719.\_org\_ Council of Australasian Museum Directors

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Submission on behalf of: Council of Australasian Museum Directors

Proposal 4-1:

CAMD supports this proposal.

Proposal 4-2:

CAMD supports this proposal.

Proposal 4-3:

CAMD supports this proposal.  See also response to Q4.1.

Proposal 4-4:

CAMD supports this proposal.

Question 4-1:

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:

Proposal 6-1:

Question 6-1:

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.

Proposal 7-1:

Proposal 7-2:

Proposal 7-3:

Proposal 7-4:

Proposal 8-1:

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

Proposal 8-2:

Proposal 8-3:

CAMD agrees with this proposal.

Proposal 9-1:

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:

Proposal 9-3:

Proposal 9-4:

Proposal 9-5:

Proposal 10-1:

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:

Proposal 10-3:

Proposal 11-1:

CAMD agrees that s200AB of the Copyright Act should be repealed if fair use is enacted.

Proposal 11-2:

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:

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:

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:

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:

CAMD agrees with this proposal.

Proposal 11-6:

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:

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

Proposal 12-1:

CAMD museums hold millions of items which are '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:

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:

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.

Proposal 13-1:

Proposal 13-2:

Proposal 13-3:

Proposal 14-1:

Proposal 14-2:

Proposal 14-3:

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:

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

Additional comments?:

In the interests of clarity, CAMD recommends that the ALRC take the opportunity of this review 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 involved, copyright holders 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 balance the significant public policy benefits of digitisation carried out by cultural institutions alongside the commercial rights of copyrights holders (which includes museums in some case) in any reform of copyright legislation.