

Copyright and the Digital Economy (IP 42)



The Australian Law Reform Commission (ALRC) is to consider whether existing exceptions and statutory licences in the *Copyright Act 1968* are adequate and appropriate in the digital environment and whether further exceptions should:

- recognise fair use of copyright material;
- allow transformative, innovative and collaborative use of copyright materials to create and deliver new products and services of public benefit; and
- allow appropriate access, use, interaction and production of copyright material online for social, private or domestic purposes.

In response to the government's intention to review the current exceptions in the *Copyright Act 1968* outlined in Issues Paper (IP 42), this paper will outline some of the main issues that the Australian War Memorial faces when managing public access to the National Collection in the digital environment and how we have used the flexible exception Section 200AB (S.200AB) as part of our digital preservation program.

Introduction

The Australian War Memorial is an experienced leader in digitisation for preservation and access. The Memorial has a digital preservation program that has now been in place for over a decade. We have digitised over two million pages of archival records to preservation level and for some time pursued a program of publishing these documents on our website. This serves to preserve the original documents from handling and decreases the amount of staff resources required to service public enquiries for the most commonly used items.

Cultural institutions are required to comply with the *Copyright Act 1968* and this often places them in direct conflict with their mandates to manage, preserve and provide access to collections using digital technologies. Until S.200AB of the *Copyright Act* was introduced in 2006, the Memorial only provided web access to those documents for which there was clear copyright ownership. This has skewed our digital preservation program in the past towards official records or collections where the Memorial owns the copyright. The Memorial has found that the use of S200AB in part has addressed the conflicting requirement to digitally preserve its collections while adhering to our obligations under the Copyright Act. With the introduction of S200AB the Memorial now has more scope to broaden the ways in which copyright material can be used for socially beneficial purposes.

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. The following example illustrates this point: While one digital copy of an original work may be created under the existing exceptions, Digital Asset Management Systems (DAMS) that conform to appropriate preservation standards generally require two separate storage devices to constantly compare against each other for notification of any change or corruption. If S200AB does not apply

to this preservation requirement there is no other provision in the Act that covers the making of a second preservation copy.

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 or if S200AB applies. 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.

Copyright protects equally works of economic value as well as those of no economic value. Due to the Free Trade Agreement (FTA) with the US all works are now protected for an extended 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 the investigation is often fruitless.

In the case of Private or Official Records in the Memorial's care, the problem is usually compounded by the presence of embedded works belonging to additional unknown parties. Since 2009 the Memorial has begun using S.200AB to make some of these works available online for non-profit research purposes. However, the exception S.200AB is limited and therefore the full potential of how our collections can be used is also limited.

Some of the problems identified with S.200AB include:

- The Act assumes that everyone has commercial intent with copyright.
- There is confusion as to how S.200AB overlaps with existing exceptions.
- Exceptions need to be used or you lose them. S.200AB has not been widely taken up – many institutions still don't know how to use it and instead are doing a risk analysis and ignoring the exception all together.
- S.200AB doesn't allow commercial use – where as if we had a US style 'Fair Use' exception it would allow commercial purposes.
- The exception is only available to archival and education institutions.
- Institutions are too focussed on exceptions being about protection against infringements – where as we tend to overlook the fact that the exceptions are an important part of the Act and should consider them more as a public right.
- S.200AB is a flexible exception – with flexibility comes uncertainty.
- There is a growing stake in transformative uses (remixes) of material for museums, libraries and archives. How does 200AB help/not help this?
- Why are our cultural institutions so risk averse in using the exceptions?
- US style 'Fair Use' is also a flexible exception – and would involve risk analysis and interpretation.

Thoughts on an open-ended 'fair use' style provision:

- Uncertainty for copyright owners and users due to emphasis on judicial precedent, until development of Australian case law

- Expensive for copyright owners and users to defend
- Fair use is technologically neutral
- An open ended provision may not fix all of the problems outline above - It may not be enough to address those particular deficiencies which libraries and archives wish the law to address
- The emphasis on precedent requires case 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 and 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".
- "Fair use" is in line with the US law and therefore in harmony with the FTA
- Addresses private copying issues (i.e. time and format shifting)

Collecting Societies

Existing Collecting Societies have approached cultural institutions in recent times offering licences for orphan works as a means of copyright protection. This is generally seen as an unworkable solution. Licencing adds a prohibitive layer of costs in fees for institutions and it does not mean that institutions are no longer required to perform a diligent search for the copyright owner. Therefore licencing adds to the production cost of any digitisation project without reducing the staff time in researching copyright.

The ideal reform of the *Copyright Act 1968*

The ideal reform of the *Copyright Act 1968* would be to have a provision whereby an individual unpublished literary work moves into the public domain following 50 years of donation into a public institution.

Conclusion

The *Copyright Act 1968* as it currently exists imposes unnecessary costs on cultural institutions, interferes with day to day management of our collections, and puts the cultural institutions in a position between serving the needs of the creator and the user. Using unpublished literary works held in archival institutions can lead to a great deal of expense to pursue permission when it is not required. The costs are often born by the cultural institution in making available collections through expending resources on onerous research to establish rights.

There is a climate of uncertainty around how cultural institutions can use the copyright exceptions. This leads to overcautiousness on behalf of the cultural institutions, which has a direct impact on the public who use the collections. Museums, libraries and archives would feel more 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 are provisions in the Copyright Act that are very defined. However, the more black and white we make the exceptions the less they will fit the majority of purposes. The Australian War Memorial requires a flexible exception, such as S.200AB, to manage and digitally preserve our orphan works and make them available to the public.

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