

# **Communication in the Digital Environment:**

**An empirical study into copyright law and digitisation  
practices in public museums, galleries and libraries**

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## COMMUNICATION IN THE DIGITAL ENVIRONMENT:

### An empirical study into copyright law and digitisation practices in public museums, galleries and libraries

Emily Hudson\* and Andrew T Kenyon†

#### *Abstract*

The development of new digital technologies has led to fundamental changes in the ways that copyright works are created, accessed and distributed. Communication between remote users has been greatly enhanced, allowing transmission of information at a quality and volume not possible with analogue technologies. However the use of digital technologies also presents substantial challenges, including legal issues in relation to compliance with copyright law and developing new business models to commercialise digital copyright.

Australian copyright law was reformed in 2000 in response to these technological changes. However, it is not yet clear how these amendments have affected the balance between the rights of copyright owners and creators, and the public interest in access to copyright material. While attempts have been made to assess the content of digital copyright law, this process has been hampered by the lack of empirical research in relation to digitisation and copyright management practices among copyright stakeholders.

This paper reports on initial results of qualitative, interview-based research into digitisation practices of leading Australian public museums, galleries and libraries and considers the ways in which those practices appear to be affected by copyright law. Cultural institutions are an excellent site for examining copyright issues because of the increased use of digitisation to fulfil institutions' public interest missions of preservation, access, research and education. This results in substantial challenges to cultural institutions to manage copyright issues surrounding the acquisition, creation and distribution of digital content. The paper discusses the ways in which digitisation facilitates the missions of cultural institutions, examines the nature of copyright issues facing institutions, reports on some existing strategies for dealing with them, and suggests implications for pending questions about reforming Australian copyright law.

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## **I Introduction**

Digital communications have led to fundamental changes in the ways that copyright works are created, accessed and distributed. Copyright law has a long history, and for much of this time, copyright material was created and accessed solely in analogue form; ordinary users could not access technology to copy works at commercial scales. However, during the twentieth century, two technological revolutions changed this position. The first was the development of cheap and widespread photocopying technology in the 1950s and 1960s (eg Franki Committee, 1976). The second was the digital revolution since the 1980s. These revolutions have certain commonalities: they significantly increased ordinary people's ability to create multiple copies of copyright material, and were viewed with concern by copyright owners. Each led to important copyright law reform in Australia and overseas (eg CONTU, 1978, Gamertsfelder, 2001). However, despite some continuity between analogue and digital copyright issues, digital communications have changed the magnitude of the problems and raised their own unique concerns. For instance, digital technology has allowed unprecedented quality and volume in communications, particularly online, and trans-border information flows are now a significant concern for copyright owners (eg Jensen, 2003).

There has been significant academic debate in relation to digital copyright law. Some writers have expressed alarm at copyright owners' powers to control access to material (eg Litman, 2001, Samuelson, 2002, Lessig, 2003), while others see the changes as less dramatic and suggest the new laws reflect wider public interests (eg Ginsburg, 2001, 2002). Underlying these debates are questions about whether differences between analogue and digital environments warrant substantially different policy approaches.

One line of argument suggests that digital communications are so different that copyright owners' rights should be enlarged without also expanding statutory exceptions and limitations. The fear of copyright infringement is argued to be much greater in digital contexts and, without additional protection, copyright owners would be unwilling to disseminate works electronically (Ginsburg, 2001). At the same time, digital technology has arguably changed copyright markets by facilitating greater use

of copyright licences, rather than the sale of tangible objects containing copyright works. This may stimulate the production and use of copyright material by allowing copyright owners to tailor-make products. Some suggest that such ‘private ordering’ is preferable to the ‘current “one size fits all” public ordering of copyright law’ (Friedman, 1998, p. 1151).

However, other commentators criticise digital copyright law for failing to reproduce existing analogue norms (Bartow, 2003). Concern has been expressed that copyright owners use non-negotiable licences that purport to contract out of copyright legislation by prohibiting activities that would otherwise be lawful under statutory exceptions to infringement (Gasaway, 2001, CLRC, 2002). Some commentators argue that statutory exceptions have been crucial to maintaining a vibrant public domain and ‘cultural commons’, but legal and technological change ‘is increasingly enclosing that commons’ (Lessig, 2003, p. 768). This sort of argument has some judicial support; for example, in 2004, the Supreme Court of Canada accepted that legislative exceptions should be conceptualised as positive user rights:

The fair dealing exception...is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively. As Professor Vaver [has explained]: ‘User rights are not just loopholes. Both owner rights and user rights should...be given the fair and balanced reading that befits remedial legislation.’ (*CCH*, 2004, p. 48, quoting Vaver, 2000, p. 171)

In 2000, the *Copyright Act 1968* (Cth) was amended in the context of these technological changes and policy debates (*Digital Agenda Act*). Three amendments are particularly relevant to this paper. First, the *Digital Agenda Act* confirmed that digitising an analogue work ‘reproduces’ the work for the purposes of copyright (*Copyright Act*, s. 21(1A), (6)). Second, it replaced technology-specific dissemination rights with a technology-neutral ‘right of communication’, which gives copyright owners the exclusive right to make protected material available online (ss. 31, 85-87). Third, a new enforcement regime was introduced for commercial dealings with ‘circumvention devices’ – that is, devices used to circumvent ‘technological protection measures’ such as access controls (Part V, Div 2A). (The enforcement provisions will be amended under the US-Australia Free Trade Agreement, which

came into force in January 2005; see Weatherall, 2004, pp. 6-7.) The *Digital Agenda Act* also made consequential amendments to the *Copyright Act*, including limited extension to some statutory exceptions to infringement.

Because the digital amendments are relatively recent, attempts to assess their impact have been hindered by a lack of empirical research into digitisation and copyright management practices (Phillips Fox, 2004). This paper begins to address that situation by reporting results of initial empirical research into digitisation and copyright management in one particular sector: public museums, galleries and libraries. Such cultural institutions offer an excellent site for examining copyright for several reasons. Cultural institutions are significant users and creators of copyright content, and they provide a site where the interests and activities of many people converge, including entities with very different powers in relation to the circulation of cultural works (eg Flew, 2005, p. 211): authors, artists and other creators; commercial publishers; researchers; educators; and the general public. As well as their public interest missions of preservation, access, research and education, cultural institutions may also have quasi-commercial arms involved in publishing and product development. The research takes a sector-wide approach to cultural institutions – rather than, for example, focussing on libraries, museums or galleries alone – because they face common challenges with digital technologies as their historically distinct roles become closer (Key Needs Study, 2002).

The paper considers two important questions: what sort of digitisation projects exist and are planned in major Australian cultural institutions; and to what extent does copyright law facilitate or impede these projects? The latter question is particularly relevant to whether digital copyright law achieves its stated aims, which include ensuring that cultural institutions:

can access, and promote access to, copyright material in the online environment on reasonable terms, including having regard to the benefits of public access to the material and the provision of adequate remuneration to creators and investors (*Digital Agenda Act*, s. 3).

After outlining relevant provisions of the *Copyright Act*, this paper reports on interviews with staff at leading Australian museums, galleries and libraries about

digitisation practices and copyright law's influences on them. The fieldwork suggests five notable matters about cultural institutions, digitisation and copyright – at least in relation to major cultural institutions that hold significant state and national collections. First, digitisation efforts appear to be widespread across large Australian institutions, although the rates of digitisation vary considerably between, and within, institutions. Second, while many digital images are intended for public use – in on-site or online exhibitions – there are also important uses of digital images in internal management and curatorial practices. Third, digitisation is pursued in the belief that it assists cultural institutions' missions regarding access to, and preservation of, collections. Fourth, costs of digitisation remain very substantial – irrespective of costs for copyright compliance – and institutions face wider information management challenges. Fifth, copyright law fits comfortably with many internal uses of digital images by cultural institutions – which is an under-appreciated aspect of some legislative provisions for the sector – but the law continues to challenge digitisation that is aimed at providing public access. Cultural institutions' missions are accommodated, but only uneasily, within copyright law's apparent commercial focus.

## **II Copyright Law**

Copyright law provides a framework for the use and management of a broad range of works found in cultural institutions. Here, it is useful to consider four aspects of the law: material that copyright protects; rights granted to copyright owners; 'fair dealing' exceptions to copyright infringement; and special provisions applying to cultural institutions. Of course, copyright law is important because physical property rights are distinct from copyright – institutions may physically possess material without owning copyright in the material.

First, for copyright to subsist in a work, it must fall within a category recognised by the *Copyright Act*; namely, original literary, dramatic, musical and artistic works, as well as sound recordings, films, sound and television broadcasts and published editions (ss. 32, 89-92). Where copyright subsists in a particular item, the *Copyright Act* deems that its author or creator is the owner of copyright. However, there are statutory exceptions to this general rule (for example, for commissioned and

employee-created works), and copyright owners can assign their interests to other parties (ss. 35, 97-100, 196).

Second, copyright owners enjoy exclusive rights to perform certain acts in relation to copyright works (ss. 31, 85-88). Two rights are particularly important here: the right to reproduce or copy protected material – which includes conversion into, or from, a digital form – and the right to ‘communicate the work to the public’, which includes making it available online. It is an infringement of copyright for a third party to perform one of these acts in relation to the whole or a ‘substantial part’ (s. 14) of a copyright work, without obtaining the consent of the copyright owner (ss. 36, 101). This means that, *prima facie*, cultural institutions infringe copyright *whenever* they digitise the whole or substantial parts of copyright material in their collection, unless the institution owns the copyright in question, or has obtained a copyright clearance (ie licence) from the copyright owner. Logistical issues in relation to obtaining licences will be discussed in detail below.

Third, the *Copyright Act* sets out important exceptions to copyright owners’ rights. For instance, ‘fair dealing’ provisions allow users to perform certain dealings with protected material without payment and without obtaining copyright owners’ permission. The dealing must relate to one of four purposes: research or study, criticism or review, news reporting, or giving professional legal advice (ss. 40-43, 103A-103C). The dealing must also be ‘fair’, having regard to matters such as its purpose and character, the nature of the work dealt with, the work’s commercial availability, and the amount of the work taken (eg Loughlan, 1998, pp. 64-67). The Australian legislation can be contrasted with the equivalent provision from United States copyright law, the exception for ‘fair use’ (*US Copyright Act*, §107). The US provision is free-roaming, in that it is not limited to enumerated purposes, and may be available in more situations than fair dealing. For example, publishing low resolution, ‘thumbnail’ images of artistic works online has been held to be fair use under US law (*Kelly v Arriba Soft*, 2003).

Fourth, other provisions of the *Copyright Act* specifically relate to certain activities by libraries and ‘archives’ (which are defined to include non-profit museums and galleries) (ss. 10(4), 48-53, 110A-110B). These provisions allow cultural institutions

to perform activities, beyond fair dealing, without payment and without obtaining copyright owners' permission. These activities include: preservation copying of original artistic works, manuscripts, sound recordings that are held as 'first records' and films held as 'first films'; replacement copying of lost or damaged published works from their collections which are not commercially available; reproducing works (but not audio-visual items) for administrative purposes; and reproducing published works for provision to patrons or for inter-library loans. However, there are important limitations on these provisions' operation (see Kenyon and Hudson, 2004). In particular, no provisions allow cultural institutions to place digital images – whether high or low resolution – on publicly accessible websites. Such activity is outside the library and archives provisions and (under current interpretation of the law) the Australian exceptions for fair dealing.

### **III Initial Fieldwork**

Interviews were conducted during 2004 with staff at six leading Australian cultural institutions. The institutions were all major collecting institutions at the state and national level, and were located in one of three capital cities (Melbourne, Canberra and Sydney). Although all institutions collected a broad range of material, some institutions focussed heavily on one category of copyright material (eg artistic works or audio-visual material). The total size of the permanent collections of each institution ranged from the tens of thousands through to many millions of items. The age of items in each collection extended back to the 1800s, and in some cases even earlier. Given the general funding base of Australian cultural institutions (eg Key Needs Study, 2002), these institutions were all well-resourced and staffed with professional and experienced personnel.

The project used semi-structured interviews that aimed to gain an understanding of: current and planned digitisation projects; copyright management practices in digitisation; and staff understandings and opinions of copyright law. The topics that were covered included:

- What is the nature and age of works in the institution's collection?

- Does the institution digitise works in its collection? For what purposes are works digitised? Who can access digitised content?
- What technology and forms of storage are used? What staff time and resources are involved in digitisation?
- Has copyright law impacted upon the process of digitising works?
- What role do copyright licences play in the digitisation of works? What are benefits or disadvantages of using licences?
- How easy or difficult is it to comply with copyright law?

Because digitisation can require the input of diverse teams of people, broad cross-sections of staff were interviewed about each institution's copyright and digitisation experiences. The content of each interview therefore varied depending on the expertise of the particular interviewee. For instance, interviews with photographers and information technology personnel focussed on the technological issues surrounding digitisation, while interviews with rights officers included in-depth discussion regarding compliance with copyright law. In total, 94 people were interviewed, sometimes in small groups. Most interviews ran for 60 minutes, and almost all were audio-recorded. The interviews were useful for easily encompassing activities across varied times, locations and personnel (eg Seale 1999, p. 59). Importantly for this cross-sectoral research, interviews were more likely than questionnaires or other methods to reveal terminological differences between museums, galleries and libraries (see eg May 1993, pp. 161-162).

This paper draws on interviews with 37 staff which have been fully transcribed. The selection of interviews used here is one of convenience, but they are not thought to differ significantly from remaining interviews. Quotations are direct transcriptions from interviews with only minimal changes made for clarity and readability, and interviewees are referred to by number (between 1 and 37) to protect their identities. As noted above, interviewees came from a range of positions and included senior management, registrars, curators, librarians, rights and copyright officers, IT managers and photographers. Very few interviewees had formal legal education, although it was common to have minimal informal training. In that, the research follows other qualitative investigations of lay people's experiences of law (eg

Fehlberg 1997, Ewick and Silbey 1998) although here many had extensive work-based experience related to law.

Given Australia's relatively small number of state and national cultural institutions, the range of experiences described here is likely to reflect those of large Australian cultural institutions. Even so, extrapolations should only be drawn with care (eg Alasuutari 1995). Further fieldwork is being undertaken at a wider range of cultural institutions, including smaller and non-metropolitan Australian institutions, English, US and Canadian institutions, and relevant copyright collecting societies. That fieldwork will be important for clarifying the wider applicability of some of the themes found here related to digitisation practices and copyright law's influence.

#### **IV Digitisation Practices**

There appears to be considerable diversity in digitisation practices both between institutions and between collections within institutions. Here, comments are made about apparent rates of digitisation, uses of digital images, believed benefits of digitisation, and concerns about costs and information management.

A spectrum of practices can be seen in rates of digitisation. Those at one end could be called 'high digitisers'. They coordinate projects aimed at creating high resolution images of most or all of a collection (eg 1, 33). The images are used internally – for example, placing low resolution derivatives on internal collection databases – and they are used for public access – for example, making images available online. These projects appear to have centred on visual art, but are spreading to other collection genre such as manuscripts and sound recordings.

At the spectrum's other end are 'low-digitisers' who are not systematically digitising their collections (eg 25, 45, 29). Instead, individual items may be digitised as needed, for instance where an image is required for an exhibition or publication (eg 28). It also appears common for low resolution images to be taken of new items during acquisition, which are used purely internally in collection records. In between, 'mid-digitiser' institutions have small scale projects in addition to needs-based and administrative digitisation (eg 6, 7, 8, 31, 34, 35). In some instances, popular or

iconic objects from collections, or those with significant research value, are identified for digitisation (eg 6, 7, 18). In other projects, low resolution images are being taken of the collection to ensure consistency in internal records (eg 8, 9).

The resulting digital images have varied uses, but two categories are notable. The first arises when digital content can be viewed *publicly*. This may take place on the institution's premises, for instance where digitised material is included in exhibitions (eg 9, 16) or interactive displays (eg 14, 17). Many institutions also place digital images online, allowing offsite access (eg 1, 7, 16, 21, 33, 37). The second category involves *internal uses* such as using digital images in computerised collection management systems (eg 1, 2, 4, 6, 7, 8, 17), or in relation to preservation (eg 5, 9, 24, 36). As one interviewee noted, these two categories of use are distinct:

Are we arguing for digitisation for the purposes of collection management ...or...public access to our collections?...[T]hey're two separate issues, and it's something that each department needs to assess...what we want to provide for public...online access, and...the rest of the collection that we talk about preserving...for the [institution]. (10)

The prevalence and value of internal institutional uses is a legally important outcome of the fieldwork, and is explored in part V, below.

Interviews raised two notable benefits of digitisation, related to collection *access* and *preservation*. A key advantage is that digitisation increases the potential for researchers and others, in varied locations, to access items (eg 18, 22). In many instances, only a tiny percentage of an institution's collection is physically displayed, and digitisation allows electronic access to non-displayed content (eg 16, 17, 37). Digitisation can also facilitate research where digital files are linked to searchable catalogues, allowing people to search for items of interest and then request another copy or access to the original, if necessary (eg 10). In some instances, viewing digitised versions may be superior to inspecting originals because of the detail available in digitised images (eg 3, 11, 45). In this regard, high resolution images of sculpture that were viewed during fieldwork were particularly impressive.

Digitisation also benefits preservation. Digital versions can act as surrogates for original works for certain purposes, reducing handling and deterioration (eg 5, 6, 17, 18, 36). However, digitisation does not replace existing preservation methods. Digitisation is useful because ‘in as much as it minimises handling ... you can do research without having to physically access things’, but it does not amount to ‘long-term, archival preservation’ (12). In addition, long-term preservation of the originals of some items, like audiovisual material, may be extremely difficult because of the limited lifespans and technological dependency of such items, making digitisation a useful ‘fallback when the film falls apart’ (22).

While digitisation offers cultural institutions benefits for access and preservation, two areas of difficulty relate to matters of cost and information management. Digitisation is time- and resource-intensive (eg 3, 45, 28), well beyond the time spent selecting material and obtaining copyright clearances. Interviewees repeatedly commented that digitisation assists their institutions, but is very expensive (eg 4, 6, 7, 22, 25, 45, 29). Institutions with large-scale or long-term digitisation projects appear to have received specific additional funding (eg 1, 6, 7, 23) and, in part, had been driven by funding opportunities (6). In other institutions, funding was derived from special exhibition budgets (eg 9) or from institutions’ general budgets (eg 18, 36). This may become increasingly common as digital technologies become central to institutions’ operations (eg 6, 7, 8, 17) and they recognise their own ‘image hungry’ quality (5). High digitisation costs have long been recognised in the sector (eg Williams, 1997) and concerns have not lessened with advancing digital communications. Cost appears to remain a very major aspect of any cultural institution’s digitisation efforts, quite separate to copyright management.

Interviewees also noted that, while clear desires to digitise collections existed, institutions were struggling with technological and information management issues. For instance, digitisation requires adequate meta-data to make items searchable (eg 22, 23) and management systems to store and allow access to a wide variety of files (eg 4, 11, 23, 27). Digitisation projects must also consider software and hardware lifecycles, allowing for content migration onto new hardware every five to ten years (eg 7, 45). Indeed, some interviewees expressed concern as to digital formats’ longevity, comparing this with established analogue lifespans (eg 13, 29).

## V Copyright and Digitisation

Within the context of institutional digitisation practices, outlined in part IV, the research focussed on understanding more about the effects of copyright law. Three aspects are examined in this part. First, the interviews suggested that the internal use of digitised material by institutional staff was accommodated by copyright law quite easily for non audio-visual material, but very poorly for audio-visual items. Second, copyright law impacts upon digitisation for the purpose of public access, and appears to do so to a substantial degree. This results from the lack of legal exceptions to cover digital access to material in cultural institutions and the complexity of copyright law, which in turn create difficulties in the relation to staff resources, copyright compliance and government funding. Third, the interviews suggested that digitising different categories of work were affected to substantially different degrees in relation to public access, with traditional artistic works offering less demanding challenges in terms of obtaining licences to allow digital dissemination of works.

In relation to digitisation practices in large Australian cultural institutions, the effects of copyright law appear to differ markedly between material destined for *internal use* and material used for *public access*. Where collections comprise literary and artistic works, copyright does not appear to have influenced the process of digitising for internal purposes. There appears to be a common practice for digitised collection items to be included on staff-only databases, such as collection management systems. In those instances, digitisation is performed without obtaining copyright owners' consent. Producing such digital files appears to fall within the express exception in the *Copyright Act* that allows cultural institutions to reproduce and communicate literary, dramatic, musical and artistic works in their collection for 'administrative purposes' (s. 51A (2),(3)). The term 'administrative purposes' is not defined in the Act, nor is it elaborated on in standard legal texts (eg Ricketson, 1999). However, the concept should include this type of practice – the creation and use of a digital image for the institution's internal purposes. It is important to appreciate the extent to which this type of access within an institution can assist collection management, including curatorial work in designing exhibitions, documenting preservation efforts, acting as a visual record for incoming or outgoing loans, and so forth. It is also notable that, in

many instances, there was no conscious reliance on copyright exceptions by interviewees for such internal uses (eg 4, 5, 6, 19, 20, 24, 37). Of course, funding for digitisation projects often depends on also developing external uses for material, which are considered below.

The practices for internal uses appear to differ for audio-visual items. Some interviewees reported that they rely on permissions for every act of copying such items (eg 26, 27). For instance, one interviewee noted that making any copy of an audio-visual item – including copies for internal use or preservation – requires the copyright owner’s consent (22). In this regard it is notable that the *Copyright Act* makes no provision for copying sound recordings and films for administrative purposes. Given the apparent extent of reliance on the administrative purposes provision for non audio-visual items, this seems likely to limit curatorial and other institutional work and appears anomalous when collections are becoming far more integrated, due in large part to digital communications technology. The *Copyright Act* does allow ‘preservation copying’ for recordings that are held as a ‘first record’ or ‘first film’, and also for ‘replacement copying’ of published recordings that are not commercially available (s. 110B). However, questions arise as to the applicability of these provisions. For example, the Act does not define ‘first record’ and ‘first film’, raising a question about whether they refer to a recording’s *master copy*, or merely to *any print* of an unpublished work. If it is the former, the provision may be of little use to institutions that have policies of not collecting master copies of recordings. Furthermore, preservation copying allows digitisation *prior* to any deterioration, whereas replacement copying only applies when the work has already suffered damage, suggesting that it cannot be invoked in relation to items at risk of deterioration. Thus, these provisions fall far short of the scope of the administrative purposes provision for non audio-visual items.

While copyright law has not hampered digitisation for administrative purposes in relation to many non audio-visual items, it has had a ‘fairly dramatic impact’ (9) on digitisation for public access. The law has ‘literally involved creating positions that...dedicate themselves to ensuring...we get copyright clearance’ (9). That is, while copyright has not generally prevented institutions from undertaking digitisation, significant resources must be put into ensuring compliance with copyright law (eg 4,

7, 8, 16, 17). Interviewees described copyright compliance as ‘cumbersome’ (9), ‘clunky’ (15), and full of ‘inefficiencies’ (19). One expressed concern that cultural institutions are ‘a bunch of amateurs trying to work this out’ (31) – and the lack of legally-trained personnel dedicated to digitisation and copyright, in almost all the institutions examined here, was striking when compared with large US cultural institutions that participated in related interviews in 2005 and generally had multiple lawyers on staff. While non-legal staff often dealt extensively with copyright, it appeared difficult for them to operate effectively across all departments of larger organisations or manage all records containing copyright information. Typical concerns from the Australian interviewees included: the high level of staff time that goes into compliance (eg 4, 6, 7, 14, 15, 16, 17, 18); difficulties in identifying and finding contacts for copyright holders (eg 2, 4, 6, 7, 9, 17, 28, 32); problems caused by only being able to negotiate licences for limited uses due to financial considerations (eg 2, 6, 14, 20, 21, 22, 23) even where more general licences are recognised as being extremely useful to institutions’ future programs (eg 17, 19, 23, 24, 26); and dealing with multiple copyright holders (eg 18, 22, 24, 32):

[A]s an institution, [we are] investing an awful lot of money in rights management, to the point where it’s not really a win for anyone. It’s probably not a win for rights holders, and it’s certainly not a win for the institution. For an institution where it’s essentially in the public domain anyway, it’s almost immoral that rights management issues are so pervasive and difficult. (21)

These concerns were exacerbated by the lack of government funding specifically for copyright compliance, and the difficulties in streamlining copyright clearance processes. In relation to funding, one interviewee commented:

I think one of the greatest problems...is the government’s understanding of the matching between their legislation and the means for people to actually abide by it...[W]hen it comes to funding organisations, they...do not understand the necessity to fund the copyright budget...They will ask ‘why is this in here?’ (2).

In relation to the diverse copyright issues that can arise for each item being considered for digitisation, another interviewee noted:

[I]t is more of a tortured process rather than a smooth, streamlined process, because you're going to different individuals each time and it's not a similar process: you can't go, well it's a five step process. It could be a five-step process with [one item] and a 25-step process with [another]. (18; 24 similar)

That said, difficulties in compliance did appear to vary with types of collections. Interviews suggested that institutions digitising traditional artistic works find compliance the most straightforward (eg 1, 2, 8, 34, 35) – often working with a combination of collective administration, through copyright collecting societies, and direct negotiation with creators or their estates. But those working with audio-visual items find compliance the hardest (eg 22, 23, 26, 27). In part, this may be due to the multiple rights in works underlying audio-visual items. Some institutions also found the material they wanted to digitise was out of copyright's limited, even if long, period of protection. They avoided, albeit fortuitously, the problems caused by copyright compliance (eg 33). Furthermore, there were a number of comments that copyright did not limit exhibition content, because there were often multiple, equally adequate images that could be used. This would be true particularly for some social history exhibitions, where there could be many images suitable to use alongside an exhibited item. In such cases, the issues concerned cost and time in relation to clearing rights, or finding replacement images, which 'certainly slows you down' (14, similar 19).

In this discussion of copyright clearance, it is important to note that cultural institutions did not begrudge creators the rights afforded to them by law. On the contrary, there was widespread agreement that creators' rights and interests must be protected (eg 1, 2, 5, 9, 14, 15, 20, 21, 22, 45, 29). This was particularly evident in relation to collections that included the work of living visual artists or their estates. The main difficulty appeared to be balancing creators' interests with the interests of cultural institutions in *managing* their collections and *making them publicly available*. Interviewees commented on the disjunction between copyright law and cultural institutions' missions to provide access to socially, scientifically and historically significant information (eg 28, 31). They described copyright law as appearing to be drafted with commercial uses in mind, which may lead to perverse results for cultural institutions that made reasonable attempts to clear copyright, but were unable to

identify or locate owners (eg 21, 30). Interviewees described ‘enormous frustration’ (29) at being unable to locate an owner despite all attempts, placing material in limbo even though it came to the institution because people thought the material’s public availability to be important. One interviewee noted:

This whole copyright issue has prevented good access to material...[Access] is countermanded by these excessively tight copyright laws which I think have probably been driven...from a commercial perspective...To me, [moral rights] are the significant areas of copyright, that you are protecting the author’s work and the intention of the author’s work. (30).

Similarly, another commented:

[W]e’re going out and making programs and...what we’re supposed to be doing is enabling Australia to appreciate [its heritage]...All of that...involves using objects, involves making reproductions of objects. It just seems as though we’re being restricted and we tend to be quite conservative in that [which] prevents us from actually providing the public with...exposure [to the collection, and] an appreciation for what we’ve got here. (36).

## **VI Conclusion**

In terms of copyright law, three matters emerge from the initial Australian fieldwork. First, the copyright provisions that allow reproductions of some protected material for administrative purposes have an important, previously unacknowledged, role in furthering digitisation efforts in major Australian cultural institutions. They are a significant element in the transforming information practices of workers within the sector and they support continuing developments in digital exhibition design and research. Second, this sample of institutions suggests there are strong reasons to extend the administrative purposes exceptions to audio-visual material. Third, digital copyright law poses more serious constraints on material’s public accessibility – it appears to be limiting public access to the collections of leading Australian cultural institutions. This outcome is consistent with expectations from earlier research in the area (eg Macmillan 1999).

These three matters relate to important copyright law reform questions facing Australia. In particular, for observers who interpret the US-Australia Free Trade Agreement as increasing copyright owners' powers and limiting the possibilities for Australian reform in many areas of copyright law (eg Weatherall 2004, Horn 2004), the issue of whether Australia should change from its current fair dealing exceptions to a US-style fair use exception is extremely topical. Indeed, in May 2005, the Attorney General's Department released an issues paper asking whether Australian copyright exceptions should be reformed (Attorney-General's Department, 2005); this fieldwork suggests that cultural institutions, and the public interests they serve, could gain significantly from such reform. The specific library and archives provisions already allow certain internal uses, which are increasingly important to institutions' operations with digital communications. A reformed fair dealing exception, along the lines of fair use, could allow many of the public access uses that institutions appear to be seeking. It is notable that related interviews at US cultural institutions in 2005 found reliance on fair use for many of those purposes, and that US law interprets at least some low resolution internet reproductions as being fair use.

There are other options for law reform in addition to reform of fair dealing. Recently, the US Library of Congress announced an inquiry into the legal issues raised by 'orphan works' (that is, copyright works whose owners are difficult or impossible to locate) (Library of Congress, 2005). The notice of inquiry emphasised how orphan works could hamper public access in ways that resonate closely with the experiences of Australian cultural institutions:

The uncertainty created by copyright in orphan works has the potential to harm an important public policy behind copyright: To promote the dissemination of works by creating incentives for their creation and dissemination to the public...[T]he public interest may be harmed when works cannot be made available to the public due to uncertainty over [their] copyright ownership and status, even where there is no longer any living person or legal entity claiming ownership of the copyright or the owner no longer has any objection to such use.

If such fair use reforms are not pursued, there remains real value in considering alternatives. These could include a wider exemption inspired by the current

administrative purposes provision or greater use of licensing, perhaps through statutory or industry-created schemes. These measures could streamline the process for institutions and lessen its 'cumbersome' (9) and 'tortured' (18) qualities. Current Australian copyright law can be seen to include a strong policy to promote public access to copyright material in the existing exceptions for fair dealing and libraries and archives (CLRC, 2002). The fieldwork reported here suggests the same policy requires amendments to be made to copyright law or practice, while wider comparative research remains relevant to developing understanding of this important aspect of Australian communications law and policy.

## References

- Alasuutari, P. (1995). *Researching culture: Qualitative method and cultural studies*. London: Sage.
- Attorney-General's Department. (2005). *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age: Issues Paper*; available from [www.ag.gov.au](http://www.ag.gov.au).
- Bartow, A. (2003). Electrifying copyright norms and making cyberspace more like a book. *Villanova Law Review*, 48, 13-127.
- CCH (2004). *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 S.C.R. 339.
- CLRC (Copyright Law Review Committee). (2002). *Copyright and contract*. Canberra: CLRC.
- CONTU (National Commission on New Technological Uses of Copyrighted Works) (1978). *Final report of the national commission on new technological uses of copyrighted works*. Washington: Library of Congress.
- Copyright Act of 1976* (US).
- Copyright Amendment (Digital Agenda) Act 2000* (Cth)
- Copyright Law Committee on Reprographic Reproduction (Franki Committee). (1976). *Report of the copyright law committee on reprographic reproduction*. Canberra: Commonwealth of Australia.
- Ewick, P. and Silbey, S. (1998). *The common place of law: Stories from everyday life*. Chicago: University of Chicago Press.
- Fehlberg, B. (1997). *Sexually transmitted debt: Surety experience and English law*. Oxford: Clarendon Press.
- Flew, T. (2005). *New media: An introduction* (2nd ed.). South Melbourne: Oxford University Press.
- Friedman, D. (1998). In defense of private orderings: Comments on Julie Cohen's 'Copyright and the jurisprudence of self-help'. *Berkeley Technology Law Journal*, 13, 1151-1172.
- Gamertsfelder, L. (2001). Digitising copyright law – an Australian Perspective. *Media and Arts Law Review*, 6, 13-29.
- Gasaway, L.N. (2001). Values conflict in the digital environment: Librarians versus copyright holders. *Columbia Journal of Law and the Arts*, 24, 115-161.
- Ginsburg, J. (2001). Copyright and control over new technologies of dissemination. *Columbia Law Review*, 101, 1613-1647.
- Ginsburg, J. (2002). How copyright got a bad name for itself. *Columbia Journal of Law and the Arts*, 26, 61-73.
- Horn, A. (2004). Creators and the copyright balance: Investigating the interests of copyright holders, users and creators. *Alternative Law Journal*, 29(3), 112-116.
- Jensen, C. (2003). The more things change, the more they stay the same: Copyright, digital technology, and social norms. *Stanford Law Review*, 56, 531-570.
- Kelly v Arriba Software Corporation* (2003) 336 F.3d 811.
- Kenyon, A.T. and Hudson, E. (2004). Copyright, digitisation and cultural institutions. *Australian Journal of Communication*, 31(1), 89-105.
- Key Needs Study (Deakin University, Cultural Heritage Centre for Asia and the Pacific). (2002). *A study into key needs of collecting institutions in the heritage sector*. Melbourne: Deakin University.
- Lessig, L. (2003). The creative commons. *Florida Law Review*, 55, 763-777.

- Library of Congress (United States). (2005). Notice of inquiry: Orphan works. *Federal Register: January 26, 2005, 70(16), 3739-3743.*
- Litman, J. (2001). *Digital copyright*. Amherst, New York: Prometheus Books.
- Loughlan, P. (1998). *Intellectual property: Creative and marketing rights*. Sydney: LBC Information Services.
- Macmillan, F. (1999). Striking the copyright balance in the digital environment. *International Company and Commercial Law Review, 10(12), 350-360.*
- May, T. (1993). *Social research: Issues, methods and process*. Buckingham: Open University Press.
- Phillips Fox. (2004) *Digital agenda review: Report and recommendations*. Canberra: Commonwealth of Australia.
- Ricketson, S. (1999). *The law of intellectual property: Copyright, designs & confidential information*. Sydney: LBC Information Services.
- Samuelson, P. (2002). Toward a “new deal” for copyright in the information age. *Michigan Law Review, 100, 1488-1505.*
- Seale, C. (1999). *The quality of qualitative research*. London: Sage.
- Vaver, D. (2000). *Copyright law*. Toronto: Irwin Law.
- Weatherall, K. (2004). *Locked in: Australia gets a bad intellectual property deal*. Intellectual Property Research Institute of Australia. Occasional Paper No. 4/04. Melbourne: IPRIA. <[www.ipria.org](http://www.ipria.org)>.
- Williams, M. (1997). Art galleries, museums, digitised catalogues and copyright. *Media & Arts Law Review, 2, 160-174.*