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CHAPTER 26. THE USE AND PROTECTION OF COPYRIGHT

26.1 INTRODUCTION

Copyright plays an essential role in any developed sophisticated society. It is the principal tool by which society accords recognition to creativity, innovation and imagination. This is economically expressed awarding the owner of the copyright a range of exclusive rights and powers.

At the end of the day, the rights of copyright are an award for innovation, creativity and risk taking. It is recognition that both the culture and the economy of our community are dependent on encouraging and fostering these characteristics.

Copyright is one of the basic tools of every museum, gallery, library and archive. Indeed, such institutions are not only holders of large quantities of copyright material, they are, themselves, great users and creators of copyright material. As an owner, it is important for collection managers to understand the basic principles of copyright, so that they may better utilise and protect the institution's resources and assets. As a user, it is important so that the institution can better fulfil its public exhibition and education purposes.

The change from closed fist to open palm

In just a generation, we have seen great changes in the purpose and function of collecting organisations. We have seen a steady (or perhaps unsteady) move by which collection, conservation, protection, and the carrying out of closed research has evolved to embrace public access, public education and indeed public pleasure and entertainment.

One might observe that purpose and function have always varied between the collecting sectors: a hundred years ago, although the cant may have included fine words about the public benefit of collections, the reality was that many were operated as fiefdoms in which public access and participation was only modestly encouraged. Those attitudes are

unrecognisable in the modern museum or gallery. For their part, archives, because of their very nature and purpose, were seen as repositories of the public record; whereas now, archives have a much greater, and developing, focus on public access and education.¹ In contrast to other collecting institutions, libraries have always been oriented towards public service and access.

These changes have an important effect on the attitude of collection managers towards copyright. There is an often-expressed annoyance or frustration that copyright inhibits the ability of the collecting institution to fulfil its public access and educational purposes. This is understandable but needs to be taken in a wider context: the system of copyright is one of competing public interests. There is a public interest in granting copyright owners certain control over their intellectual property just as there is a public interest in granting limited exclusions and exceptions in favour of those who need access to the copyright material for acknowledged public purposes. The public interest in, say, a library, gallery or museum making its collection available on-line is not inherently more important than the public interest in protecting the economic rights awarded to copyright owners. It is a question of balance.

The change as to the identification and management of assets

This evolution in thinking about collection functions has been reflected in the way that we identify, capture, administer and exploit the assets of the organisation. Every collecting institution is a repository of vast opportunities to encourage thinking and to promote, commercialise, publish and disseminate knowledge. But to do this effectively, it must rethink the way that it defines its assets: the modern institution has its accessioned collection but, just as important is the value in its name and reputation and in the ideas, knowledge, creativity and public reputation of its professional staff. It is these things that confer or enhance the value of the collections. These are the invisible assets of the institution. They are off balance sheet. They are part of the intellectual property assets of the organisation but most organisations fail to capture, either properly or at all, the potential value of these assets. Many do not even try to identify them. This is changing rapidly.

The changes imposed by technology

Copyright is also one of the areas of collections management that has been particularly affected by technological changes. The development of digital technologies and the Internet have, on one hand, made collections more accessible to the public and, on the other, have made it more difficult to prevent unauthorised reproduction and distribution of copyright material. The fact remains that computerisation has been probably the biggest change to the way collecting organisations function. Virtually all areas of professional practice are now assisted by computerisation and this is probably the greatest single catalyst for change in the way that we administer, conserve, protect, exhibit and explain our collections.

In spite of its importance, too few collection workers sufficiently understand the law of copyright.² Indeed few enough lawyers are competent in it. The aim of this chapter is to provide a basic guidance to the principles of copyright law, and to indicate the kinds of issues and problems that can arise in this area.

An approach to answering your copyright questions

To use this chapter effectively, it is useful to understand the approach taken in setting out the information.

First, the chapter sets out the general principles of copyright. This is basic knowledge for any collection manager. This includes understanding what copyright is; how it comes into existence; what material it affects; how to work out who owns it; and how long it lasts. It is important to replace old and inaccurate rules of thumb with a correct, if basic, understanding of the principles.

Second, the chapter asks: If the material is protected by copyright, what general exceptions exist? The *Copyright Act 1968* (Cth) provides a number of general exceptions that permit the use of material when certain conditions are met.

Third, there are a number of special exceptions provided for collecting institutions. These are discussed last because, generally, they only become relevant (a) if an application of the general principles demonstrate that the material is protected by copyright, and (b) the general exceptions do not apply.

In this way, finding the correct answer to a copyright question is like climbing a pyramid. You start by applying the broad principles and work your way up an ever-narrowing path towards the answer.

26.2 WHAT IS COVERED BY COPYRIGHT?

The phrase 'intellectual property' includes **copyright**³, **patent**, **trademark** and **confidentiality**. Copyright, the focus of this chapter, is principally about the right to reproduce, publish or publicly communicate. In contrast, patent is a system whereby the patent holder has a monopoly on an invention or novel process; trademark provides a system of protection for names and logos used in connection with the supply of goods or services; and confidentiality provides a non-statutory, case law-based rules to permit confidential information to be communicated without the fear that the confidence (and the value in it) will not be breached, abused or appropriated.

Three independent rights arise from an act of authorship:⁴

- (a) The rights that accompany ownership of the atom-based object or "thing" (such as the right to hang it, shelve it, exhibit it, clean it, sell it, protect it, or even destroy it); and

- (b) The copyright that arises from putting the concept into a material form. (These are ephemeral, for copyright is just an intellectual construct. We know that it's a noun – but who has ever touched one?); and
- (c) The moral rights of the author – rights that are granted by the *Copyright Act 1968* (Cth) that are distinct from copyright personal to the creator and are inalienable.

For example, if an article is written or a canvas painted, A may own the physical thing, B may own the copyright in the work, and C, the moral rights in the work. The collecting organisation may own the object but not the copyright in the object, may own the copyright without owning the thing itself, or may own both. In any event, it will never own the moral rights.

Copyright protection is given to two classes of things:

- (a) **'Works'** (including artistic, musical, literary⁵ and dramatic works).
- (b) **'Subject matter other than works'** (for example sound recordings, cinematograph works, broadcasts and published editions).

The latter, are a quite modern addition to the copyright armoury. They are a result of publishers, record companies and film studios lobbying governments to invent a whole new species of copyright material on the basis that they invest enormous sums and should have the benefit of rights that will allow them to protect and profit from that investment. It illustrates an interesting divergence in the development of copyright: for 'works', media convergence has required that the technology or media (used to embody a creative idea in material form) is becoming increasingly irrelevant. In contrast, the laws relating to 'subject matter other than works' remain steadfastly focused on individual media or technologies.

26.3 WHAT IS THE SOURCE OF COPYRIGHT?

Copyright is a creation of statute. The first Australian copyright legislation was enacted in 1905⁶ and came into effect in 1907. It was short-lived. In 1912, the Australian Federal Government enacted a further Act that adopted the UK legislation.⁷ In a startling exhibition of colonial dependence by a newly independent country, Australia declared the British legislation to be in effect throughout Australia. It remained in force in Australia even after it had long been repealed in the United Kingdom.⁸ Indeed, it stayed in effect until it was eventually repealed and replaced in 1968.⁹ These days, copyright protection in Australia is provided by the *Copyright Act 1968* (Cth) (as updated from time to time).

In addition, Australia belongs to a number of international treaties, which dovetail into the Australian laws. These treaties provide Australian copyright owners with reciprocal copyright protection in other treaty countries.

26.4 FORMALITIES NECESSARY TO PROTECT WORKS

Requirements

The *Copyright Act 1968* (Cth) provides **automatic** protection for 'works'. No formalities are necessary provided the person claiming copyright meets the criterion of being a "qualified person".¹⁰ As soon as an idea is given a 'material form', copyright exists in it. It is automatic.

Although no formalities are necessary for copyright to subsist, it can still be worthwhile to include the commonly seen formula: © name and the year that the work was first published.¹¹ It is a useful reminder to would-be users that the material is copyright but is not a requirement for the subsistence of copyright. The roots of the copyright notice lie in legal and diplomatic history: although most developed countries had long been members of the Berne Convention (which provides a formality-free approach), the United States did not sign the Berne Convention until 1989. Rather, it was a member of the Universal Copyright Convention ('UCC'), which requires that every published copy of the copyright material must bear the copyright notice if it is to qualify. Until the United States joined the Berne Convention, if one wanted protection in the US, formal registration of the copyright at the Library of Congress and use of the copyright notice, was essential. Much US material fell into the public domain in this way.¹²

Many people are mystified by the **P** symbol on records. The **P** symbol stands for 'Phonograph' and comes from the Rome Convention (yet another treaty!). It came into force in 1964. This was the first time sound recordings were given copyright recognition in an international treaty. Again, all published copies should have a **P** symbol, the year of first publication and the owner or the person who published the record itself (not always the same person).

In Australia, the principal purpose of the copyright notice is simply to remind would-be users that the work is subject to copyright and that permission is required. It is not a **requirement** for the subsistence of copyright.¹³

Essentially, copyright in Australia is automatic and it is free.

26.5 REQUIREMENTS OF COPYRIGHT

A 'work' will be the subject of copyright, from the moment of its creation, if it satisfies the following conditions:¹⁴

- it has been reduced to a 'material form';
- it is an artistic, musical, literary or dramatic work;
- the author is a 'qualified person'; and
- the work is 'original'.

Each of these requirements needs some explanation.

What is 'material form'?

Copyright only protects a work¹⁵ that is in a 'material form'. Copyright does not protect ideas; rather, it protects the physical form in which those ideas are expressed.¹⁶ So it does not protect the idea or subject matter of work, only the representation itself. Thus the idea of painting a soup can is not protected, but a painting of it would be.¹⁷

The work need not be a physically separate or discrete entity; it can be integrated into a larger structure or object. If so, it must be sufficiently identifiable to attract protection.¹⁸

It is not vital that the material form be permanent. After all, what is permanent? Thus if a work, such as Dobell's portrait of Joshua Smith or Sutherland's portrait of Sir Winston Churchill were destroyed, the copyright would continue to protect the exclusivity of the reproduction rights. Nevertheless, the question of when a form is sufficiently substantive to qualify as 'material' has remained a point of discussion in the case law. For example, is a vapour sculpture (made by an artist using a jet engine) 'material'? Some would say not because it is insufficiently substantial. But what of an ice sculpture?¹⁹ It employs the same substances but lasts slightly longer. All would surely say, 'Yes'. What then is the difference? Merely the length of time that the work exists? Given that every physical object is in a constant state of decay, the question is 'what degree of substantiality is required?' From vapour to ice to stone – it is only a matter of degree.²⁰

The subtleties of the 'materialness' issue are further demonstrated by holograms and laser light sculptures. The eye sees the work but the hand cannot feel it; yet, with a movement, the hand can destroy it. The work in any traditional sense exists only in the eye of the individual viewer. In this instance the right question to ask is not 'How long did the work exist?' but rather, 'What is the work?' In this case, the real work is the photographic plate that is the basis of the holographic projection – rather than the projection itself. (Just as it is with film: it is the film that is protected, not merely the image projected from it.) The question of whether a transitory event such as a firework display could be protected both as an artistic work and as a dramatic work under the Act was raised when Channel Nine sought to prevent

the ABC from filming and broadcasting certain elements of the 1999/2000 New Year firework display in Sydney.²¹

What is a 'work'?

The word 'work' in the Act is defined as meaning 'a literary, dramatic, musical or artistic work'.²²

1. LITERARY WORK

The Act provides no definition of '**literary work**' although the Act states that it includes: '(a) a table, or compilation, expressed in words, figures or symbols; and (b) a computer program or compilation of computer programs.' There is a considerable quantity of case law as to what amounts to a literary work. Where the proposed entity is a novel or a poem, it is easy to identify. Where the proposed entity is a betting slip or a recipe or a newspaper advertisement, the results are not so readily intuitive.

There is no requirement that a literary work be 'literary' in character: a train timetable and the lyrics to a song are as readily protected as a novel. Nor does a literary work contain any prescribed number of words: While we can safely say that a single word cannot be a literary work²³ and that titles alone would not usually be sufficiently substantial, there is no doubt that a haiku would suffice.

In 2010 this issue came before the courts when a newspaper sought to prevent an abstracting service using its headlines. This was the first case to fully examine whether headlines were sufficiently substantial to attract copyright protection. The court held that: 'Headlines generally are, like titles, simply too insubstantial and too short to qualify for copyright protection as literary works.'²⁴

2. MUSICAL WORK

Nor is the phrase '**musical work**' defined. It would appear that the legislators assume that anyone can tell music when they hear it. Style, genre, length (and volume) are irrelevant. The Act doesn't legislate as to how many musical notes it takes to make a musical work.²⁵

3. DRAMATIC WORK

Similarly, a '**dramatic work**' is not defined except that the Act states that it includes '(a) a choreographic show or other dumb show; and (b) a scenario or script for a cinematograph film; but does not include a cinematograph film as distinct from the scenario or script for a cinematograph film.' In one case²⁶ it was suggested that there was a minimum requirement of some type of performance, whether by human beings or by characters, and something sufficiently predetermined as to plot, choreography, script, characterisation or interaction between characters.

4. ARTISTIC WORK

By contrast, an '**artistic work**' is defined in the Act as follows:

- a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
- a building or a model of a building, whether the building or model is of artistic quality or not; or
- a work of artistic craftsmanship.²⁷

An artistic work is given a broad definition and can include very simple designs, such as the design for a flag,²⁸ or a logo for a company or event.²⁹ The Act also provides that:

- A '**drawing**' includes a diagram, map, chart or plan;
- An '**engraving**' includes an etching, lithograph, product of photogravure, woodcut, print or similar work, not being a photograph. Arguably it also extends to cover the block or plate that is used to produce an engraving or similar work.³⁰
- '**Photograph**' means a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography.
- '**Sculpture**' includes a cast or model made for the purposes of sculpture, medallions and friezes. It can also include found objects that are installed or assembled as a sculpture, and objects created for a purpose that is not solely artistic, such as models of mundane objects used for an advertising campaign.³¹

With paintings, drawings, engravings and photographs, the work need be neither skilful nor artistic, but this is not the case where the work is classified as one of '**artistic craftsmanship**'. There is no statutory definition of 'artistic craftsmanship' and until 2007 there was considerable uncertainty as to what constituted 'artistic craftsmanship'.

The work of 'artistic craftsmanship' must actually be one of '*craftsmanship*'; something demanding a particular skill or training. This is now interpreted quite generously and even includes situations where the work has been produced by machine rather than by hand. In the *Cuisenaire* case, it was alleged that the defendant was breaching the plaintiff's copyright in an educational tool for the teaching of arithmetic. The 'material form' consisted of small wooden rectangular blocks that were variously coloured. The court held that no copyright existed in the blocks because they were neither 'artistic works' (see the definition above) nor 'works of artistic craftsmanship'. The reasoning for the latter finding was: (a) they were not works of 'craftsmanship' in that no special skill or training was necessary to cut out simple shapes of wood, and (b) they were not intended to be 'artistic'.

'Artistic craftsmanship' is not a synonym for 'hand made'. It does not preclude items that have been made by machine.³²

The cases have long required that such works both be works of 'craftsmanship' and 'artistic' and there has always been tension around the weight to be accorded to a maker's desire to design something beautiful and the constraints imposed by utility of function. In *Burge v Swarbrick*,³³ the issue was whether a 'plug' or mould for a racing boat was capable of being a work of artistic craftsmanship. The High Court held that a work could be one of artistic craftsmanship notwithstanding that its form was

partly dictated by functional considerations: beauty and utility are not mutually exclusive. The court distinguished between designs that were determined by functional requirements (such as the physics of yacht speed or the shape of a horse shoe) and designs that were unaffected by function (such as wallpaper or a wrought iron gate). Here, the speed of the racing yacht was more important than aesthetic considerations and, therefore, the yacht was not a 'work of artistic craftsmanship'.³⁴

What is a 'qualified person'?

Even if something has 'material form' and is a 'work', in order to attract copyright protection a 'qualified person' must have created it. Who is such a person can be a complicated legal question but it is not one that will concern the majority of readers; anyone who is either a citizen of or a resident of Australia at the time the work was 'made' or reduced to its material form (which includes when the work was first stored if it is a digital work) is a 'qualified person'. To qualify as 'resident' the person need not be formally a 'permanent resident'; rather, a 'qualified person' need only be ordinarily resident in Australia.³⁵

What is 'originality'?

Irrespective of the date of its creation, a work must be 'original' if it is to be protected by copyright³⁶. This does not mean that the idea behind the work must be novel, for copyright does not protect ideas but rather the material form in which those ideas are expressed.³⁷ Thus, in the unlikely event that two artists working absolutely independently produced identical works, both would be 'original' for the purposes of the Act and both would be capable of attracting copyright protection. For example, if two artists independently paint a picture of Ayres Rock and by some extraordinary chance produce identical images, both works would be protected. Neither would be novel but both would be original. This is because the 'originality' of the works flows from the independent application of skill by their authors.³⁸ The amount of skill, labour and experience necessary is not defined in the Act or the cases, but one authority has suggested that it must be more than 'negligible'.³⁹

The requirement of 'originality' has two related aspects. The first is that the creation of the work has required some *independent* skill on the part of the author.⁴⁰ The second aspect requires that the work should not be a substantial copy of another. 'Originality' is always a question of degree. It is not merely a matter of 'changing a line here or there'. If a person copies a substantial part of another artist's work but changes the odd line or colour, not only will it not be sufficiently original to attract protection but further, the first artist will still be able to show a causal link between the works, and thus establish that the copyright of the original piece has been infringed. Conversely, an adaptation or modification of a previously existing image or pattern may none the less satisfy the requirement of 'originality' even if it does infringe the copyright of that prior image. This is a fraught area for designers, commercial artists and illustrators. Often the brief from their client starts with an example of an existing work and the instruction: 'We want something that looks and feels like this.'

Although you will hear many rules of thumb about how much you can use,⁴¹ the only thing they have in common is that they are wrong. There is only one test: Has there been a reproduction of a substantial portion of the work? But more of this later.

In the 1981 Archibald Prize competition, considerable controversy arose when it was discovered that the winner, Eric Smith, had painted the Komon portrait from a photograph. Although the publicity of the time concerned whether the painting was 'from life' as required by the rules of the competition, the circumstances are also interesting from a copyright point of view. The original photograph was clearly a copyright work. The painting was a reproduction of at least a substantial portion of that work. Accordingly, (unless the artist had obtained a licence to use the photograph in this way) the painting was probably a breach of the copyright in the photograph and thus exposed the artist to a potential claim for damages.⁴²

This, however, does not prevent the portrait from attracting copyright protection in its own right. Although the artist used the photographic image as the basis of his painted work, he clearly used considerable skill, labour and experience in its production. The exercise of these personal attributes was sufficient to make the work 'original' for establishing the subsistence of copyright. Strictly, there is no reason why a work cannot be both an infringement of copyright in an earlier work, and, at the same time, an original work in its own right.

Related to this is the question of whether a compilation of works that are themselves copyright can itself attract copyright protection. For example, a collection of essays in an exhibition catalogue, or a website, where the works have been arranged in a particular way and accompanied by commentary, can itself be protected, over and above the copyright in the individual works. Provided a sufficient degree of skill and labour has gone into the compilation and presentation of the compilation, and the individual authors who contributed to the making of it can be identified, it may be protected.⁴³

Similarly, although a work from a collection may not be protected because the copyright in it has expired, reproductions of the work may be protected because the 'originality' threshold is a low one in relation to photographs.⁴⁴ On a practical level the museum can prevent visitors from taking photographs of works in the gallery and can issue its own reproductions of that work that are themselves copyright protected.⁴⁵

26.6 WHAT ARE THE RIGHTS OF COPYRIGHT?

Because copyright arises purely from each country's national laws there are differences from country to country. Although the actual rights which are recognised may differ, because of

the network of international treaty obligations, the principles in most countries are reasonably common.

In Australia, the specific rights of copyright vary according to the subject matter:

(i) *Literary, dramatic or musical works*⁴⁶

In relation to literary, dramatic or musical works, copyright is the exclusive right to do all or any of the following acts:

- to reproduce the work in a material form;
- to publish the work;
- to perform the work in public;
- to communicate the work to the public;⁴⁷
- to make an adaptation of the work;⁴⁸
- to convert a work into a digital or other electronic machine-readable form;⁴⁹
- to rent recorded music and computer programs;⁵⁰
- to make a sound recording or cinematograph film of the work.⁵¹

All of these things require the permission of the copyright owner.

(ii) *Artistic works*

In the case of an artistic work, copyright is the exclusive right to do all or any of the following acts:

- to reproduce the work in a material form;⁵²
- to publish the work;
- to communicate the work to the public.⁵³

Note that there is no 'exhibition' right. Exhibition does not require the permission of the copyright owner.

(iii) *Sound recordings*⁵⁴

In relation to a sound recording, copyright is the exclusive right to do all or any of the following acts:

- to make a copy;
- to cause it to be heard in public;
- to communicate it to the public;
- to rent it;
- to convert it into a digital or other electronic form.⁵⁵

(iv) *Films*⁵⁶

In relation to a cinematograph film, copyright is the exclusive right to do all or any of the following acts:

- to make a copy;
- to show it in public;

- to communicate it to the public;
- to convert the film into a digital or other electronic form.⁵⁷

(v) *Television, cable and sound broadcasts*⁵⁸

In relation to a television broadcast or sound broadcast, copyright is the exclusive right:

- in the case of a television broadcast in so far as it consists of visual images – to make a film of the broadcast (or a copy of such a film);
- in the case of a radio or television broadcast – to make a sound recording of the broadcast (or a copy of such a sound recording); and
- in the case of a radio or television broadcast – to re-broadcast or communicate it to the public.

(vi) *Published editions*

Copyright, in relation to a published edition of a literary, dramatic, musical or artistic work, is the exclusive right to make a facsimile copy of the edition.⁵⁹

The right to reproduce

Although the term '**reproduction**' is used a lot when talking about copyright, it is commonly misunderstood. Reproduction may take many forms. Although it is most usually used as a synonym for 'copy' it actually has a wider meaning in copyright law, for the copy does not have to be exact.

Reproduction need not be a copy of the whole work, merely a '**substantial part**' of it. For example, using four notes from a piece of music would not usually be thought of as a 'substantial portion', but in the case of, say, the opening four notes of Beethoven's *Fifth Symphony*, the answer would be different.

Reproduction need not be in the same medium.⁶⁰ It need not be in the same dimension.⁶¹ It need not be in the same form.⁶² If one takes a photograph that is in copyright from the collection and, without permission, prints it on card for sale in the institution's shop, the copyright owner's exclusive right of reproduction is infringed. Similarly, digitising an artwork, a literary or a musical work without permission of the copyright owner, (for example by scanning it and storing it on a hard disk) would constitute an infringement.⁶³ This is so even if a two-dimensional work is reproduced in a three-dimensional version, and vice versa.⁶⁴

A commonplace example of this right in practice occurs where a collecting institution wishes to reproduce a copyright work from its own collection in an exhibition catalogue. It must obtain the permission of the copyright owner. Accordingly, to minimise the pain of chasing permissions, it is good practice to ensure that the acquisition documentation states:

- whether or not the work is copyright;
- if so, who is the owner of copyright;

- when the copyright expires;
- and if the lender, donor or vendor of the work is also a copyright owner, whether they give the museum a licence to reproduce the work for, say, non-commercial use within the museum and the right to publish it in catalogues (which presumably will be for sale).

5. CONTROL OF ACCESS

Where the collection owns a unique work but not the copyright in it, the institution may still effectively control the making of reproductions. Although it does not have the right to make reproductions itself, it can prevent the person who does own the copyright from having access to the work for the purpose of making transparencies or other copies of the original. Refusing physical access in effect hobbles the copyright owner. Accordingly, in order to exploit its exclusive rights, the copyright owner must either make the reproduction before losing possession of the work or get permission of the owner to access the work for such purpose. Access to the original work is not one of the rights of copyright.

The right to publish

In relation to the exclusive rights enjoyed by a copyright owner, the terms '**publish**' and '**publication**' have a specific meaning. Essentially it means, the right to make something public for the first time.⁶⁵ A literary, dramatic, musical or artistic work, or an edition of such a work, is 'deemed to have been published if, but only if, reproductions of the work or edition have been supplied (whether by sale or otherwise) to the public'.⁶⁶ For example, it might include placing an image of the work on the Internet, where copies can be viewed or downloaded.

The Act provides for a number of situations that do **not** to constitute 'publication':

- mere exhibition of an artistic work;
- (of a sculpture) the public supply of photographs or engravings of the sculpture;⁶⁷
- the performance of a literary, dramatic or musical work;
- the supply (whether by sale or otherwise) to the public, of records of a literary, dramatic or musical work;
- the construction of a building (or of a model of a building);
- (of a building or a model of a building) the public supply of photographs or engravings of the building or model.

For a musical composition, publication may be by means of sheet music or records; for an artistic work it may be by the making and selling of limited edition prints or by reproducing it in a catalogue.

A film is 'published if, but only if, copies of the film have been sold, let on hire, or offered or exposed for sale or hire, to the public'.⁶⁸ Similarly, a sound recording is 'published if, but only if, records embodying the recording or a part of the recording have been supplied (whether by sale or otherwise) to the public'.⁶⁹

The right to communicate to the public

Communication of a copyright work to the public requires the permission of the copyright owner.

This right came into effect in 2001. It was a major development in Australian copyright law. The new right not only includes the right to 'electronically transmit' but also to 'make available on-line'.⁷⁰

This right is technology non-specific but certainly covers free-to-air television, cable, radio, email and the Internet. It also covers Intranets, both within an individual institution and with partnering institutions.

Whereas the old Act did not contemplate the Internet, email and Intranets, the new right provides specifically for 'on-line' distribution and, because the right is 'technology neutral', it will continue to operate and withstand the semantics and processes of scientific innovation that would outdate a definition based on existing technology.

Importantly, the right covers communications not only within Australia but ones originating here and received overseas. Australian copyright owners can thus seek to prevent the unauthorised communication of their works offshore. For example, the right can be used to stop an Australian based website from making digital material available not just in Australia but also anywhere in the world.

In brief, the new right to 'communicate' works to the public is extremely broad. It clarifies and reinforces the basic and exclusive right of copyright owners to control the use of their work in the digital environment.

26.7 OWNERSHIP OF COPYRIGHT

Introduction

Understanding how to work out who is the owner of copyright is one of the core skills of collection utilisation. This is not a matter of intuition. Getting the right answer requires the application of quite complex principles but once applied, you know who is capable of granting the permissions that you require.

As you will see from this section, even when people such as lenders and donors say that they own the copyright, reliance on such assurances is dangerous. Few owners have the

knowledge to make such an assertion. This is not an area where you can say, 'I think it is, therefore it is.' You must apply the principles.

The impact of contract

The sections that follow, describe who will own the copyright in the work if no specific agreement is made between the owner and the other party (such as the employer or the client). However it is very important to remember that the statutory provisions as to the ownership of copyright are all subject to amendment by contract. When you are trying to determine the true ownership of copyright the starting point is to understand the statutory position and then ask whether that position was varied by contract. For example, it is common for employment agreements to contain provisions that vary the general rules and that change the statutory position by providing the employee with carve-outs or particular rights. Similarly there frequently clauses in commissioning agreements that vary some aspects of rights ownership as conferred by the Act.

Artistic, musical, dramatic and literary works – the general rule

As a rule, the 'author' of a work is the first owner the copyright in it.⁷¹ The Act does not define 'author' (except with regard to photographs) but the cases show that the 'author' is the person who gives physical form to the creative idea. It is not necessarily the person who thought of the idea; rather, it is the person who transformed that idea into a material form.⁷²

Where the focus of the enquiry is 'subject matter other than works', the first owner of copyright is generally the 'maker'. The question, 'who is thy maker?' is discussed below.

There are exceptions to this general rule (such as those relating to employees and the Crown) and these will be discussed later. For the moment it is important to understand that the general rule – and indeed any of the ownership provisions of the *Copyright Act 1968* (Cth) can be altered by contract. Accordingly, even where the Act provides the general rule, you must ask whether there was any agreement that might have varied the standard position.

Musical works

6. THE GENERAL RULE

The general rule is that the 'author' is the owner of copyright. The composer is the author of the music. The lyricist is the author of the lyrics.

The lyrics are protected as a **literary work** and the music as a **musical work**. If their authors are different people, then separate permissions will have to be obtained from each if you want to reproduce the song.

Even if a composer is **commissioned** to write the music, he or she still retains the copyright. However, where composers are actually **employed** to write songs (such as the 'Tin Pan Alley' composers earlier last century in New York), the employer owns the copyright.

Without knowing the facts surrounding how a work came into existence, it can be difficult to determine whether it was created as a result of a commission or as part of an employment. For example, original music in a television commercial might have been written in-house by an employee of the jingle house. Alternatively, it might have been commissioned from a freelance composer.

7. TRACKING DOWN THE OWNER

Where the work has been released on a record, CD or DVD, the label information is the starting point. The label usually will tell you the name of the composer (and any lyricist) of the track and the publisher of the composition. The publisher represents the author and should be your starting point. With the constant ebb and flow of companies and catalogues within the music industry, the label may not represent current ownership. If the named publisher no longer represents that composer, it will tell you. If Google does not give you a contact, you can contact the Australasian Performing Rights Association (APRA). It represents all of the Australasian music publishers and 99.9% of the professional composers.

If the label says 'Copyright Control' this generally means that there is no publisher involved and the rights are retained by the writer. Again, this is not infallible as the writer may have done a deal after the date of the release of the recording. In such cases, go to APRA.

Literary works

1. THE GENERAL RULE

The basic rules concerning the ownership of copyright in literary works are the same as those relating to musical works: the owner is the author, even where the work is commissioned; but if a person writes something in the course of employment, the employer will own the copyright.⁷³

As a consequence of this, personnel who write learned books and articles should clarify with their employers, exactly who is to control the copyright of their works. This is a potential industrial relations landmine, for most writers of academic material would be horrified if they knew that their employer may have the right to claim the copyright in their work.

2. TRACKING DOWN THE OWNER

The best lead in tracking ownership of material that has been published in book form is to examine the copyright information at the beginning of the book. This will usually tell you whether the publisher is the owner of the content or whether rights in the literary work have been retained by the author.⁷⁴

Where the publication is older, the publisher information is not very reliable. Many publishers have been taken over, catalogues are sold, rights expire and publishers wind up business. Nevertheless, contacting the publisher is the first prudent step. If an Internet search does not give you the required contact information, then contact the Copyright

Agency Limited. This organisation represents all professional publishers and a large proportion of authors.

Remember that many literary works in fact are accompanied by other copyright works such as licensed photographs, diagrams or quotations. To reproduce these you will need to get permission from all of the rights owners not just the principal author. Rights ownership of these will usually be described in the published work⁷⁵ and if not, the owner of copyright in the principal work will usually be able to provide contact details.

Exceptions affecting artistic, musical, dramatic and literary works

There are some important exceptions to the general rule. These relate to commissioned works and work made pursuant to an employment agreement.

1. COMMISSIONS FOR PHOTOGRAPHS

(vii) Photographs taken before 1 May 1969

In the case of photographs taken prior to 1 May 1969, the copyright vests in the person who owned the material on which the photograph was taken.⁷⁶

(viii) Photographs taken after 1 May 1969 but before 30 July 1998

Where the commissioned photographs were taken between 1 May 1969 and 30 July 1998, the copyright is owned by the commissioning party⁷⁷ regardless of the purpose for which the photograph was taken.⁷⁸

(ix) Photographs taken after 30 July 1998

The law changed again on 30 July 1998. From that date, the rule for commissioned photographs came into line with other artistic works - the author of the work (the photographer) is the owner of copyright. The only exception to this general rule is a sensible one: Where the photographs are taken for a private or domestic purpose (such as family portraits or wedding photographs), the commissioner/client owns the copyright.

2. COMMISSIONS FOR ENGRAVINGS

If the commissioned work is an engraving, the commissioning client owns the copyright.⁷⁹ For example, an artist who commissions a person to make plates for print making, owns the copyright in the plates. Plate makers often control this by keeping physical possession of the plates. This doesn't give them any copyright in the plates but creates an effective barrier to making reproductions. Accordingly, when seeking to acquire such rights the right person to approach is most likely to be the artist not maker of the plates.⁸⁰

3. COMMISSIONS FOR PORTRAITS

If the commissioned work is a drawing or painting of a portrait, the commissioning party owns the copyright.⁸¹

(x) *The definition of portrait*

The Act contains no definition of 'portrait' and, although this may be surprising to artists, the courts have not really defined it either. One commentator has suggested that 'a portrait is any painting or drawing, the principal purpose of which is in the representation of a person or animal in whatever style of artistic expression',⁸² and certainly the courts seem to have developed a broad interpretation of the term. An example of this broad interpretation is provided by the extraordinary English case of *Leah v Two Worlds Publishing Co Ltd* in which a father asked an artist to paint a likeness of his dead son – by means of extrasensory perception. In a subsequent law suit brought by the artist against the publisher of a periodical entitled *Two Worlds* for the infringement of his copyright, the judge held as follows:

'Engraving, photograph or portrait' is a curious collocation of words: one would have expected the third word in that grouping to be something like 'painting', because engraving is a method of production, and so is photography; and it would seem that 'portrait' covers all kinds of pictorial representation, however produced. I am not sure that it is necessary to express a concluded view about the matter, but I should have thought that on the whole this was a portrait, a portrait produced by the mental process of the artist, and intended to represent a deceased person as that person was when living; and that it is none the less a portrait because the materials that the artist used were entirely subjective.⁸³

The definitional problem also arose in the famous case of *Attorney-General v Trustees of National Art Gallery of NSW & Dobell*⁸⁴. In this action an injunction was sought, restraining the trustees of the gallery from paying the 1943 Archibald Prize monies to Dobell. Also sought was an order requiring the trustees to carry out the terms of the trust. Obviously, this was not a copyright case, but nevertheless it did focus upon the definition of a portrait. The following is an extract from Justice Roper's judgment:

The word is an ordinary word of the English language and its meaning has to be ascertained accordingly. ... From the context in which it is used it is clear that the testator was referring only to a particular type of portrait namely one of a human being and painted by an artist. Considered alone the word has a wider meaning and would include certain forms of sculpture, certain types of photographs and certain other methods of representation all of which the testator has himself excluded and which require no further consideration. With the assistance of dictionaries and

the many works to which I have been referred by counsel in this case, I think that the word 'portrait' as used in this will, incorporating in its meaning the limitations imposed by its context, means a pictorial representation of a person, painted by an artist. This definition connotes that some degree of likeness is essential and for the purpose of achieving it the inclusion of the fact of the subject is desirable and perhaps also essential. The picture in question is characterised by some startling exaggeration and distortion clearly intended by the artist, his technique being too brilliant to admit of any other conclusion. It bears, nevertheless, a strong degree of likeness to the subject and is I think, undoubtedly, a pictorial representation of him. I find as a fact that it is a portrait, within the meaning of the word in this will, and consequently the trustees did not err in admitting it to the competition.

Further, his Honour refused to state an opinion on the claim that the work was a 'caricature' or a 'fantasy'. He said, 'If it could be so classed that would only establish to my mind that the fields are not mutually exclusive, because in my opinion it (the work) is in any event properly classed as a portrait'.⁸⁵

4. WORKS CREATED BY EMPLOYEES AND APPRENTICES

Where a work was created under a contract of service or apprenticeship, the employer owns the copyright in any work done by the employee pursuant to that contract.⁸⁶ This is particularly important for commercial artists and photographers, designers, curators, text writers, jingle writers and the like, who are often employed.

Had Andy Warhol painted his soup can in the course of his employment with an advertising agency, the copyright in it would have vested in his employer and the artist would have made nothing from the thousands of reproductions that were made of the work. In contrast, if someone creates a work in his or her own time, outside the scope of employment, the copyright would vest in the employee.

To determine who owns the copyright in these cases there are two essential questions:

- Was the person an employee?
- If so, were the works created in pursuance of the employment?

Neither can be assumed. In many situations the person who created the work did so as an independent contractor rather than an employee. For example many architects retain contractors to work on projects and unless their contract specifies that the company will own the copyright in their work, the usual rules apply and the contractor as the 'author' of the work will own the copyright.

The second issue is to determine what is meant by the phrase 'in pursuance of the terms of his or her employment'.⁸⁷ Sometimes people will claim ownership of copyright

because they authored the work 'in their own time'. That is not the issue. In a recent case, the Federal Court said that the appropriate question to ask is: '... did the employee make the work because the contract of employment expressly, or impliedly, required or at least authorised the work to be made?'⁸⁸ Looked at this way, the issue cannot be determined by looking at when the work was created but rather by looking at the overall terms of the contract of employment.

5. SPECIAL RULES FOR EMPLOYEES OF NEWSPAPER, MAGAZINE OR OTHER PERIODICALS

(i) *Pre 1 May 1969*

If the work was created pursuant to an employment agreement with a newspaper, magazine or periodical before 1 May 1969, the proprietor owns the whole copyright. The only limitation is that the author has a right to restrain the owner from using the work in any way other than publication in a newspaper, magazine or similar periodical. The author has no right to use the material in any way. Rather, he or she has the right to supervise and limit the use made of it by the proprietor.⁸⁹

(ii) *Post 1 May 1969 to 30 July 1998*

Where an author made a literary, dramatic or artistic work between these dates, the publisher owns all copyright insofar as it relates to publication of the work in any newspaper, magazine or periodical, broadcasting the work, or reproducing it for the purposes of publication in the newspaper, periodical or broadcast. Apart from these rights, the employee owns the copyright. For example an employed journalist would own the right to publish a collection of her articles in a book and an employed artist would be able to publish postcards of his illustrations.

(iii) *Post 30 July 1998*

The law changed again in the late 1990s as the role and importance of the digital environment became obvious to newspaper publishers. If the work was made on or after 30 July 1998, for inclusion in a newspaper magazine or journal, the employee or author owns only the right to control photocopying and book publication and the proprietor owns all other rights (including all other forms of commercialisation and digital rights).⁹⁰

Sound recordings

Although we usually think of sound recordings as musical recordings, they actually cover a much wider range of material. For example, where the collecting institution records a speech or panel discussion given in the course of a public education program, that recording comes within this section.

1. THE GENERAL RULE

The general rule is that the copyright in a sound recording is owned by the **maker** of the recording. And who is the maker? There is no statutory definition but it is generally accepted that the 'maker' is the person who made the arrangements and paid for the master recording to be completed. Note that the focus is on who made the original master sound recording, rather than on the records that reproduce that master. After all, the record is just a copy of the master.

2. THE LIVE PERFORMANCE EXCEPTION

Where the sound recording is of a **live performance**, the general rule is a little more complex: the copyright is shared by the maker and the performer.⁹¹ Although the most common 'live performance' recordings are of musical works the net is much wider. The Act defines 'live performance' as:

- (a) *a performance (including an improvisation) of a dramatic work, or part of such a work, including such a performance given with the use of puppets; or*
- (b) *a performance (including an improvisation) of a musical work or part of such a work; or*
- (c) *the reading, recitation or delivery of a literary work, or part of such a work, or the recitation or delivery of an improvised literary work; or*
- (d) *a performance of a dance; or*
- (e) *a performance of a circus act or a variety act or any similar presentation or show; or*
- (f) *a performance of an expression of folklore;*

*being a live performance, whether in the presence of an audience or otherwise.*⁹²

So then, who is 'the performer'? The Act defines this as 'each person who contributed to the sounds of the performance'.⁹³ If a person contributes to the sound, whether the drummer or the triangle player, that person is a 'performer'.

To track down the copyright owner the first step is to contact the recording company. Sometimes the label copy will give you some clues. Sometimes though, recordings are made by one record company and licensed to another (for example, by an Independent which is tied to a Major) and these are a bit more complex, as copyright ownership will be determined by the terms of the contract between the label and the Major that is funding it. The company on the label will know the details of copyright ownership and will be able to give you the information you require.

If the collecting institution is a maker of sound recordings (say, as part of its public education program or an oral history project) it is important that its documentation acquires the rights from the 'performer' that permit it to use the recording. It is useful to adopt the same approach as that taken by music record companies: they get an assignment or licence of the performer's rights in their recording contract. Similarly, the collecting institution should include a provision in its agreements with 'performers' that will allow the institution to use the recordings without having to go back to the performer. Although such permissions can be absolute, most institutions will specify the intended purposes and media. One of those purposes would usually include communication through the institution's web site.

Published editions

The publisher of the edition owns the copyright in the published edition of a literary, musical, dramatic or musical work. Thus, if two institutions decide to co-operate in the mounting of an exhibition and a curator from one is asked to write an article for the catalogue whilst the other institution agreed to arrange and pay for the publication of the catalogue, the first museum would own the copyright in the article⁹⁴ and the second would own the copyright in the published edition.⁹⁵

Joint authorship

Joint authorship exists where a work 'has been produced by the collaboration of two or more authors and (is one) in which the contribution of each author is not separate from the contribution of the other author'.⁹⁶

For example, if two or more people design a mural they would be joint authors and would share the copyright in that work. However, the person who thought up the theme of the mural or the very idea of painting the mural in the first place, would not be a copyright owner unless they had also been one of the artists. Only authors who have actually participated in the creation of a work can share in the joint ownership of copyright in it.

This distinction is important in Indigenous art because it explains why copyright is so unhelpful where the system of cultural control is based on the ownership of the subject matter rather than its material form. Joint authorship relates only to the making of the work. It does not recognise collective or group ownership of a particular story and its associated design under customary law, nor the right of that group to authorise a particular artist to create an artwork based on that story and design.⁹⁷

Crown copyright

The Act provides special powers to commonwealth and state governments (the 'Crown'). The general principle is that the Crown owns the copyright in any material made by or under its direction.⁹⁸ This principle can be amended by contract between the Crown and the relevant author or maker.

It is important to be clear about the legal structure of the collecting institution. As was seen in Chapter 1, some collections are part of the Crown but others, such as the major state and commonwealth collecting institutions are actually statutory corporations. They are established by their own individual statutes: although established by the Crown and controlled by the Crown, the purpose of establishing the institution as a statutory corporation is to create an entity that is distinct from the Crown. Such an institution can sue and be sued in its own name – and it is also independent of the Crown for the purposes of copyright.⁹⁹

26.8 DURATION OF RIGHTS

Introduction

It is important to understand the principles underlying the duration of copyright. If you know that material is out copyright the world becomes simple: you don't have to worry about whether any exceptions apply and you don't have all of the problems associated with obtaining permissions.

Working out whether a copyright has expired or not is an everyday task for collection managers. Sadly, it is not easy. The laws affecting duration were changed in 1968 when the new *Copyright Act* came into effect – and then again in 2005 with the *Australia–US Free Trade Agreement* (AUSFTA). This is important to acknowledge because many of the old rules of thumb by which you may have lived have changed.

Generally, the AUSFTA extended the fifty-year copyright period to seventy years – but if a copyright had expired by 1 January 2005 when the AUSFTA came into force, it remained expired. Copyrights were not brought miraculously back to life by the introduction of the new, extended copyright periods. So, if something went into the public domain before 1 January 2005, it remains in the public domain. Let's put that another way: **if the author died before 1955, the work is out of copyright.**

The following discussion may seem somewhat repetitive but it is worth risking the boredom of the reader so that the logic of the analytic principles is reinforced.¹⁰⁰

Literary Works

With literary works¹⁰¹ it is essential to determine whether the work has been:

- published,
- performed,
- broadcast, or
- recorded and those recordings offered or exposed for sale to the public.

For brevity's sake, it is useful to summarise these uses of the work as 'public uses'.

(iv) Public uses during author's life

If public use was made of the work during the author's life and the author died before 1 January 1955, the work is in the public domain. The fifty-year period expired before the 2005 extension took effect.

If public use of the work was during the author's life and the author died after 1 January 1955, copyright continues for seventy years from the end of the year in which the author dies.

(v) No public use during author's life

If there was no public use of the work during the author's lifetime, the copyright period does not start running until the end of the calendar year in which it is published, performed, broadcast, or recorded and offered for sale. Accordingly, such works can remain in copyright indefinitely.¹⁰²

Where the work was made public posthumously but before 1 January 1955, the work is out of copyright.

Where the public use of the work is posthumous but after 1 January 1955, the copyright period runs for seventy years from the end of the year in which the work is publicly used.

Musical works

(vi) Public use during composer's life

The work is in the public domain if:

- the musical work was published, performed in public, broadcast, or recorded, or if recordings of the work are offered or exposed for sale to the public, during the composer's life; and
- the composer died before 1 January 1955.

In such a case, the fifty-year period expired before the 2005 extension took effect.

In contrast, if public use of the work (in any of the above ways) occurred during the composer's life and the composer died after 1 January 1955, copyright continues for seventy years from the end of the year in which the composer dies.

(vii) No public use during author's life

If the work was not publicly used during the composer's lifetime, the copyright period does not start running until the end of the calendar year in which it is published, performed, broadcast, or recorded and offered for sale. Accordingly, such works can remain in copyright indefinitely.¹⁰³

Where the work was made public posthumously but before 1 January 1955, the work is out of copyright.

Where the public use of the work is posthumous but after 1 January 1955, the copyright period runs for seventy years from the end of the year in which the work was so used.

(viii) Arrangements

It should never be assumed, just because the composer has been dead for centuries, that the work you wish to use is unprotected: An arranger may have rights, even though the work itself is out of copyright. Making an arrangement of a work that is in the public domain does not give the arranger rights in the work itself – but rather, in his or her arrangement of the work. The arranger is treated as an author and will enjoy copyright in their particular arrangement for the full period of copyright.

(ix) Lyrics

Lyrics are protected as literary works.¹⁰⁴ There have been many mistakes made on the assumption that the period of protection for the musical composition was the same as that of the lyric or libretto.

Dramatic works

(x) Public use during composer's life

If the dramatic work was published, performed, broadcast, or recorded and offered for sale during the author's life and the author died before 1 January 1955, the work is in the public domain. The fifty-year period expired before the 2005 extension took effect.

If public use of the dramatic work was made (in any of the above ways) during the author's life and the author died after 1 January 1955, copyright continues for seventy years from the end of the year in which the author dies.

(xi) No public use during author's life

If there was no public use of the work during the author's lifetime, the copyright period does not start running until the end of the calendar year in which it is published, performed, broadcast, or recorded and offered for sale. Accordingly, such works can remain in copyright indefinitely.¹⁰⁵

Where the public use is posthumous, but **before** 1 January 1955, the work is out of copyright.

Where the public use is posthumous but **after** 1 January 1955, the copyright period runs for seventy years from the end of the year of the public use.

Artistic works

If an artistic work was created before 1 January 1955, it is in the public domain. The fifty-year period expired before the 2005 extension took effect.

If the work was created after 1 January 1955, the copyright in it will expire seventy years from the end of the year in which the artist dies.

There are some exceptions to these general rules. In particular, these relate to photographs and etchings.¹⁰⁶

3. PHOTOGRAPHS

(xii) Taken on or before 1 January 1955

If the photograph was taken¹⁰⁷ on or before 31 December 1955, the copyright expired prior to the AUSFTA coming into force and thus it is in the public domain.

(xiii) Taken after 1 January 1955

Photographs taken after 1 January 1955 enjoy a seventy-year copyright period calculated **from the death of the photographer**.¹⁰⁸

4. ENGRAVINGS

Engravings, although defined as artistic works, are treated more like literary works. Again, the fact and timing of publication is important.

(xiv) Where the engraving has never been published

The copyright period does not start running until the end of the calendar year in which publication occurs. An unpublished engraving will remain indefinitely in copyright.

(xv) Where the engraving is published during the engraver's lifetime

If an engraving was made and published on or before 1 January 1955, it is in the public domain. The 50-year period expired before the 2005 AUSFTA extension took effect.

If the engraving was made and published after 1 January 1955, it benefits from the AUSFTA extension and copyright in it will last for seventy years from the end of the year in which the engraver dies.

(xvi) Where the engraving was first published after the engraver's death

If the engraving is first published posthumously, the copyright period runs for seventy years from the end of the calendar year in which the work is first published.¹⁰⁹

Sound recordings

With sound recordings, it is essential to know when the recording was made. With commercially released recordings, this may be found in the liner notes or other notation on the cover (although there are complexities inherent in reworked, re-engineered recordings.)¹¹⁰

(xvii) Sound recordings made prior to 1 January 1955

Copyright in sound recordings was first introduced in the *Copyright Act 1968* (Cth). When they were given protection, the fifty-year period ran from the date the recording was made. Accordingly, any recording made before 1 January 1955 is in the public domain.

(xviii) Sound recordings made after 1 January 1955

If recorded after 1 January 1955, a sound recording would have still been in copyright at the time of the AUSFTA and therefore it enjoys the extended period of protection. Copyright in these recordings lasts for seventy years and starts to run from the end of the year in which the recording was first published.¹¹¹

Films¹¹²

It was the *Copyright Act 1968* (Cth) that introduced copyright for films. Because of this, it is often said that films made before 1 May 1969 are not protected. This is not quite true. There is little doubt that the individual frames are capable of being protected as photographs.¹¹³ It is also true that whole films may be protected as 'dramatic works'. This applies where 'the arrangement, the acting, form or the combination of incidents represented gives the work an original character'.¹¹⁴ Thus, most commercially released films might reasonably come within this description whereas most home movies would not.

(xix) Films made before 1955

Films made before the *Copyright Act 1968* (Cth) came into force could only be protected as photographs or dramatic works. Accordingly, if the film was produced before 1955, any copyright protection has expired.

(xx) *Films made between 1955 and 1 May 1969*¹¹⁵

Films made during this period may still be protected as a series of photographs or as a dramatic work. If the author of the photograph or dramatic work died after 1 January 1955, the film remains in copyright until seventy years from the end of the year of the author's death.

There is little statutory guidance as to the definition of 'author' in this context.¹¹⁶ It is a question of fact. Where reliance is on the photograph, the author of the photograph is most likely the cinematographer. In contrast, the author of the dramatic work will be either the scriptwriter or the director – depending on who is the person responsible 'for the arrangement, the acting, form or the combination of incidents represented (that) gives the work an original character'.¹¹⁷

Note that in the film business it is important to distinguish between the author and the copyright owner. The film production company cannot itself be an author. In contrast it is almost always the copyright owner because it is standard industry practice to require everyone working on the film to assign all rights to the production company. This is significant because, although the owner of the rights is the person from whom you must get any permission, the identity of the owner is irrelevant to the duration of the rights. It is the date of death of the author that is crucial.

(xxi) *Films made after 1 May 1969*

Films made after that date are protected for 70 years from first publication.¹¹⁸

Television and sound broadcasts

There was no copyright in television or radio broadcasts before 1 May 1969.¹¹⁹ Since then, the copyright in a broadcast lasts for fifty years from the end of the year in which it was first broadcast. The AUSFTA did not change this position.

Published editions

There was no copyright in published editions before 1 May 1969.¹²⁰ Editions published after that, enjoy copyright protection for twenty-five years from the date of their first publication.¹²¹ The AUSFTA did not change this position. Accordingly, any edition published more than twenty-five years ago, is in the public domain.¹²²

Anonymous or pseudonymous works

If a literary, dramatic, musical or artistic work was first **published** anonymously or under a pseudonym before 1 January 1955, it is now in the public domain.¹²³ Photographs are an exception to this rule: their copyright expired if they were **taken** prior to 1 January 1955.

Those anonymous or pseudonymous works that meet the 1955 cut-off were still in copyright at the time of the AUSFTA and therefore benefit from the time extension. For these works, the period runs from the year of first **publication** plus seventy years. When calculating the duration of copyright, photographs are no longer treated differently from other works.

If the author's identity is generally known or can be ascertained by reasonable inquiry, the general rule (where time is triggered by the death of the author) applies.¹²⁴

Works of joint authorship

While a joint authorship work remains unpublished, the period continues indefinitely. It is publication that triggers the clock.

(xxii) Published during the life of an author

Where the work is of joint authorship and is published during the life of the last surviving author, the period runs from the end of the calendar year in which the last surviving author dies. If we apply the general rule to this we can say that:

- where the last author died before 1 January 1955, the work is out of copyright;
- where the last author died after 1 January 1955, the AUSFTA applies and the period is seventy years from the death of the last surviving author.

(xxiii) Published posthumously

Where the work was first published after the death of both authors,

- where the publication took place before 1 January 1955, the work is out of copyright;
- where the first publication took place after 1 January 1955, the AUSFTA applies and the seventy-year period runs from the end of the calendar year in which the work was first published.

(xxiv) Joint authors and pseudonyms

Where one or some (but not all) of the joint authors uses a pseudonym, the period runs from the end of the year in which the last author whose identity is known, dies.¹²⁵ This means that where that author died prior to 1 January 1955, the work is now out of copyright. If the death is after that date, the AUSFTA has extended the term to seventy years from the end of the year in which the last surviving identified author died.

Where all of the authors use pseudonyms, if the identity of one of the authors is (or could have been) discovered while the copyright period was still running, the period runs from the end of the year in which that author, whose identity has been revealed, dies.¹²⁶

Crown copyright

Where copyright is owned by the Commonwealth or a state, duration can be summarised as follows:

(xxv) Literary, dramatic or musical works

- (a) where the work is unpublished, crown copyright continues to subsist so long as the work remains unpublished; and
- (b) where the work is published, the copyright subsists for fifty years after the expiration of the calendar year in which the work was first published.¹²⁷

(xxvi) Artistic works

The general rule is that crown copyright in an artistic work of which the Commonwealth or a State is the owner, continues to subsist until the expiration of fifty years after the expiration of the calendar year in which the work was made.¹²⁸

There are exceptions relating to engravings and photographs:

- i. Engravings: crown copyright continues for fifty years from the end of the calendar year in which the engraving is first published.¹²⁹
- ii. Photographs: If the photograph was taken before 1 May 1969, crown copyright continues for fifty years from the end of the calendar year in which the photograph was taken.¹³⁰ However if it was taken after that date, crown copyright continues to subsist for 50 years from the end of the calendar year in which the photograph is first published.¹³¹

(xxvii) Sound recordings

Crown copyright in a sound recording made prior to 1 May 1969, subsists until the expiration of fifty years after the expiration of the calendar year in which the recording or film was **made**.¹³² Where the recording was made after that date, crown copyright runs fifty years from the end of the year in which the recording was first **published**.¹³³

(xxviii) Films

(a) Before 1 May 1969

Where the film was made before 1 May 1965 there can be no crown copyright in the film itself.¹³⁴ As with other films, this does not mean that the film is unprotected, for it may be treated as an original dramatic work or as a series of photographs. There are a series of overly complex provisions in the Act dealing with this situation in relation to films made or published by the Crown. These may be condensed as follows:

If the film can be regarded as an original **dramatic work**¹³⁵ made under the direction of the Crown¹³⁶ or first published under the direction or control of the Crown,¹³⁷ then the crown copyright runs for fifty years from the end of the calendar year in which the film was first published.¹³⁸ Unless it is published, the copyright period does not start to run.

Where the film is not a dramatic work it may still be protected as a series of photographs. Crown copyright in those films or photographs runs for fifty years from the year

they were taken. In other words, if it was taken more than fifty years ago, it is now in the public domain.

(b) After 1 May 1969

Where there is crown copyright in a film made after 1 May 1969, those rights continue to subsist for fifty years from the end of the year in which the recording was first **published**.¹³⁹

(xxix) Broadcasts

There is no crown copyright in broadcasts made before 1 May 1969. After that date, any crown copyright will subsist for fifty years from the date the broadcast was made.

(xxx) Published editions

Crown copyright in a printed edition lasts for twenty-five years from the date of first publication.¹⁴⁰

(xxxi) The effect of contract

Where the Crown would have been the owner of copyright but agrees that the author of the work or maker of the recording or film is to be the copyright owner, the duration of those rights is less than in non-Crown situations¹⁴¹:

- *unpublished works*: copyright continues indefinitely until publication;
- *literary, dramatic and musical works*: copyright lasts fifty years from the date of first publication;
- *artistic works (except photographs and engravings)*: copyright lasts fifty years from the date the work is made;
- *films, photographs and engravings*: copyright lasts fifty years from the date the work is first published.

Moral rights of authors

All of an author's moral rights in respect of a work continue in force until copyright ceases to subsist in the work.¹⁴² They are co-terminus with the copyright in the work.

There is an exception to this general rule for cinematograph works. For these, the author's right of integrity of authorship continues in force only until the author dies.

Moral rights of performers for recorded performances

The performer's attribution rights (the right of attribution of performership and the right not to have performership falsely attributed) continues in force until copyright ceases to subsist in the recorded performance.¹⁴³

In contrast, the performer's right of integrity of performership in respect of a recorded performance continues in force until the performer dies.¹⁴⁴ Upon death of the performer, his

or her legal personal representative may exercise and enforce the moral rights in respect of the performance.¹⁴⁵

Performers' protection

The protection period of a performance begins on the day when the performance was given and ends twenty calendar years after the calendar year in which the performance was given.¹⁴⁶

However, if the recording concerned was made without the performer's consent, or involves the copying, selling, distributing, possession, importation or offering for sale of an unauthorised recording, then the protection period of a performance is fifty years.¹⁴⁷

26.9 USES THAT DO NOT CONSTITUTE INFRINGEMENT

A: Introduction

Any discussion of uses that do not constitute infringement is destined to be complex. These exceptions are extremely detailed and complex and require detailed consideration of the relevant statutory provision. There has been much discussion of the new s 200AB of the *Copyright Act 1968* (Cth). It had been hoped that this would provide a much needed simplification of the mechanisms available to collecting institutions that want or need to make copies of material in their collection. It did not. The provision, far from being a panacea, is complex, its meaning untested, and its practical implementation no easy matter. Nevertheless, it has added to the armoury.

No matter how frustrating it is on a day-to-day basis, it must be remembered that the rights of copyright are designed to be the exclusive rights of their owner. Any incursion into the exclusivity of those rights is only on the basis of acknowledged public interest but, notwithstanding that public interest, must necessarily be limited and particular if the value of those exclusive rights is to be maintained. Nevertheless, in a wide range of circumstances collecting organisations may make use of these third party rights.

It is useful to divide the exceptions provided by the Act into four categories:

- (a) general exclusions – exclusions available to everyone;
- (b) exclusions available to all collecting institutions;
- (c) exclusions available to Key Cultural Organisations; and
- (d) section 200AD.

Classifying the exceptions in this way not only gives some structure to what otherwise seems an amorphous jumble of possibilities; it is essential in order to get maximum use out of s.200AB. This new mechanism can only be used where there is no other exception available: If you don't understand the exceptions, you cannot safely rely on s 200AB.

When working out whether there is an exception in the Act that allows you to do what you wish to do, always start at the top:

- Is the material in copyright?¹⁴⁸
- If so, is it third party material?¹⁴⁹
- If so, do you want to use a 'substantial portion' of the material?¹⁵⁰
- If so, do you already have rights to use the material;¹⁵¹
- If not, is there a general exception available?
- If not, is there an exception that relates to collecting institutions?
- If not, is there an exception available because your institution is a Commonwealth or state collecting institution?
- If not, does s 200AB apply?
- If not, can a licence be obtained for the use?
- If not, what is your appetite for risk?

B: Licence

Although the most risk-averse approach is to obtain a licence from the copyright owner, this is not always realistic. Sometimes the sheer bulk of the material to be cleared makes it financially and administratively impracticable to obtain individual licences; sometimes the owner of the copyright is unidentifiable or untraceable.¹⁵²

You will often find a way through the problem by following the path set out in this section. For example, with orphan works:

- If the use is one of the general exceptions, you don't need a licence and it doesn't matter whether or not you can identify the owner.
- If the use falls within the 'libraries and archives exceptions' (the administrative or preservation mechanisms) there is no requirement to identify or find the copyright owner.
- Finally, there is s 200AB. As you can see from Example 3 in the discussion of s 200AB that follows, this provision has changed the way we look at orphan works: Once the legal analysis determines that s 200AB is available, whether or not to reproduce a work becomes primarily a risk management issue.¹⁵³

C: General exceptions

The general exceptions are available to everyone in the community – including collecting institutions.¹⁵⁴ These may be summarised as follows:

- (i) sculpture or craft works in a public place
- (ii) incidental use for film or television
- (iii) fair dealing¹⁵⁵
 - (a) fair dealing for the purpose of research or study

- (b) fair dealing for the purpose of criticism or review
- (c) fair dealing for purpose of parody or satire
- (d) fair dealing for purpose of reporting news
- (e) fair dealing for purpose of obtaining legal advice
- (iv) use in judicial proceedings
- (v) reading or recitation in public or for a broadcast

5. SCULPTURE OR CRAFT WORKS IN A PUBLIC PLACE

Sculptures and other 'works of artistic craftsmanship that are **permanently** installed in a public place may be photographed, sketched, painted, or engraved without infringing copyright.¹⁵⁶ Further, the copyright owner has no recourse if these reproductions are subsequently distributed and sold.

This exception does not extend to other sorts of artistic works, such as murals.¹⁵⁷ Nor does it extend to works in an exhibition since their installation is not **permanent**.

By way of example, this exception would allow a gallery to photograph a permanently installed sculpture and put that image on an invitation or annual report. No copyright permission would be required and no fee would be payable. Note however that this exception only permits two-dimensional copyright. It does not allow three-dimensional copies to be made.¹⁵⁸

It is important to note that, except for this specific exception, there is no general exception for the taking of photographs by visitors to exhibitions. Although it is difficult in an age in which every mobile phone is also a camera, it is an identifiable risk for the organisation.

Most collecting organisations have a policy forbidding the taking of photographs in their gallery areas. There are four reasons for this prohibition:

- (i) There are potential conservation problems caused by flash bulbs or the hazards of tripods.
- (ii) The unauthorised photography of copyright works exposes the exhibiting institution to being sued in a copyright action.
- (iii) The photography may be in breach of the institution's contractual obligations pursuant to a loan agreement.¹⁵⁹
- (iv) Such photography interferes with the sale of postcards and other merchandising.

To minimise these risks the institution is well advised to have clear signage indicating the areas of the building in which photography is prohibited and should instruct the security staff (or those responsible for supervision) to quietly speak to visitors taking pictures and remind them of the prohibition. Some institutions allow photography in their exhibition areas on the

basis that they consider the risk to be minimal or that they are unable to effectively administer the prohibition. It is true that the risk of being sued is small, but if anyone is going to be sued, it will be the institution.¹⁶⁰

6. INCIDENTAL USE FOR FILM OR TELEVISION

No infringement occurs if an artistic work is reproduced on film or television if that reproduction 'is only incidental to the principal matters represented in the film or broadcast'.¹⁶¹ As to what is 'incidental', that is a matter of fact and degree and will differ in each case. For example, there is usually no copyright problem in allowing a film crew to use museum premises as a set. It may of course be different if the film was *The Picture of Dorian Gray* and that portrait was held in the museum collection. Similarly, in most cases the filming of interviews in front of copyright works holds no problems, for usually this is either only an incidental use or would be covered by other exceptions.¹⁶²

7. FAIR DEALING

There are a number of 'fair dealing' exceptions provided under the Act. These will be described in the sections that follow. These are narrow public interest exceptions: research and study; criticism or review; reporting the news; obtaining legal advice and use in or reporting of judicial proceedings. There is no general exception just because the use is 'fair'. The 'fair-go' rule has not yet entered the copyright world.

Beware of clichés. Although one often hears glib and reassuring little phrases, such as, 'you can use up to fourteen bars of music' or 'single pages are okay' or 'you only need to change a line or a colour here and there', there are few rules of thumb that are accurate. Anyone who suggests there is some simple rule that lets you use grabs of copyright material for free is woefully misinformed or no friend of yours. Such people are ignorant, lazy and dangerous. Is that blunt enough?

(xxxii) General factors indicating fairness of the dealing

To determine whether or not the intended use is fair, the Act sets out a number of factors:¹⁶³

- (i) the purpose and the character of the use;
- (ii) the nature of the work;
- (iii) the possibility of obtaining the work within a reasonable time at an ordinary commercial price;
- (iv) the effect of the dealing on the value of the work; and
- (v) where only a part of the work is copied, the amount and substantiality of the portion copied, taken in relation to the whole.

The last of these factors indicates that in order to be 'fair' the use must involve only a 'reasonable portion' of the work copied. So the question arises: What is a reasonable portion?

The Act assists by specifying some particular situations that will be considered 'reasonable',¹⁶⁴ and then, where the specific definitions don't apply, provides a number of general factors that are to be taken into account when forming a judgment as to reasonableness. If the specific exceptions do not apply or are exceeded, the proportion copied may still be 'fair'. It will be for the person making the copies to prove that the portion copied was fair. Fairness will be a question of fact in the individual circumstances of the case.

8. FAIR DEALING FOR THE PURPOSE OF RESEARCH OR STUDY

A fair dealing for the purpose of research or study of artistic, literary, dramatic and musical works does not constitute a breach of copyright.¹⁶⁵ This permits copying undertaken for the research purposes of a collecting institution; for example, where the research is undertaken in exhibition development, provenance investigation, ownership of title due diligence; but does not include administrative copying.

Provided the reproduction is for the purpose of research or study:

- (i) It is a fair dealing to reproduce 'all or part of a literary, dramatic or musical work ... contained in an article in a periodical publication'.¹⁶⁶
- (ii) If the material is not in a periodical publication, it is a fair dealing to reproduce a reasonable portion. For this purpose, reasonable portion means:¹⁶⁷

Work or adaptation	Amount that is reasonable portion
A literary, dramatic or musical work (except a computer program), that is contained in a published edition of at least 10 pages	(a) 10% of the number of pages in the edition; or (b) if the work is divided into chapters: a single chapter ¹⁶⁸
A published literary or dramatic work in electronic form ¹⁶⁹	(a) The number of words copied must not exceed 10% of the number of words in the work copied; or (b) if the work is divided into chapters, the number of words

	<p>copied may exceed 10% of the number of words in the work copied, provided that they are contained in a single chapter. In other words, one chapter is okay irrespective of the number of words.¹⁷⁰</p>
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If the use complies with one of the above exceptions, it is deemed by the Act to be fair. If the use does not comply with the above deemed amounts and types of material, the proportion copied may still be 'fair' (and thus within the research and study exception) but it will be for the person making the copies to prove that the copying was fair. The factors to be taken into account are the five general factors indicating fairness set out earlier.

9. FAIR DEALING FOR THE PURPOSE OF CRITICISM OR REVIEW

'A fair dealing with a literary, dramatic, musical or artistic work ... does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made.'¹⁷¹

This is important for collecting institutions because they can make use of this exception in the writing of essays for exhibition catalogues. Care must be taken to ensure that the use is truly criticism or review of 'a work' (such as its ideas, techniques, content), not just a period or style. Also, it is essential that proper attribution be made.

10. FAIR DEALING FOR PURPOSE OF PARODY OR SATIRE

'A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.'¹⁷²

This is a quite recent change to the law. For many years the Act did not recognise parody or satire. Now, it has discovered its sense of humour.

11. FAIR DEALING FOR PURPOSE OF REPORTING NEWS

'A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if:

- (a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgement of the work is made; or

- (b) it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.¹⁷³

This can be important for collecting institutions for many communicate with their members through newsletters and these present articles and photographs, talking about recent and forthcoming exhibitions and acquisitions. Where these items are presented as news, provided that they are properly attributed, they will be covered by the exception.¹⁷⁴

You cannot rely on this fair dealing exception for the purpose of including copyright material in advertising, the annual report, brochures or catalogues. Licences for such use are readily available from the relevant collecting societies. It is just a question of paying for the right.

12. USE IN JUDICIAL PROCEEDINGS OR LEGAL ADVICE

The copyright in an artistic work is not infringed by anything done for the purposes of a judicial proceeding, or of a report of such proceedings. Nor will a fair dealing with an artistic work for the purpose of giving professional advice by a lawyer or patent attorney, constitute an infringement.¹⁷⁵

13. READING OR RECITATION IN PUBLIC OR FOR A BROADCAST

The reading or recitation in public, or the inclusion in a sound broadcast or television broadcast of a reading or recitation, of an extract of reasonable length from a published literary or dramatic work does not constitute an infringement of the copyright in the work if a sufficient acknowledgement of the work is made.¹⁷⁶ This is important for those responsible for delivering or supervising public education programs in the institution.

D: Special mechanisms for collecting institutions

14. SCOPE

Division 5 of Part III of the *Copyright Act 1968* (Cth) contains special provisions relating to the copying of works by 'libraries and archives'. Museums and galleries are included by means of a fabulously convoluted definitional path. Section 10 of the Act provides a definition of 'archives'.

(10)(1) **archives** means:

- (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 of the State of New South Wales; or
 - (iii) the Public Record Office established by the *Public Records Act* 1973 of the State of Victoria; or

- (iv) the Archives Office of Tasmania established by the *Archives Act 1965* of the State of Tasmania; 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 1983*; or
- (b) a collection of documents or other material to which this paragraph applies by virtue of subsection (4).

The many hundreds of museums and galleries that do not fall within the above description must then refer to subsection (4):

- (4) Where:
 - (a) a collection of documents or other material of historical significance or public interest that is in the custody of a body, whether incorporated or unincorporated, is being maintained by the body for the purpose of conserving and preserving those documents or other material; and
 - (b) the body does not maintain and operate the collection for the purpose of deriving a profit;

paragraph (b) of the definition of **archives** in subsection (1) applies to that collection.¹⁷⁷

Public museums and galleries and included within subsection 4(a) – being collections of ‘other material of historical significance or public interest’. Collections in the hands of individuals are excluded but those controlled by local historical societies, statutory corporations, as well as the major governmental collections, are included provided that the collection is not held for the purpose of deriving a profit.

15. COPYING FOR PRESERVATION OR REPLACEMENT PURPOSES

In certain circumstances, the officer in charge of the collecting institution may order a copy of a copyright work to be made if the work is in danger of loss or deterioration. Although not specified in the Act, it is reasonable to assume that this does not provide a right to copy all collection objects merely on the basis that all material is in a natural state of decay. At the other end of the measure, it would be unreasonable to assume that material has to be in truly imminent danger before one can undertake the copying. Certainly if preservation or conservation work is being considered or undertaken, a copy of the material can be made.

(xxxiii) *Manuscripts*

If the work is in manuscript form a copy can be made for the purposes of preserving it 'against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the work is held or at another library or other archives'.¹⁷⁸

(xxxiv) Works in published form

If a work is held in the collection in a published form, if:

- (a) it has been damaged or has deteriorated; or
- (b) it has been lost or stolen,

it may be copied for the purpose of replacing the work.¹⁷⁹

Published works that are being replaced because they have been damaged, have deteriorated or have been stolen, can only be replaced by copying, if the an officer of the institution¹⁸⁰ signs a declaration that the work cannot be purchased within a reasonable time at an ordinary commercial price.¹⁸¹

(xxxv) Artistic works

(c) Preservation

An artistic work may be copied for the purpose of preserving the work.¹⁸² It may also be copied for 'the purpose of research that is being, or is to be, carried out at the library or archives in which the work is held or at another library or other archives'.¹⁸³ These actions must be done by or on behalf of the officer in charge of the institution in which the work is held.

Where an original artistic work held in the collection:

- (a) has been lost, or has deteriorated, since the preservation reproduction¹⁸⁴ of the work was made; or
- (b) the work has become so unstable that it cannot be displayed without risk of significant deterioration,

it is not an infringement of copyright to make a preservation copy of the work or to communicate that copy by making it available on-line. However, the copy must only be available through computer terminals:

- (a) installed within the premises of the library or archives; and
- (b) that cannot be used by a person accessing the work to make an electronic copy or a hardcopy of the reproduction, or to communicate the reproduction.

Again, putting the copy on-line in this way can only be done by or on behalf of the officer in charge of the institution.

(d) Replacement

Where the institution wishes to **replace** rather than **preserve** published material (such as posters or post cards) that has been destroyed, reference should be made to the previous section: '*Works in published form*'. The only original works that can be reproduced for the

purpose of replacement are those that have been published. This would include material such as posters and postcards but would not give the institution the right to make a facsimile of a painting stolen from the collection (because the work held in the collection was an original and not in published form.)

(xxxvi) Sound recordings or films

(e) For preservation purposes

Where a sound recording or a film ('material') is held in and forms part of the collection, it will not be a breach of copyright in either the material or any works included in the material, if the officer in charge of the institution makes a copy:

- **of original materials** for the purpose of research that is being, or is to be, carried out at the library or archives in which the material is held or at another library or archives; or
- **of original materials** for the purpose of preserving the material against loss or deterioration,

provided that the copying is done for preservation purposes.

(f) For replacement purposes

Where a sound recording or a film ('material') is held in the collection in **a published form** but has deteriorated or been damaged or stolen, it will not be a breach of copyright in either the material or any works included in the material, if the officer in charge of the institution makes a copy for the purpose of replacing the material.¹⁸⁵

The important proviso to this is that where you seek to replace a **published copy** (in contrast to **original** material), a replacement copy can only be made if an authorised officer, after reasonable investigation, makes a declaration that he or she is satisfied that a copy (not being a second-hand copy) of the material, cannot be obtained within a reasonable time at an ordinary commercial price.

Where that copy has been made for the purposes of preservation or replacement it can be made available on-line provided it is only accessible on computers within the premises of the organisation. However, where that copy has been made for the purposes of research – and that research involves another collecting institution – on-line availability may also be given to that other institution. Extraordinarily, the Act requires that in either case, the act of putting such material on-line requires the approval of the board of the institution.¹⁸⁶

16. PRESERVATION COPIES OF SIGNIFICANT COLLECTION MATERIAL IN KEY CULTURAL INSTITUTIONS

Key Commonwealth, State and Territory collecting institutions have additional powers to those set out above.¹⁸⁷ These powers are in addition to the general preservation and replacement powers already discussed.

If an authorised officer of such an institution is satisfied that a work is of historical or cultural significance to Australia, copyright will not be infringed if the institution makes up to three copies of the work for the purpose of preserving it against loss or deterioration.

There are different controls on this right, depending on the type of material:

- (a) **Manuscript:** the copy may be made so long as the work is held in the collection and the reproduction is to preserve it from loss or deterioration.
- (b) **Original artistic work:** if the work is held in the collection, the institution may make 'up to 3 comprehensive photographic reproductions of the work from the original artistic work for the purpose of preserving it against loss or deterioration, provided that the officer is 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.'¹⁸⁸
- (c) **Published work:** 'If the work is held in published form, the copyright in the work is not infringed by an authorized officer of the library or archives making up to 3 reproductions of the work from the copy held in the collection, for the purpose of preserving the work against loss or deterioration, if the officer is satisfied that' a new 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'.¹⁸⁹
In determining ... whether a reproduction or copy (not being a second-hand reproduction or copy) of the work, or of a particular edition of the work, cannot be obtained within a reasonable time at an ordinary commercial price, the authorized officer must take into account whether an electronic copy of the work or edition can be obtained within a reasonable time at an ordinary commercial price.'¹⁹⁰
- (d) **Published edition:** The institution may make 'up to 3 ... copies' of a published edition 'for the purpose of preserving the edition against loss or deterioration, if the officer is satisfied that a copy or facsimile copy of the edition (not being a second-hand copy) cannot be obtained within a reasonable time at an ordinary commercial price.' The 'officer must take into account whether an electronic copy of the edition can be obtained within a reasonable time at an ordinary commercial price.'¹⁹¹ Where 'a facsimile copy of the edition' of the published edition is made under this power, 'the making of that copy does not infringe copyright in any of the works in the published edition.'¹⁹²
- (e) **Recordings and Films:** Whether the material is published or unpublished, the institution may make 'up to 3 copies ... for the purpose of preserving' the material 'against loss or deterioration'.¹⁹³ However, where the recording or film has been published an authorised officer must make a declaration that he or she is satisfied

that a copy of the material (not being a second-hand copy) cannot be obtained within a reasonable time at an ordinary commercial price. In doing so, the authorised officer must take into account the availability of electronic copies.¹⁹⁴ Where a copy of the recording or film is made under this power, the making of that copy does not infringe copyright in any of the works in that material.¹⁹⁵

17. COPYING BY THE PUBLIC

If the collecting institution has a photocopying machine or other copying equipment available for the public to use, it will not be responsible for any infringements of copyright committed by users merely for providing the copying equipment - so long as it displays near the machine, the prescribed warning sign.¹⁹⁶

Similarly, while an institution that merely provides Internet facilities for its visitors is unlikely to be liable if their use constitutes a breach of copyright¹⁹⁷ it is prudent to display a copyright-use notice next to the machine.

18. COPYING FOR THE PUBLIC

A member of the public may request the institution¹⁹⁸ to make and supply a copy of an article or some other published work so long as the following conditions are met:

- (a) The request must be in writing;¹⁹⁹
- (b) The request must accompany the piece to be copied;
- (c) It must contain a declaration stating that the person
 - requires the copy for the purposes of research or study and will not use it for any other purpose;
 - has not previously been supplied with a copy of the same material by an authorised officer of the institution.

Where this request and declaration is made, the officer in charge may make and supply the requested copy.²⁰⁰ There are only a few restrictions on this:

- (a) The charge made must not exceed the cost of making and supplying the copy.²⁰¹
- (b) A copy may not be made of two or more articles (or parts of articles) for the same periodical publication unless the articles are requested for the same research or course of study.
- (c) If the request is for a copy of the whole (or more than a 'reasonable portion') of a literary, dramatic or literary work (other than an article in a periodical) the authorised officer must sign a declaration that:
 - (i) 'the work forms part of the library or archives collection; and'
 - (ii) a reproduction (not being second-hand) cannot be purchased 'within a reasonable time at an ordinary commercial price'.²⁰² The declaration should specify that in making this determination the officer has taken into account:

- 'the time by which the person requesting the reproduction requires it';
 - 'the time within which a reproduction (not being a second-hand reproduction) of the work at an ordinary commercial price could be delivered to the person'; and
 - 'whether an electronic reproduction of the work can be obtained within a reasonable time at an ordinary commercial price'.²⁰³
- (d) The copy of an article or other published work should usually only be supplied to the person who made the request.²⁰⁴
- (e) The copy should then be marked by the institution with a 'notation stating that the reproduction was made on behalf of that institution and specifying the date on which the reproduction was made'.²⁰⁵ This is essential if copyright infringement proceedings are commenced and the institution wishes to gain the protection of the statutory exception.

Where the institution is authorised to supply a copy under this power, it is also authorised to electronically communicate it.²⁰⁶ Note that where a copy is faxed or emailed to the person who requested it, the institution must use a particular form of wording to notify the person that the reproduction has been made under s 49 of the Act and that the article or work may be subject to copyright protection under the Act.²⁰⁷ Once sent, the copy must be destroyed.²⁰⁸

(xxxvii) Electronic access

Where the institution acquires an article or other published work in electronic form as part of its collection, the officer in charge of the organisation may make it available on-line within the premises of the organisation – but only in such a way that users can neither communicate nor make an electronic copy of the work.²⁰⁹

19. COPYING FOR OTHER COLLECTING ORGANISATIONS

This Part provides the ability of certain collections to copy for other collections. It only applies to

- (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 archive all or part of whose collection is accessible to members of the public.²¹⁰

Note the restrictions inherent in this exception: the main theme is that the collection must provide public access. For example, most collections associated with companies (such as

corporate libraries or art collections) will not come within the exception because they do not permit public access.

A complying institution can request another such institution to supply it with copies of works (or parts of works) where it wants the copy either:

- to include the copy in its collection or
- to supply the copy to a person who has made a request for a copy for the purpose of research or study.²¹¹

Such requests must be made by, or with the authorisation of, the officer in charge of one institution to the officer in charge of the other.²¹²

If the institution has previously asked for a copy of the same material for the purpose of including the work or article in the collection, upon making the request, the authorized officer must make a declaration setting out the purposes of the relevant reproduction was sought and stating that the copy so supplied 'has been lost, destroyed or damaged'.²¹³

An institution is not permitted to provide a reproduction of all or part of two or more articles that are contained in the same periodical publication and requested for the same purpose, unless the purpose is:

- (i) to assist a member of a Parliament perform his or her duties; or
- (ii) to supply a request under section 49 for the same research or course of study.

The requested copy must be made by an authorised officer and the charge must not exceed the cost of making and supplying the copy.²¹⁴ If the copy is being supplied electronically, as soon as practicable after the reproduction is supplied to the other institution, any reproduction made for the purpose of the supply and held by the supplying institution must be destroyed.²¹⁵

If the institution complies with these requirements, the copying will not be a breach of the reproduction right and sending it to the requesting institution electronically will not be a breach of the communication right.²¹⁶

So far, so good. However, if the copying sought is of the whole or an unreasonable portion of the work, you must comply with the following sections.

(g) Copying of all, or more than a 'reasonable portion', of a work that is in hardcopy form

If the request is for a copy of the whole (or more than a 'reasonable portion') of a work in hardcopy form (other than an article in a periodical), the authorised officer must make a declaration:

- (a) setting out the particulars and purposes of the request; and
- (b) stating that the work cannot be purchased new within a reasonable time at an ordinary commercial price.²¹⁷

This declaration must be made as soon as possible after making the request.²¹⁸

(h) Copying of all, or more than a 'reasonable portion', of an electronic work

Where the work is in electronic form, the procedure is similar. If the request is for a copy of the whole of a work in electronic form (including an article in a periodical), the authorised officer must make a declaration:

- (a) setting out the particulars and purposes of the request; and
- (b) stating that, after reasonable investigations, the work cannot be purchased in electronic form, either separately or together with a reasonable amount of other material, within a reasonable time at an ordinary commercial price.²¹⁹

20. UNPUBLISHED WORKS

The Act provides for two situations in which the authorised officer can copy unpublished works without breaching copyright.

(xxxviii) Theses and manuscripts

Where a collecting institution has an unpublished thesis or similar work in its collection, the work may be copied if the officer is satisfied that the person requesting it is doing so for the purpose of research or study.²²⁰

(xxxix) Other unpublished material

With other unpublished literary, dramatic, or musical works, or unpublished photographs and engravings, copies may be made (and electronically communicated) if:

- the author has been dead more than fifty years;
- the work is available for public inspection in the collection (subject to the governing regulations);
- the copy is sought only for the purposes of research or study or with a view to publication.

This copying may be made by the person undertaking the research, study or the like,²²¹ or may be made by an authorised officer of the institution provided that he or she is satisfied that the copyright and communication is for the purposes of research or study or with a view to publication and that the person will not use it for any other purpose.²²²

G: Copying works for administrative purposes

A work held in the collection may be copied by an authorised officer for 'administrative purposes'.²²³ That phrase is defined as 'purposes directly related to the care or control of the collection'.²²⁴ This certainly covers all registration-related uses (for example accessioning and deaccessioning, loans, insurances and the like) but, despite the breadth of the definition, is unlikely to include preservation as this is specifically dealt with elsewhere in the section.

Moreover, copyright in the work is not infringed where an authorised officer, with the approval of the body administering the library or archive, makes the copy available on-line to employees of the institution through the use of a computer terminal installed within the

premises.²²⁵ Note that the section requires the approval of ‘the body administering the library or archive’, which is presumably the governing board. It is certainly more than ‘an authorised officer’. Further, on-line accessibility is restricted to employees of the organisation – not its public.

H: Reproducing and communicating works in care of National Archives of Australia

Where a work that kept in the collection of the National Archives of Australia²²⁶ is open to public inspection, copyright is not infringed by the making or communication by, or on behalf of, the officer in charge of the archives:

- (a) of a single working copy of the work; or
- (b) of a single reference copy of the work for supply to the central office of the National Archives of Australia; or
- (c) on the written request for a reference copy of the work by an officer of the National Archives of Australia in a regional office of the Archives, where the officer in charge is satisfied that a reference copy of the work has not been previously supplied to that regional office – of a single reference copy of the work for supply to that regional office; or
- (d) where the officer in charge is satisfied that a reference copy of the work supplied to a regional office of the National Archives of Australia is lost, damaged or destroyed and an officer of the Archives in that regional office makes a written request for a replacement copy of the work – of a single replacement copy of the work for supply to that regional office; or
- (e) where the officer in charge is satisfied that a reference copy of the work supplied to the central office of the National Archives of Australia is lost, damaged or destroyed – of a single replacement copy of the work for supply to that central office.²²⁷

When interpreting this section it is essential to apply the particular definitions provided by the Act.²²⁸

reference copy, in relation to a work, means a reproduction of the work made from a working copy for supply to the central office, or to a regional office, of the National Archives of Australia for use by that office in providing access to the work to members of the public.

replacement copy, in relation to a work, means a reproduction of the work made

from a working copy for the purpose of replacing a reference copy of the work that is lost, damaged or destroyed.

working copy, in relation to a work, means a reproduction of the work made for the purpose of enabling the National Archives of Australia to retain the copy and use it for making reference copies and replacement copies of the work.

I: Use of copyright material for the services of the Crown

The copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, or in a sound recording, cinematograph film, television broadcast or sound broadcast, is not infringed by the Commonwealth or a State, or by a person authorised²²⁹ in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State.²³⁰

It is no easy matter to determine whether a collecting institution is properly described as the Commonwealth or State, or what constitutes doing something for the services of the Commonwealth or State. These are complex issues that must be determined on a case-by-case basis. It depends on the structure and constitution of the organisation and the purposes of the services.²³¹

Where this Crown power is used, the Act requires that the government shall as soon as possible inform the owner of the copyright²³² and shall furnish the owner with such information as to the doing of the act as they reasonably require.²³³ The terms of the copying will be as agreed between the government and the owner (or in default of agreement, as determined by the Copyright Tribunal).²³⁴

In practice this is not a power relied on by collecting institutions in the performance of its usual functions such as exhibitions, education and conservation.

Statement of Principles on Section 200AB of the *Copyright Act 1968* (Cth)

Preamble

1. Purpose of these Principles

The purpose of these Principles is to provide a guide for the cultural sector in relation to the use of section 200AB in accordance with the Australian Government's intent that s. 200AB provide a 'flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties.'²³⁵

This guide also facilitates institutions' effective management of their IP in accordance with the *Statement of IP Principles for Australian Government Agencies*.²³⁶

These Principles are a guide only and have been developed to assist institutions to interpret section 200AB in accordance with their institutional risk management, relationship management and other policies. As there have not been any judicial decisions in relation to s. 200AB, this guide cannot and does not remove all risks associated with use of the provision. However, institutions will be able to use these Principles in conjunction with their risk management policies and procedures in order to manage and mitigate those risks.

While these Principles have been drafted for the cultural sector and in particular, the members of the Copyright In Cultural Institutions (CICI) Group (the **Cultural Institutions**); section 200AB applies more broadly to all 'libraries and archives' (as defined in the *Copyright Act 1968* (Cth) (the **Act**)). It may therefore also be useful for other libraries, archives, galleries and museums falling within the statutory definition (see Part 3 below).

2. Background

2.1 The provision

The *Copyright Amendment Act 2006* introduced an important new exception which allows Cultural Institutions to use copyright materials for free in certain circumstances for the purposes of maintaining or operating the library or archive or providing library or archival services.

Section 200AB is different to other exceptions in the Act because it does not specify exactly which copyright uses are permitted by the provision. Instead it sets out a number of steps to

be followed in order to determine whether a particular use of copyright material will be allowed, and requires a case-by-case assessment of each particular use.

These Principles provide guidance in relation to how Cultural Institutions can decide whether or not a particular use of copyright material may be permitted by section 200AB, rather than prescribing the particular uses in which the exception will apply.

2.2 Importance for the Sector

The Cultural Institutions are government agencies charged with statutory functions and powers of preserving, managing and providing access to their collections.²³⁷

The Cultural Institutions face similar copyright issues which directly impact upon their ability to fulfil their statutory functions. Namely, large components of their collections are protected by copyright and, in many instances, the Cultural Institutions do not own copyright in those collection materials or have the necessary rights in relation to their collections, required to fulfil their statutory functions. For example, many collection items are 'orphan works' where it is impossible to trace or locate the copyright owner – whether due to uncertain provenance; the fact that the works are unpublished or published anonymously; or that ownership of the copyright is uncertain due to multiple transfers in title to the work.

This has resulted in a situation where Cultural Institutions are required to comply with conflicting legal requirements:

- their mandates in accordance with their enabling legislation which require them to preserve and provide public access to their collections for the benefit of the public; and
- copyright laws, which often function to inhibit this.

Section 200AB has been introduced, in part, to address these conflicting requirements by giving Cultural Institutions more scope to fulfil their mandates and by broadening the ways in which copyright material can be used for purposes that benefit the wider public interest.²³⁸

PART 2 – Application of section 200AB

For a particular use of copyright material to fall under section 200AB, the use must comply with the following requirements:

1. The use must not fall within another specific exception or statutory licence under the Act;
2. You must not circumvent a TPM in order to make the use;
3. You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive;
4. The use must not be for commercial advantage or profit;
5. The use must not 'conflict with the normal exploitation of the work';
6. The use must not 'unreasonably prejudice the legitimate interests of the owner of copyright'; and
7. The use must be a 'special case'.

This part sets out the nature of these requirements and provides flow charts to help you to apply these requirements to a particular use.

1. The use must not fall within another specific exception or statutory licence in the Act

Section 200AB will not apply if:

- your use can be made under another exception; or
- if another exception would apply to your use if you met the **conditions or requirements** of that exception²³⁹.

Therefore, if the use falls within the scope of the preservation provisions or other library or archive provisions, section 200AB will not apply.

Additionally, you cannot rely on section 200AB to circumvent the conditions or requirements of other exceptions that are applicable to your use. For example, where your use would fall within the preservation provisions if you adhered to the notice requirements or the limitations in relation to copying, then section 200AB will not be available. However, if the type of preservation that you wish to make is not covered by these provisions, then 200AB will not be excluded.

Example 1:

Scenario: The National Museum wishes to preserve a published collection item. The use would potentially fall within sections 51B (4)(a) and 51A (1)(b), however, the item is commercially available.

The museum cannot copy the material under s 200AB in order to avoid the 'commercial availability' test, a 'condition or requirement' under both section 51B and 51A.

Section 183

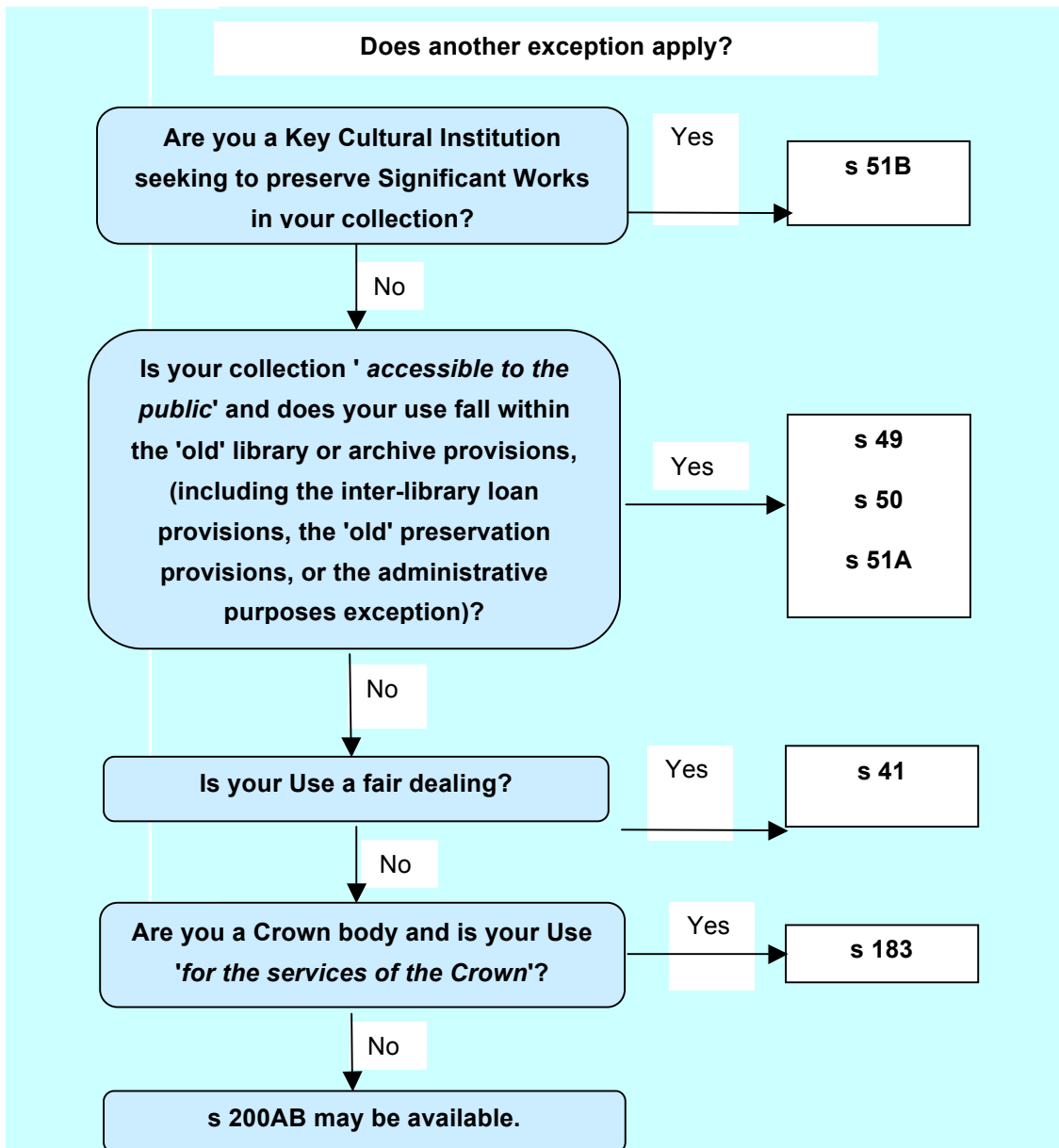
If a use is exempted from infringement because it is undertaken under s. 183, then section 200AB will not apply.

Section 183 provides that Commonwealth and State bodies do not infringe copyright by making copyright uses **'for the services of the Crown'**. However, the copyright owner is entitled to payment for any uses made under s. 183.

Cultural Institutions which are not legally considered to be **'the Crown'** will not have access to section 183 and will therefore be able to rely on section 200AB. It is a matter for each agency to determine whether they are legally considered to be the Crown for the purposes of the Act²⁴⁰.

Additionally, where uses are not **'for the services of the Crown'**, section 183 will not be available. The words 'for the services of the Commonwealth or a State' are not defined. Not every act of using copyright material will necessarily be covered by section 183.²⁴¹ For example, the Australian Copyright Council is of the view that only those dealings with copyright material which are 'governmental' in nature and where there is some element of public interest involved are likely to be covered by section 183.²⁴² The High Court has suggested that section 183 provides a comprehensive licence scheme for government use of copyright material.²⁴³

To work out whether another exception applies, follow the following flow chart:



2. The use must not require you to circumvent any TPMs

You cannot make a use under section 200AB if that use requires you to circumvent an access control technological protection measure (TPM). This is in contrast with the 'old' library and archive provisions (sections 49, 50, 51A, 110A, 110B)²⁴⁴ for which specific TPM exceptions allow you to circumvent TPMs in order for you to use those exceptions.

An access-control TPM is a **device, product, technology or component** (including a computer program) that is used by, with the permission of, or on behalf of the copyright owner, **in connection with** the exercise of the **copyright**; and in the normal course of its operation, **controls access** to copyright content.²⁴⁵

Examples of TPMs are password protection, time access controls and encryption measures applied to formats that only allow access to copyright content by authorised persons. For

example, copyright content on commercial DVDs and CDs is commonly protected by TPMs such as the Content Scrambling System (CSS).

Regional coding is not a TPM.

This means that, when you want to make a use of a work in digital form, you need to first consider whether or not that use will require you to circumvent an access TPM. If it does, s 200AB will be excluded.

3. The use must be made by or on behalf of a body administering a library or archive

'Library' is not defined for the purposes of s 200AB. 'Archive', however, is defined in the *Copyright Act 1968* (Cth) and includes:

'a collection of documents or other material which:

- are of historical significance or public interest that
- are being maintained by the body for the purpose of conserving and preserving those documents or other material; and
- are not being maintained or operated for profit'.²⁴⁶

The *Copyright Act 1968* (Cth) specifically states that museums and galleries are examples of bodies that could have collections covered by the definition of archive. For the purposes of these Principles, the Cultural Institutions fall within this definition.

4. The use must be made for the purpose of maintaining or operating the library or archive

Section 200AB is available for the purpose of maintaining or operating the library or archive.

The Explanatory Memorandum provides that this includes providing a service of a kind usually provided by a library or archive and would encompass the internal administration of the library or archive as well as providing services to users²⁴⁷.

This appears to cover all reasonable activities undertaken by Cultural Institutions in accordance with their functions and powers and could therefore apply to uses in relation to materials other than collection items.

Example:

Scenario: Institution Z seeks to make a use in relation to an item that it has borrowed from Collection D for the purposes of including it in an exhibition.

Institution Z may be able to rely on s 200AB to make the use. The fact that the item is from an external collection does not of itself preclude reliance on s 200AB.

5. The use must not be for commercial advantage or profit

This step requires that the specific use you seek to make under s. 200AB, not be for a commercial advantage or profit. Whether the institution performs functions that are for profit or commercial advantage is not directly relevant and will not prohibit the application of s 200AB. Section 200AB will only be excluded where there is a direct nexus between the profit or commercial advantage and the use. In other words, the use itself must be for profit or commercial advantage.²⁴⁸

The charging of a fee does not necessarily exclude s 200AB. The charging of a fee will not be 'for commercial advantage or profit' where it does not exceed the costs of the use.²⁴⁹

Example 1:

Scenario: Institution X wishes to make a use for purposes of a not-for-profit exhibition. The exhibition is expected to attract more patrons, potentially more donations, and to bolster the image of the institution.

The use would not be precluded from the operation of s 200AB at this step because it is not 'for commercial advantage or profit'.

Example 2:

Scenario: Institution Y wishes to make a use for the purpose of including a copy of the work as a centrepiece in tender documentation in order to procure 'best value' services for the institution.

The use is likely to be seen as being made for the purpose of gaining a commercial advantage and s 200AB is therefore likely to be excluded.

Example 3:

Scenario: Institution Z wishes to use of a work for the purpose displaying a copy of the work in its café.

The use is likely to be seen as a use which is 'for commercial advantage or profit' and section 200AB is likely to be excluded.

6. The use must not conflict with a normal exploitation of the work or subject-matter.

This step is directed towards whether either:

- (a) there is a market that the law should protect from the particular use; or
- (b) there is a potential market that 'with a certain degree of likelihood, could acquire considerable economic or practical importance'.²⁵⁰

It requires a consideration of what constitutes 'normal exploitation' and at what point or in what circumstances, there is a definable market that the law should protect. It also requires

'normative' considerations or in other words, considerations of the objectives of copyright law.²⁵¹ The term 'normal' may require a consideration of a wide range of factors including:

- market displacement,²⁵²
- technological developments;²⁵³ and
- the social benefits of the use more generally.²⁵⁴

What is required is a weighing up of all of the circumstances surrounding the use, in order to determine whether the particular use is one that the copyright owner *should* control.²⁵⁵

In order to help Cultural Institutions to balance the competing interests of this test, a balancing of the following factors in each case will assist:

Factors weighing against	Factors weighing in favour
There is a readily available licence for the use, which indicates the existence of a market for that use	There is no readily available licence for the use
The use is a way that the copyright owners usually make money from their work	The use is not a way that the copyright owners usually make money from their work
The use will deprive the copyright owner of significant revenue now or in the foreseeable future.	The use will not deprive the copyright owner of significant revenue now or in the foreseeable future.
The use is not separate or distinct from the way that the copyright owner usually exploits the work.	The use is separate or distinct from the way that the copyright owner usually exploits the work.
The use does not enhance the copyright owner's work in any way.	The use enhances the copyright owner's work in some way (For example; by promoting the work or facilitating the copyright owner's normal exploitation of the work).
There are no public interest reasons why the use should be allowed under s 200AB.	There are public interest reasons why the use should be allowed under s 200AB.

7. The use must not unreasonably prejudice the legitimate interests of the owner of copyright.

The Explanatory Memorandum states that this step requires 'an assessment of the legitimate economic and non-economic interests of the copyright owner'.²⁵⁶

The WTO panel in the '*Homestyle*' decision²⁵⁷ noted that this requires a four-step analysis of:

- what are the interests of the right holders;
- which attributes make them '**legitimate**';
- what the term 'prejudice' means; and
- when does the prejudice become '**unreasonable**'.

Again the WTO panel emphasised the importance of 'normative' definitions of these words, noting that exceptions will always prejudice the copyright holder. What this test requires is a consideration of the point at which this prejudice becomes unreasonable.²⁵⁸

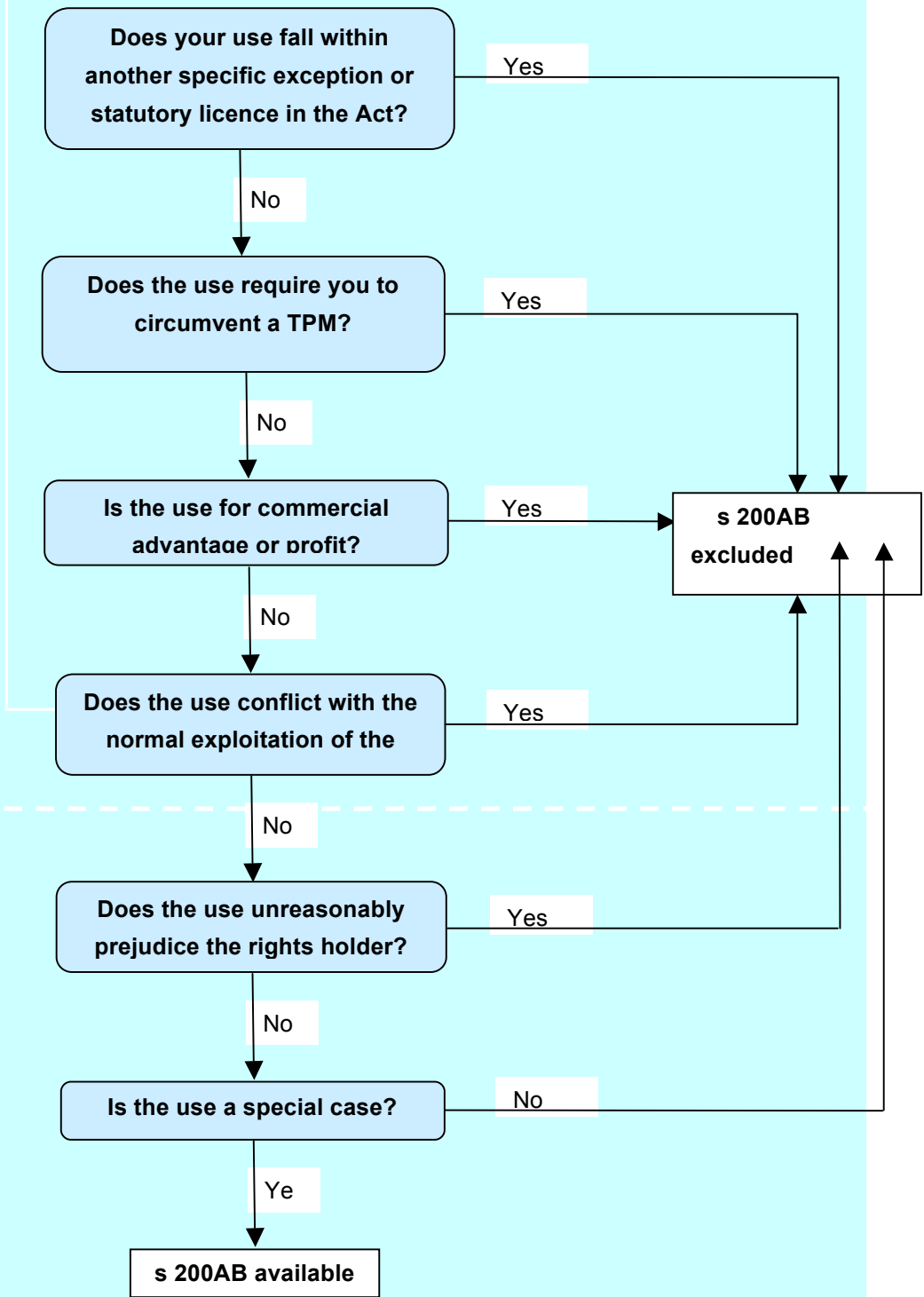
In order to help Cultural Institutions to balance the competing interests of this test, a balancing of the below factors in each case will assist:

Factors weighing favour	Factors weighing in against
The use is for a specific and limited purpose	The use is not defined
The amount and nature of the material taken is appropriate in light of the nature of the copyrighted work and of the use.	An excessive or unnecessary amount of material has been taken.
The use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material (For example: indigenous communal intellectual property rights or cultural restrictions).	Cultural sensitivities and restrictions have not been considered where it is appropriate to do so.
In making the use, you have complied with the moral rights requirements of the <i>Copyright Act 1968</i> (Cth). (For example: The use properly attributes the author where it is reasonable to do so.)	The moral rights of the creator have not been considered.
The use doesn't breach any contractual or legal restrictions on the material (For example, donor/depositor restrictions or obligations under relevant privacy laws).	The use breaches contractual or other legal restrictions on the material.
The use does not give rise to an unreasonable risk of misuse or has been appropriately constrained so that any risks are minimised.	The use exposes the material to an unreasonable risk of misuse (such as unauthorised use by others).

8. The use must be a special case

The explanatory memorandum to the Copyright Amendment Bill 2006 (Cth) states that 'this condition is intended to ensure that the use is narrow in a quantitative as well as qualitative sense'.

While this step does not require that a use be unique or extraordinary, it does require that the use be for a defined purpose²⁵⁹.



PART 3 - Examples

Example 1: A Cultural Institution wishes to copy a collection item for the purposes of including that copy in an educational program and/or exhibition.

Step 1: The use must not fall within another specific exception or statutory licence under the Act

If there are no other exceptions applicable, s 200AB will not be excluded.

Institutions should consider, in relation to the particular use, whether the library and archive provisions may apply. This may be the case if the access copy is made for preservation purposes or administrative purposes and meets the other requirements of those provisions. Institutions should also consider (if their institution is a 'Crown body') whether their use is 'for the services of the Crown' under section 183.

Step 2: You must not circumvent a TPM in order to make the use

Where the use is in relation to a digital work, you should consider whether making that use will require you to circumvent a technological protection measure (TPM) that protects access to the copyright material by limiting it to authorised persons.

Where no such measure exists, s 200AB will not be excluded.

Step 3: You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive

The making of access copies for exhibitions and educational programs would clearly fall within the reasonable services or activities of the library.

Therefore, s 200AB will not be excluded.

Step 4: The use must not be for commercial advantage or profit

If the use is made for the purpose of an exhibition which is commercial in nature, s 200AB will be excluded.

An entry fee which is for cost-recovery purposes only, or the attraction of unexpected donations, will not exclude the operation of s 200AB.

Step 5: The use must not 'conflict with the normal exploitation of the work'

An assessment of the following factors will assist Cultural Institutions to determine whether s 200AB may be available or whether s 200AB will be excluded:

- Whether there is a readily available licence for making the use (which indicates the existence of a market for that use)²⁶⁰

- The use (making an access copy for the purposes of a Cultural Institution exhibition) is unlikely to be a way that the copyright owners usually make money from their work;
- The use (being for the purposes of a limited or one-off exhibition) is unlikely to deprive the copyright owner of significant revenue now or in the foreseeable future, this weighs in favour of allowing the use;
- The use is likely to be separate and distinct from the way that the copyright owner usually exploits the work;
- The use is likely to enhance the copyright owner's use by promoting the copyright owner's work.

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses for the purposes of non-commercial, not-for-profit public exhibitions are unlikely to be excluded from s. 200AB by this step. However, so far as certain uses are covered by licences (such as an APRA collective licence), s. 200AB will be excluded.

Step 6: The use must not 'unreasonably prejudice the legitimate interests of the owner of copyright'

An assessment of the following factors will assist Cultural Institutions to determine whether s 200AB may be available or whether s 200AB will be excluded:

- The use is for a specific and limited purpose (an exhibition);
- The amount and nature of the material taken is appropriate in light of the nature of the copyrighted work and of the use (the amount reflects what will be shown at the exhibition);
- The use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material;
- In making the use, you have complied with the moral rights requirements of the *Copyright Act 1968*;
- The Institution has taken any reasonable steps to ensure the item is not exposed to unreasonable risk of misuse.

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses for the purposes of public exhibitions are unlikely to be excluded from s 200AB by this step as long as the Institution has taken steps to ensure that the use is confined to the purpose and that the moral rights of the author and any cultural sensitivities related to the work have been taken into account.

Step 7: The use must be a 'special case'

If the use has not been excluded by the above steps, it is unlikely to be excluded by this step.

This step requires the use to be for a defined purpose.

Conclusion: While each use should be assessed on a case-by-case basis, s 200AB is likely to be available for these kinds of uses.

Example 2: An institution wishes to reproduce a collection item in a low resolution format (as a thumbnail) and display it on the institution's collection database.

Step 1: The use must not fall within another specific exception or statutory licence under the Act

If there are no other exceptions applicable, s. 200AB will not be excluded.

If the use is made for preservation purposes or administrative purposes, the library and archive provisions may apply.

Institutions should also consider (if their institution is a 'Crown body') whether their use is 'for the services of the Crown' under section 183.

Step 2: You must not circumvent a TPM in order to make the use

Where the use is in relation to a digital work, you should consider whether making that use will require you to circumvent a technological protection measure (TPM) that protects access to the copyright material by limiting it to authorised persons.

Where no such measure exists, s 200AB will not be excluded.

Step 3: You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive

The making of copies for inclusion on an institution's collection database would fall within the reasonable services or activities of the library or archive.

Therefore, s 200AB will not be excluded.

Step 4: The use must not be for commercial advantage or profit

Uses for purposes of inclusion on an institution's collection database are unlikely to be for commercial advantage or profit.

Step 5: The use must not 'conflict with the normal exploitation of the work'

A weighing-up and assessment of the following factors on a case-by-case basis will assist Cultural Institutions to determine whether s 200AB may be available or whether s 200AB will be excluded:

- Whether there is a readily available licence for making the use (which indicates the existence of a market for that use);
- The use (making a low resolution thumbnail copy for the purposes of a Collection database) is unlikely to be a way that the copyright owner usually makes money from their work;
- The use is unlikely to deprive the copyright owner of significant revenue now or in the foreseeable future;

- The use is likely to be separate and distinct from the way that the copyright owner usually exploits the work;
- The use is likely to enhance the copyright owner's use by promoting the copyright owner's work.

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses of low resolution thumbnail images of items for the purposes of inclusion in a collection database are unlikely to be excluded from s 200AB by this step.

Step 6: The use must not 'unreasonably prejudice the legitimate interests of the owner of copyright'

An assessment of the following factors will assist Cultural Institutions to determine whether s 200AB may be available or whether s 200AB will be excluded:

- The use is for a specific and limited purpose (use on a collection database);
- The amount and nature of the material taken is appropriate in light of the nature of the copyrighted work and of the use (the amount reflects what will be required for the database.);
- The use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material;
- In making the use, you have complied with the moral rights requirements of the *Copyright Act 1968* (Cth);
- The Institution has taken any reasonable steps to ensure the item is not exposed to unreasonable risk of misuse. (For example, the fact that the copy will be in a low resolution format is a step which mitigates any risk of misuse.)

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses for the purposes of inclusion of low resolution images on collection databases are unlikely to be excluded from s 200AB by this step as long as the Institution has taken steps to ensure that the use is confined to the purpose and that the moral rights of the author and any cultural sensitivities related to the work have been taken into account.

Step 7: The use must be a 'special case'

If the use has not been excluded by the above steps, it is unlikely to be excluded by this step.

This step requires the use to be for a defined purpose.

Conclusion: While each use should be assessed on a case-by-case basis, s 200AB is likely to be available for these kinds of uses.

Example 3A: An institution wishes to make an orphaned work available on its website.

Step 1: The use must not fall within another specific exception or statutory licence under the Act

If there are no other exception applicable, s 200AB will not be excluded.

If the use is made for preservation purposes or administrative purposes the library and archive provisions may apply. However, this will be unlikely if the use is to promote access to the public at large via the institutional website.

Institutions should also consider (if their institution is a 'Crown body') whether their use is 'for the services of the Crown' under section 183.

Step 2: You must not circumvent a TPM in order to make the use

Where the use is in relation to a digital work, you should consider whether making that use will require you to circumvent a technological protection measure (TPM) that protects access to the copyright material by limiting it to authorised persons.

Where no such measure exists, s 200AB will not be excluded.

Step 3: You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive

The making of orphan works within the institution's collection would fall within the reasonable services or activities of the library or archive.

Therefore, s 200AB will not be excluded.

Step 4: The use must not be for commercial advantage or profit

Uses for the purposes of making orphan works available to the public are unlikely to be for commercial advantage or profit.

Step 5: The use must not 'conflict with the normal exploitation of the work'

A weighing-up and assessment of the following factors on a case-by-case basis will assist Cultural Institutions to determine whether s 200AB may be available or whether s 200AB will be excluded:

- Whether there is a readily available licence for making the use (which indicates the existence of a market for that use);
- The use (making the orphan work available to the public on the Internet) would ordinarily be a way that the copyright owner would make money from their work. However, in the case of an orphaned or abandoned work, this will not be the case (so long as the work remains orphaned or abandoned). However, institutions should note

that this may change if the owner subsequently comes forward and indicate that they wish to exploit the work;

- The use is unlikely to deprive the copyright owner of significant revenue now. The use may deprive the copyright owner of revenue in the future if the copyright owner comes forward;
- The use is likely to be separate and distinct from the way that the copyright owner usually exploits the work;
- The use is likely to enhance the copyright owner's use by promoting the copyright owner's work.

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses of orphaned works are unlikely to be excluded from s. 200AB by this step.

Step 6: The use must not 'unreasonably prejudice the legitimate interests of the owner of copyright'

An assessment of the following factors will assist Cultural Institutions to determine whether s. 200AB may be available or whether s 200AB will be excluded:

- The use is for a specific purpose. Whether the use can be said to be for a 'limited purpose' may depend on whether appropriate measures have been taken to ensure that the work is not exposed to an unreasonable risk of misuse (see below);
- The amount and nature of the material taken is appropriate in light of the nature of the copyrighted work and of the use (the amount reflects what will be required for the purpose of the use);
- The use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material (so far as is possible in the context of the work being orphaned);
- In making the use, you have complied with the moral rights requirements of the *Copyright Act 1968* (so far as you are able to do in the context of the work being orphaned);
- The Institution has taken reasonable steps to ensure the item is not exposed to unreasonable risk of misuse? This will be a key factor under this step where institutions are seeking to make works available on the Internet. While the risk in relation to 'unreasonably prejudicing the legitimate interests of the copyright owner' are less in relation to orphaned work than other works, Institutions should still consider any steps appropriate to minimise risk of misuse. The nature of those steps will depend on the nature of the work that is being made available. Examples of ways that may minimise misuse may include; making the item available in a low resolution format; making only a part of the item available; making the item available with legal or technological restrictions; or making the item available with an accompanying notice to potential copyright owners in relation to the institution's take-down procedures.

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh against the use, uses for the purposes of making orphaned works available to the public are unlikely to be excluded from s 200AB by this step.

Step 7: The use must be a 'special case'

If the use has not been excluded by the above steps, it is unlikely to be excluded by this step.

This step requires the use to be for a defined purpose.

Conclusion: While each use should be assessed on a case-by-case basis, s 200AB is likely to be available for these kinds of uses.²⁶¹

Example 3B: An institution wishes to make a work (other than an orphaned work) available on its website (for example, as part of an on-line exhibition).

Step 1: The use must not fall within another specific exception or statutory licence under the Act

Analysis same as 3A, above.

Step 2: You must not circumvent a TPM in order to make the use

Analysis same as 3A, above.

Step 3: You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive

Making access copies for the purposes of an exhibition would fall within the reasonable services or activities of the library or archive.

Therefore, s 200AB will not be excluded.

Step 4: The use must not be for commercial advantage or profit;

Uses for the purposes of making orphan works available to the public are unlikely to be for commercial advantage or profit.

Step 5: The use must not 'conflict with the normal exploitation of the work'

A weighing-up and assessment of the following factors on a case-by-case basis will assist Cultural Institutions to determine whether s 200AB may be available or whether s 200AB will be excluded:

- Whether there is a readily available licence for making the use (which indicates the existence of a market for that use);
- Depending on the nature of the work, the use (making the work available to the public on the Internet) may be a way that the copyright owners make money from their work. For example, if the work is a letter from a digger held by the Australian War Museum (AWM), the use is unlikely to be a way the copyright owner makes money from their work. On the other hand, if the work is an Australian feature film, the use is likely to be a way the copyright owner usually makes money from their work.
- The use may deprive the copyright owner of significant revenue if there is a readily available licence for the use or if the copyright owner ordinarily licences such uses;
- The use is likely to be separate and distinct from the way that the copyright owner usually exploits the work;
- The use is likely to enhance the copyright owner's use by promoting the copyright owner's work?

In the absence of other circumstances (which may arise on a case-by-case basis) which would weigh in favour of the use, uses of works are likely to be excluded from s 200AB by this step if a licence from the copyright owner is readily available. In some circumstances this may be outweighed by the nature and circumstances of the use. However, Institutions should bear in mind that use of s 200AB in these circumstances would involve a higher degree of risk than

use of s 200AB in the circumstances outlined in Example 3A above. The exact level of that risk will depend on the nature of the work.

Step 6: The use must not 'unreasonably prejudice the legitimate interests of the owner of copyright'

An assessment of the following factors will assist Cultural Institutions to determine whether s. 200AB may be available or whether s. 200AB will be excluded:

- The use is for a specific purpose. Whether the use can be said to be for a 'limited purpose' may depend on whether appropriate measures have been taken to ensure that the work is not exposed to an unreasonable risk of misuse (see below);
- The amount and nature of the material taken is appropriate in light of the nature of the copyrighted work and of the use (the amount reflects what will be required for the purpose of the use);
- The use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material;
- In making the use, you have complied with the moral rights requirements of the *Copyright Act 1968*;
- The Institution has taken reasonable steps to ensure the item is not exposed to unreasonable risk of misuse. This will be a key factor under this step where institutions are seeking to make works available on the Internet. The nature of those steps will depend on the nature of the work that is being made available. Examples of ways that may minimise misuse may include; making the item available in a low-resolution format; making only a part of the item available; making the item available with legal or technological restrictions; or making the item available with an accompanying notice to potential copyright owners in relation to the institution's take-down procedures.

Whether such a use would be available under s. 200AB would need to be assessed on a case-by-case basis and would depend heavily on the nature of the work, whether a licence is available for the use and whether appropriate steps have been taken to minimise risk of misuse of the work.

Step 7: The use must be a 'special case'

If the use has not been excluded by the above steps, it is unlikely to be excluded by this step.

This step requires the use to be for a defined purpose.

Conclusion: S.200AB may be available for these kinds of uses, depending on the factors outlined above.

Example 4: An archive wishes to preserve a collection of posters from the film and sound industries selected from across the collection. In addition to making high resolution digital preservation copies, the archive also seeks to make low resolution digital browsing copies for access purposes and to reduce the risk of corruption of the high resolution digital preservation.

Step 1: The use must not fall within another specific exception or statutory licence under the Act

If there are no other exceptions applicable, s. 200AB will not be excluded.

In relation to the high resolution digital preservation copies, these will be able to be made under the preservation provisions as long as the relevant works are not able to be obtained 'within a reasonable time at an ordinary commercial price' (s 51B). The copies may also be able to be made under section 51A(2) for administrative purposes. On this basis, there would be other provisions which would allow the preservation of the collection and s.200AB would be excluded.

However, in relation to the low resolution digital browsing copies for access purposes, s.200AB will not be excluded.

Institutions should also consider (if their institution is a 'Crown body') whether their use is 'for the services of the Crown' under section 183.

Step 2: You must not circumvent a TPM in order to make the use

Technological protection measures (TPMs) don't apply to hard copy posters so s. 200AB will not be excluded.

Step 3: You must be making the use on behalf of a library or archive for the purpose of maintaining the library or archive

The uses (making access copies) would fall within the reasonable services or activities of the library or archive. Therefore, s 200AB will not be excluded.

Step 4: The use must not be for commercial advantage or profit;

Uses for the purposes of making access copies are unlikely to be for commercial advantage or profit.

Step 5: The use must not 'conflict with the normal exploitation of the work'

A weighing-up and assessment of the following factors in relation to each use will assist Cultural Institutions to determine whether s.200AB may be available or whether s.200AB will be excluded:

- Whether there is a readily available licence for making each use (which indicates the existence of a market for that use);
- In relation to each use, (making a work available to the public on the internet) whether that use would ordinarily be a way that the copyright owner would make money from their work. This may depend on the nature of the work in each instance;
- The use may deprive the copyright owner of significant revenue if there is a readily available licence for the use or if the copyright owner ordinarily licences such uses;
- The use is likely to be separate and distinct from the way that the copyright owner usually exploits the work;
- The use is likely to enhance the copyright owner's use by promoting the copyright owner's work;

Whether s.200AB will be excluded or not under this step will depend upon a balancing of the above factors in relation to each use. If a licence is readily available from the copyright owner, a use may be excluded from s. 200AB by this step. On the other hand, if there is no readily

available licence, it is unlikely that s.200AB will be excluded. The risk of using s.200AB in relation to these uses may differ depending on the nature of the particular works in question.

Step 6: The use must not 'unreasonably prejudice the legitimate interests of the owner of copyright'

An assessment of the following factors will assist Cultural Institutions to determine whether s.200AB may be available in relation to each use or whether s.200AB will be excluded:

- Each use is for a specific purpose. Whether a use can be said to be for a 'limited purpose' may depend on whether appropriate measures have been taken to ensure that the work in question is not exposed to an unreasonable risk of misuse (see below);
- The amount and nature of the material taken in relation to each use is appropriate in light of the nature of the copyright work and of the use (the amount reflects what will be required for the purpose of the use);
- Each use takes into account and respects any cultural sensitivities that may exist in relation to the nature of the material;
- In making each use, you have complied with the moral rights requirements of the *Copyright Act 1968*;
- The Institution has taken reasonable steps to ensure each item is not exposed to unreasonable risk of misuse. This will be a key factor under this step where institutions are seeking to make works available on the Internet. The nature of those steps will depend on the nature of each work that is being made available. Examples of ways that may minimise misuse may include; making items available in a low resolution format; making only a part of an item available; making an item available with legal or technological restrictions; or making an item (or the collection) available with an accompanying notice to potential copyright owners in relation to the institution's take-down procedures.

Whether such uses would be available under s. 200AB would need to be assessed on a case-by-case basis and would depend on the nature of the work, whether a licence is available for the use and whether appropriate steps have been taken to minimise risk of misuse of the work.

Step 7: The use must be a 'special case'

If the uses in relation to the collection have not been excluded by the above steps, they are unlikely to be excluded by this step.

This step requires the use to be for a defined purpose.

Conclusion: While each use should be assessed on a case-by-case basis, s 200AB is likely to be available for these kinds of uses. However, institutions should note that, where they are making a number of uses under s. 200AB (for example, because they are making access copies of several works, or because they would like to make several copyright uses in relation to those works), they will need to consider the application of s 200AB on a case-by-case basis, in accordance with their Institution's risk mitigation strategy.

K: Inspection of records and declarations retained by libraries, archives or institutions

Some of the copying powers given to collecting institutions in the Act, require an authorised officer or some other person to make a declaration as to belief or purpose or some other matter required by the legislation. Clearly there is a public interest to ensure that these exceptional incursions into private property rights are not treated lightly. For this reason, the copyright owner may demand to inspect all of the declarations that relate to the making of copies in reliance on section 49, 50, 51A or 110B²⁶² and in some cases may even have the right to inspect the collection.²⁶³

These declarations are important matters and there are a number of potential offences attached to misbehaviour in this regard. For example, it is an offence:

- if the declaration is not kept in the records of the institution;
- if the officer in charge of the institution does not take all reasonable precautions, and exercise due diligence, to ensure that the person inspecting the records is provided with all reasonable facilities and assistance for the effective exercise of the inspection powers;²⁶⁴
- if the declarations are not kept in chronological order;²⁶⁵
- if the declarations are destroyed or disposed of before the date prescribed by the Regulations;²⁶⁶
- if the copy required to be made contains a notation that is false or misleading in a material particular.²⁶⁷

L: Some concluding comments

The way that the Act deals with the needs of collecting institutions cannot make any lawyer proud. There is no apparent overarching scheme to the rights given to the institutions and little apparent effort to organise or draft the legislation in a manner that promotes access and understanding. The language of the drafting is obtuse; the structure of the provisions and their interrelationship is medieval. The mechanisms provided do not take sufficient account of the real copying needs within collecting institutions,²⁶⁸ mechanisms that would respect the balancing of public interests that attaches to any exception to the exclusive rights of copyright.

It is likely that only the largest and best-resourced collecting institutions can comply with any degree of reliability on the 'libraries and archives' exceptions. While it is readily acknowledged that any incursion into the exclusive rights of copyright owners should be carefully considered, the administrative requirements are complex, slow and resource heavy. (For ten points, can anyone answer the following question: Which procedures require authorisation by an 'authorized officer', the 'officer in charge' and 'the body administering

library or archives'? As a supplementary question, 'Can the officer in charge or the body administering the library or archives' delegate that responsibility to an authorised officer?)

The new s 200AB, the great hope of the collections community, is no exception. The paper developed by Minters and reproduced above, demonstrates that even fine legal minds cannot simplify the supposed panacea provided by that provision. Its operation was apparently designed as part of *The Glass Bead Game*; its wording is compliant with all international treaty obligations but unhelpful to those who must apply it. Nevertheless, it is what we've got. It may be a dog with only three legs – but it is OUR dog. So, until it is mercifully put to sleep, we must learn to love it.

26.10 DEALING WITH COPYRIGHT

Introduction

Copyright is personal property. It can be sold, licensed, or even left in one's will. Almost all of the statutory provisions as to the ownership of copyright are all subject to variation by contract. The most common methods are discussed in this section.

It is basic to the whole understanding of dealing with copyright that copyright is distinct from the material in which it subsists. The material and the copyright in it are distinct assets. Many amateur collectors believe that when they acquire a thing, they also acquire the copyright in it. The trap in this for collecting institutions is that when they acquire material they are often told wrong information about the copyright status of the material being acquired. Honestly mistaken vendors and donors purport to pass copyright to the institution when they are not owners of those rights. The consequent dangers for the institution are obvious.

There are two basic kinds of copyright transaction: licences and assignments.

Assignments

When you assign a right, the whole legal ownership and control of that right passes to the other party. It is like selling that right.

To be legally effective, an assignment must be in writing. You cannot assign copyright unless it is in writing. That writing must be signed by the copyright owner or the copyright owner's representative. Nothing less will do.²⁶⁹

It is not necessary to assign the whole copyright. Think of an onion. You can sell the whole onion or you can peel off various layers and treat them separately. For example, assignments are frequently limited to:

- one or more of the exclusive rights of copyright or part of them;
- a specified territory; or

- a specific length of time.

Until only couple of decades ago, public galleries acquiring work tended to adopt a rather heavy hand and often used their considerable power to acquire assignments of copyright when acquiring the work itself. For many years it was common gallery practice for all acquisition contracts with artists to contain a clause by which the artist was required to assign the copyright at the same time as the work itself was purchased.

Three changes have meant that collecting organisations are quite capable of fulfilling their needs by means of licences:

- Copyright owners have become more aware of their rights and in particular the value of their copyrights. In this the age of merchandising, the subsidiary rights have become often more valuable than the traditional property rights.
- The skill and professionalism of collection managers has grown.
- Computer technology allows the creation of readily accessible systems that readily provide the copyright status of any particular material in the collection.

Licensing the rights

When you give a licence, you give the other person permission to use the right in a particular way but always retain ownership and potentially, a certain control over the right.

Licensing is huge business. Almost every sector of commerce is reliant on it. Art and design is a fundamental component of all advertising, merchandising, marketing, corporate image making and communication media. Now that the commercial value of these rights is an everyday part of business, both licensors and licensees have become more commercially sophisticated in their copyright dealings. In particular, owners are recognising that licences should be limited to those rights that are really necessary for the licensee's commercial or other purposes.

There are several advantages to licensing:

- It has nothing to do with the ownership of the work itself. You can license its reproduction and publication long without having to own (or sell) the original.
- It provides an on-going source of income for the copyright owner – irrespective of ownership of the material to which it relates.
- You remain the owner of the copyright. When you grant a licence you are permitting someone else to use the right but you retain ownership and thus control over that right. Because of this tighter control, licences are a much safer way to deal with your copyright.

- You can sculpt the ambit of the licence to suit your needs and those of the licensee. As you will see from the checklists that follow, a licence allows you to articulate the rights that you grant in a very precise way.

The layers of rights that can be granted by licence are extraordinarily divisible. Think onion again. Accordingly, if you are the rights owner good business demands that you ensure that any licence you grant is limited to the real needs of the licensee. As for licensees, good practice requires that they seek only the rights that are needed for their purpose: it is generally easy to obtain a licence when the uses are spelled out and the rights owner can see that the intended use is reasonable.

Formalities

No particular form is required for a **non-exclusive** licence. Non-exclusive licences can be verbal, in writing, or partly verbal and partly in writing. In contrast, **exclusive** licences must be in writing, signed by the 'licensor' (the one granting the licence) or their agent.

If a licence that purports to be exclusive does not fulfil the above formal requirements, it does not mean that no licence has been granted: it will simply be treated as a non-exclusive licence.

That said, when dealing with copyright, either as an owner or a licensee, it is not sensible or prudent practice to deal with such valuable property except by formal documentation.

Licensing Checklist

The following checklist will be of assistance in determining whether the licence being sought is appropriate for the circumstances.

Parties involved	Who is the contract between? Who is the grantor and who is the grantee? Although it may seem obvious, in an era of complex legal structures, it is sometimes not as easy as it seems. ²⁷⁰
Works involved	What work(s) are included in the transaction? Include an attachment or schedule showing what works are part of the deal.
Rights	What rights are being granted? What parts of the 'bundle of rights' are included in the agreement? Is it to include all of the rights of copyright or only some of them?
Duration	For how long are the rights to be granted? You can license copyright for a set number of years or by other criteria such as a set number of

	copies.
Uses	What uses does the party using the rights need? What uses will the owner permit?
Exclusivity	The grant of rights may be exclusive or non-exclusive. Even where they are 'exclusive', the extent of that exclusivity can be limited. The owner can grant exclusive rights to different people for different uses in the same territory.
Territory	You can license someone the right to use your rights in a particular territory, but retain the rights in other territories. If you are licensing rights to make merchandise for an exhibition or for inclusion of a work in an exhibition catalogue, you may only need them for your State or Territory. However if the exhibition is going to tour inter-state, the territory of the agreement will need to take that into account.
Creative control	What changes to your work are you going to permit? What degree of control will the owner retain? Who may approve changes? Who will own the changes?
Quality control	These provisions are particularly important. A prudent owner will include extensive quality approval and maintenance procedures to ensure that the value of the rights is not diminished by inferior quality reproductions.
Payment	How will the copyright owner be paid: With an up-front fee or by royalties or a mixture of both? This will be largely determined by the type of deal and the relative bargaining power of the parties. Also, will the validity of the licence be dependent on actual payment.
Obligations and guarantees	What obligations and guarantees are the parties offering each other?
Accounting and inspection	How can the copyright owner check that they are being paid the right amount? Where royalties are involved, agreed audit powers and procedures are essential.
Sub-licences	Can the grantee sub-license the rights to anyone else? How is the owner protected in respect of sub-licensee behaviour that might

	damage the value of the rights?
Enforcement	The owner will require provisions to protect their rights from infringement. Some exclusive licensees will also require such rights to ensure that they are getting the benefit of their promised exclusivity. Who will pay the legal costs? Who may 'settle' a dispute if it goes to court? How will damages and costs be split?
Termination	What are there circumstances in which the contract can be terminated? If these circumstances arise, will termination be automatic or will there be a notice procedure to provide the opportunity to remedy the default.
Disputes	How will you settle disputes? Is there a mechanism in the contract that makes the parties undergo mediation or arbitration of a dispute that cannot be resolved by negotiation? This is a standard provision in modern licence agreements.

Remuneration

Copyright is a valuable thing. It should be paid for. There are three basic ways to structure the remuneration: an outright fee; a royalty; a fee and a royalty.

21. FEE

The outright fee is the easiest but has its drawbacks. The biggest disadvantage of the straight fee is that no one can really know at the outset of a transaction how much the rights are worth. For example, the value of the right to reproduce photographs in a book will vary wildly depending on the likely sales of the book. On the other hand, when dealing with licensees who are perhaps unknown quantities or whose intended use will be hard to audit, it may be better to adopt an outright fee rather than take the risk of getting a percentage of nothing.

22. ROYALTY

A royalty is a common method of profit participation. If one makes money, both make money. However it works only so long as the person doing the arithmetic can be trusted and the arithmetic can be checked. Thus, t-shirt distributors are notorious for their rubbery sums whereas most large publishing companies have accountants who can add up and have methods of accounting that are easily subjected to audit.

It need hardly be said that when dealing with royalties one should always be suspicious of royalties based on the net income. In such deals the definition of 'net' is always highly

negotiated. It is much easier to calculate royalties on the gross income. The point is commercial rather than legal but many people have gone broke on fifty per cent of net when they would have made a fortune out of twelve per cent of gross.

23. ADVANCE

Often a licensor will demand an advance. An advance differs from a fee in that it is a pre-payment of royalties. The amount of the advance is paid up-front and then recouped from the royalties that would otherwise be payable. An advance may be either 'repayable' or 'recoupable but not repayable'. With the former, if the advance is greater than the royalty income payable during the term of the deal, the difference has to be repaid. With the latter, the advance is only repaid through royalty income. Most advances are not repayable but are fully recoupable.

24. FEE PLUS ROYALTY

Increasingly common is the payment of a fee plus a royalty. In this way the copyright owner gets an upfront fee for the usage and a royalty on the proceeds. Here, the questions are two-fold:

- Is the fee **repayable** in any circumstances?
- Is the fee **recoupable**? (In other words, is it really merely an advance against future royalties?) There is nothing wrong with this, but the answer is important for the purpose of working out whether or not the deal is a fair one.

On-line licensing and creative commons

As the Internet developed into a major communication and business medium it became clear that new contractual approaches needed to be explored. There was no longer any real opportunity to negotiate individual contracts. The one with something to sell was dealing with the many – global, not local; largely anonymous; often unknown, except by an email or internet protocol (IP) address. On-line, the relationship between vendors and purchasers was hugely different from that in the atom-based world.

This meant that new ways of entering contracts had to be developed so that on-line commerce could develop and mature within the boundaries of the legal system – for without that, no vendor and no purchaser could trade with equanimity, let alone make the enormous investments that were required by this new market-place. Although it is almost unbelievable for those who were born in the compact disc (CD) generation, the Internet was an interesting but nerdy place until the development of easy to use search engines in the mid-1990s stimulated and permitted the role of the Internet to change from a military and academic communication network to the modern equivalent of the Roman forum: the meeting place; a centre for commerce, news, discussion, politics, sex, deceit and truth.

Lawyers had to develop new ways of contracting. It was no longer reasonable to expect the contracting parties to meet or even personally communicate. A whole new way of entering formal agreements had to be found.

The most ubiquitous and dominant of these is the click-through contract. The law presumes that one has read and understood the contents of any agreement to which one agrees to be bound. Given this, the question became, as we don't have handwritten signatures on-line, how can one party establish that the other has read and agreed to the terms of the deal offered? Nowadays, we are all used to the 'agree' and 'decline' buttons and press them without a moment's thought. When did you last read the terms before pressing the 'agree' button? If you do venture into that lonely land you will discover a long document, full of legal terms that protect only the interests of the offeror. Would Facebook have become so successful if people had actually read and understood the contractual terms of membership before pressing the 'agree' button?

For some years there was legal discussion as to the validity of the 'click button' form of entering an agreement but it is now quite settled that pressing the 'agree' button is legally akin to signing your consent with a pen. It is acceptance by conduct and that acceptance is communicated to the offeror. Provided that the offeror can prove the identity of the contracting party, it can enforce the agreement.

All of this may seem tangential to copyright licensing but it is not. When you put a digital asset on-line (whether it is a photograph, video, music, article, book or blog) you are making it possible for an indeterminable number of unidentified people to make unrestricted numbers and types of uses, of the asset. This is fabulous if you are old enough to have once argued the toss between the Maoists and the Trotskyists, or young enough to remember The Spice Girls fondly. The two demographics (with little else in common) share a belief in the socialisation of private digital assets. Groups such as the Electronic Frontier may have argued for a new world in which the laws of the old world did not apply to the new on-line world but the younger demographic didn't care about the philosophy – they just did it. File sharing and unauthorised appropriation became a part of everyday life.

This created a challenge for the owners of copyright material: How could they protect their investment in the creation and promotion of digital assets? Further, how could owners permit the distribution of their assets in accordance with the purposes for which they had been created? This is where the interests of, say a record company, diverge from those of a collecting institution. For one, the primary purpose is commercial; for the other, the primary purpose is public access. One is measured in corporate profit and the other, by the effectiveness of the public educational initiative. They are both valid and defensible. It is a question of what use the owner wishes to make of its asset.

The Creative Commons approach is one that recognises that some owners wish to make their content available to as many people as possible while at the same time imposing simple restrictions on subsequent use.

Creative Commons and collecting institutions

Many institutions use some form of Creative Commons licensing in respect of their on-line collections. There are many advocates of Creative Commons who see it as a way of avoiding the complexities of copyright. This is a false hope. Put at its simplest, Creative Commons is a 'low-doc' system of copyright notification and licensing. It works within the copyright system rather than being an alternative to it. It provides those who own rights to grant licences and those who wish to use those rights, the ability to enter licences without the need to enter individual negotiations. The copyright position of the material stated, the permitted uses and contractual terms are spelled out and the user can either take it or leave it.

In a standard copyright licence, one of the most important sections will be as to enforcement and sanction. What happens if the licensor breaches the terms of the licence? With a Creative Commons licence what must be remembered is that once granted, the use granted is without supervision and can include only minimal sanction. An institution that adopts this approach should make sure that it reviews very carefully the standard agreements that it adopts when implementing the Creative Commons approach. All of the standard agreements currently available need considerable amendment before use by collecting institutions. No institution would be prudent if it left the control of the asset to such a basic agreement.

Although no institution will offer unlimited use of the on-line asset, it should reinforce the agreement by using technological protections that will inhibit unauthorised uses. The most common protections are to ensure that images be put on-line only if they are in a resolution that is too low for commercial re-use and to convert literary material into a PDF format. These are somewhat primitive precautions and do not prevent copyright infringement – they merely reduce them.

Creative Commons is really only relevant to collecting institutions in respect of their public access programs. When it comes to the commercial or inter-institutional licensing, an institution cannot prudently rely on such a simplistic approach. Where it is important to control the period, nature and quality of the use, to protect important features of the material and to safeguard the reputation of the institution, it is essential that the institution use a formal, fully articulated licence. Creative Commons licensing has no place in the granting of licences for merchandising, reproduction of catalogue images and text, and all of those other uses where the owner wishes to control the value of their copyright asset.

25. THE OPENING AUSTRALIAN ARCHIVES PROJECT

Opening Australian Archives: Open Access Principles for Australian Collecting Institutions is a project of the Australian Research Council (ARC) Centre of Excellence for Creative Industries and at [Queensland University of Technology](#).²⁷¹ Although the website states that its content is only in draft form, it is essential reading for any collecting institution that is undertaking any on-line copyright licensing regime. It provides advice that is both prudent and practical. It also provides an interesting selection of brief case studies from local, national and international institutions.

Thanks to this project – and its availability on-line – there is no need to reinvent the wheel here.

Intellectual property (IP) licence checklist

The following checklist sets out the issues that you might need to consider when entering a licence agreement involving copyright. The contract itself will not contain all of these issues – it is an *aide de memoire* for drafting or examining a licence agreement.

INTELLECTUAL PROPERTY LICENCE CHECKLIST

	Issues	Comments
1.	Licensor <ul style="list-style-type: none"> Name of entity granting the licence ACN Address of registered office 	<p>Who is the contract between? Who is the grantor and who is the grantee? Although it may seem obvious, in an era of complex legal structures, it is sometimes not as easy as it seems.</p> <p>Is the licensor actually the rights owner? Or is it acting as an agent or other kind of representative?</p>
2.	Rights owner	
3.	Licensee <ul style="list-style-type: none"> Name of entity taking the licence ACN Address of registered office 	
4.	Material to be licensed <ul style="list-style-type: none"> Artistic work, literary work, song, recording, film/video/program; data, software, etc. Describe the characteristics of the licensed subject matter: [title, description, dimensions, bytes, pages, words, minutes, application]. 	<p>What material is the subject of the licence? Include an attachment or schedule describing each work or object and specify any limitations as to how much of it can be used.</p>
5.	Rights licensed? <ul style="list-style-type: none"> Purpose for which rights are granted Which rights are granted? Which rights are reserved? Can the licensee grant sub-licences? 	<p>What uses does the party using the rights need? What uses will the owner permit?</p> <p>What rights are being granted? What parts of the 'bundle of rights' are included in the agreement? Is</p>

	<ul style="list-style-type: none"> Quality control and approval procedures (restrictions on alteration/modification)? 	it to include all of the rights of copyright or only some of them?
6.	<p>Manufacture and distribution</p> <ul style="list-style-type: none"> Specified or approved manufacturer? Specified or approved distributor? 	In commercialisation agreements it can be an important part of quality control and audit control to agree on a specified manufacturer and/or distributor. They must be proven to be reliable both as to quality and accounting.
7.	<p>Permitted uses</p> <ul style="list-style-type: none"> What specific uses can be made of the subject matter? Facsimile reproduction or digitisation? Adaptation, manipulation, enhancement? Merger with other materials or data (producing derivative material)? <ul style="list-style-type: none"> Who owns rights in merged/derivative material? 	<p>Limiting the use to specified purposes is basic. No licensee should grant the right to use IP without clearly defining the authorised purpose. Some are clearly more dangerous to the IP than others, particularly where they include facsimile reproduction or digitisation.</p> <p>If the owner's material is to be merged with other material, who will own the compilation? What control will the owner retain?</p>
8.	<p>Type of licence:</p> <ul style="list-style-type: none"> Exclusive? Sole? Right to sub-license? 	The grant of rights may be exclusive or non-exclusive. Even where rights are 'exclusive', the extent of that exclusivity can be limited. The owner can grant exclusive rights to different people for different uses in the same territory.
9.	<p>Is the licence limited in application?</p> <ul style="list-style-type: none"> Particular class of users/consumers? 	

	<ul style="list-style-type: none"> • Time? • Industry? • Materials? 	
10.	<p>Territory</p>	<p>You can license someone the right to use your rights in a particular territory, but retain the rights in other territories. If you are licensing rights to make merchandise for an exhibition or for inclusion of a work in an exhibition catalogue, you may only need them for your state or territory. However if the exhibition is going to tour interstate, the territory of the agreement will need to take that into account.</p>
11.	<p><i>Term</i></p> <ul style="list-style-type: none"> • Commencement date? • Period? 	<p>For how long are the rights to be granted? You can license copyright for a set number of years or it can be controlled by other triggers, for example, a specified number of uses.</p>
12.	<p>Option to renew</p> <ul style="list-style-type: none"> • Performance triggers? • Consent? • Notice? • Period? • Number of options? 	<p>Given that most licences are for a limited period, what is the mechanism for extending that period Is there an automatic roll-over if certain success criteria are met? Will it be extended if roll-over unless notice of termination is given? Does it just drop dead at the end of the licence period? There are any number of</p>

		possibilities that may be negotiated.
13.	Registration <ul style="list-style-type: none"> • Design registration [where artistic work being industrially applied]: • Trademark registration? • Who pays for lodgement? • Who prepares forms? 	This one to worry about if you are involved in brand commercialisation or merchandising. Registration of designs and trademarks is an important and overlooked aspect of IP administration in collecting organisations.
14.	Changes, improvements and developments <ul style="list-style-type: none"> • Is any change permitted and, if so, are any approvals required? • Ownership of improvements to licensed material by licensee? • Obligation of licensor to provide updates? 	What changes to your work are you going to permit? What degree of control will the owner retain? Who may approve changes? Who will own the changes? If the licensor improves the subject matter, will it provide the improvements to the licensee?
15.	<i>Quality control</i> <ul style="list-style-type: none"> • Samples and approval mechanisms? • Number of samples? • Date of delivery to licensor – pre-production? • Communications? 	These provisions are particularly important. A prudent owner will include extensive quality approval and maintenance procedures to ensure that that the value of the rights is not diminished by inferior quality reproduction.
16.	<i>Training</i> <ul style="list-style-type: none"> • Is the licensor to provide training? 	Perhaps most important where any kind of 'know-how' or software is being licensed but also relevant more generally.
17.	<i>Accreditation</i> <ul style="list-style-type: none"> • Wording? • When (each use, advertising etc)? 	Not common but important where the licensee is being permitted to use the name of the institution in training or consultancies.

18.	<p><i>Delivery of materials by licensor</i></p> <ul style="list-style-type: none"> • What must be supplied? • By what date? 	
19.	<p style="text-align: center;">Money</p> <ul style="list-style-type: none"> • Royalties? <ul style="list-style-type: none"> ○ Fee upon receipt of each design? ○ Fee per article sold/manufactured for _____ number? ○ Fee per article sold/manufactured for more than _____ number? ○ Outside Australia? ○ Basis of calculation? <ul style="list-style-type: none"> • Licensee's net/gross income? • Exclusions? • Flat fee? <ul style="list-style-type: none"> ○ Amount? ○ Other? (For example, flat fee per hour of use) • Commission? • Percentage of anticipated earnings? • Increase if option to renew exercised? 	<p>How will the copyright owner be paid: With an up-front fee or by royalties or a mixture of both? This will be largely determined by the type of deal and the relative bargaining power of the parties.</p>

	<ul style="list-style-type: none"> • Payment schedule (dates)? <ul style="list-style-type: none"> ○ Flat fee: <ul style="list-style-type: none"> • \$..... upon (delivery, draft or final)? • number to be produced? • fee for further produced? • number to be further produced? ○ Advance and royalty? 	
20.	<p>Accounting</p> <ul style="list-style-type: none"> ▪ Period of accounting ▪ Details to be provided: <ul style="list-style-type: none"> ▪ number manufactured ▪ number sold ▪ price per article ▪ territory sold to ▪ amount owing to artist ▪ money (and like matters) • Statement to include cheque • Licensor to have access to records and books • Frequency of statements • Review upon sales performance • Interest upon arrears 	<p>How can the copyright owner check that they are being paid the right amount? Where royalties are involved, agreed audit powers and procedures are essential.</p>

	<ul style="list-style-type: none"> • Audit rights 	
21.	<p>Enforcement and termination</p> <ul style="list-style-type: none"> • Unilateral/bilateral? • Written notice • Failure to perform <ul style="list-style-type: none"> ○ Non-payment ○ Late payment after sufficient notice ○ Bankruptcy, winding up, scheme of arrangement, judgment debt, criminal conviction • Quality of product • Cessation of production • Return of materials, original, copies, records • Removal of accreditation • Reversion of rights to licensor • Breach: limitation of remedies 	<p>What are there circumstances in which the contact can be terminated?</p> <p>The owner will require provisions to protect their rights from infringement. Some exclusive licensees will also require such rights to ensure that they are getting the benefit of their promised exclusivity. Who will pay the legal costs? Who may 'settle' a dispute if it goes to court? How will damages and costs be split?</p>
22.	<p><i>Alternatives to termination</i></p> <ul style="list-style-type: none"> • Alter to non-exclusive licence • Alter agreement 	

23.	Actions to occur upon termination <ul style="list-style-type: none"> • Time to dispose of stock • Time to account to licensor • Time to return licensor's materials 	
24.	<i>Dispute resolution</i> <ul style="list-style-type: none"> • Mediation • Arbitration • Appointment of arbitrator(s) 	<p>How will you settle disputes? Is there a mechanism in the contract that makes the parties undergo mediation or arbitration of a dispute that cannot be resolved by negotiation? This is a standard provision in modern licence agreements</p>
25.	Governing law or jurisdiction	<p>The law of the contract is usually the law of the licensor – but reality also plays its part. The biggest gorilla has the most power.</p>
26.	<i>Warranties</i> <ul style="list-style-type: none"> • Ownership of rights • Quality • Return of materials • Originality of work 	<p>These set out basic obligations, without which the parties would not proceed.</p>
27.	Licensee's right to sub-license? <ul style="list-style-type: none"> • Consent required? • Limits to the length of term of any sub-licence? 	<p>Is the licensee allowed to grant rights to others? If so, who and what for? How is the owner protected against sub-licensee behaviour that might damage the value of the rights?</p>
28.	Indemnity	<p>Does each party indemnify the other in the event that any of the</p>

		promises it makes are broken? These are as complex as they are important.
29.	Third party infringement <ul style="list-style-type: none"> • Licensee right to initiate proceedings • Who pays costs? • Who retains solicitors? • Warranty to assist in infringement proceedings 	Where the licensor is granting exclusive rights and this exclusivity is breached by a third party, ²⁷² what is the procedure? Does the owner have to act to shore up its promise of exclusivity? Can the licensee sue in the owner's name? Who pays?
30.	Confidential Information / Privacy	Is any part of the deal commercial in confidence? Is it subject to FOI?
31.	Taxation considerations: <ul style="list-style-type: none"> • Is the licence a taxable supply for GST? • Other tax considerations? 	

26.11 REMEDIES

The rights conferred by the Act are exclusive. They can be enforced by their owner, or where appropriate, the owner's assignee or the exclusive licensee. Determining which remedies are available and the legal and strategic reasons for adopting one over another, is a complex matter that requires experienced legal advice in each individual case. The following brief outline is to give you some basic information before meeting with your organisation's litigators.

Remedies for breach of copyright

26. INJUNCTION

This is an order of the court forbidding the threatened infringement or the continued infringement of a copyright. For example, the court may issue an injunction preventing the sale of items such as printed t-shirts that the copyright owner alleges reproduce their work without permission. An injunction can be issued even where there has not been a final decision by the court as to whether copyright has been infringed, though in this situation the

copyright owner may have to give an undertaking to compensate the defendant if their case is unsuccessful. It can be obtained quickly and should be sought as soon as an ongoing infringement or threatened infringement is discovered.²⁷³

27. DAMAGES

In addition to an injunction, the court may award damages to compensate the copyright owner for the loss suffered because of the defendant's infringement.²⁷⁴ The court may also award additional damages when it sees fit; for example, when the infringement is flagrant, vexatious, or perhaps causes severe mental or emotional stress.²⁷⁵

28. ACCOUNT OF PROFITS

This remedy does not seek to compensate the copyright owner for loss suffered, but rather, requires the defendant to reveal how much money was derived from the breach and, where appropriate, pay those profits to the rightful copyright owner. (Note that you can either seek damages **or** an account of profits – but not both. The decision is of vital strategic significance in copyright cases.)

29. CONVERSION OR DETINUE

While the remedy of damages is designed to compensate the owner for the infringement of an exclusive right, conversion and detinue are old procedures by which the owner receives damages for the loss of the infringing copies already disposed of and, more importantly, delivery up of the remaining copies.²⁷⁶ For example, if the artistic work has been reproduced on a range of clothing (as had happened in Bronwyn Bancroft's Federal Court case against Dolina Fashions) the law says that the infringing copies (such as the dresses) are the property of the copyright owner whose rights have been breached. In that case, the company had to pay the artist an account of profits and hand over all garments that bore the artist's designs.

30. ANTON PILLAR ORDERS

Anton Pillar orders provide the copyright owner with a power to enter the premises of a person who is suspected of being a copyright pirate, to search for, and take possession of infringing material. It can even extend to forcing the subject to reveal other relevant information such as the whereabouts of stock or printing plates or the names and addresses of other people who have been involved.

These orders are granted only in limited circumstances, usually when there is a real fear that evidence will be disposed of or destroyed.²⁷⁷ These are not just Rambo-like raids; the Courts put very firm restrictions on the parties' behaviour during the raid and require that the lawyers provide written reports after the event. Because they amount to a non-police raid of private

property, these orders are not easy to get but they are often the only way of nailing copyright pirates who are working on a large scale.

Another version of the Anton Pillar order is referred to as the John Doe Order. In this case, the plaintiff doesn't know the exact names of the pirates and hence the reference to the legal fictional person, John Doe). This is used mainly in situations where you can be sure that there will be copyright bootleggers but cannot reasonably be expected to know who they are.²⁷⁸ This is often the case, for example, at popular music concerts where pirate merchandisers are hugely organised and follow the stars on tour, from date to date and country to country. In such cases the court is may grant an order permitting the seizure of contraband merchandise such as t-shirts, caps, posters and badges from unspecified vendors, and requiring these vendors to give details about how the illegal merchandise had been acquired. These are strong remedies but are difficult to obtain. They are expensive and are only suitable where the dollar value of the piracy is high.

Remedies for breaches of moral rights

Given the respect that almost all collecting institutions have for the moral rights, these remedies require only brief mention.

The breach of moral rights is not a criminal offence but it gives the owner of the moral rights the power to bring an action against the wrongdoer. In a case for an infringement of any of an author's moral rights in a work, the applicant may seek any or all the following remedies:

- (a) an injunction;
- (b) damages for loss resulting from the infringement;
- (c) a declaration that a moral right of the author has been infringed;
- (d) an order that the defendant make a public apology for the infringement;
- (e) an order that any false attribution of authorship, or derogatory treatment, of the work be removed or reversed.²⁷⁹

It is worth noting that in exercising its discretion as to the appropriate relief to be granted, the court may take into account any of the following:

- (a) whether the defendant was aware, or ought reasonably to have been aware, of the author's moral rights;
- (b) the effect on the author's honour or reputation resulting from any damage to the work;
- (c) the number, and categories, of people who have seen or heard the work;
- (d) anything done by the defendant to mitigate the effects of the infringement;

- (e) if the moral right that was infringed was a right of attribution of authorship - any cost or difficulty that would have been associated with identifying the author;
- (f) any cost or difficulty in removing or reversing any false attribution of authorship, or derogatory treatment, of the work.²⁸⁰

It is easy to recognise how each of these matters can have special significance in the contest of collecting institutions.

Remedies for infringements of performer's moral rights

A performer has moral rights in respect of a live performance or recorded performance. Where those rights are breached they may seek any one or more of the following remedies from the court:

- (a) an injunction (subject to any terms that the court thinks fit);
- (b) damages for loss resulting from the infringement;
- (c) a declaration that a moral right of the performer has been infringed;
- (d) an order that the defendant make a public apology for the infringement;
- (e) an order that any false attribution of performership, or derogatory treatment, of the performance be removed or reversed.²⁸¹

In exercising its discretion as to what relief would be appropriate, the court may take into account any of the following:

- (a) whether the defendant was aware, or ought reasonably to have been aware, of the performer's moral rights;
- (b) the effect on the performer's reputation resulting from any damage to the performance;
- (c) the number, and categories, of people who have heard the performance;
- (d) anything done by the defendant to mitigate the effects of the infringement;
- (e) if the moral right that was infringed was a right of attribution of performership—any cost or difficulty that would have been associated with identifying the performer;
- (f) any cost or difficulty in removing or reversing any false attribution of performership, or derogatory treatment, of the performance.²⁸²

ENDNOTES

- ¹ The development of freedom of information legislation certainly promoted this change in philosophy.
- ² In 1999, the Copyright Law Review Committee published Part 2 of its report *Simplification of the Copyright Act 1968 (Categorisation of Subject Matter and Exclusive Rights and Other Issues)*. Part 1 (*Exceptions to the Exclusive Rights of Copyright Owners*) was published in September 1998. The recommendations of the Committee are unlikely to be implemented. For a discussion of the report, see Andrew Christie, 'Simplifying Australian Copyright Law' (2000) 11(1) *AIPJ* 40–62.
- ³ References to specific sections in this chapter are from the *Copyright Act 1968* (Cth), unless otherwise stated.
- ⁴ In the law of copyright, all creators, not just writers, are referred to as 'authors'.
- ⁵ The lyrics for a song are protected as a literary work. Computer programs are deemed 'literary works'.
- ⁶ *Copyright Act 1905* (Cth).
- ⁷ *Copyright Act 1911* (UK).
- ⁸ This was the effect of s.4 of the Statute of Westminster; *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597.
- ⁹ *Copyright Act 1968* (Cth).
- ¹⁰ That is an Australian citizen, resident or company.
- ¹¹ For example, © Simpson 2007.
- ¹² For this reason it is often difficult, time consuming and expensive to work out the copyright status of US material. It is important to note that where a work is out of copyright in its country of origin (say, it was not registered or registration has expired in the US), it may still be protected in Australia. Under our treaty obligations we are obliged to treat works as though they were our own – notwithstanding that their home country does not protect them.
- ¹³ In sections 126-130 of the *Copyright Act 1968* (Cth) there are a number of presumptions as to subsistence, ownership and authorship that may be relevant in the event on civil proceedings.
- ¹⁴ Section 32.
- ¹⁵ The word 'work' is used in its technical sense and refers to an artistic, musical, literary or dramatic work.
- ¹⁶ This is almost a truism in the copyright world. It is a leitmotif in many cases. Many readers will be familiar with the Telstra's advertisement for *Yellow Pages* in which a man is trying to locate parts for his 1954 Goggomobile. In his Scottish brogue he has to spell out 'G-O-G-G-O ...' It became an advertising icon. When Shannons used the same actor using the same famous phrase: 'G-O-G-G-O ...' to advertise car insurance, Telstra sued. There was no liability for taking the idea and the phrase was not sufficiently substantial to amount to a literary work. It was not a reproduction – merely an evocation of the original script. Telstra lost on the copyright claim but won on its claim under the *Trade Practices Act 1974* (Cth): *Telstra Corp v Royal & Sun Alliance Insurance Australia* [2003] FCA 786; see also Nathan Archibald, *Case Note: Telstra Corp v Royal & Sun Alliance Insurance Australia* (2004) 9 *Media & Arts Law Review* 83.
- ¹⁷ This requirement presents conceptual artists with unusual difficulties. By the very nature of their art form, many conceptual works are not reduced to a material form and therefore do not enjoy copyright protection. Such works should be carefully documented by words and diagrams. Copyright would then at least be able to subsist in the documentation.
- ¹⁸ But note the exception relating to public sculptures, discussed later.
- ¹⁹ In the case of *Metix (UK) Ltd v Croner Trading Pty Ltd* [1997] Fleet Street Reports Vol 24(10) 718 at 721, the court used the example of an ice sculpture to indicate that protection can be granted to such impermanent works. Logically, it follows from this that kinetic artistic works (where the form or colour of the work may change continuously) are nevertheless capable of protection.
- ²⁰ See *Creation Records Ltd v News Group Newspapers* (1997) 39 IPR 1 (UK), involving the English pop group Oasis, where the plaintiff was unable to prevent others from taking photos of an elaborate tableau that the plaintiff had staged by claiming that the tableau was subject to copyright. See also *Skybase Nominees Pty Ltd v Fortuity Pty Ltd* (1996) 36 IPR 529.
- ²¹ The court did not grant an injunction restraining the ABC from broadcasting the event and did not make a final determination as to whether the display could have been protected. See *Nine Network Australia Pty Ltd v Australia Broadcasting Corporation*, Hill J, 23 December 1999, [1999] FCA 1864, No 1435 of 1999.
- ²² Section 10.

²³ For example, Arthur Stace's famous chalk inscriptions of the word 'Eternity' around Sydney could not be copyright works.

²⁴ *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984.

²⁵ Consider *Four Minutes Thirty-Three Seconds* by the composer John Cage. In this, the orchestra is on stage but does not play. The musicians sit quietly for 4 minutes 33 seconds. There is no music. Does a musical work need music? Can we assume that it is a musical work because it is the creation of a professional composer who intended it to be considered a work? If it is not a musical work, is it still capable of attracting copyright protection as a 'dramatic work' given that it is capable of performance before an audience? Interestingly, if protection is based on it being a dramatic work then it does not qualify for the various licence schemes (which are administered by collecting societies such as APRA and AMCOS) that control the performance and recording of musical works.

²⁶ *Aristocrat Leisure Industries Pty Ltd v Pacific Gaming Pty Ltd* (1999) 48 IPR 333 at 336–8; and see Lahore, Copyright and Designs [6045]. This is why Cage's *Four Minutes Thirty-Three Seconds* might be protected as a dramatic work.

²⁷ Section 10.

²⁸ See *Harold Joseph Thomas v David George Brown & James Morrison Valley Tennant* (1997) 37 IPR 207 (concerning the design of the Aboriginal flag).

²⁹ See for example *Sydney Organising Committee for the Olympic Games v Pam Clarke* (1998) 41 IPR 403 (concerning Sydney 2000 Olympic Games logo).

³⁰ There is even a lively debate as to whether 'engraving' includes a mould or a die. In the NZ case, *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1987] RPC 127, the mould for making Frisbees was held to be an 'engraving'. The correctness of this was doubted in *Interlego AG v Tyco Industries Inc* [1987] FSR 409 at 453.

³¹ See *Breville Europe v Thorne EMI Domestic Appliances Ltd* [1995] FSR 77 (UK). However, it does not seem to extend to functional components of a larger apparatus or machine; see *Greenfield Products Pty Ltd v Rover-Scott Bonnar Pty Ltd* (1990) 17 IPR 417.

³² *Coogi Australia Pty Ltd v Hysport International Pty Ltd & Ors*. In that case protection was accorded to distinctive knitted fabric and the garments because, although they were produced by machine, the machine was operated by a skilled programmer in accordance with the manufacturer's designs. Note that Coogi's success in this case was limited; for example, copyright protection was granted to the 'first-run' of the fabric only.

³³ [2007] HCA 17

³⁴ From this it followed that the plug and the resin moulds for the deck and hull were not works of artistic craftsmanship either.

³⁵ Those who are neither citizens nor residents will nevertheless often come within the scheme of protection: see s 184 *Copyright Act 1968* (Cth).

³⁶ Section 32(1).

³⁷ See *Sands & McDougall Pty Ltd v Robinson* (1917) 23 C.L.R. 49; *Mander v O'Brien* [1934] S.A.S.R. 87 at 91.

³⁸ See *Krisarts SA v Briarfine Ltd* (1977) 3 F.S.R. 557 at 562.

³⁹ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 287. See also *Kalamazoo (Australia) Ltd v Compact Business Systems* (1985) 5 IPR 213 at 233.

⁴⁰ See *George Milpurruru & Others v Indofurn Pty Ltd & Others* (1994) 130 ALR 659, which discusses the question as to the 'originality' of designs that express a group story, in the context of works by Indigenous artists.

⁴¹ Such as 'just change a line here and a colour there', 'up to ten per cent is okay', and so on.

⁴² See *Bauman v Fussell* [1978] RPC 485 (UK); *A-One Accessory Imports Pty Ltd v Offroad Imports Pty Ltd* (1996) 34 IPR 306.

⁴³ *IceTV Pty Limited v Nine Network Australia Pty Ltd* [2009] HCA 14. It is also interesting to consider the Shepard Fairey situation: an artist (creator of the Obama 'HOPE' poster) who uses the work of others without attribution but seeks to protect copyright in his own work: http://en.wikipedia.org/wiki/Shepard_Fairey. Note that although Fairey claims to be able to use the material under US 'fair use' law, he would certainly not be able to under Australian 'fair dealing' exceptions.

⁴⁴ A US case challenged this low threshold, when it held that an exact photographic reproduction of a painting in the public domain was not sufficiently 'original' to warrant copyright protection. See *Bridgeman Art Library v Corel Corporation* 36 F. Supp 2d 191 (1999) (SD NY (US)). Discussed in Kevin Garnett, 'Copyright in Photographs' (2000) 22(5) *European Intellectual Property Review* 229

and Simon Stokes, 'Graves' case revisited in the USA: *The Bridgeman Art Gallery v The Corel Corporation* [2000] *Entertainment Law Review* 104.

⁴⁵ For a critical look at this aspect of copyright, see Kathleen Connolly Butler, 'Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain through Copyright in Photographic and Digital Reproduction' (1998) 21 *Hastings Communications and Entertainment Law Journal* 55.

⁴⁶ Section 31 (1)(a).

⁴⁷ This includes the right to communicate a work by making it available on-line.

⁴⁸ It also includes the exclusive right to do these things in respect of an adaptation of the work: s 31 (1)(a)(vii).

⁴⁹ Section 21 (1A).

⁵⁰ Other items such as books may be rented without the permission of the copyright owner.

⁵¹ Section 21 (1).

⁵² Including to reproduce a two-dimensional work in a three-dimensional form; or to reproduce a three-dimensional work in a two-dimensional form: s 21 (3)(a)(b).

⁵³ This includes the right to communicate a work by making it available on-line. 'Communicate means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter': s 10

⁵⁴ Section 85.

⁵⁵ Section 21 (6).

⁵⁶ Section 86.

⁵⁷ Section 21 (6).

⁵⁸ Section 87.

⁵⁹ Section 88.

⁶⁰ For example, the photograph of a painting or a film based on a book.

⁶¹ For example, a photograph of a musical instrument or a maquette made from plans.

⁶² For example, the book digitised and made available on a website.

⁶³ Conversion from hard copy to digital form and vice versa constitutes reproduction: s 21, *Copyright Amendment (Digital Agenda) Act 2000 (Cth)*.

⁶⁴ Section 21 (3).

⁶⁵ As to the complexities of working out the meaning of the right to 'publish', see *Avel Pty Ltd v Multicoin Amusements Pty Ltd* [1990] HCA 58; (1990) 171 CLR 88.

⁶⁶ Section 29 (1).

⁶⁷ Section 29(3). This may seem rather extraordinary for the selling of photographs or engravings of a drawing, painting or craftwork **would** constitute publication.

⁶⁸ Section 29 (1)(b).

⁶⁹ Section 29 (1)(c).

⁷⁰ In the former, you are sending, in the latter you are allowing someone else to come and collect.

⁷¹ Section 35(2).

⁷² *Kenrick v Lawrence & Co* [1890] QBD 99.

⁷³ The rights in material published by employees of newspapers, magazines and periodicals are as described in the next section.

⁷⁴ For example, with this book, the rights in the content are retained by the author of the material and licensed to the publisher. Still, the easiest way of contacting the author (and perhaps the most polite) is to contact the author through the publisher.

⁷⁵ This information is may be next to the work (in the case of maps, diagrams and photographs), often in the Acknowledgements section and occasionally in the footnotes.

⁷⁶ Section 208.

⁷⁷ Section 10. See also *Pacific Film Laboratories Pty Ltd v. Commissioner of Taxation (Cth)* (1970) 121 C.L.R. 154.

⁷⁸ Where works are commissioned and the commissioner owns the copyright, there are certain situations where the commission may be restrained from granting further rights – for example where it agreed in the commissioning agreement that its rights were constrained or that it would only use them

for particular purposes. You cannot guess this. You limit this risk by stating in the permission document that the party granting the rights has the right to do so.

⁷⁹ Section 35 (5); s. 213 (5).

⁸⁰ The plate maker is making a reproduction of the artist's original work and does not thereby acquire rights in the original work. Sometimes printers of fine art have a contract with their artist clients by which they acquire the copyright in the plates but this is unusual.

⁸¹ Note that if at the time of entering the commission agreement the commissioner tells the artist that the work is required for a particular purpose, the artist can restrain the commissioner from doing any act covered by copyright that is beyond the declared purpose.

For example, if a manufacturer commissions an artist to paint a portrait of Julia Gillard for the express purpose of putting it on a biscuit tin lid, the company may be restrained from reproducing the image on postcards. This is on the basis that the artist has agreed to create a work for a specific purpose. This 'purpose' exception applies only to works created pursuant to agreements made after 1 May 1969.

⁸² James Lahore, *Copyright and Designs*, 3rd Edition (Butterworths: Sydney 1996) at para 20 065.

⁸³ [1951] 1 Ch 393 at 398-399.

⁸⁴ (1945) 62 WN (NSW) 212.

⁸⁵ (1945) 62 WN (NSW) 212 at 215.

⁸⁶ Section 35(6).

⁸⁷ Section 35(6).

⁸⁸ *EdSonic Pty Ltd v Cassidy*, *Fed Ct*, (September 2010).

⁸⁹ See *Sun Newspapers Ltd v Whippie* (1928) 28 SR (NSW) 473, a 'Ginger Meggs' case.

⁹⁰ Section 35 (4). This was a deal done at a time when the economic value of the digital rights was uncertain and pessimistic and the CAL income from photocopying was seen as important source of income for journalists that the union sought to protect. It was a trade-off.

⁹¹ Section 22 (3A).

⁹² Section 22 (7).

⁹³ Section 22 (7). If there is a conductor, it is deemed to be a 'performer' even though their performance is not actually heard.

⁹⁴ As employer of the author.

⁹⁵ As the publisher of the edition.

⁹⁶ Section 10.

⁹⁷ See *John Bulun Bulun & Another v R & T Textiles Pty Ltd* [1998] 1082 FCA (3 September 1998). In this case the court held that the *Copyright Act 1968* (Cth) could not recognise communal ownership of designs or paintings, but that there was scope for recognition of a fiduciary duty owed by the artist to their community that could give the community rights to enforce copyright in a work if the artist did not do so.

⁹⁸ 'Material' here includes works and subject matter other than works such as recordings, editions and films.

⁹⁹ The *Commonwealth Authorities and Companies Act 1997* (Cth) also makes it clear that a company incorporated under the *Corporations Act 2001* (Cth) is distinct from the Crown (s 7). For example, the Bundanon Trust that (among other things) maintains the Arthur Boyd collection is constituted as a company limited by guarantee. Although funded by the Commonwealth and its board appointed by the Minister, it does not come within the definition of 'the Crown'.

¹⁰⁰ Note that in calculating copyright periods, the time period is calculated from the end of the relevant calendar year; for example, for works, the end of the year in which the author died.

¹⁰¹ Such as fiction, non-fiction, stories, lyrics, poems.

¹⁰² For example, material such as diaries, work notes, letters.

¹⁰³ For example, unpublished manuscripts of compositions.

¹⁰⁴ See discussion of Literary Works above.

¹⁰⁵ For example, unpublished and unperformed scripts and other directions.

¹⁰⁶ The effect of these exceptions creates an illogical anomaly. It is possible for the copyright in a photograph or an etching to last indefinitely if it remains unpublished. By contrast, the copyright in other kinds of artistic works can only ever run for the life of the author plus fifty years. Given that recent copyright reforms have sought to make the protections more technology neutral, there seems to be little logic in treating photographs and etchings differently from other art works.

¹⁰⁷ Section 212.

¹⁰⁸ Photographs taken after 1 January 1955 were still in copyright when the AUSFTA came into force and therefore were subject to the copyright period extension. Before the *Copyright Act 1968* (Cth) came into force on 1 May 1969, the copyright in photographs lasted for fifty years from the end of the calendar year in which the photo was **taken**. The 1968 Act changed the basis of calculating the copyright period.

¹⁰⁹ Section 33 (5).

¹¹⁰ There are no decided decisions on whether a re-engineered, digitised etc recording is treated as a new recording for these purposes.

¹¹¹ In such cases, 'published' means that 'records embodying the recording or a part of the recording have been supplied (whether by sale or otherwise) to the public': s 29(1)(c). Thus, if a master recording is made but, for whatever reason, a decision is made not to release the record, copyright will remain indefinitely. The seventy-year period will never start to run.

¹¹² The expression 'film' includes any format including video and all digital formats. Note that this discussion relates only to the copyright in the film itself. It does not cover the rights in the underlying rights – the works that are included in the film.

¹¹³ There are also provisions protecting films made before that date which were 'dramatic works'.

¹¹⁴ Section 204 and s 222.

¹¹⁵ If the making of the film started before 1 May 1969 but was not completed until after that date, it is considered having been made after 1 May 1969: s 205.

¹¹⁶ As to who the creator is in such a case, s 222(1) unhelpfully states that, 'the person who was the author of the work for the purposes of the *Copyright Act, 1911* shall be deemed to be the author of the work for the purposes of this Act'.

¹¹⁷ Section 204.

¹¹⁸ This was extended from 50 years by the AUSFTA in 2005. 'Published' means that 'copies of the film have been sold, let on hire, or offered or exposed for sale or hire, to the public': s 29(1)(b).

¹¹⁹ Section 223. A 'broadcast' means a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* (Cth) (s 10). It does not include a service that provides only data or only text (with or without associated images) or a service that makes programs available on demand on a point to point basis, including a dial-up service.

¹²⁰ Section 244.

¹²¹ This was unchanged by the AUSFTA.

¹²² Remember that this refers only to the 'published edition'. It does not include any copyright in the artistic or literary works that may be contained within the edition.

¹²³ Section 34 (1).

¹²⁴ Section 34 (2). Despite the use of the pseudonym *Stendhal*, it was 'generally known or could be ascertained by reasonable enquiry' that the author's name was Henri Beyle. These days, the same issues commonly arise with graffiti artists or say, Lady Gaga: www.ladygaga.com.

¹²⁵ Sections 80, 33 (3).

¹²⁶ Section 81.

¹²⁷ Section 180(1).

¹²⁸ Section 180(2).

¹²⁹ Section 180(3).

¹³⁰ Section 233.

¹³¹ Section 180(3).

¹³² Section 234.

¹³³ Section 181.

¹³⁴ Section 235(1).

¹³⁵ As defined by s 204: 'a cinematograph production where the arrangement, the acting form or the combination of incidents represented gives the work an original character'.

¹³⁶ Section 176.

¹³⁷ Section 177.

¹³⁸ Section 235(2).

¹³⁹ Section 181.

¹⁴⁰ Caution: this does not include the contents of the edition.

¹⁴¹ Sections 180 and 181.

¹⁴² Section 195AM.

¹⁴³ Section 195ANA(1)(2).

¹⁴⁴ Section 195ANA(3).

¹⁴⁵ Section 195ANB(1).

¹⁴⁶ Section 248CA.

¹⁴⁷ Section 248CA(2)(3).

¹⁴⁸ Some material (such as natural history specimens) is not subject to copyright; with other material, the copyright has expired.

¹⁴⁹ The collecting institution is itself the maker and owner of an enormous amount of copyright material.

¹⁵⁰ See earlier discussion as to what is a 'substantial' portion of a work. If it is not substantial, it can be used.

¹⁵¹ When acquiring material from the copyright owner, it is prudent to include in the acquisition documentation a licence that permits you to do standard things such as reproduction in the catalogue; making available through the website; reproduction in the exhibition catalogue; reproduction in slides for public education programs; publication in books, pamphlets and reports; making copies for scientific experimentation and so on.

¹⁵² So-called 'orphan works'. If the owner cannot be identified it is even difficult to calculate whether a work is still in copyright because if you can't identify the owner, you can't know when he or she died. The pre-s 200AB legal position is set out in I McDonald, 'Some Thoughts on Orphan Works', (2006) 24 (3) *Copyright Reporter: Journal of the Copyright Society of Australia*, 152–96.

¹⁵³ One of the most important discussions of this issue may be found in M Warren, 'Getting the orphans out of the orphanage: risk management and orphan works at the State Library of Queensland', (2009) _____ *Information Online* <http://www.information-online.com.au/sb_clients/iog/data/content_item_files/000001/PresentationC3.pdf>.

¹⁵⁴ See s 43.

¹⁵⁵ There is no 'fairness' requirement for subject matter other than works (films, recordings, published editions): s 104.

¹⁵⁶ Section 65.

¹⁵⁷ An example of this difference arose in relation to murals painted by John Lendis in the town of Sheffield, Tasmania, depicting the history of the town. Concerned about unauthorised reproductions of the murals, he attempted to claim full copyright in the murals, which was resisted by the other members of the town community. Bruce Montgomery, 'Mural artists runs into town's wall of resistance', *The Weekend Australian*, February 19–20, 2000 at 13.

¹⁵⁸ It is unclear whether such copy is permitted to be electronically communicated (such as by Internet).

¹⁵⁹ This is often the most important risk as, even if no-one sues for the copyright breach, the lender of the work may well require the return of the loaned work – or refuse to lend other works in the future. This risk can be even more damaging than litigation.

¹⁶⁰ Rule one in copyright litigation is to sue the party with the money.

¹⁶¹ Section 67.

¹⁶² Nevertheless, it is prudent to include in your permission documentation with the TV/film company that the company indemnifies the institution for any breach of copyright that occurs as a result of the filming.

¹⁶³ Section 40(2).

¹⁶⁴ Section 10(2) and s.10(2).

¹⁶⁵ Section 40. For subject matter other than works, see: s 103C.

¹⁶⁶ Section 40(3).

¹⁶⁷ *Ibid.* Even though the person making the copy has complied with the reasonable portion test provided in this section, it does not give another person the right to make a subsequent copy of that copy: s 40(6).

¹⁶⁸ Section 10(2)(a)(b).

¹⁶⁹ Other than a computer program or an electronic compilation, such as a database: s 10(2A)(a).

¹⁷⁰ Section 40(5).

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- ¹⁷¹ Section 41. For subject matter other than works, see: s 103A.
- ¹⁷² Section 41.A. For subject matter other than works, see: s 103AA.
- ¹⁷³ Section 42. For subject matter other than works, see: s 103B.
- ¹⁷⁴ Note that where the newsletter is being delivered on-line, the exception does not permit you to include accompanying music. (You would need to get a licence to use the music.)
- ¹⁷⁵ Section 43; for subject matter other than works, see: s 104.
- ¹⁷⁶ Section 45.
- ¹⁷⁷ Section 10(4).
- ¹⁷⁸ Section 51A(1)(a). Where a copy made for research being carried out at another institution, is sent to that institution, that supply does not constitute a 'publication' of the work: s 51A(5).
- ¹⁷⁹ Section 51A(1).
- ¹⁸⁰ Where the term '*officers of the library or archives*' is used in this section it includes volunteers assisting with the care or control of the collection: s 51A(6).
- ¹⁸¹ Section 51A(4).
- ¹⁸² Section 51A(1)(a).
- ¹⁸³ Section 51A(1)(a).
- ¹⁸⁴ 'Preservation reproduction' means 'a reproduction of the work made under subsection (1) for the purpose of preserving the work against loss or deterioration': s 51A(6).
- ¹⁸⁵ Sound recordings: s 110B(1); film: s 110B(2); copying for these purposes does not constitute 'publication' for the purposes of the Act: s 110B(4).
- ¹⁸⁶ Section 110B2A. Perhaps this is just part of a 'keeping the bastards honest' approach.
- ¹⁸⁷ Key collecting institutions are defined as those where the governing body (the board, council etc) of the organisation has the statutory 'function of developing and maintaining the collection' or is 'prescribed by the regulations for the purposes of this subparagraph': s 51B (1)(a).
- ¹⁸⁸ Section 51B(3).
- ¹⁸⁹ Section 51B(4).
- ¹⁹⁰ Section 51B(5).
- ¹⁹¹ Section 112AA(2).
- ¹⁹² Section 112AA(4).
- ¹⁹³ Section 110BA.
- ¹⁹⁴ Section 110BA(6).
- ¹⁹⁵ Section 110BA(7).
- ¹⁹⁶ Section 39A; for subject matter other than works, see: s 104B.
- ¹⁹⁷ Section 39B.
- ¹⁹⁸ This covers a collecting institution whose collection is accessible to members of the public directly or, in the case of libraries, indirectly through interlibrary loans: s 49(9).
- ¹⁹⁹ Although less important in these days of fax and email, an exception to the requirement for written request is provided for users who, by reason of the remoteness of their location, cannot conveniently furnish the request and declaration soon enough to enable the reproduction to be supplied in the time required: s 49(2A)&(B).
- ²⁰⁰ Section 49(2). Note that it is also permissible to make a copy of a copy already made under the preservation and replacement powers discussed earlier.
- ²⁰¹ One assumes that this is to prevent the commercialisation of what is essentially a public interest service.
- ²⁰² Section 49(5). See earlier discussion as to the meaning of 'reasonable portion'.
- ²⁰³ Section 49(5AB).
- ²⁰⁴ Sections 49(6), 49(7).
- ²⁰⁵ Section 203 H.
- ²⁰⁶ Section 49(9) & s 49(7B).
- ²⁰⁷ Section 49(7A)(c).
- ²⁰⁸ Section 49(7A)(d).
- ²⁰⁹ Section 49(5A).
- ²¹⁰ Section 50(10). For example, libraries within law firms or mining companies would not fall within this definition.
- ²¹¹ That is, a request by a user where the prerequisites of s 49 have been satisfied. See heading 3 above.
- ²¹² Section 50(1).
- ²¹³ Section 50(7)(d).

²¹⁴ Section 50(6).

²¹⁵ Section 50(7C).

²¹⁶ Section 50(3)(4).

²¹⁷ Section 50(7A).

²¹⁸ Where the principal purpose of the library is to provide library services for members of a Parliament and the reproduction is supplied to assist a member of that Parliament in the performance of his or her duties, this declaration is not necessary. This also applies to requests for electronic works.

²¹⁹ Section 50(7B).

²²⁰ This copy can be provided to the researcher in either hard copy or electronic form.

²²¹ Section 51(c).

²²² Section 51 (c)(d). The copy can be provided to the researcher in hard copy or electronic form.

²²³ Section 51A(2).

²²⁴ Section 51A(6).

²²⁵ Section 51A(3) There is no guidance as to the limits or extent of 'administrative' purposes.

²²⁶ Or archival material in the custody of a person (other than the National Archives of Australia) in accordance with an arrangement referred to in s 64 of the *Archives Act 1983* (Cth): s 10(aa).

²²⁷ Section 51AA(1).

²²⁸ Section 51AA(2).

²²⁹ This authorisation may be given either before or after the acts in respect of which the authority is given have been done, and may be given to a person notwithstanding that he or she already has a licence granted by, or binding on, the owner of the copyright to do the acts: s 183(2).

²³⁰ Section 183(1). Note that an act done under this subsection does not constitute publication of a work or other subject matter and shall not be taken into account in the application of any provision of this Act relating to the duration of any copyright: s 183(8).

²³¹ Section 183(2) provides a deeming provision (which is unlikely to be relevant to most collecting institutions) whereby if the Commonwealth government has made a deal with the government of another country for the supply of goods required for the defence of that country, the doing of any act in connexion with the supply of those goods (and the sale of leftovers) is deemed to be 'for the services of the Commonwealth'.

²³² Notification is not necessary if it is not in the public interest to do so: s 183(2).

²³³ Section 183(3).

²³⁴ Section 183(5).

²³⁵ Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth).

²³⁶ The Statement of IP Principles for Australian Government Agencies can be found on the Attorney-General's Department's website at: <http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright_CommonwealthCopyrightAdministration_StatementofIPPrinciplesforAustralianGovernmentAgencies>.

²³⁷ See for example, *National Gallery Act 1975* (Cth) (ss 6–7), *National Library Act 1960* (Cth) (s 6), *National Museum of Australia Act 1980* (Cth) (ss 6–7), *The National Film and Sound Archive Act 2008* (Cth) (ss 6–7).

²³⁸ See for example; AGD e-news on Copyright, Issue 9, May 2006; the Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth); the Supplementary Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth).

²³⁹ Section 200AB(6), *Copyright Act 1968* (Cth).

²⁴⁰ This is a complex question of law and will depend on the purpose and constitution of the body in question. Institutions may need to get independent legal advice on this point.

²⁴¹ See for example, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth*, 1959, at para 404.

²⁴² Australian Copyright Council, Information Sheet: *Governments (Commonwealth and State) G062*, October 2009; <<http://www.copyright.org/au/publications/infosheets.htm>>.

²⁴³ *Copyright Agency Limited v State of New South Wales* [2008] HCA 35 (see for example para 67, 70).

²⁴⁴ These are specified in the *Copyright Regulations 1969* (Cth), Schedule 10A. The 'old' library provisions is a reference to those provisions that were in existence prior to the implementation of the *Copyright Amendment Act 2006* (Cth).

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- ²⁴⁵ Section 10.
- ²⁴⁶ Section 10(1) and 10(4).
- ²⁴⁷ Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth).
- ²⁴⁸ Section 200AB; Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth); Evidence of Ms Helen Daniels to the Senate Standing Committee on Legal and Constitutional Affairs in relation to the Copyright Amendment Bill 2006 (Cth), for example, see: <http://www.aph.gov.au/SENATE/committee/legcon_ctte/completed_inquiries/2004-07/copyright06/submissions/sub69A.pdf>.
- ²⁴⁹ Section 200AB(6A).
- ²⁵⁰ Ibid at para 6.180.
- ²⁵¹ See Report of the Panel (the Homestyle Case) WT/DS160/R, 15 June 2000WT/DS160/R, 15 June 2000, para 6.163–6.189.
- ²⁵² Ibid at para 6.183.
- ²⁵³ Ibid at para 6.187.
- ²⁵⁴ Ibid at para 6.187. See also, the US Ninth Circuit Court of Appeals interpretation of the three step test embodied in s 107 of the US *Copyright Act 1976* in cases such as: *Kelly v Arriba Soft Corp* (2003) at 9073; *Perfect 10 Inc v Amazon (& Google)* (2007) at 5779.
- ²⁵⁵ Ibid, for example at para 6.167. See also Ginsberg, J, 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions' at 14; cf *Campbell v. Acuff-Rose Music Inc*, 510 US 569 (1994) ('no market' for parodies, even if copyright owner could license them).
- ²⁵⁶ Explanatory Memorandum to the Copyright Amendment Bill 2006 (Cth).
- ²⁵⁷ See Report of the Panel (the 'Homestyle Case') WT/DS160/R, 15 June 2000WT/DS160/R, 15 June 2000, para 6.222.
- ²⁵⁸ Ibid at 6.222-6.229.
- ²⁵⁹ See Report of the Panel (the Homestyle Case) WT/DS160/R, 15 June 2000WT/DS160/R, 15 June 2000, for example at para 6.112.
- ²⁶⁰ For example, if the collection item is an audiovisual item, a licence for use of the music and/or sound recording may be available from APRA.
- ²⁶¹ However, institutions should note that, the nature of the uses made by the Institution may be relevant to negotiating payment in relation to those uses should a copyright owner come forward in the future and seek payment. Therefore, containing the nature of the uses and taking reasonable steps not to expose the material to unreasonable risk of misuse will be an important part of an Institution's general risk mitigation strategy.
- ²⁶² These include the reproduction of materials for users, other collecting organisations and for preservation purposes. The person may demand to inspect all such records or just those between certain nominated dates: s 203E (1)(a)(i)(ii).
- ²⁶³ Section 203A(1)(b) & (4).
- ²⁶⁴ Section 203E (6).
- ²⁶⁵ Section 203D.
- ²⁶⁶ Section 203G.
- ²⁶⁷ Section 203H.
- ²⁶⁸ For example, see M Warren, above at n 2.
- ²⁶⁹ Section 196(3).
- ²⁷⁰ For example, what is the actual legal persona of a particular government department; where a trust or a partnership is involved, who is the correct contracting party?
- ²⁷¹ See <<http://openingarchives.wikidot.com>>.
- ²⁷² For example, say the Metropolitan Museum granted a licensee the exclusive right to distribute and sell the museum's merchandise in Australia, and a third party set up in competition selling unauthorised reproductions of Metropolitan collection material.
- ²⁷³ Section 115(2); see *Fraser v Evans* [1969] 1 Q.B. 349; *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 C.L.R. 618 at 622; *Shercliff v Engadine Acceptance Corporation Pty Ltd* [1978] 1 NSWLR 729.
- ²⁷⁴ *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales* (1974-1975) 6 A.L.R. 445

²⁷⁵ Section 115(4); see *George Milpurrurru & Others v Indofurn Pty Ltd & Others* (1994) 130 ALR 659; *Williams v Settle* [1960] 1 WLR 1072; *Ravenscroft v Herbert and New English Library Ltd* [1980] RPC 193; *Concrete Systems Pty Ltd v Devon Symonds Holdings Ltd* (1978) 20 ALR 677. (As to pleading, see *P J Holdings Australia Pty Ltd v Hughes* (1979) 25 ALR 538.)

²⁷⁶ Section 116; see further, Ricketson and Creswell, *The Law of Intellectual Property: copyright, designs & confidential information*, Sydney: LBC Information Services, 1999- , at paras 13.55 to 13.105. Lahore, *Copyright and Designs*, 3rd ed, Sydney, Butterworths, 1996, at paras 36,285ff & 86,200.

²⁷⁷ See further, Simpson, Bailey and Evans, *Discovery and Interrogatories*, Butterworths, Sydney, 1984.

²⁷⁸ *Tony Bain Pty Ltd v Jamison* (1993) 41 FCR 414.

²⁷⁹ Section 195 AZA (1); In deciding whether or not to grant an injunction under subsection (1), the court must consider whether the parties have made any attempt to negotiate a settlement of the action and whether it should adjourn the hearing or further hearing of the action for the purpose of giving the parties an appropriate opportunity to negotiate a settlement, whether through a process of mediation or otherwise: (3). In other words, negotiation is seen by the court as a positive step – not one to be resisted. Many of these problems are overcome through open-handed communication but never, by passive resistance.

²⁸⁰ Section 195 AZA (1).

²⁸¹ Section 195AZGC(1). In deciding whether or not to grant an injunction under s 195AZG(1), the court must consider whether the parties have made any attempt to negotiate a settlement of the action and whether it should adjourn the hearing or further hearing of the action for the purpose of giving the parties an appropriate opportunity to negotiate a settlement, whether through a process of mediation or otherwise: s 195AZGC(3).

²⁸² Section 195 AZC (2).