

The Inquiry

Question 1. The ALRC is interested in evidence of how Australia’s copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;
- (b) affects the introduction of new or innovative business models;
- (c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or
- (d) places Australia at a competitive disadvantage internationally.

The Council of Australasian Museum Directors (CAMD), which represents the leaders of the major National, State/Territory and regional museums in Australia and New Zealand, welcomes the current Inquiry particularly in relation to its examination of the impact of copyright law on the ability of Australians to access, use and interact with digital content ‘in the advancement of education, research and culture’. CAMD museums manage over 68 separate institutions, ranging from natural and social history museums to science centres and historical sites, the majority of which have a mandate to disseminate information about their collections through education, exhibitions, public programs and research. Collectively they hold over 60 million objects, a sizeable proportion of which could be considered creative works.

Museums have taken full advantage of the opportunities provided by advancing digital technology to meet increasing public demand and to respond to Government requirements to make the distributed national collection accessible. While major museums are keen to digitise parts of their collections to ensure preservation, this is only one of a number of cogent reasons for uploading this information to the web. While the Inquiry makes sole reference to the ‘digital economy’ and provides examples in terms of economic outputs and benefits it can be seen that there are also extensive social and cultural benefits arising from the digital environment including the facilitation of

community development and promotion of social cohesion. Ultimately, the value of digitising collections lies in the critically useful information it unlocks which can be used, for instance, to create online content for schools; develop digital story-telling projects and other creative art programs; stage virtual exhibitions accessible to regional and remote communities; reconnect diaspora and Indigenous creator communities with their material culture; provide content for mobile applications and services and encourage 'citizen scientists' to record observations on environmental topics.

It has become clear in recent years that there is a widening gulf between the mandate of cultural institutions like museums to preserve collections and make them publicly accessible and the legal restrictions imposed by copyright legislation. This situation is further complicated, as the Inquiry notes, by the way in which the public accesses and uses this information. It should be noted here that many museums are themselves creators of material which can be part of a commercial arm of their institution and for which they require copyright protection. Museums agree there is an ongoing need to provide protection to copyright holders but are also aware that the changes wrought by the advance of digital technology requires new efforts to balance creators' rights with public access and use.

CAMD believes that the current copyright regime is unnecessarily impeding museum efforts to meet demand for access to collection material because it:

- fails to adequately recognise the role and value of public access to museum collections online;
- treats all works in a similar manner, despite potential differences in the circumstances of their creation and the interests of creators and copyright owners;
- fails to recognise the non-commercial nature of many unpublished and/or 'orphan works' in museum collections;
- tends to skew the material museums make accessible online because copyright status has a significant impact on the selection of material and how it is made available;
- adds a further layer of administrative cost to the process of digitisation;
- lacks clarity and is unnecessarily complex leading to the need for legal interpretation; and
- imposes unnecessarily high compliance costs on public institutions.

Guiding Principles for Reform

Question 2. What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the *Copyright Act 1968* (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable.

From the perspective of Australian museums and their users, current and future, CAMD would suggest that the ALRC in its approach to the Inquiry should pay particular regard to:

- *Principle 4* which calls for reform which promotes fair access to and wide dissemination of information and content;
- *Principle 5* which suggests the need for a copyright regime to be sufficiently flexible to respond to new technologies, platforms and services in the digital environment; and
- *Principle 7* which alludes to the need for a new broader/wider fair use exception which promotes clarity and certainty for creators, rights holders and users.

If a new broader fair use exception is to be developed it should be 'technology neutral' and also broad enough to account for as yet unknown digital technologies and the changing spectrum of 'content' and 'digital content'.

Format-Shifting

Question 8. The format shifting exceptions in the *Copyright Act 1968* (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

A single broad format shifting exception with common restrictions would be less confusing and more productive to personal, commercial, creative and cultural sectors across the board and could allow for future changes in digital technology.

Back-Up Copies

Question 10. Should the *Copyright Act 1968* (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

Yes. The rapid changes in technology and the fact that large cultural institutions often have multiple campuses which require use of the same material at the one time suggest that a provision is needed to make multiple back-ups of digitised copyright material. Reform in this area should also address the fact that there are currently no equivalent provisions to reproduce audio-visual material such as DVDs and CDs held in cultural institutions for ‘purposes directly related to the care or control of the collection’.

Libraries, archives and digitisation

Question 19. What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

CAMD notes that the current Act deems museums to be covered by the definition of ‘archives’. Museums do carry out many of the public duties of an archive but their mandate is different. The range of uses that museums and galleries, particularly publicly funded institutions, have for copyright materials needs to be properly considered and understood; museums have different statutory functions and duties, operate at different levels of Government, and, most importantly, have different types of collections and varied methods of making these collections available for public use when compared to other institutions covered by the ‘library and archives’ exceptions. CAMD suggests that museums be explicitly mentioned in the Act alongside libraries and archives. Including museums more specifically in the context of the copyright legislation will ensure that the challenges they face are foremost in the minds of those maintaining the law and will promote a wider understanding of the ramifications of the Act amongst institutions and their users.

The types of practices carried out by museums which are impeded by the operation of the current libraries and archives exception include:

- the lending of ebooks and eresources;
- the facilitation of public access off-site to digital resources;
- the preservation of eresources (eg websites);
- innovative use and reuse of digital works (as the designers of software applications and APIs are not interested in using collections when they are unable to fully utilise images and other information);
- transformative acts such as those required to comply with online guidelines for accessibility (eg Web Content Accessibility Guidelines) where, for example, an audio transcript is required to be made of a video to assist those with limited or no sight; and
- mass digitisation projects.

Museum collections encompass a diverse range of copyright works including those which institutions might want to release for public access but whose copyright status is unclear because a) they have never been published (eg private letters, diaries, journals etc) and/or b) they are 'orphan' works. Many of these works were never intended to be copyrighted but still retain substantial social or historical value. Uncertainty surrounding the use of either s183 or s200AB is discouraging some museums from releasing this material online and impeding mass digitisation projects. The failure of the current copyright regime to allow the types of activities listed above, is preventing the vast store of ideas inherent in collections from being utilised to their fullest extent.

Question 20. Is s200AB of the *Copyright Act 1968* (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

A small minority of CAMD members have indicated that they utilise Section 200AB to make some of their works available online for non-profit research purposes. These institutions, alongside those using a risk analysis approach rather than s200AB, have noted that the provision is limited and that,

- it is complex, requiring regular legal interpretation;
- there is confusion over how it overlaps with other exceptions;
- there is a lack of consistency in the way it treats different formats of material, for example, copying audio-visual material for administrative purposes;
- there is no definitive guidance for its use; and
- it is untested in law.

For many reasons, museums are relatively risk averse and CAMD would prefer to see the replacement of s200AB with a more flexible dealing right for libraries, archives, museums and galleries which is based on a concept of 'fair' or 'reasonable' use that would permit the private use of digitized works, especially where the use does not interfere with the copyright owner's market.

Question 21. Should the *Copyright Act 1968* (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

CAMD supports the reform of copyright law to allow for greater digitisation and communication of works by public and cultural institutions but is concerned to ensure that new provisions are flexible and open enough to allow for future scenarios and technological developments not yet envisaged.

In the Australian context this reform might be affected by the implementation of a broader 'fair use' exception flexible enough to cope with new technologies and digital formats (as outlined in CAMD'S response to Question 52). For example, the 'free-use exceptions' list could be amended to allow

communication of copyright works by cultural institutions to the public online (even if restrictions are placed on display resolution etc).

Question 22. What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

The digitisation of Indigenous works requires special consideration given the complex community creation and ownership of such Indigenous works.

Orphan works

Question 23. How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

Many CAMD museums have identified the current legal treatment of 'orphan works' as having a major impact on their ability to provide online access to collections and to undertake mass digitisation projects. Orphan works are often thought of as 'works whose copyright holder is waiting to be found' whereas, in a large number of cases, there is virtually no possibility of finding a rightful copyright holder, no matter how diligently the institution searches.

The use of the term 'orphan works' covers a more fundamental aspect of these works as many are not just 'missing' an owner but were never meant to be commercially exploited and have little commercial viability on their own. Many are gifts and donations to cultural institutions for the public benefit. Ironically, the fact that there is no legal certainty in their use online means that this potential avenue for alerting owners is denied to museums. For example, Museum Victoria has recently uncovered in its collections World War I diaries found under the floorboards of the Royal Exhibition Building (which was a war hospital). These works are both orphan and unpublished works which were clearly written for non-commercial purposes but as the museum feels unable to place these online with any certainty it is deprived of a significant way to identify copyright owners, gain further information about their creators and thereby uncover their wider historical significance.

The way in which museums deal with the orphan works in their care varies. Some have relied in the past on interpretations of s183 while others have applied, with legal assistance, the tests embodied in s200AB in order to feel able to place this material online. Works addressed in this way and where uncertainty about copyright status remains are being placed online with orphan 'riders'. Other institutions however feel little able to bear the risk of contracted and costly legal claims if copyright is pursued under the Act and tend to avoid digitising and putting orphan works online.

Museums are not resourced to undertake a full diligence process for every orphan work in their care. Any copyright law reform that requires cultural institutions to attempt this will simply mean that this material is effectively made inaccessible. At present, 'orphan works' in some collections are virtually invisible to the public as well as to academic historians and researchers which fosters significant gaps in knowledge and impedes scholarly research.

Museums clearly need more specific guidance on what constitutes a "reasonably diligent" search for the owner of the orphan work as they are often limited by the administrative cost of an extensive search. They also need some clarity and certainty so there is consistency in the approach to these works. Rather than further complicate the existing clauses with new definitional material the majority of CAMD members have indicated a preference for a broader fair-use exception to address these issues.

Question 24. Should the Copyright Act 1968 (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

Yes. Lifting existing restraints on 'orphan works' would allow a large number of works to be made available to the public online for the first time. Public display, preservation and the wider use of orphan works would also provide the potential for such works to be reunited with their right holders.

CAMD harbours a concern however that a collective licensing scheme for orphan works would be both inappropriate and unworkable. The very nature of 'orphan works' suggests that there is a very low likelihood that owners will come forward. Many of these works have been donated as gifts for public use and in an age when museum budgets are reducing, it would appear to be a misuse of public funds to pay fees to collecting societies for works unlikely to be claimed. In addition, the cost of payments to licensing boards or to collecting societies could add significantly to the cost of mass digitisation and deter collecting institutions from innovative digitisation projects.

Instead, CAMD would support the development of a broad and flexible exception which allows the use of orphan works by museums which is fair and reasonable. The Act could sanction a reasonable attempt to find the owner, followed by online release and reasonable use that protects the commercial markets of the copyright holder but permits fair use for private, non-commercial purposes.

Fair dealing exceptions

Question 45. The Copyright Act 1968 (Cth) provides fair dealing exceptions for the purposes of:

(a) research or study; (b) criticism or review; (c) parody or satire; (d) reporting news; and
(e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice. What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

The current provisions are not broad enough to deal with the public impetus for greater access to online digital material from collections eg students and researchers using museum collections are currently encouraged to share their work further in the digital environment but the private research and study provision doesn't allow for this.

Fair Use

Question 52.

Should the Copyright Act 1968 (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

CAMD supports the reform of the Copyright Act to provide for a broad 'fair use' exception which:

- continues to protect the commercial interests of copyright owners;
- is technology, media and format neutral;
- allows for digitisation and communication of works in museums online for non-commercial, private purposes; and
- is not limited by the current s200AB provision.