

## COPYRIGHT, DIGITISATION AND CULTURAL INSTITUTIONS

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### **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.*

### **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).