

Copyright and the Digital Economy (DP 79)



The Australian War Memorial is pleased to provide the following submission to the Australian Law Reform Commission's (ALRC) Second Discussion Paper (DP79) on *Copyright and the Digital Economy*.

The Memorial makes this submission to ensure it can continue its mandate to manage, preserve and provide public access to its collections using digital technologies under the *Copyright Act 1968* and also to improve this ability by broadening the exceptions in the Act.

Introduction

The ALRC inquiry has offered in (DP79) two main solutions for managing copyright into the future - the implementation a US style fair use exception and extending copyright licencing.

The use of digital technologies plays a vital role in the Memorial's mandate to manage, preserve and provide access to its collections. Any reform to the *Copyright Act 1968* must take into account the financial and ongoing impact on cultural institutions to comply with the Act. Copyright treats and protects equally works of economic value as well as those of no economic value. National Collection material does not always have great economic value but does have highly significant cultural value and not all uses of copyright material should be remunerable.

The Memorial considers the introduction of a US style fair use exception as potentially broader and more useful than the existing flexible and fair dealing exceptions. This exception should be used for both internal administrative and preservation uses and for making the collection available to the public. However, any proposed extension of voluntary licencing will make fair use unworkable if it negates the exception or what is currently available under the free exceptions.

Fair use exception

One of the key ALRC proposals is the repeal of the existing fair dealing and flexible exceptions and adoption of a general and flexible fair use exception.

The Australian War Memorial currently relies on the use of fair dealing to carry out its day to day business in communicating its collections to the public. The Memorial also uses the flexible exception S.200AB to accommodate new technological uses of copyright material

(such as, digital preservation, social media and search), to deal with copyright material when the creator cannot be located and to provide use of copyright material for research and educational purposes.

The Memorial supports proposal 4.2, 4.3 and 4.4 that the *Copyright Act 1968* should provide a broad, flexible exception for fair use with defined fairness factors and the non-exhaustive list of illustrative purposes. The adoption of fair use should not water down what is currently available under existing exceptions. Fair dealing provides clear and guaranteed use of copyright material that does not have to be assessed against fair use. With the introduction of fair use the ALRC's proposed list of illustrative uses must be as clear and at least as encompassing as the current fair dealing exceptions.

Fair use should expand on the flexibility and uses currently available under S.200AB. It should include the capacity for cultural institutions and the public to more broadly manage and use orphan works held in National Collections. The 'reasonably diligent search' should be flexible according to the use and should be defined by the cultural institution managing the work.

Using the existing exceptions in the Act the Memorial currently supplies digital copies of its collections on CD for research and study purposes. Proposals that cultural institutions take measures to enforce limiting further communication of material by the public (Proposal 11-7) would place an unreasonable economic and resource burden on the Memorial. To use technology to limit further communication of this copyright material by the public, or limit the time accessible would be prohibitively expensive and logistically impossible. Notifying the user of the requirements of copyright law should be considered sufficient.

The capacity to quote from published and unpublished works is a use not adequately covered by specific libraries and archives exceptions and should be included under a 'fair use' exception with illustrative uses as a guideline.

The Memorial supports proposal 11-2 and 11-3. Specific exceptions for libraries and archives should remain. There should be libraries and archives exceptions that are guaranteed and do not have to be assessed against fair use. Uses not covered by specific libraries and archives exceptions should be considered under a fair use exception.

Licencing

The ALRC proposes reform of the statutory licence schemes under the Act which allows for certain uses of copyright material without the permission of the rights holder, subject to the payment of reasonable remuneration. The discussion paper (79) proposes the repeal of the statutory licences for government, educational institutions and institutions assisting persons with a print disability and recommends that licences for use by these institutions be negotiated voluntarily with the copyright holders.

The Memorial considers any extension of licencing over its collections, where no licencing currently exists, as prohibitive to the management and use of those works. Works held in

cultural institutions are often of little economic value but have high cultural value and are of public interest. The majority of the Memorial's National Collection is characterised by these works. Extending licencing over these collections imposes an economic value that is artificial and inflated and would put digital preservation of and digital access to these collections beyond the Memorial's resources.

The Memorial's current dealings with copyright owners of unpublished written works in the collection for a major digital preservation project *Anzac Connections* has provided good evidence on how owners would like the Memorial to manage and use its collection. In this project hundreds of individual private records (personal letters and diaries) held by the Memorial will be made available to the public free of charge online for research and study purposes. When copyright permissions were sought for these collections, in each case, permissions were given and the economic value and remuneration for this material was not of concern. These collections were generally donated as a memorial to the creator and of most concern to the descendants is the Australian War Memorial's ability to preserve the collection for posterity and make it available for research.

In relation to question 11-1 in the discussion paper voluntary extended collective licensing should not be introduced to facilitate mass digitisation projects for preservation and public access online. The Australian War Memorial feels the sentiment that we have received from copyright owners regarding *ANZAC Connections* can be extended to unpublished orphan works in the collection. Extending licencing over works implies that the most important aspect in the use of a collection is remuneration. The Memorial, however, considers its relationship with creators of these works or their descendants as most important. Licencing of works would only achieve a prohibitive layer of costs in royalty fees for the Memorial. The Memorial would still have to perform a reasonably diligent search for the copyright owner.

Licencing places an economic value on every item which most likely did not previously exist. The payment of royalties would prohibitively add to the production cost of any digital preservation and public access project without reducing the staff time in researching copyright.

Free exceptions should apply to collections held in cultural institutions whether a licence is in place or not. Acquisition and preservation of collections by cultural institutions should not be subject to a statutory licence and royalties (Proposal 6-1). Any new exception should permit libraries and archives to make copies of any copyright material for the purposes of preservation, without limits based on format or number.

Collecting societies

Greater transparency and accountability is required of collecting societies, especially if extended licensing is introduced. In particular access to their membership databases and clarity around how members' claims to copyright are ascertained would be of great benefit. Perhaps also of benefit would be the eventual return to the cultural institution of licence fees applied to orphan works for which an owner does not come forward.

Expiry of copyright in unpublished works

Unpublished works are in perpetual copyright until published. This is an issue for older unpublished works in the National Collection and particularly for orphan works as institutions holding the materials often cannot publish them because the authors are unknown or untraceable. Current laws of most countries set a standard limit on the duration of copyright in unpublished works. Reform to the Act should consider aligning Australian Copyright Law with the copyright statutes of most other countries in relation to unpublished works.

The Memorial supports the ALRCs model for fair use of unpublished works. Under the fair use exception proposed (11.36), unpublished does not rule out the case for fair use. Whether a use is fair will be determined by the fairness factors, including the nature of the use; the amount that is copied; and the impact on any potential market for the material.

For question 4.1 –‘what additional uses or purposes, if any, should be included in the list of illustrative purposes in the fair use exception?’ The Memorial proposes an additional illustrative use for using unpublished works deposited in cultural institutions for over 50 years to enable digital preservation and public access online. This would facilitate the long term preservation of culturally and historically significant material held in cultural institutions and enable broad public access to those collections.

Given the enormous amount of resources cultural institutions put into the ongoing management of unpublished works, including conservation, housing, cataloguing, digital preservation and facilitating ongoing public access any reform to the Act could also consider an exception whereby an individual unpublished work moves into the public domain following a period of time after donation into a public institution. The Memorial proposes 50 years duration.

Conclusion

The Australian War Memorial in its response to Copyright and the Digital Economy (IP 42) outlined its main concerns with the Copyright Act 1968 in preserving and managing the National Collection in the digital environment. It discussed that Act, as it currently exists, imposes unnecessary costs on cultural institutions, interferes with day to day management of its collections, and puts cultural institutions in a position between serving the needs of the creator and the user. Establishing rights in order to use works held in cultural institutions can lead to a great expenditure of resources in pursuing permissions, these costs are born by the cultural institution.

In response to (DP79) the Australian War Memorial considers the introduction of a US style fair use exception as potentially broader and more useful than the existing flexible and fair dealing exceptions. However, the illustrative uses must be as clear and at least as encompassing as the current fair dealing and flexible exceptions. Any proposed extension of voluntary licencing will be unworkable for cultural institutions particularly if it negates the fair use exception or what is currently available under the free fair dealing exceptions.

The Memorial asks that the ALRC consider an exception whereby an individual unpublished work moves into the public domain following 50 years of donation into a public institution.

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