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Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions

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Abstract

Digital communications technologies are providing new means for museums, galleries, libraries and archives to pursue their public interest missions, including in relation to access. However, as practical impediments to collection access change, copyright law poses significant challenges to the development of digital collections. This article uses recent experience in Australia to discuss copyright's impact on digitisation, and to explain why and how copyright has influenced the cultural institution "without walls". It also describes recent amendments to Australian copyright law – in particular, introduction of a flexible exception for some activities by cultural institutions. This may represent an important development in Australia, and offers relevant case study internationally, for addressing copyright issues about digital access.

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1. Copyright and digital access

1.1 Introduction

Australian museums, galleries, libraries and archives are increasingly using digital technologies in the management of their collections. In some instances, longstanding activities are now undertaken using digital rather than analogue equipment. Examples include: projects in which hard copy collection files are migrated to electronic form;[1] record photography, where works of art and other objects are photographed for internal administrative purposes;[2] and image delivery services, where collection items are reproduced in response to external requests.[3] In these cases, digitisation produces certain advantages when compared with analogue reproduction, for instance in ease of staff access to collection information, and the ability to re-purpose digital reproductions for multiple uses.

However, digital technologies also provide cultural institutions with broader ways of pursuing their goals. This article focuses on a particular category of such activity: the use of digitisation to facilitate public access to cultural collections.[4] Provision of access is often seen as a key goal that drives the activities of cultural institutions, and indeed underscores their continued existence. Much institutional activity – preservation activities, administration, and so forth – can be seen as a pre-condition for ongoing access to collections. And in the absence of providing access, it is difficult to justify acquisition and conservation efforts. That is, institutions acquire and preserve collection items of artistic, historic, scientific, technological, cultural and social significance because of decisions that ongoing access to such materials is important.[5] Promoting access to collection material has long been linked to technologies of reproduction: current developments in digital access arise within a long movement towards institutions "without walls". As André Malraux discussed more than 40 years ago in light of print technology:

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[1] These projects aim to create electronic databases of collection information (curatorial, legal, and so on), and often require significant resources to verify and update existing records. See eg Timothy Hart, 'Digitisation: An Australian Museum's Perspective' (Paper presented at the Collections Council of Australia's Digital Collections Summit, Adelaide, 16–17 August 2006).

[2] See eg M R W Williams, 'Art Galleries, Museums, Digitised Catalogues and Copyright' (1997) 2 *Media & Arts Law Review* 160.

[3] See eg Ted Ling, *Taking it to the Streets: Why the National Archives of Australia Embraced Digitisation on Demand* (2002) National Archives of Australia, available at <http://www.aa.gov.au>.

[4] See eg Jesmond Calleja, 'On-Line Access to the Art Gallery of New South Wales' Collection' (2005) 14(2) *Museums Australia Magazine* 22. The article leaves to one side another avenue of using digital technology, where institutions seek to raise revenue by commercially exploiting collection material, see eg Marilyn Phelan, 'Digital Dissemination of Cultural Information: Copyright, Publicity, and Licensing Issues in Cyberspace' (2002) 8 *Southwestern Journal of Law and Trade in the Americas* 177.

[5] Whether it is desirable to offer unrestricted access to *all* such collection items has been questioned: see below nn 25 to 30 and accompanying text.

> *A museum without walls has been opened to us, and it will carry infinitely farther that limited revelation of the world of art which the real museums offer us within their walls.*[6]

That sentiment exists all the more with digital technologies, with emerging technologies being used to 'activate, engage, and transform' the social and intellectual capital held in cultural institutions.[7] But questions exist as to whether limitations in access have shifted from the physical walls of Malraux to copyright "walls" of legal limitations and their everyday implementation within the sector.[8]

This article explores the impact of copyright law on the digital accessibility of material held by Australian public galleries, museums, libraries and archives. It describes the results of interviewing approximately 150 staff of cultural institutions, as well as organisations representing creators, in relation to the digitisation activities of institutions and the influences of copyright on those practices. The quantity and range of interviews produced a comprehensive picture of institutional digitisation practices.[9] As discussed in Part II, the fieldwork suggests that copyright has had a significant impact on digitisation practices to date, including in the selection of material to digitise and the circumstances in which it is made publicly available. This has resulted in notable differences between analogue and digital collections – what

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[6] André Malraux, *Museum Without Walls* (1965, trans Stuart Gilbert and Francis Price, 1967) 12. For other literature invoking the metaphor of 'without walls', see eg Mary Brandt Jensen, 'Is the Library Without Walls on a Collision Course with the 1976 Copyright Act' (1993) 85 *Law Librarian Journal* 619; Susan J Drucker and Gary Crumpert, 'Museums Without Walls: Property Rights and Reproduction in the World of Cyberspace' in Susan Tiefenbrun (ed), *Law and the Arts* (1999) 47. Neither Jensen, nor Drucker and Crumpert, overtly link their chapter title to work such as Malraux's, although the latter do note the classic writing of Walter Benjamin on images and technologies of reproduction: 'The Work of Art in the Age of Mechanical Reproduction'. The metaphor could also be explored through examining communication theory and the recurring dream of communication as a communion between minds; see eg John Durham Peters, *Speaking in the Air: A History of the Idea of Communication* (1999).

[7] The quoted words come from an interesting recent anthology of critical heritage studies, Fiona Cameron and Sarah Kenderdine (eds), *Theorizing Digital Cultural Heritage: A Critical Discourse* (2007) 1.

[8] As well as offering new avenues for dissemination to cultural institutions, digital communications offer similar possibilities to non-institutional actors, changing the political economy of culture; see eg Guy Pessach, 'Museums, Digitization and Copyright Law – Taking Stock and Looking Ahead' (2007) *Journal of International Media and Entertainment Law* in press; <http:ssrn.com/abstract=961328>.

[9] The methodology and results of the project are explored in detail in Emily Hudson and Andrew T Kenyon, 'Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives' (2007) 30:1 *University of New South Wales Law Journal* (in press). The research was supported by the Australian Research Council (Andrew Kenyon and Andrew Christie, LP0348534) through its Linkage Projects scheme. Instigated by Museums Australia, six institutions were research partners in that Linkage Project: Art Gallery of New South Wales, Australian Centre for the Moving Image, Australian War Memorial, Museum Victoria, National Museum of Australia and State Library of Victoria. The fieldwork involved 38 cultural institutions, not merely the partner institutions. The research team has commenced a subsequent project, with funding during 2007–2009 from the Australian Research Council, cultural institutions and creator-focussed organisations such as the Arts Law Centre of Australia and the Australian Film Commission (Andrew Kenyon and Andrew Christie, LP0669566). That project is examining further aspects of the public availability of digital cultural material in Australia, Canada and the US. Queries on the research are welcome to Andrew Kenyon: a.kenyon@unimelb.edu.au.

could be called a "digital skew" – and has driven the content of online exhibitions, galleries and databases. Thus while digital technologies have enhanced the ability of institutions to provide access to their collections, the need to comply with copyright has constrained decision-making about online content. Importantly, such restriction does not always seem necessary to protect the interests of creators and copyright owners.

This situation could prompt reform of at least three types: amendment of copyright law, in particular statutory exceptions; reform of licensing practices, especially collective licensing whether of voluntary or statutory form;[10] and development of new curatorial practices and risk management strategies. To some degree, such changes are already occurring. For example, Australian copyright law has seen recent amendments that introduce new exceptions for non-commercial activities within cultural institutions; these are discussed in Part III. While Australia has not moved to a broad "fair use" model[11] – although that change was considered before the reforms – it has introduced a "flexible" provision in s 200AB which could allow some similar activities in this sector to those permitted by fair use,[12] and could also support developments in voluntary licensing practices and risk management.

By examining the legal milieu that existed prior to this legislation, this article seeks to illustrate the significance of the 2006 reforms to both the particular situation of cultural institutions, and to wider debates about copyright exceptions in many countries.[13] The reception of s 200AB, in particular, deserves close attention. It can be expected to offer a case study of wide relevance, as many and varied digital collections are being developed internationally.[14] The extent to which s 200AB can facilitate digital access will depend on a number of factors, including interpretation of terminology drawn from the TRIPS Agreement, and how public institutions, copyright owners and (should disputes reach the courts) judges respond to its greater flexibility than the existing, detailed libraries and archives provisions within the Copyright Act 1968.

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[10] Eg Australia has elaborate statutory licensing for some educational activities in Copyright Act 1968 (Cth) part VB.

[11] Copyright Act of 1976 (US) §107. For discussion of the reform process, see eg David Lindsay, 'Fair Use and Other Copyright Exceptions: Overview of Issues' (2005) 23 *Copyright Reporter* 4.

[12] Eg Drucker and Crumpert, above n 6, 54: '[M]any Internet sites are created for informational or public relations purposes rather than as profit-seeking enterprises, so these sites may well fall within the fair use privilege'. See also eg *Kelly* v *Arriba Soft Corporation* 336 F 3d 811 (9th Cir, 2003) in which online thumbnail images of photographic works constituted fair use. Relevant factors were the size and resolution of the images, 818–19, and the finding that the search engine did not harm the photographs' market, 821–22. It appears that compensation was paid settling claims related to high resolution images; see eg Ian McDonald, *Fair Use: Issues & Perspectives* (2006) 59. Possible limitations on the applicability of fair use to museum digitisation activities are also examined by Pessach, above n 8, particularly the fair use factors of a use's transformative quality and its effect on the market for a copyright work.

[13] See eg Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (2005).

[14] Projects digitising books in the US and Europe and the copyright difficulties they face are just one current example, see eg Charlotte Waelde, 'The Priorities, the Values, the Public' in Charlotte Waelde and Hector MacQueen (eds), *Intellectual Property: The Many Faces of the Public Domain* (2007) 226, 237–38; and the European Commission's Information Society initiative, i2010: Digital Libraries, High Level Expert Group – Copyright Subgroup, *Report on Digital Preservation, Orphan works, and Out-of-Print Works, Selected Implementation Issues* (18 April 2007).

1.2 Access as an Australian legislative aim

Improving the public accessibility of copyright materials can be seen as a sustained goal of copyright legislation in Australia, particularly for amendments concerned with cultural and educational institutions. In 1976, for example, the authors of the Franki Report argued that there is *"a very considerable public interest in ensuring a free flow of information in education and research, and that the interests of individual copyright owners must be balanced against this element of public interest"*.[15] In their recommendations related to s 50 of the Copyright Act 1968, which deals with the "inter-library loan" scheme,[16] the Franki Report noted the challenges caused by Australia's size and varied population density,[17] and the negative effects of information not being *"readily available"* to users at libraries across the country.[18] Some two decades later, when the debate shifted to amending copyright law for digital technologies, access was again emphasised. The stated aims of the Copyright Amendment (Digital Agenda) Act 2000 included to:

> *…ensure that cultural and educational institutions can access, and promote access to, copyright material in the online environment on reasonable terms, including having regard to the benefits of public access to the material and the provision of adequate remuneration to creators and investors.*[19]

Similar sentiments appeared in explanatory material to the most recent amending legislation: the Copyright Amendment Act 2006. This compendious legislation introduced numerous amendments to the Copyright Act 1968, including new exceptions for cultural and educational institutions.[20] The stated aim of these was *"to ensure that exceptions and statutory licences in the Act continue to provide reasonable public access to copyright material"*.[21] As discussed below, the Digital

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[15] Copyright Law Committee on Reprographic Reproduction (Franki Committee), *Report of the Copyright Law Committee on Reprographic Reproduction* (October 1976) [1.02]. The Franki Committee was appointed by the federal Attorney-General in Australia to consider possible reforms to the Copyright Act 1968 (Cth) in the light of new technologies of reproduction. The committee's recommendations spanned numerous topics, including fair dealing, copying by libraries and archives, and special provisions for educational institutions.

[16] The term 'inter-library loan' includes the situation in which one institution, upon the request of a second institution, makes a reproduction of a work in the first institution's collection, either for inclusion in the second institution's collection or supply to a patron of the second institution: ibid [4.01].

[17] Ibid [4.03]–[4.05].

[18] Ibid [4.06].

[19] Copyright Amendment (Digital Agenda) Act 2000 s 3(d). For discussion of the Digital Agenda Act, see eg Tanya Aplin, 'Contemplating Australia's Digital Future: The Copyright Amendment (Digital Agenda) Act 2000' (2001) 23(12) *European Intellectual Property Review* 565.

[20] For an overview of the reforms as they relate to cultural institutions, see eg Emily Hudson, 'The Copyright Amendment Act 2006: The Scope and Likely Impact of New Library Exceptions' (2006) 14(4) *Australian Law Librarian* 25. For an overview of the reforms in general, see eg the Australian Copyright Council, 'Information Sheet G096 Copyright Amendment Act 2006' (January 2007), available at <http://www.copyright.org.au>.

[21] Parliament of the Commonwealth of Australia, House of Representatives, *Copyright Amendment Bill 2006: Explanatory Memorandum* 7.

Agenda and earlier copyright reforms – while they permitted digitisation for purposes such as administration and user requests – had limited direct relevance to institutions' broader public activities. This makes the operation of the 2006 reforms particularly important.

Before outlining institutional practices, it is important to note debates about "access" and whether increased accessibility is necessarily desirable. On the first question: there can be a tendency to equate making content *available* online with improving that content's *accessibility*. In the cultural institution sector, this statement may be true if one merely compares the number of "virtual" visitors with the number who attend an institution's physical premises.[22] However, online access is far from equal for all. Ownership and availability of computer equipment varies across populations, as do internet connections and expertise in navigating the web. These disparities echo older variations in the usage of cultural institutions, along distinctions drawn along lines of education, gender, class and race.[23] While certain segments of the public are served well by online technologies, others have no or limited ability to access digital collections over the internet. Online technologies are clearly powerful in expanding the reach of institution activities – and reaching new audiences[24] – but are limited by inequities in the presence and use of technological infrastructure.

On the question of the desirability of access, some commentators have questioned the value of increasing access to at least some types of cultural collections. For instance, Anderson and Bowrey question the claims of the access to knowledge (A2K) movement, noting that arguments championing development of a commons of information may mask power imbalances in the politics and history of content creation.[25] One example is material recording and representing the lives of Australian Aborigines and Torres Strait Islanders, much of which contains sensitive personal and cultural information, was not created with informed consent or the provision of benefits, and is not owned by the people to which the information relates.[26] While 1990s Australian cases about Aboriginal art demonstrate copyright law's flexibility in

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[22] Discussed in Hudson and Kenyon, above n 9.

[23] See eg the classic study of Pierre Bourdieu, Distinction: *A Social Critique of the Judgement of Taste* (trans Richard Nice, 1984) and in the Australian context, Tony Bennett, Michael Emmison and John Frow, *Accounting for Tastes: Australian Everyday Cultures* (1999).

[24] See eg Catherine Styles, 'Vroom Fever: Inducing a Passion for Archives' (2005) 38 *Southern Review: Communication, Politics & Culture* 50; Klaus Neumann, 'Probing the Past: Ideas for a Web-Based Learning Resource about the White Australia Policy' (2005) 38 *Southern Review: Communication, Politics & Culture* 33.

[25] Jane Anderson and Kathy Bowrey, 'The Imaginary Politics of Access to Knowledge: Whose Cultural Agendas are Being Advanced?' [2006] *Australasian Intellectual Property Law Resources* 13. See also Jane Anderson, 'Indigenous Knowledge, Intellectual Property, Libraries and Archives: Crises of Access, Control and Future Utility' in Martin Nakata and Marcia Langton, *Australian Indigenous Knowledge and Libraries* (2005).

[26] Ownership here refers to both the physical record, and intangible rights, of particular relevance for present purposes is copyright. For discussion, see eg Terri Janke, *Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998); Emily Hudson, *Cultural Institutions, Law and Indigenous Knowledge: A Legal Primer on the Management of Australian Indigenous Collections* (2006).

recognising certain Indigenous interests in some forms of cultural material,[27] the scope of legal protection available in that way is substantially narrower than the range of Indigenous concerns about material in cultural institutions. Janke's work for the World Intellectual Property Organization provides one important exploration of these issues, based on a close investigation of the wider circumstances of some key instances of litigation.[28] As she earlier noted, *"Indigenous Australians point out that they have little say about how this material is represented, accessed, used and disseminated"*.[29] These concerns have led to the development of policies and protocols directed to Indigenous collections, including varying degrees of restriction on the accessibility of certain materials, but also recognising how digitisation and online technologies can be used to promote access by Indigenous people.[30]

2. Copyright and cultural institutions

In this Part, an argument is set out that copyright has acted directly and indirectly to shape the content of digital collections and the activities of cultural institutions "without walls". This is because the scope of pre-2006 statutory exceptions, combined with legal and practical difficulties in obtaining licences, have meant that many public digitisation activities would constitute an infringement of copyright. Institutions commonly report focusing digitisation efforts on works for which copyright is easy to deal with, such as items in the public domain and those for which licensing is straightforward. Importantly, it appears that the exclusion of many collections from public digitisation does not necessarily further any economic or non-economic interest of creators and copyright owners.

2.1 Relevance of copyright

Copyright has great relevance to cultural institutions because they generally do not own copyright in collection items,[31] but routinely perform acts within the exclusive rights of the copyright owner,[32] placing them at risk of infringing copyright.[33]

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[27] For overviews see eg Colin Golvan, 'Aboriginal Art and Copyright – An Overview and Commentary Concerning Recent Developments' (1996) 1 *Media & Arts Law Review* 151; Andrew T Kenyon, 'Copyright, Heritage and Australian Aboriginal Art' (2000) 9:2 *Griffith Law Review* 303–320 (special issue: Intellectual Property and Indigenous Culture). See also the attempts, to date unsuccessful, to introduce statutory Indigenous communal moral rights in Australia, eg Samantha Joseph and Erin Mackay, 'Moral Rights and Indigenous Communities' [September 2006] *Art and Law* 6.

[28] Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (2003).

[29] Janke, above n 26, 31.

[30] See eg ATSILIRN, Aboriginal and Torres Strait Islander Library and Information Resource Network Protocols (updated 2005); Museums Australia, *Continuous Cultures, Ongoing Responsibilities: Principles and guidelines for Australian museums working with Aboriginal and Torres Strait Islander cultural heritage* (updated 2005); National and States Libraries Australasia, *National Policy Framework for Aboriginal and Torres Strait Islander Library Services and Collections* (2006).

[31] Ownership of copyright and physical property are separate, and can be held by two different people: see eg *Re Dickens; Dickens* v *Hawksley* [1935] Ch 267; *Pacific Film Laboratories Pty Ltd* v *Commissioner Taxation* (1970) 121 CLR 154.

[32] Copyright Act 1968 (Cth) ss 31, 85–88.

Copyright has long been relevant for cultural institution activities, and was a focus of attention from the 1950s to 1970s due to the advent of self-service photocopiers and library photocopying services.[34] However, awareness of copyright appears to have increased dramatically with digital technologies, and the resulting expansion in the reach of institution activities.[35]

The research with cultural institutions revealed four main approaches to dealing with the risks of digitising collection materials. First, institutions often rely on statutory exceptions. However, the devil is in the detail; many exceptions only permit activity in limited circumstances, and typically not where digitised material is to be made available to the public. Second, institutions report dealing with copyright through negotiating for licences and assignments. Two main difficulties arise, related to the costs of individual negotiation and the impact of orphan works. Where exception- and negotiation-based approaches fail, two main options remain: avoid copyright issues through the selection of works, such as materials in the public domain; or proceed with infringing conduct under a risk management strategy.[36] The influence of exceptions, negotiation and risk management is discussed next, in Parts 2.2 to 2.4. Our research shows that the lack of relevant copyright exceptions, difficulties in the licensing process to date, and institutions' generally conservative and under-developed risk management have resulted in copyright significantly influencing the selection of materials to digitise and their availability to the public.

2.2 Copyright exceptions

In Australia, two sets of exceptions have been particularly relevant to cultural institutions: fair dealing, and the libraries and archives provisions.[37] Fair dealing permits activities that are fair, and performed for one of the following purposes: research or study, criticism or review, professional legal advice and, since December 2006, parody or satire.[38] While fair dealing is relevant to research activities of patrons

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[33] Copyright Act 1968 (Cth) ss 36(1), 101(1).

[34] Library photocopying was considered in detail in major reviews of copyright legislation: see eg Franki Report, above n 15, and the 'Spicer Report': Copyright Law Review Committee, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in The Copyright Law of the Commonwealth* (1959). It was also the focus of major pieces of litigation, eg, *Williams & Wilkins Company* v *United States*, 487 F 2d 1345 (1973), affirmed by an equally divided court, 420 US 376 (1975); *University of New South Wales* v *Moorhouse* (1975) 133 CLR 1.

[35] For a discussion of these themes in the context of academic libraries, see Samuel E Trosow, 'The Changing Landscape of Academic Libraries and Copyright Policy: Interlibrary Loan, Electronic Reserves, and Distance Education' in Michael Geist, *In the Public Interest: The Future of Canadian Copyright Law* (2005) 375–377. Other research suggests a similar increase in awareness has occurred in educational settings, see eg Martine Courant Rife and William Hart-Davidson, 'Is There a Chilling of Digital Communication? Exploring How Knowledge and Understanding of the Fair Use Doctrine May Influence Web Composing', unpublished report (21 July 2006) 10–11; <http://ssrn.abstract=918822> and <http://www.wide.msu.edu/Members/martine/FAIRUSE/index>.

[36] See also Hudson and Kenyon, above n 9.

[37] See eg Andrew T Kenyon and Emily Hudson, 'Copyright, Digitisation, and Cultural Institutions' (2004) 31(1) *Australian Journal of Communications* 89.

[38] Copyright Act 1968 (Cth) ss 40, 41, 41A, 42, 43(2), 103A, 103AA, 103B, 103C. On the new parody and satire provisions, see eg Melissa de Zwart, 'Australia's Fair Dealing Exceptions: Do they Facilitate

and staff, and for some lectures and publications of criticism and review, it is not relied on more generally. There appear to be two reasons for this. First, the exception is purpose-specific. Despite judicial statements to the contrary,[39] commentators argue that the terms have been interpreted narrowly by Australian courts,[40] particularly when compared with the more expansive definition of "research" accepted by the Canadian Supreme Court.[41] Second, it has been held that the relevant purpose, when assessing a defence of fair dealing, is that of the alleged infringer.[42] This means an institution cannot rely on fair dealing because a recipient required, or a user accessed, material for research purposes.

The libraries[43] and archives[44] provisions allow cultural institutions including public museums and galleries to reproduce collection items for designated purposes, such as: responding to user requests for copies of published works and articles;[45] participation in the interlibrary loan scheme;[46] preservation of manuscripts, original artistic works, sound recordings held in the form of a "first record" and films held as a "first film";[47] replacement of published items that are not commercially available;[48] and

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or Inhibit Creativity in the Production of Television Comedy?' in Andrew T Kenyon (ed), *TV Futures: Digital Television Policy in Australia* (2007, in press).

[39] See eg *TCN Channel Nine Pty Ltd* v *Network Ten Pty Ltd* (2001) 50 IPR 335, 380–381 (Conti J).

[40] See eg Melissa de Zwart, 'Seriously Entertaining: The Panel and the Future of Fair Dealing' (2003) 8 *Media & Arts Law Review* 1; Michael Handler and David Rolph, '"A Real Pea Souper": The Panel Case and the Development of the Fair Dealing Defences to Copyright Infringement in Australia' (2003) 27 *Melbourne University Law Review* 381.

[41] *CCH Canadian Ltd* v *Law Society of Canada* (2004) 236 DLR (4th) 395.

[42] See eg *Sillitoe* v *McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545, 558; *De Garis* v *Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 297–299. This position, however, has been criticised with a wider approach being recommended; see eg Patricia Loughlan, *Intellectual Property: Creative and Marketing Rights* (1998) 62–63; Australia, Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1 Exceptions to the Exclusive Rights of Copyright Owners* (1998) [4.06]–[4.18].

[43] The term 'library' is not defined in the Copyright Act 1968 (Cth), although s 49 (user requests) and s 50 (requests by other cultural institutions) only apply to libraries that have collections accessible, in whole or part, to the public directly or through inter-library loans.

[44] The term 'archives' means four listed archives (Copyright Act 1968 (Cth) s 10(1)) and public museums and galleries more generally: s 10(4). This is broader in scope than many library and archives copying provisions, cf eg Copyright Act of 1976 (US) §108; Pessach, above n 8, 12 and its note 41; Burrell and Coleman, above n 13, 137 who have called for the UK law to take a similarly broad approach to its library and archive provisions. The term 'public' is used in this article given the prominence of publicly funded museums, galleries, libraries and archives in Australia, but the legislative provisions apply where:

> (a) a collection of documents or other material of historical significance or public interest that is in the custody of a body, whether incorporated or unincorporated, is being maintained by the body for the purpose of conserving and preserving those documents or other material; and
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> (b) the body does not maintain and operate the collection for the purpose of deriving a profit.

Copyright Act 1968 (Cth) s 10(4). It is worth noting that this definition would encompass many of the private charitable institutions that are significant in countries like the US.

[45] Copyright Act 1968 (Cth) s 49.

[46] Copyright Act 1968 (Cth) s 50.

[47] Copyright Act 1968 (Cth) ss 51A(1), 110B.

[48] Copyright Act 1968 (Cth) ss 51A(1), 110B.

reproduction of literary, dramatic, musical and artistic works for administrative purposes.[49] Fieldwork suggested that while the libraries and archives provisions accommodate some internal uses well (as exemplified by the administrative purposes provision), they contain anomalies and restrictions that do not seem justified by any compelling policy reasons.[50] Importantly for this research, the libraries and archives provisions are generally not applicable for public activities, such as reproducing material for exhibitions, allowing patrons to browse collection items onsite on copy-disabled terminals, or the creation of online databases.[51] Given that fair dealing is also limited, cultural institutions have relied on other strategies in their public digitisation activities.

Since the above fieldwork, the Copyright Act 1968 has been amended. Among other changes, two new exceptions have been introduced: a flexible exception for cultural institutions and other specified users in s 200AB, and a provision allowing preservation copying of significant collections by key cultural institutions.[52] The possible impact of these provisions is considered later in this article.

2.3 Licences and assignment

An activity will not infringe copyright if performed under a licence from the copyright owner or its representative.[53] As there is no statutory licensing scheme for cultural institutions,[54] this licensing is undertaken voluntarily with individual owners, although streamlined and collective models have been developed and are becoming more widely used.[55] Some institutions also seek assignments of copyright, although of the institutions investigated in the fieldwork, none that used assignment came from the gallery sector. While assignment may seem a major step for copyright owners, the value of using it in addition to licensing becomes clear when the breadth of material

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[49] Copyright Act 1968 (Cth) s 51A(2), (3).

[50] For instance, the preservation copying provisions in s 51A and s 110B *never* apply to published items, regardless of whether they are rare, old or out-of-print. And the administrative purposes provision does not apply to sound recordings and films held in the collection, but only to literary, dramatic, musical and artistic works: s 51A(2). See Hudson and Kenyon, above n 9.

[51] The Copyright Act 1968 (Cth) contains narrow exceptions allowing published works acquired in electronic form to be made available on electronic copy disabled terminals (s 49(5A)), and preservation copies of unstable artistic works to be made available on entirely copy disabled terminals: s 51A(3A). There is also a provision under which certain old, unpublished manuscripts can be included in a new publication without infringing copyright, so long as certain procedures are followed: s 52. Note that this provision applies to any publication, not just those of cultural institutions.

[52] Copyright Act 1968 (Cth) ss 51B, 110BA, 112AA.

[53] Copyright Act 1968 (Cth) ss 36(1), 101(1).

[54] There is no statutory licensing scheme directed at cultural institutions generally, although certain subsets of conduct may be covered by other schemes, such as the Part VB licence for educational copying, which might be applicable to some activities by academic libraries.

[55] For instance, Viscopy, the Australian collecting society for visual artists, negotiates with cultural institutions in relation to collective licensing of works of art, and has created an online database of digital images that can be downloaded and licensed for a variety of purposes: <http://viscopy.me.com.au/home.php>. Proposals for blanket licensing for visual artists are also longstanding, see eg Maralee Buttery, 'Blanket Licensing: A Proposal for the Protection and Encouragement of Artistic Endeavour' (1983) 83 *Columbia Law Review* 1245.

within cultural institutions, and hence the range of copyright owners and interests, is kept in mind. A utilitarian object within a social history museum is a very different object, in terms of the copyright interests involved, than a piece of visual art.

Licensing raises two key issues. The first is cost. Interviewees from across the sector discussed this, noting the resources that can be spent identifying and locating copyright owners, negotiating and recording licence information, renegotiating licences, and so forth.[56] These costs can be prohibitive on large projects, where hundreds of individual licences may be required. Ironically, while institutional budgets for copyright are growing, this does not necessarily result in higher (or indeed any) fees for copyright owners, given that resources are often exhausted in the search and negotiation process.

The second issue is what to do if traditional licensing models fail. This failure may arise because of the high costs of licensing, but also because works have become "orphaned": the copyright owner is impossible, in any practical sense, to identify or locate.[57] At least three factors contribute to the orphan works problem, connected to time, attribution and the breath of material protected by copyright. Given the length of the copyright term,[58] rights may need to be cleared well after the date of publication or creation. The passage of time can make ownership difficult to trace, particularly for deceased or defunct owners. Second, lack of meaningful attribution poses notable challenges, particularly for social history collections. Interviewees reported regular instances in which it was either impossible to identify a copyright owner, or an extensive search was required. Finally, the breadth of items protected by copyright,[59] combined with the lack of any assertion or registration requirement,[60] makes it likely that many individual unaware they are copyright owners.

2.4 Risk management

Before considering copyright's impact on public digitisation, it is important to note one final and crucial factor about digital collections and copyright law: public institutions generally appear risk averse. This is not an image of users that has great prominence in debates about digital copyright, where pirates and parasites have taken centre stage.[61] But it was a prominent feature in the fieldwork carried out in Australia, and deserves careful consideration in relation to copyright exceptions and

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[56] The Australian fieldwork echoes the comments of Pessach, above n 8, on the complexities and costs of digital licensing in the sector.

[57] See eg definition in United States Copyright Office, *Report on Orphan Works* (2006) 15. See also Ian McDonald, 'Some Thoughts on Orphan Works' (2006) 24(3) *Copyright Reporter* 152.

[58] Copyright Act 1968 (Cth) ss 33, 34, 93–96.

[59] See eg Jessica Litman, 'The Exclusive Right to Read' (1994) 13 *Cardozo Arts and Entertainment Law Journal* 29, 34.

[60] Copyright Act 1968 (Cth) ss 32, 89–92; see also Berne Convention for the Protection of Literary and Artistic Works art 5(2).

[61] For a useful review of metaphorical reasoning in copyright see Patricia Loughlan, 'Pirates, Parasites, Reapers, Sowers, Fruits, Foxes…The Metaphors of Intellectual Property' (2006) 28 *Sydney Law Review* 211.

licensing practices.[62] Given the public status, funding and accountability of cultural institutions – and what has been called their fiduciary duties towards both creator and public[63] – it appears more difficult for them than for many other users to infringe copyright law intentionally, even where the financial risks of any breach are slight.

Many cultural institutions appear resigned to withholding digital content from public access when managing copyright becomes too difficult. Such an approach is not unknown in other sectors, with other users at times influenced by copyright risks: for instance, recent research on fair use and digital composition practices, such as website authoring,[64] provide just one example of what could be called the "common place" of copyright law.[65] However, copyright law can be seen to have operated within analogue environments through, in many instances, being "honoured" in the breach. Routine and common uses of copyright material – such as domestic time-shifting of television content with video cassette recorders – occurred without *any* copyright exception or licence being applicable in countries like Australia.[66] Indeed, record photography and other standard administrative activities of cultural institutions were only permitted by Australian copyright law (and even then only for literary, dramatic, musical and artistic works) following the Digital Agenda reforms of 2000.

2.5 The impact of copyright on digital access

Limited exceptions, challenges to licensing in terms of costs and orphan works, and a cautious approach to copyright infringement, mean the selection of works for public digitisation is often driven, in whole or in part, by the ease of copyright compliance. Works that tend to be digitised are those for which copyright licences are readily obtainable or works in the public domain. Works for which licensing is not practical may be digitised under an exception, but – depending on the circumstances – are often withheld from public uses. This does not present substantial problems when those works can be substituted with non-infringing content; for example, for some purposes, one image may be as useful as another within an exhibition. However, copyright can

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[62] Two caveats should be noted. First, our fieldwork largely relied on institutions self-reporting their risk management approach. Second, there were contrary tendencies in some smaller institutions and, importantly, some interviewees from larger institutions discussed difficulties in ensuring copyright-compliant behaviour across institution staff (some of whom could be described as risk unaware); see Hudson and Kenyon, above n 9. However, caution with regards to copyright was a most pronounced tendency from the fieldwork.

[63] Drucker and Crumpert, above n 6. See also Kim L Milone, 'Dithering Over Digitisation: International Copyright and Licensing Agreements Between Museums, Artists, and New Media Publishers' (1995) 5 *Indiana International and Comparative Law Review* 393, 399–400.

[64] See eg Rife and Hart-Davidson, above n 35.

[65] For research into law people's experiences with other areas of law, see eg Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (1998). And for exploratory interviews with seven collecting societies to discuss some of their concerns about competition between societies in relation to digital content, see Philippe Gilliéron, 'Collecting Societies and the Digital Environment' (2006) 38 IIC 939.

[66] See eg Saba Elkman and Andrew F Christie, 'Negotiated Solution to Audio Home Recording?: Lessons from the US Audio Home Recording Act of 1992' (2004) 27 *University of New South Wales Law Journal* 123; and for a review of other 2006 amendments to the Copyright Act 1968 which allow some time-shifting of TV content, see Robin Wright, 'So You Want to Tape Off TV? Copyright Law, Digital Television and Personal Use' in Kenyon (ed), above n 38.

end up driving project content with more noticeable effects when desired works are unique or iconic.

Copyright issues also mean that digital collections often do not reflect the entire analogue holdings of an institution, with certain collections extremely well-represented, but others with little or no digital presence. For example, photographs have been a key target for digitisation because they are information rich and relatively easy to digitise in technical terms. In Australia, pre-1955 photographs are particularly attractive, due to a now-repealed provision of the Copyright Act 1968 that has placed those items in the public domain.[67] However, many digital photographic collections are primarily historical, with less focus on contemporary images.

The upshot is that copyright is acting, both directly and indirectly, to mould the digital content of the cultural institution without walls. It acts directly because of limitations in the circumstances in which cultural institutions can reproduce and communicate collection items without infringing copyright. It has an indirect effect through the increasing resources being dedicated to copyright compliance: time and money spent on administrative tasks in identifying, locating and contacting copyright owners, rather than acquiring new copyright works, digitising works, paying licence fees to copyright owners, or other activities to develop online collections.

Importantly, these restrictions on the digital availability of cultural collections do not necessarily advance the economic and non-economic interests of copyright owners. While some items held by cultural institutions are created by people who seek income out of creating or commercialising intellectual property, other items – particularly those in social history collections – were not made with any desire to secure an income, or otherwise enforce the rights that are granted automatically by copyright law. For example, the position of a professional author, photographer or filmmaker is very different to that of an individual who wants to donate some letters, photos and amateur footage to a local history collection. In addition, the market for a copyright work changes over time, meaning in many cases that *"as a work grows older, more and more of its market is behind it"*.[68] A wide variety of works are held in cultural institutions, including those with a current market, those that previously had a market, and those that never had a market. As one interviewee commented:

> *There's a real conflict between the Copyright Act, which is there, according to the government, to stimulate production of original works and to provide fair economic remuneration, and the effect that has on archival institutions where locking up a manuscript produced in 1970 isn't going to stimulate anyone to do any work because it wasn't produced with that purpose anyway. And [it] isn't*

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[67] The rules regarding duration of copyright in photographs have changed over the years. Until 1 January 2005, copyright in pre-commencement photographs (ie, those taken before the Copyright Act came into force on 1 May 1969) was fifty years following the year the photograph was taken: Copyright Act 1968 (Cth) s 212. That provision was repealed by the US Free Trade Agreement Implementation Act 2004 (Cth). The current rule is that copyright subsists in photographs for the life of the photographer plus seventy years: s 33(2).

[68] Justin Hughes, 'Fair Use Across Time' (2003) 50 *UCLA Law Review* 775, 787.

> *going to stop anyone getting economic remuneration because it's not worth anything anyway.*[69]

The challenge is to develop copyright law, policy and management practices that reflect variations in the interests of copyright owners, creators and users. While interviewees repeatedly supported the rights of creators to control use of their works and receive an income from their creative practice,[70] they also spoke at length of the practical difficulties in managing copyright, and of widespread challenges in understanding the law. This appears to have led to a somewhat hostile debate in which institutions bemoan being under-resourced to comply with the law, while creator interests feel those administrative issues are being used to justify the withholding of fair remuneration to copyright owners. There appears to be value in further exploration of copyright law in this context: examining the needs and interests of the multiplicity of copyright owners whose works are held in cultural institutions, and the possible changes to law and practice to help achieve goals of improving access to cultural collections and protecting the interests of copyright owners. The existing Australian fieldwork suggests areas in which the needs of cultural institutions and other copyright users are not being met, often with no corresponding imperative to stimulate creation, secure an income stream to copyright owners, or protect other non-economic interests of creators. Limitations in the statutory exceptions that then existed made this particularly true for public activities, whether for onsite or online access. While the detail of law and practice can be expected to vary across those countries with a similar history of cultural institutions, the Australian example is suggestive of the situation in many commonwealth countries at the least.[71]

3. "Flexible dealing" in Australia

The introduction of new exceptions by the Copyright Amendment Act 2006 offers encouraging potential for the Copyright Act to achieve longstanding goals related to public access. Perhaps the most significant change is the introduction of a flexible exception for cultural and educational institutions (and for people with a disability) in s 200AB.[72] The stated aim of this provision is to:

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[69] Hudson and Kenyon, above n 9, Part VII, Section C.

[70] See Emily Hudson and Andrew T Kenyon, 'Communication in the Digital Environment: An Empirical Study into Copyright Law and Digitisation Practices in Public Museums, Galleries and Libraries', refereed conference paper, Australia and New Zealand Communication Association Conference, Christchurch, New Zealand, July 2005.

[71] The effect, if any, of the varied legal regimes in Canada and the US is one focus of the project that has developed from the research discussed in this article, see above n 9.

[72] Copyright Act 1968 (Cth) s 200AB. The exception is commonly referred to as the 'flexible dealing' exception, after comments in a media release of the Attorney-General's Department in May 2006: Attorney-General's Department, 'Major Copyright Reforms Strike Balance' (Media Release 088/2006). However, the terminology 'flexible dealing' has not been used in the legislation.

> *provide a flexible exception to enable copyright material to be used for certain socially useful purposes while remaining consistent with Australia's obligations under international copyright treaties.*[73]

The exception has two elements. First, there are limits on when the flexible exception applies to cultural institution activities. Thus, the use must be:

> *- made "by or on behalf of the body administering a library or archives";*
>
> *- made "for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives)"; and*
>
> *- not made "partly for the purpose of the body obtaining a commercial advantage or profit".*[74]

The Explanatory Memorandum to the Copyright Amendment Bill states that *"services of a kind usually provided"* includes both *"internal administration"* as well as *"providing services to users"*.[75] On its face, this would appear to include making reproductions publicly accessible, thus opening up the argument that at least some forms of public digitisation are permitted by a statutory exception. As outlined above, this argument was unavailable in most circumstances under the previous law. The amendment could allow a shift in the risk management policies of institutions, by making them more confident in digitising and publishing some items online where traditional licensing is not practical. The extent to which this shift occurs may depend on interpretation of the second stage of the exception, which assesses whether the proposed use complies with factors drawn from the "three-step test" found in the TRIPS Agreement and other international instruments.[76] Thus the following factors must be satisfied:

> *- the "circumstances of the use … amount to a special case";*
>
> *- the use "does not conflict with a normal exploitation" of the copyright work; and*
>
> *- the use "does not unreasonably prejudice the legitimate interests of the owner of the copyright".*[77]

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[73] Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [6.53].

[74] Copyright Act 1968 (Cth) s 200AB(2).

[75] Explanatory Memorandum above n 73 [6.55].

[76] Copyright Act 1968 (Cth) s 200AB(7). See also Berne Convention for the Protection of Literary and Artistic Works Art 9(2). For a detailed overview of Berne and TRIPS, see Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd edn (2006).

[77] Copyright Act 1968 (Cth) s 200AB(1)(a), (c), (d), respectively.

The direct importation of language from TRIPS into s 200AB is controversial.[78] For example, some commentators have questioned how "special case" will be assessed, given that the term as used in TRIPS refers to the *exception* constituting a special case and not the *use*.[79] In addition, it remains to be seen what analytical tools will be relevant in interpreting each limb of the three-step test. Apart from the WTO Panel decision,[80] there is academic commentary on the application of the test,[81] and some case law in overseas domestic courts.[82] Which sources will inform interpretation by stakeholders and the judiciary, and to what degree? What impact will this have on court procedure, as Australian judges are forced to make determinations previously not required in copyright litigation? And how will the uncertainty surrounding this development be understood within cultural institutions? While such issues might be clarified by future practices or litigation, it seems clear that s 200AB is a qualitatively different exception to those available to cultural institutions under the earlier Australian law; namely, the detailed libraries and archives provisions which are limited to specific works and circumstances.[83]

The reception of s 200AB by Australian cultural institutions and copyright owners will be important for broader debates about statutory drafting and the desirability of flexible, fair use-style exceptions in copyright law. On its face, s 200AB appears to have the potential to allow greater preservation activities by institutions, and permit some public activities for which licensing is not possible. However, it is an exception for which users' level of knowledge is likely to be a major influence on its practical application (as appears to be the case for fair use).[84]

4. Conclusion

The development of ubiquitous digital technologies offers renewed impetus to dreams of technologically accessible institutions – of cultural institutions without walls. However, copyright law appears to be playing a significant role in the selection of

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[78] See eg Hudson, above n 20, 30–32.

[79] See eg World Trade Organization, United States – Section 110(5) of the US Copyright Act, Report of the Panel, WT/DS160R, 15 June 2000. The Panel held that exceptions must be limited in qualitative and quantitative ways. The term 'certain' means that the exception must be 'clearly defined': it need not specify every circumstance in which it arises, 'provided that the scope of the exception is known and particularised': [6.108]. The term 'special case' refers to the exception being 'limited in its field of application or exceptional in its scope': [6.109]. Note that 'special' does not import a normative aspect, for instance that there was some discernable policy justification for the exception: [6.111] – [6.112].

[80] Ibid.

[81] The extensive research paper of Professor Ricketson springs to mind: Sam Ricketson, *The three-step test, deemed quantities, libraries and closed exceptions* (2002) (advice prepared for the Centre for Copyright Studies). See also eg David J Brennan, 'The Three Step Test Frenzy – Why the TRIPS Panel Decision Might be Considered Per Incuriam' [2002] *Intellectual Property Quarterly* 212.

[82] See generally Martin Senftleben, Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law (2004).

[83] For further discussion, see Emily Hudson, Andrew T Kenyon and Andrew F Christie, 'Modelling Copyright Exceptions: Law and Practice in Australian Cultural Institutions' in Fiona Macmillan (ed), *New Directions in Copyright Law* (Volume 6) (2007) *in press*.

[84] See eg Rife and Hart-Davidson, above n 35.

material to digitise and make publicly available. As discussed above, this can drive the content of certain exhibitions, galleries and databases, and create an asymmetry between analogue holdings and digital collections. These copyright issues reflect limitations in the pre-2006 copyright exceptions in Australia, weaknesses in the licensing process, the impact of orphan works, and the conservative risk management approaches of many cultural institutions.

Guy Pessach wrote recently that:

> *[M]useums should be provided with a broad and flexible exemption that permits reproduction, as well as other uses, of copyrighted works for purposes of cultural preservation. This exemption should also secure the public's right of access to such works. … [T]he fair use exemption seems as the most appropriate legal tool to begin such a reform. This development, however, would require courts to make the move of introducing the values of cultural preservation into the balancing scheme that governs fair use.*[85]

The recent Australian reforms do not quite do what Pessach has called for. (It is worth noting, as Pessach does, that his analysis leaves aside matters of significance for individual creators such as moral rights.[86]) But the Australian reforms' broader exception should benefit preservation and may also facilitate some types of digital access, particularly to orphaned material. Under the new provision, institutions need not report to their public funders, for example, that they decided to ignore the requirements of Australia's copyright legislation in pursuing a particular digital collection strategy; instead, institutions could develop policies that clarify which material and which uses they believe are covered by the new flexible exception. Endeavouring to do that may also prompt greater involvement in the development of voluntary collective licences for uses that fall outside the new exception. The degree to which such developments in practice do occur – and the degree to which older dreams of cultural institutions without walls are realised – deserves careful consideration for Australian and for comparative copyright law and policy.

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[85] Pessach, above n 8.

[86] Moral and economic interests of creators, as well as the interests of cultural institutions, are an important part of ongoing research: see above n 9.