

3 June 2016

Ms Karen Chester and Mr Jonathan Copper
Commissioners
Intellectual Property Arrangement
Productivity Commission

Submission via online lodgement

Dear Ms Chester and Mr Copper,

Submission on Productivity Commission Draft Report: Intellectual Property Arrangements (April 2016)

The release of the Draft Report is welcomed by the National Film and Sound Archive of Australia (NFSA). The NFSA is a corporate Commonwealth entity and body corporate established by the *National Film and Sound Archive of Australia Act 2008* (Cth) (NFSA Act) as the Commonwealth agency responsible for collecting, preserving and providing access to a national collection of audiovisual and related material (the National Audiovisual Collection).

This submission is structured according to these draft findings, recommendations and requests for further information of direct relevance to the NFSA:

- Draft Finding 4.2 on an revised term of copyright protection;
- Draft Recommendation 4.3 on the application of copyright to unpublished works;
- Draft Recommendation 5.1 on geoblocking technology;
- Draft Recommendation 5.3 on the introduction of a "fair use" exception;
- Draft Recommendation 14.1 on the application of competition law to IP;
- Draft Recommendation 15.1 on open access policies for publicly-funded research;
- Draft Recommendation 17.1 on global cooperation in intellectual property policy;
- Draft Recommendation 18.1 on expanding the safe harbour scheme;
- Information Request 5.1 on contracting out of copyright exceptions;
- Information Request 5.2 on the code of conduct for copyright collecting societies; and
- Information Request 5.3 on the operation of education and government statutory licences; and
- Information Request 16.2 on the separation of policy and administrative responsibility.

This submission and the related submissions it refers to are informed by the experience of NFSA staff either working at the coalface with the National Audiovisual Collection and its stakeholders, or advising on the implications of copyright and related rights for collection development, administration, preservation, research and other access activities. Unless noted otherwise, references to sections refer to the *Copyright Act 1968* (Cth).

As the report's recommendations are extensive, the NFSA would be pleased to provide clarification and further comments to assist the Productivity Commission with its final report.

Comments of NFSA on recommendations and requests for further information

DRAFT FINDING 4.2

While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.

The National Film and Sound Archive (NFSA) agrees that the extended copyright term to a term of life and 70 for works and 70 years from publication for films and sound recordings has reduced the effectiveness, efficiency and adaptability of Australian copyright law. It has also hampered the NFSA's ability to easily preserve, maintain and provide access to cultural heritage items in its National Audiovisual Collection and related material. As copyright terms have increased, the administrative burden on institutions has also increased – with the passage of time it becomes more difficult or impossible to find rights holders for works that are very old (particularly for audiovisual works which were often produced by companies set up primarily for a specific production).

The NFSA supports the Productivity Commission's findings on term and its recommendations to move towards a shorter term (noting that the extent to which this can be realised in the short term is uncertain given our obligations under international copyright treaties such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)). The NFSA agrees that the current copyright settings are not optimal, with excessive terms leading to an imbalance between the incentives to creators to create and the compliance costs to users and intermediaries, including institutions such as the NFSA which despite having a statutory mandate to provide access to its collection, takes seriously its role as gate-keeper to collection material still protected by copyright.

Despite the imbalance caused by excessive copyright terms, the NFSA considers that a recommendation for a copyright term of between 15-25 years may be swinging the pendulum too far towards users and not provide returns for all types of creative material sufficient to motivate or fairly remunerate creators. This is particularly so when taking into account the broad range of creative output the NFSA deals with and the numerous and diverse markets and models digital technology allows for the exploitation of creative works.

The premise made in the draft report at page 114 that the commercial life of copyright works is between 2-5 years maximum, may be relevant for only certain types of copyright material made available through mainstream markets and distribution channels. This analysis also fails to acknowledge that secondary markets for works exists, which although generating less revenue than primary markets, nevertheless provide a source of downstream and ongoing revenue which often exceeds the period of exploitation for copyright works in primary commercial markets. The NFSA in actively promoting access to and re-use of Australia's cultural heritage believes that creators and their direct heirs should be able to avail themselves of economic returns which can be generated by downstream markets.

Below are some of the many examples of secondary markets for the exploitation of copyright material for which a copyright term in excess of 25 years would be warranted:

*A text that has been adapted to film may create a secondary market for the film. For example, currently the texts of *Rabbit Proof Fence* and *To Kill a Mockingbird* are HSC texts of which the study by thousands of students creates a secondary commercial market for the film.*

Early works of film-makers (eg, student works) or artists may not have an initial market (as a creator may not be well known early in their careers) but once they have an established reputation the economic value of the work is increased as the work becomes exploitable.

The growth in 'on demand' viewing (Netflix, Stan etc) has created secondary distribution markets resulting in a continuous revenue stream for viewing and exploiting a copyright work exceeding the period of exposure to copyright materials in traditional markets (eg, the period of cinema release). Similarly, iTunes and other online suppliers, has extended the traditional market for "old" out of distribution audio recordings.

Restoration of older works can create new markets, such as in the cultural sector, which revive the work. For example, the seminal Australian work, 'Wake in Fright', thought lost forever was carefully restored by the NFSA and was then successfully screened by the NFSA and marketed on Blue-ray and DVD for the home video market. Similarly the 'NFSA Restores' programme is designed to digitally restore and preserve classic and cult Australian films, so they can be seen in today's digital cinemas including *Storm Boy* (1976) and *Proof* (1991). This often results in secondary markets as interest is newly ignited.

DRAFT RECOMMENDATION 4.3

The Australian Government should amend the *Copyright Act 1968* (Cth) so the current terms of copyright protection apply to unpublished works.

The NFSA supports this recommendation and notes that the government has favoured this approach in the exposure draft of the *Copyright Amendment (Disability Access and Other Measures) Bill 2016* (CADAOM Bill) as a means of limiting the challenges created for users, such as researchers and cultural institutions, where copyright material is protected in perpetuity.

Many unpublished works are non-commercial in nature (e.g. home movies, diaries, manuscripts) and, even if originally commercial, have become orphaned through a lack of provenance details, rendering it often impossible to provide access to this copyright material.

In releasing the draft exposure bill, the Department of Communications and the Arts raised technical concerns about the difficulty of determining the date of making of a cinematograph film or sound recording. The NFSA, along with other cultural institutions, considered that the concerns were over-stated and that it was possible to determine the date of making of audiovisual material for the purposes of reforming the rules for copyright duration.¹ The NFSA further suggests that industry consultation could deliver consensus for a model to determine the date of making for audiovisual material.

The NFSA suggests that the Productivity Commission, in making its recommendation 4.3, include in its final report a reference to the proposed amendments under the CADAOM Bill in relation to removing perpetual copyright and, in doing so, also refer to submissions made by the NFSA and other cultural institutions on this issue (particularly given the large volume of unpublished works held by these institutions).

¹ National Film and Sound Archive of Australia, Submission on Guiding Questions and Exposure Draft: *Copyright Amendment (Disability Access and Other Measures) Bill 2016*, p 7 (not for publication); Copyright in Cultural Institutions, Submission on Exposure Draft: *Copyright Amendment (Disability Access and Other Measures) Bill 2016*, pp 10-13, forthcoming publication expected at <https://www.communications.gov.au/have-your-say/updating-australias-copyright-laws> .

DRAFT RECOMMENDATION 5.1

The Australian Government should implement the recommendation made in the House of Representatives Committee report *At What Cost? IT pricing and the Australia tax* to amend the *Copyright Act 1968* (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology.

The Australian Government should seek to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.

The NFSA notes that the implementation of this recommendation could eliminate doubt about the legality of current consumer practices which have been widespread for some time.

The NFSA would support the elimination of any doubt about the ability of cultural institutions, as intermediaries or on behalf of our clients, to circumvent technological barriers of all kinds in order to access content and to rely on copyright exceptions for which there are not necessarily corresponding exceptions allowing circumvention.

Comments on this point were made to the Attorney-General's Department for the Review of Technological Protection Measures made under the *Copyright Act 1968* (Cth) in August 2012² and to the Australian Law Reform Commission, *Copyright and the Digital Economy*, August 2013.³

See also comments in response to Information Request 5.1 about copyright and contract.

² For example, *Copyright in Cultural Institutions*, Submission to the Attorney-General's Department Review of Technological Protection Measure exceptions made under the *Copyright Act 1968* (Cth)

³ NFSA, Submission to ALRC DP 79, 6 August 2013 (ALRC #750), p 12

DRAFT RECOMMENDATION 5.3

The Australian Government should amend the *Copyright Act 1968* (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for 'fair use'.

The new exception should contain a clause outlining that the objective of the exception is to ensure Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.

The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:

- the effect of the use on the market for the copyright protected work at the time of the use
- the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work
- the commercial availability of the work at the time of the infringement
- the purpose and character of the use, including whether the use is commercial or private use.

The Copyright Act should also specify a non-exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.

The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.

The NFSA supports open ended copyright exceptions which provide flexibility for new dealings with copyright content, if the exceptions are practical and supplement (not dilute) dealings allowed by specific exceptions on which publicly funded cultural institutions like the NFSA rely to perform their statutory functions.

The NFSA gives qualified support for the introduction of the proposed exception and would welcome a recommendation offering greater certainty, including about dealings allowed by existing exceptions. The ALRC's proposal for a new "fair dealing" may be more suited, at least initially, to offer the benefits of a more open copyright exception without the burdens that are familiar to cultural institutions and other copyright users like the NFSA.

The NFSA's preferred position is for an open-ended fair dealing exception with a formulation of the "fairness factors" according to the ALRC's recommendations, with the exception that the focus on "potential market" should be changed to the "current market" using the Productivity Commission's formulation.

The Productivity Commission states that it welcomes additional information on the merits of options to reduce uncertainty with a new fair use exception.⁴ This is relevant to the NFSA, particularly because of its experience applying the open ended exception of s 200AB that was a focus of the ALRC inquiry but is not discussed in the Productivity Commission's draft report. Flexible dealing, even with apparently exhaustive conditions, is not practical for reasons presented elsewhere. However, it is helpfully framed in terms that it supplements other exceptions.⁵

⁴ Draft report, p 161

⁵ s 200AB(6).

The following sections provide the NFSA's views on options to reduce uncertainty with the new "fair use" exception in response to the Productivity Commission's request for additional information.

Reducing uncertainty – adopt ALRC model of an extended fair dealing exception

It may be true that "copyright exceptions have never been expanded to counterbalance the increase in the scope or duration of protection for rights holders"⁶ in a direct sense. However, an open ended copyright exception was introduced in the form of s 200AB⁷ after the copyright term extension was enacted to comply with Australia's obligations under the AUSFTA.⁸

The ALRC ultimately recommended, among other things:

- the amendment of some specific exceptions, notably for preservation;
- the repeal of s 200AB; and
- either:
 - a "fair use" exception containing a non-exhaustive lists of "fairness factors" and "illustrative purposes" (including library or archive use); or
 - a new "fair dealing" exception with the "fairness factors" and a limited list of purposes (including library or archive use).⁹

Based on its experience of "flexible dealing", the NFSA expressed reservations about the ALRC's draft recommendation to introduce an open ended exception:

While it is encouraging that the ALRC is considering a case for significant change to statutory exceptions in Australia, the NFSA is concerned that this market-dependent solution may promote licensing to stimulate the digital economy, to the detriment of any parties like cultural institutions who are already heavily reliant on specific exceptions for uses which are not intended to compete directly with the interests of the copyright owner or creator. This would be an even worse outcome than the 's200AB experiment' which created much complexity and uncertainty for cultural institutions who, on one interpretation, are precluded from flexible dealing to undertake their core functions if any licence exists. There is unlikely to be any test case to provide judicial scrutiny of the provision.¹⁰

It was the stated preference of the NFSA that specific exceptions be retained or expanded and that the existing "fair dealing" exception be extended rather than introducing the ALRC's formulation of "fair use":

Provided that the proposal would not jeopardise the availability of the exceptions, it seems preferable to reform the "fair" exception using the existing fair dealings as a familiar starting point for ease of terminology and as a starting point for interpretation in Australia.¹¹

Reducing uncertainty –'Fair-use' to supplement rather than replace purpose-specific exceptions

The NFSA notes that the Productivity Commission proposes that 'fair use' only replace 'fair dealing', thereby maintaining purpose specific exceptions such as the library and archive provisions. This is essential. The NFSA considers that given the size of the NFSA's collection and the fact that day-to-day business often involves copyright uses, that purpose-specific exceptions (such as preservation copying) give it certainty and are administratively more efficient than open ended exceptions which require evaluation on a case by case basis.

⁶ Draft report, p 148

⁷ *Copyright Amendment Act 2006* (Cth)

⁸ *US Free Trade Agreement Implementation Act 2004* (Cth)

⁹ ALRC Report 122, *Copyright and the Digital Economy*, December 2013, Ch 5, 10, 12, 14, 16.

¹⁰ NFSA, Submission to ALRC DP 79, 6 August 2013 (ALRC #750), p 14

¹¹ NFSA, Submission to ALRC DP 79, 6 August 2013 (ALRC #750), p 17

The Productivity Commission's 'fairness factors' require the effects of the use to be assessed against the copyright owner's **current market** for the protected content **at the time of use** (rather than the ALRC's focus on the effect of the use upon the **potential market** for or value of the copyright material). Similarly, the commercial availability of the work is an assessment of the availability of the work at the time of the alleged infringement rather than at some unknown period of time.

The NFSA therefore supports the Productivity Commission's drafting of 'fairness factors' (a) and (c). This addresses NFSA's concerns¹² that the use should be assessed as to whether it directly competes with the rights holder's actual or current market so as to avoid the potential of creating assessments against false markets, including where copyright content in collection items was never intended for commercial exploitation (which is the case for some NFSA collection items which were created for reasons other than commercial exploitation, e.g. oral history interviews, home movies).

Reducing uncertainty – lack of Australian experience applying “transformative use”

The Productivity Commission's drafting of 'fairness factor' (b)¹³ presents significant uncertainty about the interpretation of “transformation”. The NFSA is concerned that the inclusion of transformative use without further clarification may cause the most degree of uncertainty. As 'transformative use' is a new legal concept originating in the United States there is no Australian-based reference point for assessing the scope of the use (as compared to uses such as fair dealing). There is also the burden that transformation may involve a degree of subjective assessment – as one person's new creation could equally be considered someone else's 'rip off'. The NFSA acknowledges the inherent value of new works – for example, it has for years acknowledged that 'rushes' and 'out-takes' of films are separate copyright works to a final cut of a film – however, when a new work is created based on a prior work the NFSA understands that judicial authority, such as the Panel decision¹⁴, have involved a qualitative (and not just quantitative) evaluation of whether a substantial part was copied and re-used in assessing reliance on a fair dealing exception.

It would be of significant advantage to users of the exception if existing authority in Australia could be applied to interpret the new law, which is unlikely to happen if “transformation” is a new concept. Accordingly, it would be preferable to use existing concepts rather than introducing uncertainty around this factor which might only be informed by reference to US judicial authority.

This leads to the conclusion that perhaps flexibility could be promoted and uncertainty limited by formulating the “fairness factors” according to the ALRC's model, with the exception that the focus on 'potential market' should be changed to 'current market' using the Productivity Commission's formulation. The NFSA submits that this would make for a more practical open ended exception. However, with the list being non-exhaustive for “fair use”, it is possible that 'transformative use' will still be relevant to proving that all the 'fairness factors' are satisfied. This leads to the conclusion that perhaps the benefits of flexibility and practicality are best achieved by making the list of 'fairness factors' an exhaustive list that is closer to that proposed for the ALRC's new “fair dealing” exception, which is more 'closed' than the draft proposal of the Productivity Commission.

Reducing uncertainty - adopt 'illustrative purposes'

The NFSA strongly supports the adoption of 'illustrative purposes' for any open ended exception model, to define the scope of the exception. As such, should the Productivity Commission pursue a recommendation for such an exception, the NFSA supports the

¹² which the NFSA raised in its submission to ALRC Review DP 79 at p 15.

¹³ (b) the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work.

¹⁴ *TCN Channel Nine v Network Ten Pty Ltd* [2001] FCAFC 146 22 May 2002

Productivity Commission's suggestion to include in the list of illustrative purposes all of the existing fair dealing uses (research or study, criticism or review, parody or satire, reporting the news) as well as institution-specific exceptions such as use by a 'library or archive'.

Other general comments on the draft proposal for an open ended exception and its uncertainty

Orphan and abandoned works

The NFSA acknowledges that 'fair use' can potentially deal with the orphan work issue (which will not be fully resolved by ending perpetual copyright as there will always be collection items where the copyright status of the material will always be uncertain due to lack of provenance or details about its date of creation). The NFSA acknowledges that a 'fair use' exception will also be able to deal with out-of-commerce works or what the NFSA colloquially refers to as 'abandoned works' (where rights holders no longer wish to supply the market or where they refuse to respond to requests to licence material).

However, the NFSA considers that a purpose-specific orphan works exception (which could potentially cover the situation of 'abandoned works') combined with a limitation on liability (as recommended by the ALRC in its report on its enquiry into copyright and the digital economy) is preferable to 'fair use' which will always be open to challenge or dispute by a copyright owner.

Furthermore, there will always be a level of risk of an action for authorising copyright infringement should the NFSA and other institutions provide third party access to orphan works under a 'fair use' model: the assessment of the fairness of the use could be disputed depending on the nature of the third party use or should a family member later appear claiming copyright to the title.

As 'fair use' requires a case by case assessment of the proposed use of material, given the large volume of orphan works in the National Audiovisual Collection (estimated at 20%)¹⁵ it will also be administratively cumbersome for the NFSA to assess each title individually.

The NFSA suggests that should the Productivity Commission proceed with its recommendation for 'fair use' and decide against the merits of recommending a purpose specific exception for orphan works, that it should give consideration to including orphan and out-of-commerce / abandoned works in the list of illustrative purposes. This would provide more certainty to the NFSA and other copyright users in the same position.

'Fair use' increases risks for institutions of claims for copyright infringement

Although the exception proposed by the Productivity Commission is to include the specific provision that the exception may apply to users **and** on behalf of users, it is important to acknowledge that any open ended exception presents considerable risk to intermediaries such as cultural institutions.

The main risk for the NFSA is as an intermediary in providing third party clients with access to collection items (e.g. a broadcaster or documentary film-maker). It is in its 'gate-keeper' role of maintaining a collection with a large number of 'in-copyright' works that the NFSA requires certainty that it will not be liable for infringement or authorising infringement should clients make a request to access copyright material under 'fair use'.

It is the preferred practice of the NFSA to only authorise the copying and release of collection items in response to user requests where the user has obtained the permission of the copyright owner. In instances where users seek to rely on fair dealing, the NFSA needs to

¹⁵ National Film and Sound Archive of Australia, Statement on Orphan Works (June 2010) at <http://www.nfsa.gov.au/collection/collection-enquiries/copyright/>

rely on contractual warranties and client agreement to indemnify the NFSA should their claim to be able to rely on the exception be disputed.

Should 'fair-use' be introduced, it is envisaged that there will be an increase in demand on the NFSA to release material to clients without a licence from copyright owners – particularly by documentary film-makers and others claiming that the proposed use by the client would fall within the open ended exception. The NFSA does not have the staffing or resources available that would be required to assess the merits of case-by-case 'fair use' claims made by its clients.

The NFSA suggests that accompanying the introduction of any 'fair use' exception that a limitation on liability also be introduced for any third parties, such as cultural institutions, who provide copyright content in good faith to individuals or organisations seeking to rely on the exception as opposed to licensing the use of the material. This will ensure that the risks associated with releasing material under 'fair use' are borne by the client and/or limited for the institution.

This combined with the provision relating to third parties could address the NFSA's concerns as an intermediary between the National Audiovisual Collection and the NFSA's clients.

'Fair use' risks encouraging new licensing practices which did not previously exist

The NFSA is very concerned that as a reaction to the introduction of 'fair use' copyright owners may attempt to licence uses of material where licences were not commonplace previously. To protect against this risk the NFSA proposes that a 'fair use' model or accompanying explanatory material clarifies that the existence of a licence, or industry practice of licensing, does not preclude reliance on the exception. As raised in the NFSA's submission to the ALRC DP 79 at page 14, the introduction of s 200AB created much complexity and uncertainty for cultural institutions who, on one interpretation, are precluded from flexible dealing to undertake their core functions if any licence exists. This interpretation greatly affected the perceived usefulness of the provision for cultural institutions. It is important that uncertainty around the interrelationship between any open ended exception and existing licensing practices be minimised to avoid a similar situation arising in relation to a fair use provision.

'Fair use' is potentially inefficient and costly

While 'fair use' provides flexibility, arguably it causes inefficiencies with increased administrative costs for institutions whose role is to facilitate the trade in copyright material (e.g. through the provision of access to collection material to researchers, the general public, documentary and other film makers, educational institutions etc).

If 'fair use' were to be introduced, additional resourcing will be required by the NFSA at both officer and executive levels as additional administrative costs could not be absorbed under current funding models. Officers will need to complete 'fair use' assessments and delegates will be required to sign-off on these assessments (as 'fair use' will always involve inherent risks of authorising infringement so assessments will need to be approved and second-counselled).

This is a relevant consideration to the current process for preparing a Regulatory Impact Statement for proposals for regulatory reform.¹⁶

¹⁶ *The Australian Government Guide to Regulation* (2014), <https://www.cuttingredtape.gov.au/handbook/australian-government-guide-regulation>

DRAFT RECOMMENDATION 14.1

The Australian Government should repeal s. 51(3) of the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act).

The Australian Competition and Consumer Commission should issue guidance on the application of part IV of the Competition and Consumer Act to intellectual property.

The NFSA has no comment on this recommendation.

Chapter 15: IP and public institutions

DRAFT RECOMMENDATION 15.1

All Australian, and State and Territory Governments should implement an open access policy for publicly-funded research. The policy should provide free access through an open access repository for all publications funded by governments, directly or through university funding, within 12 months of publication. The policy should minimise exemptions.

The Australian Government should seek to establish the same policy for international agencies to which it is a contributory funder, but which still charge for their publications, such as the Organisation for Economic Cooperation and Development.

While research per se is not the NFSA's primary function, research and the results of this are integral to the NFSA's statutory mandate to develop, preserve, maintain, promote and provide access to a national collection of programs and related material.¹⁷

One of the NFSA's priorities is to share its curatorial knowledge and technical expertise, nationally and internationally.¹⁸ For example, the NFSA is acknowledged as a world leader in scientific and technological audiovisual archival research¹⁹ and many of its preservation staff are leaders in the field, including through membership of the Executive of various international associations for audiovisual archiving.²⁰

Similarly, rather than being a mere storage house of audiovisual and related material, the NFSA also shares and value-adds to the national collection through research. This includes publishing online on its website curated notes on collection items (eg, curated guides to highlight specific collections or specific film or sound genres in the national collection²¹); curatorial notes on collection items and content to support programs and events; blogs and general interest and educational material.²² Copyright subsists in all this material and, in some instances, innovative new practices and preservation procedures could potentially be

¹⁷ s. 6(1)(a) *National Film and Sound Archive of Australia Act 2008*

¹⁸ NFSA Annual Report 2014-15, pg 43.

¹⁹ For example, NFSA's senior researchers have investigated film can design and the use of ventilation to remove the catalysing acids that accelerate film decomposition. Other research papers can be found at: <http://www.nfsa.gov.au/preservation/research/>.

²⁰ NFSA staff are members of the International Federation of Film Archives (FIAP), the South East Asia Pacific Audio-Visual Archives Association (SEAPAVAA), International Sound and Audiovisual Archives and the Association of Moving Image Archives.

²¹ See: <http://www.nfsa.gov.au/collection-guides/>

²² such as education or curator's notes on websites such as *australianscreen online*: www.aso.gov.au

patentable (however, the NFSA decided not to patent any of its innovations in the area of audiovisual preservation and preservation technologies and equipment).

To the extent possible, the NFSA seeks to make its research publicly accessible. Previously, publications were made available in hard-copy form (such as the now defunct *NFSA Journal* and research kits such as *Keepin Silent* – a curated summary of the NFSA’s silent film collection which was freely available to researchers onsite in the NFSA’s library) but now more in-house specialist information is increasingly being made available through the NFSA’s website and other online forums.

Given this, the NFSA supports the underlying principle of the Productivity Commission’s recommendation that free access to research findings will provide the greatest public benefit – allowing for follow-on research, knowledge sharing, education and the promotion, and potentially the creation, of new content.

However, the NFSA, like many other cultural institutions is in a unique position in that high transaction costs and legal impediments (third party ownership of copyright in material included in NFSA-created research and content) means that, in many instances, the NFSA cannot provide complete full open-access to its research material.

Rather, the NFSA is generally able to provide access for personal, non-commercial use or educational use within an organisation, but not for downstream commercial use. This is due to donor restrictions and restrictions placed by third-party rights holders on the use of collection items included within research (eg, stills /film clips on websites such as *australianscreen*²³), which impede its ability to create unfettered, open access to all NFSA research and content. Other legal impediments such as privacy and contractual restrictions on content (such as embargoes on releasing oral history material or home movie footage), or the need for authorisation of communities in relation to Indigenous Cultural and Intellectual Property Rights, can also prevent unfettered access to research material including or related to this content.

The NFSA notes that one of the main justifications to the open-access model is that the traditional requirement for intellectual property protection as a means of recouping transaction costs associated with traditional publishing models no longer applies in a paperless, digital world. However, this rationale does not apply easily to cultural institutions that still have high transactions costs to meet in making research broadly available, thereby justifying both the charging of fees for accessing NFSA-owned collection content and limiting commercial use of its research. Such transaction costs include:

- administrative and actual costs associated with licensing copyright material created or owned by third parties which is included in NFSA research;
- the high likelihood of third party rights holders *not* agreeing to grant free, perpetual, irrevocable and worldwide licences (to enable online or open-access) for both legacy and future material, without the expectation of remuneration from the NFSA; and
- an expectation by government that cultural institutions supplement direct funding through other means – including applying cost-recovery models to access collection items, sourcing philanthropic contributions, and developing public and private partnerships to pool and streamline resourcing.

²³ <http://aso.gov.au/>

Given these ongoing transaction costs, the NFSA seeks a recognition to any mandated open-access model (through an exemption or carve out) that it can reserve the right to assert institutional ownership over NFSA-owned or created research or content, including charging for commercial use of this material.

In support of the NFSA's views in relation to the Commission's draft recommendation 15.1, the report of Project 6 of the Government 2.0 Taskforce²⁴ similarly acknowledged the unique challenges faced by cultural institutions in seeking to meet open-access mandates:

In the absence of additional funding, or the capacity to implement differentiated pricing systems (discussed below) cultural institutions face an inevitable trade-off between collection and access. That is, income foregone through free provision of access implies a reduction in the volume or quality of new material collected, or in expenditure on preservation, classification and digitisation of existing material. Focusing on the final point, in circumstances where access to digitised collections is free of charge, the rate of digitisation may be slower.²⁵

Chapter 16: Institutional and governance arrangements

REQUEST 16.2

Is there merit in establishing a clearer separation between policy and administrative functions for intellectual property, and if so, where should the dividing line lie?

What mechanisms are available for transparently setting out the separation of IP policy and administration responsibilities?

The draft report focusses on functions associated with the statutory granting of rights: (a) policy advice and input and (b) IP rights allocation and administration.

Another dimension to consider is the administration of rights and licences owned by or granted to the Australian Government and its agencies, particularly where the represented agencies are legally distinct from the Commonwealth. These comments apply equally to all forms of intellectual property rights.

To the extent that a single agency or Department undertakes functions for intellectual property rights systems as well as negotiating or enforcing rights on behalf of Departments and agencies, there could be merit in clearly separating functions to avoid actual or perceived conflicts of interest. This could also place represented agencies and Departments in a fairer position to exercise their rights, within the bounds of any applicable government policies.²⁶

²⁴ <http://gov2.net.au/about/draftreport/>

²⁵ John Quiggin, *Project 6: The value of Public Sector Information for cultural institutions*

²⁶ Such as the Australian Government Intellectual Property Rules
<https://www.communications.gov.au/policy/policy-listing/australian-government-intellectual-property-rules>

Chapter 17: International cooperation

DRAFT RECOMMENDATION 17.1

Australia should revive its role in supporting opportunities to promote global cooperation on intellectual property policy among intellectual property offices through the World Intellectual Property Organization and the World Trade Organization to avoid duplication and reduce transaction costs.

The NFSA has no comment on this recommendation.

Chapter 18: Compliance and enforcement

DRAFT RECOMMENDATION 18.1

The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the *Copyright Act 1968 (Cth)*.

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

REQUESTS FOR FURTHER INFORMATION

The NFSA only provides comments in relation to Information Requests 5.1, 5.2 and 5.3 and has no comments to make in relation to the other information requests

INFORMATION REQUEST 5.1

Other than for libraries and archives, to what extent are copyright licence conditions being used by rights holders to override the exceptions in the Copyright Act 1968 (Cth)? To what extent (if any) are these conditions being enforced and what are the resulting effects on users?

Would amendments to the Copyright Act 1968 (Cth) to preserve exceptions for digital material have any unintended impacts?

The NFSA does not experience the same level of contracting out of exceptions as the Commission's draft report noted is occurring with libraries in relation to digital products. However, in some instances licensors, especially large or multinational companies (such as film distribution companies) may offer standard terms and not be willing to

negotiate, whether in relation to uses by the NFSA or the NFSA's clients. In such cases the NFSA's default position is to accept these terms, especially where the company is the only source of the copyright material.

While acquisition, preservation and internal collection management by cultural institutions should ideally not be limited by contractual terms – practical as well as financial constraints unique to cultural institutions make it difficult to fully realise this ideal.

As outlined in the NFSA's response to draft recommendation 15.1, the NFSA licences-out NFSA-owned content including content from its Film Australia Collection and makes accessible third party owned copyright content via its public programmes and outreach activities (screenings, curated websites, performances etc). This provides a much-needed revenue stream supplementing public funding to enable the NFSA to meet its statutory mandate.

In certain situations the NFSA makes a commercial decision to restrict access to content via contract to specific audiences only – such as educational users only – requiring any other users such as the general public to purchase an actual copy of the material should they need to do so for research or general use. Similarly, in relation to other outreach programmes, such as websites hosting NFSA and third party content like *australianscreen online*, contractual restrictions imposed by third party owners of copyright in the content on the site would prevent the NFSA from enabling users seeking to rely on 'fair use' or any other exception to exercise their rights.

The NFSA is therefore concerned to ensure that any amendments preserving exceptions for digital material not impede its ability to generate essential revenue in relation to copyright it owns, or impede its ability to manage potential liability for copyright infringement claims by the owners of third party copyright held in its collection.

INFORMATION REQUEST 5.2

Is the code of conduct for copyright collecting societies sufficient to ensure they operate transparently, efficiently and at best practice?

The NFSA has dealings with collecting societies both as a user and an owner of copyright material. Therefore, the issue as to whether the Code of Conduct for Collecting Societies (Code of Conduct) is sufficient to ensure that they operate transparently, efficiently and at best practice is of direct concern to the NFSA. The NFSA also notes that this issue goes directly to the achievements of the objectives of the Code, which include the following:

'.....
(b) to promote confidence in Collecting societies and the effective administration of copyright ...in Australia'²⁷

As a licensee the NFSA pays for any copying or communication of copyright material undertaken for the services of the government under the statutory licence under Division 2 of Part VII of the Copyright Act 1968 (Copyright Act).

As the owner of copyright in the Film Australia Collection (FAC)²⁸, the NFSA is both a member of Screenrights and the Copyright Agency. It is in receipt of payments from

²⁷ Clause 1.3(b), *Code of Conduct for Collecting Societies*, 1 July 2011

²⁸ The NFSA is the proud custodian of the Film Australia Collection (FAC) which it inherited from Screen Australia in 2011. Film Australia collection titles comprise historical film and audiovisual holdings,

Screenrights for the off-air copying and retransmission of FAC titles in schools under the Part VA statutory licence and also for payments from the Copyright Agency for the copying of educational materials related to FAC titles under the Part VB statutory licence.

The NFSA has concerns in relation to the following aspects of the Code of Conduct which it considers is hampering its ability to fully ensure that the societies operate transparently, efficiently and at best practice:

- i. as a form of self-regulation, the Code of Conduct lacks enforceability that would be available via a more regulated form of oversight,
- ii. there is a lack of enforceability of the Code Reviewer's findings or recommendations (including a lack of available penalties or consequences for a breach of the Code of Conduct),
- iii. there is a need to continue to strengthen the Code of Conduct's requirements
- iv. for increased transparency, particularly in relation to requiring collecting societies to provide greater details on how equitable remuneration is distributed under the statutory licences.

Voluntary as opposed to prescribed structure of the Code of Conduct

The Code of Conduct is a voluntary code (rather than prescribed under the Copyright Act or other statute). All the declared collecting societies, together with a range of non-declared societies and industry groups such as APRA/AMCOS and guilds such as the Australian Writer's Guild, have signed and agreed to be bound by the Code of Conduct which is a positive indicator of their willingness to operate transparently, efficiently and at best practice. However, enforcement is nevertheless weak as a voluntary instrument lacks the incentive or means to ensure compliance. This also compromises the inherent value of the Code of Conduct, creating more of an aspirational document than an effective tool for scrutinising the conduct of collecting societies.

The NFSA notes that the Code Reviewer is appointed by the collecting societies who have endorsed the Code of Conduct. While this does not create impartiality per se, it could lead to a perception of impartiality. This perception could be possibly overcome through the Code Reviewer being a statutory appointment (under the Copyright Act or other legislation) rather than an appointment by the collecting societies.

Problems with enforceability of the Code Reviewer's findings

The NFSA notes that there are no enforceable penalties for breach of the Code. While clause 5.3 of the Code does require that the Code Reviewer's report (and any subsequent recommendations made in it) be made available as follows: to each society, the relevant Commonwealth Department responsible for administering the Copyright Act, any person or body who had provided a submission and the general public – there are no penalties or process to be followed should a breach be found.

The NFSA suggests that one possible option to deal with the lack of enforceability would be to mandate compliance with the Code of Conduct as a statutory obligation for declared collecting societies under Division 3 of Part D of the Copyright Act. Similarly, a material breach could be included as grounds for revocation by the Minister of a body's status as a declared collecting society (such as by an amendment to s.135ZZP or otherwise).

including documentaries, which document Australian life. The FAC continues to enable filmmakers to produce new content.

Concerns over transparency in dealings with statutory licences

The NFSA notes the Productivity Commission's reference at pp 135-36 of its draft report of the supplementary report of the Hon K E Lindgren AM, QC, in relation to his latest review of compliance by the Collecting societies with the Code of Conduct.²⁹

The NFSA agrees with the underlying principle raised by the State of NSW and the Copyright Agency Group in their submissions to Justice Lindgren that declared collecting societies should be held to a higher standard in relation to their dealings with public monies paid under the statutory licences than in the situation of ordinary commercial dealings – particularly given the monopoly position they hold as being the only declared society in relation to a particular class of copyright material and particular uses of that material. As highlighted by both groups, in relation to the statutory licences there is a strong public interest served in requiring collecting societies to disclose the amount of equitable remuneration actually collected from licences, the amount paid into trust or other funds and the amount of licence fees used to recoup the administrative costs of the society.

The NFSA as a publicly-funded institution in receipt of small amounts of philanthropic funding is also entrusted by donors and depositors as custodians of audiovisual cultural heritage. It therefore shares the same public interest concerns as raised by the State of NSW and Copyright Advisory Group in relation to the need to increase the disclosure requirements for declared collecting societies in relation to the use and distribution of equitable remuneration.

INFORMATION REQUEST 5.3

Will the Australian Government's proposed reforms to simplify and streamline education statutory licences result in an efficient and effective scheme? Should similar reforms be made to the operation of the government statutory licence scheme?

As outlined above in the response to Information Request 5.2, the NFSA as an owner of some collection material including the Film Australia Collection, is a beneficiary of royalties received from the 'equitable remuneration' paid by educational institutions under the Part VA and VB statutory licences for the use of that material.

The NFSA supports the proposal to extend the reforms to the educational statutory licences to government statutory licence scheme, particularly given concerns raised regarding the actual and administrative costs involved in determining the sampling method under the s 183A statutory licence and the fact that the current method fails to record actual copying.³⁰ As a result, the amount of 'equitable remuneration' payable has not been seen to be 'fair' or equitable as it does not reflect actual copying undertaken³¹, nor does the current survey method acknowledge the diversity of copying practices and functions within different corners of government.

For example, the NFSA does not currently undertake the type of copying of print based works (ie, literary and artistic works) covered by the Copyright Agency Agreement with the Commonwealth under the government copying licence. This is because it does not

²⁹ <http://copyright.com.au/about-us/governance/code-of-conduct/>

³⁰ Under the s183A statutory licences for government copying the method of working out equitable remuneration may provide for different treatment of different classes government copies. See: <https://www.alrc.gov.au/publications/15-government-use/current-arrangements>

³¹ Equitable remuneration is calculated on the FTE of an agency multiplied by a set fee –in the case of the NFSA, it may be that only a small number of employees undertake the actual copying (such as a research or publications area) rather than all officers equally within the agency.

undertake the level of photocopying and printing common to mainstream departments, such as those engaged in policy-development and research. Where the NFSA does make use of copyright protected material (such as in the inclusion of stills from films in its annual reports) it directly licences the use of that material rather than relying on the statutory scheme.

The NFSA's submission to the ALRC³² provided further insight into how cultural institutions' uses of copyright material are often very different to other government entities. Previous reviews have acknowledged the complexities for government funded cultural institutions, especially in the context of publication.³³

In terms of other options for reforms, as well as streamlining the operation of the existing statutory licence schemes for educational institutions and government, the NFSA considers that there is scope for greater legislative clarity on the scope of the scheme, whether it precludes agencies from direct source licensing or relying on other exceptions in the Copyright Act such as fair dealing, flexible dealing or the library and archive provisions. The NFSA accordingly endorses the recommendations 8-1 to 8-4 of the ALRC review into Copyright and the Digital Economy as it addressed as part of its enquiry these issues in relation to the statutory licences.³⁴

Closing remarks

The NFSA appreciates the Productivity Commission's consideration of this submission and would be pleased to further assist the Commission with the finalisation of its report.

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

Yours sincerely

Michael Loebenstein
Chief Executive Officer

³² NFSA, Submission to ALRC DP 79, 6 August 2013 (ALRC #750),

<http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc>

³³ For example, see reference to the NFSA in *The Principles on open public sector information: Report on review and development of principles*, Office of the Australian Information Commissioner (May 2011), <https://www.oaic.gov.au/information-policy/information-policy-resources/principles-on-open-public-sector-information-report-on-review-and-development-of-principles-may-2011>

³⁴ <https://www.alrc.gov.au/publications/recommendations>