Copyright Amendment Bill 2006

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

CMCL – Centre for Media and Communications Law
Faculty of Law
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Preface

The Centre for Media and Communications Law is a centre for the research, discussion and teaching of all aspects of media and communications law and policy, located in the Faculty of Law at the University of Melbourne. The CMCL undertakes multi-year research projects, holds public seminars in Melbourne and Sydney about legal and regulatory developments, supports research visits from Australian and international academics, lawyers and policy makers, and supervises undergraduate and graduate teaching and research in media and communications law at the University. For more information on the CMCL, please consult www.law.unimelb.edu.au/cmcl.

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Background

In recent years, academics at the CMCL and the Intellectual Property Research Institute of Australia (IPRIA) have carried out ARC-funded empirical research into digitisation practices in Australian public museums, galleries, libraries and archives.[1] This research investigated the ways in which digital collections are being produced and made publicly accessible by cultural institutions. It is the only Australian research of which we are aware that has investigated empirically the effects of copyright law within the cultural institution sector.

Among other things, this research has produced copyright guidelines tailored for cultural institutions that are digitising collection material. These guidelines have been distributed widely across the sector and have fostered ongoing dialogue about digitisation and copyright law both within institutions, as well as through bodies such as the Collections Council of Australia.[2]

This research underlies the comments offered here, which are directed only at a few specific elements of the Copyright Amendment Bill 2006. The limited timeline available to the Committee means that we have avoided wider comments.

General comments from digitisation research

Our research project involved traditional legal analysis of the scope and content of digital copyright law, as well as fieldwork with staff in the sector. Interviews were conducted primarily with Australian museums, galleries, libraries and archives, with additional fieldwork conducted with some of the largest UK and US cultural institutions, and with collecting societies and entities representing creators in Australia and internationally. The institutions ranged in size from major state and federal collections with millions of items, through to regional institutions with smaller or focussed collections of less than 10,000 objects. In total, 178 people were interviewed from 64 cultural institutions and other bodies during 2004 and 2005. The number, variety and scope of the Australian interviews makes us confident that they provide a comprehensive picture of digitisations practices in Australian public museums, galleries, libraries and archives.

There are three broad types of digitisation occurring in Australian institutions:

[1] Kenyon and Christie, Project ID LP0348534. Six institutions were research partners in the ARC Linkage Project: the Art Gallery of New South Wales, Australian Centre for the Moving Image, Australian War Memorial, Museum Victoria, National Museum of Australia and State Library of Victoria.

[2] The Guidelines: Emily Hudson and Andrew T Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitisation* (2005) are available via <http://www.law.unimelb.edu.au/cmcl>.

- administrative digitisation, which is performed for internal, management purposes such as developing collection management databases;
- on-demand digitisation, which is driven by requirements in other internal or external projects, such as institution publications and exhibitions, and user requests; and
- stand-alone digitisation, where projects specifically aim to create digital repositories of collection material for public access and preservation purposes.

Copyright is an important factor in all these activities. Key observations from the fieldwork include:

- ***Copyright law drives the selection of material to digitise***. Copyright law frequently drives the selection of collection material to digitise, and how digital content is made publicly available. It appears that uses of digital material that are likely to be socially productive, and not detrimental to creators and copyright owners, are not occurring because of concerns about copyright law. In part, this is caused by the risk-averse qualities of cultural institutions in relation to copyright, qualities which are understandable given their public sector status. But it also follows from the existing content of Australian copyright law, including the parameters of current exceptions in the *Copyright Act 1968*, and the high reliance on individually-negotiated licences.
- ***Negotiating and managing licences involves high administrative costs.*** One way in which institutions seek to make digital material publicly available is through negotiating non-exclusive licences with copyright owners or their representatives. However, institutions face notable administrative difficulties in negotiating and then managing individual licences of varied terms and duration, particularly where large numbers of licences are required. Reliance on individual licensing may be less than ideal for both institutions and copyright owners. For instance, the considerable resources that can be required for the licensing *process* often do not translate to remuneration for creators, and at least some parties to negotiations appear to lack appropriate knowledge of the choices available to them under copyright law.[3] In addition, problems arise for 'orphan works': materials for which a copyright owner cannot be identified or located. These factors suggest that a variety of reforms are worthy of consideration, ranging from a statutory licensing scheme (for example, for some commercial uses), through to new unremunerated exceptions of more general application than the technical and limited libraries and archives provisions.

[3] This aspect of the research highlights the importance of having copyright resources and support services available to creators – particularly creators who seek recognition and income from their work – such as the services provided by the Arts Law Centre of Australia and the Australian Copyright Council: see <http://www.artslaw.com.au>; <http://www.copyright.org.au>.

- ***Some existing exceptions do not match industry practice***. The exceptions that allow libraries and archives to reproduce collection items for 'preservation' and 'administrative' purposes are significant for digitisation, but neither provision encompasses standard practices within the sector. For example, the statutory exception that allows copyright works to be reproduced and communicated for administrative purposes[4] is significant for many digitisation activities occurring across the sector, but the exception fails in at least two notable ways. First, the exception applies to literary, dramatic, musical and artistic works, but there is no equivalent exception for subject-matter other than works, such as sound recordings and audiovisual material. This appears to be a substantial and anomalous omission that is not justified on any clear policy basis. Second, the exception does not appear to cover some activities that institutions see as standard administrative practice, such as activities concerned with insurance and loans.

Overall, the sector faces two particular difficulties, related to: digitising audiovisual material and social history collections; and making many types of digital collection publicly accessible.

Comments on Copyright Amendment Bill

Two reforms in the Bill appear to have particular relevance for the production and availability of digital collections in public museums, galleries, libraries and archives:

- introducing a flexible dealing exception that would apply to cultural institutions; and
- introducing an exception for 'key cultural institutions' to reproduce 'significant' works.

The Bill also contains some technical amendments to the libraries and archives provisions, mainly arising out of the Phillips Fox review of the Digital Agenda Act.[5]

Three areas of comment follow, concerned with flexible dealing, preservation copying and administrative purposes.

[4] *Copyright Act 1968* (Cth) s 51A(2), (3).

[5] Phillips Fox, *Digital Agenda Review: Report and Recommendations* (January 2004); <http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations>. It should be noted that the so-called libraries and archives' provisions encompass public museums and galleries. The Digital Agenda reforms, which were passed in 2000 and began operating in March 2001, expressly recognised this fact.

1 *Flexible dealing*

The proposed s 200AB of the *Copyright Act 1968* would provide for several 'flexible dealing exceptions' under which copyright in works and other subject-matter would not be not infringed by certain uses – including some activities by cultural institutions. For flexible dealing to apply, the following requirements would need to be met:

- 'the circumstances of the use … amount to a special case';[6]
- 'the use does not conflict with a normal exploitation of the work or other subject-matter';[7] and
- 'the use does not unreasonably prejudice the legitimate interests of the owner of the copyright' or someone licensed by the owner.[8]

Proposed s 200AB(7) provides that the terms 'special case', 'conflict with a normal exploitation' and 'unreasonably prejudice the legitimate interests' have the same meaning as Article 13 of the TRIPS Agreement. This article encompasses a test that is commonly known as the three-step test, and which is found in other international copyright treaties.[9] However, there is at least one difference between the proposed s 200AB and Article 13 of TRIPS: in the treaty, the *exception* is required to constitute a special case, while in s 200AB, it is the circumstances of the *use* that must be a special case.[10] In addition, incorporation of the three-step test directly into the *Copyright Act 1968* is likely to pose challenge for the whole sector in determining which uses are permissible, particularly given divergent opinion in relation to the content and application of each limb. This appears to be one reason for retaining more specific exceptions alongside the proposed s 200AB, such as those considered below.

In addition, the use would have to come within the requirements specifically aimed at cultural institutions in the proposed s 200AB(2). The subsection would protect a use that:

(a) is made by or on behalf of the body administering a library or archives; and

(b) is made for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives); and

(c) is not made partly for the purpose of the body obtaining a commercial advantage.

[6] Proposed s 200AB(1)(a).

[7] Proposed s 200AB(1)(c).

[8] Proposed s 200AB(1)(d).

[9] Eg Berne Convention for the Protection of Literary and Artistic Works Art 9(2).

[10] Eg World Trade Organization, United States – Section 110(5) of the US Copyright Act, Report of the Panel, WT/DS160R, 15 June 2000, [6.108]–[6.112].

As a preliminary matter, we note that the Bill's explanatory memorandum states that the requirement in s 200AB(2)(c) for the use not to be made partly for the institution's commercial advantage 'would not necessarily preclude use on a cost recovery basis'.[11] However, the justification for the restriction in s 200AB(2)(c) is hard to discern: any concern to limit commercially significant uses that unreasonably prejudice the legitimate interests of copyright owners would already be caught by the proposed s 200AB(1). It is not clear why s 200AB(2)(c) needs to be enacted, given the content of s 200AB(1).

Section 200AB(2) encompasses uses made 'for the purpose of maintaining or operating' the institution, which includes 'providing a service of a kind usually provided by' such an institution. The Bill's explanatory memorandum notes: 'This condition would encompass the internal administration of the library or archives as well as providing services to users.'[12]

Both parts of this explanatory note are significant. The first relates to existing 'administrative purposes' provisions, which are considered below. The second suggests that some public uses of collection material would be covered by s 200AB, such as the online availability of particular digital files, or the use of digital images in 'kiosks' that are accessible to patrons within institutions' buildings. This would be an important development. Our research suggests that the Digital Agenda reforms to the *Copyright Act 1968* have not directly promoted digital access to public museum, gallery, library and archive collections. In that aspect, the Digital Agenda reforms appear to have failed to meet one of their key aims; namely, to ensure that cultural institutions could promote access to 'copyright material in the online environment on reasonable terms' with regard to 'the benefits of public access to the material and the provision of adequate remuneration to creators and investors'.[13] Instead, the limited scope and technical nature of the libraries and archives provisions have proven difficult for the sector to use in relation to digital collection material. Far less material is available digitally than could be the case and, for much of that material, creators' interests are not a significant reason for the limited public accessibility.

In light of this experience, the proposed flexible dealing exception offers *some* encouraging potential for achieving the aims articulated in the Digital Agenda reforms. In relation to public uses, challenging questions may arise in relation to whether such uses are 'normal exploitations', and whether they provide institutions with any commercial advantage. In this regard, there is already substantial debate surrounding

[11] Explanatory Memorandum to the Copyright Amendment Bill 2006: [6.55].
[12] Ibid [6.55].
[13] *Copyright Amendment (Digital Agenda) Act 2000* (Cth) s 3(d); the amendments came into force on 4 March 2001.

the distinction between 'commercial' and 'non-commercial' activity, and the scope and application of non-commercial activity in the digital environment remains controversial. If some public uses are to be protected under the proposed flexible dealing exception, as the explanatory memorandum suggests is intended, the legislation could provide illustrative guidance on this issue. This approach has been taken in other sections of the *Copyright Act 1968*, such as the legislative note added to the definition of 'archives' by the Digital Agenda reforms which made it clear the term could include public museums and galleries.

While there are likely to be divergent views about public access to digital collections – from institutions, users, creators and copyright owners – it is important to remember the diversity of material which institutions hold. For some types of material, flexible dealing could effectively promote greater digital access and offer a substantial improvement on what has existed to date. For example, social history collections include many utilitarian objects and photographs that were taken by people who do not consider themselves artistic creators,[14] which they (or their descendents) have donated to the institution with the expectation that the material would be made as widely available as possible. However, in situations like this, institutions often do not own the copyright associated with the item. And Australian cultural institutions are notably risk averse with regard to copyright, meaning that digital collections of important social history are not as accessible as warranted.

The caution exhibited within the sector can be contrasted with other types of users of copyright material who routinely infringe copyright. In that situation, the policy challenge is to develop appropriate responses to infringements that will happen in any event. The Bill deals with some such areas – for example, domestic recording of television broadcasts – in which it is almost certain that every Australian who reads this submission has regularly broken copyright law. Cultural institutions take a different approach to breaking the law and, for understandable reasons given their public sector status, they avoid many public uses of digital material because of copyright. Although the quantum for any legal liability might be small, the very possibility of legal liability appears to dissuade use within this sector. What is particularly important to recognise is that this caution exists for material that is far removed from any identifiable creator – that is, in many instances, the caution appears to be as great with regard to an anonymous social history item as it rightly is when dealing with an art gallery painting.

[14] Such material raises very different interests than, eg, visual artworks that have been created by persons seeking at least some recognition and income from their endeavours.

2 *Key institutions and preservation copying*

The Copyright Amendment Bill 2006 would introduce specific provisions allowing the copying of historically or culturally 'significant'[15] works, films, sound recordings and published editions that are held in the collections of 'key cultural institutions'.[16] These reforms are limited in several ways: in terms of the institutions to which they apply; requirements for commercial availability tests for published material and photographic reproductions of original artistic works;[17] and in generally only permitting a single reproduction. The provisions appear to be aimed at addressing the anomaly – which is clear from the research we have undertaken – that the existing preservation copying provisions are limited, and do not encompass 'preventative' copying of many collection items.[18]

Preservation is seen as a prominent benefit of digitisation within the sector. In some cases, its value flows from preventing excessive handling of material, thus maximising the effects of conservation activities directed to original items. In others, digitisation represents one way to preserve the informational content of an inherently unstable or fragile item. In both cases, preservation copying works best if performed *before* deterioration has occurred. Given the limited operation of existing preservation copying provisions, cultural institutions may feel compelled to break the letter of the law if they are to fulfil their own institutional missions and undertake preservation activities (which are often set out in the statutes creating institutions). While some institutions are comfortable to proceed in these circumstances, others report that preservation activities are not taking place due to copyright issues.

Thus, our research shows that the aim of these reforms is valuable. However, it is not clear that allowing only a *single* reproduction will meet the intention to assist with preservation. That is, the technical processes of preservation copying, whether in analogue or digital form, often involve multiple copies being made at different stages of the process. (The recurrent obsolescence and potential instability of digital storage media also suggests that *repeated* reproductions will need to be made over time, not just a single reproduction.) The quantitative limitations expressed in the proposed provisions – such as 'a single reproduction' of a manuscript, 'a comprehensive photographic reproduction of an original artistic work', or a single copy of a sound recording held in the form of a first record or an unpublished record[19] – may well defeat the aim of the amendment. In addition, it is not clear why the proposed

[15] An authorised officer of the relevant institution would need to be satisfied of the significance, and no statutory guidance is provided as to the meaning of historical or cultural significance.

[16] Proposed ss 51B, 110BA, 112AA. The institutions would be those where the administering body has the legal function 'of developing and maintaining the collection', see eg proposed s 51B(1)(a).

[17] See eg proposed s51B(3)–(5).

[18] See Explanatory Memorandum , above n 11, [6.104]–[6.116] which makes clear this intention.

[19] See proposed ss 51B(2) and (3), 110BA(2)

exception only applies to 'key' institutions, or the meaning of 'historical or cultural significance'.

The combined effect of these limitations may be that institutions are much more likely to rely on the new flexible dealing provision in s 200AB than these proposed sections. That section would be available to *all* cultural institutions, not only to those 'key' institutions covered here, and would appear to better accommodate standard practice in preservation copying.

3 *Administrative purposes*

As with preservation, s 200AB may well become the more significant provision for 'administrative purposes' than the existing provisions in s 51A that allow works to be reproduced and communicated to institutional staff for administrative purposes.

The first point to note about s 51A is that it *is* important for many internal administrative activities in the sector. For example, many institutions are migrating their collection records to central digital repositories, creating large databases with comprehensive curatorial and legal information and low resolution digital images of collection material. Such databases allow staff to perform many research and administrative tasks from their desks without manually inspecting records or sending requests to other departments. And they offer a significant, qualitatively development in how curatorial staff can develop exhibitions, create educational programs and carry out research.

Two notable changes are proposed to s 51A. First, the section would be extended to cover communications to volunteers 'assisting with the care or control of the collection'.[20] This would respond to concerns raised in our research that the existing administrative purposes provisions do not apply to volunteers, even though volunteers play an important role in the administration of many cultural institutions. Second, administrative purposes would be defined for the first time to mean 'purposes directly related to the care or control of the collection'.[21] This appears to accord with current practices, and the lack of a definition is something we have commented on previously in academic writing.

However, two of the key weaknesses in the existing administrative purposes provisions would remain. This means the provisions would continue to fail in covering standard administrative procedures in cultural institutions, and they would do this for no clear policy reason. First, communicating reproductions of collection material to people or entities outside the institution – even communications that directly relate to the care and

[20] Inclusive definition of officers of the libraries or archives in proposed s 51A(6).

[21] Proposed s 51A(6).

control of the collection, such as those concerning potential loans and insurance – would remain unprotected because only communication to institutional officers (and volunteers) would be covered. Second, these provisions apply only to copyright works (that is, literary, dramatic, musical and artistic works) which are dealt with under Part III of the *Copyright Act 1968*. No similar 'administrative purposes' provisions would apply to other copyright subject-matter, such as sound recordings and films, which are dealt with under Part IV of the Act. This is one instance of clear asymmetry between existing copyright exceptions for works and other subject-matter. It means that licences are required for internal administrative dealings with films and sound recordings that would be permitted if they were performed with literary or artistic works. Given the convergence of different collection media that is occurring with digitisation, this situation is becoming increasingly problematic.

If not for the proposed s 200AB, these would be serious failings in the 'administrative purposes' provisions. If the current legislative provisions for administrative purposes have good policy justifications, then it is anomalous that they do not apply more widely in the above ways. And given that refinements to the existing provisions have been proposed in the 2006 Bill, it is unfortunate that they have not been dealt with more comprehensively. So, once again, institutions are likely to look to s 200AB for many of the internal, administrative activities related to digitisation and digital communications technologies. There may well be reasons to have specific provisions for administrative purposes and preservation, in addition to the somewhat more general provision proposed in s 200AB. Among other things, it may be thought appropriate that certain uses are expressly provided for, so institutions have clearer guidance on matters such as when a preservation copy can be made. However, if such specific provisions are to exist in the legislation, it would be better that they deal appropriately with the full range of collection material and uses that need to be undertaken as part of the ordinary operations of cultural institutions.