

1. Introduction

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The Australian Society of Archivists appreciates the opportunity to provide a submission in response to the Attorney-General's issues paper Fair Use and Other Copyright Exceptions.

Before providing comments on the issues raised in the paper we would like to describe the role and functions of the Society to assist an understanding of the issues we wish to raise.

1.2 The Australian Society of Archivists and its role

The Australian Society of Archivists Inc. (ASA) is the peak professional body for archivists in Australia. It was formed in 1975 in response to the growing number of archivists in Australia and to the increasing demand for archival skills. The Society is administered on a national basis by an elected Council. Branches and Special Interest Groups are active in the States and Territories.

The Australian Society of Archivists aims to:

- promote a professional identity amongst archivists
- promote the keeping, care and use of archives and encourage research and development in all areas of archival practice
- establish and maintain standards of archival practice and professional conduct amongst archivists, including standards of archival qualifications and professional training
- encourage the responsible use of archives including cooperating with other organisations and groups with common interests and concerns
- encourage communication and cooperation amongst archivists, their institutions and the users of archives
- publish and disseminate information relevant to the archival profession

2. Interest of the Society in commenting on the Issues Paper

The Society has an interest in the issues raised by the Issues Paper not as an owner or user of copyrighted material but as a representative of various archives around Australia which hold copyrighted material in their collection.

3. General position of the Society: availability of copyright material for non commercial purposes

The Society regards it as essential that the public role of archives as keepers and disseminators of knowledge resources should be recognised and provided for in copyright legislation. A distinction should be drawn between commercial uses of copyright material

and the dissemination of copyright material by organisations which make their archival collections available, not for profit, but in the public interest.

Australian state and territory governments have invested resources in the collection, the preservation and dissemination of public documents in the interests of accountability and cultural heritage. Public sector archives have used resources to establish technical and organisational infrastructure to facilitate and promote access to their archival collections. The availability of these archival collections for public use promotes accountability of government, awareness of civic responsibility and national pride. Increased accessibility to and greater use of these archival collections increases their value as national assets.

The Australian Society of Archivists supports the aims of government copyright policy to encourage creativity and innovation, and at the same time provide fair remuneration to the authors of copyright material. Much material, however, held in public and private sector archives does not display a high level of creativity nor is the type of material which is commercially exploitable. It is preserved and valued for its information content, whether the material documents the functions of government, the operations of a business or trade union, or some other institution. The benefits of preserving and making available this material are social benefits that arise from the free flow of knowledge through access. Restricting access on the basis of copyright concerns merely makes material of no commercial value unavailable; it unreasonably denies to the Australian public the social benefits of access to material that in many cases public funds have paid to maintain and preserve.

The special exceptions in the Copyright Act specifically recognise the non-commercial public interest basis of archival institutions: s51 recognises the public interest in making available a copy of material kept in a not for profit archives where it is open to public inspection. The Society believes that this section does not reflect advances in technology. Its wording reflects a 1950's view of archives as a museum of documents which researchers come to view and, occasionally, obtain copies of. The operations of archives have been fundamentally changed by new technology. The ability to produce digital copies of documents has opened the possibility of virtual archives online, freed from the constraints of a physical collection viewable only in one location. The Australian public has a growing expectation that archives will be able not only to be searched but directly accessed online. To do this involves both creating digital copies and communicating those copies to researchers. The spirit and intention of s51 is that archives can make their collections accessible in this way.

The Society recognises the genuine concerns of copyright owners that new technologies may undermine the value of their works. However it cannot be argued that the use of technology to increase the availability of works in archives for non commercial purposes has the potential to reduce revenues to the authors of those works. If the legitimate commercial necessity to exercise greater control over access to and distribution in electronic form of copyrighted material is applied unreasonably and indiscriminately to archives there is an adverse affect on the public availability of those archives for which the public has invested so much to maintain and preserve.

4. Comments on specific issues raised by the Issues Paper

Issue 2. That the Copyright Act should be amended to consolidate the fair dealing exceptions on the model recommended by the Copyright Law Review Committee (CLRC)

The Society favours the suggestion by the CLRC for consolidating existing fair dealing provisions (CLRC recommendation 2.01) whilst maintaining the specific libraries and archives exceptions (CLRC recommendation 2.27, 2.57) if it provides a wider scope for archives to make their collections available. There is merit in adding to existing exceptions an open ended fair use type provision, if this strengthens the ability of archives to make their collections accessible using new technologies.

Overall the Society sees that a fair use type provision may operate in favour making available for non-commercial purposes, works in archives.

Issue 3 That the Copyright Act should be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law

The Society does not favour the replacement of existing specific exceptions for libraries and archives as they provide certainty for public archives and their users. We favour the modification of fair dealing provisions to make them more like the open ended fair use type provision in US law if this were to provide additional defence for the reasonable use of copyright material. There are advantages in a hybrid model that combines a flexible central doctrine of fair use with specific exemptions, including special provisions for archives and libraries.

Issue 5. That the Copyright Act should be amended to include specific exception for format-shifting and if so, for what materials and under what conditions

The Society would favour a specific exception relating to format shifting which gives a general discretion to not for profit archives, including government archives, to convert items from their collection for various non-commercial purposes. These would include:

- for storage purposes where it is desirable to convert to formats which take up less space
- to facilitate public access by converting materials in a range of formats including manuscript, film, audio, photographic print, into other formats, especially digital format, that facilitates public access to the material
- preservation to prevent the deterioration of a collection
- shifting from obsolete formats such as nitrate based film stock or older computer tapes or discs to formats which are readable with current devices: archives may need

to migrate parts of their collection regularly in order to insure that material is not lost because it is contained on obsolete formats which are not accessible by current technology

Preservation we would interpret broadly as both a preventative measure and as a response to actual deterioration of collection items. For example in the case of an archives it may be necessary to make photocopies or digital copies of certain documentary material which is fragile and used frequently in order to prevent deterioration by making only digital or photocopies of the original material available to researchers. Audiovisual material on fragile film or tape may need to be converted to a more stable format for the purposes of access by researchers visiting the institution. The exception would apply to material in any format in the collection, whether paper documents, audio visual material, maps, microfilm etc when that material is deteriorating or in danger of deteriorating through the effects of aging or of frequent use, or display in an exhibition. As long as the format shifting is in accordance with the function of the institution to maintain a collection that is available for public consultation, the exception would apply regardless of whether or not the institution owns copyright in the material. The Society would regard format shifting by not for profit collecting institutions as a fair dealing or fair use in the public interest of maintaining the value of the investment in the collection and ensuring its continued survival and accessibility for public use.

Issue 6. That the Copyright Act should be amended to include a specific exception for making back up-copies of copyright material other than computer programs and if so, for what materials and under what conditions

The arguments put forward under Issue 5 apply here as well, that not for profit archives should be able to make back up copies of collection items for non-profit purposes with the aim of protecting the collection from loss or damage. Material which has been received in electronic format, or transferred to electronic format is vulnerable to loss through failures of hardware or applications. It is standard practice for any government or business institution to maintain back up copies of data held in electronic form and this should be no different for archives and cultural institutions holding collection material in electronic form

Issue 8. That the Copyright Act should be amended to include other specific exceptions or statutory licences, and if so, under what conditions

The Society considers that the matter of unpublished orphaned works (ie works in copyright whose copyright owner is unknown or practically impossible to trace) needs particular attention in copyright legislation. The issue of orphaned works and unpublished works are linked as, by the time older works are available to the public under the regulations governing the archives, for all practical purposes their authors are very difficult or impossible to trace.

The issue of orphaned/unpublished works affects the operation of s51 of the Copyright Act which allows communication and reproduction of unpublished works in libraries and archives “at a time more than 50 years after the end of calendar year in which the author of a literary...work died”. The very nature of the many of these works in archives, being more documentary than literary, and usually already decades old before they are publicly available, precludes the possibility of determining when the author died, and therefore renders s51 less effective in the achievement of its intention to allow archives greater liberty to make available for research and study, copyright works in their collections.

The Copyright Law Review Committee in its 1998 report on the Simplification of the Copyright Act 1968, recommended that “ the requirement in s51 of the Act that an unpublished work not be copied until 75 years have elapsed since the work was made be removed from the provision” (recommendation 2.59). Since that recommendation the requirement in the Act has been altered to 50 years after the death of the author, a period that in many cases is difficult if not impossible to determine, and administratively more complex than a period from the date of the making of the work. By removing any qualification related to the date of death of the author, the provision would allow the work to be copied for research and study as soon it is was publicly available under the rule governing the archives. This would be more in keeping with the intention of s51 which recognises the public non-commercial purpose of such institutions.

Orphaned works have previously been identified as an important issue for libraries and archives. The National Library of Australia, in its 1998 submission to the Copyright Law Review Committee in regard to its reference to review and simplify the Copyright Act, identified issues with unpublished works, particularly orphaned works. The submission noted

(3.1) “The Copyright Act, 1968, treats unpublished material in a particularly restrictive manner...” and “Practical problems have already been experienced by the National Library because the present act does not specify any system for the use of copyright materials where the owner of the copyright is unknown or untraceable. This situation may be expected to persist, and even to increase...” (9.1). This difficulty is particularly relevant, as the submission notes, to large scale digitisation projects.

It could be argued that the Copyright Act in protecting orphan works, actually hinders one of the goals of copyright which is to increase public access to copyright works, because permissions for orphan works cannot be obtained or can only be obtained at significant cost to the archives. The situation is made worse by the fact that the amendments to the Copyright Act as a result of the Free Trade Agreement have now extended the duration of copyright in non-government copyright literary works.

The Society would argue that in a time when advances in technology make it increasingly possible to provide broad access to copyright material online, the effect of the Copyright Act of providing the same protection to economically worthless as to economically valuable works has even more harmful consequences in hindering reasonable access to copyright material.

Kimberlee Weatherall in her paper “Fair use, fair dealing: The Copyright Exceptions Review and the Future of Copyright Exceptions in Australia” has written (3.3.1):

The ‘orphan works’ problem, therefore, is a classic situation where the copyright balance fails. In general, copyright increases public access to works by giving authors incentives to create and incentives to make works available. But protecting orphan works gives no incentive for more creation or exploitation of the work. By definition, these works are not valuable to the copyright owner. But copyright stands in the way of the copyright goal of increasing public access to copyright works, because the necessary permissions for use cannot be obtained at a reasonable cost” (Kimberlee Weatherall, Faculty of Law, The University of Melbourne, Associate Director (Law) Intellectual Property Research Institute of Australia, Background Paper to Oral Presentation, SNAPSHOT 3, 22 May 2005)

The Society argues in favour of some measure which allows archives and libraries more freedom to copy and make available for non-commercial purposes, material which is available in their collections for which copyright owners are unknown or for all practical purposes impossible to trace, after reasonable efforts have been made to trace copyright owners, and providing a notice is included inviting anyone claiming to be the copyright owner of material to come forward: if a genuine copyright owner did come forward the institution would be obliged to withdraw the material from publication at the owner’s request, or enter into discussions of licencing arrangements. This exception should be non-remunerable given the non-commercial nature of such material held in archives.

In summary there should be greater freedom for copying by archives of unpublished works for research or study purposes, s51 of the Copyright Act is unreasonably restrictive in this regard, and there should be a reasonable efforts test for publication of orphan works.

Other issues

In support of the recommendation for greater freedom for archives in format shifting, a free exception for caching within archives is also necessary. Caching is necessary to give effect to the benefits we have argued come from format shifting especially in allowing the public users of archives to make the best use of material available in electronic form by accessing cached copies.

5. Conclusion

Underpinning the Society’s submission is the distinction between commercial and noncommercial environments. The Copyright Act is intended to encourage creativity and protect fair remuneration in a market context and the Society has no argument against this. Most archives operate in a noncommercial environment, many are publicly funded, their activities are noncommercial, and the material they hold is noncommercial in nature. Archives are not competing against copyright owners seeking to exploit commercial

material in a commercial market. The indiscriminating application of the increasingly rigorous protective provisions of copyright legislation to cultural institutions such as archives has the effect only of hindering the free flow of information to the community. The Copyright Act in its libraries and archives exceptions explicitly recognises this, but it is the argument of the Society that these exceptions do not go far enough in exempting libraries and archives from what is a commercial regulatory regime, and that the formulation of these exceptions has not kept pace with advancing technology and the expanding opportunities available to archives to facilitate access to their collections through technology.

Contact for this submission

Catherine Robinson
President
Australian Society of Archivists
PO Box 77
Dickson ACT 2602
Email: asapresident@emailme.com.au
Tel: (02) 8247 8631