

DIGITAL ACCESS: THE IMPACT OF COPYRIGHT ON DIGITISATION PRACTICES IN AUSTRALIAN MUSEUMS, GALLERIES, LIBRARIES AND ARCHIVES

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ABSTRACT

Empirical research into the digitisation of collections in Australian museums, galleries, libraries and archives suggests that copyright law affects what material is digitised and how it is made accessible. This article analyses digitisation within cultural institutions in light of the Digital Agenda reforms of 2000 and the *Copyright Amendment Act 2006* (Cth). Copyright law can have a significant impact on digitisation practices, particularly with regard to digitising audiovisual material and orphan works, and in relation to digital access: that is, the public availability of digital content. Research suggests that, for the *Copyright Act 1968* (Cth) (*‘Copyright Act’*) to work on its own terms, some small-scale reforms are required. However, the research also underscores larger questions about the sustainability of existing copyright law and practice. Provisions in the *Copyright Amendment Act 2006* (Cth) may improve the situation, depending on the operation of the new ‘flexible dealing’ exception for the sector in s 200AB. This suggests the need for continued attention and debate on copyright exceptions and the possibility of new collective licensing models.

I INTRODUCTION

In Australian cultural institutions, digital technologies are transforming how collections are acquired, preserved, interpreted and researched. An increasing number of creative and intellectual works are born-digital,¹ and the digitisation of analogue collection items is a growing tool to facilitate the missions of public

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¹ That is, the works are created in digital form.

libraries, museums, galleries and archives.² Digital technologies have also changed the expectations of those accessing information in cultural collections, with many users appearing to expect items to be available in online, searchable formats.³ Government policy contains similar sentiments, with a significant push for Australian cultural institutions to become digital.⁴ For instance, one aim of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (*Digital Agenda Act*) was to ensure that cultural institutions could promote access to ‘copyright material in the online environment on reasonable terms’ having regard to ‘the benefits of public access’ and ‘the provision of adequate remuneration to creators and investors’.⁵

Major copyright reforms occurred in the *Copyright Amendment Act 2006* (Cth)⁶ (*Copyright Amendment Act 2006*). Among many changes, this Act made technical amendments to the libraries and archives provisions and, more significantly, added a ‘flexible dealing’ provision for the sector.⁷ This makes it timely to consider how aspects of the earlier *Digital Agenda Act* have affected, if at all, the digitisation of collections in cultural institutions. Analysing that experience lays a basis for understanding and assessing the 2006 reforms.

Cultural institutions have many potential sources for digital holdings. Some collection items are acquired in digital form – although this currently represents only a small percentage of acquisitions.⁸ Research, education and outreach programs also generate digital content. This article focuses on another source: digitisation of analogue collection items, in which digital files are created from

2 See, eg, Sharon Appel, ‘Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers’ (1999) 6 *UCLA Entertainment Law Review* 149; Guy Pessach, ‘Museums, Digitization and Copyright Law – Taking Stock and Looking Ahead’ (2007) forthcoming *Journal of International Media and Entertainment Law* <<http://ssrn.com/abstract=961328>> at 13 May 2007, for consideration of the impact of copyright law on the use of digital technologies by cultural institutions.

3 At the least, professional staff of cultural institutions hold this view of users: see below nn 49-51 and accompanying text.

4 See, eg, Australia, Department of Communications, Information Technology and the Arts, Strategic Industry Leaders Group, *Unlocking the Potential: Digital Content Industry Action Agenda* (2005) <http://www.dcita.gov.au/arts_culture/publications_and_reports/film_and_digital_content/unlocking_the_potential_digital_content_industry_action_agenda_report> at 13 May 2007; and the Culture and Recreation Portal: <<http://www.cultureandrecreation.gov.au>> at 13 May 2007.

5 *Digital Agenda Act* s 3(d); the amendments came into force on 4 March 2001. Fiona Macmillan notes that neither the exposure draft of the *Digital Agenda Act* nor its explanatory material contained any real discussion of the underlying purpose of copyright exceptions: Fiona Macmillan, ‘Striking the Copyright Balance in the Digital Environment’ (1999) 10 *International Company and Commercial Law Review* 350, 350-51. For a similar observation about the Copyright Exceptions Issues Paper released in 2005, see David Lindsay, ‘Fair Use and Other Copyright Exceptions: Overview of Issues’ (2005) 23(1) *Copyright Reporter* 4.

6 *Copyright Amendment Act 2006* (Cth) received royal assent on 11 December 2006.

7 *Copyright Act* s 200AB; see below nn 197-213 and accompanying text. The exception is titled ‘use of works and subject-matter for certain purposes’. The term ‘flexible dealing’ comes from earlier public material, eg Attorney-General’s Department, ‘Major Copyright Reforms Strike Balance’ (Media Release 088/2006).

8 See below n 22 and accompanying text.

physical material.⁹ Digitisation raises the possibility of institutions infringing copyright when they reproduce works for which copyright is owned by third parties.¹⁰ In principle, this has significant implications for digitisation practices, especially in the selection of material to digitise and make publicly available. This article examines what effects, if any, are felt in practice, drawing from empirical research about copyright and cultural institutions. The detailed description of practice is offered to help understand the operation of copyright law now and in the immediate future within this socially important sector.¹¹

The article has seven Parts after this Introduction. Part II outlines fieldwork that was undertaken into digitisation practices, including brief observations on the collections of participating institutions. Part III describes digitisation practices occurring in Australian institutions in terms of three categories: administrative digitisation (performed for internal, management purposes); on-demand digitisation (driven by requirements in other internal or external projects); and stand-alone digitisation (projects specifically aimed at creating digital repositories of collection material). While these categories overlap, the classification is helpful for understanding the forms and motivations of digitisation practices.

Parts IV to VII then consider the relevance of copyright law to digitisation. This includes considering aspects of negotiation – and exception-based compliance with copyright. Thus Part V discusses how institutions obtain and manage licences and assignments, while Part VI considers when they rely on copyright exceptions. Part VII assesses the impact of copyright on digitisation practices in public museums, galleries, libraries and archives. It considers three factors: institution size, type of collection material, and level of public access to digital content. This analysis demonstrates that copyright law's impact can be significant, particularly in relation to digitisation of audiovisual material and 'orphan works' – items for which the copyright owner cannot practically be identified or located¹² – and in relation to making digital content publicly accessible.

The article concludes that, in order to make the *Copyright Act* work on its own terms, small-scale reforms are required. Some, but not all, of these may have been achieved by the 2006 amendments, particularly through the new flexible dealing exception in s 200AB. Given the significance of this exception for the sector's immediate future, its likely significance is examined in light of the

9 Digitisation as used here is distinguished from merely transforming *catalogue* records into a digital form.

10 An institution will, prima facie, infringe copyright when it reproduces the whole or a 'substantial part' of a copyright-protected work for which it is not the copyright owner: *Copyright Act* ss 36(1), 101(1). Any doubt that the term 'reproduction' includes digitisation was removed by the *Digital Agenda Act*, which amended the principal Act to expressly state that 'reproduce' and 'copy' include digitising a pt III work or pt IV subject-matter: *Copyright Act* ss 21(1A), (6).

11 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* (6th ed, 2007) *in press* for a brief discussion of the social value of cultural institutions historically and in relation to digitisation.

12 See, eg, definition in United States Copyright Office, *Report on Orphan Works* (2006) 15.

research into digitisation practices set out earlier in the article. It is argued that flexible dealing *may* facilitate aims of the earlier Digital Agenda reforms that were not achieved, particularly those related to appropriate public accessibility of cultural collections. That said, larger questions remain about the sustainability of the existing system of copyright law and practice, including whether problems observed in the empirical research are resolvable within this system or whether more significant reform may be required.

II FIELDWORK

A Interviews

Interviews were conducted in Australia with 144 people from 38 cultural institutions and other bodies between June 2004 and August 2005.¹³ Most interviewees were staff of cultural institutions, although some worked for collecting societies and entities representing creators. The institutions ranged in size from major state and federal collections with millions of items, through to institutions with smaller or focussed collections of less than 10 000 objects. Institutions were located in major cities, particularly Melbourne, Canberra and Sydney, and regional centres.

The interviews were conducted in two stages. The first involved in-depth fieldwork at six major collecting institutions. To develop detailed understanding of each institution's digitisation and copyright experiences, interviews were conducted with a total of 94 staff, including senior managers, registrars, rights officers, curators, librarians, information technology personnel, photographers, publishers and image delivery staff.¹⁴ The second stage involved a broader range of institutions, including smaller and regional entities, to assess experience across the sector. Only one interview was conducted at each of these institutions, although it often involved multiple interviewees. The research intentionally took a sector-wide approach to the institutions because they face increasingly common issues with digital technologies.¹⁵

The semi-structured interviews concerned three main topics. The first centred on current and proposed digitisation practices, and explored the nature and size of collections, the purposes of any digitisation, and technical aspects related to equipment, storage, costs and so forth. The second topic concerned copyright management, including any impact of copyright law on digitisation (such as the choice of material or public access), roles of copyright licences, protection of the institution's own intellectual property, and institutional procedures to comply

13 Thirty four people from 26 cultural institutions and other organisations were also interviewed in London and New York during this period as part of wider research.

14 See generally 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 paper presented at the Australia and New Zealand Communication Association Conference, Christchurch, New Zealand, July 2005).

15 See, eg, Deakin University, Cultural Heritage Centre for Asia and the Pacific, *A Study into Key Needs of Collecting Institutions in the Heritage Sector* (2002); and the more recent formation of the Collections Council of Australia <<http://www.collectionscouncil.com.au>> at 13 May 2007.

with copyright and moral rights. The third related to staff opinions on copyright law, including their level of knowledge and views of the aims of copyright, perceived ease of copyright compliance, and comments on statutory exceptions.¹⁶

Interviews were a useful method for this research for two key reasons. First, because digitisation occurs across varied times and locations, discussing the practice with interviewees was more practical than observing it all. Second, interviews were more likely than questionnaires or other methods to reveal similarities and differences in the procedures and terminology used by different institutions. Each interview lasted approximately 60 minutes, and almost all were audio-recorded with written transcripts generated. Here, interviewees are referred to by randomised numbers to protect their anonymity, and identified with a letter indicating the type of institution in which they work: gallery ('G'), museum ('M'), or library ('L'). Archives, historical societies and other bodies that do not fall neatly within this classification have been classified as other ('X'). The interviews were supplemented with documentary material from many of the institutions related to matters such as licensing agreements and copyright management policies.¹⁷

The number, variety and scope of Australian interviews means we are confident they provide a comprehensive picture of digitisations practices in Australian cultural institutions. In that respect, they offer one response to the noted lack of independent empirical research in relation to digital copyright law.¹⁸

B Collections

Although there was considerable diversity in the size, age and scope of collections, four common features emerged. First, collections – whether broad or focussed – usually spanned numerous categories of subject matter protected by copyright law.¹⁹ Second, a substantial proportion of each collection was commonly protected by copyright. Among other things, this appears to be related to the duration of copyright in published materials (which was extended by an

16 The emphasis of interviews varied depending on interviewees' expertise. For example, interviews with photographers in the first stage of interviews generally focussed on technical issues, while those with rights officers considered copyright issues more closely.

17 All interviewees are thanked for their assistance. For a useful overview of contemporary social research see, eg, Clive Seale (ed), *Researching Society and Culture* (2nd ed, 2004); and for a general outline of the approach adopted in this research, see Andrew T Kenyon, *Defamation: Comparative Law and Practice* (2006) 393-401. The interviews discussed in this article involved more diverse participants than the defamation lawyers and judges involved in that project. Interviewees here had knowledge of different aspects of digitisation, and the reporting of their responses necessarily tracks their varied knowledge. While the result is not as detailed as can be achieved with a more homogenous group of interviewees, like expert defamation litigators, the reporting aims to present *comprehensive* material on each topic from the interviews; for example, it notes divergent views where they were expressed by participants, it highlights the areas of greatest concern raised in interviews, and so forth.

18 See, eg, Phillips Fox, *Digital Agenda Review: Report and Recommendations* (January 2004) [8.5] ('there has been little empirical evidence provided to the review to support any significant change to the *Digital Agenda Act*'), [8.9] ('there is a clear need for further empirical data to be collected').

19 16M, 36M, 72L, 75M, 96X, 99X, 100L, 106X, 108X, 112G, 115M, 117M, 120M, 123L, 126M, 132M, 134M, 141M, 142L.

extra 20 years from 1 January 2005),²⁰ and the fact that copyright is effectively perpetual for certain unpublished subject matter.²¹ Third, most institutions have only recently begun acquiring born-digital content, which for many institutions represents only a ‘tiny proportion’ of the collection.²² This means institutions wanting to use digital technologies often seek to digitise existing analogue collection items. Fourth, institutions tend to digitise intellectual and creative works, rather than items found in natural history collections, which means they need to consider the copyright implications of their activities.

III DIGITISATION IN CULTURAL INSTITUTIONS

Almost all the institutions involved in this research had digitised collection items. Some had large digitisation projects or were otherwise digitising routinely, while others had only digitised infrequently. These activities can be divided into three categories, which are considered in turn below:

- ‘Administrative digitisation’, in which reproductions are made for internal purposes such as collection management and documenting loans.
- ‘On-demand digitisation’, which responds to internal requests (for other institutional projects) or external requests from other entities.
- ‘Stand-alone digitisation’, in which digital repositories are created, usually for one or both of preservation and public access.

In terms of the number of institutions engaged, on-demand digitisation is the most common form. Administrative digitisation is also widespread, particularly for collections of artworks and three-dimensional objects, for which ‘record photography’ has been standard practice for many years. Stand-alone digitisation is less prevalent (although far from rare), commonly depends on external funding, and raises most clearly two issues that can be difficult to accommodate under copyright law: preservation of collection material and the public accessibility of digital collections.

A Administrative Digitisation

Institutions often digitally photograph visual artworks and three-dimensional objects for internal purposes such as record-keeping, condition reports, insurance,

20 Following amendments introduced into the *Copyright Act* by the *US Free Trade Agreement Implementation Act 2004* (Cth), copyright subsists for the life of the author plus 70 years in literary, dramatic, musical works and engravings that were published during the life of the author: *Copyright Act* s 33(2). For artistic works (excluding engravings), duration is life plus 70 years: s 33(2). For sound recordings and films, copyright subsists for 70 years after the year of first publication: ss 93, 94.

21 Where a literary, dramatic or musical work or engraving has not been published in the author’s lifetime, duration is 70 years after the year of first publication: *Copyright Act* ss 33(3), (5). This makes copyright in unpublished works effectively indefinite. A similar position exists for sound recordings and films, in which duration is linked to year of publication, not year in which the recording or film was made: ss 93, 94. In calculating the copyright term for works pre-dating the entry into force of *Copyright Act* on 1 May 1969, regard should be had to transitional provisions in pt XI of the Act.

22 36M; similar 1G, 19M, 51L, 89X, 97L, 117M.

exhibition planning and documenting preservation.²³ Often general staff, rather than professional photographers, are responsible for capturing images; in some institutions, new acquisitions are digitally photographed, even if just through a ‘point and click’ image by registration staff.²⁴ And while many digital files are only used by institutional staff, sometimes images are distributed more widely, for instance where an image of an artwork is provided to a prospective borrower.

Reproductions for administrative purposes have occurred for years with analogue cameras, but digital equipment provides some advantages.²⁵ Many institutions are improving catalogues and migrating collection records to central digital repositories, creating large databases with comprehensive curatorial and legal information, and sometimes low resolution images of collection items.²⁶ Such databases mean staff can perform many research and administrative tasks from their desks without manually inspecting records or sending requests to other departments.²⁷

Interviewees from institutions not engaged in administrative digitisation offered several reasons for this, including inadequate information management systems and lack of resources. Some interviewees – particularly from smaller institutions – said they would not capture digital images even for internal purposes without proper technological infrastructure for storage and access.²⁸ Projects to implement such infrastructure were major priorities, but consumed substantial resources.²⁹ Interviewees also reported a lack of resources for the process of digitisation itself. Smaller institutions often lacked digital cameras or scanners, or had only just purchased such equipment – commonly basic models with fewer features than in larger institutions.³⁰

While it appears common for visual artworks and objects to be digitised for administrative reasons, print-based works and audiovisual items tend to be digitised only within on-demand or stand-alone projects. The possibility of administrative use was sometimes described as a flow-on benefit of these projects, in that digital files could be repurposed and used internally.³¹ However, within these categories of copyright subject matter, there is no equivalent to

23 9M, 13M, 17M, 19M, 28M, 36M, 61L, 98G, 100L, 101L, 102G, 105G, 109X, 112G, 115M, 117M, 121M, 128G, 131G, 142L.

24 27M, 100L, 102G, 112G, 115M, 117M, 131G.

25 See, eg. Mark Williams, ‘Art Galleries, Museums, Digitised Catalogues and Copyright’ (1997) 2 *Media & Arts Law Review* 160.

26 1G, 8M, 31M, 62L, 90X, 105G, 109X, 115M, 117M, 119M, 120M, 126M, 128G, 132M, 136M, 141M.

27 One interviewee was ‘horrified’ to discover that institutional photographers spent about 20 per cent of their time assisting with images for lectures and presentations. Digitisation helped reduce this by giving staff greater autonomy to complete projects with less recourse to image delivery services: 5G. Similar comments on efficiency of digital records: 1G, 22M, 36M, 59L.

28 98G, 99X, 126M, 131G, 132M, 136M.

29 126M, 127M, 131G, 132M, 136M.

30 97L, 99X, 131G, 132M, 136M. In one institution, which lacked any photographic or scanning equipment, all requests for copies of images went to the local photographic shop, which risked loss or damage to the collection: 97L; similar 132M.

31 It appears to be reasonably common that where items are reproduced at high resolution by a technician or photographer, that digital file is then used as a template for lower resolution derivatives, including thumbnails for internal databases or the internet: 3G, 9M, 77X, 88X, 130G.

record photography. Technical issues may play a role here, particularly for audiovisual material, which is resource intensive to digitise and requires high staff expertise. And, as discussed below in Part VII, particular copyright issues for audiovisual items appear to influence differences in digitisation practices from those for literary, dramatic, musical and artistic works.

B On-Demand Digitisation

Interviewees repeatedly gave examples of digitisation being performed on-demand, whether for use in other institutional projects such as exhibitions and publications,³² or to fulfil orders from external researchers, students, media practitioners and publishers.³³ Even institutions that had not digitised regularly had some digital content created for particular purposes, such as exhibition catalogues. Being driven by other internal projects or external requests, on-demand digitisation involves varied copyright subject matter and differing file resolution. Its funding often comes from other project budgets, or fees from external entities.³⁴

C Stand-Alone Digitisation

Although stand-alone digitisation was reported less commonly than administrative or on-demand projects, creating digital repositories of collection items is nevertheless quite frequent.³⁵ Some institutions have only targeted iconic objects or discrete collections, while others have earmarked larger but logistically straightforward collections, such as small two-dimensional works that are easily scanned. These projects can be distinguished from administrative and on-demand digitisation because they are completed for the sake of holding assets in digital form, and have often been financed through initial external funding.³⁶ While the projects involve varied material, some institutions have chosen photographs as the first subject matter for digitisation. The attraction of photographs appears to relate to a number of factors, including the fact that they are information rich, readily captured using digital equipment, and (for older photographs) out of copyright.³⁷ Again, varied digital resolutions are used, from low-resolution reproduction of paper files to high-resolution photography of visual artworks.

32 8M, 13M, 19M, 27M, 31M, 49L, 50L, 69L, 88X, 98G, 101L, 102G, 103X, 105G, 112G, 115M, 141M.

33 6M, 19M, 42X, 50L, 51L, 55L, 59L, 77X, 82X, 101L, 102G, 104X, 105G, 120M, 121M, 131G, 132M, 141M, 142L.

34 In Australia, it appears rare that on-demand digitisation generates any significant income for institutions; many products are subsidised and charges for on-demand services commonly only cover production costs: 1G, 7M, 8M, 29M, 59L, 62L, 96X, 115M, 131G. Overseas, there are examples of commercial ventures surrounding digitisation: see, eg, Babette Aalberts and Annemarie Beunen, 'Exploiting Museum Images' in Ruth Towse (ed), *Copyright in the Cultural Industries* (2002), which was echoed in international interviews (above n 13). While some interviewees questioned whether this position would ever occur in Australia (eg 8M, 35M, 115M) or whether fees-for-access was consistent with public missions (eg 63L, 101L), others were contemplating future projects that might generate revenue, for instance through streamlined online image banks: eg 2G, 33M, 99X, 102G, 107X, 135L.

35 1G, 8M, 27M, 48L, 59L, 65L, 96X, 101L, 103X, 107X, 108X, 115M, 141M, 144L.

36 1G, 8M, 58L, 63L, 65L, 96X, 108X, 123L, 126M, 128G, 131G, 132M, 141M, 142L.

37 See below nn 157-159 and accompanying text.

Interviewees typically said stand-alone projects were instigated to facilitate one or both of two aims: preservation and accessibility.

1 *Preservation*

Numerous interviewees nominated preservation as a major benefit of digitisation because digital versions can reduce handling of original items, lowering risks of loss, deterioration and breakage. In some instances, this is an attractive by-product of projects conducted for other goals.³⁸ In others, preservation is the key factor driving digitisation, particularly for photographic images on fragile substrates (such as glass negatives and transparencies), old paper documents, sound recordings and films.³⁹ Conservation of the original work often continues in parallel to these projects, but obtaining archive-quality surrogates is crucial due to these objects' finite life spans and high risk of deterioration.⁴⁰ Such digitisation preserves an item's information content, even if its original embodiment cannot be sustained. As one interviewee said:

The [institution] tends to regard the principal value of collection items which are works of art or relics [as the item's] original fabric ... plus of course the provenance ... With documents, photographs, film, sound items, the principal value of the item is regarded as the information which that item conveys and carries. So if you photograph a document that's on brittle paper ... you're preserving the intellectual content and that is considered to be a valid preservation technique.⁴¹

In addition to fragility, technological obsolescence can be a key factor in digitising, particularly (but not exclusively) for sound recordings and film.⁴² As one interviewee said, with sound recordings 'concern about the formats and equipment becoming obsolete' means 'we've got no choice' but to digitise.⁴³ Film presents similar issues, with some formats so rare that only specialist institutions have appropriate playback equipment. Copying from obsolete formats responds to both preservation and access goals. While discussed separately here, there is an 'inextricable link'⁴⁴ between preservation and access: material must be preserved in order for access to be possible; and in the absence of being able to provide access (whether for copyright or other reasons) questions arise as to why institutions are collecting and preserving materials.

38 13M, 19M, 29M, 31M, 58L, 60L, 62L, 112G, 141M.

39 5G, 8M, 22M, 37X, 48L, 65L, 93X, 96X, 104X, 106X, 108X, 109X, 142L.

40 2G, 22M, 37X, 93X, 142L.

41 93X. Certain interviewees noted that some creators have strong views about the format in which works are viewed and stored. Copying works onto a different format (whether digital or otherwise) could be contrary to those intentions: eg 5G, 40X. This raises the question of whether digitisation could infringe an author's right of integrity of authorship in a work or cinematograph film: *Copyright Act* s 195AI(1). In Australia, an exception would appear to permit digitisation for preservation; the relevant section provides that 'anything done in good faith to restore or preserve a work is not, by that act alone, an infringement of the author's right of integrity': s 195AT(5). There is also a more general exception for action that was 'reasonable' in the circumstances: s 195AS(1).

42 2G, 45X, 62L, 65L, 107X, 108X, 109X, 123L, 129G, 144L.

43 109X.

44 107X; similar 2G, 65L.

2 Accessibility

Improving collection accessibility is another significant goal in stand-alone projects.⁴⁵ Digital repositories allow multiple, simultaneous access to collection items, whether via public websites or onsite terminals. This allows the collection to be inspected without direct staff supervision, and may permit public access to more of the collection than can be physically displayed. The goals of preservation and access again coincide strongly, in that popular items are often at high risk of deterioration from repeated handling.⁴⁶

These factors mean cultural institutions, particularly larger ones, increasingly operate in two spheres: as a physical building with a particular location and opening hours, and as a 'virtual' institution which is online, accessible and global.⁴⁷ Such access to virtual collections should not be thought of as being free of all restriction; consider, for example, varied rates of internet usage across Australia and internationally, and longstanding variations in the consumption of cultural material.⁴⁸ However, online material appears to be attracting substantial audiences. Rather than a minor adjunct to onsite activities, websites are being developed specifically for online visitors. Some institutional sites include searchable databases, while digital holdings can also be accessed through sites such as Picture Australia and the Collections Australia Network.⁴⁹

In addition, digital technologies appear to have amplified public expectations of accessibility, and greater public use of digital collection material prompts continued pressure to digitise.⁵⁰ For instance, one interviewee said:

I don't think anyone knew that ... digitising ... would actually *stimulate* use. There's often a misconception that if you spoon-feed people, it will satisfy them, and what it actually seems to do is create more curiosity. So the more you give people, the more they want to know.⁵¹

In addition to improving overall accessibility, digitisation enhances the usability of individual collection items. In some cases, digitised versions record greater detail than is easily perceptible in originals.⁵² Digitisation also permits users to experience collection items in ways different from the traditional. For example, one museum had digitised an old court transcript and displayed it on an interactive display that allowed patrons to view the entire document page by page, complete with inkblots.⁵³ Such digital material is a valuable addition for understanding and interpreting physical collection items.

45 3G, 5G, 19M, 27M, 31M, 45X, 48L, 51L, 59L, 63L, 100L, 115M, 128G, 142L.

46 58L, 59L, 63L, 82X, 97L, 120M.

47 This is discussed in Hudson, Kenyon and Christie, above n 11. See also Susan J Drucker and Gary Gumpert, 'Museums Without Walls' in Susan Tiefenbrun, *Law and the Arts* (1999) 51.

48 These varied patterns of consumption for cultural material have commonly been linked to class and educational distinctions among potential users of cultural institutions; see, eg, Tony Bennett, Michael Emmison and John Frow, *Accounting for Tastes: Australian Everyday Cultures* (1999).

49 See Picture Australia <<http://www.pictureaustralia.org>>; Collections Australia Network <<http://www.collectionsaustralia.net>> at 13 May 2007.

50 2G, 25M, 53L, 61L, 63L, 84X, 86X, 103X, 118M.

51 63L (emphasis added).

52 4G, 18M.

53 26M.

IV COPYRIGHT AND CULTURAL INSTITUTIONS

The research described above reveals that a great deal of digitisation is occurring in public museums, galleries, libraries and archives. It is pursued for administrative reasons that seek to allow collection management to make use of digital technologies; in response to varied internal and external requests related to exhibitions, publications, research and so forth; and in a number of stand-alone digitisation projects, which are seen to offer significant benefits in terms of preservation and access. All this activity raises concerns about copyright: copyright has assumed a position of ‘centrality’ for institution ‘activities in digital domains’.⁵⁴

A basic principle of copyright is that rights in tangible objects are separate to intangible intellectual property rights. This means acquiring collection items does not result automatically in acquiring copyright.⁵⁵ This is significant for digitisation, which necessarily involves performing the copyright owner’s exclusive rights such as reproduction, publication and communication.⁵⁶ If an institution performs one of these acts in relation to a substantial part of a work that is still protected by copyright, for which it does not own copyright, it risks infringing copyright.⁵⁷

In theory, potential infringement could be avoided by only digitising insubstantial portions of works, avoiding any breach of copyright.⁵⁸ This option, however, is rarely feasible, so in practice three alternatives are considered.

54 Pessach, above n 2. Digitisation also poses notable *logistical* issues for cultural institutions, with older catalogue information needing to be reviewed and updated, systems developed for managing access to digital files, and the durability of digital storage carefully assessed. A particular point raised by the fieldwork concerns the technical challenges of high quality digital reproduction. While record photography can be performed with relative ease by registrars or curators using hand-held cameras, much high-end digitisation requires more expensive equipment, takes literally hours of labour per image, and requires professional technicians: eg 4G, 9M, 13M, 22M, 36M, 45X, 100L, 102G, 112G. The effort required to produce high quality digital files may be instructive about doctrinal debates as to whether photographs of public domain material should receive copyright protection; see, eg, Simon Stokes, ‘Graves’ Case and Copyright in Photographs: *Bridgeman v Corel*’ in Daniel McClean and Karsten Schubert (eds), *Dear Images: Art, Copyright and Culture* (2002) 108.

55 See, eg, *Re Dickens; Dickens v Hawksley* [1935] Ch 267; *Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation* (1970) 121 CLR 154. An exception is found in s 198 of the *Copyright Act*, which relates to unpublished manuscript and artistic works transferred under a will.

56 The exclusive rights vary for different subject matter. The most basic right is the reproduction or copying right, which exists in some form for all types of subject matter: *Copyright Act* ss 31(1)(a)(i), (b)(i), 85(1)(a), 86(a), 87(a), (b), 88. Part III works have a publication right – s 31(1)(a)(ii), (b)(ii) – which has been interpreted to mean publication for the first time: *Avel v Multicoin Amusements* (1990) 171 CLR 88. Following amendments introduced by the *Digital Agenda Act*, the copyright owner has the right to communicate to the public a pt III work, sound recording, film or broadcast: ss 31(1)(a)(iv), (b)(iii), 85(1)(c), 86(c), 87(c). Other rights include: public performance and screening rights for literary dramatic and musical works (s 31(1)(a)(iii)) and sound recordings and films (ss 85(1)(b), 86(b)); re-broadcast rights for broadcasts (s 87(c)); and adaptation rights for literary, dramatic and musical works (s 31(1)(a)(vi)).

57 *Copyright Act* ss 36(1), 101(1).

58 The *Copyright Act* only applies to acts done in relation to the whole or a ‘substantial part’ of a work or subject matter: s 14. That said, case law on ‘substantial part’ reveals that even small parts of a work can be ‘substantial’ for copyright law, as this is judged on a qualitative rather than merely quantitative basis: see, eg, *Hawkes & Son (London) Ltd v Paramount Film Service* [1934] Ch 593.

First, institutions may obtain licences or assignments from the copyright owner, which is examined in Part V. Second, they may rely on statutory exceptions, which is addressed in Part VI. Third, they may target digitisation at works for which copyright has expired, which is returned to in Part VII.

One important observation from this research is that the scope of exceptions before the *Copyright Amendment Act 2006* seems to have caused a high level of reliance on individually-negotiated licences, particularly where copyright material is digitised for public access. That is, the exceptions permitted some internal, administrative activities, certain instances of preservation and replacement copying, and specified dealings for individual researchers. This left many instances requiring copyright licences or assignments. The high reliance on individually negotiated transactions had several ramifications: for instance, institutions appeared to be facing significant and growing issues about the costs of copyright compliance (such as tracking down copyright owners and recording licence information), and about orphan works. The pre-2006 system may also have operated to the disadvantage of some copyright owners, particularly where transaction costs did not translate to licensing fees. This poses questions about the continuing feasibility of the general system of specific exceptions and voluntary licences, particularly if enhanced online access is a goal of digital copyright law, and about the way new unremunerated exceptions may alter the position.

V COPYRIGHT LICENSING AND ASSIGNMENT

Two main strategies for clearing copyright emerged from the fieldwork: obtain a non-exclusive licence from a copyright owner or their representative, or obtain an assignment of copyright. Some institutions only seek non-exclusive licences,⁵⁹ while others use a combination of licences and assignments depending on the type of material and the copyright owner's preferences.⁶⁰ Exclusive licences appear to be extremely rare.⁶¹

A Non-Exclusive Licences

Interviewing institutional staff and reviewing licence documentation suggested considerable variation in the rights sought by institutions and the detail in associated paperwork. Some licences were simple one or two page documents; others were longer, incorporating features like recitals and governing law clauses. Not surprisingly, licences' legal sophistication appears related to the availability of legal advice to institutions. But it is worth noting that institutions of all sizes used documentation that did not appear to have been legally drafted or reviewed. This is one example of broader issues regarding the costs of digital copyright

59 2G, 47X, 62L, 72L, 96X, 97L, 98G, 101L, 102G, 105G, 112G, 117M, 143G.

60 8M, 9M, 13M, 17M, 34M, 80X, 86X, 94X, 99X, 106X, 123L, 126M, 141M, 142L, 144L.

61 For example, reviews of commissioning agreements revealed some instances in which the commissioning institution initially received an exclusive licence in relation to the work and, after expiry of a fixed period, was granted a non-exclusive licence.

compliance and the apparent lack of institutional resources in Australia for copyright management.⁶²

When seeking non-exclusive licences, one option is to request perpetual licences for non-commercial activities: this was seen in state-level archives through to regional galleries.⁶³ Clearly, what constitutes 'non-commercial' is contentious, particularly where licences are unremunerated. Licences described by interviewees as 'non-commercial' permitted reproduction for curatorial activities, exhibitions (including catalogues and ancillary promotional material), research and education. Some allowed digital files to be published on institutions' websites. Whether all these activities are 'non-commercial' was questioned by representatives of creators and copyright owners, who also raised concerns about the ease with which material cleared for one use can be repurposed for others.⁶⁴ The management challenge faced by institutions in controlling the re-purposing of digital files was also noted by institutional interviewees.⁶⁵

Another option is to obtain licences limited by duration or purpose, such as exhibition-specific licences. These 'focussed' non-exclusive licences were also quite common.⁶⁶ In some instances, the decision between a broad or focussed licence appears to come down to cost: if the licence is remunerated, additional rights or longer terms may be more expensive. In other instances, it reflects copyright owners' preferences. Some institutions' documentation offers owners options from a broad grant of rights to a limited, purpose-specific arrangement.⁶⁷

The fieldwork also suggested variation in the payment of licence fees, with a mixture of remunerated and non-remunerated licences used. Interviewees suggested the high volumes of images to be cleared meant fees that were not unreasonable on an individual basis become prohibitive when aggregated within one project.⁶⁸ For instance, one interviewee seeking an astronomical image for an exhibition noted that excellent material was available from a particular source, but would cost US\$400 per image and said 'we might do it once, but if you've got 3000 images in your show you can't'.⁶⁹ Another interviewee noted the copyright costs for a technology-rich exhibition came to six figures.⁷⁰

62 The contrast with the US appears to be particularly strong, but most UK institutions involved in the wider research also focussed greater resources on copyright. The Australian position appears to be changing somewhat, with more resources becoming devoted to copyright.

63 2G, 13M, 26M, 29M, 35M, 36M, 46X, 47X, 77X, 86X, 94X, 98G, 99X, 101L, 102G, 105G, 106X, 108X, 112G, 128G.

64 For instance, one interviewee described the overlap between commercial and non-commercial use as 'fuzzy': 140X. See also 137X, 139X.

65 9M, 17M, 22M; similar 45X, 59L.

66 13M, 33M, 34M, 51L, 61L, 62L, 69L, 75X, 80X, 101L, 102G, 116M, 141M.

67 13M, 34M, 77X, 86X, 101L, 106X.

68 2G, 34M, 75X, 102G, 105G, 112G, 115M, 126M, 128G. The payment of flat licence fees for accessing large commercial databases (rather than pay-per-use) was nominated by 63L as 'opening the doors' to electronic access in libraries. Not dissimilarly, 115M argued in favour of a scheme in which a flat fee would give 'blanket coverage' for certain uses of images by specified artists and designers.

69 23M.

70 115M.

It was not surprising, therefore, that many institutions regularly seek unremunerated licences, particularly for activities they see as non-commercial.⁷¹ This does not mean those licences are obtained at no cost to the institution; there remains the administrative expense of identifying and locating copyright owners or their representatives, negotiating terms, and managing licences. However, the high cost of administration combined with limited budgets means the resources dedicated to procuring licences do not necessarily translate into fees for creators and copyright owners. Interviewees reported that many copyright owners were comfortable in providing unremunerated licences to cultural institutions.⁷² This may be due to support for the institution's public interest missions, the nature of permitted activities, or a perception that indirect financial benefits will accrue to the creator. However, creator representatives argued that the financial needs of copyright owners, particularly those who seek to make a living from their work, are often overlooked in this process. For instance, one interviewee observed that while institutions would spend considerable money developing new technologies, they expected copyright aspects to be free.⁷³ Similarly, another said:

Who deserves to be paid for what? Even with something like digitising a database, you'll find that the programmer who creates the database is paid, and the person who scans the images is paid, and the person who writes the text is paid. So you have to say, well, why isn't the artist paid? Particularly when those databases are used for either direct or indirect commercial purposes.⁷⁴

This appears to relate in part to public funding – some of which reportedly overlooks the need for copyright licensing or funding copyright compliance costs. As one institutional interviewee commented:

I think one of the greatest problems ... is the government's understanding of the match between their legislation and the means for people to actually abide by it ... [W]hen it comes to funding organisations, they ... do not understand the necessity to fund the copyright budget ... They will ask 'why is this in here?'⁷⁵

B Assignment

Although assignment would be a significant step for some copyright owners, the value in this strategy, as well as licensing, becomes apparent once the great diversity of material in cultural collections is remembered. For example, the sector includes social history collections with many utilitarian objects made by people who do not consider themselves artistic or literary creators, as well as books, films and visual artworks created by those seeking at least some recognition and income for their endeavours.

Numerous institutions request, or offer the option of, an assignment of copyright. However, in the fieldwork, none of these institutions were galleries; instead they included libraries, museums and archives of all sizes and locations.⁷⁶

71 46X, 69L, 75X, 98G, 99X, 101L, 102G, 106X, 108X, 112G, 115M, 117M, 128G, 143G.

72 17M, 25M, 87X, 98G, 102G, 128G, 143G.

73 137X.

74 140X.

75 2G.

76 Some of the non-gallery institutions that offered both assignments and licences had small collections of visual art.

This may relate to the different types of items likely to be within their collections and their relationships with creators and copyright owners. For instance, interviewees from galleries holding 20th century and contemporary art repeatedly referred to ongoing relationships with artists, estates and collecting agencies. These interviewees suggested that copyright amounted to the legal aspect of broader professional obligations to consult with artists about institutional activities.⁷⁷ They also noted that dialogue was important to ensure moral rights of attribution and integrity were respected.⁷⁸ Indeed, one interviewee suggested:

I actually don't think [copyright will] ever be a ... major economic instrument for a visual artist, but what it does do is to ensure that there is a mechanism in place whereby things like moral rights can be engaged. Because without copyright law, moral rights would probably be 'legless'.⁷⁹

In contrast, interviewees managing other types of collection – particularly those with a social history orientation – reported copyright owners being comfortable with transferring copyright where they saw no benefit in retention and did not want to be informed of, or control, future institutional use of the material.⁸⁰ For example, one interviewee described a media organisation that donated a large photographic collection. That donor – which apparently had a good legal understanding of its position – was willing to assign copyright along with transferring physical ownership because, as the interviewee put it, 'they didn't want to know about' the photographs anymore.⁸¹ For institutions, assignments offer obvious administrative benefits: they provide a simple structure for collection management and remove uncertainties caused by licences, particularly project-specific or fixed term permissions.⁸²

Real questions arise about the ability of some copyright owners to negotiate with institutions over copyright and to assign or licence rights on an informed basis. Interviewees said some copyright owners had little or no knowledge of copyright law, meaning institutional staff had to spend substantial time explaining copyright documentation to them. The possibility of coercion by institutions was also raised by representatives of copyright owners; for instance, one stated:

there's a whole range of experience and some of it's good, but a lot of it isn't ... and artists are often placed in a very difficult position ... where there will be some implication that if they're willing to trade off their economic rights, then they'll get ... better attention by the institution. At its worst, the institution can threaten them that if they don't, they'll be buried in a dungeon, so there are quite a lot of power games going on.⁸³

77 1G, 2G, 98G, 102G, 112G, 128G, 143G. 112G noted that a licence agreement is 'also helpful in letting the artist know how their work is going to be used. So I think even if it's not covered by copyright law, we have a professional obligation to artists to let them know what context their image is actually going to appear in'.

78 2G, 5G, 98G, 102G, 105G, 112G, 128G, 143G.

79 5G.

80 17M, 80X, 123L, 142L, 144L.

81 144L.

82 8M, 13M, 34M, 143M.

83 140X.

This highlights the vital importance of having copyright resources and support services available to creators – particularly those seeking recognition and income from their work – such as the services provided by the Arts Law Centre of Australia, and the Australian Copyright Council.⁸⁴

VI COPYRIGHT EXCEPTIONS

Licences or assignments are not required for all acts of digitisation; some institutional activities can be performed, without payment and without permission from copyright owners, under exceptions in the *Copyright Act*. Two sets of exceptions have been particularly relevant: fair dealing⁸⁵ and the ‘libraries and archives’ provisions.⁸⁶ Neither adopts a free-floating approach.⁸⁷ Instead, both are limited by the purpose of the dealing and, for the libraries and archives provisions, often depend on certain conditions and record-keeping requirements being met. In this Part, the fair dealing and libraries and archives provisions are discussed in turn. The most relevant aspects of the 2006 statutory reforms are discussed in Part VIII; among other things, they supplement existing exceptions with ‘flexible dealing’ and make some technical amendments to the libraries and archives provisions.

A Fair Dealing

In Australia, fair dealing is distributed across 10 sections in the *Copyright Act*, covering dealings for the purposes of research or study,⁸⁸ criticism or review,⁸⁹ reporting news,⁹⁰ giving professional legal advice,⁹¹ and – following the *Copyright Amendment Act 2006* – parody and satire.⁹² These prescribed purposes are exhaustive. A defence of fair dealing will not arise for dealings outside their ambit, regardless of how ‘fair’ such activities are.⁹³

84 See Arts Law Centre of Australia Online, <<http://www.artslaw.com.au>>; and the Australian Copyright Council ‘s Online Information Centre, <<http://www.copyright.org.au>> at 13 April 2007. Other relevant bodies include the National Association for the Visual Arts and copyright collecting societies.

85 *Copyright Act* ss 40–42, 43(2), 103A–103C.

86 *Copyright Act* ss 48–53, 110A, 110B. A third set of exceptions, which will not be considered in this article, allows certain dealings with sculptures and works of artistic craftsmanship works located in public places: ss 65–73. For a discussion, see, eg, Emily Hudson and Andrew T Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitisation* (2005) 62–63.

87 Cf *Copyright Act of 1976* (US) §107 (fair use). For a consideration of fair use in the context of digitization by museums, see Pessach, above n 2.

88 *Copyright Act* ss 40, 103C.

89 *Copyright Act* ss 41, 103A.

90 *Copyright Act* ss 42, 103B.

91 *Copyright Act* ss 43(2), 104(b), (c).

92 *Copyright Act* ss 41A, 103AA, added by the *Copyright Amendment Act 2006* (Cth) subsequent to the interviews. The amendment to permit parody and satire appears welcome in the light of litigation such as *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273; 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.

93 See, eg, *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 262.

Most interviewees who were directly asked about their familiarity with the fair dealing exceptions reported limited knowledge of their scope and application in the sector.⁹⁴ Many were able to recall a '10 per cent rule', or identified fair dealing as relevant to research and study.⁹⁵ A smaller group said fair dealing permitted *reasonable* uses of copyright works, such as non-commercial private activity, but did not refer to its purpose-based application.⁹⁶ A few thought it encapsulated a *due diligence* exception, in which certain dealings were permissible if reasonable efforts had been made to locate the copyright owner or a second-hand copy of a work.⁹⁷

Interviewees with greater knowledge of the provisions reported their relevance to institutions in two aspects: research and study being undertaken by patrons and staff,⁹⁸ and, through the criticism and review exception, some institutional lectures, public programs and publications.⁹⁹ Thus, fair dealing appears to have a *limited* scope of application for institutions, but it has some importance within that scope.

This result was expected due to two characteristics of fair dealing. First, as noted above, situations in which the exception applies are set out exhaustively in the legislation. They have been interpreted in Australia by reference to dictionary definitions of terms such as 'research', 'study', 'criticism' and 'review'.¹⁰⁰ Although there is some authority that these terms should be interpreted liberally,¹⁰¹ questions remain as to whether this has occurred in practice.¹⁰² Second, it has been held in English and Australian law that the relevant purpose when considering fair dealing is that of the alleged infringer.¹⁰³ Under this approach, institutions cannot defend copyright infringement claims by showing that, for instance, patrons who received educational materials reproduced by the institution required them for their own research. This can be contrasted with a decision of the Canadian Supreme Court which held that a photocopying service provided by a non-profit library for legal professionals was protected by fair dealing:

[A]lthough the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process.¹⁰⁴

94 Interviewees who had not heard of fair dealing, or were unable to provide any substantive detail of its contents, included 3G, 4G, 13M, 43X, 45X, 50L, 88X, 95X, 141M, 144L.

95 8M, 22M, 23M, 25M, 28M, 42X, 49L, 58L, 59L, 61L, 72L.

96 24M, 35M, 62L, 103X.

97 7M, 48L.

98 2G, 33M, 55L, 65L, 97L, 112G, 142L.

99 2G, 34M, 38X, 46X, 47X, 102G, 112G, 128G.

100 See, eg, *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 297-300.

101 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, 380-381 (Conti J).

102 See, eg, de Zwart, above n 92; Handler and Rolph, above n 92.

103 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.

104 *CCH Canadian Ltd v Law Society of Canada* (2004) 236 DLR (4th) 395, 424. The Supreme Court did not cite the *De Garis* or *Sillitoe* cases: *ibid*.

This more expansive Canadian approach to fair dealing for research or study has not yet been applied or rejected in Australia.¹⁰⁵

B Libraries and Archives Provisions

The general non-applicability of fair dealing to digitisation activities by cultural institutions increases the significance of the libraries and archives provisions. They have transformed from an original focus on library photocopying, to encompass more varied collections and activities. This has seen their relevance to public museums and galleries increase greatly over time.

1 History and Development

The libraries and archives provisions can be traced to photocopying developments in the 1950s and 1960s. Before then, print-based works could generally only be copied laboriously.¹⁰⁶ However, changes in electrographic technology made photocopiers readily available in workplaces and libraries, allowing the production of quality, inexpensive copies.¹⁰⁷ This development generated anxiety for copyright owners and publishers, who feared that libraries were directly competing in their markets through providing photocopying services and facilities. Librarians also felt exposed to liability, but argued that such dealings were important for research and the dissemination of knowledge.¹⁰⁸ While doctrines such as fair dealing and fair use were theoretically available, with no direct authority on point, the ambit of any relevant exception was a matter for debate.¹⁰⁹

105 But for an earlier argument that Australia's fair dealing exception for research or study should be treated more widely in this way, see Patricia Loughlan, *Intellectual Property: Creative and Marketing Rights* (1998) 62-63. See also Sam Ricketson and Megan Richardson, *Intellectual Property: Cases, Materials and Commentary* (3rd ed, 2005) 438 referring to Copyright Law Committee on Reprographic Reproduction (Franki Committee), *Report of the Copyright Law Committee on Reprographic Reproduction* (1976) [2.64] ('Franki Report'); 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].

106 United Kingdom, Committee to Consider the Law on Copyright and Designs (Whitford Committee), *Copyright and Designs Law: Report of the Committee to Consider the Law on Copyright and Designs*, Cmnd 6732 (1977) 54 [204].

107 See, eg, Franki Report, above n 105, 9.

108 For example, the Gregory Committee, in a mid-20th century UK review, noted that 'on the one hand [librarians] feel it a duty to be of all possible assistance to serious workers using their libraries; on the other they fear that in doing so they are being parties to what may be held in the Courts to be an infringement of copyright': United Kingdom, Copyright Committee (Gregory Committee), *Report of the Copyright Committee*, Cmd 8662 (1952) [43]-[53]. See also Benjamin Kaplan, *An Unhurried View of Copyright* (1967) 102.

109 See, eg, Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' (1970) 84 *Harvard Law Review* 281, 329-30. The first relevant decision regarding library photocopying and fair use was *Williams & Wilkins Company v US*, 487 F 2d 1345 (1973).

The solution adopted in a number of countries was to introduce unremunerated copyright exceptions directed specifically at libraries.¹¹⁰ In Australia, such provisions were first included in the *Copyright Act*, at the recommendation of the Spicer Report of 1959.¹¹¹ The original provisions covered three areas: copying articles and published works for students and parliamentarians,¹¹² copying such works for supply to another library,¹¹³ and copying old, unpublished works for the purpose of research or with a view to publication.¹¹⁴ The provisions only applied to ‘libraries’, a term not defined in the *Copyright Act*. Since then, the libraries provisions have undergone a series of revisions. The *Copyright Amendment Act 1980* (Cth) amended existing exceptions, added new ones for preservation and replacement copying, and extended the reach of the provisions to ‘archives’, following recommendations in the Franki Report of October 1976.¹¹⁵ Provisions about reproducing sound and audiovisual items were introduced by the *Copyright Amendment Act 1986* (Cth).¹¹⁶ The next major amendment of the libraries and archives provisions was the *Digital Agenda Act* in 2000, when it was clarified that the term ‘archives’ includes public museums and galleries,¹¹⁷ an exception for administrative uses for Part III works added,¹¹⁸ and other amendments made in the light of digital communications.¹¹⁹ The latest reforms are those in the *Copyright Amendment Act 2006*, discussed below in Part VIII.

110 For example, libraries provisions were included in the *Copyright Act 1956* (UK) at the recommendation of the Gregory Committee: above n 108. Since then, the provisions have been amended, survived a recommendation for abolition by the Whitford Committee, above n 106, and were included – in extended form – in the *Copyright, Designs and Patents Act 1988* (UK). In the US, libraries provisions were included in § 108 of the *Copyright Act of 1976* (US): see eg Melville B Nimmer and David Nimmer, *Nimmer on Copyright* (Volume 2) (2003) §8.03; William F Patry, *The Fair Use Privilege in Copyright Law* (1985) ch 13; Roberta Rosenthal Kwall, ‘Library Reproduction Rights for Preservation and Replacement in the Digital Era: An Author’s Perspective on § 108’ (2006) 29 *Columbia Journal of Law and the Arts* 343.

111 Australia, 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) [129]-[151].

112 *Copyright Act* s 49 (reprinted as at 19 December 1973).

113 *Copyright Act* s 50.

114 *Copyright Act* ss 51, 52.

115 Franki Report, above n 105, [5.04] (preservation copying), [5.10] (replacement copying). No reasons were given for the recommendation to extend the existing provisions to ‘archives’, nor any definition given of the bodies to which that term refers: [3.34], [4.21].

116 *Copyright Amendment Act 1986* (Cth) s 12 (introducing new s 110A and 110B into the *Copyright Act*). Another notable development from the Franki Committee was the introduction of a statutory licence for educational copying, see, eg, Leanne Wiseman, ‘Beyond the Photocopier: Copyright and Publishing in Australia’ (2002) 7 *Media & Arts Law Review* 299.

117 Some commentary suggests the UK library and archive provisions should be extended to cultural institutions due to the similar social role played by public museums, galleries, libraries and archives: Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (2005) 137.

118 *Copyright Act* s 51A(2), (3).

119 For an overview of the post-2000 provisions, see Anne Fitzgerald and Brian Fitzgerald, *Intellectual Property in Principle* (2004) 179-182; for more detailed analyses see Ian McDonald, *A Comparative Study of Library Provisions from Photocopying to Digital Communication* (2001); Australia, Copyright Law Review Committee, *Copyright and Contract* (2002) 41-64.

The research confirmed the complexity of the libraries and archives provisions, and emphasised the varying degree to which they accommodate standard cultural institution practice. The history of the provisions may help explain the ‘unhappy and uneven ground’ that they currently occupy.¹²⁰ That is, given that the existing provisions appear to have ‘developed by legislative accretion ... it is not surprising that this process has produced a somewhat ad hoc, particularised and inconsistent set of provisions’.¹²¹ On paper at least, the new flexible dealing exception represents a significant departure from the existing suite of purpose-specific exceptions.

2 *Institutions Covered by the Provisions*

The term ‘library’ has never been defined in the *Copyright Act*. As noted by Ricketson, the ‘traditional’ meaning is ‘a collection of books, journals and other printed materials maintained for the purposes of consultation by users (the advent of the “electronic library” obviously extends this traditional conception)’.¹²² There has not been any exclusion that prevents for-profit libraries and those operated by business from taking the benefit of the libraries and archives provisions, although two important provisions have previously excluded libraries that are conducted for the profit, direct or indirect, of an individual or individuals.¹²³ After the 2006 reforms, only libraries that have collections accessible, in whole or part, to the public directly or through inter-library loans can take the benefit of the provisions.¹²⁴

The term ‘archives’ is defined in the *Copyright Act*. This definition has two components. First, the term ‘archives’ refers to archival material in the custody of four listed institutions, all of which are ‘archives’ in the common usage of that term.¹²⁵ Second, there is a more general definition that encompasses a broader range of cultural institutions, including museums and galleries.¹²⁶ Where a body holds ‘a collection of documents or other material of historical significance of public interest ... for the purpose of conserving and preserving those documents

120 Hudson, Kenyon and Christie, above n 11.

121 Ibid. For discussion of the process of legislative drafting in the US context, see Jessica Litman, ‘Copyright, Compromise and Legislative History’ (1987) 72 *Cornell Law Review* 857; Jessica Litman, ‘Copyright Legislation and Technological Change’ (1989) 68 *Oregon Law Review* 275.

122 Staniforth Ricketson, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (1999) [11.245].

123 *Copyright Act* ss 49(9), 50(9). Section 49 allows libraries and archives to reproduce and communicate articles and published works in response to user requests, while s 50 relates to the reproduction and communication of such items under the inter-library loan scheme. There is no case law on the meaning of ‘conducted for profit’ in this context, although s 18 provides that ‘a library shall not be taken to be established or conducted for profit by reason only that the library is owned by a person carrying on business for profit’. See also Phillips Fox, above n 18, [14.1]-[14.15].

124 *Copyright Act* ss 49(9), 50(10).

125 *Copyright Act* s 10(1). The four institutions are the Australian Archives, the Archives Office of New South Wales, the Victorian Public Record Office and the Archives Office of Tasmania.

126 *Copyright Act* ss 10(1), 10(4). In 2000, a note was added to s 10(4) as follows: ‘Example: Museums and galleries are examples of bodies that could have collections covered by paragraph (b) of the definition of archives’. The Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 [21] stated: ‘It is intended that major collecting institutions, such as the National Gallery of Australia, be included, but not private commercial galleries’.

or other material' and the body 'does not maintain and operate the collection for the purpose of deriving a profit', the collection falls within the definition of archives.¹²⁷

3 *Activities Permitted Under the Provisions*

Activities permitted under the libraries and archives provisions can be divided into six categories related to: user requests and inter-library loans; researcher exceptions; publication; preservation; replacement; and administrative purposes.

User requests and inter-library loans: Many institutions provide photocopying and image delivery services for third parties. Where a request is received from a user or another cultural institution, and the requested material is either a published work or an article from a periodical, it may be possible to fulfil the request without obtaining permission from the copyright owner under ss 49 or 50.¹²⁸ There are four notable limits on the operation of these provisions. First, for user requests, the reproduction must be required for the purpose of research or study;¹²⁹ and for institutional requests, the reproduction must be needed for inclusion in the institution's collection, or for supply to a patron under s 49.¹³⁰ Second, 'commercial availability declarations' are often required where the whole or greater than a 'reasonable portion'¹³¹ of a work or article is requested.¹³² Third, fees are permitted, however these may only represent cost-recovery if ss 49 or 50 are to be invoked.¹³³ Fourth, it is possible to supply the reproduction in electronic form, however special notification must be provided to users,¹³⁴ and the institution must destroy any electronic reproduction that remains in its possession.¹³⁵

Researcher exceptions: The libraries and archives provisions contain exceptions that permit certain reproductions when made by, or on behalf of, researchers. Thus ss 51(1) and 110A allow certain old,¹³⁶ unpublished works,

¹²⁷ *Copyright Act* s 10(4).

¹²⁸ Section 49 is directed to patron requests, while s 50 relates to the 'inter-library loan' system.

¹²⁹ *Copyright Act* s 49(1). The user must make a signed declaration in relation to the purpose of the request, and other matters: *Copyright Act* s 49(1)(b). The requirement that the request and declaration be made in writing may be dispensed with for urgent requests made by remote users: *Copyright Act* s 49(2A).

¹³⁰ *Copyright Act* s 50(1)(a), (b).

¹³¹ *Copyright Act* ss 10(2), 10(2A).

¹³² *Copyright Act* ss 49(5), 49(5AA), 49(5AB), 50(7A), 50(7B), 50(7BA), 50(7BB). The precise wording varies between these sections, but in essence provides for situations where, following reasonable investigation, an authorised officer is satisfied that an unused copy is not available in a reasonable time at an ordinary commercial price.

¹³³ *Copyright Act* ss 49(3), 50(6).

¹³⁴ *Copyright Act* s 49(7A)(c).

¹³⁵ *Copyright Act* s 49(7A)(d).

¹³⁶ Fifty years must have passed since the author died (for Part III works) or the sound recording or film was made: *Copyright Act* ss 51(1), 110A.

sound recordings and films held in publicly accessible collections¹³⁷ to be reproduced and communicated for the purpose of research or study. Section 51(2) also permits the reproduction of an unpublished thesis for someone who requires it for research or study. And ss 51A(1) and 110B allow original artistic works, manuscripts, sound recordings held ‘in the form of a first record’ and films held ‘in the form of a first film’ to be reproduced and communicated for the purpose of research ‘at’ the library or archive, or another library or archive. The use of the word ‘at’ may suggest that while the reproduction can be *accessed* by an external researcher, if they wish to take it offsite, they would need to rely on another exception.¹³⁸

Publication: s 52 permits certain old, unpublished works,¹³⁹ for which the copyright owner is not known, to be incorporated into new, published works, without infringing copyright. In order to rely on s 52, a prescribed notice must be published in the Commonwealth Gazette, as well complying with other stipulated conditions.¹⁴⁰

Preservation: Preservation copying provisions allow the reproduction of certain collection items for the purpose of preserving those items against loss or deterioration. The items covered are: works held in manuscript form; ‘an original’ artistic work;¹⁴¹ sound recordings held in the form of a ‘first record’ and films held as a ‘first film’.¹⁴² The terms ‘first record’ and ‘first film’ are not separately defined in the *Copyright Act*, and interviewees indicated that they are not terms of art within the industry. However, other provisions of the *Copyright Act* suggest they refer to the first embodiment of a sound recording or film.¹⁴³ These preservation provisions have been supplemented in the 2006 reforms with sections applying to preservation copying by ‘key cultural institutions’.¹⁴⁴

Replacement: The replacement copying provisions apply where a *published* work, sound recording or film that is, or has been, in the collection of a library or

137 The work, or a reproduction, record or copy of it, must be ‘kept in the collection of a library or archives where it is, subject to any regulations governing that collection, accessible to the public’: *Copyright Act* ss 51(1), 110A. The phrase ‘accessible to the public’ is not defined; it may well refer to items that can be accessed *upon request*, in addition to those that are on display: see Hudson and Kenyon, *Guidelines for Digitisation*, above n 86, 80.

138 See Staniforth Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (1999) [11.320].

139 The definition of ‘old, unpublished work’ is per the *Copyright Act* s 51(1), described above.

140 The prescribed notice is contained in the *Copyright Regulations 1969* (Cth) r 5.

141 *Copyright Act* s 51A(1)(a). The phrase ‘an original artistic work’ probably refers to works as originally created by the artist: Hudson and Kenyon, *Guidelines for Digitisation*, above n 86, 82. A liberal interpretation would presumably include prints, photographs, and other works created as editions (whether sequentially numbered or not). The application of the provision to born-digital artistic works may be more difficult.

142 *Copyright Act* ss 110B(1)(a), (2)(a).

143 See *Copyright Act* s 22. That provision provides, among other things, that ‘a sound recording, other than a sound recording of a live performance, shall be deemed to have been made at the time when the first record embodying the recording was produced’: *Copyright Act* s 22(3)(a); and that ‘a reference to the making of a cinematograph film shall be read as a reference to the doing of the things necessary for the production of the first copy of the film’: *Copyright Act* s 22(4)(a).

144 See below Part VIII.

archive has *already* deteriorated, or been damaged, lost or stolen.¹⁴⁵ A commercial availability declaration is required.¹⁴⁶

Administrative purposes: s 51A(2) of the *Copyright Act* provides:

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.

This provision was introduced by the *Digital Agenda Act*, with no elaboration in the second reading speech or explanatory memorandum as to the meaning of ‘administrative purposes’ or the reasons for its introduction. As discussed below, the *Copyright Amendment Act 2006* introduced a simple definition for the term.¹⁴⁷ However, that definitional clarification does not address a key finding of this research: while important activity in cultural institutions is protected by the administrative purposes provision, the limited application of the provision – particularly its restriction to copyright *works* rather than other subject-matter – appears anomalous.

VII COPYRIGHT LAW’S IMPACT ON DIGITISATION

In Parts III to VI, above, digitisation practices of Australian cultural institutions have been grouped into three categories – administrative, on-demand and stand-alone digitisation – and provisions of copyright law have been discussed, with particular attention given to the use of licences and assignments in the cultural institution sector, and the content of relevant copyright exceptions. Table 1 summarises the main findings arising from these Parts in terms of the category of digitisation, typical subject matter involved for that digitisation, institutions that engage in that digitisation, copyright exceptions that could apply – before the 2006 amendments which are examined in Part VIII – and the reported impact of copyright law on the activity.

Table 1: *Copyright and digitisation practices in Australian cultural institutions*

Category of digitisation	Typical subject matter	Institutions	Relevant copyright exceptions	Reported impact of copyright
Administrative digitisation	‘Record photography’ is particularly common for artistic works and three-dimensional objects. For other materials, digital files made for	More prevalent in larger and established institutions. Smaller institutions report a lack of information technology	Administrative purposes for Part III works, s 51A(2), (3). Note: institutions do not appear to treat differently permanent and loaned items, but a	Very low for Part III works. A licence is required for Part IV subject-matter other than works.

¹⁴⁵ *Copyright Act* ss 51A(1)(b), (c), 110B(1)(b), (c), (2)(b), (c).

¹⁴⁶ *Copyright Act* ss 51A(4), 110B(3).

¹⁴⁷ See below nn 219-221 and accompanying text.

	other purposes may be reconfigured for administrative use.	systems to store and access digital files.	distinction appears to be made in the exception.	
On-demand digitisation that is internally driven by other institutional projects such as exhibitions and publications	Ranges across copyright subject matter.	Present throughout the sector, although for smaller institutions, the quantity of digital files is often small.	For some uses, fair dealing for the purposes of criticism or review, ss 41, 103A.	High impact where material is to be made available to the public.
On-demand digitisation that responds to external requests	Ranges across copyright subject matter.	Present throughout the sector, although more common in library and reference collections.	Provisions allowing the reproduction of materials for users, s 49; researchers, ss 51, 51A, 110B; and under the inter-library loan system, s 50.	If the item is protected by copyright, and no exceptions apply, institutions often place the onus of obtaining clearances on the requestor.
Stand-alone digitisation, where access is a key goal	More prevalent for items that are information rich, iconic or easy to digitise. Photographs are particularly common.	More prevalent in larger and established institutions.	Fair dealing exception of limited relevance. In general, licence or assignment required.	High impact on the selection of material to digitise, and on the selection of material to make publicly available.
Stand-alone digitisation, where preservation is a key goal	Ranges throughout copyright subject matter; more common for fragile items at high risk of degradation, or those in high demand.	More prevalent in larger and established institutions.	Exceptions allowing preservation copying of manuscripts and original artistic works, s 51A(1)(a); and sound recordings and films held as 'first record' or 'first film', s 110B(1)(a), (2)(a).	Very low impact for items covered by the exceptions. For all other items, there is a high impact, as licence or assignment is required.

In light of these findings about digitisation practices and copyright law, this Part examines the impact of copyright on digitisation using three measures:

- size of the institution that is digitising collection items (as indicated by funding and number of permanent staff);

- type of copyright material being digitised; and
- level of public access to digitised materials.

This analysis suggests that copyright law has a considerable impact on digitisation practices across the sector, including in the selection of material to digitise and the public accessibility of digital content.

A Large and Small Institutions

The research investigated what differences, if any, are apparent in the copyright experiences of state and national collecting institutions, when compared with smaller and regional institutions. It was observed that the copyright issues faced by institutions tend to relate to the nature of their collections and the purposes of digitisation, rather than the institution's size. However, there appear to be considerable differences in institutions' ability to respond to those issues, with smaller institutions having fewer resources to dedicate to copyright compliance, and larger institutions facing difficulties in the ongoing management of copyright budgets and licences.

Although the relevance of copyright law to the activities of cultural institutions has long been recognised,¹⁴⁸ the digital environment has seen it assume unprecedented prominence in collection management and use. As seen in Part III, digital technologies are changing how cultural institutions operate. Institutions are 'hungry'¹⁴⁹ for digitised content, as are many of their patrons, who 'are telling [the institutions] they don't just want the catalogue entry and opening hours [online], they want "the stuff"'.¹⁵⁰ Technological changes have also been accompanied by growing awareness of copyright law, certainly within institutions, copyright owners and at least some creators, and perhaps among the general public. These changes have meant the sector is directing greater resources into copyright compliance than in earlier periods.

In large institutions, this has commonly involved employing copyright and rights management officers whose main or sole responsibility is administering copyright. Some institutions also have internal copyright interest groups in which copyright issues can be discussed and management strategies devised. This level of copyright engagement is not generally observed in smaller institutions, where staff with responsibility for copyright must handle it as part of a broad portfolio of responsibilities. Staff at smaller institutions repeatedly referred to the difficulties in finding time to understand copyright law, which they viewed as 'incredibly complicated and continually changing'.¹⁵¹ That said, concern at the complexity of the law recurred in interviews throughout the sector,¹⁵² with

148 See, eg, *Williams & Wilkins Company v United States*, 487 F 2d 1345 (Ct Cl, 1973), affirmed by an equally divided court, 420 US 376 (1975); *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

149 7M.

150 82X.

151 98G; similar 99X, 126M, 127M, 132M, 136M, 144L.

152 2G, 8M, 13M, 19M, 35M, 36M, 50L, 58L, 62L, 72L, 89X, 93X, 106X, 107X, 108X, 112G, 118M, 128G,

interviewees describing copyright as ‘an absolute minefield’¹⁵³ and ‘a big headache’,¹⁵⁴ and that understanding the law is ‘like learning another language’.¹⁵⁵ In addition, the lack of specialist copyright training was common throughout the sector, with few staff – even rights officers in large institutions – having a law degree.¹⁵⁶

B Different Types of Collections

Across institutions, it appeared that copyright had the lowest impact on the digitisation of old photographs, visual art, and contemporary published literary materials. In contrast, it had the greatest impact on audiovisual items and sound recordings, as well as orphan works. This trend occurred throughout the sector but particularly in social history collections. Each of these categories is considered below.

1 Photographs

In many institutions, photographs represent by far the largest subject matter for stand-alone digitisation projects. The attraction of photographs appears related to a number of factors, including that they are information rich,¹⁵⁷ readily captured using digital scanning equipment, and, for photographs taken prior to 1 January 1955, no longer in copyright.¹⁵⁸ Amendment to the *Copyright Act* following the US-Australia free trade agreement will reduce the flow of photographs into the public domain,¹⁵⁹ and may therefore reduce the attractiveness of photographs for future digitisation. The position of photographs acquired for social history collections – many of which are taken by anonymous private individuals – is important to note here. In those collections, many items constitute orphan works, which are discussed below, and copyright issues may become very relevant to the decision of whether to digitise.

2 Visual Art

Interviewees overseeing visual art collections reported that copyright law had not generally prevented them from digitising.¹⁶⁰ This appears to be a result of a number of factors that make licensing more feasible when compared with other collections, including fewer and more iconic works, the existence of detailed files

153 50L.

154 118M.

155 72L.

156 This contrasted with interviewees from major institutions in the US (above n 13) where it was common for teams of in-house lawyers to handle intellectual property issues.

157 As one interviewee put it, a photograph ‘has its own meaning and its own context, it’s not the 10th page of a manuscript which doesn’t have meaning out of context’: 101L.

158 See, eg, Hudson and Kenyon, *Guidelines for Digitisation*, above n 86, 30-32.

159 The current rule is that copyright subsists in photographs for the life of the photographer plus seventy years: *Copyright Act* s 33(2). The former rule for pre-commencement photographs (ie, those taken before the *Copyright Act* came into force on 1 May 1969) was that copyright subsists for 50 years after the year in which the photograph was taken: *Copyright Act* s 212, repealed by the *US Free Trade Agreement Implementation Act 2004* (Cth) sch 9 para 116, with effect from 1 January 2005.

160 1G, 3G, 102G, 105G, 112G, 128G, 131G, 143G.

setting out provenance information, the presence of collecting societies for the sector, and the ongoing relationship many galleries have with artists and their estates. Indeed, interviewees saw the institution-artist relationship as of paramount importance, and said that compliance with copyright demonstrated respect for the artist's integrity and economic interests – interests which are rightly recognised by copyright law.¹⁶¹

While copyright has not generally prevented digitisation, it has affected, sometimes to a significant degree, the process. As with other collections, the logistical issues surrounding copyright have 'really slowed ... down' digitisation.¹⁶² These issues relate to the resources and time spent, for example: developing and revising licence documentation; identifying and locating copyright owners; negotiating and re-negotiating licences; and developing information technology systems to store copyright information.¹⁶³ The difficulties of keeping track of artists (particularly where contact details are not kept up-to-date) was mentioned by a number of interviewees. In this regard, while orphan works appear to be less common when compared with other collections, they can have a substantial impact on digitisation where they do arise, as discussed below.

3 *Contemporary Published Literary Materials*

The impact of copyright on digitisation of contemporary books and periodicals appears to be comparatively low because of the established systems for reproducing such works in analogue format under long-standing exceptions in the *Copyright Act*.¹⁶⁴ Complying with these exceptions is clearly resource intensive, and includes numerous record-keeping requirements.¹⁶⁵ However, copyright compliance for digitisation is, in practice, almost equivalent to the steps for analogue reproduction, meaning that librarians are experienced in administering these forms and complying with the *Copyright Act*. Where a proposed use falls outside the ambit of an exception, negotiation for a licence may be possible, as contact details for the copyright owner or publisher are often readily available or ascertainable. As discussed further below, the position is different for older published materials which may, over time, develop the status of orphan works.

4 *Audiovisual Items*

Our research suggests many more digitisation efforts have been directed to artistic and print-based collections than sound and audiovisual materials. In part, this follows from technological and logistical factors, such as equipment cost, the need for highly-trained staff, and storage costs for sound and moving image

161 5G, 98G, 102G, 105G, 112G, 128G, 130G, 133G, 134G and see above nn 78-79 and accompanying text.

162 5G.

163 2G, 5G, 98G, 102G, 112G, 128G, 131G.

164 *Copyright Act* ss 49 (user requests), 50 (inter-library loans).

165 The declarations system, and requirements for retaining records, were introduced to allow copyright owners to verify the activities of cultural institutions. However, interviewees reported only rare instances of owners availing themselves of this opportunity. Further, while an established part of library practice, compliance with the system was reported to be 'tying us all up in knots': 55L; similar 54L, 62L, 97L.

files.¹⁶⁶ As technological capabilities increase, this position is changing. For example, sound recordings (particularly oral history) are an increasingly common target of current and planned digitisation projects.¹⁶⁷ However, it also appears that copyright plays a greater role in the digitisation of sound and moving image than other collections for at least three reasons.

First, there is a clear asymmetry between existing copyright exceptions relevant to Part III works and Part IV subject-matter.¹⁶⁸ Licences are required for dealings that would be permitted if they were performed with print-based or artistic material, such as copying a sound recording for internal, administrative purposes. Second, there are limitations in the operation of the existing exceptions. For instance, the general preservation copying provisions only apply where a sound recording or film is held in the form of a 'first record' or 'first film', terms which are not defined, but which seem to refer to the first embodiment of a recording.¹⁶⁹ This may not cause difficulty for unique items, but may render the exception inapplicable if multiple prints have been created, or where material is collected in published form.¹⁷⁰ Third, Part IV subject-matter is often more challenging to deal with than Part III works because of greater copyright complexity, in particular due to the presence of underlying works in audiovisual material.¹⁷¹

5 Orphan Works

Copyright appears to have a significant but varied impact on digitisation of orphan works. Our research suggests that orphan works are an issue throughout the sector, although they seem to be more prevalent in archival, research and social history collections. These collections often contain large numbers of individual works, including such diverse items as correspondence, manuscripts, household items, oral history recordings, amateur footage and historical artefacts.

A number of factors contribute to such copyright works becoming orphaned. First, the copyright term is long, particularly for unpublished items, many of which are protected by copyright indefinitely.¹⁷² Thus rights may need to be cleared well after the date material was made or published, rendering deceased or (for companies) defunct owners untraceable. Second, many items – particularly in social history collections – lack any meaningful attribution, even for contemporary materials. Many interviewees said they regularly had instances in which copyright owners could not be identified, or were only ascertained after significant research to identify the original creator and trace copyright to the

166 2G, 5G, 43X, 45X, 58L, 115M.

167 65L, 76X, 96X, 116M, 135L, 142L.

168 The situation found here related to cultural institutions is just one illustration of the challenge that digital technology poses to categorising subject matter in the *Copyright Act*; see, eg, Jill McKeough, Andrew Stewart and Philip Griffith, *Intellectual Property in Australia* (3rd ed, 2004) 179-180 discussing Australia, Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2 Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999) [5.07].

169 See above nn 142-143 and accompanying text.

170 The new preservation copying provisions for key cultural institutions are considered below in pt VIII.

171 43X, 46X, 58L, 65L, 77X, 106X, 107X, 111X, 118M, 135L, 142L.

172 See above n 21.

current owner.¹⁷³ This may be exacerbated where there is incomplete copyright documentation, perhaps because items were acquired when copyright was not a prominent issue or because the donor did not have rights information. Third, items may be protected by copyright despite the absence of any creative or literary quality,¹⁷⁴ and no assertion or registration of copyright is required.¹⁷⁵ This makes it likely that many creators are unaware they own copyright.

The impact of orphan works appears to be high across the sector because of Australian institutions' aversion to copyright risks: interviewees repeatedly reported adopting a conservative risk management position, particularly for public activities.¹⁷⁶ This appears to be influenced by institutions' public sector status, their receipt of public funds, and a desire to maintain the confidence of users and contributors that they comply with copyright law.¹⁷⁷ In many cases, institutions are more comfortable in deleting or withholding public access to digital content where copyright issues cannot be resolved – even if unsuccessful efforts have been made to identify or locate copyright owners.¹⁷⁸ Although any potential liability for damages might be small, the possibility of legal breach itself appears to dissuade use.¹⁷⁹ As one interviewee put it, 'if you're not sure

173 7M, 19M, 32M, 33M, 51L, 55L, 59L, 79X, 85X, 89X, 101L, 103X, 106X, 107X, 109X, 117M, 119M, 121M, 123L, 132M, 135L, 142L.

174 As noted by Litman, copyright 'has reached out to embrace much of the paraphernalia of modern society': Jessica Litman, 'The Exclusive Right to Read' (1994) 13 *Cardozo Arts and Entertainment Law Journal* 29, 34.

175 In Australia, copyright subsists once a work or subject-matter has been 'published' or 'made': *Copyright Act* ss 32, 89-92 in accordance with art 5(2) of the *Berne Convention for the Protection of Literary and Artistic Works*.

176 2G, 13M, 26M, 27M, 28M, 33M, 35M, 42X, 51L, 55L, 59L, 62L, 72L, 77X, 93X, 97L, 98G, 101L, 107X, 109X, 112G, 117M, 132M, 135L, 136X. While many interviewees described their institutions as risk averse, there are two points of qualification. First, there appears to be a concurrent problem with some *individual members of staff* being copyright unaware, producing a risk of infringement. Interviewees said their institutions are devising strategies to raise staff copyright awareness, including developing uniform copyright documentation and encouraging staff to consider copyright issues earlier in projects. Second, lack of awareness or misunderstandings of the law may be particularly significant in *smaller institutions*, with considerably less resources for staff training and copyright compliance. Indeed, copyright questions appear to have been ignored in some small-scale digitisation projects involving local history collections, with one interviewee commenting: 'I think there probably needs to be more knowledge by societies like ourselves as to what the parameters are. We have difficulty in defining what is copyright and what is not. Sometimes, it's a "what you don't know doesn't hurt you" attitude ... But I think there would be a benefit in knowing more clearly what our rights are'.

177 It is worth noting that the institutions' caution differs from other users who routinely infringe copyright (eg by time and format shifting, at least before the 2006 amendments to the *Copyright Act*) and are commonly labelled copyright 'pirates' or 'parasites'. Such metaphors, which have conceptual effects even before their linguistic power, 'can have substantive effect' on the law's development: Patricia Loughlan, 'Pirates, Parasites, Reapers, Sowers, Fruits, Foxes...The Metaphors of Intellectual Property' (2006) 28 *Sydney Law Review* 211, 213, and 215. Whatever relevance such metaphors may have for other copyright users, they appear particularly poorly suited to cultural institutions.

178 2G, 7M, 25M, 35M, 59L, 62L, 65L, 97L, 98G, 101L, 107X, 112G, 117M, 132M, 136X.

179 For some collections, the chance of any complaint appears low, and of amicably resolving it high. Among the Australian institutions participating in this research, there were no reported instances of litigation over copyright infringement. Some interviewees spoke of the occasional complaint, which seemed to be readily resolved, for instance through retrospectively paying a licence fee or removing material from the internet.

[how] to make a call, it's easy to fall back on a no'.¹⁸⁰ That said, interviewees also reported instances where this restrictive position had been relaxed following a risk management assessment.¹⁸¹ It appears that social history collections are more amenable to such decision-making than visual art collections, where risk management generally only occurs in exceptional, one-off circumstances – making orphan works (although perhaps rarer than in social history collections) more difficult to deal with when they do occur. This may be related to the age and nature of material in social history collections, perceptions about the interests of copyright owners and creators of visual art, and the views of those donating material. For instance, a less conservative approach may be taken where private, non-commercial material is donated to an institution with the intention that it be made publicly available; as one interviewee noted:

Copyright is, to an extent, restricting the use ... You have members of the community bringing in their snaps and they're happy for you to use them, but they haven't got a clue who took the photo or about copyright ... They just want you to use it, so you do ... How much time and effort do you spend in trying to chase up the copyright owner? There's no financial gain for either party.¹⁸²

Overall, institutions face a challenge in dealing with orphan works, particularly where items have social or cultural (but not obvious commercial) value and would be ideal targets for digitisation. If the aim is to avoid copyright infringement *entirely*, then digitisation can only occur under the shelter of a copyright exception. This means that, at least under the law before the *Copyright Amendment Act 2006*, orphan works could not be used in publicly-available outputs, such as electronic databases and virtual exhibitions. It is questionable whether such a conservative approach is desirable as the default position on copyright management across the sector.¹⁸³ There appears to be merit in institutions developing nuanced copyright policies, so the same risk management strategy is not used for an anonymous social history item as an art gallery painting or commercially-distributed feature film.¹⁸⁴ The 2006 reforms, while not explicitly targeted at orphan works, may prompt this development.¹⁸⁵

180 59L.

181 2G, 13M, 17M, 48L, 51L, 69L, 82X, 94X, 99X, 103X, 117M, 123L, 130G, 141M, 142L.

182 6M.

183 This shift in thinking was already occurring with some interviewees. For instance, one noted that 'my job is not to ensure that the [institution] complies, because it can't be done. My job is to manage the risk of using other people's intellectual property': 96X.

184 See Hudson and Kenyon, *Guidelines for Digitisation*, above n 86, 100-102, for factors that may be relevant in this decision-making process. Following the *Copyright Amendment Act 2006* (Cth), such policies may also need to refer to new strict liability offences. They extend to some activity undertaken without a commercial motivation, and only some of them contain defences for cultural institutions. For a general overview see Kimberlee Weatherall, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Copyright Amendment Bill 2006* (10 November 2006) section 5 <http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/submissions/sub54.pdf> at 14 March 2007.

185 At the same time, broader reforms aimed at orphan works remain worthy of consideration. For a discussion of some options, see, eg, United States Copyright Office, above n 12.

C Different Levels of Public Access

Copyright can have a high impact on digitisation where digital content is intended to be publicly available, for instance as part of an exhibition, onsite electronic database, publication or website. This is because statutory exceptions have limited relevance for ‘public digitisation’: fair dealing may apply in some instances, but most public uses require a licence or transfer of rights if infringement is to be avoided.

There are two key ramifications for public digitisation. First, *copyright management in cultural institutions often involves considerable administrative costs*. Interviewees from across the sector noted that copyright compliance can be extremely resource intensive.¹⁸⁶ Significant time can be spent identifying and finding copyright owners. If a copyright owner can be located – which is not always the case – then negotiations for a licence or assignment can be protracted, for instance because of delays in responding to requests or returning paperwork, or because it is not clear who, within an organisation, has authority for handling copyright. Managing these issues is exacerbated in image- and technology-rich projects, in which hundreds or thousands of separate licences may be required. It is noteworthy that there is no compulsory licensing scheme for the sector, and that many copyright owners are not represented by collecting societies (particularly for social history collections), meaning that institutions must commonly negotiate each licence individually.

This leads to the second notable effect: *with tight institution budgets and timelines, selecting works for public digitisation is often based, in whole or part, on the ease of copyright compliance*. This creates a preference for works outside the term of copyright, or works for which negotiating with copyright owners will be relatively straightforward.¹⁸⁷ This does not necessarily reduce the *quality* of a product or project as there may be works that can be substituted for a problematic one, or alternative topics or themes that can be developed. However, it can alter the substantive *content* of exhibitions, databases, websites and publications, particularly for unique or iconic works. This can mean that digital holdings are not representative of analogue collections: online content does not reflect the entirety of collections.¹⁸⁸ Importantly, these impacts are not always justified by any economic or non-economic interest of copyright owners, particularly when one has regard to the diversity of cultural material held by the sector. As noted by one interviewee,

186 2G, 8M, 13M, 16M, 22M, 26M, 29M, 33M, 35M, 46X, 61L, 62L, 65L, 82X, 101L, 102G, 106X, 115M, 118M, 123L, 128G, 142L.

187 2G, 7M, 13M, 18M, 26M, 48L, 58L, 59L, 61L, 62L, 65L, 82X, 85X, 100L, 101L, 115M, 121M, 123L, 131G, 141M, 142L, 144L.

188 1G, 7M, 59L, 80X, 87X, 107X, 115M, 123L, 131G.

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 going to stop anyone getting economic remuneration because it's not worth anything anyway.¹⁸⁹

Some institutions, particularly larger ones, have ameliorated these difficulties by developing new copyright management systems, including assessing copyright prior to acquisition, creating standardised licensing documentation across the institution, developing voluntary collective licensing models with collecting societies, and obtaining copyright assignments or non-exclusive, perpetual copyright licences for non-commercial activities.¹⁹⁰ These strategies appear to have been successful in reducing copyright-related management difficulties for some collections, and represent useful, practical strategies that institutions can adopt immediately to deal with copyright issues. That said, the measures are not viable for all types of collection material and can entail their own problems.

To start with, there are the costs of monitoring and controlling institution-wide activity, such as developing and implementing copyright policies, and monitoring staff activity. In addition, the large number of licences required can generate significant information management issues, particularly for short-term, use-specific licences.¹⁹¹ In relation to the latter, while interviewees recognised the benefits of longer-term licences permitting a broader range of activities, the cost was often prohibitive due to higher licence fees and uncertainty about future institutional budgets. In addition, new copyright management procedures appear to operate best for recent and well-documented acquisitions. This leaves a hiatus for older collections in which copyright information is often incomplete or unavailable, and for orphan works where copyright owners cannot be identified or located. Thus, if institutions are to be encouraged to use digital technologies to make collections publicly available, consideration must be given to *legal* as well as *practical* means to facilitate this. Reforms under the *Copyright Amendment Act 2006* will be considered next in light of these issues. But the research suggests larger reforms may be warranted if public accessibility is sought to be improved, and these could include new unremunerated exceptions as well as remunerated statutory licensing schemes or other voluntary collective licensing practices.

189 103X.

190 2G, 8M, 13M, 32M, 36M, 46X, 51L, 61L, 62L, 82X, 86X, 101L, 102G, 105G, 112G, 115M, 123L, 128G.

191 2G, 7M, 8M, 22M, 25M, 33M, 35M, 46X.

VIII CONCLUSIONS: DIGITAL ACCESS AND CULTURAL INSTITUTIONS

A *Copyright Amendment (Digital Agenda) Act 2000 (Cth)*

As noted at the outset of this article, a key aim of the *Digital Agenda Act* in 2000 was to enhance online access to collection material. Whether that goal has been achieved would be further illuminated by the views of creators and copyright owners,¹⁹² but two broad issues are suggested by our research into institutional experiences. First, what could be called ‘micro-level’ reforms appear warranted. Copyright provisions applying to digital collections have certain anomalies and restrictions which do not appear justified on their own terms. Several examples are considered below.

Second, larger reforms to copyright law and sector practices may be warranted. The law has allowed certain internal activities under detailed, purpose-specific exceptions. Everything else – in particular, the vast majority of public uses – has required a licence or assignment from the copyright owner. This can place a high administrative burden on cultural institutions, particularly when digitising for public access. While copyright exceptions facilitate important institutional activities, they do little to promote the aim of online access, except to the extent that administration and preservation are both necessary preconditions to making collections available. This position may change with new exceptions like ‘flexible dealing’, although this will depend on how they are interpreted by the sector and, if need be, by the courts. Further options may warrant examination, such as remunerated statutory licensing schemes, or law reform directed to orphan works.

B *Micro-Level Concerns: Preservation and Administration*

This section discusses two provisions in detail to illustrate problems at the ‘micro’ level: exceptions for preservation and administrative purposes. Each provision contains restrictions that inhibit their ability to work on their own terms and appear unnecessary to protect copyright owners’ interests.

1 *Preservation Copying*

Preservation copying provisions were first introduced into the *Copyright Act* in 1980 following recommendations in the Franki Report.¹⁹³ The preservation copying provisions that appeared in the *Copyright Act* before the 2006 reforms were limited: they only applied to manuscripts, ‘original’ artistic works, sound

192 Research related to such issues is being conducted over the next few years, under another ARC-funded project based at the University of Melbourne.

193 *Copyright Amendment Act 1980* (Cth) introducing s 51A into the *Copyright Act*; Franki Report, above n 105, [5.01]. The Franki Committee identified preservation copying as important for broader, public interest reasons: for example, it helps reduce unnecessary handling of original, unpublished works, and is important for works that will deteriorate *even without* undue handling, ‘with consequential loss to the nation’: [5.03]-[5.04]. The Committee identified problems in leaving the ability to preservation copy to private licensing arrangements, including that it may be impossible to secure such permission if the copyright owner cannot be identified or located: [5.02].

recordings held in the form of a 'first record', and films held in the form of a 'first film'.¹⁹⁴ This caused problems. First, the terms 'original artistic work', 'first record' and 'first film' would seem to refer to the first embodiment of a work, which caused no issues where only one copy of a work was made. Greater difficulties have arisen, however, where there are multiple prints or editions (for instance, where the institution's record is not the first record), or where an institution has a copy of an alternative version of a work.

In addition, *published* materials protected by copyright could not be preservation-copied under the exception, even if they were rare, old, in high demand, or out-of-print. For some of those items, the neighbouring *replacement* copying provisions apply. These allow certain published materials to be reproduced if they have been damaged, lost or stolen, or are deteriorating.¹⁹⁵ However, the aim of these provisions is very different: to allow copies to be made where *already damaged or lost* published items cannot be replaced through ordinary commercial means. It appears that concerns about copyright prevent 'healthy' but 'at-risk' works from being preservation copied, often due to difficulties in locating owners.

This appears to be an unfortunate result of copyright law: institutions cannot preserve the informational content of important items, even though the copyright owner is difficult or impossible to identify or locate, or there is no longer (or never was) any commercial market for the work. Thus, there appears to be merit in expanding preservation copying provisions to capture other collection items, including non-commercially available published items, and all unpublished sound recordings and films. As discussed below, some reform has occurred through the *Copyright Amendment Act 2006*.

2 *Administrative Purposes*

Section 51A(2) allows collection items to be reproduced for 'administrative purposes' and was introduced into the *Copyright Act* in 2000 by the *Digital Agenda Act*. It is limited in several ways, related to copyright subject matter, the status of collection material, and those who may access or receive digital content.

First, the administrative purposes exception only applies to literary, dramatic, musical and artistic works protected under Part III of the *Copyright Act*. There is no equivalent provision for Part IV subject-matter, such as sound recordings and films.

Second, the provision requires the work to be 'held' in the collection. This suggests it may not apply to loaned materials, in which the institution is acting as bailee. Obviously, the longer the term of the loan, the more difficult it may be to maintain this distinction. Any differentiation under s 51A(2) between 'the collection' and 'loans' appears artificial because record photography – whether of items held permanently or temporarily – is only performed for internal, administrative goals. And, if loans are excluded from the section, then routine activities such as photographing incoming loans for the purposes of record-

¹⁹⁴ *Copyright Act* ss 51A(1)(a), 110B(1)(a), (2)(a).

¹⁹⁵ *Copyright Act* ss 51A(1)(b), (c), 110B(1)(b), (c), (2)(b), (c).

keeping and condition reports may be excluded from this definition, and *prima facie* constitute an infringement of copyright.

Third, there are limits on the distribution of administrative reproductions. Section 51A(3) permits the communication of reproductions to ‘*officers* of the library or archives’, which was not further defined before the 2006 reforms, meaning volunteers were unlikely to have been covered by the provision. And administrative purposes only apply to *internal* administrative communications, meaning that routine management activities such as external communications related to insurance or potential loans appear not to be covered by the provision.

C Larger Reforms and the *Copyright Amendment Act 2006* (Cth)

The *Copyright Amendment Act 2006* dealt with a wide range of copyright issues, including changes related to technological protection measures, domestic time-shifting and format-shifting of copyright content, stronger enforcement measures, and statutory exceptions.¹⁹⁶ For the digitisation activities considered in this article, two new exceptions are of particular relevance:

- a ‘flexible dealing’ exception for cultural institutions; and
- an exception for ‘key cultural institutions’ reproducing ‘significant’ works in their collections.

Here, three areas are considered in light of the empirical research. They concern the scope and potential impact of the flexible dealing exception (particularly for public digitisation), circumstances in which preservation activities may be permitted under new exceptions, and how reproduction for administrative purposes has been dealt with under the Act.

1 *Flexible Dealing*

The new s 200AB of the *Copyright Act* permits certain ‘uses’¹⁹⁷ of works and other subject-matter by cultural institutions and other specified users.¹⁹⁸ The exception contains two parts. The first is common to all the permitted uses, and provides that:

- section 200AB(1)(a): ‘the circumstances of the use ... amount to a special case’;
- section 200AB(1)(c): ‘the use does not conflict with a normal exploitation of the work or other subject-matter’;
- section 200AB(1)(d): ‘the use does not unreasonably prejudice the legitimate interests of the owner of the copyright’ or someone licensed by the owner.

¹⁹⁶ The Act also contains technical amendments to the libraries and archives provisions, mainly arising out of the Phillips Fox review of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth): Phillips Fox, above n 18.

¹⁹⁷ The term ‘use’ is broad, with *Copyright Act* s 200AB(7) stating that it ‘includes any act that would infringe copyright apart from this section’.

¹⁹⁸ Flexible dealing also applies to some activities by educational institutions and uses by or on behalf of persons with a disability: *Copyright Act* s 200AB(3), (4).

Under s 200AB(7), the terms ‘special case’, ‘conflict with a normal exploitation’ and ‘unreasonably prejudice the legitimate interests’ have the same meaning as in Article 13 of the TRIPS Agreement. Article 13 encompasses a test, commonly known as the three-step test, which is found in other international copyright treaties.¹⁹⁹ However, there is at least one difference between s 200AB and Article 13: in the treaty, the *exception* is required to constitute a special case, while in s 200AB, it is the circumstances of the *use* that must be a special case.²⁰⁰ In addition, the direct transposition of the three-step test to domestic law is controversial.²⁰¹ While its application in flexible dealing is likely to generate substantial commentary,²⁰² the main point from our research is that the uncertainties inherent in the wording of s 200AB(1) may place substantial obligations on the sector to obtain professional advice and develop policies about what uses can be pursued under flexible dealing.²⁰³

Second, the use has to come within provisions specifically aimed at cultural institutions in s 200AB(2). The subsection protects a use that:

- (a) is made by or on behalf of the body administering a library or archives;²⁰⁴ and
- (b) is 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
- (c) is not made partly for the purpose of the body obtaining a commercial advantage.

The first paragraph appears fairly straightforward, but more can be said about the concepts of ‘commercial advantage’ and ‘maintaining or operating’ the institution. The explanatory memorandum noted that the restriction in paragraph

199 See, eg, *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 ed, 2006). For an analysis of the three-step test, see, eg, Martin Senfleben, *Copyright Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004).

200 See, eg, World Trade Organization, United States – Section 110(5) of the US Copyright Act, Report of the Panel, WT/DS160R, 15 June 2000, [6.108]–[6.112].

201 There are questions regarding whether a treaty provision designed to help governments draft compliant legislation is appropriate to guide users (or judges) in determining whether particular uses are permissible. The three-step test has previously been criticised on the basis that it is ‘no test at all’ and ‘invites ad hoc decision-making which is not based upon readily ascertainable rules’: David J Brennan, ‘The Three Step Test Frenzy – Why the TRIPS Panel Decision Might be Considered Per Incuriam’ (2002) *Intellectual Property Quarterly* 212.

202 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.

203 There are benefits in a flexible approach: for instance, it gives institutions greater latitude to argue that activities do not infringe copyright, and may accord with intuitive understandings of non-legal actors regarding the content of law. However, invoking phrases from an international treaty may have a chilling effect on users, particularly given the lack of any meaningful consensus regarding the ambit of the three-step test, and queries regarding whether existing libraries and archives provisions are TRIPS compliant: on the latter, see, eg, Sam Ricketson, *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions*, Centre for Copyright Studies (2002), < <http://www.copyright.com.au/reports/per cent20& per cent20papers/CCS0202Berne.pdf>> at 18 March 2007, but see also Weatherall, above n 184, [4.2.1].

204 This requirement would appear to exclude acts by users of the institution.

(c) ‘would not necessarily preclude use on a cost recovery basis’.²⁰⁵ This point was strengthened by amendments to the Bill adding s 200AB(6A), which expressly states that a use will not fail to meet the condition in paragraph (c) merely because a cost-recovery fee is charged in connection with the use. But the justification for the commercial advantage restriction is hard to discern: any concern to limit commercially significant uses that unreasonably prejudice the legitimate interests of copyright owners should already be caught by s 200AB(1). Paragraph (b) encompasses uses made ‘for the purpose of maintaining or operating’ the institution, which includes ‘providing a service of a kind usually provided by’ such an institution. As the Bill’s explanatory memorandum noted: ‘This condition would encompass the internal administration of the library or archives as well as providing services to users’.²⁰⁶

Both parts of this explanatory note are significant. The first relates to existing administrative purposes provisions, which are considered below. The second suggests that some public uses – such as online digital files or on-site digital kiosks – might be covered by s 200AB.²⁰⁷ If the Digital Agenda reforms have not directly assisted greater digital access to cultural collections – which appears to be the case – then flexible dealing offers *some* encouraging potential. But in relation to public uses, challenging questions may arise in relation to whether such uses conflict with material’s ‘normal exploitations’, unreasonably prejudice the owner’s ‘legitimate interests’, or offer institutions any ‘commercial advantage’. For example, some commentators suggest that viewing digital content via on-site terminals equates to analogue browsing of collections, so it should be permitted as freely as that browsing has been permitted.²⁰⁸ However, others suggest that digital browsing – even when done on-site by physical visitors – markedly differs from physical inspection of analogue collection material. Among other things, such digital access allows simultaneous use by

205 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) para 6.55.

206 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) para 6.55.

207 Although not decided under equivalent law, reasoning adopted in US case law on fair use may be instructive in predicting the relevance of flexible dealing to public digitisation. For instance, in *Kelly v Arriba Soft Corporation* 336 F 3d 811 (9th Cir, 2003), it was held that the creation of thumbnail images of photographic works by an internet search engine constituted a fair use. Relevant in the decision-making was the size and resolution of the images, 818-19, and the finding that the search engine did not harm the market for or value of the photographic images, 821-22. It appears that compensation was later paid in settling claims related to high resolution images; see, eg, Ian McDonald, *Fair Use: Issues & Perspectives* (2006) 59. Similar conclusions may apply to some digital uses of collection material under US law, although there is not authority directly on point for the display of digital collections by cultural institutions.

208 See, eg, Sir Anthony Mason, ‘The Users’ Perspective on Issues Arising in Proposals for the Reform of the Law of Copyright’ (1997) 19 *Sydney Law Review* 65, 74; Ann Bartow, ‘Electrifying Copyright Norms and Making Cyberspace More Like a Book’ (2003) 48 *Villanova Law Review* 13. See also Macmillan, above n 5, 354-55, 359.

multiple viewers, potentially from multiple locations within the institution.²⁰⁹ Similarly, the interviews discussed earlier in this article underline that the scope of ‘non-commercial’ institutional activity is controversial. The scope of flexible dealing may well become one of the next focal points in the familiar copyright ‘battles’.²¹⁰

While there are likely to be divergent views about the public use of some collection material, it is important to remember the diversity of material within the sector. Much of it has no known, or expected, connection to any creator or copyright owner that seeks recognition or reward for their efforts. For much social history material and orphan works, in particular, s 200AB has the potential to be powerful, depending on how it is interpreted by the sector, copyright owners, and the courts.

2 Key Institutions and Preservation Copying

The *Copyright Amendment Act 2006* introduced specific provisions allowing the copying of historically or culturally ‘significant’²¹¹ works, films, sound recordings and published editions in the collections of ‘key cultural institutions’.²¹² These reforms are limited in several ways: the scope of institutions to which they apply; being subject to commercial availability tests for published material and photographic reproductions of original artistic works;²¹³ and only permitting three reproductions to be made. They are aimed at addressing the anomaly – clear from the interviews discussed in this article – that the preservation copying provisions do not encompass ‘preventative’ copying of many collection items.²¹⁴

Preservation is seen as a prominent benefit of digitisation by institutions. In some cases, its value flows from preventing excessive handling of material, thus maximising the effects of conservation activities directed to original items. In others, digitisation represents one way to preserve the informational content of an inherently unstable or fragile item. In both cases, preservation copying works

209 See, eg, Australian Copyright Council, *Submission to Digital Agenda Review* (September 2003), Australia Copyright Council, <<http://www.copyright.org.au/pdf/acc/submissions/X0307.pdf>>, at 15 March 2007; and see, eg, the resistance from copyright owners to the introduction in the *Digital Agenda Act* of existing provisions for on-site digital access: Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999* (November 1999) [2.115].

210 If so, a sense of the history of such copyright ‘battles’, and of the sometimes problematic use of historical arguments in copyright reform, could be valuable to add to the debate; see, eg, Brad Sherman and Lionel Bentley, *The Making of Modern Intellectual Property Law* (1999); Kathy Bowrey and Matthew Rimmer, ‘Rip, Mix, Burn: The Politics of Peer to Peer and Copyright Law’ (2002) 7 *First Monday*, <http://www.firstmonday.org/issues/issue7_8/bowrey/index.html>, at 10 March 2007.

211 An authorised officer of the relevant institution would need to be satisfied of the significance, and no statutory guidance is provided as to the meaning of historical or cultural significance.

212 *Copyright Act* ss 51B, 110BA, 112AA. The institutions would be those where the body administering the institution has the legal function of ‘developing and maintaining the collection’, see, eg, *Copyright Act* s 51B(1)(a).

213 See, eg, *Copyright Act* s 51B(3)-(5).

214 See Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) [6.104]-[6.116] which makes this intention clear.

best if performed *before* deterioration has occurred. Given the limited operation of the earlier preservation copying provisions, cultural institutions may have felt compelled to break the letter of the law if they were to fulfil their own institutional missions and undertake preservation activities. However, some institutions did report that preservation activities were not taking place due to copyright issues.

The fieldwork suggests the aim of these reforms is valuable. The fieldwork also suggests that an important change was made between the Bill and the final Act. The Bill would have generally allowed only a *single* reproduction to be made. It is not clear that this would have assisted preservation. The technical processes of preservation copying, in analogue or digital form, often involve multiple copies at different stages of the process. (The recurrent obsolescence and potential instability of digital storage media also suggests that *repeated* reproductions will need to be made over time, not just a single reproduction.) The quantitative limitations in the originally proposed provisions – such as ‘a single reproduction’ of a manuscript, ‘a comprehensive photographic reproduction of an original artistic work’, or a single copy of a sound recording held in the form of a first record or an unpublished record²¹⁵ – may well have defeated the aim. Submissions on the Bill drew attention to this difficulty,²¹⁶ and the provisions now provide for three copies to be made. While certainly an improvement in implementing the stated aim of the provisions, it is not clear that the number three accords with the multiple reproductions required in high quality preservation practice.

It therefore appears likely that the flexible dealing provisions will be relied on for preservation purposes. Common preservation practices appear likely to be protected by s 200AB, and that section is available to all cultural institutions, not only to those ‘key’ institutions covered here. As has been noted in relation to normative arguments for unremunerated exceptions to copyright:

A reasonable copyright owner may be unlikely to think: ‘If I create a work and then sell it, in due course it’s going to crumble, and I’ll be able to sell another one to the original buyer’. Thus, it may be argued that, in some cases at least, preservation is an act outside the copyright owner’s normal market and should be freely permitted.²¹⁷

Even if such an analysis may be doubted by some commentators if applied to all copyright users and subject-matter,²¹⁸ it underscores how preservation copying by cultural institutions would appear to be the type of conduct warranted under s 200AB.

215 See Copyright Amendment Bill 2006 (Cth) proposed ss 51B(2), (3), 110BA(2).

216 Including Centre for Media and Communications Law, *Copyright Amendment Bill 2006: Submission to the Senate Standing Committee on Legal and Constitutional Affairs* (October 2006), <http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/submissions/sub27.pdf> at 13 March 2007.

217 Hudson, Kenyon and Christie, above n 11, which also notes market-failure arguments.

218 See, eg, Burrell and Coleman caution against allowing *any* user to make a preservation copy of *any* work: above n 117, 136-37.

3 *Administrative Purposes*

As with preservation, s 200AB may well become the more significant provision for administrative purposes than the existing provisions in s 51A. However, two notable changes have been made to s 51A. First, the section has been extended to cover communications to volunteers ‘assisting with the care or control of the collection’,²¹⁹ which responds to concerns that the earlier restriction to officers did not reflect the personnel structures used in many institutions. Second, the term ‘administrative purposes’ has been defined for the first time, in a manner which appears to accord with current practices. The term means ‘purposes directly related to the care or control of the collection’.²²⁰ The explanatory memorandum noted:

The purpose of the definition ... is to add clarity and to ensure that copying is appropriately limited ... to only genuinely administrative purposes, being those directly related to the effective internal management, care and control of the collection of the library or archives ... The definition would not cover reproduction to merely add to the collection of the library or archives so more copies are available for users.²²¹

However, two of the key weaknesses in the administrative purposes provisions raised in the interviews remain. First, communicating reproductions of collection material to people or entities outside the institution – even communications directly related to the care and control of the collection, such as related to potential loans and insurance – remains unprotected. Second, no similar provisions apply to other subject-matter under Part IV of the *Copyright Act*, such as sound recordings and films. Given the convergence of different collection media that is occurring with digitisation, this differential treatment is becoming increasingly problematic.

If not for s 200AB, these would be serious failings in light of the empirical research set out in this article. If the legislative provisions for administrative purposes have good policy justification, it is anomalous that they do not apply more widely in these ways. And given the refinements made in the 2006 Act, it is unfortunate that the provisions were not dealt with more comprehensively. So, once again, institutions are likely to look to s 200AB for many of the internal, administrative uses related to digitisation and digital communications technologies.

Overall, s 200AB may change the copyright management strategies adopted by institutions. Interviews suggested the then existing model of copyright law – where specific exceptions were generally limited to internal uses, and public uses required licences or a transfer of rights – created significant administrative challenges, and impacted on both the selection of material to digitise, and the circumstances in which digital content was made available to the public. Section 200AB creates, in most cases for the first time, the possibility that public digitisation is permitted under a statutory exception. This could allow institutions to develop risk management strategies in less conservative terms, because rather

219 Inclusive definition of ‘officers of the libraries or archives’ in *Copyright Act* s 51A(6).

220 *Copyright Act* s 51A(6).

221 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) para 6.102.

than most public digitisation *inherently* infringing copyright, it is open to argue that some activities fall within the flexible dealing exception. This could well be a key benefit of the reforms – and an area in which substantially greater digital access results.

That said, the reforms do not tackle the more difficult issues of which uses in the sector should require remuneration, and how to deal with the licensing issues relating to activities and copyright works for which flexible dealing does not apply. There are numerous debates between cultural institutions and copyright owners regarding the status of institutional conduct and how any licence fees should be calculated. The government has not directly entered into these debates, instead leaving the application of flexible dealing to institutions, copyright owners, creators, and, if raised before them, the courts. The result of such negotiations and judicial decisions will be very important if digital access to cultural collections is to be facilitated. If the amendments work well – and that should be a key site for future research – there is hope for both greater access and a greater percentage of resources being directed to remunerating creators for commercial uses of their material. However, the reforms appear a long way from ensuring, or even making particularly likely, that outcome.