

Copyright, Digitisation and Cultural Institutions

Andrew T Kenyon * and Emily Hudson **

Intellectual Property Research Institute of Australia
The University of Melbourne

Intellectual Property Research Institute of Australia

Occasional Paper No. 3/04

ISSN 1449-8782

August 2004

Intellectual Property Research Institute of Australia

The University of Melbourne

Law School Building

Victoria 3010 Australia

Telephone: 61 (0) 3 8344 1127

Fax: 61 (0) 3 9348 2353

Email: info@ipria.org

www.ipria.org

Abstract

Digitisation and communications technologies offer new ways for cultural institutions to further their missions of preservation, research, education and public access. But digitisation also offers substantial challenges to museums, galleries and libraries, including the potential for creation and dissemination of digital works to constitute copyright infringement. Digital technologies also mean copyright law is undergoing its most significant period of change in decades. Digitisation dramatically alters the way copyright works are accessed and distributed. The balance between copyright owners' rights and the public interest in access to copyright material is a key issue in digitisation. Cultural institutions are an excellent site for investigating policy issues regarding digitisation because they are important creators, users and disseminators of digital copyright material.

This paper analyses Australian copyright law in relation to digitisation and cultural institutions, noting the law's complexity and focussing on provisions that have received little judicial and academic attention to date. It explores difficulties that are likely to face cultural institutions in understanding and complying with the law, and considers options in terms of institutional practices and copyright law reform. The research is part of a joint project of the CMCL and IPRIA, instigated and supported by Museums Australia. It is primarily funded by the Australian Research Council (LP0348534) along with six Australian cultural institutions: Art Gallery of NSW, Australian Centre for the Moving Image, Australian War Memorial, Museum Victoria, National Museum of Australia, State Library of Victoria.

Table of Contents

I	INTRODUCTION.....	1
II	COPYRIGHT LAW	5
III	DIGITISATION AND CULTURAL INSTITUTIONS	8
IV	CONCLUSION.....	11
	REFERENCES.....	14

Acknowledgements

*Director, Centre for Media and Communications Law, University of Melbourne, Australia

** Research Fellow, Centre for Media and Communications Law and Intellectual Property
Research Institute of Australia, University of Melbourne, Australia

Address for correspondence

Andrew Kenyon
Centre for Media and Communications Law
University of Melbourne
(185 Pelham Street, Carlton)
Victoria 3010
Australia
a.kenyon@unimelb.edu.au

I INTRODUCTION

Copyright is becoming a central issue in communications law and policy, as digital technologies lead to the most significant transformation of copyright law in decades. A key reason for copyright law's growing importance lies in the way digitisation dramatically alters the nature of accessing and communicating material. In the analogue world, access and copying were, to a large extent, distinct acts. Restrictions on copying material did not unduly limit people's ability to access material in the first place. This is no longer the case. Because of the way material is reproduced within digital communications, copying is an unavoidable incident of accessing copyright material. At the same time, technological change has given copyright owners unprecedented powers to control access to electronic works using measures such as passwords and encryption. Thus whilst digital technologies greatly facilitate communication, technological limitations together with legal restrictions in the form of copyright law have the capacity to substantially impede information flows.

In this situation, recent amendments to copyright law, and questions about how the law should develop, have been very contentious (Bartow, 2003). There is voluminous, prominent writing that decries an increasing power for copyright owners to control access to their material (eg Litman, 2001, Samuelson, 2002, Lessig, 2003). But there is also trenchant, sophisticated writing that doubts whether the changes are as dramatic as others fear, and suggests the new copyright law reflects wider public interests (eg Ginsburg, 2001, 2002).

Debates about digital copyright concern ways in which analogue and digital technologies might warrant different policy approaches. On one argument, the digital environment is so different from the analogue one that copyright owners' rights should be expanded and statutory exceptions and limitations, which traditionally exist in copyright legislation, more limited in their application. One reason this strengthening is seen as necessary is to remove a great impediment to electronic dissemination of works: a heightened fear of infringement (Ginsburg, 2001). Not only do electronic technologies allow almost any text, sound or vision to be digitally reproduced, but the technology is commonplace. It puts in users' hands the capacity to make and disseminate multiple and perfect reproductions of works. If one legal reproduction is accessed or made under a statutory provision, it is comparatively easy to make further unauthorised reproductions without permission from the copyright owner. The

existence of widespread, large-scale infringement may severely impact upon commercialisation activities and the potential market for a copyright owner's work. Thus, the argument suggests that copyright exceptions that have existed for analogue uses should be curtailed for digital ones. A second, related reason for limiting exceptions lies in the way digital technology can be seen to change copyright markets. Instead of selling physical objects containing works, copyright owners may licence access to works. This may allow copyright owners to obtain payments for many more types of digital use than is feasible for analogue use. And this ability will be enhanced by limiting copyright exceptions.

But digital copyright critics – commentators who might be called copyright ‘pessimists’ (Goldstein, 1994: 15) – argue that digital communications do not require the limiting of traditional statutory exceptions. On the contrary, copyright law should be developed to ensure that copyright norms in the analogue world are protected as user rights in the digital world (Bartow, 2003). Using licences and technological controls may circumvent copyright norms; for example, by preventing users from engaging in activities that otherwise fall within express exceptions to copyright infringement. These exceptions to infringement are seen to have been crucial in creating a vibrant ‘public domain’ and ‘cultural commons’. However, copyright pessimists fear that:

changing technology and changing law is increasingly enclosing that commons. ... Courts and legislators proceed as if everything is the same, while in fact, crucial original values are inverted (Lessig, 2003: 768).

Vesting increased powers of control in copyright owners may suffocate the cultural commons, replacing it with a ‘market in words and sentences’ (Macmillan, 1999: 357) or a “‘pay-per-use” economy in digital information’ (Samuelson, 2002: 1494).

These sort of debates about digital copyright law follow from different beliefs about how best to promote public welfare and encourage creation and distribution of copyright material. As suggested by the above, brief outline, much existing literature on ‘digital lockup’ (Ginsburg, 2002: 71) describes a stark division of copyright owners *versus* copyright users. It tends to polarise debate and can coarsen any consideration of wider social interests (Power, 1997). It is certainly true that the ‘digital commons has been politicised’ (Sherman, 2001: 95). But the interests of copyright creators, investors, users and wider publics interact in complex ways, and apparently opposed groups may share parallel interests. When they are creating, for example, authors have an interest close to that of copyright users in a rich public domain

from which they can adapt and develop their works (Litman, 1990). One way to develop digital copyright debates about the public interest may be through examining particular *contexts* in which copyright owners, disseminators and public users come together. It may be useful to analyse the combination of statutory measures that exist in a given country's copyright law, and how they apply to cultural institutions with clear public interest missions, such as museums, galleries and libraries. A more detailed understanding of what has been achieved across that particular sector may offer important material to reframe understandings of digital copyright.

This paper begins the project. Part II outlines Australian copyright law and the most relevant exceptions for cultural institutions. It then discusses relevant legal reforms that have responded to digital communications. Part III discusses the implications of these aspects of copyright law for cultural institutions. It addresses three areas of limitation which appear particularly important, related to digital collections, preservation copying, and digital reproductions. The paper suggests that examining the detailed legal contexts in which cultural institutions operate with copyright, and subsequently examining the practical contexts, offers great scope for considering the wider social interests in copyright law and its relationship to the communications environment.

Cultural institutions, and the legal environments they face, offer excellent sites for investigating how well copyright changes are achieving their stated policy objectives of promoting digital creation and access. Cultural institutions are important users *and* disseminators of digital copyright material, while being charged with public interest missions of equitable access, research, education and preservation. They have responsibilities to copyright owners and the public, as well as significant opportunities to exploit their collections in digital forms (Aalberts and Beunen, 2002, Phelan, 2002). For instance, creating electronic reserves enables multiple concurrent uses of works, allows electronic searching and browsing, and removes costs caused by the physical degradation of frequently-accessed works. Creating online collections is not only useful for research and education, but allows remote users who cannot otherwise attend institutions' premises to access collections. Institutions such as the Art Gallery of NSW have extensive online collections, complete with commentaries on works and information regarding provenance (see Art Gallery of NSW, 2004). Digitisation allows the making of high quality preservation copies of important, fragile or deteriorating works (eg Power, 1997). And it can help alleviate problems of

physically storage, particularly for institutions such as libraries primarily housing print-based works.

In recent years, cultural institutions have sought to develop management strategies for digitisation's technical challenges (eg Webb, 2002) and to promote access while addressing copyright owners' interests (eg Day and Jones, 2002). Australian institutions have achieved some notable successes, especially with material for which they own copyright (eg Freeman, 2002) but digitisation remains an important issue right across the sector (eg Key Needs Study, 2002: 71-7). This is because institutions often physically possess copyright materials without owning any copyright in the materials – property rights in the tangible object and copyright being distinct. This makes copyright compliance a substantial, recurring issue for cultural institutions. They constantly risk infringing copyright through acts that are necessary to fulfil their missions. The clearest example is the frequent need to reproduce copyright works for purposes as varied as inclusion in catalogues and guides, provision to users and other institutions, preservation, creation of exhibits, use in advertising and promotion materials, and producing derivative products, like books, calendars and postcards.

Cultural institutions can avoid copyright liability in two main ways: where they have a licence from the copyright owner to perform the unauthorised act, or where the act falls within a statutory exception. As a contribution to understanding digital copyright, this paper therefore examines the most important statutory exceptions for cultural institutions. The exceptions set the context in which licensing and rights management practices can be interpreted through later empirical research.

Reviewing the law suggests two broad conclusions. First, Australian law goes some way to enabling cultural institutions to exploit digital communications technologies. But there appear to be significant limitations on their ability to use digital technologies without obtaining licences from copyright owners. Rather than achieving equivalent copyright positions in digital and analogue environments – which was the stated objective of recent Australian reforms (Attorney General, 1999) – cultural institutions' powers in the electronic environment are more limited than their powers for dealing with print material. Second, the provisions do not appear to allow the best use of technologies by cultural institutions. This is an important point from the analysis, given the communicative potentials of both digital technologies and copyright policy (eg Macmillan, 2002, van Caenegem, 1995). Australian

law does not appear well suited for the support of cultural institutions where electronic storage and browsing is standard, nor where collections are available online and can be accessed both within institutions' premises and remotely. Legally, cultural institutions must obtain the consent of copyright owners for many acts of digitisation, through negotiating licensing arrangements. Practically, this appears to place greater power in the hands of copyright owners to dictate the circumstances in which digitisation and communication take place. But a caveat must be placed on the conclusions from this paper's legal analysis. As with the different positions in the academic literature on digital copyright, the conclusions assume the prevalence of behaviours that should be investigated empirically. In fact, the suggestion that licensing practices will be very significant, which arises from the legal analysis, underlines the value of empirical research. To that end, the paper forms part of a larger project examining the contexts of digital copyright law through substantial research with Australian cultural institutions and the people who work in them.

II COPYRIGHT LAW

The most significant, recent Australian changes for copyright law date from March 2001, when the Copyright Amendment (Digital Agenda) Act 2000 ('Digital Agenda Act') came into effect and amended the Copyright Act 1968. The Digital Agenda Act, which followed a long consultation process, has the stated objective of promoting the creation of, and access to, electronic copyright material (Digital Agenda Act, s 3). Similar amendments have been introduced in legislation around the world (eg the US Digital Millennium Copyright Act; also see WIPO, 1996). Details of the Digital Agenda Act are considered after briefly outlining general aspects of Australian copyright law.

The Copyright Act provides that copyright subsists in various categories of material and gives copyright owners the exclusive right to perform certain acts with respect to copyright material. Copyright subsists in original literary, dramatic, musical and artistic works, as well as sound recordings, films, sound and television broadcasts and published editions (Copyright Act, ss 32, 89-92). Under the Copyright Act, the author or maker of copyright material, or their employer, is generally deemed to be the owner of copyright. But this principle can be modified by agreement, such that publishers and other investors who promote works will frequently be the owners of copyright (Copyright Act, ss 35, 97-100, 196). The exclusive rights of copyright owners include the right to reproduce copyright material, to publish it, and to communicate it to the public by making it available online or electronically transmitting it

(Copyright Act, ss 31, 85-88). But copyright owners' rights are circumscribed through statutory exceptions and limitations. In part, these exception and limitation provisions aim to promote the public interest in providing access to copyright material. Thus, copyright can be seen as a statutory mechanism to encourage material's creation and dissemination by giving owners exclusive rights, while also protecting the public interest in access through statutory exceptions and limitations to those rights (Litman, 1996). Arguments about digital copyright place differing emphases on each of these elements: encouraging creation by providing economic rights, or encouraging access, use and further creation by limiting those rights.

The Digital Agenda Act expanded copyright owners' rights in several ways. First, it confirmed that converting a work into, or from, a digital form reproduces the work. This means copyright owners of analogue works have the right of first digitisation of the works (Copyright Act, s 21(1A)). Second, the Act replaced earlier technology-specific dissemination rights with the broader right of communication to the public, mentioned above. Third, enforcement measures were extended to protect the position of copyright owners. Most notably, legislative protection was introduced for technological protection measures ('TPMs'). The future of copyright exceptions is seen to depend significantly on TPMs and the legal restrictions on their circumvention, both in Australia and internationally (Lindsay, 2000, Wiseman, 2002). TPMs are defined as devices or products designed, in the ordinary course of operation, to prevent or inhibit the infringement of copyright. They use access and copy control mechanisms (Copyright Act, s 10(1)). The new provisions enable legal action to be taken against persons involved in importing, selling, or commercially dealing with circumvention devices (see eg Coco, 2001). Legal protection of TPMs is significant as it heralds a move away from copyright law's traditional focus – the copying of works – to also protect a copyright owner's ability to control access to published material. The abilities of copyright owners to control the first digitisation of material, communication of material, and access to material through the use of TPMs are why copyright pessimists speak of digital lockup. And they are reasons why changing technology and law is said to be enclosing the public domain (eg Lessig, 2003: 768).

These technological and legal developments underline the importance of copyright exceptions and limitations in the digital environment. In relation to cultural institutions, the most important statutory limits are provided by the combination of fair dealing exceptions (Copyright Act, ss 40-43, 103A-103C) and libraries and archives provisions (Copyright Act,

ss 48-53, 110A-110B, 203A, 203D-203H). These exceptions have closely related policy bases aimed at promoting public access to copyright material (CLRC, 2002).

Fair dealing allows users to deal with copyright material for particular purposes without the permission of the copyright owner. The four specified purposes for fair dealing are research or study, criticism or review, news reporting, and giving professional legal advice. In addition, the dealing must be 'fair', which will depend upon a variety of factors, including the character of the dealing, its effect on the market for the work, and the possibility of obtaining the work within a reasonable time at an ordinary commercial price (eg Copyright Act, s 41(2)).

Australian law differs from US law, under which there is a general defence of 'fair use' that is not attached to any specific purposes. The open-ended US model appears to be influenced in part by the US's greater protection for free speech (eg Loughlan, 2002). It results in the defence being available in many more situations than Australia's fair dealing (eg *Sony v Universal City Studios*, 1984). For example, its adaptability has seen low resolution 'thumbnail' digital images be treated as fair use in the US (*Kelly v Arriba Soft*, 2003). There have been calls for Australia to simplify its copyright law by adopting a general fair use defence (eg CLRC, 1998) however these calls have as yet gone unanswered.

Although they are limited to the four purposes, the fair dealing exceptions are seen to promote the creation of new works based on existing works by overcoming difficulties in negotiating licences for every use of copyright material (see eg Gordon, 1997, Bently and Sherman, 2000: 192). But the fair dealing exceptions do not exist purely to deal with problems in obtaining owners' permission. They are seen, by some commentators at least, as a central element in the definition of copyright owners' rights (eg CLRC, 2002, De Zwart, 2003).

But fair dealing is not the most important copyright exception for cultural institutions for two main reasons. First, it only arises for dealings within one of the four statutory purposes, which do not cover many activities of cultural institutions. Second, the relevant purpose is that of the alleged infringer (De Garis, 1990). This makes the defence importance for members of the public using institutions' facilities. But when cultural institutions deal with copyright works on behalf of third parties (such as copying articles to supply them to users),

the fact that the third parties have fair dealing purposes will not allow the defence to crystallise. Cultural institutions must rely on other statutory provisions to avoid liability. The most relevant exceptions for cultural institutions are the libraries and archives provisions.

Libraries and archives provisions have existed in Australian copyright law since the Copyright Act commenced. They apply to cultural institutions because ‘archives’ are defined widely to include public museums and galleries (Copyright Act, ss 10(1), 10(4)). They aim to promote public interests in being able to access copyright material, and allow cultural institutions to make some use of material without paying copyright owners. For example, certain reproductions may be made for supply to library users conducting research or study (Copyright Act, ss 49, 50), or for supply to other libraries to add to their collections (Copyright Act, ss 50). And institutions may make preservation or replacement copies of material in their own collections (Copyright Act, ss 51A, 110B). But the provisions also seek to protect copyright owners’ markets because many of the provisions do not apply to commercially available works. The provisions are very detailed, and apply limits in relation to the proportion of material that can be reproduced, the uses for which this can be done, declarations that must be obtained from users, and records that must be kept by institutions (see generally McDonald, 2001, CLRC, 2002: 41-64).

It is noteworthy that some of the libraries and archives provisions are specifically stated not to apply to libraries that are conducted for profit (Copyright Act, ss 49, 50). Section 18 of the Copyright Act provides a library is not conducted for profit merely because it is within a for profit business. This means libraries in private corporations may not be conducted for profit, in the statute’s terms, and could therefore utilise the provisions. A strong reason underlying the provisions’ wide scope, and inclusion of private libraries, has been to improve the viability of the inter-library loans system to benefit public sector institutions and their clientele (eg Franki Report, 1976).

III DIGITISATION AND CULTURAL INSTITUTIONS

As outlined in Part II, the *Digital Agenda Act* broadened existing exceptions, as well as providing a new right of communication to the public. The Act sought to replicate, ‘as far as possible ... the balance that has been struck in the print environment between the rights of owners of copyright and the rights of users’ (Attorney General, 1999). Important elements of

the amendments extended the application of the libraries and archives provisions to digitally reproducing material, rather than merely to copying it in analogue form, and extended the means of supplying material to digitally communicating it (eg *Copyright Act*, ss 49-51A). Despite the changes introduced by the *Digital Agenda Act*, many central activities of cultural institutions still require the consent of the copyright owner through the granting of a licence. This is so even where they are fundamentally non-commercial in nature, directly benefit users of cultural institutions, further cultural institutions' public interest missions and do not appear to unduly prejudice the rights of copyright owners. Three areas of limitation appear to be especially important. They relate to digital collections, preservation copying, and digital reproductions.

Limitations on digital collections

The policy agenda behind *Digital Agenda Act* is clear: whilst individual acts of digitisation are permitted, these are for specific purposes only. They do not allow the creation of digital collections. Three examples illustrate this.

First, where an analogue work is digitally reproduced and supplied to a user who has requested a copy (which is covered by s 49), any electronic copy in the possession of institution must be destroyed once the user's request has been fulfilled (*Copyright Act*, s 49(7A)(d)). This is the position regardless of whether it forces institutions into inefficient practices of digitising the same works multiple times for different users. The limitation is said to ensure that institutions do not build up electronic collections as a result of section 49 requests (Explanatory Memorandum, 1999: ¶¶79-82). But it is not clear that permitting cultural institutions to retain such copies, purely to satisfy other user requests, would unduly impact on copyright owners' rights. On the contrary, it may improve public access to copyright material.

Second, where a work is acquired in electronic form it can be made available on terminals within the institution's premises. Those terminals must not permit electronic reproduction or communication of the work (*Copyright Act*, s 49(5A)). The words 'electronic reproduction' suggest printing a hard copy would be acceptable, but not saving the work to disk, attaching it to an email, or similar actions. This provision is further limited in two significant ways. It excludes users located off-site from accessing any electronic collection, such as those using the internet. And, with the exception of original artistic works, the provision excludes all

works acquired in hard copy form, even using terminals that are completely copy-disabled and solely allow electronic browsing. Again, it is difficult to see how digitising a collection to permit electronic browsing and searching would impact on copyright owner's rights, particularly if users can only make hard copy reproductions of the work for fair dealing purposes. Indeed, many academic and research authors might experience significant benefits through the increased exposure of their works. In such cases, the change in format may well not facilitate making unauthorised digital copies so there not need be any diminution in the level of sales.

Third, for original artistic works acquired in analogue form, a preservation reproduction may be made available to users within the institution's premises on completely copy-disabled terminals. But this is only possible where the original has been lost, has deteriorated or is so unstable that it cannot be displayed (*Copyright Act*, s 51A(3A)). The Act does not indicate why users cannot make hard copy reproductions, which is allowed for electronically-acquired works (*Copyright Act*, s 49(5A)).

Limitations on preservation copying

Preservation copying is only permitted for original artistic works and works held in manuscript form (*Copyright Act*, s 51A(1)(a); see also s 110B). For other works, only replacement copying is allowed – that is, the work must have deteriorated or been damaged, lost or stolen *prior* to a replacement copy being made. Even then, an officer of a library or archives must make a 'commercial availability declaration' with respect to published works that an unused copy of the work is not commercially available (*Copyright Act*, s 51A(4)). This means back-up copies of frequently accessed works cannot be made, nor can preservation copies of rare or out-of-print works that are still in good condition. In addition, there is no provision expressly allowing existing preservation copies or electronic works to be reproduced in a different electronic format, should existing hardware or software be upgraded or become obsolete. The *Digital Agenda Act* changes do allow reproducing a work for 'administrative purposes' (*Copyright Act*, s 51A(2)). But the phrase is undefined in the Act, and is unlikely to include all the above uses. It may be directed more to use of reproductions in internal, administrative catalogues. Thus, the copyright owner's permission is required for many acts that promote access and preservation.

Limitations specifically for digital reproductions

Rather than being equivalent with analogue works, digital reproductions face more limitations and bureaucracy. For instance, an institution supplying an electronic reproduction to a user must notify the user about copyright and then destroy any copy of the work remaining in its possession (*Copyright Act*, s 49(7A)(c) and (d)). In addition, where an institution requests a reproduction of the whole, or more than a reasonable part of, a published work other than an article in a periodical publication, and the work from which a reproduction is made is in *hardcopy* form, the statutory protections will not apply unless an authorised officer has made a commercial availability declaration (*Copyright Act*, s 50(7A)). In contrast, where the work copied is in *electronic* form, a commercial availability declaration is required for *all reproductions* (including for articles), regardless of the amount copied (*Copyright Act*, s 50(7B)).

The whittling away of circumstances in which digitisation is permitted, outlined above, appears to force cultural institutions to obtain licences to undertake many fundamental activities. This must create costs in locating and negotiating with copyright owners, in addition to the technological costs associated with digitisation, such as the expense of equipment and training, and the time and logistics of digital imaging (eg Williams, 1997). This combination of factors may make digitisation programs prohibitively expensive. However, there may be greater costs. The increased need to obtain licences appears likely to give copyright owners more power to negotiate restrictive terms. Some of the academic literature suggests that licence terms may have extremely onerous conditions (eg Lessig, 2003). The prevalence and scope of restrictive terms in the cultural sector, limiting the ways in which material can be accessed, used and communicated, thus emerges as a very important empirical question in relation to debates about digital copyright. In any event, licences would appear to remain impractical and inefficient for one-off uses, dealings with older works, and for difficult-to-locate owners and creators. All this means there may be value in an expanded role for the collective administration of digital copyright issues (see eg Simpson, 1995).

IV CONCLUSION

The Australian approach in the Digital Agenda Act has been to amend exceptions to copyright infringement in response to the digital environment. But the extent to which they

consider owners' and users' rights is controversial. In particular, the reformulated libraries and archives provisions allow some digital reproductions to be communicated to the institution's own staff, users or other institutions. But these exceptions only operate in a narrow range of circumstances. The requirements for specific requests from users, and the application of a commercial availability test, mean the provisions do not extend to providing general digital access to institutions' collections. Many digitisation efforts will be outside the scope of fair dealing and the libraries and archives provisions, and so will require permission from copyright owners. The exceptions also vary in complex ways depending on the type of work or audiovisual item in question. This is likely to produce particular difficulties for institutions because their collections increasingly involve the full range of material protected by copyright.

It should be noted that these debates about control and use are not new, although digital communications qualitatively change the stakes involved (Digital Dilemma, 2000). Fair dealing and the libraries and archives provisions developed significantly in response to earlier technological change. Then, an important issue was the balance between copyright owners and users. For example, the Franki Report (1976) was particularly concerned with photocopying and its effects on copyright material. Legislative reform after the Report provided guidelines about fair dealing for research or study, and deemed certain limited reproductions for research or study to be fair dealing. The libraries and archives provisions have been even more influenced by new technologies, with the Franki Report arguing for expanded provisions, in part, because Australia's geographic size and population density created a very dispersed national collection. Without greater sharing of copyright material, research or study would be unreasonably impeded. Jessica Litman (1989) illustrates how such detailed, complex provisions for libraries also arose in US law in response to the development of photocopying.

Concern with reproductive technology's influence on the copyright balance between owners and users has continued in recent reforms. This paper's review of Australian law suggests its digital copyright provisions may be failing cultural institutions, and wider public interests, in relation to digital collections, preservation copying, and digital reproductions. This echoes Fiona Macmillan's comments that the digital agenda reforms did not duplicate the accessibility of print material in relation to digital material in libraries:

This is a serious issue in a world of proliferating digitisation. A consequence may be to restrict access to a considerable wealth of knowledge. Alternatively, libraries and their users will simply have to pay more in licence fees ... Either way we are turning libraries into gatekeepers for the new information age, rather than making them its facilitators (Macmillan, 1999: 359).

But the situation may not be so bleak, and arguments that analogue and digital environments should have equivalent copyright treatment may be overstated (Ginsburg, 2001). Future research into institutional practices will show what balance between gatekeeping and facilitating exists across the sector of cultural institutions. This is an important way in which to develop current policy consideration of digital copyright reforms. Copyright policy documents have sometimes taken a conceptual approach and re-examined the categories and criteria used within copyright law (eg CLRC, 1998, 1999). But more often, reform bodies have pursued their tasks through publishing discussion papers, accepting submissions from a wide range of stakeholders, and attempting to describe and synthesise the range of issues and interests affected (eg CLRC, 2002). This work has been valuable in clarifying the diversity of views relevant to digitisation and copyright, and the strength with which those views are held. But it may merely replicate the 'hostile camps' of academic commentary (Ginsburg, 2001: 71). This sort of limited outcome may well be repeated in the federal government's current Digital Agenda Review (see Argy 2003). The review, using law firm consultants, has adopted an issues paper and stakeholder-submission model (eg Phillips Fox, 2003). Showing what uses, if any, large and small cultural institutions can make of the fair dealing and libraries and archives provisions may do more to suggest whether copyright pessimists are the more insightful commentators on digital copyright.

REFERENCES

- Aalberts, B. & Beunen, A. (2002). Exploiting museum images. In Towse, R. (Ed.), *Copyright in the cultural industries* (pp. 221-32). Northampton, Mass: Edward Elgar Publishing.
- Argy, M. (2003). Review of digital agenda copyright reforms. *Computers and Law Journal*, 53, 24-26.
- Art Gallery of NSW. (2004). *Collection Art Gallery of New South Wales*. Retrieved April 27, 2004, from http://www.artgallery.nsw.gov.au/collection/curatorial_browsing.
- Attorney-General, Hon. Daryl Williams. (1999). Copyright Amendment (Digital Agenda) Bill 1999 Second Reading Speech. *Hansard, Thursday 2 September 1999*, 9749.
- Bartow, A. (2003). Electrifying copyright norms and making cyberspace more like a book. *Villanova Law Review*, 48, 13-127.
- Baulch, L. (1998). *Copyright guidelines for museums and galleries in a digital environment*. Canberra: DCITA.
- Bently, L. & Sherman, B. (2000). *Intellectual property law*. Oxford: Oxford University Press.
- CLRC (Copyright Law Review Committee). (1998). *Simplification of the Copyright Act 1968: Part 1 Exceptions to the exclusive rights of copyright owners*. Canberra: CLRC.
- CLRC. (1999). *Simplification of the Copyright Act 1968: Part 2 Categorisation of subject matter and exclusive rights, and other issues*. Canberra: CLRC.
- CLRC. (2002). *Copyright and contract*. Canberra: CLRC.
- Coco, M. (2001). Anti-circumvention: The new song and dance routine. *Australian Intellectual Property Journal*, 12, 199-210.
- Day, M. & Jones, M. (2002). *Cedars final workshop summary*. University of Leeds. Retrieved April 27, 2004, from <http://www.leeds.ac.uk/cedars/pubconf/pubconf.html>.
- De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625.
- De Zwart, M. (2003). Seriously entertaining: *The Panel* and the future of fair dealing. *Media & Arts Law Review*, 7 (4), 1-17.
- Digital Millennium Copyright Act of 1998* (US).
- Digital Dilemma (Committee on IP rights and the emerging information infrastructure). (2000). *The digital dilemma: Intellectual property in the information age*. Washington: National Academy Press.
- Explanatory Memorandum. (1998-9). *Copyright Amendment (Digital Agenda) Bill 1999 Explanatory Memorandum*. Circulated by authority of the Attorney-General, Hon. Daryl Williams.
- Franki Report (Copyright Law Committee on Reprographic Reproduction). (1976). *Report of the Copyright Law Committee on Reprographic Reproduction*. Canberra: AGPS.
- Freeman, D. (2002). *PictureAustralia – a Collaborative Digital Project*. Retrieved April 27, 2004, from <http://www.nla.gov.au/nla/staffpaper/2002/freeman1.html>.
- Ginsburg, J. (2001). Copyright and control over new technologies of dissemination. *Columbia Law Review*, 101, 1613-1647.
- Ginsburg, J. (2002). How copyright got a bad name for itself. *Columbia Journal of Law and the Arts*, 26, 61-73.
- Goldstein, P. (1994). *Copyright's highway: The law and lore of copyright from guttenberg to the celestial jukebox*. New York: Hill and Wang.
- Gordon, W. (1997). On the economics of copyright, restitution and “fair use”: Systemic versus case-by-case responses to market failure. *Journal of Law and Information Science*, 8 (1), 7.
- Kelly v Arriba Software Corporation* (2003) 336 F.3d 811.

- Key Needs Study (Deakin University, Cultural Heritage Centre for Asia and the Pacific). (2002). *A study into key needs of collecting institutions in the heritage sector*. Melbourne: Deakin University.
- Lessig, L. (2003). The creative commons. *Florida Law Review*, 55, 763-777.
- Lindsay, D. (2000). *The future of the fair dealing defence to copyright infringement*. Melbourne: CMCITL.
- Litman, J. (1990). The public domain. *Emory Law Journal*, 39, 965-1023.
- Litman, J. (1996). Revising copyright law for the information age. *Oregon Law Review*, 75, 19-48.
- Litman, J. (2001). *Digital copyright*. Amherst, New York: Prometheus Books.
- Loughlan, P. (2002). Looking at the matrix: Intellectual property and expressive freedom. *European Intellectual Property Review*, 24, 30-39.
- McDonald, I. (2001). *A comparative study of library provisions from photocopying to digital communication*. Sydney: Centre for Copyright Studies
- Macmillan, F. (1999). Striking the copyright balance in the digital environment. *International Company and Commercial Law Review*, 10 (12), 350-60.
- Macmillan, F. (2002). Copyright and corporate power. In Towse (Ed.), *Copyright in the cultural industries* (pp. 99-118). Northampton, Mass: Edward Elgar Publishing.
- Phelan, M. (2002). Digital dissemination of cultural information: Copyright, publicity, and licensing issues in cyberspace. *Southwestern Journal of Law and Trade in the Americas*, 8, 177-228.
- Phillips Fox. (2003). *Digital agenda review: Libraries, archives and educational copying*. (Issues paper.) Sydney: Phillips Fox.
- Power, T. (1997). Digitisation of serials and publications: The seminal objective of copyright law. *European Intellectual Property Review*, 8, 444-461.
- Samuelson, P. (2002). Toward a “new deal” for copyright in the information age. *Michigan Law Review*, 100, 1488-1505.
- Sherman, B. (2001). Digital property and the digital commons. In Heath, C. & Sanders, A. (Eds.), *Intellectual property in the digital age: Challenges for Asia* (pp. 95-109). London : Kluwer Law International.
- Simpson, S. (1995). *Review of Australian copyright collecting societies*. Canberra: DCA.
- Sony Corp of America v Universal City Studios Inc* (1984) 464 US 417.
- Van Caenegem, W. (1995). Copyright, Communication and New Technologies. *Federal Law Review*, 23, 322-347.
- Webb, C. (2002). *Digital preservation – A many-layered thing: Experience at the National Library of Australia*. Retrieved April 27, 2004, from <http://www.clir.org/pubs/reports/pub107/webb.html>.
- WIPO (World Intellectual Property Organization). (1996). *WIPO Copyright Treaty*. Adopted in Geneva on 20 December 1996. Retrieved April 27, 2004, from <http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm>.
- Williams, M. (1997). Art galleries, museums, digitised catalogues and copyright. *Media & Arts Law Review*, 2, 160-174.
- Wiseman, L. (2002). Beyond the photocopier: Copyright and publishing in Australia *Media & Arts Law Review*, 7 (4), 299-314.

IPRIA Occasional Papers

No.	Title	Author(s)
3/04	Copyright, Digitisation and Cultural Institutions	A T Kenyon / E Hudson
2/04	Private Copying Licence and Levy Schemes: Resolving the	A F Christie
1/04	Paradox of Civilian and Common Law Approaches IPRIA - The Vision Is To Be A Research Institute Of World Repute	O Morgan / E Caine
2/03	The New Zealand Trade Marks Act – No Place for Offence	O Morgan
1/03	The Value of IP Protection in Markets for Ideas	J Gans

Electronic copies of all IPRIA Occasional Papers are available at
<http://www.ipria.org/publications.html>