



INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS AND INSTITUTIONS
FEDERATION INTERNATIONALE DES ASSOCIATIONS DE BIBLIOTHECAIRES ET DES BIBLIOTHEQUES
INTERNATIONALE VEREINIGUNG BIBLIOTHEKARISCHER VERBÄNDE UND EINRICHTUNGEN
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МЕЖДУНАРОДНАЯ ФЕДЕРАЦИЯ БИБЛИОТЕЧНЫХ АССОЦИАЦИЙ И УЧРЕЖДЕНИЙ
国际图书馆协会与机构联合会
الاتحاد الدولي لجمعيات ومؤسسات المكتبات

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Submission by the International Federation of Library Associations and Institutions (IFLA) to the Australian Copyright Modernisation Review

**We hereby confirm that this submission can be made public and published*

The International Federation of Library Associations and Institutions (IFLA) is the leading international body representing the interests of library and information services and their users. With over 1400 members in over 140 countries around the world, IFLA is the global voice of the library and information profession.

IFLA is also leading international library advocacy on copyright exceptions and limitations at the Standing Committee on Copyright & Related Rights (SCCR) of the World Intellectual Property Organisation (WIPO), and also advocates for copyright policies suited for libraries and their users at the regional and national level. As part of IFLA's work of monitoring copyright changes that will have an impact on libraries, IFLA has submitted comments to several copyright reforms in different parts of the world.

We are thankful for the possibility provided by the Department for comments to be submitted from abroad. The influence that Australian provisions may have elsewhere makes this an important opportunity. We would like to make use of it, in the hope that our views will positively contribute to the process.

IFLA strongly welcomes the copyright modernisation in Australia, and the acknowledgement that an effective, efficient, accountable and especially adaptable system is needed. Moreover, we agree that the three areas of the Copyright Act that are subject to review are key topics. In the following pages, we address the questions raised by the consultation.

Overall, we are supportive of the submission by [Australian Libraries Copyright Committee \(ALCC\)](#), that to our understanding provides key and useful points, as well as very relevant examples.

For any further information, please get in touch with ariadna.matas@ifla.org.



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Questions

Flexible exceptions

Question 1

To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?

IFLA welcomes the flexibility that both fair use and fair dealing systems provide. More particularly, IFLA considers that Australia would benefit from a flexible fair use exception, which would better help address to unforeseen changes in technology or even in the public interest activities undertaken by institutions such as libraries. Fair dealing, even if amended, would most likely fail to serve this purpose, especially as technology and uses evolve.

Among the illustrative purposes of an open ended fair use exception, we are supportive of the existing purposes under the fair dealing exception, plus all the purposes suggested to be added to that exception: quotation, non-commercial private use, incidental or technical use, text and data mining, library and archive use, certain educational uses and certain government uses. Each focus on relevant activities that serve the public interest.

If fair use is not adopted, we are supportive of maintaining fair dealing with the necessary improvements. Library and information professionals would benefit from changes that brought legal clarity to some activities (listed below) that could fall under the "research" purpose of the current fair dealing provision but could also be considered to fall outside of its scope, even though serving the public interest. In this case, we would suggest the inclusion under the fair dealing exception of all the additional prescribed purposes the Department is consulting upon.

Strictly from the library perspective, we strongly encourage the adoption of the following ones:

Text and data mining

The ability to analyse information, and to reuse facts and data freely is fundamental to knowledge sharing and everyday life. It should not make a difference whether this happens through simple reading, or with the help of computer programmes that can read (or 'mine') texts and databases to discover ideas and trends.

As underlined in the [IFLA Statement on Text and Data Mining](#), "IFLA believes TDM to be an essential tool to the advancement of learning, and new forms of creation (...). Digital information opens new opportunities for research and innovation".

Text and data mining falls within the realm of copyright nearly by accident, because a reproduction needs to be made for the work to be read through digital means. A transitory copying exception,



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الاتحاد الدولي لجمعيات ومؤسسات المكتبات

although very relevant in itself, would not be enough for text and data mining, given that the copy might be kept for longer than that allows in order to permit verification.

A provision that clarifies that text and data mining is possible is needed to ensure that copyright and database laws do not impede the use of materials by library users in ways that would benefit communities – for scholarship, research, improvements in health and science, creativity and social inclusion.

Library and archive use

The inclusion of library and archive uses will bring legal clarity to many activities that happen or should happen within these institutions, conducted for the benefit of the public. It would cover, for instance, online access, public exhibition or incidental uses such as on social media. Furthermore, many copies that need to be made for internal purposes, such as insurances or cataloguing, could also fall within the scope of this provision.

Certain educational uses

Educational activities, given that they serve the public interest, should also benefit from an exception to copyright. Libraries are providers of life-long learning, and in some occasions are also part of educational institutions (such as university libraries and school libraries). Some of the activities might be covered by the current system, under research or study, and it will certainly bring legal clarity on many others. A flexible exception is suitable for educational activities.

Question 2

What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- section 200AB
- specific exceptions relating to galleries, libraries, archives and museums.

Regarding the specific exceptions, we believe that the document supply and interlibrary loan provisions should be modernised in line with the recent changes to the preservation exceptions. We also support the adoption of an orphan works exception.

Improvements to the **fair dealing exception** through an extension or even through replacing it by a fair use exception should, to our opinion, exist in parallel to these exceptions. They provide legal clarity to some fundamental activities. We also consider that the exception should be without prejudice to the broader possibilities granted by the fair use provision.

The current **document supply** and interlibrary loan exceptions would benefit from harmonisation on what documents should be supplied.

On **orphan works**, we are supportive of a fair use provision that covers their use. We also support an exception that allows the use of orphan works for non-commercial purposes by cultural heritage institutions and by users.

A diligent search could be made mandatory for institutions holding the work before it is considered orphan, but we recommend that no specific sources of consultation are made mandatory and that the



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الاتحاد الدولي لجمعيات ومؤسسات المكتبات

search does not necessarily need to be conducted in sources abroad if available information about the author shows that they are not an Australian national. These conditions, if implemented, would place too many burdens and discourage many institutions from undertaking the process.

Compensation should not be payable for normal uses of the works. It should only be justified if unreasonable prejudice has been caused. General compensation is not justified and would mean more legal uncertainty for those institutions using the work. There should be guarantees for rightsholders to stop any illegitimate uses of their works.

The provision should reflect the possibility for orphan works to be used outside of the institution that holds them. This would contribute to reaching the full potential of this provision, by providing the possibility for everyone to benefit from the cultural value of the heritage.

Contracting out of exceptions

Question 3

Which current and proposed copyright exceptions should be protected against contracting out?

IFLA strongly supports the protection of copyright exceptions from contractual override. As we have previously [stated](#) “licence and contract terms that override copyright law undermine and restrict creativity and innovation”. When exceptions are overridden by contract, the policy defined at the legislative level loses all its power, and so does the public interest objective it chases. Public actors are given all discretionarily to decide on a matter that is public.

For this reason, all exceptions and limitations, including works in the public domain and fair dealing provisions, should be protected against provisions contracting out.

With the increase of use of digital material, which is often accessed under contract (as a service), instead of physical material, which is acquired as a good, libraries deal more and more often with contractual conditions. On this topic, we would like to refer to the [“The Limits of Licensing” literature review](#) commissioned by IFLA, in which the author underlines that “licensing agreements signed by libraries not only can limit the rights that they typically have in relation to physical copies of works, but can also affect the rights of libraries’ patrons, such as the right to access to information and the right to privacy and personal data protection”. Contract override is a key tool to ensure that libraries can keep using materials in the way to which they are entitled by law.

In this regard, and although this is not addressed in the question, we would like to add a point with regards to technological protection measures. We consider that when such measures are circumvented with the purpose of making a legitimate use of a work under an exception or limitation, there should be no consequences for the person or institution performing the circumvention. This would follow the same logic of preserving the effect of limitations and exceptions as the provision that the Department is exploring for contracting out of exceptions.

Question 4

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:



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МЕЖДУНАРОДНАЯ ФЕДЕРАЦИЯ БИБЛИОТЕЧНЫХ АССОЦИАЦИЙ И УЧРЕЖДЕНИЙ
国际图书馆协会与机构联合会
الاتحاد الدولي لجمعيات ومؤسسات المكتبات

- only prescribed purpose copyright exceptions?
- all copyright exceptions?

As indicated in our response to the question above, we support a provision that states the unenforceability of provisions contracting out of any exception. We think this should also be applicable to limitations, such as the public domain provision, to ensure that the purpose of having such a provision in place in legislation is met.

Access to orphan works

Question 5

To what extent do you support each option and why?

- statutory exception
- limitation of remedies
- a combination of the above.

To solve the problem of orphan works, IFLA supports a statutory exception (as described under question 2) for the following reasons:

- Given that we are looking at a solution to specific problem, a clear exception would be suited for that, and would offer welcome legal certainty.
- The exception should have mechanisms in place to ensure that no illegitimate prejudice is done to the interests of rightsholders.
- As mentioned in ALCC's submission "Orphan works, by definition, have no market and no discernible or contactable owner, and therefore will always automatically satisfy the market impact test that underlies both s200AB and fair use. Where a copyright owner comes forward, the work stops being orphaned and therefore the exception would stop applying. The institution would have to stop using the orphan work or pay a licensing fee to continue the use".
- We consider that a licensing solution would add no value, given that money would be collected without any clear beneficiary, and all of the associated overheads of collective management systems. Excluding licensing solutions would also ensure that the public interest objective pursued cannot be limited by conditions established privately (i.e. a commercial decision not to offer licences, the lack of representative or well-governed collective management organisations). A statutory license is likely to be burdensome and expensive, making the system more complex.



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الاتحاد الدولي لجمعيات ومؤسسات المكتبات

Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use.

Our preferred solution is a fair use provision that covers the use of orphan works, together with an exception, or if not possible, an extended fair dealing provision. If we count with an exception, those using orphan works should not be liable for uses made under the exception. Only those that create an illegitimate prejudice to the interests of rightsholders should be held liable.

A simple limitation of liability would not fulfil the goal of making the use of orphan works possible. The regime would provide no legal clarity as to what use can be made, and still some legal insecurity that would stop many institutions from taking their projects forward.

Question 7

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

As indicated above and under questions 2 and 5, our preferred approach is a fair use provision and a specific exception for orphan works. We would still welcome clarity that uses of orphan works by cultural heritage institutions are likely to be considered “fair”.