% of the number of pages or words in a published literary, dramatic or musical work will significantly impede research. The 10% cap also implies that a published edition can be easily obtained elsewhere and that a researcher wanting a permanent copy for referral should/can purchase their own copy. This fails to acknowledge the curatorial/research value in consulting various editions of a work, particularly given that many published works of cultural, historical and educational significance are out-of-print. For example, the Macquarie Dictionary has been published in various editions and each edition contains subtle differences as to the interpretation of the English language.

3.43 The 10% cap will also detrimentally impact on Cultural Institutions in that it will:

- impede the Cultural Institutions' ability to adequately service client requests related to research and study, especially for one-off and out-of print items which may not be commercially or readily available elsewhere;
- discriminate against rural, regional and remote clients who will be required to spend extra time and resources accessing collection material onsite at institutions rather than visit once and photocopy/copy relevant material to take away, or will not be able to access material at all;
- increase the amount of time clients will require to browse material onsite and thereby put a strain on the already limited physical resources cultural institutions have available for clients (eg, libraries, access centres, reading rooms);
- in relation to ss 49 (5AA) and 50(7BA), increase the number of declarations institutions need to administer specifying that a work is not otherwise commercially available (as most clients will require more than 10% of an item, particularly if the item is out-of-print or not available elsewhere, institutions will now need to make a declaration under ss 49(5) and 50(7) in situations where they could have previously supplied the material without a declaration provided the amount copied was 'fair' under s 40(2));
- increase the risk to institutions of liability for authorising copyright infringement given that the copying by clients or the copying and supply by institutions of more than 10% of the number of words or pages in a published work (other than an artistic work) will inevitably infringe copyright; and
- given the increased risks of liability for authorising copyright infringement, will increase administrative and compliance costs for institutions who will be required to vigilantly monitor client copying.

3.44 The Cultural Institutions also note that there is no equivalent reasonable portion test for a fair dealing with an audiovisual item under Part IV of the Act. It is therefore open to a client to copy more than 10% of a film or sound recording (and possibly the whole item) for research and study provided that the copying is considered 'fair' under s 40(2), whereas it will now be unlawful for them to copy more than 10% of a book. As many of the Cultural Institutions hold a diverse range of materials (including both print-based and audiovisual material) it is likely that clients will become confused and frustrated over the two standards for determining the fairness of an act of copying, and question why print-based published material is subject to a more restrictive test than audiovisual material.

3.45 Recommendation 3:

- 1. That the proposed new ss 40(5), 49 (5AA) and 50(7BA) be removed and that there be no change to the current definition of reasonable portion under the current fair dealing and the library and archive provisions.**
- 2. Question – has the reasonable portion test been narrowed because the Australian Government considers that Australia was in contravention of the TRIPS Agreement and other international copyright treaties under the previous legislation?**

3. General amendments to the library and archive provisions

Clarification of terminology

3.46 The Cultural Institutions applaud the following amendments to the library and archive provisions which will add clarity to the operation of the provisions:

- proposed changes to the definition of ‘library’ and ‘archives’ under s 49(9) and s 50(10);
- the clarification of the term ‘administrative purposes’ to include at least copying for purposes directly related to the care or control of the collection (s 51A(6));
- the extension of ‘officers of the library or archives’ to include volunteers assisting with the care and control of the collection (s 51A(9));
- amendments to ss 49(2) and (2C) and to s 50(2) to clarify that when copying items for users or for inter-library loans, the copy need not be made from the original copy and can be made from a preservation or other legitimate copy. This change should prevent further deterioration and damage to fragile collection items arising from the need to constantly refer to original items to service client and inter-library loan requests due to the current Act’s requirement that the copy be made from the original copy; and
- the guidance on the phrase ‘within a reasonable time and at an ordinary commercial price’ provided by the new s 49(5B), given that this phrase was previously undefined.

Changes to the declaration requirements (s 51A(4)(b))

3.47 The Cultural Institutions oppose the introduction of the requirement under s 51A(4)(b) that where a copy of the work is otherwise commercially available that officers must specify why a reproduction of a published work, manuscript and original artistic work made for preservation purposes or for supply to clients for research and study should be made from the copy of the work held in the collection.

3.48 This condition places both unreasonable financial and administrative burdens on institutions, given that:

- Institutions house significantly large collections (which can include millions of copyright articles)¹² and a large proportion of collections are in a damaged or deteriorated state due to media decomposition and wear and tear. Therefore it is financially unviable for institutions to purchase an additional copy of an item each time an item needs to be preserved or copied to process a client access request.
- Preservation copying does not prejudice the copyright owner's interests and in fact benefits copyright owners as it provides a material record of the work as 'initially prepared' by the author.¹³ It also allows copyright owners to access preserved copies at a later time.
- Subsequent editions of a book/work or other published material often differ from the original and each other (eg, different editions of the Macquarie Dictionary are worthwhile for tracking social and linguistic changes in the interpretation of the English language). Preservation copying of each edition/work is undertaken because of the inherent curatorial value in preserving a specific edition/work as an 'original artefact' within the collection. The requirement to state why the copy is being made would simply be an administrative burden needing to be fulfilled by institutions for the sake of meeting the test given that there is also inherent value in consulting different editions of a work. The declaration would not add any justification / information beyond what is already accepted practice within the sector.
- Institutions have an ethical and professional obligation as custodians of cultural heritage to preserve and maintain all collection material so that collection items can be experienced by future generations of Australians in a state/form as close as possible to the way they were originally acquired. Again, having to specify this as the reason for preserving a published work would not add any justification / information beyond what is accepted practice within the sector.

3.49 Recommendation 4:

- 1. The Cultural Institutions support the following amendments to the library and archive provisions which will add clarity to the operation of the provisions:**
 - **proposed changes to the definition of 'library' and 'archives' under s 49(9) and s 50(10);**
 - **the clarification of the term 'administrative purposes' (s 51A(6));**
 - **the extension of 'officers of the library or archives' to include volunteers assisting with the care and control of the collection (s 51A96));**
 - **amendments to ss 49(2) and (2C) and to s 50(2) to clarify that when copying items for users or for inter-library loans, the copy need not be made from the original copy and can be made from a preservation or other legitimate copy; and**

¹² For example, the NGA houses over 136,000 works of art.

¹³ Sam Ricketson, *The three-step test, deemed quantities, libraries and closed exceptions*, The Centre for Copyright Studies, 2002 at 127-128. This can be viewed at: <http://www.copyright.org.au/pdf/ccs/CCS0202.pdf>

- the guidance on the phrase ‘within a reasonable time and at an ordinary commercial price’ provided by the new s 49(5B).

The Cultural Institutions make the following recommendations for amendment to the Act:

- 2. Provide that s 51A(4)(b) is satisfied (ie, no declaration is required) when a copy is made in accordance with an industry code of conduct.**
- 3. If recommendation 4.2 is not accepted, remove the requirement in s 51A(4)(b) for authorised officers of a library to specify (where a copy of the work is commercially available elsewhere) in a declaration made under this provision why a reproduction should be made from a work held in the collection.**

Narrowing of the inter-library loan provisions (new ss 50(8) and (9))

3.50 The Cultural Institutions note that the effect of ss 50(8) and (9) is to prevent libraries from copying and communicating all or part of two or more articles that are contained in the same periodical for the purposes of including the reproduction in the collection of another library or archive. There may be situations where regional, rural, and remote libraries or libraries with small collections seek a copy of rare or out of date (but culturally valuable) periodicals from another library/archive for the purposes of including this material in their collection.

3.51 We believe that this could be a drafting error, given that two or more articles can be copied and communicated to assist parliamentary libraries to assist Parliamentarians and to enable libraries to respond to access requests from clients.

3.52 Recommendation 5:

- 1. That ss 50(8) and (9) be amended to include a reference to paragraph 1(a) of s 50 so as to allow for inter-library loans of all or part of 2 or more articles that are contained in the same periodical publication for the purposes of building the collection of the first library.**

4. New time-shifting exception (s 111)

3.53 The Cultural Institutions endorse the recommendations made by the Australian Digital Alliance that the time shifting provision should apply more broadly to all consumers (particularly cultural institutions) and should not be limited to private and domestic use. As noted by the ADA:

‘This limitation is unnecessary given that by definition time-shifting is limited to watching or listening to material at a more convenient time. Thus, given this type of use is limited and does not detrimentally affect the interests of rights-holders, this provision should apply more broadly to all consumers. Time shifting enables institutions and consumers to access and disseminate information for research, and

educational and cultural purposes, in dynamic and responsive ways. Indeed, the increased exposure of works as a result of time-shifting can enhance rights-holders' profiles thereby facilitating their ability to further exploit their works.'

3.54 Recommendation 6:

- 1. That the time shifting provision (s 111) should apply more broadly to all consumers (particularly cultural institutions) and should not be solely limited to private and domestic use.**

5. Enforcement measures

3.55 The Cultural Institutions have not had sufficient time to analyse the provisions in detail, but are concerned that they have serious implications for the sector (particularly the strict liability provisions due to the size of institutions collections).

3.56 As the Cultural Institutions understand it, the only defences to liability available to public institutions (including Cultural Institutions) relate to:

- Subdivision B regarding commercial-scale infringement prejudicing the copyright owner.
- Subdivision F regarding the unauthorised removal of electronic rights management information and infringements on a commercial scale.

3.57 Furthermore, the defences at subdivisions B and F relate only to 'anything lawfully done'. The Cultural Institutions are unclear of the implications of this wording, particularly given the uncertainty of international law being incorporated into domestic legislation and what activities undertaken by cultural institutions will be considered to lawfully fall within the scope of the library and archive exceptions. We suggest that it be reworded as a general defence in recognition of the *unique and significant copyright challenges institutions face in complying with copyright* compared to other copyright users (see para 3.59, below). Under current wording, institutions would not be able to rely on the defence in using orphan works (as under current law, use of such material appears illegal), despite the fact that such materials may include letters, notes, old government reports, diary entries, which although culturally significant are often not commercially viable.

3.58 The Cultural Institutions also note that the provisions introduce strict liability offences into the Copyright Act. As these offences do not require any knowledge element, they will, as noted by the Australian Digital Alliance in their submission on the Bill, 'fundamentally change how copyright infringements, particularly, innocent copyright infringements are dealt with in Australia. The penalty for a strict criminal liability offence under these provisions will be 60 penalty units or \$6600.00. This is not an insignificant amount, particularly given that this is the penalty *per infringement*.' There is the potential for multiple infringements in the case of items held within collections with more than one layer of copyright. For example a film may comprise film copyright, together with underlying rights in the script (as a dramatic work) and copyright may subsist in musical work and lyrics in the soundtrack to the film. Similarly, there can often be two layers of copyright in a published item (the literary work together with published edition copyright).

3.59 Unlike an enforcement regime based on civil offences, a *strict liability regime unfairly discriminates against the Cultural Institutions who face unique and significant copyright challenges in complying with copyright* compared to other copyright users due to the large size, particular nature (eg, material can be decades old) and the means by which collections are acquired (eg, materials are often donated by third parties who do not own the copyright). **(See Appendix D, part 1 for outline of the unique compliance issues faced by cultural institutions)**. As a result, institutions are more at risk of unintentionally infringing copyright than many other copyright users despite undertaking considerable efforts to comply.

3.60 Unlike other copyright users (such as individuals engaged in unauthorised copying and file-sharing of music downloads) the Cultural Institutions rarely or intentionally infringe copyright (other than perhaps in relation to the use of orphan works, where exhaustive attempts have been made to locate and identify the copyright owner). Of the institutions endorsing this submission, none have been subject to a copyright infringement claim resulting in litigation or substantial damages being awarded.

3.61 However, in those instances where the Cultural Institutions do use copyright material without the permission or licence of the copyright owner, it is only after undertaking considerable efforts to locate/contact the owner and only after a thorough risk assessment has been undertaken. The work will be copied or otherwise used only once it has been determined that the cultural importance and the public benefit to be obtained through using or otherwise making the work available is significant and in the particular circumstances there is no or very little detriment to the copyright owner in continuing to use the work.

3.62 The Cultural Institutions understand that the enforcement provisions are primarily designed to combat piracy. However, under the current drafting, in some instances institutions' use of orphan works will be covered by the general enforcement provisions listed under subdivisions C, D and E. They could therefore be liable for a range of offences such as offering, distributing and exhibiting unauthorised copies of collection items and publicly performing works, films and sound recordings without permission. For example, under the current law, use of orphan works may be illegal and therefore institutions proceeding with the use of such a work will be at risk of being issued with substantial fines. Further, as the provenance of many collection items was unknown at the time of acquisition, there could be instances where an institution unknowingly hires out or exhibits unauthorised copies of copyright material. In addition, the extension to the term of copyright protection arising out of the AUSFTA has exacerbated the orphan works issue and the accessibility of published materials. The Cultural Institutions therefore suggest that the commencement of the enforcement provisions be delayed until the problem of orphan works is dealt with.

Implications for institutions

3.63 The Cultural Institutions believe that the proposed enforcement regime will also have significant financial and administrative implications for the sector **(these issues are elaborated on in further detail in Appendix D, part 2, 'Impact of proposed enforcement provisions on cultural institutions')**:

- There will be significant compliance costs for institutions, including the following:

- there will be a need to acquire additional insurance coverage (if available – it may not be due to uncertainty over the enforcement provisions and possible fines) given that under a strict liability regime the risk of being held liable for infringement is higher;
 - costs associated with legal advice in defending a penalty or in clarifying the extent to which institutions are subject to the provisions;
 - litigation costs are also likely to be higher given that more copyright owners may seek to sue institutions as it will be easier to make out a case of infringement under a strict liability regime. Damages may also be potentially higher than under a civil regime where the circumstances of the infringement can be taken into account in determining liability and remedies are often awarded appropriate to the particular circumstances. It also appears the Bill provides presumptions in favour of such litigants; and
 - the penalties the Cultural Institutions will be exposed to under the enforcement provisions are prohibitive and disproportionate to the value of standard licensing fees which copyright could have otherwise obtained.
- Under a strict liability regime where copyright cannot be clearly established, institutions are also likely to adopt a risk averse attitude to copyright and not seek to use collection items (such as orphan works). Institutions will be forced to use alternative items. This will ultimately reduce the pool of collection materials institutions can copy for the purposes of providing access (such as in exhibitions and public programmes) and will ultimately devalue collections and the public’s experience of them.
 - Given that liability will be determined on a ‘no fault’ basis, institutions are also likely to adopt a risk averse attitude to relying on the extended dealings section of s 200AB. Until a body of case law develops around particular uses of copyright material institutions seeking to rely on the provision will always run the risk that their specific use of material will be successfully contested by copyright owners and that they will be subsequently issued with large fines. Institutions may not be willing to take that risk and thus will be unlikely to use orphan works or particular collection material where the copyright status is uncertain.
 - Institutions will be more at risk of fines for failing to keep the declarations required under Parts III and IV of the Act due to the introduction of a strict liability test for this offence (proposed new ss 203A and D). Due to the large size of collections and the high public demand for access to copies of collection items it is inevitable that institutions will not always be able to fully comply with these requirements – whether due to human error or because of the tight time-frames required to meet access requests for clients (such as the media and broadcasters).

3.64 Recommendation 7:

- 1. That a general defence along the lines of ss 132AC(7) and 132AT(2) be introduced for public institutions in relation to offences falling under subdivisions C, D and E of the enforcement provisions.**
- 2. That the current defences to enforcement and the defences recommended above in relation to subdivisions C, D and E be framed as general defences in relation to**

activities undertaken by libraries and archives in performing their functions, rather than only applying in respect of anything lawfully done by these institutions.

- 3. That the offences relating to the declarations requirements for copying made under the library or archives provisions (ss 203A and D) be redrafted as a civil liability offence and not made an offence of strict liability.**
- 4. That the Committee give consideration to excising the proposed enforcement measures from the Bill so that further public consultation can be had regarding the impact of strict liability offences for copyright infringement on public institutions.**
- 5. That the commencement of the enforcement provisions be delayed until the issue of orphan works has been dealt with.**

3.54 Recommendation 6:

- 1. That the time shifting provision (s 111) should apply more broadly to all consumers (particularly cultural institutions) and should not be solely limited to private and domestic use.**

Schedule

Consolidated list of recommendations

3.18 Recommendation 1:

The Cultural Institutions therefore make the following recommendations for amendment to ss 51B, 100BA and 112AA

1. **The provision should not be limited to state/national institutions and should be extended to any library or archive or activity of national significance.**
2. **To remove uncertainty as to whether the exception applies to cultural institutions with multiple statutory functions the reference in ss 51B(1)(a), 1110BA(1)(a), and s112AA(1)(a) to ‘the function’ should be changed to ‘a function’. The NMA, NGA, NLA, AIATSIS, NAA, AWM [ie, the institutions endorsing this submission as listed in Appendix A] should be expressly deemed as qualifying ‘key institutions’ to which the section applies.**
3. **The distinction between different categories of works (ie, manuscripts, original artistic works, works, films, sound recordings and published editions) and between ‘first copy’, ‘first record’, ‘published’ and ‘unpublished’ material should be removed. This should be replaced with a right for institutions to copy any items held in their collections (provided that the material is of historical or cultural significance to Australia as per the definition in s 51B(1)(b), s110BA(1)(b), s112AA(1)(b)).**
4. **In recognition of the fact that the technical process of preservation and conservation often involve the making of more than one copy of an item, the limitation on ‘single copy’, ‘single reproduction’, a ‘comprehensive photographic reproduction’ and a ‘single facsimile copy’ should be removed and replaced with a general right to copy/reproduce.**
5. **The ‘commercial availability’ test for original artistic works and published works, sound recordings, films and published editions and the requirement to consider whether an electronic copy can be obtained within a reasonable time at an ordinary commercial price should be removed. This test doubles-up on the WPPT three-step test (ie, the 2nd and 3rd steps) and is inappropriate in some circumstances.**
6. **Subsections 51B, 100BA and 112AA should be extended to permit the further communication of legitimate copies made under these provisions and under the current library and archive exceptions both within the institution and to rural, regional and remote clients for research and study purposes.**

3.40 Recommendation 2:

- 1. That s 200AB(1)(a) is deleted, or that a deeming provision is included that clearly states that use by libraries and archives is a 'special case'.**
- 2. That s 200(2)(c) (the commercial advantage test) be removed.**
- 3. In the event that subsection 2(c) is not removed as suggested above, that the wording in the legislation be clarified to include express permission for institutions to engage in charging.**

3.45 Recommendation 3:

- 1. That the proposed new ss 40(5), 49 (5AA) and 50(7BA) be removed and that there be no change to the current definition of reasonable portion under the current fair dealing and the library and archive provisions.**
- 2. Question – has the reasonable portion test been narrowed because the Australian Government considers that Australia was in contravention of the TRIPS Agreement and other international copyright treaties under the previous legislation?**

3.49 Recommendation 4:

- 1. The Cultural Institutions support the following amendments to the library and archive provisions which will add clarity to the operation of the provisions:**
 - proposed changes to the definition of 'library' and 'archives' under s 49(9) and s 50(10);**
 - the clarification of the term 'administrative purposes' (s 51A(6));**
 - the extension of 'officers of the library or archives' to include volunteers assisting with the care and control of the collection (s 51A96));**
 - amendments to ss 49(2) and (2C) and to s 50(2) to clarify that when copying items for users or for inter-library loans, the copy need not be made from the original copy and can be made from a preservation or other legitimate copy; and**
 - the guidance on the phrase 'within a reasonable time and at an ordinary commercial price' provided by the new s 49(5B).**

The Cultural Institutions make the following recommendations for amendment to the Act:

- 2. Provide that s 51A(4)(b) is satisfied (ie, no declaration is required) when a copy is made in accordance with an industry code of conduct.**
- 3. If recommendation 4.2 is not accepted, remove the requirement in s 51A(4)(b) for authorised officers of a library to specify (where a copy of the work is commercially available elsewhere) in a declaration made under this provision why a reproduction should be made from a work held in the collection.**

3.52 Recommendation 5:

- 1. That ss 50(8) and (9) be amended to include a reference to paragraph 1(a) of s 50 so as to allow for inter-library loans of all or part of 2 or more articles that are contained in the same periodical publication for the purposes of building the collection of the first library.**

3.54 Recommendation 6:

- 1. That the time shifting provision (s 111) should apply more broadly to all consumers (particularly cultural institutions) and should not be solely limited to private and domestic use.**

3.64 Recommendation 7:

- 6. That a general defence along the lines of ss 132AC(7) and 132AT(2) be introduced for public institutions in relation to offences falling under subdivisions C, D and E of the enforcement provisions.**
- 7. That the current defences to enforcement and the defences recommended above in relation to subdivisions C, D and E be framed as general defences in relation to activities undertaken by libraries and archives in performing their functions, rather than only applying in respect of anything lawfully done by these institutions.**
- 8. That the offences relating to the declarations requirements for copying made under the library or archives provisions (ss 203A and D) be redrafted as a civil liability offence and not made an offence of strict liability.**
- 9. That the Committee give consideration to excising the proposed enforcement measures from the Bill so that further public consultation can be had regarding the impact of strict liability offences for copyright infringement on public institutions.**
- 10. That the commencement of the enforcement provisions be delayed until the issue of orphan works has been dealt with.**

Appendix A

CICI member institutions endorsing this submission

- National Gallery of Australia (NGA)
- National Library of Australia (NLA)
- National Museum of Australia (NMA)
- Australian Libraries Copyright Committee (ALCC)¹⁴
- Australian Institute of Torres Strait and Islander Studies (AIATSIS)
- National Archives of Australia (NAA)
- Australian War Memorial (AWM)

¹⁴ The ALCC is a cross-sectoral committee with representatives from the following organisations:

- Australian Library and Information Association
- Council of Australian State Libraries
- Australian Government Libraries Information Network
- Council of Australian University Librarians
- National Library of Australia

Appendix B

Significant works exception – further comments and examples

As noted at paras 3.02-3.08, the Cultural Institutions support the proposed new s 51B, 110BA and s112AA, ‘significant works exception’ but note that it doesn’t accord with ‘best practice’ in preservation and conservation nor allow institutions to meet the technical challenges in providing access or in preserving, maintaining and storing collections.

These further examples are offered in support of this argument.

A Copying for preservation/archival/conservation purposes often involves the making of more than one reproduction /copy as this:

- accords with ‘best practice’ preservation/conservation, archival processes; and
- the one copy /reproduction limitation potentially places collection material at risk of damage.

For example,

In the event that a client of an audiovisual archive wishes to access a film only held as a positive print, the ‘single reproduction’ limitation would limit the institution to transferring the print directly to a viewable/tape copy (through the process of making a duplicate through a telecine machine). This would place the film at risk given that there is always the risk that the film could become damaged through the telecine process.

The more appropriate archival practice would be to make a ‘negative’ of the original ‘positive print’ and then transfer this to an inter-positive. The duplicate telecine would then be made from the inter-positive without risk of damage to the original positive print. Thus, this involves the making of 3 copies to service the access request.

B Multiple copies are required to respond to multiple and often simultaneous access requests

Institutions often have multiple and simultaneous requests for access to collection items. The limitation on one copy/reproduction would therefore prevent institutions from servicing all requests or from providing access in multiple and diverse ways (eg, displaying the working /additional copy of the item in an exhibition whilst also making this available for access requests). These requests are processed according to strict licensing agreements to ensure the parties are legitimate publishers / researchers.

For example

The National Gallery of Australia holds a large collection of oral history interviews with Australian artists from the 1970's, some who are now deceased, on audiotapes which are deteriorating. Preservation copying of the original is most important as this is considered to be the archival object. Derivative copies are vital for research and access by future generations.

The transfer of this material often involves the making of multiple copies – copies are created as digital audio files as well as CD copies for ease of access. The digital audio files are created as very large streaming files which are not easily transmitted because of their size and the complexity of the technology. An additional CD copy (which is clearly only a derivative) is then made for clients' research and study purposes.

C Additional / working copies also required to adequately maintain a collection:

The Cultural Institutions note that there can be five or more copies involved in maintaining a collection: eg, original copy, preservation and conservation treatment copies, access copy, back-up copy, and temporary copies made in the process of digital copying

For example:

Sound files can have original, .wav, .mp3, and CD versions. Multiple copies are also made from the .wav and .mp3 files so that the original is not handled and exposed to damage. For example, 'born-digital' material such as oral history recordings recorded digitally are often ingested straight into an institution's network and preserved as a wav file. An MP3 derivative access file is immediately created and attached to the collection management system for the cataloguer to catalogue and transcribe. The same is done for digital images where there is a preservation standard image stored at say 300dpi Tif and then a jpeg derivative is created for the collection management system and access.

IT sections of institutions also make back-up files of collection material held in digital form in accordance with rigorous disaster recovery policies cultural institutions are required to employ to protect institutional and third party intellectual property.

D The limitation on 'one copy' doesn't accord with the technical processes involved in copying collection items for the purposes of preservation and collection management

Temporary and intermediate copies

'Temporary copies' are made in the process of making a digital copy and 'Intermediate copies' are often made in the preservation process for certain forms of media.

For example:

Film preservation often involves making up to 3 different components (eg, inter-positive, dupe negative and then new print) – each component is a material reproduction of the film and therefore involves making a copy/reproduction in a copyright sense.

Format obsolescence

While ‘best practice’ in preservation requires that material be preserved in its original format (to maintain the integrity of the work – ie, so that the work can be experienced in a form as close as possible to the way it was intended to be seen and heard at the time of its creation), it is often appropriate to copy the material into a new format (such as a digital version) to create a back-up copy in the event that original technology and associated hardware becomes obsolete.

Refreshing media

Over time, the media on which copyright material is based may degrade (for example, although digital files may be stable, DVD disks are not). Future preservation of digital files may require material to be refreshed by copying onto new media. This would necessitate more than one copy being made.

Older analogue material may be donated to collections in a deteriorated or damaged state and cannot be left in that state otherwise deterioration will continue to the point that the material is unusable and the valuable contents will be lost forever.

For example:

Data degradation and loss of information during digital compression is common during the process of digital transfer/back-up of audiovisual material. A cause celebre in this respect was the partial loss of the audiovisual data used in the film Toy Story (1995) during the back-up process of digital masters.

Appendix C

Extended dealings exception (s200AB) – further comments and examples

1. Onsite access via ‘dumb terminals’

While technologies, such as dumb terminals, are relatively small in size, their use can allow access to numerous works and provide an efficient means of providing access to collection items which would otherwise be inaccessible due to limited storage space, format obsolescence or because the items are too fragile to display.

The Cultural Institutions consider that it is inherently contradictory that hard copy / print-based works can be viewed by the public in their original form in an exhibition space without permission or remuneration to the copyright owner whereas this material cannot be reproduced and communicated via a dumb terminal for the purposes of onsite viewing/browsing without referral to the copyright owner.¹⁵

The Cultural Institutions consider that digitising all collection material (not just material acquired in electronic form) for the purposes of making it accessible onsite to the public, staff and volunteers via ‘dumb’ terminals¹⁶ would not unreasonably prejudice the interests of the copyright owner. It is their experience that copyright owners are usually pleased to have their work displayed using digital technologies because it increases public exposure to their work and in many cases stimulates sales.

2. Orphan works

Orphan works (works where the copyright owner is unlocatable or unidentifiable) are particularly problematic for the Cultural Institutions given that most of them hold older, unpublished, and one-off items in their collections and ‘everyday’ items without details as to copyright ownership or the provenance of the item. Many of these items have little or no commercial value but are still protected by copyright because of the low level of originality required for subsistence of copyright in Australia. Inability to publish orphan works is particularly illogical when the material is not commercially viable.

For example, the NAA notes that a letter written to the government in 1917 seeking information about a relative in the First AIF who has been reported missing, is an unpublished work still in copyright in 2005. With no information other than the address of the author in 1917 is it impossible to trace descendants of the author of the letter who might be the current copyright owners.

¹⁵ with the exception of an original artistic work (which has been lost or deteriorated since the preservation copy was made or the original is too unstable to be displayed) – such a work may be communicated on a dumb terminal for the purposes of display (s 51A(3A) and (3B)).

¹⁶ the Cultural Institutions require that this term be defined in a technologically neutral way to cover both touch screens and other technologies capable of displaying collection items (whether existing now or yet to be invented).

Many orphan works consist of older material which may be in a fragile condition and require reproduction in facsimile form for display in exhibitions, onsite display on dumb terminals or the internet. Therefore, without a legal right to use such works where the copyright owner is unlocatable or untraceable, Cultural Institutions cannot provide public access to a considerable amount of their collections which essentially become 'locked-up'. This also frustrates the development of a richer pool of material which could be available for use by the creative industries.

Appendix D

Enforcement provisions – further comments and examples

1. Overview of copyright compliance issues faced by cultural institutions

As outlined below, cultural institutions face unique challenges in complying with copyright compared with many other users due to the nature of items held in their collections and the means by which they were acquired. For example:

- A large proportion of Cultural Institutions' collections are subject to copyright and will be subject to copyright for a longer period of time due to the extension to the copyright term under the Australia – United States Free Trade Agreement.
- Many institutions do not own copyright in their collections and material is donated or deposited by third parties who may not own (or be aware of) who owns copyright in the material.
- The provenance and copyright status of many collection items, particularly older, unpublished and anonymous material was either unknown at the time of acquisition or was not documented at that time or was unknown because the material was acquired in an ad hoc manner (for example, left by an anonymous donor at the front of the institution's premises).
- Copyright in many materials (such as audiovisual items) may have been owned by a company that is now defunct or has changed hands.
- There are many items held in the institutions' collections where the copyright owner can not be identified or located (orphan works), despite considerable efforts made by the institutions to trace the copyright owner. This may occur due to the age of the material, the fact that the copyright owner is now dead and there is uncertainty as to whether descendants may own the copyright; because the work was anonymously published; or because the copyright owner is unaware that they own copyright in the material or are disinterested in exploiting their rights.
- Significantly large numbers of copyright works are used in exhibitions, public and educational programmes and products, and therefore the likelihood of institutions unintentionally infringing copyright increases according to the size of the project /programme.

2. Impact of proposed enforcement provisions on Cultural Institutions:

Cultural institutions will face significant compliance and other costs

Given that the offences and penalties apply to each infringement (for example, separate penalties could apply in relation to the underlying works subsisting in a sound recording played in a place of public entertainment without the permission of or a licence from the

copyright owner), many institutions may not have the resources readily available in current budgets to meet such fines and may have to seek additional government funding.

The option of placing monies aside to cover for possible fines would divert resources from other initiatives /activities essential to maintaining and providing access to the collection. Institutions will therefore have to seek additional insurance coverage to ensure that they can meet penalties and costs of litigation that may possibly arise.

Insurance premiums are likely to increase given that under a strict liability rather than civil liability regime there is a greater risk of institutions being held liable for copyright infringement.

Cultural Institutions may adopt a risk averse attitude to copyright

It is likely that without further amendment to the enforcement provisions, as recommended in para. 3.64, many institutions will not use or make collection items such as orphan works accessible where they cannot guarantee the copyright status of the work or are unable to identify or locate the copyright owner. This is because there will always be the risk, irrespective of the circumstances in which the work was used, that they could be issued with a substantial fine. Many institutions' collections are comprised of a high proportion of orphan works and some institutions have indicated that they do copy and otherwise use orphan works in particular circumstances.

As a result of a strict liability regime, Institutions will then be forced to resort to using alternative collection items where the copyright status of the material is known or where they have been able to obtain the permission of or a licence from the copyright owner. This will inevitably lead to a devaluing of the collection as such items may not have the same cultural, historical or artistic significance as the original item. This will ultimately be to the detriment of the public's understanding and appreciation and understanding of our cultural heritage.

Cultural institutions will be subject to penalties which are disproportionate to the value of standard licensing fees

It has also been the experience of institutions that in the case of orphan works, copyright owners who later appear either authorise the Cultural Institutions to continue using the work on an unremunerated basis or simply request payment of a standard licensing fee.

While these fees vary according to the types of work and intended use and whether the copyright material is being commercially exploited by the owner. In many cases copyright owners willingly provide free access to their work for a range of purposes, such as inclusion of the material in exhibitions, exhibition catalogues and other publications. Where copyright material is being commercially fees again vary according to the type of work and proposed use. On average, the licence fee for use of an image (such as use in an exhibition or publication) is \$150 per image, whereas the fee for a one-off non-theatrical (ie, non-commercial) screening of a film is around \$300.

Furthermore, in many cases an institution's use of copyright material often benefits the copyright owner by promoting them and their work. For example, communicating images of an artist's work on a dumb terminal in a gallery may promote and increase sales of prints of the work which will directly benefit copyright owners.

The Cultural Institutions also believe that it is more appropriate that any fines issued to publicly funded institutions be directed to benefit the individuals aggrieved (ie, copyright owners) through payment of damages or other remedies (such as an account of profits) rather than through direct fines which are redirected to general revenue.