

17<sup>th</sup> August 2000

Ms Catherine Cornish  
Committee Secretary  
House of Representatives  
Standing Committee on Legal and Constitutional Affairs  
R1 109 Parliament House  
Canberra A.C.T 2000

Dear Ms Cornish,

*SUBMISSION TO THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS*

This gallery is about to embark on a major IT project over the next three years to digitise its collection, adding digital images of each work in the collection to the existing Collection database. In our successful request for funding to the New South Wales State Government we committed to integrating the Collection database (including the newly digitised images) with our Internet website.

The gallery has undertaken this project to digitise and provide its collection 'online' to promote and enhance public access to the gallery's collection of art. This project will also facilitate reciprocal benefits with international galleries who already provide their collections 'online'. These objectives are currently hampered by temporal, geographically and human resource limitations of the gallery. It is our intention that this gallery's website become the primary research tool for the general public, students, art historians and other galleries.

Further, as a public gallery, this gallery has an obligation to provide its resources to the public in the most efficient and accessible manner. Electronic service delivery is a quicker, cheaper and more efficient way to meet current and increasing public demand for information.

I am concerned that both existing copyright law and legislative amendment currently before parliament, in its present form, severely restricts our ability to provide appropriate public access to our collection.

I would urge the Committee to closely review the attached submission that specifically outlines the problems faced by this and other public galleries under the current and proposed copyright legislation. Broadly stated, the submission argues for a specific exception to allow publicly funded state and national galleries to provide online access to works within their collections (within strict guidelines). This recommended legislative amendment would allow this gallery and other public galleries to comply with their public obligations, free from the possibility of enforcement proceedings or crippling copyright fees.

To this end, it is my recommendation that the following clause be incorporated into the *Copyright Act 1968* (together with the amendments under the *Copyright Act (Digital Agenda) Bill 1999*):

**After section 49**

Insert:

**49A Reproductions of artistic works by public holding galleries**

**The copyright in an artistic work, where that work is held by a publicly funded state or national gallery, is not infringed by the digital reproduction of that work as part of the holding gallery's online collection database, whether the artistic work has been previously published or not, provided that:**

- (a) the complete work is reproduced together with its title and full caption details including dimension, medium and the year of production (where applicable);**
- (b) the author of the work is clearly identified with the work;**
- (c) the digital reproduction includes a technological protection measure through a copy control mechanism;**
- (d) before or when the reproduction is communicated to online users, a clear notification is also provided by the holding gallery in accordance with the regulations:**
  - (i) that the reproduction has been made under this section and the work may be subject to copyright protection under this Act;  
and**
  - (ii) the reproduction is provided solely for the purposes of research or study;**
  - (iii) for any other matters (if any) as are prescribed.**

If you would like to further discuss this matter please do not hesitate to contact Mr Tony Bond, General Manager, Curatorial Services on either email [tonyb@ag.nsw.gov.au](mailto:tonyb@ag.nsw.gov.au) or on telephone 9225-1786.

Yours faithfully,

Edmund Capon  
Director

SUBMISSION OF THE ART GALLERY OF NEW SOUTH WALES TO THE  
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS:  
INQUIRY INTO COPYRIGHT ENFORCEMENT

**1       FACTS**

*The Art Gallery of New South Wales – a public gallery*

- 1.1     The Art Gallery of New South Wales ('the gallery') is a public gallery with a primary objective of collecting and maintaining works of art (artistic works as defined by the *Copyright Act 1968*) for the benefit of the general public. It was established in 1874 to enrich public appreciation of art, both Australian and international.
- 1.2     The gallery presently houses over 30,000 works of art and presents over 30 exhibitions a year. Increasingly this programme is managed through partnerships and collaborations with international museums and agencies. Many of these institutions are already online and look to us to provide reciprocal access. Reciprocity with loans from the collection is vital to the continuing support of some of the most important museums in the world. Regular contributions to this gallery's exhibitions have been forthcoming from museums such as The Uffizzi, The Tate, M.O.M.A. New York, Musee d'Orsay, The Louvre, Pompidou Centre and other National collections. In order to maintain the high level of exposure to major international art that our visitors have come to expect we must be able to provide these institutions access to our own resources.

*The digitisation project*

- 1.3     In July 2000 the gallery was granted funds by the New South Wales State Government to digitise its collection to ensure its works are comprehensively recorded on its Collection database and to facilitate on-line public access ('the digitisation project').
- 1.4     The digitisation project as accepted by the State Government consists of two components:
  - 1.4.1   adding digital images of each work to the existing database (which contains only text and field descriptions of works); and
  - 1.4.2   providing greater public access to the works of art in the gallery's collection via electronic service delivery through the gallery's Internet website. This would allow on-line users to view the information research related fields of the gallery Collection database together with a digital reproduction of the work enabling ease of identification of works.
- 1.5     The funds were granted in accordance with the gallery's proposal contained in its *Forward Estimates Submission 2000/01 – 2003/04*. This submission

specifically outlines the objectives of the digitisation project to enhance and expand the gallery's collection database:

- 1.5.1 To enhance public access to the collection and so to improve research opportunities to students, scholars and other interested parties both locally and internationally, eliminating geographical constraints.
- 1.5.2 To aid internal staff use within the gallery and to aid conservation of existing fragile works by reducing handling of these works.

[See *Forward Estimates Submission*, p 52]

- 1.6 It is generally understood and accepted that the funds are provided to the gallery to "digitise the gallery's collection and put it on the Internet" as reported in the Ministry for the Arts publication, the *Arts Bulletin* June 2000.

### ***Legal Requirements***

- 1.7 The existing copyright law does not specifically address digital reproductions of works.
- 1.8 The drafted amendments in the *Copyright Amendment (Digital Agenda) Bill* 1999 ('*the Digital Agenda Bill*') propose law concerning digital reproductions of works.
- 1.9 In general terms, concerning artistic works, *the Digital Agenda Bill* provides the author of a work with the right to communicate (and so reproduce) the work.
- 1.10 It is the gallery's submission that neither the existing legislation, nor the proposed amendments, enable the gallery (or any other public gallery) to fulfil its public obligations in a manner that is up-to-date with current technologies and in line with the level of public access and inter-gallery access provided by public galleries internationally.**
- 1.11 Both the current legislation and proposed amendments provided in *the Digital Agenda Bill* leave the gallery open to enforcement proceedings for breach of copyright:
  - 1.11.1 if it carries out the digitisation project as authorised by the NSW State Government and provides its collection online; or
  - 1.11.2 if it provides digital reproductions in response to specific requests for reproductions of works of art within its collection, where the work is unpublished, regardless of whether the request is a bona fide request for research or study purposes.
- 1.12 It is the gallery's submission that the overriding public interest in providing access to its collection online:**

**1.12.1 to the general public for the benefit of research, public enquiry and cultural enrichment; and**

**1.12.2 the further public interest in providing reciprocal collection access to other galleries, nationally and internationally;**

**should be recognised legislatively as an exception to the right of the author to communicate his/her artistic work to the public.**

## **2 LAW**

### ***Existing Legislation: The Copyright Act 1968***

2.1 The existing *Copyright Act 1968* (*'the Act'*) has express exceptions for the reproduction of works for research and study purposes. In general terms it allows libraries and archives to reproduce copyright works and furnish copyright material in response to written or oral requests made together with an undertaking that the use is for the purpose of research and study.  
[See s 49 (1) &(2)]

2.2 However, section 49 (5) allows a library or archive to furnish a reproduction of *the whole of a work* in response to a request, only when:

2.2.1 the work forms part of the library or archives collection; and

2.2.2 the reproduction is provided in circumstances where the authorizing officer is satisfied that a reproduction of the work cannot be obtained "within a reasonable time and at an ordinary commercial price".

2.2.3 Further, provision of a reproduction of a work of art is pursuant to section 49 (2) or (2C) of the Act, and requires that it be in response to a request in accordance with section 49 (1) or 49 (2A) of the *Act*, and therefore:

2.2.3.1 must be a request concerning a *published* work as prescribed by the *Act*.

[See s 49 (1) (a); s 49 (2A)].

2.3 A work is *published* when reproductions are made available to the public.  
[See s 29 (1) (a)]

2.4 Libraries and archives may reproduce *unpublished* works of art for the purpose of research or private study or with a view to publication, where more than 50 years has elapsed since the author died, and only if the unpublished work is a photograph or an engraving.  
[See s 51 (1) and further requirements of being 75 years after the work was made]

### ***The Copyright Amendment (Digital Agenda) Bill 1999***

- 2.5 The *Copyright Amendment (Digital Agenda) Bill 1999* (now in its third reading before Parliament) will amend the *Copyright Act 1968* to address and include digital reproductions of copyright works.
- 2.6 Specifically, it establishes the author's right to communicate his/her work to the public.
- 2.7 This right to communicate is technologically neutral and includes the right to digitally reproduce a work of art.
- 2.8 This right mirrors the right provided by Article 8 of the *World Intellectual Property Organization ('WIPO') Copyright Treaty 1996*.
- 2.9 Article 10 of the *WIPO Copyright Treaty* provides that nations which are parties of WIPO may in their "national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author". [See article 10 *WIPO Copyright Treaty*]
- 2.10 The proposed amendments under the *Digital Agenda Bill* allow the gallery to *digitally* reproduce a work of art:
- 2.10.1 In response to a written/oral request pursuant to the existing exception under s. 49 of *the Act* (where the work is published).  
[See 2.1& 2.2 above]
- 2.10.2 For administrative purposes.  
[See amendment numbered 75, proposed s 51A (2) and (3)]
- 2.10.3 For the purposes of preserving a work against loss or deterioration, ('a preservation reproduction').  
[See amendment no. 75, proposed s 51A (3A) and (B)]
- Digital reproductions for research or study: s49 (1) (2) & (2c)*
- 2.11 The *Digital Agenda Bill* mirrors the existing law but extends it to include digital reproductions. It therefore does not alter *the Act*, which specifically requires a request and an assessment by the responding officer of the archive or library in relation to the allowed reproduction of published works. It does not address the circumstances of on-line use where the end user has no personal interaction with an officer of the archive, library, or gallery.

### ***Administrative digital reproduction***

- 2.12 A reproduction made for administrative purposes may be made available online as part of an intranet service to officers of the gallery through the use of computer terminals installed within the premises of the gallery.

[See amendment no. 75, proposed s 51A(2) and (3)]

### ***A preservation digital reproduction***

- 2.13 A preservation reproduction may be made available by the gallery to *members of the public* online without infringing copyright:

2.13.1 where the work has deteriorated since the preservation reproduction was made or the work has become so unstable that that it cannot be displayed without risk of deterioration; and

[See amendment no. 75, proposed s 51A (3A) and (3B)]

2.13.2 where the preservation reproduction is available online to be accessed through a computer terminal *on the gallery premises* that cannot be used to make another copy of the reproduction by the user or communicate that reproduction. [My italics]

[See amendment 75, proposed s 51A (3A) and (3A) (a) (b)]

## **3. APPLICATION**

### ***Ability to digitally reproduce for research and study purposes***

- 3.1 The existing legislation allows galleries to provide reproductions of works within their collections to members of the public only in circumstances where:

3.1.1 the work either:

3.1.1.1 has been published (that is reproductions have previously been provided to the public) or;

3.1.1.2 the work has not been published and is a photograph or etching and is more than 50 years old; AND

3.1.2 a copy of the work in published form cannot otherwise be reasonably obtained; and

3.1.3 the applicant gives an undertaking that his/her purposes are for private research or study.

- 3.2 There is no provision in the existing legislation which allows the gallery to provide to members of the public, reproductions for *unpublished* works other than photographs and etchings.**
- 3.3 The *Digital Agenda Bill* amends the legislation to allow digital reproductions in the circumstances already prescribed by the existing legislation.  
[See 2.1 & 2.2 above]
- 3.4 The majority of works of art subject to copyright in the gallery's collection are *unpublished* works other than photographs or etchings. Under the existing *Act* and proposed amendments pursuant to the *Digital Agenda Bill*, these works of art, in general, may not be reproduced for public use.**
- 3.5 The majority of requests for study and research reproductions concern works which are unpublished precisely because they are otherwise unobtainable.**
- 3.6 Reproductions of unpublished works may only be provided to members of the public in the exceptional circumstances where the work of art has deteriorated and a preservation copy may be viewed on site.  
[See 3.7 & 3.8 below]

#### *Administrative and preservation digital reproductions*

- 3.7 The proposed amendments do not allow administrative reproductions for any use other than an internal staff gallery use.
- 3.8 The proposed amendments allow a gallery to provide *digital reproductions* of works in its collection to the public when a preservation copy has been made and:
- 3.8.1 the work is now so unstable that it cannot be exhibited without deterioration; and
- 3.8.2 this preservation copy is made available for display internally from a terminal within the gallery for public use provided that it cannot be downloaded or otherwise be reproduced.
- 3.9 This reproduction is in addition to the reproductions of published works provided to individuals for research and study purposes.

## **4. POLICY CONSIDERATIONS FOR COPYRIGHT REFORM**

- 4.1 The reforms contained in the *Digital Agenda Bill* profess to provide public access online:



The reforms implemented in the bill are an important part of establishing a legal framework to encourage online activity and the growth of the information economy.

[See Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum at p2 of 79]

Users would benefit from amendments to the Act which would ensure reasonable access to copyright material in the online environment. The exception provisions would ensure that individual users of copyright material and institutional users of copyright material, such as libraries, have appropriate access to copyright material in the online environment.

[See Explanatory Memorandum Ibid at p9 of 79]

**4.2 In effect, the restrictions which are imposed on public access to the works in the gallery's collection serve to defeat the manifest benefits associated with online activity and cancel out any public benefit which may otherwise arise from the advent of this new technology and the gallery's harnessing it to public benefit.**

4.3 The gallery can only display a small proportion of the works within its collection at any one time. Access to digital reproductions could allow effective access by members of the public to the whole of the gallery's collection, regardless of whether it is on display physically within the gallery or not.

4.4 However, under the proposed amendments, the only works which would be generally accessible to the public are those which:

4.4.1 have been published but cannot be otherwise reasonably obtained; or

4.4.2 are fragile and risk deterioration;

allowing access to a negligible number of works, and generally works which are also out of copyright and therefore could otherwise be reproduced without infringement.

**4.5 The other manifest advantage of digital technology is the removal of temporal and geographic limitations. However, the proposed amendments require that the public access to online digital reproductions be within the physical confines of the gallery. This effectively removes the possibility of any public benefit resulting from the ability which the Internet provides to access information regardless of remoteness and locality in general or the opening hours of the gallery.**

- 4.6 Existing copyright legislation provides a general “fair dealing” defence for individual users of copyright works when that use is for research and study. However no such general protection is afforded the gallery against enforcement where the gallery provides the reproduction of the work in circumstances beyond the limited exceptions set out in the *Act* and the proposed amendments.
- 4.7 Neither the *Act* nor the proposed amendments in the *Digital Agenda Bill* allow the gallery to provide digital reproductions online as a part of its collection. Under existing and proposed legislation, the gallery may be subject to enforcement proceedings where it facilitates a digital reproduction, even in circumstances where the end user may claim a defence of fair dealing for research or study purposes.**
- 4.8 The *Digital Agenda Bill* is drafted in conformity with the right to communication in Article 8 of the *WIPO Copyright Treaty* (*‘the Treaty’*).
- 4.9 It is the express intention of the Parliament that “the proposed reforms are consistent with the new international obligations in the *WIPO Copyright Treaty*”.  
[See Explanatory Memorandum Ibid. Para 2, p 5 of 79]
- 4.10 The *Treaty* expressly allows nations to legislate for exceptions to the author’s right of communication in cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.  
[See Article 10 of the *WIPO Copyright Treaty*]
- 4.11 The primary objectives of the gallery’s digitisation project of the Collection is for public benefit:
- 4.11.1 in providing access for research and study purposes of a standard already provided by international American and European galleries;
- 4.11.2 to enhance public access to the collection irrespective of location and temporality.
- 4.12 As part of the gallery’s digitisation project, this gallery will ensure that the works are digitally reproduced with all due diligence concerning international copyright requirements including:
- 4.12.1 a general copyright warning which precedes the viewing of all works to the effect that:
- 4.12.1.2 Many of the reproductions are subject to copyright.
- 4.12.1.3 All reproductions are provided for private research or study purposes only.

- 4.12.1.4 Any other intended use requires permission from the copyright holder and the gallery.
  - 4.12.1.5 Any unauthorised use may be in breach of national and international copyright legislation.
  - 4.12.2 embedding each image with a watermark so that any unauthorised posting of reproductions to other sites may be traced and corrective action pursued;
  - 4.12.3 clear artist and copyright credits which accord with the moral rights of the author of the work, identifying the artist, the year(s) the work was produced, copyright emblem and copyright holder;
  - 4.12.4 ensuring that each work appears individually, with one reproduction on each 'web page' so that the importance of each work is not compromised;
  - 4.12.5 ensuring that each reproduction is of the complete work, and is as faithful to the original work as possible and is neither cropped, overprinted or altered in any way; and
  - 4.12.6 ensuring each reproduction has clear and full caption details providing dimensions, medium and the title of the work.
- 4.13 It is the gallery's submission that the digital reproductions proposed under the gallery's digitisation project affords a legitimate exception in accordance with the requirements of Article 10 of the *WIPO Copyright Treaty*.**
- 4.14 Reproductions as part of the digitalisation project are within the exceptional circumstances of the holding gallery's collection for the overriding public benefit.**
- 4.15 This exception to the author's right to communicate his/her work of art to the public does not conflict with the normal exploitation of the work. [See Article 10, *WIPO Copyright Treaty 1996*]**
- 4.16 Such reproductions will only be available for private research and study, and for the same public interest purposes for which it may be viewed within the gallery.**
- 4.17 Nor does it affect the author's ability to commercially exploit his/her work While the quality of the resolution of the digital image is suitable for viewing, it is a sufficiently low resolution that will effectively preclude any non-authorized commercial use.
- 4.18 Reproduction as part of the digitalisation project does not interfere with the author's (artist's) legitimate interests. [See Article 10, *WIPO Copyright Treaty 1996*]

**4.19 Digital reproduction in these circumstances serves to promote the artist and the artist's work within the context of the gallery's collection. The work is reproduced in a manner which maintains the integrity of the work of art and fulfils the artist's moral rights concerning the quality and manner of reproduction. The artist is identified with a complete and correctly captioned reproduction of his/her work Reproductions as part of the gallery's digitisation project serves to enhance and promote the artist's reputation within the context of the holding gallery's collection, both to the general public and to other international galleries through on-line access.**

## **5. RECOMMENDATION**

5.1 The gallery submits the following legislative amendment as enabling the gallery to provide public access in accordance with the digitalisation project:

### **After section 49**

Insert:

#### **49A Reproductions of artistic works by public holding galleries**

**The copyright in an artistic work, where that work is held by a publicly funded state or national gallery, is not infringed by the digital reproduction of that work as part of the holding gallery's online collection database, whether the artistic work has been previously published or not, provided that:**

- (e) the complete work is reproduced together with its title and full caption details including dimension, medium and the year of production (where applicable);**
- (f) the author of the work is clearly identified with the work;**
- (g) the digital reproduction includes a technological protection measure through a copy control mechanism;**
- (h) before or when the reproduction is communicated to online users, a clear notification is also provided by the holding gallery in accordance with the regulations:**
  - (i) that the reproduction has been made under this section and the work may be subject to copyright protection under this Act; and**
  - (ii) the reproduction is provided solely for the purposes of research or study ;**
  - (iii) for any other matters (if any) as are prescribed.**