

## ALIA 2016

### Dealing with copyright long after it has exhausted you... Proposing a copyright risk management framework for Australian libraries

Original abstract: Copyright is involved in just about every service provided by Australian libraries. The copyright implications of some services, such as document delivery and inter-library loan, are relatively well defined under the Copyright Act and libraries have established national practices. Other services expected by the public in the digital era, such as putting digitised collections online, can present apparently insurmountable barriers. As Paula Le Dieu reflected about her role as project director of the British Broadcasting Corporation's Creative Archive, a pilot project to make BBC archive content available for re-use by the public, 'If you are making a creative archive, you have to deal with the rights issue from the first breath, and keep dealing with it long after it has exhausted you'.

The Australian Libraries Copyright Committee (ALCC) is a tireless advocate of copyright law reform that appropriately protects the interests of rights holders while ensuring access to important cultural content in the public interest. Even if highly desirable reforms eventuate, such as a broad fair use exception and ending perpetual copyright in unpublished works, many complexities will remain, and a responsive twenty-first century library needs a large proportion of its staff to be both competent and confident in making copyright determinations.

Is it possible to develop a broadly applicable framework that teaches staff about copyright and their organisation's risk tolerance within a decision making context? In 2013 ALCC's copyright advisor Trish Hepworth began developing risk management guidelines to support libraries promoting collections online. In conjunction with Beth Robertson at the State Library of South Australia (SLSA), these guidelines were incorporated into ALCC's 2013 and 2014 training days in several states. During 2015 the guidelines were expanded by SLSA into a 12-step draft 'Copyright determination and risk management framework', which links to online Australian Copyright Council resources and draws on important work by the National & State Libraries Australasia (NSLA) Copyright Working Group that is providing standard approaches to copyright across NSLA libraries (e.g. identifying orphan works through a 'reasonable search', using Creative Commons licencing, and responding to takedown requests about online content). The draft framework is being trialled and adapted to help resolve diverse copyright issues that arise at SLSA from day to day pending formal approval.

\* \* \* \* \*

Publicly-funded libraries manage competing responsibilities to make information and collections freely available to the public and to respect the rights of authors, other creators, and subsequent rights holders in compliance with copyright law. Measured in terms of litigation, libraries have managed these responsibilities successfully for over 40 years. No Australian library has been involved in a court action relating to copyright since 1974. In that year the Australian Copyright Council (ACC) orchestrated a test case in which the Supreme Court found that the University of New South Wales had authorised the infringement of copyright by providing unsupervised photocopiers on its library premises. The High Court upheld this decision on appeal in 1975. This led to the notice prescribed under section 39A of the Copyright Act, and set out in the Act's Regulations, which limits the liability of libraries for copyright infringements by third parties when the notice is displayed in the proximity of copying machines.<sup>1</sup>

In recent years, our copyright environment has become increasingly restrictive and combative as evidenced by the greater use of technological protection measures (TPMs), harsher penalties for infringement enshrined in free trade agreements (such as the Australia-United States Free Trade

---

<sup>1</sup> [Copyright Act 1968 \(Cth\)](#); [Copyright Regulations 1969](#); [University of New South Wales v. Moorhouse \(1975\) 133 CLR 1](#); IP Laws, [The development of copyright](#), Libraries&Books blog, 19 September 2012.

Agreement - AUSFTA), and high profile judgements against re-use.<sup>2</sup> Unlike the public who might be unaware of copyright or choose to disregard it, libraries like other cultural institutions strive to comply with the Copyright Act, even if this conflicts with their mandate to manage, preserve and provide public access to collections.

The copyright implications of some other library services, such as document delivery and inter-library loan, are also defined in the Act and Regulations and national practices are well-established. However, as the digital era advances and the technical barriers to copying and disseminating material disappear, the tension between free library services and copyright compliance is increasing. This is readily apparent in a number of the submissions that responded to the Australian Law Reform Commission's (ALRC) inquiry into *Copyright and the Digital Economy, 2012-2013*, as well as more recent reactions to the exposure draft of the Copyright Amendment (Disability Access and Other Measures) Bill 2016 and the Productivity Commission's *Draft Report on Intellectual Property Arrangements*, April 2016.

The preliminary *Issues Paper* by the ALRC resulted in submissions from rights holder representatives calling for the repeal of the majority of current libraries and archives exceptions, rejecting the idea of amendments that could allow greater digitisation and communication of works by cultural institutions, and questioning whether orphan works are a problem in Australia.<sup>3</sup> This ignores the fact that recent estimates suggest that between 10% and 70% of National & State Libraries Australasia (NSLA) libraries' unpublished collections are orphan works.<sup>4</sup> Where rights holders did acknowledge the issues with orphan works, they rejected exceptions in favour of licensing options. For example, the Copyright Agency suggested that Australia should adopt a licensing scheme, such as those adopted in Britain and Canada, which would allow cultural institutions to undertake mass digitising of orphan works under a blanket licensing arrangement so that rights holders coming forward at some future date can be remunerated, 'less the collecting society's reasonable administrative fee'.<sup>5</sup> Both these schemes have proven to have high administrative costs and restrictive terms with low returns to rights holders.<sup>6</sup> Arguably, they act as a tax on rights holders with the primary benefits flowing to the collecting society.

Furthermore, the kinds of materials that constitute orphan works makes licensing an inappropriate solution. The great majority of orphan works that libraries and archives wish to make available online

---

<sup>2</sup> For example, in 2010 the Federal Court found that 'the flute riff in *Land Down Under* which lasts only seconds was copied from the *Kookaburra* song without authorisation from the copyright owner'. Amy Hay, [Mighty Kookaburra swoop Men at Work](#), Arts Law Centre of Australia, 2010.

<sup>3</sup> Orphan works are works where the copyright owner cannot be identified and/or located to ask permission to use the work. [Submissions](#) to Australian Law Reform Commission *Copyright and the Digital Economy Issues Paper*, August 2012, numbers 225 – Australian Publishers Association, 169 – The Australian Society of Authors, 129 - Australian Literary Agents' Association.

<sup>4</sup> NSLA Copyright Group survey conducted in 2012.

<sup>5</sup> Submission to *Issues Paper* number 249 – Copyright Agency, and submission to *Discussion Paper*, June 2013, number 727 – Copyright Agency.

<sup>6</sup> For example, in the UK scheme non-commercial uses attract a licence fee of 10p, while the minimum administrative fee is £20. At the 12 month review stage it had collected only £8,001.97 and no rights holders had come forward (see Intellectual Property Office, *Orphan Works: Review of the first twelve months*, (2015) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/480742/orphan-works-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480742/orphan-works-review.pdf)). When Ariel Katz examined the Canadian scheme it had been in operation for 18 years, in which time it had issued an average of 12 licences a year with an average of C\$326 per licence. Katz concluded that "the costs of maintaining the regime (for the applicants and for Canadian taxpayers) likely exceed the amount of license fees that it has generated, and even the cost of applying and processing a license likely exceeds the average license fee."<sup>6</sup> Katz, Ariel, 'The Orphans, The Market, and the Copyright Dogma: A Modest Solution to a Grand Problem (July 27, 2012). 27(3) *Berkeley Technology Law Journal*, 2012 at p.1327. Available at SSRN: <http://ssrn.com/abstract=2118886>

are categories of material to which copyright was never intended to apply; vast proportions of archival and ephemera collections that remain in perpetual copyright because they have never been published. This includes diaries of colonial immigrants; the letters of First World War servicemen and women; church records of baptisms, marriages and burials; the wage ledgers of pastoral companies; the minutes of societies; and ephemera such as most menus, programs and tickets. These kinds of material were not created with the intention of subsequent publication, let alone commercial gain. There are no legitimate economic interests to be respected.<sup>7</sup> Also, the original creator is often unidentified, or there are unknown numbers of current rights holders because copyright has been dispersed through generations from the original creator's estate. How many of these putative rights holders will benefit, or should benefit, from a licensing scheme?

In contrast, these unwitting rights holders are among the wider public that expects libraries and archives to put such collections online for reference and re-use, even though current copyright law presents apparently insurmountable barriers to compliance. As Paula Le Dieu reflected about her role as project director of the British Broadcasting Corporation's (BBC) Creative Archive, a pilot project to make BBC archive content available for re-use by the public, 'If you are making a creative archive, you have to deal with the rights issue from the first breath, and keep dealing with it long after it has exhausted you'.<sup>8</sup>

### **Standardising approaches to copyright**

The process of contributing to the ALRC's *Copyright and the Digital Economy* inquiry involved commenting on an Act that is at times ambiguous and irrational. This consolidated the sector's motivation to develop processes and guidelines that acknowledge both the rights of creators (and subsequent copyright owners) while also assisting individual libraries' to meet their responsibilities to the public.

One of the key aims of any library is access to and re-use of collection materials while striving for legal compliance. With this in mind, National & State Libraries Australasia (NSLA) have formed a Copyright Group to assist its member libraries to:

- Standardise approaches to copyright and implement policy and procedural changes that remove barriers to access and re-use;
- Promote knowledge and understanding about copyright, rights and responsibilities among staff and the general public; and,
- Connect with interested organisations, peak bodies and individuals to support and promote legislative reform.

During the past five years the Copyright Group's efforts have delivered a number of key achievements: these are reflected in positions statements and procedural guidelines, all of which are accessible from the NSLA website and available for re-use under a Creative Commons Attribution licence (CC BY 4.0).<sup>9</sup> The NSLA Copyright Group generally meets via web conference three times a year, with email communications in between. All member libraries are represented on the group; given jurisdictional differences the National Library of New Zealand has opted for observer status. Representatives are

---

<sup>7</sup> Anne Fitzgerald and Kylie Pappalardo, [Report to the Government 2.0 Taskforce: Project 4 Copyright law and intellectual property](#), 2009, p. 53.

<sup>8</sup> Andrew Einspruch, [Digitise or perish, museums and galleries warned](#), Publishing ArtsHub, 15 August 2013.

<sup>9</sup> [NSLA website](#)

encouraged to self-nominate to work on specific projects outlined at the beginning of each calendar year – this supports the spirit of collaboration and builds knowledge and confidence across the NSLA libraries.

The first substantial piece of work undertaken by the Copyright Group took the form of a guide, *Copyright information for the clients*.<sup>10</sup> Recently updated, this document seeks to break down the barrier arising from the complexity, length and legalese of the *Copyright Act* and provide a plain English version of what copyright is (and is not) and the respective rights and responsibilities of copyright owners and users. The guide is incorporated in the websites of all NSLA libraries and points to further information including references to the specific sections of the Act and useful organisations, such as the Australian Copyright Council (ACC), Australian Library and Information Association (ALIA) and the Australian Libraries Copyright Committee (ALCC).

The information guide was followed by a project to support the growth of the Australian public domain by ensuring that digital images of works that have fallen out of copyright are available for re-use without any need for prior permission from the library that holds them. Asserting reproduction rights in public domain collection material was at this time standard practice for most NSLA libraries. Removing the permissions barrier sounds simple, but it does involve a great deal of continuing effort to identify and change catalogue records, other finding aids, legacy websites and online delivery systems, while supporting exceptions such as works that include culturally sensitive content that continue to require authorisation.<sup>11</sup>

The Copyright Group has also developed guidelines for Creative Commons licences, which provide a useful tool to expand access to copyright materials held and or created by NSLA libraries, as they bridge the gap between the ‘all rights reserved’ function of copyright and the ‘no rights reserved’ function of the public domain.<sup>12</sup>

Like many other institutions, the collections of the NSLA libraries include a large number of orphan works. The Copyright Group has adopted the Society of American Archivists ‘reasonable search’ methodology for orphan works. Like the Society of American Archivists, the NSLA guidelines offer an industry standard and process that is scalable and takes into account factors such as the age and purpose for which the work was created. In practice, the reasonable search process involves a continuum of effort ranging from minimal through to extensive.<sup>13</sup>

The most recent of these copyright education resources is the Australian Library Copyright Committee’s Library and Archives Copyright Guide.<sup>14</sup> This is a series of fact sheets that aims to set out in a simple, accessible manner the basics of copyright needed by librarians and archivists. Focusing on practicalities in areas such as client access and care of the collection, the guide builds on the training courses run

---

<sup>10</sup> NSLA, [Copyright information for clients](#), updated March 2016.

<sup>11</sup> An example of a legacy website is the State Library of South Australia’s [SA Memory](#). Launched in 2007, *SA Memory* operates on a content management system that is now obsolete. Outmoded copyright statements embedded in system templates cannot be changed until the website’s content is migrated to a new system.

<sup>12</sup> NSLA, [Creative Commons procedural guidelines](#), 2015.

<sup>13</sup> Society of American Archivists, [Orphan works: statement of best practice](#), 2009; NSLA, [Procedural guidelines for reasonable search for orphan works](#), 2010; State Library of Victoria, (internal working document) Reasonable search for orphan works checklist, 2014

<sup>14</sup> See <http://www.libcopyright.org.au/content/resources>

annually by this organisation.<sup>15</sup> All materials are Creative Commons licensed to allow sharing and adaptation by individual institutions. In future the ALCC intends to further develop this resource with additional targeted fact sheets and multimedia materials.

### **Risk management approaches to copyright**

The many references to collaborative projects and sources of information about copyright in the preceding paragraphs might suggest that staff in Australian libraries have all the skills and tools they need to manage copyright. In fact, even in the largest NSLA libraries there is often only a handful of staff who feel confident making copyright determinations across a wide range of library services, rather than particular elements such as document delivery and other copy orders. Even those with advanced skills will at times come upon situations for which there is no clear answer. Inevitably some decisions when dealing with copyright material in a library context will contain some level of risk of infringement.

This, along with the process of gathering data about the barriers and omissions in the Copyright Act that thwart the provision of library services for the ALRC, has convinced many that it is reasonable to temper compliance with risk management. For example, Alison Makins of the University of New South Wales advocates that risk management is preferable to strict compliance to the Act:

While it may seem as if the best practice would be to recommend following the letter of the law, in actuality a strict compliance approach can often lead to uncertain or inefficient guidance from compliance officers and to varying levels of compliance from users. Uncertain guidance is often the result of scenarios that the Act is ill-equipped or unequipped to handle. These scenarios are currently prolific, and the number of scenarios that the Act cannot handle is only going to grow as technology advances.<sup>16</sup>

In the past most libraries' risk management approaches to copyright involved the elimination of risk. If permission to copy or publish could not be obtained from the creator or subsequent rights holders the item was not copied or published. This applied to both library activities (e.g. creating facsimiles for exhibition, providing online access) and customer copying requests. In contrast, a responsive twenty-first century library needs a large proportion of its staff to be both competent and confident in making copyright determinations and forming sound judgments based not on eliminating all potential for infringement but on assessing its likelihood and determining whether the use falls within the organisation's acceptable risk tolerance. After all, generally the risk of legal action against public libraries is relatively low. Mechanisms such as copyright infringement notification and takedown processes can also be developed to help reduce this risk. This is another area in which the NSLA Copyright Group has been active.<sup>17</sup> Importantly, the Copyright Group worked to establish a takedown process as a comprehensive legal risk mitigation strategy extending beyond copyright to cover a range of legal and ethical issues including privacy, defamation, and culturally sensitive materials.<sup>18</sup>

---

<sup>15</sup> See <http://www.libcopyright.org.au/content/training>

<sup>16</sup> Alison Makins, *Copyright and compliance when the law can't keep up: A risk management strategy for innovation in online classrooms*, paper presented at the THETA 2015 Conference, Gold Coast, Australia, p. 4.

<sup>17</sup> NSLA, *Position statement on takedown*, 2015.

<sup>18</sup> See Janice van de Velde and Kerry Blinco, NSLA *Legal Issues Discussion Paper*, 2015.

## **A copyright determination and risk management framework**

The question then arises, is it possible to develop a broadly applicable framework that teaches library staff about copyright and their organisation's risk tolerance in a decision making context? The 15-step Copyright Determination and Risk Management Framework under development by the State Library of South Australia (SLSA), with input from the ALCC and NSLA Copyright Group is intended to do just this.

The framework begins with compliance (Steps 1-7) and proceeds to risk management (Steps 8-14). The 15<sup>th</sup> step reiterates the importance of documenting the outcome of determinations and decisions for future reference.

The framework is intended to work as a whole. Skipping steps may increase a library's risk and also mean that opportunities to add value to the management of the library's collections will be missed – such as locating a copyright holder and not only negotiating permission for the use in question but also an agreement about future uses by the library and the public. The flow chart in the appendix to this paper is the skeleton of the proposed Australian libraries' Copyright Determination and Risk Management Framework.

The expanded framework links staff to authoritative copyright information and guidelines such as those developed by the ACC, NSLA, and the ALCC. The framework also invites a library to 'plug in' its own guidelines, such as a list of sources for researching the date of death of a person in the library's jurisdiction or information about a library's policies about staff or volunteers and copyright.

### **Section 200AB - the flexible dealing exception**

The most difficult decision in the development of the proposed framework was where to place the step that asks 'Is the use covered by Section 200AB?' Should it be placed with the compliance steps of the framework, or among the risk management strategies? Where does s200AB end and risk management begin?

Section 200AB (s200AB) was added to the *Copyright Act* in 2006 as a new flexible dealing exception that lets libraries, other cultural institutions and educational institutions use copyright material in certain circumstances for 'socially useful purposes'.<sup>19</sup>

In order to be permitted under s200AB, a library's use of copyright material must comply with seven requirements:

- There must be no other exception or statutory licence available;
- Technological protection measures must not be circumvented;
- It must be made for the purpose of maintaining or operating the library;
- It must not be for commercial advantage or profit;
- It must not conflict with copyright owner's normal exploitation of the work;
- It must not unreasonably prejudice the legitimate interests of the copyright owner;
- It must be a special case.

---

<sup>19</sup> [Copyright Amendment Bill 2006](#), Part 3.

The last three requirements comprise the ‘three-step test’ that originated in the 1971 revision of the *Berne Convention for the Protection of Literary and Artistic Works*. It is reproduced in recent international treaties on intellectual property. Nations that are party to the treaties must confine legislated copyright exceptions ‘to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder’.<sup>20</sup> This is fair enough, except that each of the three components must be dealt with separately as well as cumulatively. One of the greatest uncertainties in the application of s200AB surrounds the requirement that a use must be a ‘special case’.

The Explanatory Memorandum for the 2006 Copyright Amendment Bill states that the special case condition ‘is intended to ensure that the use is *narrow* in a *quantitative* as well as *qualitative* sense’. The Supplementary Explanatory Memorandum states that s200AB ‘might be determined by a court, for example, to allow a library or archive to make a use of *a work* where *a copyright owner’s* permission cannot be obtained because he or she cannot be identified or contacted.’<sup>21</sup> (*Emphases added*)

This constrained language does not readily suggest that s200AB can be used for mass online delivery of orphan works, and there have been calls for the government to ‘identify the categories of material and circumstances that fall within the scope of s200AB, for example, old (“unpublished”) letters and diaries’.<sup>22</sup> Nevertheless, despite persistent widespread uncertainty about the interpretation and application of s200AB<sup>23</sup> some cultural institutions have proceeded to use it to deliver large collections online. This involves risk assessment, both in terms of whether the use is compliant under s200AB and what risk mitigation strategies should be used to augment reliance on s200AB. In recognition of the uncertainty surrounding s200AB the framework places its consideration at the beginning of the risk management section. It is followed by the step which introduces the reasonable search.

The Australian War Memorial’s 2009 pilot for publishing orphan works online using s200AB was the First World War era papers of official war correspondent C.E.W. Bean, which are a mixture of Commonwealth, family and third party copyright. The Memorial followed the advice of the Copyright in Cultural Institutions group, which echoes that of ALCC, that if the use has not been excluded by the other six requirements of s200AB it is very likely that it is a special case.<sup>24</sup> Other cultural institutions are using the same rationale to release other collections of orphan works relating to the Centenary of ANZAC. SLSA has put online 76,718 pages of correspondence between the Australian Army and members of South Australian families about the fate of over 8,000 missing soldiers fighting in the First World War; also a mix of Commonwealth and private copyright.<sup>25</sup>

---

<sup>20</sup> [Berne Convention for the Protection of Literary and Artistic Works](#), Article 9.2; [Agreement on trade-related aspects of intellectual property rights](#), Article 13.

<sup>21</sup> [Copyright Amendment Bill 2006](#)

<sup>22</sup> Fitzgerald & Pappalardo, p. 53.

<sup>23</sup> See Fitzgerald & Pappalardo and Anne Flahvin and Carolyn Dalton, [Flexible exceptions for the education, library and cultural sectors: Why has s 200AB failed to deliver and would these sectors fare better under fair use?](#), Policy Australia, 2012.

<sup>24</sup> Robyn van Dyk, ‘[Digital Preservation: the problems and issues involved in publishing private records online: the web publishing of the notebooks and diaries of C.E.W Bean](#)’, paper presented at the VALA 2010 conference, Melbourne, Australia; Copyright in Cultural Institution group, [Flexible dealing and cultural institutions. Statement of Principles regarding the use of section 200AB of the Copyright Act \(1968\): an industry standard and user guide for the cultural sector](#), 2010; Australian Libraries Copyright Committee, [A User’s Guide to the Flexible Dealing Provision for Libraries, Educational Institutions and Cultural Institutions](#), 2008.

<sup>25</sup> State Library of South Australia, [South Australian Red Cross Information Bureau collection](#), released in 2015.

## Copyright and collection management

Another aspect of the expanded proposed framework helps staff to understand that copyright determinations have important collection management and records management dimensions. Investigations staff make in the course of copyright determinations will often reveal information that can enhance the management of the material in question. Documenting that information, and flagging the need for further actions based on that information, will greatly reduce if not eliminate the work involved in the next copyright determination involving the same or related material.

Steps in the expanded framework have an 'Action' section. Some suggested actions are simple. Step 4 proposes that 'If the use can be met by simply linking to an instance of the work that is already online, do so. In many cases, it will be reasonable to make use of someone else's copyright determination or risk management decision.' The use in question may have, for example, related to including a particular resource in a Library Guide. The action for Step 4 suggests that if the work has been put online by another collecting institution the URL is likely to be stable; adding a link from the catalogue record of the work to the other collection institution's instance of the work will provide a second way for staff and the public to discover the existing online version from within the library's website.

Other actions proposed in the expanded framework are more complex. Step 5 is undertaken to determine whether copyright in the material in question has already been assigned to the library, in which case the library is able to make decisions about its use. This step involves staff checking the terms of relevant donor agreements or deeds of gift. However, the expanded framework warns that assignments of copyright in such documents shouldn't be taken at face value. It is not unusual for donors to have assigned copyright which was never theirs, on the assumption that if they own an item they also own copyright in it. When this is the case the expanded framework recommends documenting the matter for future reference so that the false assignment will no longer mislead. This process is likely to involve actions that will be transferred to staff not involved in the copyright determination. The expanded framework suggests that this can be done by way of a 'copyright action form'.

The expanded framework also proposes that libraries maintain a 'significant copyright decisions register'. The NSLA Copyright Group has developed such a register to share the outcomes of takedown requests and help ensure that NSLA libraries consistently apply the principles set out in the NSLA *Position statement on takedown*.<sup>26</sup> The framework proposes that individual libraries adopt the concept to record decisions about the use of copyright material that are made in relation to the requirements of s200AB or a risk management process (or both). For example, in 2014 SLSA decided to begin putting online digitised, word-searchable copies of published almanacs and directories dating from the 1860s to the 1970s.<sup>27</sup> The rationale noted in SLSA's significant copyright decisions register (in addition to public interest) is that the publisher is no longer registered with the Australian Securities and Investments Commission. The register specifies that before applying the decision to similar works the publishing entity must be investigated.

---

<sup>26</sup> NSLA, [Position statement on takedown](#). The NSLA Copyright Group's register is password protected and it does not contain details that would tend to identify those who have requested takedown of online content.

<sup>27</sup> State Library of South Australia, [Almanacs and directories](#), released 2014.

## Conclusion

When Paula Le Dieu spoke about the pilot she directed to make BBC archive content available online, she emphasised the implications of the endeavour:

Let's be clear here what we're actually asking. ... we are about to make the material available, for free, forever, to we are not quite sure whom, to do we have no idea and probably we're not going to like some of it. That's what we're asking when we're having the rights conversation.<sup>28</sup>

The copyright determination and risk management framework proposed in this paper acknowledges the gravity of copyright decisions by placing legislative compliance ahead of risk management strategies, and by proposing risk reduction strategies (e.g. presenting online at a low resolution; revealing only a small proportion of a document; constructing technological gateways to material). The framework is not a short cut. Copyright will continue to be exhausting, but the framework offers a disciplined and principled way for libraries to give the public, including copyright creators, greater access to Australia's cultural heritage.<sup>29</sup>

---

<sup>28</sup> Andrew Einspruch, [Digitise or perish, museums and galleries warned](#).

<sup>29</sup> Australian libraries interested in using the expanded framework and perhaps contributing to its further development can contact Jessica Coates, Australian Libraries Copyright Committee, [jcoates@nla.gov.au](mailto:jcoates@nla.gov.au)

## **Appendix: Basic outline of the proposed Australian Libraries' Copyright Determination and Risk Management Framework**

### **1. Identify the material using the terminology of the Copyright Act.**

Is the type of material protected by copyright?

If no, use the material.

If yes:

### **2. Is the material in question out of copyright?**

If yes use the material – no copyright limits apply to the use of public domain material.

If no:

### **3. Identify the use using the terminology of the Copyright Act.**

Is the use controlled by copyright?

If no, use the material.

If yes:

### **4. Has someone else already made the material available online?**

If the use can be met by simply linking to an instance of the material that is already online, do so.

If no:

### **5. Has copyright in the material been assigned to my library?**

If yes, apply in-house policies/procedures to determine whether the material can be used.

If no:

### **6. Is the use covered by a permission or licence?**

If yes then use the material, ensuring you stay within the bounds of the permission or licence.

If no:

**7. Is the use covered by a copyright exception (not s200AB)?**

If yes, use the material ensuring you stay within the bounds of the exception.

If no:

**8. Is the use covered by s200AB?**

If yes and the use involves a single item or a small amount of material, use the material, being sure you record your decision making process.

If you are uncertain about the answer, or if yes and the use involves large amounts of material, consider the remaining steps in the framework.

If no:

**9. Can the copyright owner/s be identified and contacted?**

If yes, contact the owner/s or their agents and seek permission/a licence to use the material.

If no, the material is an orphan work:

**10. Has a relevant decision already been made to use the material under my library's copyright risk management framework?**

If yes, update in-house documentation (e.g. a significant copyright decision register) and use the material.

If no:

**11. Is there alternative out of copyright or licensed material that would serve just as well?**

If yes, use that material instead.

If no:

**12. What is the risk of using the material without permission or an exception?**

Consult the Risk Factors table in the expanded framework.

If too many high-risk risk factors apply, do not use the material but document your decision-making process for future reference.

If the risk factors may be acceptable:

**13. Can the level of risk be reduced?**

Consider the risk reduction strategies outlined in the expanded framework.

Proceed to Step 14:

**14. Does the risk fall within my library's risk tolerance?**

If yes, use the material and document your decision-making process for future reference.

If no, do not use but document your decision-making process for future reference.

**15. Document the outcome of this determination for future reference**