



## Stakeholder consultation: proposed reform of the *Copyright Act 1968*

### Guiding questions – December 2015

#### **Response of Council of Australasian Museum Directors (CAMD)**

11 February 2016

##### Overview

Q 1: Do you think the proposed provisions are sufficiently clear and will operate effectively to meet the objective of ensuring access to accessible format copies of works?

CAMD welcomes the extent to which the proposed Bill brings greater clarity to the provisions of the *Copyright Act 1968* as they relate to cultural institutions. The Bill will assist in the preservation of Australia's historically and culturally significant collections and improve access to them by researchers and the general public.

The following response brings together comments by our Australian members, the Directors and CEO's of the major national, State/Territory and major regional museums, in relation to the Guiding Questions provided by the Department of Communications and the Arts.

##### **Defining the collecting sector**

One overall comment made by members relates to the opportunity provided by the reform proposal to deal with the potential confusion caused by the use of separate terms such as 'libraries and archives'. CAMD is aware that 'museums and galleries' are deemed to be 'archives' under the Act but at a time when many museums encompass the functions of museum, archive, gallery and library, it seems illogical to maintain such distinctions through the current definitions. This concern also relates to the use of the separate 'key cultural institution' definition. Many of our member museums can rely on provisions for 'libraries and archives' but can also be 'key cultural institutions' for the purposes of the legislation. This proliferation of terms is potentially confusing and impacts negatively on the consistent application of the Act. This is particularly the case when the definitions are used to differentiate access to exceptions (as is the case in s113K on administration and s113J on research). The divisions and the difference in exceptions seem arbitrary and inconsistent with the intent of the Act.

In the further interests of clarity, CAMD recommends that the exposure bill change the current reference to ‘libraries and archives’ in the Act to a single, broader term such as ‘collecting institutions’ which makes application of the legislation in relation to libraries, archives, museums and galleries clearer for the institutions themselves and users. Specifically including museums and galleries under a new definition will ensure that their different mandate is automatically considered by those maintaining the law. CAMD also suggests that it will promote a wider understanding of and compliance with the ramifications of the Act amongst institutional staff and collection users.

#### **Comment on s113D Access Control Technological Protection Measures (TPM)**

It is anticipated that access control Technological Protection Measures (TPMs) will increase over time, particularly with the proliferation of digital media entering collections. CAMD agrees that TPMs should not prevent collecting organisations from relying on exceptions<sup>1</sup> and it supports the inclusion of an explanatory statement within the Bill which plainly states this point.

#### Disability Access

CAMD supports the proposed consolidation of the existing exceptions and limitations in the Act that help to provide access to copyright material for certain authorised organisations and individuals assisting persons with a disability.

CAMD would also note that it will be a challenge for some collections to sustain access requirements, particularly for specialist AV viewing/listening, with current resources.

**Q 2: Do you prefer the terminology ‘organisation assisting a person with a disability’?**

CAMD prefers ‘organisation and/or individual assisting a person with a disability’.

**Q 3: Will the proposed exception allow providers of print disability radio to continue operating as they currently do?**

Nil response.

#### Preservation and Research copying

CAMD welcomes the Bill’s harmonisation of provisions for collecting institutions to make preservation and research copies. These provisions will allow greater flexibility in copying and digitising copyright material for preservation and research purposes.

CAMD would suggest however that some of the terms used in the preservation and research provisions outlined may have the unintended consequences of:

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<sup>1</sup> The detailed reasons why TPM circumvention exceptions are required by collecting organisations are outlined in the submission made by the Copyright in Cultural Institutions group to the Australian Law Reform Commission in 2012.

- preventing staff or researchers from accessing collection items (which are not originals or in electronic form);
- failing to take advantage of digital technology, when provided, to allow the widest possible access to Australia’s collections; and
- introducing further inequities in access to collections by forcing users to attend the institution to access material.

#### **‘Original form’**

The proposed restriction of the preservation and research exceptions to copyright subject matter existing in “original form” is not practical for preserving and providing access to museum collections and is not supported by the best practice anticipated in s113H.

Museums hold many collection items that would be considered non-original but are the only remaining copies in existence, the best copy or are the only accessible copy in a collection eg research papers that usually hold copies of third party material. This material may not be original but is now part of a whole collection and requires preservation and access equally with original material. For example, First World War letters and diaries copied by the Australian War Memorial in the 1920s and 1930s for the collection are in many cases the only known or surviving copies.

CAMD would recommend the removal of the reference to ‘original form’ in these provisions.

#### **‘Electronic form’**

Each section of the Bill appears to limit copyright dealings for preservation or research purposes by requiring that a “preservation copy” or “research copy” be in electronic form. Some members regularly provide paper copies of collections to members of the public who do not have access to computers or who cannot attend the museum in person. Museums require flexibility to preserve and facilitate research in analogue form and/or electronic form. Apart from the question of imposing electronic control, which will be addressed below, there does not appear to be a rationale for this restriction and it appears inconsistent with new and existing provisions.

CAMD would recommend the removal of the reference to ‘electronic form’ in these provisions.

#### **Electronic controls**

CAMD understands that s113H(2) and s113J(2)(d) limit copyright dealings for the purposes of preservation or research by requiring a ‘preservation copy’ or ‘research copy’ to have electronic controls so that it cannot be copied electronically by any person or communicated to the public. The provision places the onus on the institution to police the use of copyright material.

CAMD would submit that it is inequitable to restrict access to research material only to those users who are financially able to visit the institution in person to view an electronic copy. The public should have broad access, as is facilitated by the internet, to seek access beyond institutional walls. If left unchanged the current proposed restrictions also places a considerable burden and expense on institutions to ensure digitised versions of records cannot be communicated “to the public”.

CAMD supports bringing this section into line with other parts of the Copyright Act where the burden is on the user of the copyright material and not on the agent that makes it available. Notifying the user of the requirements of copyright law should be sufficient.

### Non-public collections

Q 4: Should the proposed preservation provisions apply to a library or archives that forms part of an educational (or other type of) institution if its collection is not available to the public?

The current amendment appears to restrict collections which are not available to the public, from preserving the at-risk collections in advance of loss.

Museums often contain a number of records/unpublished documents and working papers which were originally collected for ancillary purposes, are not discoverable/indexed for the public but should be preserved for their historical and cultural significance. These records and documents are primarily paper based and at risk of further deterioration. It should also be noted that in some cases museums are required to maintain and provide access to non-public information under freedom of information legislation. Collecting institutions also include other forms of material not accessible to the public, for example, donated personal records embargoed for public access, usually by the donor for specified periods, and collections closed for public access under the Archives Act.

There is also a great deal of material with cultural and historic significance in private hands. While this material might not be directly accessible to the public it does form part of the distributed national collection.

The omission of exceptions for material under the copyright legislation held in non-public collections could impact future research and investigation work involving non-public institutions including university libraries and charitable organisations.

CAMD supports the proposal to extend coverage to include non-public collections.

### Educational Measures

#### Statutory Licences

Q 5: Does the proposed statutory licence appropriately extend the coverage of broadcasts to the types of broadcast content used by educational institutions?

Q 6: Does the Copyright Tribunal have adequate jurisdiction to determine all necessary matters?

Q 7: Will the proposed statutory licence reduce the administrative burden on parties to the licence?

### **Safe Harbour provisions**

We support the expansion of the current ‘safe harbour’ provisions in the Act to reflect the definition of a service provider in Article 17.11.29(xi) of the Australian-United States Free Trade Agreement and Article 18.81 of the Trans Pacific Partnership Free Trade Agreement.

In addition, we support the definition being extended to collecting institutions taking on library-like (or ISP-like) functions. It may assist interpretation of the Act if an Explanatory Memorandum was added stating this change clearly.

Q 8: Do the proposed transitional provisions adequately protect current arrangements for the life of their term?

Q 9: While the transitional provisions provide that existing notices, agreements and determinations will continue, the new provisions would govern these existing arrangements. Are there any arrangements that the new provisions should not apply to?

Nil response

### **Term of protection**

CAMD applauds the introduction of the harmonisation of copyright terms for published and unpublished works by creating a new general protection of period of life plus 70 years. Museums hold many unpublished papers and the proposed amendments would increase their discoverability and accessibility. It should be noted, however, that the provisions of the Bill only partially address the problems associated with orphan works held by collecting institutions.

#### **Orphan works**

Australia’s museums hold millions of historic items (such as domestic recipes, letters, diaries etc) which can be considered ‘orphan works’ as no author is known or can feasibly be located.

These works are also characterised by the fact that:

- most were donations and bequests to the museum for the public benefit;
- they were never meant to be commercially exploited; and
- they have little commercial viability on their own.

At present, this type of orphan work is virtually invisible to the public and researchers which fosters significant gaps in knowledge and impedes scholarly research.

It is important to note that, in many cases, the name of the person who made the item is known but due to the age of the item and the context in which it was created there is little or no chance that reasonable inquiries would turn up copyright holders.

To encompass this category of unpublished works under the exceptions, CAMD supports the extension of the duration provisions to include a reference, alongside ‘unknown authors’, to

situations where the author name may be known but where a search for the copyright holder would not be feasible.

It should be noted that, in many cases, digitisation of such items by a collecting institution may be the only way in which any existing copyright holder might be alerted.

#### Film and sound recordings

Q 10: The current proposal only applies to the duration of copyright in works. This could be extended to films and sound recordings. With this in mind, and given that the Act currently does not use the concept of the date of 'making' a film or sound recording for the purposes of determining duration, views are sought on the common industry understandings of when a commercial film or sound recording is made.

CAMD supports the extension of the provisions on duration of copyright to cover commercial and non-commercial films and/or sound recordings.

In relation to the making of a commercial or non-commercial film and/or sound recording the existing concept of 'making' is appropriate to apply to the duration rules for all types of sound recordings and cinematograph films.

If you require further information or clarification of the comments above please contact:

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