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By email: copyright@alrc.gov.au

Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Dear Executive Director

Issues Paper No 42 – Copyright and the Digital Economy Submissions by the Dax Centre

We act for the Dax Centre.

We make the following submissions in response to the Australian Law Reform Commission's (**ALRC**) issues paper on copyright and the digital economy (**Issues Paper**) on the Dax Centre's behalf.

1. About the Dax Centre

The Dax Centre is a multi-faceted, non-profit organisation whose mission is to promote mental health and wellbeing by fostering a greater understanding of the mind, mental illness and trauma through art and creativity. The Centre is recognised nationally and internationally for its innovative use of the arts in promoting mental health. The Centre has a broad range of programs, which include touring exhibitions, school education, mental health workforce training, art therapy and community development.

The Centre grew out of and now incorporates the Cunningham Dax Collection which has its origin in 1946. With some 15,000 artworks by people with experience of mental illness and trauma, the Cunningham Dax Collection is one of the largest collections of its kind in the world. More than two thirds of the artworks in the collection are orphaned works, their creator are either unknown or not traceable. These artworks are invaluable in assisting health professionals and the general public to understand the nature and experience of mental illness and trauma.

We refer to the works in the Dax Centre's collection as the "Dax Collection".

2. The Dax Centre's interest in the Issues Paper

A significant proportion of the works in the Dax Collection are "orphan works". Put simply, there is no identifying information provided with the works that would allow the Dax Centre to identify the owners of the copyright in those works.

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In the Dax Centre's special circumstances, even where the authors of the works can be determined (for example, by cross-referencing the works with clinical notes or other patient details provided with the works), privacy and ethical considerations prevent the Dax Centre from attempting to contact the authors/copyright owners. In this respect, those works are essentially "quasi"-orphan works.

This has a flow on effect that the Dax Centre is restricted in digitising the works in the Dax Collection. The Dax Centre considers there is a significant public interest in allowing cultural institutions to digitise their collections, both for the purposes of preserving the collections and for improving public access to them.

3. Answers to questions

1. **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?

The Issues Paper identifies a growing expectation that institutions like the Dax Centre will provide access to their collections in an online format (paragraph 131).

Digitisation of the works in the Dax Collection would allow the Dax Centre to disseminate the works to a wider audience. Without digitising the Dax Collection, public exposure to the Dax Collection is limited to physically attending the Dax Centre. Digitisation would also allow the Dax Centre to preserve the works in its collection, the earliest of which date back to the 1950s.

However, the Dax Centre's ability to digitise the Dax Collection is restricted by the fact that the majority of the collection consists of orphan works or, as discussed above, quasi-orphan works.

The Dax Centre would support amendments to the Copyright Act that would allow libraries, archives and cultural institutions to digitise their collections in a wider range of circumstances than currently provided for (paragraph 144). The Dax Centre considers that it would be appropriate for those circumstances to be limited to instances of "non-commercial" use.

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

As we have explained above, a significant proportion of the works in the Dax Collection are orphan works, or, as explained above, "quasi"-orphan works.

The current legal treatment of orphan works restricts the Dax Centre's ability to reproduce the works in its collection, for example in advertising material (both hardcopy or electronic); in program guides for the Dax Centre's exhibitions; or in books regarding the Dax Centre's collection. This restricts the Dax Centre's ability to create awareness of the Dax Collection and to improve public awareness of the use of art therapy in the treatment of people with mental illness.

Over the past 10 years Middletons has advised the Dax Centre on complex copyright questions concerning its collection and whether various proposed actions infringe or do not infringe copyright. In some cases, the Dax Centre has been left with no choice but to infringe copyright

as it has been unable to contact a person to seek a licence to reproduce a work. This has led to ethical dilemmas for the Dax Centre which are not easily resolved.

A solution to these difficult copyright questions would alleviate concerns for the Dax Centre and allow it to concentrate on its important work.

3. **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?

The Dax Centre supports the creation of a new exception to copyright infringement that would allow the curators of collections of orphan works to make copies of the orphan works in circumstances where the copyright owner cannot be determined or their consent to reproduce the works cannot be reasonably obtained.

The Dax Centre considers that any such exception would need to make provision for circumstances where the author of an "orphan" work identifies themselves to the person or organisation in question (in other words, circumstances where an "orphan" work ceases to have "orphan" status).

The Issues Paper discusses potential exceptions where the owner of copyright cannot be located after a diligent search (paragraph 164), but the Dax Centre feels strongly about the application of the exception to circumstances where even if the copyright owner can be identified, it is not appropriate to approach them to seek their consent for the work to be reproduced. As we have explained above, this issue is especially pertinent to the Dax Centre, whose ability to approach the owners of copyright works donated to it is restricted by privacy and ethical considerations.

The Dax Centre otherwise supports the proposals of Brennan and Fraser.

4. Conclusion

Please let us know if the ALRC has any questions regarding the Dax Centre's submissions. The Dax Centre would welcome the opportunity to be involved further in the ALRC's investigations into copyright law issues concerning orphan works.

Yours faithfully



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Partner