

AWM Submission

Introduction

The Australian War Memorial was established to assist Australians to commemorate in a relevant, fitting and dignified fashion the sacrifice of Australians who have died in war. From the time of its inception, the Memorial was envisaged as being much more than a shrine: it is also a museum housing an outstanding and diverse collection of material relating to the Australian experience of war; a centre of historical research and dissemination of information relating to Australian military history; and a major archive holding official and unofficial diaries, documents and papers.

Under the *Australian War Memorial Act 1980* our functions are: to develop and maintain a national collection of historical material; to exhibit historical material from this collection; to assist in research into matters pertaining to Australian military history; to disseminate information relating to Australian military history and the collection, and; to use every endeavour to make the most advantageous use of the collection in the national interest.¹ The Attorney General's *Fair Use and Other Copyright Exceptions: an examination of fair use, fair dealing and other exceptions in the Digital Age* Issues Paper² raises questions about copyright and its administration that are of vital interest to the Memorial and its functions as outlined above.

The National Collection of historical material has developed over almost a century now from its origins in the War Records Section and the earliest Official Art and Photography programs of the First World War. The collection was further developed through a proactive acquisitions program that solicited donations of all forms of personal memoirs and memorabilia from private individuals in the 1920s. Similar acquisition programs continued through out the Second World War and thereafter in more recent conflicts. A large proportion of the Memorial's holdings of personal manuscript collections and memorabilia such as photos, film, sound recordings, uniforms and medals has been and continues to come from the public as donated material.

In response to the government's intention to review the current exceptions in the Copyright Act 1968 outlined in the Attorney General's Issues Paper³, his submission will outline some of the main difficulties that the Memorial faces when managing public access to the National Collection. It will also briefly outline our preferred option for reform.

The Memorial's Challenge

Like many Australian cultural institutions, the Memorial is a custodian, disseminator and user of the National Collection which it is tasked to collect and preserve for all Australians. The range of formats held in the National Collection and the ways in which we preserve, provide access to and make use of this material is governed to a significant extent by the *Copyright Act 1968*.

Due to rapid technological developments over the past decade, the means to make and transmit or publish high quality reproductions has become available to almost anyone. With these activities becoming widespread and difficult to police, copyright legislation has struggled to maintain the balance between protecting the economic rights of owners and preserving the public interest by allowing access to copyright protected material for certain acknowledged purposes.

¹ *Australian War Memorial Act 1980*. S 5(1), (2).

² May 2005

³ *Fair Use and Other Copyright Exceptions: an examination of fair use, fair dealing and other exceptions in the Digital Age*. Issues Paper. May 2005.

Cultural institutions with diverse public collections exemplify this struggle. In a climate characterised by a public expectation of ready access to information and of copyright owners' increasingly protecting their property, they face the challenge to manage their own copyright and their use of copyright belonging to others, in compliance with an Act that is at best outdated and complicated and at worst deficient, and inconsistent.

Why this is Public Policy Issue

The Attorney General's Issues Paper notes the dual purpose of copyright law in Australia. This is to promote creativity and innovation by granting and protecting the economic rights of the copyright owner while at the same time ... *promoting the social benefits that come from a free flow of knowledge and expression*⁴. The latter occurs by allowing unpaid access to copyrighted material for a limited number of prescribed purposes or in a narrow range of circumstances. These exceptions in the *Copyright Act 1968* therefore reflect our society's sense of what is considered to be in the public interest.

Libraries, archives and museums are one of the first places that the public will seek information. They are a level playing field, providing access to information indiscriminately to all members of the public. They are often the only informational resource for many groups in our community such as migrants, the aged and the poor and so on. Against this backdrop the ability of these institutions to provide access to copyright protected material in their collections may be seen as a strong example of the public interest that the Copyright Act seeks to fairly reflect.

Further, the majority of national collecting institutions are mandated under their respective Acts to disseminate information held within their collections. The Memorial for example does make '... every endeavour to make the most advantageous use of the collection in the national interest as stated in the Australian War Memorial Act 1980. 'Advantageous' use, however, encompasses lawful use and in facilitating access to the National Collection on behalf of copyright users, the Memorial at the same time actively polices this use on behalf of copyright owners. The Memorial is vigilant about protecting the rights of copyright owners - who in many cases are the donor of the item - and every effort is made to place clients in contact with the copyright holders or to gain permission on their behalf.⁵

Libraries and archives are conscientious copyright citizens. In addition the Memorial, like the Commonwealth, must be a model citizen.

All of the exceptions in the *Copyright Act 1968* for libraries and archives are full exemptions that provide for the free use of copyright protected material without permission from the owner. The Memorial relies upon them heavily to fulfil its statutory functions via the provision and dissemination of collection material via our Reading Rooms and the web site.

Deficiencies in current provisions

The Memorial believes that the current exceptions in the *Copyright Act 1968* are not broad enough to adequately allow us to perform our statutory functions.

1. Orphaned works:

Copyright protects equally works of economic value as well as those of no economic value. Due to the Free Trade Agreement with the US all works are now protected for an extended

⁴ *Fair Use and Other Copyright Exceptions: an examination of fair use, fair dealing and other exceptions in the Digital Age. Issues Paper. May 2005.*

⁵ As a matter of policy for example the Memorial's Art section will not release the contact details of the copyright owner/s. Instead, Memorial staff approach the copyright owner on behalf of the requestor. While a burden on resources, this ensures the copyright owners' privacy and security and is a long standing practice in relation to art works held in public collections.

period of 70 years after the death of the creator or, if unpublished, protection is granted in perpetuity. Works of little economic value however often have cultural value and are of interest to the public at large. It is true to say that majority of the Memorial's National Collection is characterised by these works.

Where a copyright owner is unknown and/ or the work is very old the resources involved to attempt to trace them can be prohibitive and in any case, the investigation is often fruitless. In the case of Private or Official Records⁶ in the Memorial's care, the problem is usually compounded by the presence of embedded works belonging to additional unknown parties.

The following examples illustrate these points:

- The Memorial's Private Records section has received 214 photocopy requests since November 2004 to date; in approximately 60 instances the Memorial had to deny the request and ask the researcher to contact the donor directly for permission. Due to the age of the collection we are usually unable to provide assistance, although in very few cases we can provide an address for the donor, commonly many years old. Less than 5% of researchers locate the copyright owner/s.
- The letters of John Kirkpatrick Simpson of Simpson and the Donkey fame, written c.1913-1915, are unable to be copied or published by the Memorial or any researcher as we do not know the identity of the copyright holder and are therefore unable to determine the date of their death or seek their permission. This is despite numerous attempts in the past by the Memorial to locate the copyright owner. The implication is that there are unique works of cultural significance in the Memorial's care that the public are unable to access.
- The Australian Red Cross Society Wounded and Missing Enquiry Bureau files comprise a large and unique Private Records collection that details tens of thousands of eye witness accounts of injury or death that befell Australian servicemen in the First World War. It is heavily used by family historians, biographers and other researchers. The vast majority of these accounts however are expressed in the witnesses' own words and are therefore subject to copyright protection. The task of identifying and locating these copyright owners and their descendents, if possible, would take many years and many resources. This frustrates the development of a richer pool of public domain works that should positively influence the creation of new works and hence be of benefit to society.

The Memorial accepts that copyright users must attempt to locate copyright owners, and that remuneration of owners is important. However, unless the legislation is reformed, unpublished orphaned works held in the National Collection will remain restricted to those members of the public who are willing and able to travel to view the material on site. While unexploited by its copyright owner, this material has no hope of ever entering the public domain until details of the copyright owner become known. Public domain material is often the basis for new works that in their turn may advantage society. This is a situation that denies the potential benefit of these works even though their cultural worth is recognised by their inclusion in a national cultural heritage collection.

2. Digitisation for the purpose of storage, preservation and access:

The *Copyright Amendment (Digital Agenda) Act 2000* confirmed that converting a work into, or from, a digital form reproduces the work. This has significant implications for libraries and archives wishing to digitise collection material in order to preserve it, store it or provide greater access.

While a digital copy of an original work may be created under the existing exceptions, copies may not be made of collection material for the purpose of providing access to the material or to more efficiently store the material.

⁶ Official records held by the Memorial are governed under the *Archives Act 1983*. This sets up a situation whereby the majority of government records become available after 30 years but any embedded works identified as belonging to an individual are regulated by the Copyright Act and usually remain protected under that Act in perpetuity.

To date the Internet is our most expedient tool for conveying collection material to remote users. While the *Copyright Act 1968* provides for some communication of specifically requested material, general collection material can only be displayed on the Memorial's web site if permission from the copyright owner has been obtained. Presently, this permission is sought at the point of donation however the retrospective investigation required to seek permission for the vast majority of the National Collection is impractical, and while the Memorial's objective is not to recreate all of its collection as a virtual museum or archive, it does wish to provide comparable access to its collections to remote users as mandated under our Act.

The following examples illustrate these points:

- The Memorial is reliant on its web site to fulfil its functions in the digital environment. Whilst the Memorial receives approximately 900,000 visitors each year, only 34,000 of these access the collection through the Reading Room of the Research Centre. Over 2.2 million people use the Memorial's web site (for an average visit of 17 minutes per stay) to gain access to digitised research material, collection information and historical information. An average of 75-80% of these visitors come from within Australia.
- Less than 2% (over 2 million pages) of the Memorial's Research Centre collections have been digitised and are currently available on the Memorial's web site. There is a concern that due to copyright restrictions on orphaned and unpublished works, it is this factor rather than an historical prerogative that is shaping the view of Australian military and social history being presented to our remote clients.
- As the Memorial's film and sound collection ages it must be transferred to new formats to enable continued access to the information it contains. This is to preserve material that is vulnerable to obsolescence like film and sound. Access is a separate and additional issue as preservation copies of collection material can not perform the dual role as access copies.
- A copy of a specific audio-visual item can be provided to a client for the purpose of research and study⁷. However, the public are unable to browse the Memorial's film and sound collection unless they visit the Memorial's Reading Rooms in Canberra.
- Approximately 3,500 VHS tapes have been created to provide access to the Memorial's film collection but these tapes will soon be obsolete. If the information could be moved to the Internet this would provide the required access and negate the need for individual analogue copies, reducing pressure on the Memorial's physical storage facilities. In addition the original film is preserved.
- Prior to 1998 incomplete details of the relevant copyright owners were recorded in relation to the Memorial's Sound collection. This means that approximately 50% of the collection would require retrospective investigation to identify, locate and solicit the appropriate permissions for the sound collection to be made accessible via the Memorial's web site.
- As access copies of original works are not permitted, repeated access to these works either by members of the public or staff copying for remote requests, must be made. This contributes significantly to their degradation.
- Backing up computer servers that store preservation copies of collection material is a common practice to safeguard the Memorial's National Collection and is in line with the prevalent industry practise to for disaster prevention.

The Memorial suggests that the prohibition of these activities by cultural institutions to fulfil their statutory functions is at odds with the public interest, in the same way that private copying, as evidenced in time and format shifting activities, is at odds with the public interest and therefore increasingly, public behaviour.

⁷ *Copyright Act 1968*. S103C.

Preferred option for reform, costs and benefits

Addition of special provisions

Costs:	Benefits:
Prescriptive and therefore inflexible	Each provision concerns a particular circumstance thus providing an amount of certainty for that circumstance
Not able to respond to future changes in technology	Keeps exceptions simple as special provisions are inline with structure of existing provisions
Exhaustive listing would necessarily requires periodic legislative amendment	

Addition of an open-ended 'fair use' style provision

Costs:	Benefits:
Uncertainty for copyright owners and users due to emphasis on judicial precedent, until development of Australian case law	Flexible and able to cope with as yet unknown circumstances
Expensive for copyright owners and users to defend Climate of uncertainty leads to overcautiousness for copyright users leading to expense for them to pursue permission when it is not required	Able to cater for a number of scenarios that would otherwise need to be addressed in an exhaustive list Technologically neutral
Would an open ended provision fix all of the problems outline above - It still may not be enough to address those particular deficiencies which libraries & archives wish the law to address	Legislative simplicity
The emphasis on precedent requires a body a judge law to be built up which takes time and money for both copyright owners and users	Less frequent need for legislative review (as courts address changes in society & technology)
The Judiciary may be reluctant to take over what has been up until now in Australia the traditional legislators' role of determining what is "fair".	In line with the US law and therefore in harmony with the FTA
	Addresses private copying issues (i.e. time and format shifting)

The Memorial accepts that any such provision must comply with the 'three step test' and accordingly pose no contradiction to Australia's international treaty obligations.

Recommendation

The Hybrid solution proposed by the Australian Digital Alliance involves the inclusion of both special provisions and an open ended 'fair use' style provision. If the Act was reformed in

this way, the combination of the benefits would provide both options of certainty and flexibility as appropriate in a cost efficient manner. For example, libraries and archives will feel secure when providing access to orphaned works in their respective collections, or creating copies for the purpose of preservation, storage or access, knowing that there were provisions in the Act outlining the circumstances in which they could do so. Similarly, copyright owners and users could rely on the flexibility of an open ended 'fair use' style provision to allow for our courts to determine whether as yet unknown uses of copyright protected material is "fair" and therefore permitted.

The proposed reform of the legislation will reinforce the ability of the public to access copyright protected material by extending the principles on which the current fair dealing exceptions are based into the digital environment, and by providing special provisions to loosen the restrictions on works that are orphaned and therefore unexploited, even though they have cultural value and are therefore worthy of public access.