522. \_org\_ Museum Victoria

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Proposal 4-1:

Proposal 4-2:

Museum Victoria requires clarification on the definition of ‘fair use’ and whether it can only be decided through the courts. To date there has been little case law in Australia that anyone can use to backup claims.

The National Library of Australia cited the example (see Example 3: 1981 cook book to replace lost copy in National Library of Australia Submissions to Issues Paper, 2012) of having to refuse a request to provide a digitised copy of an out-of-print, but still in copyright, cookbook in their collection. The request was refused, even though the publisher had no plans to republish and there were no copies available for sale via the publisher or via online stores such as Amazon. The requestor could not purchase a copy, unless they happened to stumble across one in a second-hand book store. Another illustrative purpose could, therefore, include lack of supply.

There should also be a specific illustrative purpose to enable the GLAM sector to share copyright works in their collection online. See also sections on mass digitisation and orphan works. The benefits of putting material online are:

1. Public purpose (benefit/good)
2. Provide access to these works for the purposes of research, education, personal research (e.g. genealogical research)
3. Create online educational material to support the school curriculum
4. Foster/enable learning by encouraging community involvement and receiving useful information back to the cultural agency about items in the State collections – when people find this material their most common response is to want to share the information with the source.

Proposal 4-3:

Proposal 4-4:

Question 4-1:

Question 4-2:

Proposal 6-1:

MV does not support the concept of collecting agencies offering licenses to items held in the State collections. Museum Victoria agrees with the Powerhouse Museum’s response to the Discussion Paper and is ‘opposed to handing over rights of orphan works to a collecting society as the likelihood of copyright owners coming forward is low and collecting fees for using unclaimed orphan works for non-commercial uses goes against our mission of access’.

Question 6-1:

Proposal 7-1:

Reliance on ‘fair dealing” to publish online is difficult because most online activities open Australian content up to the laws of other countries. This requires international cooperation – applicable whether it’s fair dealing or fair use. The interplay with the copyright laws of other countries is particularly complex.

Proposal 7-2:

Proposal 7-3:

Proposal 7-4:

Proposal 8-1:

Proposal 8-2:

Proposal 8-3:

Museum Victoria requires clarification on the definition of ‘nonconsumptive use’ and how it would be applied to the GLAM sector.

Proposal 9-1:

Museum Victoria agrees with the proposal to include ‘private and domestic use’ as an illustrative purpose in the fair use exception. Yes, that would make sense. Popular examples are the use of digitised sheet music to be downloaded and played at home and knitting patterns to be downloaded and used at home.

Private and domestic use of museum-created content should be explicitly allowed if extensive and free reuse is encouraged, as it usually is for museum-created content. This might include use of appropriately attributed images or text in school assignments, PowerPoint presentations etc.

Private and domestic reuse of copyrighted material held by cultural organisations should be permitted.

Proposal 9-2:

Proposal 9-3:

Proposal 9-4:

Proposal 9-5:

Proposal 10-1:

Museum Victoria believes that transformative use should include digitisation and making content freely available online. There are many large-scale collaborative repositories that support cross-organisation sharing of digital content for example, the Hathi Trust Digital Library <http://www.hathitrust.org/>  and the National Library of Australia’s PANDORA: Australia’s Web Archive for preserving and archiving Australian web content.

Proposal 10-2:

Proposal 10-3:

Proposal 11-1:

Museum Victoria supports and welcomes many of the statements in the discussion paper including:

11.8 In the digital environment, two main issues face cultural institutions in fulfilling their public service missions: the preservation of materials in their collections and provision of access to the public.[4]

11.9 The importance of digitisation and access to cultural knowledge and information has been recognised in government policy. As part of the National Cultural Policy Discussion Paper, the Australian Government highlighted that ‘changing community expectations of access and service have created additional areas of common interest, including education, interpretation, regional delivery and digitisation of collections’.[*[5]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/cultural-institutions-digital-environment#_ftn5) The final report, Creative Australia, emphasised that:

The digitisation of our National Collections Institutions will change significantly. The digitisation of their collections and increasing online engagement, using the potential of the NBN, will exponentially increase the value and role of our national collections in telling Australian stories.[*[6]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/cultural-institutions-digital-environment#_ftn6)

GLAM organisations with rural/remote community or international collections should also be able to digitise in order to share information digitally due to geographic distance and financial restrictions. This would support our mandate ‘to exhibit’ and ‘to promote’ the State collections of natural sciences, indigenous culture, social history and science and technology’.

11.10 Consistent with these objectives, cultural institutions called for reforms to the Copyright Act to give them greater freedom to engage in:

* routine digitisation of collection material;[*[7]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/cultural-institutions-digital-environment#_ftn7)
* digitisation and making public unpublished material (for example, on a museum’s website);[*[8]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/cultural-institutions-digital-environment#_ftn8)
* digitisation and communication of non-Crown copyright material that forms part of government records;[*[9]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/cultural-institutions-digital-environment#_ftn9)
* capturing and archiving Australian web content;[*[10]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/cultural-institutions-digital-environment#_ftn10) and
* mass digitisation projects.[*[11]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/cultural-institutions-digital-environment#_ftn11)

11.35 A number of stakeholders called for a reduction in the term of copyright to allow the digitisation and communication of unpublished material.[*[41]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/fair-use#_ftn41) Under the Copyright Act, copyright subsists in a literary, dramatic, musical or artistic work until 70 years after the end of the calendar year in which the author died.[*[42]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/fair-use#_ftn42) If a literary, dramatic or musical work was not published before the author died, the copyright term of 70 years does not start to run until one calendar year after it is first published.[*[43]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/fair-use#_ftn43) In effect, if a work is never published copyright in the work remains in perpetuity.

11.36 Under the fair use exception proposed, the fact that a work is unpublished does not rule out the case for fair use. The fair use provision in the US specifically recognises that ‘the fact that a work is unpublished shall not of itself bar a finding of fair use if such a finding is made upon consideration of all the above factors’.[*[44]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/fair-use#_ftn44) Similarly, under the ALRC’s model, the fact that a work is unpublished is not determinative of the fair use question.[*[45]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/fair-use#_ftn45) Whether a use is fair will be determined by the fairness factors, including the nature of the use; the amount that is copied; and the impact on any potential market for the material.[*[46]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/fair-use#_ftn46)

Museum Victoria would welcome further clarification around the use of unpublished works and providing access to these online.

Museum Victoria needs to digitise works that are either fragile so as to minimise/prevent damage by over-handling or movement and/or format- shifting for items subject to technical obsolescence.

Proposal 11-2:

Proposal 11-3:

Museum Victoria would like to see the terms 'libraries' and 'archives' be replaced by more inclusive terms. Examples are ‘collecting agencies/institution’, ‘memory institutions/organisations’ or ‘cultural agencies/institutions’ to capture the GLAM sector more broadly.

Again, there are some points in the discussion paper we would agree with:

11.44 Cultural institutions suggested that s 200AB has not been used to facilitate mass digitisation projects. A key reason relates to the fact that uses under s 200AB must be a ‘special case’, and it is unclear whether mass digitisation would fall under this definition.[*[52]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/mass-digitisation#_ftn52) The Australian Society of Archivists (ASA) suggested that s 200AB does not consider ‘the economic impact on an archive attempting to fulfil its duties to preserve and make available its collection as a whole’.[*[53]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/mass-digitisation#_ftn53)

11.45 A common theme in submissions from the cultural institutions was the inability to clear rights due to lack of resources, time, or the scale of the project.[*[54]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/mass-digitisation#_ftn54) For example, the Powerhouse Museum submitted that:

The collections of museums and galleries are diverse and have a range of complex copyright issues that need to be dealt with on a daily basis. Most institutions don’t have access to legal services and need to spend many hours finding copyright holders and negotiating license agreements.[*[55]*](http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/mass-digitisation#_ftn55)

Question 11-1:

The ‘pay someone, pay anyone’ approach to licensing of potentially in-copyright works digitised during mass digitisation projects is to be heartily rejected. Mandatory payment of fees to a collecting society, on top of the cost of digitisation of works will make it financially unviable to digitise any in copyright works. See also orphan works issues.

There are potential conflicts here with public purpose/public good of cultural organisations. If we are required by our enabling Acts to make our collections available and accessible, and the chief way to do that is electronically, then mass digitisation needs to be facilitated.

The push to open government and open data is at odds with any reforms to the Copyright Act that try to lock down access to in-copyright content.

There is an administrative burden incumbent on institutions to undertake due diligence searches for copyright holders.

Proposal 11-4:

Museum Victoria strongly supports removing the limit on the number or format of copies that may be made for the purposes of preservation.

Proposal 11-5:

Proposal 11-6:

Proposal 11-7:

There is currently no technical method to ensure that the user does not use, further communicate or alter the material supplied. The user can be required to sign an agreement that says they’ll do (or not do) all these things but the user will only be bound by their own conscience and fear of legal consequence to adhere to the agreement.

Proposal 12-1:

A large proportion of items in the Museum Victoria images collection can be categorised as ‘orphan works’. We are cautious about publishing these items online and we do not support the implementation of a collective licensing scheme for the use of orphan works particularly if we undertake the work to establish the rights holder in order to handover the information to a collecting society who could then charge us for use of items in the State collection once the rights holder is found.

Museum Victoria could there be seen to neglect our function to ‘exhibit’ material from our collections for the purposes of education and entertainment and scientific research. (Museums Act 1983 - s23)

Museum Victoria believes that guidance and/or a standard checklist is required in order to demonstrate the steps taken in order the for the search to be considered to be ‘diligent’ in relation to an ‘orphan work’.

Proposal 12-2:

Proposal 12-3:

Guidelines to inform the concept of a ‘reasonably diligent search’ should be developed to assist with conducting searches. What should be kept as part of the paper trail?

There are some legitimate cases where there is actually no clear copyright owner. For example, a promotional pamphlet is commissioned by a company in the 1960’s for the purposes of advertising its products or services. The company has since been bought out, then the purchasing company is itself bought out and merged with another business, and the final purchaser subsequently closes the modified and merged business. Who, now, would actually be the copyright holder?

A further example, a letter written during the war from a field hospital, from John Smith to Betty Alexander. As a private letter it was never intended to be published and there is, thus, a lack of clarity about whether the digitisation and publication online constitutes ‘publishing’ and thus the beginning of copyright. But John Smith died from his injuries, leaving no offspring. Whilst a collecting institution might be able to find members of his or Betty’s family who have an emotional or historical interest in this letter, this does not mean that they have any claim to copyright. Further, the notion that they would seek monetary recompense from the publication online of this letter is not borne out by the experience of the GLAM sector. The far more common response of family members finding this content online, often in the course of genealogical research, is surprise and delight that the family’s history has been documented. An occasional take down request is complied with promptly.

Financial gain is almost never a driver. This is at odds with the approach of collecting agencies, for which the presumption of financial reward is the primary driver.

Proposal 13-1:

Proposal 13-2:

Proposal 13-3:

Proposal 14-1:

Proposal 14-2:

Proposal 14-3:

Museum Victoria requires clarification on the definition of ‘public administration’.

Proposal 15-1:

Proposal 15-2:

Question 15-1:

Proposal 15-3:

Question 15-2:

Proposal 16-1:

Question 16-1:

Proposal 16-2:

Question 16-2:

Question 16-3:

Proposal 17-1:

MV believes that the limitations on contracting out should also apply to private and domestic use.

Additional comments?:

**Background to Museum Victoria response**

One of the arguments proposed by the "galleries, libraries, archives, and museums" (GLAM) sector for making works, including orphan works, accessible through digitisation and dissemination online is that undertaking such work can be argued as ‘public good’. It can also be argued that our founding legislative Acts require us to do this from the point of acquisition for the long-term.

Museum Victoria is governed by the Museums Act 1983 with subsequent amendments in 2011. The full text of this Act can be found here: <http://www.austlii.edu.au/au/legis/vic/consol_act/ma1983125/>

The most relevant section is Section 23, Functions. In full, this section states:

23. Functions

The functions of the Board are-

   (a)  to control, manage, operate, promote, develop and maintain the Museum of Victoria;

   (aa) to control, manage, operate, promote, develop and maintain the Exhibition land as a place-

   (i)  for the holding of public exhibitions;

   (ii) for the assembly, education, instruction, entertainment or recreation of the public or any sector of the public;

   (iii) for any other uses which will not substantially interfere with the continued use of the land for museum or exhibition purposes that the Governor in Council directs or that the Board, with the approval of the Minister, determines;

   (b)  to develop and maintain the State collections of natural sciences, indigenous culture, social history and science and technology;

   (c)  to exhibit material from those collections for the purposes of education and entertainment;

   (d)  to promote use of those collections for scientific research;

   (e)  to promote the use of the Museum's resources for education in Victoria;

   (f)  to research, present and promote issues of public relevance and benefit in the following fields-

   (i)  the origins, development and diversity of cultures in Australia and adjacent lands;

   (ii) the natural environment;

   (iii) science and technology and their applications to the development of society;

   (g)  to act as a repository for specimens upon which scientific studies have been made or which may have special cultural or historical significance;

   (ga) to provide leadership to museums in Victoria;

   (gb) to advise the Minister on matters relating to museums, and co-ordination of museum services, in Victoria;

   (h)  to carry out such other functions appropriate to museums and the Exhibition land as the Minister from time to time directs.

The Museums Act 1983 does not explicitly state that there should be online dissemination of State collections information, the terms ‘to exhibit’ and ‘to promote’ could be interpreted today – with changing technologies and audiences – as inclusive of online dissemination.

File 1:

File 2: