



Australian Libraries Copyright Committee



Australian Digital Alliance

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**ENGAGE:  
GETTING ON WITH GOVERNMENT 2.0  
DRAFT REPORT**

Joint submission of the  
Australian Digital Alliance and  
the Australian Libraries Copyright Committee  
to the Government 2.0 Taskforce

December 2009

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## EXECUTIVE SUMMARY

The Australian Digital Alliance and the Australian Libraries Copyright Committee are supportive of all recommendations made in the *Engage: Getting on with Government 2.0 Draft Report*. We commend the proactive approach and the strong stance taken by the Government 2.0 Taskforce. The purpose of this submission is to make additional supporting comments with respect to: open, accessible and reusable PSI; and increasing access to the collections of cultural institutions.

The Creative Commons BY licence is the ideal mechanism to facilitate open PSI. The unrestricted permission to reuse information released under Creative Commons, subject to appropriate caveats about reliance and quality, is the key to unlocking the maximum value of PSI.

Government should invest in open PSI, with a view to making it progressively available over time. Availability of PSI should be prioritised according to potential value. This investment will have a high return to government through increased tax revenue from the resulting economic and social dividends. It is important that government embarks on an ambitious project to release its existing stock of PSI.

There should be a requirement for government agencies and Ministers to allow for the entire content of their websites to be captured and made available to the public. Such PSI is often transitory and is frequently lost when websites or webpages are taken down, leaving a 'black hole' in Australian history.

There should be a presumption of access for the release of PSI. The *Freedom of Information Act 1982* provides a strong regime against which to measure decisions to withhold PSI. PSI should only be withheld in the event that an FOI exemption is found to apply.

Australia's cultural institutions hold a wealth of copyright material, which primarily consists of documentary and artistic works, and objects of cultural and historical importance. Cultural institutions seek to use digital technologies to achieve the widest possible audiences for their collections. However, unbalanced copyright laws prevent cultural institutions from providing adequate access to their collections.

Orphan works pose a particular problem to the digitisation of the collections of cultural institutions. The adoption and utilisation of section 200AB to allow digitisation has been slow. Cultural institutions should be permitted to digitise large scale collections of orphan works. After diligent searches have determined a representative portion of a collection to be orphan works, the collection should be given the status of an orphan works collection. Additionally, government policy, and the recommendations of the Taskforce, should encourage cultural institutions to take a risk managed approach to making their collections widely available, particularly with respect to orphan works.

## RECOMMENDATIONS

### **Open, Accessible and Reusable PSI**

We recommend that the Taskforce consider the following suggestions:

- The inclusion of metadata marking government's assessment of the veracity of the information is sufficient to address any issues.
- Major agencies be required to assess the value of their entire stock of existing PSI, with a view to making it freely available for use.
- Government to allocate a budget to major agencies to progressively make existing stocks of PSI available, prioritised according to the PSI's potential to add value.
- Government to pay for the right to release the output of work contracted to third parties under Creative Commons.
- Government to allow the NLA to capture the entire content of available websites and webpages for its PANDORA service.
- The creation of a presumption of access where all PSI should be publicly available unless an exemption to release is found to apply.
- Exemptions to the release of PSI should be those that apply under the *Freedom of Information Act 1982*.

### **Access to the Collections of Cultural Institutions**

We recommend that the Taskforce consider the following suggestions:

- In any future legislation relating to orphan works define a 'reasonable search' to locate a rights holder in relation to the use of the work, so that the cost is not prohibitive. It should take into account the value of the work, the likelihood of the rights holder to derive an income from the work/use, and the value to the person relying on the exemption.
- Re-interpret s 200AB to allow for a more permissive use. Cultural institutions should be encouraged to rely on the exception for all uses unless the use will breach the test.
- After diligent searches have determined a representative portion of a collection to be orphan works, the collection should be given the status of an orphan works collection.
- This status should be enough of itself for section 200AB to apply, and to permit large scale noncommercial use of the exception.
- Government policy should encourage a risk managed approach to making the collections of cultural institutions widely available, particularly those with orphan works.

# ENGAGE: GETTING ON WITH GOVERNMENT 2.0 DRAFT REPORT

## A. INTRODUCTION

### Purpose

1. The Australian Digital Alliance and the Australian Libraries Copyright Committee are supportive of all recommendations made in the *Engage: Getting on with Government 2.0 Draft Report (the Report)*. We commend the proactive approach and the strong stance taken by the Government 2.0 Taskforce (**the Taskforce**).
2. The purpose of this submission is to make additional supporting comments with respect to the following:
  - Recommendation 6—open, accessible and reusable Public Sector Information (**PSI**)
  - Recommendation 7—access to the collections of cultural institutions.

### Who We Are

3. The ADA is a non-profit coalition of public and private sector interests. The ADA was formed to promote balanced copyright law by providing an effective voice for the public interest perspective in debates about copyright reform.
4. Whilst the breadth of ADA membership spans across various sectors, all members are united by the common theme that intellectual property laws must strike a balance between providing appropriate incentives for creativity against reasonable and equitable access to knowledge.
5. Sir Anthony Mason AC KBE QC, former Chief Justice of the High Court of Australia, was a founding patron of the ADA. ADA members include:
  - Group of Eight universities
  - Metropolitan and regional universities
  - National cultural institutions such as galleries and museums
  - Information and communication technology companies such as Google Australia
  - Scientific and other research organisations
  - Schools.
6. The ADA works closely with its sister organisation, the ALCC. The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It develops policy and advocates action to support the role of libraries as information providers and preservers.

7. The ALCC is a cross-sectoral committee which represents the following organisations:

- The National and State libraries
- National Archives of Australia
- Australian Library and Information Association
- Council of Australian University Librarians
- National and State Libraries Australasia
- The Australian Society of Archivists
- The Council of Australasian Archives and Records Authorities
- Australian Government Libraries Information Network.

**B. RECOMMENDATION 6—OPEN, ACCESSIBLE AND REUSABLE PSI**

*By default PSI should be*

- *Free*
- *Based on open standards*
- *Easily discoverable*
- *Understandable*
- *Machine-readable*
- *Freely reusable.*

**Terms of Release**

8. We support the recommendation for the release of PSI, past and future, under the Creative Commons BY licence. We consider that Creative Commons is the ideal mechanism to facilitate open PSI, and to unlock the maximum social and economic value of PSI. The public benefit from releasing PSI under Creative Commons licences far outweighs any public detriment that might occur from such unencumbered release.
9. We consider that weighing the balance of public benefit against any public detriment should be the key factor in the decision making process for determining the terms of release for PSI.
10. We agree with the analysis of the Taskforce which addresses concerns raised about the use of Creative Commons licences.<sup>1</sup> We would like to make additional comments supporting the appropriateness of Creative Commons licences.

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<sup>1</sup> The Report, pp 72–74.

### *Control Over Released Material*

11. Unrestricted permission to reuse PSI is required to create maximum value. Control over the process of re-using PSI is not required. The benefit from open PSI comes through allowing anyone to reuse the material to create new products. If permission must be sought for each reuse, transformation, etc – then the bureaucracy of the process will stifle innovation. Freedom to reuse is the key to unlocking the maximum value of PSI.
12. Fears of potential misuse of PSI are neither substantiated nor relevant. Any qualms about the potential for misuse to reflect poorly on government are expressly addressed by the inclusion of a ‘no endorsement’ provision in Creative Commons licences. In any case, the social and economic benefit from open PSI far outweighs any public detriment that might occur from its misuse.
13. We consider that public detriment from the misuse of PSI would be isolated, small scale, and in any event – unable to be effectively prevented by reasonable control. If a rogue is willing to misuse PSI in the first place, then the lack of permission from the Commonwealth Copyright Administration is unlikely to be a factor in making the decision to take such rogue action. Thus, there is no merit in arguments that permission and vetting for the reuse of PSI is required.

### *Cost*

14. Government does not need an economic incentive for the collection of PSI. Government creates PSI to support its role as a decision and policy maker and as part of its social policy for cultural institutions. There is no rationale for charging for access to PSI as free access will not deprive government of its incentive.
15. Government should not even charge an amount to recover the costs of providing access. Even the lowest charges would significantly reduce the number of people who choose to access PSI. Any sort of cost would be prohibitive to small scale innovators, business and hobbyists. These people invest their own time and money and can produce high value output with minimal overheads. Government should avoid doing anything that would prevent small scale operators from contributing.

## **Existing and Future PSI**

### *Releasing Existing PSI*

16. We support the recommendation that the proposed new Office of the Information Commissioner should create policies to maximise the stock of existing PSI that is re-licensed under Creative Commons.
17. We consider that government should be required to review and assess all the PSI it holds, and endeavour to make it available. The release of existing PSI should be prioritised according to its potential value to the public.

18. Government should invest in open PSI, with a view to progressively making it available to the public over time. Such an investment will have a high return to government through increased tax revenue from the resulting economic and social dividends. Major government agencies should be allocated a budget to release their existing stock of PSI.

#### *Releasing Future PSI*

19. We support the recommendation that all contractual relationships between the Commonwealth and third parties must contain a clause for release of contracted material under Creative Commons. The government contracts large amounts of work to the private sector. Much of this output is not owned by government and we consider that, if required, government should pay an additional fee for the right to release contracted work under Creative Commons. The return for the public will be far greater than the cost of securing the right to release the work as open PSI.
20. We support the recommendation that PSI covered by Crown copyright should be subject to automatic licensing under Creative Commons when it becomes available for public access under the *Archives Act 1983*.

#### **Capturing online PSI**

21. We support the submission by the Australian Library and Information Association that the requirement to publish PSI as early as possible should include a reference to temporary PSI. Information is regularly published online by government agencies and Ministers on a temporary basis. For example, the Centenary of Federation website, the 2000 Sydney Olympics website, and election websites. This material often only exists in digital form, and is no longer available when the website is taken down after the event. However, the information is of vital importance to Australia's cultural heritage. When websites are taken down it effectively leaves a 'black hole' in Australia's history.
22. The NLA has an ambitious program to effectively 'capture' such websites. It is known as PANDORA: Australia's Web Archive. PANDORA's purpose is to provide long term access to websites of cultural significance to Australia. However, it is also necessary to fill the gap created by the failure of government agencies to retain their temporary, but crucially important PSI. As PANDORA copies the entire content of websites, it is hampered by copyright issues. Permission must be sought before the NLA 'captures' and copies websites for long term access and preservation.
23. We consider that there should be a requirement for government agencies to allow the NLA to capture and make available to the public, the entire content of their websites and public webpages.

#### **Presumption of Access**

24. We support the recommendation for PSI to be released according to the *Freedom of Information Act 1982 (the FOI Act)* principle of the presumption of access. All PSI should be publicly available unless an exemption to release is found to apply. The presumption of access is in line with the proposed reform of the FOI Act, and with the key Rudd Government election policy – *Government Information: Restoring Trust and Integrity*.

25. We also note that Senator the Hon Joe Ludwig, Cabinet Minister and Special Minister for State, with responsibility for FOI and open government, has made supporting comments on the presumption of access. In a speech given on 24 March 2009, *Open and Transparent Government – the Way Forward*, Senator Ludwig made the point that the ‘best safeguard against ill-informed public judgement is not concealment but information.’

#### *When not to Release*

26. We support the recommendation that PSI should be released where possible. We consider that the regime of exemptions created by the FOI Act should be used to determine when and where PSI should be exempted from release. Generally, the FOI regime allows exemptions where the public interest in access is outweighed by the public interest in non-release. The FOI regime has case law to aid in making determinations on release. The same exemptions should apply to the release of PSI. Because the FOI regime provides a framework against which decisions not to release PSI can be measured, it will help achieve the goal of making PSI as open as possible.
27. We support the recommendation that decisions not to release information should be made with the involvement of the proposed new Office of the Information Commissioner. This will help to ensure PSI is withheld only in accordance with the exemptions regime of the FOI Act.

#### *Veracity of the Information*

28. We consider that all PSI should be released, regardless of concerns about its veracity. The social and economic benefit from open PSI far outweighs any public detriment that might occur from potentially incomplete, poor quality or outdated information. The benefit comes from the release of PSI with clear caveats, so that potential users are given the opportunity to assess the information and choose the degree of reliance they place on it. The benefit from this outcome clearly outweighs the alternative where mandatory suppression of the information denies people the opportunity to make their own assessment. The inclusion of metadata marking government’s assessment of the veracity of the information is sufficient to allay any concerns.
29. Concerns have been raised that government should not be required to release information because of perceived defects with its quality. The mere fact that a dataset is poorly maintained and contains missing or incorrect information should be no hindrance to its release. With an appropriate caveat, the public is in a position to add to the value of the dataset by correcting it.
30. The Australian Newspapers service run by the National Library of Australia (NLA) has placed thousands of Australian newspapers online, ranging from 1803 to 1954. The service is innovative and unique in the way it delivers digitised newspaper content and engages with the online user community. Web2.0 technology has been embraced in order to provide a cutting edge service that allows users to interact, contribute and add value to the newspaper content.

31. The interactive features of the service include the ability for users to add subject tags and comments to specific articles and also to correct the electronically translated text of the articles. Since release of the Australian Newspapers service, the NLA has built up a very dedicated user community who have been very active in making text corrections, which in turn enhances and enriches the content for all users. As at December 2009, over 8 million lines of text have been corrected, 232,000 subject tags and over 5,000 comments added.
32. The NLA does not moderate content added by users in any formal way. To date only two examples of 'graffiti' have been detected. These were both added as comments and were in the form of advertising. The NLA's experience is that users are not adding spurious content or vandalising the service in any way. By building a dedicated user community and placing a high level of trust in users, the NLA and the user community has been rewarded with enriched and value-added content to assist and support the research of others. The public have provided a service that the NLA could not itself afford.
33. There is no merit in concerns about data becoming out of date, and that by extension, any products which rely on that data may then become misleading. Such an attitude is risk averse, runs contrary to the purpose of releasing PSI, and ignores the fact that most data becomes out of date with the passage of time. It belies the contributions that users will make to improve datasets, and the interest of the creator in keeping their product up to date. Further, it is likely that release of the data will result in more efficient updates than government itself would provide.

### **In Summary**

34. The Creative Commons BY licence is the ideal mechanism to facilitate open PSI. The unrestricted permission to reuse information released under Creative Commons, subject to appropriate caveats about reliance and quality, is the key to unlocking the maximum value of PSI. It is important that government embarks on an ambitious project to release its existing stock of PSI. We consider that in order to facilitate the greatest release of PSI, there should be a presumption of access, unless an exemption under the FOI Act would be found to apply.

#### **Recommendation**

We recommend that the Taskforce consider the following suggestions:

- The inclusion of metadata marking government's assessment of the veracity of the information is sufficient address any issues.
- Major agencies be required to assess the value of their entire stock of existing PSI, with a view to making it freely available for use.
- Government to allocate a budget to major agencies to progressively make existing stocks of PSI available, prioritised according the PSI's potential to add value.
- Government to pay for the right to release the output of work contracted to third parties under Creative Commons.
- Government to allow the NLA to capture the entire content of government agency websites and webpages for its PANDORA service.

- The creation of a presumption of access where all PSI should be publicly available unless an exemption to release is found to apply.
- Exemptions to the release of PSI should be those that apply under the *Freedom of Information Act 1982*.

### C. **RECOMMENDATION 7—ACCESS TO THE COLLECTIONS OF CULTURAL INSTITUTIONS**

*An important category of PSI held by public collecting institutions is information for which the copyright is held by third parties who cannot be identified or located, i.e. 'orphan works'. It is recommended that the Government, through the proposed new Information Commissioner function, examine the current state of copyright law with regard to orphan works (including s.200AB), with the aim of recommending amendments that would remove the practical restrictions that currently impede the use of such works.*

#### **Works in Copyright Held by Cultural Institutions**

35. Australia's cultural institutions hold a wealth of copyright material, which primarily consists of documentary and artistic works, and objects of cultural and historical importance. Cultural institutions have the function and responsibility of disseminating information to the public, and to develop and maintain representative Australian collections.
36. Cultural institutions serve the public through providing effective and efficient access to their collections for the enhancement of research and scholarship and the public's understanding, appreciation, and enjoyment of culture. This category of information is one of the most valuable. It can be readily utilised and enjoyed by the general public without the need for any technical skills.
37. Government needs to support cultural institutions to provide adequate public access to their collections through discovery systems and increased digitisation. Cultural institutions seek to use digital technologies to achieve the widest possible audiences for their collections. Digitisation, such as onsite digital displays and online distribution of material, vastly increases accessibility for the public.

#### **Difficulties Under the Current Copyright Regime**

38. Unbalanced copyright laws prevent cultural institutions from providing adequate access to their collections. Cultural institutions often do not own the copyright or the required rights in the material they hold to fulfil their statutory obligations of providing access.

39. This creates significant problems for providing digital access to their collections. For example, the National Museum and National Gallery of Australia have a combined collection of 315 000 objects and works of art – of which fewer than 3 percent are capable of being displayed at any one time.<sup>2</sup> Digitisation of the collections held by these two cultural institutions would substantially improve access.
40. The libraries and archives exceptions and fair dealing exceptions are too limited to enable cultural institutions to provide adequate digital access to their collections. These exceptions limit electronic reproductions. Because of the lack of technological neutrality, they serve a limited purpose for cultural institutions. The section 200AB flexible dealing, discussed below, also does not facilitate large scale digitisation projects.
41. Cultural institutions uphold copyright law, but need to have the balance between copyright users and rights holders maintained and not eroded, especially in the digital environment.

#### *Orphan Works*

42. Orphan works pose a particular problem to the digitisation of the collections of cultural institutions. Orphan works are those where it is practically impossible or difficult to identify or locate the rights holder. We consider that government owned orphan works should be regarded as PSI.
43. Orphan works comprise large parts of collections, especially older collections acquired when copyright laws were different, or donated collections. Often, cultural institutions are restricted from providing access to orphan works, where doing so would create great social value and a low risk of complaint.
44. This problem is exacerbated by two factors. First, the term of copyright in unpublished works is effectively indefinite. Second, the cost of locating rights holders is prohibitively costly, and often technically impossible. Technical issues are created by a lack of information on a copyright holder's status, location or an inability to determine who the copyright holder is after the passage of time.

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<sup>2</sup> Submission of National Museum of Australia, National Gallery of Australia and National Gallery of Victoria, 'Digital Agenda Review: Libraries, Archives and Educational Copying Issues Paper', <[http://www.nma.gov.au/shared/libraries/attachments/corporate\\_documents/nma\\_nga\\_ngv\\_submission/files/637/NMA-NGA-NGV\\_submission.pdf](http://www.nma.gov.au/shared/libraries/attachments/corporate_documents/nma_nga_ngv_submission/files/637/NMA-NGA-NGV_submission.pdf)>.

### *Flexible Dealing Provision – Section 200AB*

45. The section 200AB flexible dealing provision was introduced, in part, to deal with the issue posed by orphan works. It gives cultural institutions some scope to use copyright materials in certain circumstances, for the purposes of maintenance or operations, or providing services. It is open ended and sets out a series of steps to determine whether a particular use is permitted.
46. Adoption of section 200AB has been slow. In operation, the provision has failed to provide certainty for the copying of works by cultural institutions. The provision has not been used to a great extent because it is too limited, and cultural institutions are unsure how to use section 200AB in accordance with their institutional risk management, relationship management and other policies.
47. The main problem with section 200AB is its apparent inapplicability to large scale or systematic digitisation projects. The section is technologically neutral and applies to all formats, but does not expressly permit collections of material to be treated as a 'block'. There is great uncertainty surrounding the ability of cultural institutions to digitise collections, and whether these can be special cases as required by the provision. The requirement for a case-by-case assessment of each item of a collection hampers large projects.
48. The requirement to undertake a diligent search to find a rights holder does not adequately take into account the balance of the likely value of the work to the rights holder against the value to the person relying on the exemption. The cost of conducting a search is often too onerous in relation to the value likely to be derived from making the work available. With orphan works, the balance is heavily against conducting a diligent search for large volumes of material.
49. Cultural institutions should be permitted to digitise large scale collections of orphan works. After diligent searches have determined a representative portion of a collection to be orphan works, the collection should be given the status of an orphan works collection. This status should be enough of itself for section 200AB to apply, and to permit large scale noncommercial use of the exception.

### *Facilitation of Access by Collecting Societies*

50. Collecting societies have proven to be ineffective at helping cultural institutions to facilitate access to their collections. Generally, collecting societies facilitate access to copyright material where individual negotiations would be too costly by providing for the collective administration of rights. This is not the solution for providing access to orphan works held by cultural institutions, it is especially not conducive to *open* (free) PSI.
51. Collecting societies are not authorised to licence all possible uses – such as communication. Further, collecting societies charge fees for noncommercial and educational uses. In most cases, such as for unpublished manuscripts, when located, rights holders do not wish to receive royalties.

52. Our members have experienced great difficulties trying to licence music. The NLA and other cultural institutions have sought to facilitate public access to in-copyright Australian music through providing bibliographic records linked to streamed 30 second sound samples that are used merely to identify the musical work. By itself, the streamed sound sample has no commercial value, either to the NLA or to the user, nor competes with commercial digital download services. Nevertheless, such use in national collaborative online services promotes and exposes Australian content and thus has community interest, cultural value and the potential to increase demand for Australian creative product.
53. The Australasian Performing Right Association (**APRA**) licence fee to cover the free delivery of these sound samples from the NLA's website is averaging \$0.30 per single sound sample use, a cost to the NLA that significantly outweighs any public benefit. To date, APRA has not responded to the NLA's recent request to renegotiate the licence fee and to factor in the community purpose and non-commercial context of the use.

### **Risk Management Approach to Access**

54. The copyright regime does not provide cultural institutions with enough certainty to be proactive in their use of exceptions. Only a few organisations have been proactive in digitising low risk collections where the application of exceptions is uncertain.
55. The NLA has taken a unique approach to the issues posed by orphan works. The NLA applies a risk management strategy to research requests for access to its collection of manuscripts. Works are only checked for date and potential sensitivity. If they are dated pre 1970 and of low sensitivity, works are supplied without further checking or permissions. This process has reduced staff checking time from thirty to five minutes per request, allowing greater access to the NLA's collection. The NLA has received no complaints over the past year that the strategy has been in operation.
56. The NLA is also taking a risk managed approach in providing access to the Australian Newspapers service. In order to provide online access to Australian newspapers in an efficient and cost-effective way it is not possible for the NLA to attempt to determine the copyright status, particularly for photographs printed in the newspapers. In addition, a number of the newspaper publishers no longer exist, making it very difficult, if not impossible, to determine who the copyright owner is. The NLA has been delivering this digitised newspaper content online since August 2008 and to date has not received any claims or complaints about copyright.
57. In the 2009-10 financial year the NLA is undertaking a project to digitise and make available the Australian Women's Weekly from 1933-1983 (the first 50 years of publication). Through this project, the NLA is again undertaking a risk managed approach to improve access by making this content freely available online. The NLA is working closely with the publishers, Australian Consolidated Press, to progress this project. However, the risk in regard to copyright infringement rests with the NLA.
58. As the potential copyright risk is greater to the NLA than with the Australian Newspapers service, it will need to implement a process to be able to take down or restrict access to content if a copyright claim is made. This will be an additional cost to the NLA in order to support digitisation of the Australian Women's Weekly.

59. We consider that government policy, and the recommendations of the Taskforce, should encourage cultural institutions to take a risk managed approach to making their collections widely available, particularly with respect to orphan works. Such a government policy would help to establish industry practice. The potential benefits are demonstrated by the support for the NLA's approach.

### **In Summary**

60. Australia's cultural institutions hold a vast amount of copyright material, with the objective of providing access to the public. However, cultural institutions can only provide physical access to a proportion of their collections, and are unable to provide adequate digital access due to copyright restrictions. The libraries and archives exceptions and fair dealing exceptions are too limited, and the adoption of section 200AB has been slow. The application of the provision is too uncertain, with cultural institutions being unable to embark on ambitious digitisation projects.

#### **Recommendation**

We recommend that the Taskforce consider the following suggestions:

- In any future legislation relating to orphan works define a 'reasonable search' to locate a rights holder in relation to the use of the work, so that the cost is not prohibitive. It should take into account the value of the work, the likelihood of the rights holder to derive an income from the work/use, and the value to the person relying on the exemption.
- Re-interpret section 200AB to allow for a more permissive use. Cultural institutions should be encouraged to rely on the exception for all uses unless the use will breach the test.
- After diligent searches have determined a representative portion of a collection to be orphan works, the collection should be given the status of an orphan works collection.
- This status should be enough of itself for section 200AB to apply, and to permit large scale noncommercial use of the exception.
- Government policy should encourage a risk managed approach to making the collections of cultural institutions widely available, particularly those with orphan works.