

Submission to Australian Law Reform Commission's inquiry Copyright and the Digital Economy, Australian Institute of Aboriginal and Torres Strait Islander Studies

AIATSIS is required by its Act to collect and disseminate information and about Aboriginal and Torres Strait Islander peoples. As a collecting and publishing agency AIATSIS's interaction with the *Copyright Act 1968 (Commonwealth)* and the digital economy occurs in five main areas:

1. Preservation copying: Copying for preservation both digitally and in hard copy is not well supported under the current Act;
2. Collection building: Obtaining copies of unpublished theses from other institutions and copying for them for the purpose of collection building is not explicitly supported by the current Act;
3. Making collections available: Copying material for researchers in both digital and hard copy formats requires adherence to the Copyright Act and additional provisions of the AIATSIS Act. Publication requires extensive permissions management;
4. Administration of the Act: The Act's focus on cultural institutions having to manage rights on behalf of copyright holders, and the Act's complexity, place administrative loads on agencies like AIATSIS;
5. Indigenous intellectual and cultural property management: AIATSIS has legislative responsibility to care for Indigenous collections in a culturally sensitive way. This requires processes that both reflect the provisions of the Act and in some cases require additional protocols, which fall outside the Act's domain. The concern is to ensure that any proposed changes to the Act do not conflict or restrict AIATSIS' capacity to observe appropriate cultural protocols;
6. Publishing: AIATSIS has a publishing arm, Aboriginal Studies Press, which creates and disseminates print and digital publications relating to Australian Indigenous studies. It is both an occasional user of the copyright material of other intellectual property owners (for which appropriate licences are sought) and a licensor of AIATSIS materials to others which forms a valuable income stream for AIATSIS, while fulfilling the requirements of the organisation under the Act.

AIATSIS' responses to the Discussion Paper relate to these functions.

Summary of Key Points

The proposed changes as currently framed in the discussion paper impact significantly on AIATSIS, in terms of both its publishing and library/archiving functions, particularly in relation to fair use and education (though the reasons for this differ from a library/archival and publishing perspective). In the broad, the proposals provide insufficient certainty and clarity about rights in various circumstances that will be problematic from either side of AIATSIS' business.

The proposed changes to fair use for educational purposes as outlined in the discussion paper risk inappropriate use of information relating to Aboriginal and Torres Strait Islander groups which AIATSIS could not support and are also impractical. In addition, from a publishing perspective, there are strong concerns about the rights of the copyright owner/publisher and subsequent loss of income that would result from these proposed changes and/or cost shifting from education providers to private rights holders.

Indigenous Intellectual and Cultural property recognition and management:

Although the Discussion Paper notes that ‘protocols and considerations may also apply to Indigenous cultural material whether within copyright protection or not’ (3.68 and 2.4) it does not discuss broader cultural property rights of ownership and their relationship to copyright. Indigenous rights may require that items (especially unpublished works) need additional protection.

By focusing on the Copyright Act, the Discussion Paper does not take the opportunity to examine the wider context of the digital economy, intellectual property and the emergence of knowledge economies especially as it might apply to Indigenous and other classes of knowledge producers and owners particularly in regard to Principle 1: Acknowledging and respecting authorship and creation (section 2.4).

AIATSIS accepts that it is beyond the scope of this proposed reform to that Indigenous moral rights or cultural protocols be recognized in the Copyright Act. However, the proposed changes should avoid conflict with the administration of suitable protocols. In this regard Proposal 17.1 although generally supported may have the capacity to impact on AIATSIS’s contractual agreements with Indigenous authors, creators, depositors and owners of material.

General comments from a publishing perspective

The mooted changes are substantial changes and are not proportionate response to perceived difficulties with statutory licences and the availability of material through fair dealing.

As a publisher, AIATSIS would potentially lose \$30,000, annually or more, in terms of income distributed through Copyright Agency Limited (CAL) if the statutory licence scheme were abandoned. The statutory licence scheme is a successful model for publishers and authors, who are the beneficiaries of the revenues distributed through CAL. As property rights holders, authors and publishers ought to be able to choose their own form of income production from the licensed use of their intellectual property.

AIATSIS’ experience as publishers who license material created by AIATSIS (for example, the Aboriginal Australia map) is that the cost of creating and managing licences on a voluntary basis would severely outweigh the income produced.

Further, our experience as licensors of copyright material is that there are a large number of people who already infringe AIATSIS’ copyright and would have no intention of paying fairly for their use of copyright material; nor would they make a fair attempt to do so. This necessarily leads to a loss of legitimate income. Equally importantly, it would mean the Institute would maintain far less control over the use of Indigenous cultural content for which the Institute has a responsibility under its Act – as well as its contractual responsibilities to its authors.

The discussion paper does not provide sufficient justification for expanding the terms of fair dealing. Indeed the proposed regime will lead to confusion in the marketplace (or school or institution or to the individuals within those institutions). The lack of specificity would also lead to ongoing potential litigation on behalf of rights-holders.

While educators might want education or educational materials to be free, it isn’t appropriate that intellectual property owners fund those materials indirectly.

General comments from a Libraries and Archiving Perspective

The AIATSIS library and archiving functions give rise to a number of concerns with the proposed changes, but AIATSIS supports some specific proposals.

Preservation Copying:

Proposal 11-4 would address the difficulties that AIATSIS faces in making multiple copies for preservation. AIATSIS supports this proposal.

Collection Building: Unpublished theses

AIATSIS has encountered increasing difficulty in purchasing copies of unpublished theses from university libraries. The Copyright Act does not explicitly support the term research can be interpreted to include building a research collection. The proposed changes do not address the issue:

Apart from Section 50, which allows the copying of published works only, the provisions of the current Act which relate to copying of material do not support copying for the purpose of collection building.

They include:

- Ss51A(2) – *“The copyright in a work that is held in the collection of a library or archives is not infringed by the making, by or on behalf of the officer in charge of the library or archives, of a reproduction of the work for administrative purposes”* - the term ‘administrative’ is not defined in the Act and provisions do not extend to copying for other libraries;
- Ss110B(2A) -cinematograph film copying only for preservation or research purposes;
- S49 – copying works for library users applies only to published works required for study/ research;
- S51 – 50 years after the death of the author a copy of an unpublished work can be made for study/research;
- Ss51(2) – a manuscript, thesis or similar work can be copied for private study;
- Ss51A(1a) – allows copying of a work which is part of the collection of a library for preservation and for research at the library at which it is held or at another library.

There is little consistency in the way the university libraries interpret the Act with regard to copying theses for other libraries. In cases where an institution is relying on section 200AB to support the copying process the need to obtain the affirmation of the copyright holder to establish whether the copy would be against their legitimate interests often proves to be too difficult and the purchase does not proceed. In these cases we have had to give up on approaching many institutions for copies and now purchase copies only rarely.

Although universities are making a large number of theses available on-line and it is tempting in the digital environment to see this as adequate it makes it difficult to build collections that are theme or subject specific and does not ensure alternative long-term access to the work. An added difficulty is that the publication status of theses made available on-line is uncertain and universities are unwilling to authorize copying from the on-line site.

In general the Act doesn't explicitly recognise the need to build collections and preserve items by copying (especially unpublished items) and through their distribution to other libraries. While the proposals adequately address the limitations of preservation copying they do not explicitly recognise the need to distribute copies of unpublished work to other libraries or explicitly acknowledge the value of developing research infrastructure as opposed to conducting research. The ALRC Discussion Paper recognises (11.69) that institutions have statutory obligations to preserve and provide access, that the Act needs to clearly delineate what copyright functions are necessary to fulfill these functions and that specific exceptions need to be retained in the areas of preservation and document supply. It is recommended that document supply be extended to explicitly include the capacity of institutions to supply items (especially unpublished items and published items that are no longer in print) for inclusion in the collection of another institution.

Making collections available:

Subject to concerns expressed in relation to publishing, the proposed move to library and archive specific fair use or fair dealing provisions should greatly aid in the management of the day to day provision of documents according to copyright provisions. The proposed modifications for orphaned works are also welcomed.

Proposal 11-7 would not be helpful as it maintains the increasingly limited distinction between hard and digital copies and requires libraries and archives to attempt to ensure adherence on the part of the user which is largely beyond their powers to implement, monitor or enforce adequately. Beyond their immediate operations libraries have limited capacity to protect the rights of copyright holders who may have no commercial interest in the material or interest in retaining their right. It is probably fair to say that much of the time AIATSIS is required to administer the concept of a right not its actuality.

As a consequence AIATSIS would support proposals that are as technologically neutral as possible.

The problem of the digital economy and the missing archive:

When considering the digital economy, the temptation is to assume that a document made available on a single web site constitutes adequate access, but it may not constitute adequate archiving. In discussing the digital economy, the problem of ensuring the long-term availability of materials is not generally considered. Although the process of digital archiving is relatively new the nature of the medium suggests that the preservation of digital material cannot proceed from the assumption that the carrier mediums are stable in the long-term and that their survival and availability are dependent on simply having to stabilize the documentation and the environment to ensure long-term survival.

Rather, digital documents, for the stabilization of the environment and the medium, requires perpetual copying and recopying of the information and may include reformatting and new storage platforms and locations. Ironically for digital text items the existence of multiple hard copies may be an important part of their long-term survival. Hence consideration of the digital economy should not only be seen through the lenses of creativity and commerciality.

The proposal 11-4 will certainly facilitate this process as will the suggestion (above) to make provisions for collecting institutions to make copies of unpublished items more widely available to other agencies.

Administration of the Act:

The Copyright Act focuses strongly on libraries and archives managing the rights of copyright holders. This focus, coupled with the complexity and imprecise drafting, place an additional load on AIATSIS in terms of the additional administration needed to manage uncertainty. Many of the proposals would appear to increase the flexibility of access and simplification of provisions would certainly aid in administration.

Responses to Specific Proposals related to Libraries and Archives:

1. Proposal 6-1: Exceptions for collecting institutions and cultural agencies to copy broadcasts for acquisition into the collection and preservation should be included and should also not be able to be contracted out.
2. Question 6-1: Free use exceptions for governments and educational institutions should operate exclusive of where a free license can or cannot be obtained. However, if an exception for educational institutions is implemented, there needs to be very clear definitions about what 'educational use' comprises. Does it include public dissemination of copyrighted material? If so, AIATSIS does not support such a change.
3. Proposal 8-1/8-3: Non-consumptive use should be covered by a fair use exception, or a new fair dealing exception.
4. Proposal 10-2/10-3: Quotation should be covered by a fair use exception, or a new fair dealing exception.
5. Proposal 11-2/11-3: Libraries and archives should have clear exceptions which do not have to be assessed against fair use. Uses not covered by specific libraries and archives exceptions should either be considered under a fair use exception, or there should be a new fair dealing exception for libraries and archives.
6. Question 11-1: Mass digitisation projects should be supported via an exception not by a voluntary extended collective licensing. Digitisation of collection material should be covered by a specific libraries and archives exception. Public uses of digitised material should be assessed against fair use/ fair dealing or other relevant exceptions. If the uses are not fair they should be able to be licensed either directly with rights holders or with collecting societies.
7. Proposal 11-4: A new exception should be included that permits libraries and archives to make copies of any copyright material for preservation, without limits on format or number. This is particularly vital to the effective archiving of digital items as they currently need to be housed on backup systems and in multiple formats.
8. Proposal 11-6: A commercial availability test should not be applied to new preservation exceptions. For digital items especially commercially available copies may be protected and not in formats which are suitable for long-term preservation.
9. Proposal 11-7: Library and archives should not be required to take measures to limit further communication, alteration, or limit the time accessible of copyright material when provided in an

'electronic format'. The proposed change retains the Act's differentiation between digital and analogue documents especially in regard to the added protections required for digital items provided as copies. This is an increasingly anachronistic distinction as hard copies may be quickly digitised and vice versa. Beyond the obligation to make it clear to the researcher that material is being made available for the purposes specified in accordance with the Act and, if copyright still subsists may not be further reproduced it is ineffective to require libraries and archives to go to additional lengths to limit the potential use of the documents on the part of the researcher. Copyright notices should be extended to digital materials and licence agreements should continue to be used when providing copies of unpublished material (e.g. an agreement the material will be used for private study).

10. Proposal 12-1: A fair dealing exception for libraries and archives (or fair use if introduced) should be available in determining whether use of an orphan work infringes copyright.
11. Proposal 12-2: Remedies if use of an orphan work infringes copyright should be limited especially if there is no commercial interest.
12. Proposal 12-3. The use of freely available databases, search technologies and registers should define the 'reasonably diligent search'. The Act could also place a time limit on the degree to which copyright can subsist in an unpublished work when it is part of the collection of a cultural institution unless the copyright owner registers their continued interest in holding the rights.
13. Proposal 13-1 /13-2: Material used for educational purposes should either be covered by a fair use exception, or new fair dealing exception. However, a better definition of 'educational use' is required - see response to 6-1.
14. Proposal 14-1 /14-2: Public administration should either be covered by a fair use exception, or there should be a new fair dealing exception for public administration. Public administration is not defined in the Act and it is currently unclear if this can be applied to all government collecting functions. The suggestion (Proposal 14-1) that public administration be used as an illustrative example should include the development of public collections.
15. Proposal 17-1: Although there should be limits on libraries and archives contracting out exceptions, there is a need to also provide for the protection of Indigenous cultural practices in regard to knowledge distribution. Provision should be made for contracts to be required for the purposes of government or for the protection of personal or cultural information. For example, the *Aboriginal and Torres Strait Islander Studies Act 1989* s41(1) and s41(2) require that:
 1. Where information or other matter has been deposited with the Institute under conditions of restricted access, the Institute or the Council shall not disclose that information or other matter except in accordance with those conditions.
 2. The Institute or the Council shall not disclose information or other matter held by it (including information or other matter covered by subsection (1)) if that disclosure would be inconsistent with the views or sensitivities of relevant Aboriginal persons or Torres Strait Islanders

Both provisions have the capacity to restrict access to published and unpublished material; however, only deposits under s41(1) have been identified as using a form of contract between

AIATSIS and the depositor who may or may not be the copyright holder. The principle on which this based is that the depositor as the owner of the physical copy (regardless of the copyright) may specify what access and use provisions they see fit on their copy. As a consequence AIATSIS does not own a high proportion of its unpublished collection and in regard to these items performs the role of custodian. The potential limitation of AIATSIS' capacity to protect the owner's personal or cultural rights in material by the proposal 17-1 must be recognised in the redrafting.