

Australian Law Reform Council (ALRC) Copyright and the Digital Economy Discussion Paper

CAMD response

1 August 2013

Proposals and Questions

4. The Case for Fair Use in Australia

Proposal 4–1 The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.

[CAMD supports this proposal.](#)

Proposal 4–2 The new fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').

[CAMD supports this proposal.](#)

Proposal 4–3 The non-exhaustive list of fairness factors should be:

- (a) the purpose and character of the use;
- (b) the nature of the copyright material used;
- (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

[CAMD supports this proposal. See response to Q4.1.](#)

Proposal 4–4 The non-exhaustive list of illustrative purposes should include the following:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;
- (e) non-consumptive;
- (f) private and domestic;
- (g) quotation;
- (h) education; and
- (i) public administration.

[CAMD supports this proposal.](#)

Question 4–1 What additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?

CAMD wishes to ensure that works which are no longer available (eg are not being published and are not planned to be republished) or are no longer commercially available are covered by the fairness factors.

Question 4–2 If fair use is enacted, the ALRC proposes that a range of specific exceptions be repealed. What other exceptions should be repealed if fair use is enacted?

6. Statutory Licences

Proposal 6–1 The statutory licensing schemes in pts VA, VB and VII div 2 of the *Copyright Act* should be repealed. Licences for the use of copyright material by governments, educational institutions, and institutions assisting persons with a print disability, should instead be negotiated voluntarily.

Question 6–1 If the statutory licences are repealed, should the *Copyright Act* be amended to provide for certain free use exceptions for governments and educational institutions that only operate where the use cannot be licensed, and if so, how?

CAMD does not support the concept that certain free use exceptions should operate only when the use cannot be licensed. This allows for future forms of licensing which may add unnecessary cost and complexity to the copyright system.

7. Fair Dealing

Proposal 7–1 The fair use exception should be applied when determining whether a use for the purpose of research or study; criticism or review; parody or satire; reporting news; or professional advice infringes copyright. ‘Research or study’, ‘criticism or review’, ‘parody or satire’, and ‘reporting news’ should be illustrative purposes in the fair use exception.

Proposal 7–2 The *Copyright Act* should be amended to repeal the following exceptions:

- (a) ss 40(1), 103C(1)—fair dealing for research or study;
- (b) ss 41, 103A—fair dealing for criticism or review;
- (c) ss 41A, 103AA—fair dealing for parody or satire;
- (d) ss 42, 103B—fair dealing for reporting news;
- (e) s 43(2)—fair dealing for a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice; and
- (f) ss 104(b) and (c)—professional advice exceptions.

Proposal 7–3 If fair use is not enacted, the exceptions for the purpose of professional legal advice in ss 43(2), 104(b) and (c) of the *Copyright Act* should be repealed and the *Copyright Act* should provide for new fair dealing exceptions ‘for the purpose of professional advice by a legal practitioner, registered patent attorney or registered trade marks attorney’ for both works and subject-matter other than works.

Proposal 7–4 If fair use is not enacted, the existing fair dealing exceptions, and the new fair dealing exceptions proposed in this Discussion Paper, should all provide that the fairness factors must be considered in determining whether copyright is infringed.

8. Non-consumptive Use

Proposal 8–1 The fair use exception should be applied when determining whether uses of copyright material for the purposes of caching, indexing or data and text mining infringes copyright. ‘Non-consumptive use’ should be an illustrative purpose in the fair use exception.

CAMD welcomes the inclusion of ‘non-consumptive use’ as an illustrative purpose in the fair use exception.

Proposal 8–2 If fair use is enacted, the following exceptions in the *Copyright Act* should be repealed:

- (a) s 43A—temporary reproductions made in the course of communication;
- (b) s 111A—temporary copying made in the course of communication;
- (c) s 43B—temporary reproductions of works as part of a technical process of use;
- (d) s 111B—temporary copying of subject-matter as a part of a technical process of use; and
- (e) s 200AAA—proxy web caching by educational institutions.

Proposal 8–3 If fair use is not enacted, the *Copyright Act* should be amended to provide a new fair dealing exception for ‘non-consumptive’ use. This should also require the fairness factors to be considered. The *Copyright Act* should define a ‘nonconsumptive’ use as a use of copyright material that does not directly trade on the underlying creative and expressive purpose of the material.

CAMD agrees with this proposal.

9. Private and domestic use

Proposal 9–1 The fair use exception should be applied when determining whether a private and domestic use infringes copyright. ‘Private and domestic use’ should be an illustrative purpose in the fair use exception.

CAMD agrees with the general proposal but would suggest the wording ‘private or domestic’ be used to ensure that the use of ‘and’ does not in some way constrain the meaning of the use. This proposal is of importance to museums which wish to see extensive and free reuse particularly of museum materials used by students.

Proposal 9–2 If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for private and domestic purposes. This should also require the fairness factors to be considered.

Proposal 9–3 The exceptions for format shifting and time shifting in ss 43C, 47J, 109A, 110AA and 111 of the *Copyright Act* should be repealed.

Proposal 9–4 The fair use exception should be applied when determining whether a use of copyright material for the purpose of back-up and data recovery infringes copyright.

Proposal 9–5 The exception for backing-up computer programs in s 47J of the *Copyright Act* should be repealed.

10. Transformative Use and Quotation

Proposal 10–1 The *Copyright Act* should not provide for any new ‘transformative use’ exception. The fair use exception should be applied when determining whether a ‘transformative use’ infringes copyright.

A number of CAMD members have suggested that ‘transformative use’ should be extended to cover large collaborative repositories, such as Trove and Pandora, which depend on the cross-organisation sharing of digital content.

Proposal 10–2 The fair use exception should be applied when determining whether quotation infringes copyright. ‘Quotation’ should be an illustrative purpose in the fair use exception.

Proposal 10–3 If fair use is not enacted, the *Copyright Act* should provide for a new fair dealing exception for quotation. This should also require the fairness factors to be considered.

11. Libraries, Archives and Digitisation

Proposal 11–1 If fair use is enacted, s 200AB of the *Copyright Act* should be repealed.

CAMD agrees that s200AB of the *Copyright Act* should be repealed if fair use is enacted.

Proposal 11–2 The fair use exception should be applied when determining whether uses of copyright material not covered by specific libraries and archives exceptions infringe copyright.

CAMD agrees that the fair use exception should be applied when determining whether uses of copyright material not covered by specific libraries and archives exceptions infringe copyright.

Proposal 11–3 If fair use is not enacted, the *Copyright Act* should be amended to provide for a new fair dealing exception for libraries and archives. This should also require the fairness factors to be considered.

CAMD agrees that if fair use is not enacted, new fair dealing exceptions should rely on the fairness factors outlined earlier. If fair dealing is to be introduced it is paramount that it has the necessary breadth to encompass public need and interest and the major purposes of public collecting institutions.

Question 11–1 Should voluntary extended collective licensing be facilitated to deal with mass digitisation projects by libraries, museums and archives? How can the *Copyright Act* be amended to facilitate voluntary extended collective licensing?

CAMD strongly opposes the introduction of a voluntary extended collective licensing scheme to deal with mass digitisation projects. Some of the reasons for this opposition have been canvassed in CAMD’S earlier response to the issues paper.

It has been argued that allowing mass digitisation somehow undermines the market in copyright work. This position fails to acknowledge the countervailing facts that:

- public collecting institutions exist to provide the public with access to their collections. Museums wish to put these items online for public benefit and not commercial gain;

- many items in these collections came to the museums through donation or gift with the aim of making them available in perpetuity to the public;
- many of the items currently held back from digitisation were not created with commercial intent in mind eg oral histories, traditional knowledge, cultural artefacts, family photographs, diaries, letters from the front; and
- that the works currently held back by uncertainty over copyright are undermining and skewing Australia’s research effort which have great economic and social import.

Ignoring these facts risks undermining the legitimacy of our great public cultural institutions.

CAMD members also see little sense in involving collecting societies in mass digitisation projects.

Museums curate collections and in the process build important relationships with communities associated with the various cultural artefacts held. It doesn’t make sense to hand over to another organisation the work of seeking copyright holders when, in most cases, our museums have much closer links to the communities from which the works were sourced, know their provenance and need to engage with them to address moral and cultural sensibilities.

It would also appear to be a misuse of public funds to pay fees to collecting societies for works which were originally gifted to the institution and, in the case of many orphan works, are unlikely to ever be claimed. Museums already allocate considerable resources to uncover copyright holders but they are not resourced to undertake a full diligence process for every orphan work in their care. In these situations it would be fairer that they be able to digitise after applying the fair use test. It would seem that there would be a far greater chance to find copyright holders if these items are included on the websites of cultural organisations which regularly log tens of millions of visits per year.

Finally, CAMD holds great concern at the potential cost of mass digitisation for members if a voluntary extended collective licensing scheme is introduced. This assertion has been borne out by the recent report on *Copyright and the Regulation of Orphan Works* released in the UK in July 2013. The findings of this report, which was commissioned by the UK Intellectual Property Office, found that extended licensing fees were actively discouraging mass digitisation. The report noted that:

Per item fees initially appearing very low and thus sustainable turn out to render mass-digitisation unviable for public and non-profit institutions when scaled up under reasonable assumptions. Mass digitisation projects involving 100,000 items may incur annual licensing fees exceeding 1 million (British pounds) per year (p.4)

Proposal 11–4 The *Copyright Act* should be amended to provide a new exception that permits libraries and archives to make copies of copyright material, whether published or unpublished, for the purpose of preservation. The exception should not limit the number or format of copies that may be made.

CAMD agrees that museums and other public collecting institutions should be permitted to make copies, without limit on the number or format of copies, for the purposes of preservation.

Proposal 11–5 If the new preservation copying exception is enacted, the following sections of the *Copyright Act* should be repealed:

- (a) s 51A—reproducing and communicating works for preservation and other purposes;
- (b) s 51B—making preservation copies of significant works held in key cultural institutions’ collections;

- (c) s 110B—copying and communicating sound recordings and cinematograph films for preservation and other purposes;
- (d) s 110BA—making preservation copies of significant recordings and films in key cultural institutions' collections; and
- (e) s 112AA—making preservation copies of significant published editions in key cultural institutions' collections.

CAMD agrees with this proposal.

Proposal 11–6 Any new preservation copying exception should contain a requirement that it does not apply to copyright material that can be commercially obtained within a reasonable time at an ordinary commercial price.

CAMD members have indicated that existing regulations of this type are difficult to enforce. CAMD does not support the inclusion of a commercial availability test in relation to preservation copying.

Proposal 11–7 Section 49 of the *Copyright Act* should be amended to provide that, where a library or archive supplies copyright material in an electronic format in response to user requests for the purposes of research or study, the library or archive must take measures to:

- (a) prevent the user from further communicating the work;
- (b) ensure that the work cannot be altered; and
- (c) limit the time during which the copy of the work can be accessed.

There is currently no way in which CAMD museums can enforce this proposal. Notifying the user of the requirements of copyright law should be sufficient.

12. Orphan Works

Proposal 12–1 The fair use exception should be applied when determining whether a use of an 'orphan work' infringes copyright.

CAMD museums hold millions of objects which can be considered 'orphan works'.

Two important characteristics apply to a large proportion of these objects:

1. there is virtually no possibility of a copyright owner emerging no matter how diligently the institution searches; and
2. many were gifts and donations to the museum for the public benefit and were never meant to be commercially exploited and have little commercial viability on their own.

CAMD supports the use of a fair use exception when determining whether a use of an 'orphan work' infringes copyright.

Proposal 12–2 The *Copyright Act* should be amended to limit the remedies available in an action for infringement of copyright, where it is established that, at the time of the infringement:

- (a) a 'reasonably diligent search' for the rights holder had been conducted and the rights holder had not been found; and
- (b) as far as reasonably possible, the work was clearly attributed to the author.

If fair use is not enacted, CAMD supports the test outlined to limit the remedies available. In delineating the extent of a 'reasonably diligent search', consideration should be given to the nature of the item and its potential commercial value. Remedies should include taking the item offline.

CAMD members have indicated a willingness to be involved in the development of an industry wide policy for take-down where copyright concerns are raised. The onus should be on the rights holder to demonstrate that his or her interests have been damaged.

Proposal 12–3 The *Copyright Act* should provide that, in determining whether a ‘reasonably diligent search’ was conducted, regard may be had, among other things, to:

- (a) how and by whom the search was conducted;
- (b) the search technologies, databases and registers available at the time; and
- (c) any guidelines or industry practices about conducting diligent searches available at the time.

CAMD supports the development of broad guidelines to inform the concept of a ‘reasonably diligent search’. There needs to be provision for the fact that, in some cases, following a search, no clear copyright owner will emerge.

13. Educational Use

Proposal 13–1 The fair use exception should be applied when determining whether an educational use infringes copyright. ‘Education’ should be an illustrative purpose in the fair use exception.

Proposal 13–2 If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for education. This would also require the fairness factors to be considered.

Proposal 13–3 The exceptions for education in ss 28, 44, 200, 200AAA and 200AB of the *Copyright Act* should be repealed.

14. Government Use

Proposal 14–1 The fair use exception should be applied when determining whether a government use infringes copyright. ‘Public administration’ should be an illustrative purpose in the fair use exception.

Proposal 14–2 If fair use is not enacted, the *Copyright Act* should provide for a new exception for fair dealing for public administration. This should also require the fairness factors to be considered.

Proposal 14–3 The following exceptions in the *Copyright Act* should be repealed:

- (a) ss 43(1), 104—judicial proceedings; and
- (b) ss 48A, 104A—copying for members of Parliament.

17. Contracting Out

Proposal 17–1 The *Copyright Act* should provide that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of certain copyright exceptions has no effect. These limitations on contracting out should apply to the exceptions for libraries and archives; and the fair use or fair dealing exceptions, to the extent these exceptions apply to the use of material for research or study, criticism or review, parody or satire, reporting news, or quotation.

CAMD supports measures to limit the contracting out of ‘libraries and archives’ exceptions

Other Comments

In the interests of clarity, CAMD recommends that the ALRC take the opportunity of this review and reform process to change the reference to 'library and archives' in the act to a broader term such as 'public collecting institutions' which makes application of the legislation in relation to public libraries, archives, museums and galleries clearer for the institutions themselves and to users.

The above response has been prepared for 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. 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. CAMD members support the overall thrust of the ALRC discussion paper to repeal s200AB and to introduce a fair use regime to copyright in Australia. As outlined in detail in its response to the first discussion paper, CAMD believes that there is a need to account for the significant public policy benefits of digitisation carried out by cultural institutions in any reform of copyright legislation.

Museums today are faced with increasing public demand and Government directives to increase online access to their collections. As argued in earlier submissions, CAMD believes that meeting this need, as well as protecting the rights of creators (among which museums can be counted) would best be served by the repeal of s200AB of the Copyright Act and the introduction of a broad, flexible and technologically neutral approach to fair use as outlined in the discussion paper.