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Q246

Exceptions and limitations to copyright protection for libraries, archives and education and research institutions

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I. Current law and practice

1) Does your law provide for exceptions or limitations to copyright protection for libraries and archives?

yes

If so, please provide details of such exceptions or limitations, including in relation to the following activities::

a) reproduction and/or distribution for the purpose of preservation or replacement;

yes

Please comment:

A library or archive may reproduce a work held in manuscript form and may reproduce an original artistic work for purposes of preservation against loss or deterioration (s 51A(1)(a)). "Work" is defined by s 10 to mean a literary, dramatic, musical or artistic work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#artistic_work]. "Manuscript" in relation to a literary, dramatic or musical work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#musical_work] is defined to mean the document embodying the work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] "as initially prepared by the author[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#author]", whether in hardcopy, electronic or any other form. Hence s 51A(1)(a) is limited to original material, and does not apply to the reproduction of published literary works or commercially reproduced artistic works.

Further, a library or archive may make up to three preservation copies of significant works in key cultural institutions' collections (s 51B). Section 51B(1) applies to works held in the collection of a library or archives where the body administering the library or archives has, under a law of the Commonwealth or a State or Territory, the function of developing and maintaining a collection of works which are of "historical or cultural significance to Australia". As with s 51A, s 51B is limited to original material.

Corresponding exceptions are created in relation to "first" records of sound recordings and cinematograph films by s 110B and s 110BA and published editions by s 112AA..

A library or archive is permitted to reproduce a work held in published form in a library collection (s 51A(1)(b) and (c)) for purposes of replacement. If a published literary, dramatic or musical work has either been damaged or deteriorated (s 51A(1)(b)) or lost or stolen (s 51A(1)(c)), it may be reproduced and communicated for replacement purposes. However, prior to any such reproduction and communication, an authorized officer of the library or archive must conduct a "reasonable investigation" to ascertain that a new copy is unavailable commercially within a reasonable time, and make a formal declaration as to this finding (s 51A(4)).

Similar exceptions are created in relation to "first" records of sound recordings and cinematograph films by s 110B and s 110BA.

Additionally, s 51AA permits the National Archives of Australia to reproduce and communicate works in its care which have been lost, damaged or destroyed without infringing copyright. For purposes of s 51AA, "replace" means a reproduction of the work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] for the purpose of replacing the lost, damaged or destroyed work.

b) reproduction and/or distribution for the purpose of interlibrary lending;

yes

Please comment:

A library[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s50.html#library] may, pursuant to s 50, request another library[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s50.html#library] to supply[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s50.html#supply] a reproduction of an article[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s115.html#article] , or a part of an article[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s115.html#article] , contained in a periodical publication, or of the whole or a part of a published work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] . Section 50(2) permits the requisitioned library[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s50.html#library] to then make a reproduction to which the request relates, and supply the reproduction to the requesting library[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s50.html#library] . Section 50(3) stipulates that such a reproduction will not infringe copyright. Section 50 does not however encompass the reproduction of audiovisual items by one library on behalf of another.

If the reproduction is to be made from a hard copy and is for the whole of the work or more than a reasonable portion, however, an authorised officer of the library making the copy must first make a

declaration that, after reasonable inquiry, he or she is satisfied that a copy of the work (not being a second hand copy) cannot be obtained within a reasonable time at an ordinary commercial price. The same requirement applies to works in electronic form even where the amount to be copied is not more than a reasonable portion. In general terms, a “reasonable portion” is 10% of the work or, if it is published in chapters, not more than 1 chapter. More specifically, the concept of “reasonable portion” is defined in the Act by reference to the nature of the copyright work used. Where the use involves a literary, dramatic or musical work (except a computer program), or an adaptation of such a work, that is contained in a published edition of at least 10 pages, a reasonable portion constitutes 10% of the number of pages in the edition or if the work or adaptation is divided into chapters, a single chapter. Where the use involves a published literary work in electronic form (except a computer program or an electronic compilation, such as a database), a published dramatic work in electronic form or an adaptation published in electronic form of such a literary or dramatic work, a reasonable portion constitutes 10% of the number of words in the work or adaptation or if the work or adaptation is divided into chapters, a single chapter.

Similar provision is made in respect of sound recordings and cinematograph films by s 110B.

Distribution for purposes of interlibrary lending

The right to lend copyright material (in the absence of reproduction) is not one of the rights conferred by the *Copyright Act* on copyright proprietors. Hence as lending copyright material does not in itself infringe copyright, there is no need for the Act to create exceptions for libraries and archives in relation to this activity. The *Copyright Act* does confer, however, a right to control commercial rental of computer programs and sound recordings (and underlying works to the extent they are included in the recording): ss 31(1)(c) & (d), 85(1)(d). A commercial rental arrangement is defined by s 30A and broadly requires that the arrangement be entered into in the course of carrying on business and provides for the copy to be provided on terms of payment in money or money’s worth.

c) reproduction and/or distribution for the purpose of providing copies (either in a physical or a digital form) to users of libraries or archives; or

yes

Please comment:

A library or archive is permitted to reproduce a literary, dramatic or musical work and communicate it to users for purposes of research and study (s 49). An officer in charge of a library or archive may reproduce and supply such material in response to a specific request by a user or student who wishes to use the material for purposes of research or study. The person making the request must provide a declaration that the requested material is for the purpose of research or study, and will[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#will] not be used for any other purpose. The terms “research or study” are not defined in the Act.

It is relevant to note that the amount to be copied must form a reasonable portion of the whole. As noted in 1(b), a “reasonable portion” consists of an entire journal article or one chapter or 10% of a book of 10 or more pages, or 10% of the words of a work that is in electronic form. In order to determine that they do not supply more than a reasonable portion, the requisitioned library must, before supplying the requested material, be satisfied that it has not previously communicated a reproduction of the same material to the person making the request. However, an exception to the reasonable portion requirement exists where the library is satisfied that a new copy of the work cannot be obtained in a reasonable time at an ordinary commercial price. If the library is satisfied after reasonable investigation that the work cannot be obtained in a reasonable time at an ordinary commercial price, the library may reproduce and communicate more than a reasonable portion of the requisitioned work.

The distribution may be in either hardcopy or electronic form. A library may make an electronic reproduction of the relevant work or part of the work for purpose of supply. Hence the communication can be via email or via posting on a secure site on the institution's website.

Finally, s 49 prescribes a highly detailed procedure for the making, receipt and processing of requests for reproduction and communication, including various declarations that need to be made by both the requesting party and the library, and the documentation to be maintained.

If the user has requested a copy of material not held in the library's collection but in another library's collection, s 50 provides that the library or archives may request that other library or archives to supply the copy for the user's research or study on similar conditions to those applicable under s 49 including satisfaction about the unavailability of new copies within a reasonable time at an ordinary commercial price.

Section 110B(2)(B) provides that a library or archives does not infringe copyright in a sound recording or cinematograph film (or the underlying works embodied in the recording or film) if the copy is made from a 'first' record by communicating a copy of it to another library or archives where the second library or archives makes the recording or film available via a terminal installed within its premises for research that is being carried on at that library or archives.

d) any other activities, and if so, what activities?

yes

Please comment:

Additionally, exceptions to copyright for libraries and archives exist in relation to the activity of reproducing and communicating works to Parliamentarians, National Archives, and reproduction works of historical and cultural significance in key cultural institutions' collections. These are considered in the response to Question 2, as in each case, these exceptions are contingent on the nature of the organisation. Finally, the special case or flexible dealing option created by s 200AB of the Act (discussed at 5(b) below) can also be relied upon by libraries and archives.

2) Do any of these exceptions or limitations apply to libraries, archives or other organizations (e.g. museums) generally, or only to certain organizations (e.g. public and/or commercial libraries and archives)? If so, which organizations?

Libraries and archives

There is no definition of "library" in the interpretation section of the *Copyright Act*. Rather the Act provides varying definitions of "library", contingent on the nature of the exception to copyright. For example, for purposes of the exception created by s 49, "library" is defined by s 49 itself to mean a library[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s49.html#library], all or part of whose collection is accessible to members[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s136.html#member] of the public directly[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s248a.html#direct] or through interlibrary loans. In comparison, for the purposes of the exception created by s 50, "library" is defined to be: (a) a library all or part of whose collection is accessible to members of the public directly or through interlibrary loans; or (b) a library whose principal purpose is to provide library services for members of a Parliament; or (c) an archives all or part of whose collection is accessible to members of the public. Whilst referring to libraries, s 51 does not provide any definition of "library", causing the application of the section to be dependent on the commonly understood meaning of library. There is no definition of 'library' for the purposes of ss 110B and 110BA.

Previously, to qualify as a library for the purposes of ss 49 and 50, the library must not have been conducted for profit. This appears to have required examination of the library's own operation and funding as s 18 provides that a library is not taken to be conducted for profit by reason only that it is owned by a person which carries on business for profit.

There is however an overarching definition of "archive" in the interpretations provision of s 10 that is consistently applied throughout the Act. "Archive" is defined as: (a) archival material in the custody of: (i) the National Archives of Australia; or (ii) the Archives Office of New South Wales established by the *Archives Act 1960* (NSW); or (iii) the Public Record Office established by the *Public Records Act 1973* (Vic); or (iv) the Archives Office of Tasmania established by the *Archives Act 1965* (Tas); or (aa) archival material in the custody of a person (other than the National Archives of Australia) in accordance with an arrangement referred to in section 64 of the *Archives Act* (Cth) 1983.

Therefore, the exceptions in ss 49, 50 and 51 apply to libraries (as variously defined in the provision creating the exception) and archives (as defined in s 10). In addition to the above exceptions for libraries and archives, there are other exceptions that relate to specific forms and activities of libraries and archives. These are outlined below.

Parliamentary libraries

Section 48A governs copying by Parliamentary libraries for members of Parliament. A "Parliamentary library" is defined by s 48A to be "library" the "principal purpose of which is to provide library services for members[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s136.html#member] of that Parliament". Sections 50, 110B and 110BA provide that copyright[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s134b.html#copy] in a work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] is not infringed by anything done by an authorised officer of such a library for the sole purpose of assisting a person who is a member[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s136.html#member] of a Parliament in the performance[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s135a.html#performance] of the person's duties as such a member[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s136.html#member].

National Archive of Australia

Section s 51AA permits the National Archives of Australia to reproduce and communicate works in its care without infringing copyright for purposes of replacement. "Replace" means a reproduction of the work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] made from a working copy[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s51aa.html#working_copy] for the purpose of replacing a reference copy[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s51aa.html#reference_copy] of the work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] that has been lost, damaged or destroyed. There is no counterpart provision in relation to sound recordings and films.

Libraries overseeing works in key cultural institutions' collections

Further, s 51B permits libraries to make preservation copies of significant works in key cultural institutions' collections. Section 51B(1) applies in relation to a work held in the collection of a library or archives where the body administering the library or archives has, under a law of the Commonwealth or a State or Territory, the function of developing and maintaining a collection of works that are of "historical or cultural significance to Australia". Section 110BA makes corresponding provision in relation to sound recordings and cinematograph films.

- 3) Are there any conditions as to the type or scope of any permitted activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether certain forms of reproduction (e.g. digital reproduction) are excluded)? If so, please explain the conditions.

The exceptions for libraries and archives created in Part 3, Division 5 and Part 4, Division 6 delineate the scope of the permitted activities. These have been incidentally noted when describing the scope of the permitted reproduction and communication in Question 1 (a). The significant points are reiterated below. Section 49, which permits libraries and archives to reproduce and communicate material to users for purposes of research and study, is limited to original literary, dramatic, musical or artistic works included in the article or publication and does not extend to electronic and audiovisual works such as videos and CDs. Section 50, which permits a library[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s50.html#library] to make reproduction to supply[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s50.html#supply] a requesting library[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s50.html#library], does not encompass the reproduction of audiovisual items by one library on behalf of another. Where the copy is to be supplied to a user for that person's research or study under s 49, there is a requirement that the person not previously have been supplied with a copy of the same material. Also, under ss 49 and 50, where the work is an article in a periodical publication, it is permissible to copy more than one article from the same issue only if they are for the same research or course of study. Section 110B, however, makes provision in relation to sound recordings and cinematograph films which are 'first' records and permits them to be made available to another library or archives for research at that second library by being made available on a terminal in that library. Section 51A (1)(a), which permits the reproduction of a work for the purposes of preservation against loss or deterioration or for research or study, is limited to the reproduction of original material. Similar provision is made for sound recordings and films by s 110B. Finally, s 51B, which permits a library or archive to make preservation copies of significant works in key cultural institutions' collections, is also limited to original material. Similar provision is made for sound recordings and films by s 110BA.

- 4) Are there any conditions as to the type of copyrighted work that may be used (e.g. lawfully created copies, copies existing in the library's or archive's collection, published works)? If so, please explain the conditions.

All the exceptions for libraries and archives relate to copies existing within their collection.

- 5) Does your law provide for exceptions or limitations to copyright protection for education and research institutions?

yes

If so, please provide details of such exceptions or limitations, including in relation to the following activities::

a) performance and/or display for educational purposes;

yes

Please comment:

Where a literary, dramatic or musical work is performed by a teacher in the course of giving educational instruction to a class, or otherwise in the presence of an audience and not for profit, it shall not be deemed to be a performance to the public, and therefore not constitute an infringement of copyright. As such the performance does not require the consent of the copyright proprietor (s 28(1)-(3)). "Perform" in relation to a dramatic work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#dramatic_work] as defined by this section or a musical work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#musical_work] , means make an acoustic representation of the work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] or a visual representation of a dramatic action[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s135a.html#action] in the work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] , and includes the making of such a representation by means of a mechanical instrument (s 204). The term "educational instruction" is not defined in the Act and is to be determined by reference to the common law.

The same exception applies to sound recordings[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#sound_recording] and cinematograph films[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#cinematograph_film] except that in the case of recordings[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s248a.html#recording] or films, the reference to "performance[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s135a.html#performance]" is read as a reference to the "act of causing the sounds concerned to be heard or the visual images concerned to be seen" (s 28(4)).

Hence, as such a screening of a film, DVD or video in class is not deemed a performance to the public, it does not require the consent of the copyright proprietor.

Similarly, a communication of a television broadcast[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#television_broadcast] or sound broadcast[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#sound_broadcast] is not a communication to the public[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#to_the_public] if the communication is made merely to facilitate the television broadcast[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#television_broadcast] being seen and heard, or the sound[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#sound_broadcast] broadcast[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#sound_broadcast] being heard in class or otherwise in the presence of an audience (s 28(6)).

Finally, a communication of an artistic work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#artistic_work] is not a communication of the work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] to the[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#to_the_public]

public[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#to_the_public] if the communication is made merely to facilitate the work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] being seen in class or otherwise in the presence of an audience, in the course of educational instruction that is given by a teacher (s 28(7)).

In all cases, it is pertinent to note that the exception relating to performance and display does not apply where the performance or display is for entertainment rather than educational purposes. The teacher, or student, must give the performance or display in the course of giving the course of actually giving the instruction. Further, the exceptions are not available if the education instruction is provided for profit.

"Profit" does not include any advantage, benefit, or gain that is received by a person and results from, or is associated with, the person's private or domestic use of any copyright material (s 132AA). Finally, the exceptions does not apply if people, other than students are present or if people who are not directly connected to with the place where the instruction is taking place are present at the performance or screening.

b) reproduction and/or distribution for educational purposes (e.g. preparation of course packs, compilations or anthologies, exams);

no

Please comment:

The Act does not create a general exception in relation to the reproduction and/or distribution for educational purposes. Instead, Part VB of the Copyright Act creates a compulsory statutory licensing regime to govern the copying and communication of text and images. Hence the reproduction and distribution of copyright materials, such as the use of copyright material for preparation of course packs, compilations or anthologies, exams, is governed by this compulsory licensing framework.

Under this regime, where an educational institution wishes to make multiple copies of published copyright material (original literary, dramatic, musical and artistic works, sound recordings and cinematograph films) solely for the educational purposes of the institution, it must give a remuneration notice to the relevant collecting society, keep the relevant records in respect to the making of copies (including marking the copies so made) and pay equitable remuneration. Part VB also provides for copying by organisations representing people with print or other intellectual disabilities. Part VA makes similar provision in respect of the copyright in radio and television broadcasts.

In practice, the educational institutions and collecting societies generally enter into contractual arrangements with simplified administrative arrangements.

Section 40 (1A) creates a limited exception, providing a fair dealing with[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s195au.html#dealing_with] a literary work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#literary_work] (other than lecture[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s204.html#lecture] notes) does not constitute an infringement of the copyright[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s134b.html#copy] in the work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] if it is for the purpose of, or associated with, an approved course of study or research by an enrolled external

student of an educational institution [http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#educational_institution] institution [http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#educational_institution]. This provision is limited to a copy made by, or perhaps for, the external student individually. It is constrained by the requirement that the dealing be 'fair' and consequently, if the copy is one of multiple copies being made for the class generally, it will typically not qualify for the exception as the making of multiple copies in such situations is covered by the statutory licence in Part VB.

Further, s 200AB creates what has been termed a "special case" or "flexible dealing" exception that permits an educational institution to use copyright material for educational instruction. However, the provision may only be invoked where the use of copyright is not expressly governed by another specific exception in the *Copyright Act*. Hence, if the contemplated use relates to copying and communicating text and images, such a use would be governed by the compulsory statutory licensing regime created by Part VB and would not be covered by the more general s 200AB. Similarly, if the contemplated use relates to recording and communicating television and radio programmes, such a use would be governed by the statutory licensing regime created by Part VA and is not likely to fall within the purview of s 200AB.

c) making translations;

no

Please comment:

Reproduction for the purpose of making translations is not the subject of an exception to copyright.

d) making available in digital networks for educational purposes (e.g. uploading course packs onto on-line platforms, compilations or anthologies, providing distance education);

no

Please comment:

The *Copyright Act* does not create an express exception in relation to making works available in digital networks for educational purposes. Instead, this issue has been dealt with by extending the statutory licences provided in Part VB of the *Copyright Act*. Therefore, the copyright in a published work is not infringed by making a copy of it available online if the institution has given a remuneration notice to the relevant collecting society and the communication is solely for the educational purposes of the institution. In broad terms, this requirement effectively limits those who may access the material to the teachers and students participating in a relevant course. For works other than articles in published periodicals, what is made available may not exceed more than a reasonable portion unless the institution is satisfied that an electronic copy is not available in electronic form within a reasonable time at an ordinary commercial price. In the case of articles, two or more may be made available from the same issue only if they relate to the same subject matter. A statutory licensing regime to govern the copying and communication of text and images, the reproduction and distribution of copyright materials, such as uploading course packs onto on-line platforms, compilations or anthologies, providing distance education, is likely to fall within the ambit of the compulsory licensing framework.

When enacted, it was envisaged that s 200AB might provide educational institutions with some scope to engage in more extensive activities than covered by Part VB but in practice that has not eventuated to any consistent extent due to uncertainty about the interpretation of the provision.

e) reproduction and/or distribution for research purposes; or

yes

Please comment:

Copyright material may legitimately be used for the purpose of research or study. However there are a variety of conditions attaching to this exception. Firstly, the use must primarily be for "research or study". Whilst the term is not defined in the Act, *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625 held that if the primary purpose of the research or study was commercial, such as the supply of published material for a fee, the exception would be unavailable. Secondly, the research and use must be a fair dealing. If the use is confined to a reasonable portion, fairness is established. See 1(b) above for an outline of the concept of "reasonable portion".

However, where the person conducting the research or study exceeds the reasonable portion limits, the use may still be deemed fair pursuant to the relevant circumstances prescribed by the Act. The Act outlines the matters to be taken into account when determining whether a dealing by way of reproducing the whole or a part of the

work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] ,

adaptation[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#adaptation] or

audiovisual item is fair. The factors include

the[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s195au.html#dealing_with]

character of the

dealing[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#deal] , the nature of

the copyright work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] or

adaptation[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#adaptation]

used, the possibility of obtaining the

work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] ,

adaptation[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#adaptation] or

audiovisual item within a reasonable time at an ordinary commercial price, the effect of the

dealing[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#deal] upon the

potential market for, or value of, the

work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] ,

adaptation[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#adaptation] or

audiovisual item, and the substantiality of the part copied in relation to the whole (s 40(2) and s

103C(2)).

f) any other activities, and if so, what activities?

yes

if so, what activities?:

As noted at 5(b), s 200AB creates what has been termed a "special case" or "flexible dealing" exception that permits an educational institution to use copyright material for educational instruction. However, as noted, the provision may only be invoked where the use of copyright is not expressly governed by another specific exception in the *Copyright Act*.

Further, the s 200AB exception is only available where the circumstances of the use constitute a "special case", the use does not conflict with a normal exploitation of the work or other subject-matter, and the use does not unreasonably prejudice the legitimate interests of the owner of the copyright. The terms "special case", "unreasonably prejudice the legitimate interests" and "conflict with a normal exploitation" all have the same meaning as in

Article[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s115.html#article] 13 of the TRIPS

Agreement[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s10.html#trips_agreement]

(s 200AB). Article 13 of TRIPS governs limitations and exceptions to copyright and stipulates that Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate

interests of the right holder.

- 6) Do any of these exceptions or limitations apply to educational and research institutions generally (e.g. non-profit institutions), or only to certain institutions? If so, which institutions?

The exceptions discussed above relate to educational institutions. The term “educational institution” is expansively defined in s 10 to encompass a wide range of organisations, such as schools, universities and colleges of advanced education, nursing schools and teaching units within hospitals. Further, an institution in relation to which a declaration has been made that its principal function is the provision of training for a general education, the preparation of people for a particular occupation or profession or the teaching of English to people whose first language is not English, are also encompassed within the term (s10A(4)).

There are similar, more limited schemes for the making of copies and communication of copyright material by institutions assisting persons with a print disability or intellectual disability.

- 7) Are there any conditions as to the type or scope of the activities and the persons who may engage in such activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether both a teacher's and student's performance is covered, or only one or the other)? If so, please explain the conditions.

The conditions as to the type of scope of the activities and the persona who may engage in such activities relating to the performance and display exception are also integrated into the discussion at 5(a) above. The conditions relating to the fair dealing are outlined above at 5 (e). The conditions relating to the special case of flexible dealing exception are outlined above at 5(f).

- 8) Are there any conditions as to the type of copyrighted work that may be used (e.g. only lawfully created copies, only certain kinds of copyrighted works)? If so, please explain the conditions.

The conditions as to the type of copyright that may be used relating to the performance and display exception are also integrated into the discussion at 5(a) above. The conditions relating to the fair dealing are outlined above at 5 (e). The conditions relating to the special case of flexible dealing exception are outlined above at 5(f).

For the questions below, please provide an answer for each exception or limitation mentioned above.

- 9) Is there any statutory provision that specifically provides for such exception or limitation? Is it alternatively or additionally recognized in case law? If neither, does your jurisdiction have a more general or broad exception or limitation that is interpreted as covering such specific exception or limitation?

As outlined in the individual responses to Questions 1-8, each of the exceptions are founded on provisions of the *Copyright Act*, as interpreted by case law.

- 10) Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation?

The only exception that precisely adopts the Three-Step Test is the special case or flexible dealing

exception created by s 200AB. The special case exception is only available where the following three steps delineated in the TRIPS Article 13 test are satisfied:

1. The circumstances of the use amount to a special case (s 200AB(1)(a));
2. The use does not conflict with a normal exploitation of the work or other subject-matter (s 200AB(1)(c)); and
3. The use does not unreasonably prejudice the legitimate interests of the owner of the copyright (s 200AB(1)(d)).

Additionally, the factors to be taken into account pursuant to s 40(2) and s 103C(2) in determining whether a use for research or study that exceeds the reasonable portion requirement can be deemed fair also echo the rationale of the Three-Step Test. The factors to be taken into account include character of the dealing[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#deal] , the nature of the copyright work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] used, the possibility of obtaining the work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] within a reasonable time at an ordinary commercial price, the effect of the dealing[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#deal] upon the potential market for, or value of, the work[http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s189.html#work] , and the substantiality of the part copied in relation to the whole. Hence whilst the criteria does not expressly adopt the Three-Step Test, it is underpinned by the same policy rationale of balancing the needs of an individual special need user and the commercial interests of the copyright proprietor.

- 11) Is use under the exception or limitation permitted automatically (without any further action), or must certain criteria be fulfilled/procedure(s) followed (e.g. seeking a compulsory licence)? If it is the latter, please explain the criteria/procedure(s).

Libraries and archives

In certain circumstances, the Act requires declarations to be made before the exceptions set out in ss 49, 50, 51A and 110B can be relied on. These are set out in more detail below, however, in general terms they require that a reasonable investigation has been made into whether a copy can be obtained within a reasonable time at an ordinary commercial price.

In addition, s 203H provides that the exceptions for making reproductions of works set out in ss 49, 50 and 51A are not available unless there has been appropriate notation of the reproduction. That is, at or about the time the reproduction was made, there must be a notation made on the reproduction stating that the reproduction was made on behalf of the relevant institution, or person or body administering the library or archives, and specifying the date on which the reproduction was made. Notation is also required for copies of sound recordings and cinematograph films made pursuant to s 110B.

In addition, the exceptions in ss 49 and 50 require the destruction of the electronic reproduction remaining with the library or archives as soon as practicable after the reproduction is communicated.

Each exception in Part 3, Division 5 of the *Copyright Act 1968* (Cth) is considered below.

Copying for members of Parliament (s 48A) [s 104A]

Use under s 48A relating to copying for members of Parliament is permitted automatically.

Reproducing and communicating works by libraries and archives for users (s 49)

Section 49, dealing with the reproduction and communication of works for users, sets out a request and declaration procedure to be followed before the exception applies and use can occur. The person who requires a copy makes a written request to the officer in charge of the library or archives. They should also provide a signed declaration that the copy is required for the purpose of research or study, that they will not use it for any other purpose and that they have not previously been supplied with a reproduction of the same article or work (or the same part of the article or work) by an authorised officer of the library or archives (s 49(1)). Section 49(2A)-(2C) provides an alternative process if a person is located too remotely to provide the written request and declaration provided for in s 49(1).

In addition, where an electronic reproduction is made in response to a request under s 49, the person receiving the reproduction must be notified that the reproduction has been made under that section and that the article or work might be subject to copyright protection. The reproduction held by the library or archives must also be destroyed as soon as practicable after it has been communicated (s 49(7A)).

If the request is for a reproduction of the whole, or more than a reasonable portion, of a published work, then an authorised officer of the library or archive which makes the reproduction must also, after a reasonable investigation, make a declaration stating that he or she is satisfied that a reproduction (not being a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price (s 49(5)). Factors that the authorised officer must take into account in making this determination are listed in s 49(5AB).

Notation on any reproduction is also required pursuant to s 203H. This notation must be in the terms set out above.

Reproducing and communicating works by libraries or archives for other libraries or archives (s 50)

Section 50, dealing with the reproduction and communication of works for other libraries or archives, requires declarations to be made in certain circumstances.

Where the work from which the reproduction is made is in hardcopy form, and the reproduction is of a whole of the work (other than an article contained in a periodical) or of more than a reasonable portion of the work, then the exception is not available unless certain procedures are followed. That is, as soon as practicable after the request relating to the reproduction is made, an authorised officer of the library

must make a declaration: (i) setting out particulars of the request; and (ii) stating that, after reasonable investigation, the authorised officer is satisfied that a reproduction (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price (s 50(7A)). The factors set out at s 50(7BB) must be taken into account for this purpose.

A declaration in similar terms is required as soon as practicable after a request for reproduction of a work is made, where that work is in electronic form, and the reproduction is made of the whole of the work (including an article contained in a periodical) or any part of the work (s 50(7B)).

In addition, if the reproduction is made in electronic form, the reproduction remaining with the supplying library must be destroyed as soon as practicable after it has been supplied (s 50(7C)).

Notation on any reproduction is also required pursuant to s 203H. This notation must be in the terms set out above.

Reproducing and communicating unpublished works in libraries or archives (s 51) [s 110A]

Section 51(1) and s 110A create exceptions for the reproduction and communication of unpublished works, sound recordings or cinematograph films held in the collection of a library or archives to a person for the person's research or study or with a view to publication. The exception applies to works only after the expiry of 50 calendar years from the author's death or, in the case of sound recordings and cinematograph films, the making of the record or film. The person who requests the copy must satisfy the officer in charge of the library or archives that he or she requires the reproduction for the purposes of research or study, or with a view to publication, and that he or she will not use it for any other purpose (51(1)(d), 110A(d)).

Section 51(2), relating to unpublished theses in university libraries or archives, requires the person to whom it is being supplied to satisfy an authorised officer of the library or archives that he or she requires the reproduction for the purposes of research or study.

Publication of unpublished works kept in libraries or archives (s 52)

Section 52, relating to the publication of unpublished works, requires that the prescribed notice of the intended publication of the work is given before the new work is published (s 52(1)(b)). The prescribed notice of intended publication is made pursuant to reg 5 of the *Copyright Regulations 1969*. This is a notice given by advertisement published in the *Gazette* not earlier than three months, and not later than two months, before the date of the publication or subsequent publication of the new work, and including the information specified in reg 5.

Reproducing and communicating works in Australian Archives (s 51AA)

Some of the provisions contained in s 51AA, relating to the reproduction and communication of works in the Australian Archives, require a request in writing to be made (see ss 51AA(1)(c) and 51AA(1)(d)).

Reproducing and communicating works for preservation or replacement (s 51A) [s 110B]

This exception does not apply in relation to works held in published form in the library or archives, unless an authorised officer has, after reasonable investigation, made a declaration stating that he or she is satisfied that a copy (not being a second-hand copy) of the work, or of the edition in which the work is held in the collection, cannot be obtained within a reasonable time at an ordinary commercial price. In addition, if he or she is satisfied that a copy (not being a second-hand copy) of another edition of the work can be obtained within a reasonable time at an ordinary commercial price, the declaration must state why the reproduction should be made from the copy of the work held in the collection (s 51A(4)).

Notation on any reproduction is also required pursuant to s 203H. This notation must be in the terms set out above.

Making preservation copies of significant works in key cultural institutions' collections (s 51B) [110BA and 112AA]

Before use can be made under this exception, the authorised officer must be satisfied that the work is of 'historical or cultural significance to Australia' (s 51B(1)). Depending on the form in which the significant work is held, there may also be further requirements.

If the work is held in the form of an original artistic work, the authorised officer must be satisfied that a photographic reproduction (not being a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price (s 51B(3)). If the work is held in published form, the authorised officer must be satisfied that a copy (not being a second-hand copy) of the work, or of the edition in which the work is held in the collection, cannot be obtained within a reasonable time at an ordinary commercial price. In addition, if the officer is satisfied that a copy of another edition of the work can be obtained within a reasonable time at an ordinary commercial price, he or she must be satisfied that it is appropriate that the reproduction should be made from the copy of the work held in the collection (s 51B(4)).

'Special case' exception for a body administering a library or archives (s 200AB)

Use under the exception is permitted automatically if the conditions set out in s 200AB exist (these are

set out in Question (5)(f) above).

Educational and research institutions

Statutory licensing scheme (Part VA and Part VB)

All uses under Part VA (relating to the copying and communication of broadcasts) and some uses under Part VB (relating to the reproduction and communication of works and periodical articles) require a remuneration notice to be in force at the time. This is a notice that is given by the body administering an institution to a collecting society in which the institution undertakes to pay equitable remuneration for the use. The remuneration notice must specify the basis on which equitable remuneration will be assessed. This is considered in more detail below.

There are various administrative requirements provided in relation to the statutory licensing scheme contained in the Act. These include various marking and record-keeping requirements (s 135K for Part VA; s 135ZX for Part VB) and notice requirements (s 135KA for Part VA; s 135ZXA for Part VB) which the body administering the institution must comply with as the case requires. For example, s 135ZXA requires a specific notice to be given in relation to all digital copies and communications of material made under Part VB. That is, each copy or communication made must contain statements to the effect that the copy or communication has been made under Part VB and that any work or other subject-matter contained in the copy or communication might be subject to copyright protection. Furthermore, in relation to digital communications, the administering body must take all reasonable steps to ensure that the communication can only be received or accessed by persons entitled to receive or access it (s 135ZXA(b)).

Performance and communication of works or other subject-matter in the course of educational instruction (s 28)

The exception in s 28, relating to performance and communication in the course of educational instruction, applies automatically.

Fair dealing for purpose of research or study (s 40)

The fair dealing exception in s 40 applies automatically.

'Special case' exception for a body administering an educational institution (s 200AB)

Use under the exception is permitted automatically if the conditions set out in s 200AB exist (these are

set out in Question (5)(f) above).

- 12) Is remuneration payable for use under such exception or limitation? If so, how is the amount of remuneration determined or calculated? Who is liable for making such payment, and to whom must such payment be made?

Libraries and archives

No remuneration is payable for use under the *Copyright Act* exceptions for libraries and archives.

Educational and research institutions

No remuneration is payable for the exceptions contained in ss 28 and 40 of the *Copyright Act*.

There is, however, remuneration payable under the statutory licensing scheme set out in Parts VA and VB of the *Copyright Act*. Remuneration is payable for all copying or communication that falls under Part VA of the Act (relating to broadcasts). That is, there are no provisions in that Part that allow for copying or communication without a remuneration notice. In addition, remuneration is payable for most instances of copying or communication that falls under Part VB of the Act. However, remuneration is not payable for reproduction or communication under Part VB (i.e. a remuneration notice is not required) where very small parts of certain works are reproduced or communicated for educational purposes (ss 135ZG; 135ZM; 135 ZMB; 135ZME).

As noted above, the remuneration notice sets out the basis for assessing the equitable remuneration. For Part VA notices this can be a records system, a sampling system or an agreed system (s 135G(2)). For Part VB notices this can be a records system, a sampling system or an electronic use system (s 135ZU(2)). For example, a 'records system' involves the payment of a specified amount for each copy or communication allowed. This system requires copies to be marked and records to be kept and sent by the administering body. Furthermore, a 'sampling system' involves payment by the administering body of an annual amount. This system requires copies to be marked.

There is no definition of 'equitable remuneration' in the *Copyright Act*, however, case law treats the term as meaning remuneration that is fair and reasonable. For each type of system, the amount of equitable remuneration to be paid is as determined between the collecting society and the administering body of the institution. If an agreement cannot be reached, the Copyright Tribunal determines the relevant amount to be paid.

The administering body which gave the relevant remuneration notice is liable for making the payment of equitable remuneration to the relevant 'declared' collecting society. The collecting society is entitled to give notice to the administering body requesting payment within a reasonable time (ss 135N; 135ZZA).

13) Is there any special treatment for orphan works for use within such exception or limitation? If so please explain.

Libraries and archives

The only exception that specifically refers to orphan works is s 52, which relates to the publication of unpublished works kept in libraries or archives. It is a requirement under that section that the identity of the copyright owner in the unpublished work (the 'old work') was not known to the publishers of the 'new work' immediately before publication. If s 51(1) applied to the old work immediately before the new work was published, and the prescribed notice of intended publication was given (as set out above), then the exception will apply and the orphan work (or part thereof) can be published as part of a literary, dramatic or musical work.

Educational and research institutions

There is no specific exception that provides special treatment for orphan works in relation to educational institutions. Statutory licences pursuant to Parts VA and VB apply whether or not the materials are orphaned.

14) Does the law of your jurisdiction allow the exception or limitation to be overridden by contract?

The *Copyright Act* does not contain provisions that prevent contracts from excluding or limiting the relevant exceptions. Given that there are such provisions in the Act in relation to the reproduction of computer programs, it is arguable that both the exceptions for libraries and archives under the Act, and the statutory licence scheme and other exceptions for educational and other institutions, can be excluded or limited by contract. Indeed, this is not an uncommon practice in Australia (particularly where copyright materials are dealt with online). Nevertheless, legislation and general law principles may still have an impact on whether contractual provisions that exclude or limit the exceptions are enforceable (e.g. consumer protection legislation or contract principles concerning public policy).

Research by the Copyright Law Review Committee in 2002 and again by the Australian Law Reform Commission in 2013/2014 identified many educational institutions reporting that licence agreements, particularly for access to online databases, purported to exclude the institution's ability to provide copies of material to users under the fair dealing exception for research or study and for use pursuant to the Part VB statutory licence.^[1] It is less clear the extent to which institutions comply with such contractual restrictions.

^[1] ALRC, *Copyright and the Digital Economy* (DP 79) paragraphs 17.10 - 17.22.

15) Other than what is provided in the law of your jurisdiction, are there any efforts by private organizations (such as a private licensing organizations) to address use by libraries, archives and educational and research institutions?

yes

If so, please explain those efforts.:

Given there is limited coverage of the use of music by the statutory licensing scheme and other exceptions in the *Copyright Act* for educational institutions, some institutions have licences with various music industry collecting societies to use music in ways that are not covered by the Act.

II. Policy considerations and proposals for improvements of the current law

16) Should there be any exceptions or limitations to copyright protection for libraries and archives?

yes

If yes, in relation to what activities?:

In principle, yes.

First, to the extent that an individual may exercise a right to make a copy for his or her own personal use (for example, for research or study), a library or archives should be able to make a copy for the individual rather than requiring the individual to make the copy him- or herself. If the request relates to a copy of the whole of the copyright material, or more than some reasonable portion of it, the library or archives should first be satisfied that the material cannot be obtained in a reasonable time at the usual commercial price. (The amounts specified for a 'reasonable portion' in answer to questions 1(b) and (c) seem appropriate limits.)

Similarly, in modern conditions, the library or archives should be able to provide the copy to the individual by electronic means and not be limited to providing the copy in hardcopy form. AIPPI Australia acknowledges concerns about the ease with which digital copies may be reproduced and distributed. If the library or archives is satisfied that the 'user' has requested the copy for a purpose within that user's rights, the responsibility for what is done with the copy should lie with the user, not the library or archives.

The library or archives should be limited to cost recovery in respect of any charges for making or supplying the copy otherwise the library or archives would be unduly competing with the copyright owner.

Secondly, libraries and archives should have power to make a copy of the material for the purposes of preservation or replacement (in their own collection or the collection of another library or archive) where the material is not otherwise available at the usual commercial price.

Thirdly, if the library or archive holds material in its own collection in digital form (rather than being supplied through an online database by a third party), the library or archive should be able to make and maintain a back up copy of the material.

17) Should there be any exceptions or limitations to copyright protection for education and research institutions?

yes

If yes, in relation to what activities? :

In principle, yes.

In common law countries, copyright protection is not an end in itself, but rather a tool to facilitate the progress of science and the arts. Educational institutions are key and crucial means in the dissemination and transmission of the information and knowledge embodied in materials protected by copyright. The access to the materials, however, must not unreasonably undermine the copyright owners' incentives to

produce and publish the materials. It appears impractical and prohibitively expensive both for the institutions and their users such as students to be required to buy multiple copies of text books, journals and other materials where what is needed for, for example, a course of study on a particular subject is a particular chapter or article. Accordingly, educational institutions should have the ability to provide copies of such materials to faculty and students in connection with the teaching and research functions of the institution. As with Question (16) above, however, the ability to make a copy in connection with a particular course of study or to a researcher should be subject to quantification controls such as a 'reasonable portion' requirement and, where more than that is copied from the one publication, subject to a commercial availability test.

18) Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection?

yes

Why?:

At the level of policy, yes. But at the level of *inter partes* dealings, no.

The three-step test provides guidance and sets necessary limits on the extent to which a country may adopt exceptions and limitations that compromise copyright owners' rights. The terms in which the three-step test is expressed, however, are very general and uncertain in application. A legislative body may take advice and give careful consideration to the interpretation of the test and its application in deciding whether to introduce a new exception and in defining it. In practical terms, however, there is very little guidance available to Australian courts and the public generally about how the test should be applied in day to day situations. Copyright owners in general are likely to have stronger incentives to challenge the legitimacy of a particular usage under the three-step test than most users. Those incentives are compounded by the uncertainty about the meaning and application of the elements of the three-step test.

19) Should the exception or limitation be capable of being overridden by contract? Why? Why not?

The exceptions and limitations for libraries and archives addressed in question (16) should not be capable of being overridden by contract. This is addressed further in answer to question (29).

Although it reported that the incidence of licences to educational institutions prohibiting use under statutory licences such as addressed in question (17) had increased since 2002, in its report, *Copyright and the Digital Economy* (Report No. 122), the ALRC did not recommend that there should be a prohibition on contracting out.

20) Should remuneration be payable for any of the activities described in 16) and 17) above? Why? Why not?

Given the nature and purpose of the library and archives exceptions in question (16), no. However, the library or archives should not be able to charge more than costs recovery for any copy supplied pursuant to the exception as that would lead to the library or archives competing unfairly with the copyright owner.

Where multiple copies are made and/or supplied pursuant to the exceptions contemplated in question (17), or the copies are made and/or supplied on a systematic basis, the educational institution should be required to pay equitable remuneration.

As noted in the answers to questions (16) and (17) where the quantity of copying from a particular work

exceeds some reasonable portion, the availability of the exception should also be contingent on the copyright material in question not being available on normal commercial terms in a reasonable timeframe. If such a constraint is not imposed, the library, archives or educational institution would be usurping the position of the copyright owner and competing unfairly with the copyright owner.

21) How can your current law as it applies to exceptions and limitations to copyright protection for libraries, archives and educational and research institutions be improved?

In its report *Copyright and the Digital Economy report* (Report No. 122), the ALRC recommended (recommendation 12-1) that s 200AB be repealed and replaced by a new general "fair use" exception. If a general 'fair use' defence were not introduced, the ALRC's alternative recommendation was to introduce a new 'consolidated' fair dealing defence, with one of the specific fair dealing purposes to be included being a fair dealing for 'library or archive use'. This was largely intended to cover at least the existing exceptions with further consideration being given to broadening to include activities relating to 'cultural heritage' or the 'public interest purposes of cultural institutions'. As envisaged by the ALRC, the main constraint on reliance on this exception would be the application of the fairness criteria in relation to the purpose of the exception.

By recommendation 12-2, the ALRC further recommended that ss 51A, 51B, 110B, 110BA and 112AA also be repealed and replaced with a new exception permitting the making of preservation copies with no limit on the number of copies that could be made. This was seen to be in line with international archiving best practice and would include format shifting - from hardcopy to digital copying. According to the ALRC, rights holders were not so much concerned with copying for preservation, archival purposes as with access to the preservation copy and the use that might be made in competition with the rights holder.

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

In principle, yes.

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

23) If your answer to question 16) or 17) is no, should this be explicitly set out in any international treaty/convention?

no

Please comment:

Not applicable

24) If yes to question 16):

a) to what libraries, archives and other organizations should these exceptions or limitations apply;

As understood in Australia, a library need not be a separate legal entity in its own right; it may be a

“library” maintained within a company or other organisation. The definition provided by s 50, referred to in answer to question 1(d) above appears to provide a suitable definition.

b) to what activities should these exceptions or limitations apply;

Reproduction of a copy and communication of a digital copy to the individual, library or archive which has requested the copy for a purpose the individual, library or archive is permitted to make a copy for itself. Generally, the permitted purposes should cover research or study, criticism or review, reporting of news. There may well be other uses which are, or should be, permitted.

c) under what conditions should the activities be undertaken or the copyrighted work used?

Refer to the answers to questions (16) and (26).

25) If yes to question 17):

a) to what educational and research institutions should these exceptions or limitations apply;

In Australia, it appears to have found impractical or otherwise undesirable to distinguish between educational institutions according to whether or not they are conducted for profit. Instead, qualification has focused on:

1. whether the, or a, main focus of the institution or undertaking within an organisation is the provision of education and/or training; and
2. whether the copy is provided for a charge in excess of costs. It has not mattered whether the education or training is directed to pre-school, school or post-school education, full-time or part-time or directed to training for a particular occupation, trade or profession and extends to language training courses.

In addition to educational institutions, Australian law provides limited rights to copy and communicate copyright materials to institutions assisting people with a print disability or intellectual disability. As the market for copyright materials in a form suitable for use by persons with such disabilities may be too small, or too small for the copies to be made available at a reasonable price, this is an appropriate extension.

AIPPI Australia has not recommended specific provision for research institutions over and above any extent that they are not engaged in providing education or training. Although it has not finally been determined in Australia, it is likely that individuals within such organisations may take advantage of the fair dealing exceptions for research or study in the course of their work.

b) to what activities should these exceptions or limitations apply;

Reproduction of a copy and communication of a digital copy to the staff and students participating in the relevant education or training activity.

c) under what conditions should the activities be undertaken or the copyrighted work be used?

See question (26) below.

For the questions below, please provide an answer for each exception or limitation mentioned above (as applicable).

26) Should use under the exception or limitation be permitted automatically (without any further action), or should certain criteria or procedure(s) be required? If so, what criteria/procedure(s)?

The library or archives should be required to keep a record of each copy made and to whom it was supplied. The record should also include:

1. details of the person who made any inquiries about commercial availability of the material, the date the inquiries were made and what search or searches were made;
2. what steps were taken to identify the name and address and the person to whom the copy was made, the purpose for which the recipient claimed the copy was required and whether or not a copy had previously been supplied to that person.

Similarly, in relation to question (17), the educational institution should be required:

1. to give a notice to the relevant copyright owner or collecting society undertaking to pay equitable remuneration in respect of copies made and supplied pursuant to the exception; and
2. to pay the remuneration.

The mechanics of how the number of copies made and of what materials are recorded should ultimately be determined by negotiation and agreement or, in default be determined by an independent body such as the Copyright Tribunal. Legislation could specify certain minimum requirements about record keeping and procedural matters to protect both owners and users from unreasonable behavior by the other. However, Australian experience indicates such provisions have tended to preclude development of alternative solutions and have not reduced the amount and technicality of disputation. Hence, the Australian Law Review Commission in its *Copyright and the Digital Economy* report (Report No. 122) recommended (recommendation 8-4) their repeal.

In the case of copies made under the exceptions contemplated by both questions (16) and (17), there should be a requirement to include on, or in, the copy a notice setting out what provision it was made under.

27) How should any remuneration for use that falls under such exception or limitation be determined or calculated? Who should be liable for making such payment, and to whom should such payment be made?

This does not arise under our response to question 16.

In relation to question (17), the educational institution should be liable for the payment. It should be possible to make the payment either directly to the relevant copyright owner or, if applicable, a collecting society representing copyright owners in respect of the relevant interest.

The amount the remuneration is set at should be equitable remuneration in the circumstances. This involves a balancing exercise recognizing the need to provide compensation to the rights owner so that the incentive to create new works is not unreasonably undermined while ensuring that access to the material is not unduly impeded by rates which are not affordable. What is fair in any particular case or class may depend on the amount copied, the nature of the material copied (so that in Australia rates per page with illustrations or artistic works are often higher than text) and the use being made (so for example a higher rate may apply to copying by universities and tertiary institutions compared to secondary and primary schools).

28) What special treatment, if any, should there be for use of orphan works within such exception or

limitation?

In its *Copyright and the Digital Economy* report (Report No. 122), recommendation 13-1, the Australian Law Reform Commission has recently recommended that the remedies for infringement of copyright in “orphan works” should be limited where, before the infringement, the person using the copyright material:

1. had made a reasonably diligent search for the rights holder and had not been able to locate the rights holder; and
2. as far as reasonably possible, the user had clearly attributed the authorship of the work.

The ALRC considered a number of options for the limitation of remedies, without finally deciding on one. It reported broad support for limitation of monetary relief to a reasonable licence fee or reasonable compensation.

29) In what circumstances should the exception or limitation be capable of being overridden by contract?

A prohibition on contracting out of exceptions and limitations represents a significant constraint on freedom of contract. The ability of parties to freely negotiate and agree on the terms of their contractual relations – freedom of contract – is generally recognized as in the public interest. However, it is not an absolute freedom.

The ALRC in its *Copyright and the Digital Economy* report (Report No. 122) (recommendations 20-1 and 20-2) recommended that contracting out of the ‘fair dealing’ exceptions and the library and archives exceptions should be prohibited on the grounds that these were exceptions designed to protect and preserve overriding public interests. At paragraphs 20.92 – 20.96, it did not recommend prohibition of contracting out if, instead of ‘fair dealing’, its recommendation to introduce a general fair use exception was adopted. This was because the general fair use exception is intended to be open ended and so it could not be predicted with any certainty that a particular ‘fair use’ warranted protection from contracting out.

The recommendation on prohibiting contracting out does not appear to extend to the statutory licences for educational institutions on the basis that these are intended to set minimum thresholds.

30) How should any efforts by private organisations to address use by libraries, archives and educational and research institutions, be reconciled with any exception or limitation provided by law?

Any conduct by private organisations should be consistent with the exceptions and limitations on copyright provided by law.

Summary

Libraries, archives and educational institutions play a vital role in disseminating information and learning. Exceptions and limitations that facilitate that role are necessary, but must not unreasonably prejudice the incentive to create new works. On that basis:

1. libraries and archives should be able to supply an individual with a copy where the individual has a right to make the copy him or herself, such as for research or study and, where the material is not available at an ordinary price, to preserve damaged, lost or stolen items;
2. educational institutions should be able to make copies for their educational purposes on payment of equitable remuneration where multiple copies are made.

These rights should not apply where more than a reasonable portion is copied if the material is available at an ordinary commercial price. Contracts should not be able to exclude these rights. Use of orphan works should be subject to payment of equitable remuneration.

Please comment on any additional issues concerning exceptions and limitations to copyright protection for libraries, archives and educational and research institutions you consider relevant to this Working Question.

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